

\$110M in fees for attorneys who sued Apple

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Plaintiffs' firms who got Apple Inc. to pay \$490 million to resolve claims that the iPhone maker misled stockholders about the economic impacts of the U.S.-China trade war will receive \$110 million in attorney fees, ruled a federal judge in Oakland who regularly presides over complex litigation involving the tech giant.

Class counsel at Robbins Geller Rudman & Dowd LLP, Labaton Keller Sucharow LLP, and other firms asked U.S. District Judge Yvonne Gonzalez Rogers for \$122 million in attorney fees. Apple's lawyers at Paul Weiss Rifkind Wharton & Garrison LLP and Orrick Herrington & Sutcliffe LLP did not take a position on the motion. The company denied any wrongdoing.

"Using the percentage-of-the-fund approach, with a lodestar cross-check, the court finds it fair to both the class and counsel to award a reduced amount of fees than that requested," Gonzalez Rogers wrote in her final approval order last week.

Under the percentage-of-the-fund approach, courts consider various factors, including the overall results for the class members, whether the case was risky for class counsel, and whether the attorneys' performance generated benefits beyond the settlement fund. The lodestar approach multiplies the hours reasonably expended by the reasonable hourly rate.

Gonzalez Rogers wrote in her order that class members' reaction to the settlement "was overwhelmingly positive" with few opt-outs, strongly indicating that the deal was fair and equitable. *In re: Apple Inc. Securities Litigation*, 4:19-cv-02033-YGR (N.D. Cal., filed Apr. 16, 2019).

The investor plaintiffs accused Apple's top executives, including CEO Tim Cook and chief financial officer Luca Maestri, of lying about the threats to Apple's Chinese market because of trade tensions between the U.S. and China.

While the Trump administration enacted import tariffs, Chinese smartphone competitors offered alternatives for hundreds of dollars less than iPhones, Robbins Geller founding partner Shawn A. Williams wrote in the complaint.

During a conference call for analysts and investors in November 2018, Cook explicitly excluded China from the category of emerging markets experiencing negative economic pressures, Williams continued.

He said Apple had already "begun to see declining traffic in Apple's retail stores and those of its channel partner stores in Greater China and reports of an overall contraction of the smartphone industry."

#381043

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Domino's Pizza, Leaders Hit With Investor's Suit Over Growth

By Bloomberg Law Automation

- **COURT:** E.D. Mich.
- **TRACK DOCKET:** [No. 2:24-cv-12477](#) (Bloomberg Law subscription)

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Domino's Pizza, Leaders Hit With Investor's Suit Over Growth

By Bloomberg Law Automation 2024-09-23T15:15:04000-04:00

- **COURT:** E.D. Mich.
- **TRACK DOCKET:** [No. 2:24-cv-12477](#) (Bloomberg Law subscription)

Domino's Pizza Inc. and two senior leaders allegedly misled investors on the growth of its largest master franchise, Domino's Pizza Enterprise, according to a new lawsuit in a federal court in Michigan.

Domino's, its chief executive officer Russell J. Weiner, and its chief financial officer Sandeep Reddy allegedly misled investors on the challenges DEP faced as to both new store openings and closures of existing stores, according to the lawsuit filed Sept. 20 in the US District Court for the Eastern District of Michigan. This allegedly resulted in the company's securities trading at artificially inflated prices during the class period, the lawsuit says.

The alleged misleading statements and omissions concerned Domino's business operations and prospects, including with respect to the company's ability to meet its previously announced guidance for global net store growth.

On July 28, Domino's issued a press release announcing its financial results for the second 2024 quarter. This was followed by an earnings call where Reddy revealed that the long-term guidance announced earlier didn't accurately reflect the extent of DPE's challenges. On this news, the company's stock price fell \$64.23 per share, or nearly 14%, to close at \$409.04, the lawsuit says.

The complaint asserts claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5.

Scott Bender, the investor who filed the lawsuit, seeks to represent a class of those who purchased stock between Dec. 7, 2023 and July 17, 2024. Bender also seeks damages, interest, attorneys' fees, and costs.

Domino's didn't immediately respond to Bloomberg Law's request for comment on Monday.

Pomerantz LLP and Bronstein Gewirtz & Grossman LLP represent the investor and the proposed class.

The case is Bender v. Domino's Pizza, Inc. , E.D. Mich., No. 2:24-cv-12477, complaint filed 9/20/24 .

This story was produced by Bloomberg Law Automation.

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Rosen law firm reminds investors of class action deadline against Starbucks

 legalnewsline.com/stories/664467959-rosen-law-firm-reminds-investors-of-class-action-deadline-against-starbucks

September 24, 2024

Rosen Law Firm | LinkedIn

Rosen Law Firm, a global investor rights law firm, has issued a reminder to purchasers of securities in Starbucks Corporation (NASDAQ: SBUX) who acquired Starbucks shares between November 2, 2023, and April 30, 2024, to take note of the October 28, 2024, deadline for lead plaintiff applications.

Investors who purchased Starbucks securities during the specified period may be eligible for compensation without any out-of-pocket expenses, thanks to a contingency fee arrangement, the firm reported.

The lawsuit alleges that during the class period, Starbucks executives provided misleading information about the company's fiscal year 2023 revenue and guidance for fiscal year 2024. Despite expressing confidence in the company's reinvention and diversification strategies, the lawsuit claims that Starbucks concealed critical adverse information related to its plans for global expansion, same-store sales performance, and innovation in foreign markets. When the true details became public, investors reportedly experienced significant financial losses.

On April 30, 2024 second-quarter earnings had dropped 2%. On a call with investors, CEO Laxman Narasimhan acknowledged disappointing financial results, with net revenue down 2% to \$8.6 billion. On the call, Narasimhan said, "let me be clear from the beginning. Our performance this quarter was disappointing and did not meet our expectations."

On July 30, 2024, Starbucks reported quarterly revenue below analysts' expectations in Q3, with net sales dropping 1% to \$9.11 billion, compared to the expected \$9.24 billion. Despite this, the company's shares rose more than 5% in extended trading as the results were better than feared. The coffee giant's net income was \$1.05 billion, or 93 cents per share, down from \$1.14 billion, or 99 cents per share, a year earlier. U.S. traffic fell by 6%. Starbucks is exploring strategic partnerships in China to accelerate growth and opened 526 net new stores during the fiscal quarter.

The coffee company faces multiple legal issues amidst the appointment of their new CEO, Brian Niccols, who officially joined the company on September 9.

Bodum USA has also filed a lawsuit against Starbucks, according to a report in BloombergLaw. Bodum USA Inc. and its subsidiary Pi-Design AG are suing Starbucks for allegedly selling a French press coffeemaker that infringes on Bodum's patented design and violates an exclusive seller agreement. The lawsuit, filed in the US District Court for the Northern District of Illinois, claims Starbucks' product mimics Bodum's patented "Plunger-Filter Beverage-Making Machine with a Closable Pouring Opening" and breaches a 2008 settlement agreement where Bodum was designated as Starbucks' exclusive supplier.

Judge Pauses Tupperware Investor Suit During Bankruptcy Case

By David Hood

- Investors sought class action status over misleading earnings
- Suit named Tupperware's former CEO, CFO as defendants

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Judge Pauses Tupperware Investor Suit During Bankruptcy Case

By David Hood 2024-09-23T15:54:10000-04:00

- Investors sought class action status over misleading earnings
- Suit named Tupperware's former CEO, CFO as defendants

A federal judge in Orlando paused a lawsuit claiming Tupperware Brands Corp. misled shareholders with rosy earnings and sales figures in the lead-up to filing for bankruptcy.

The case is stayed in light of Tupperware's bankruptcy filing last week, according to a Monday order from Judge Roy Dalton in the US District Court for the Middle District of Florida.

The food-container maker has been struggling with sales declines and growing competition.

Shareholders sued Tupperware in 2022 over failing to meet projections in what they deemed unrealistically optimistic earnings guidance for the year. The company's turnaround plan didn't materialize as expected, Tupperware acknowledged in a press release in May of that year.

In addition to the company, the suit named as defendants Miguel Fernandez, the now-former chief executive officer of Tupperware, and Cassandra Harris, former chief financial officer.

Dalton had granted the investors class action status in an earlier order, but the judge quickly stayed the case because of the bankruptcy proceedings.

The judge also ordered the plaintiffs and the individual defendants to submit a filing by Oct. 7 indicating whether the case "can and should proceed" against Fernandez and Harris while the bankruptcy stay is in place.

Tupperware is represented by Sidley Austin LLP. The plaintiffs are represented by Levi & Korinsky LLP, Cullin O'Brien Law P.A., Grossman Hufford Dahlstrom & Gross LLP and Pomerantz LLP.

The case is Edge v. Tupperware Brands Corp. , M.D. Fla., No. 6:22-cv-1518, case stayed 9/23/24 .

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Mallinckrodt Executives Fail to Shake Class Action Investor Suit

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Mallinckrodt Public Limited Co. officers must face a proposed class action alleging executives at the pharmaceutical company misled investors about the financial strength of the company, a federal judge ruled.

The complaint “clearly and in detail sets forth the alleged materially false and misleading statements made by Defendants, and provides explanations as to why those statements are misleading,” Judge Zahid N. Quraishi said Monday in an opinion for the US District Court for the District of New Jersey, denying Mallinckrodt’s motion to dismiss.

The court setback for Mallinckrodt comes in the wake of the company’s Sept. 19 agreement to pay \$46 million to settle a separate class action. That suit also alleged company executives misled investors regarding the financial health of the company.

In the suit at issue Monday, Two Mallinckrodt shareholders—Continental General Insurance Company and Percy Rockdale LLC—filed a proposed class action under the Securities Exchange Act in the federal New Jersey court last year.

Continental’s complaint alleged Mallinckrodt’s chief executive and other top brass overstated the company’s ability to pay a bankruptcy court-approved settlement, among other claims. The settlement stemmed from litigation that accused Mallinckrodt of contributing to the national opioid crisis.

The proposed class includes investors who acquired Mallinckrodt securities between June 17, 2022—as the company was emerging from bankruptcy—and August 25, 2023, as it was nearing a second bankruptcy.

Mallinckrodt executives moved to dismiss, arguing in its motion the company released accurate information to investors and wasn’t required to “adopt negative interpretations, or put pessimistic spins on facts that are otherwise objectively true and verifiable.”

To survive a motion to dismiss, a fraud-based complaint under the Securities Exchange Act must state with particularity the circumstances constituting fraud or mistake, Quraishi said.

Continental’s complaint alleges sufficiently particular facts, including specific quotes the investors say were fraudulent, Quraishi said. The plaintiffs quoted from a 2022 company release in which CEO Sigurdur Olafsson said Mallinckrodt “benefits from significant liquidity,” arguing it misrepresented the company’s financial picture, Quraishi said.

“The Court emphasizes that it makes no finding or conclusion as to whether Plaintiffs will ultimately succeed,” Quraishi wrote. “All the Court concludes today is that Plaintiffs have pled sufficiently to survive a motion to dismiss.”

Mallinckrodt filed for its second bankruptcy in 2023. Its second debt-reduction plan lessened the amount the company must pay as part of the opioid epidemic settlement.

Pomerantz LLP represents the investors. Hogan Lovells represents Mallinckrodt officers.

The case is Cont’l Gen. Ins. Co. v. Mallinckrodt , D.N.J., No. 3:23-cv-03662, 9/23/24 .

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Sinovac Beats Untimely Investor Poison Pill Manipulation Lawsuit

By Quinn Wilson

- Delaware's three-year statute of limitations applies to claims
- Delaware law requires application of shorter limitation period

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Sinovac Beats Untimely Investor Poison Pill Manipulation Lawsuit

By Quinn Wilson 2024-09-23T19:57:25000-04:00

- Delaware's three-year statute of limitations applies to claims
- Delaware law requires application of shorter limitation period

Chinese vaccine maker Sinovac Biotech Ltd. escaped a lawsuit from a class of shareholders after a Delaware chancellor ruled Monday that their allegations of a manipulated anti-takeover poison pill were untimely.

The proposed shareholder class action was dismissed after Vice Chancellor J. Travis Laster ruled that Delaware's three-year statute of limitations applied to breach of contract and fiduciary duty, aiding and abetting breach of contract and fiduciary duty, and wrongful dilution claims. The investors argued Antigua's six-year tolling limit applied to their claims, but since the investors weren't forced to file in Delaware, the US-based time period applies, Laster's order said.

"This information put the investor on inquiry notice by May 13, 2020," Laster said. "The Investor did not file suit until September 2023. That degree of delay is unreasonable."

The shareholders allege Sinovac, its CEO Weidong Yin, and other members of its board breached the terms of the poison pill, or "rights agreement." They said the defendants waited to activate it until after Yin increased his stake from 30% to 41% at below-market prices, rather than when it was initially triggered several years earlier.

Sinovac is best known for developing the CoronaVac vaccine against Covid-19, which has been administered widely outside the US.

The shareholders say the rights agreement should have been automatically activated when a competing faction—led by Boston-based 1Globe Capital LLC—disclosed its 22.5% stake in 2016 and made a play for control of the board in 2018. But Sinovac's board waited until 2019 to declare that the provision had been triggered, the plaintiffs said.

The shareholders sought both legal and equitable claims and relief, leaving them bound by the doctrine of laches. The doctrine requires a test to ensure there is no unreasonable delay in bringing a claim by a plaintiff with knowledge thereof and no resulting prejudice to the defendant, according to the order.

Starting with determining the analogous statute of limitations, Laster said Delaware law requires the court to apply whichever limitations period is shorter.

Pomerantz LLP and Ashby & Geddes PA represent the investors. Latham & Watkins LLP and Morris Nichols Arsht & Tunnell LLP represent Sinovac.

The case is MW Gestion v. Sinovac Biotech Ltd. , Del. Ch., No. 2023-0907Bo, 9/23/24 .

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NEWS

Latham Team Scores Dismissal of Stock-Drop Securities Class Action for Meta

District Judge Yvonne Gonzalez Rogers issued an order granting Meta's motion to dismiss the case with prejudice in the U.S. District Court for the Northern District of California on Sept. 17. Meta's counsel included Latham partners Andrew Clubok, Susan Engel and Melanie Blunsch and associates Nicholas Rosellini and Elizabeth Cheng.

September 23, 2024 at 08:38 PM

Securities Litigation



Kat Black



What You Need to Know

- Investors filed a securities class action against Meta in March 2022 accusing the company of failing to warn them about a substantial hit to its revenue caused by Apple's new privacy policies.
- The company's securities fraud led to the biggest one-day loss in the history of the U.S. stock market, when Meta lost 26% of its market cap, the complaint said.

Meta and three of its senior officers, represented by Latham & Watkins, last week secured the dismissal of a stock-drop securities class action in a California federal court.

The case alleged that Meta failed to warn investors about the impact of Apple’s new privacy controls on its advertising business, resulting in an astronomical revenue hit and the biggest one-day loss for a company in U.S. stock market history on Feb. 3, 2022.

U.S. District Judge Yvonne Gonzalez Rogers issued an order granting Meta’s motion to dismiss the case with prejudice in the U.S. District Court for the Northern District of California on Sept. 17. Meta’s counsel included Latham partners Andrew Clubok, Susan Engel and Melanie Blunsch and associates Nicholas Rosellini and Elizabeth Cheng, who did not immediately respond to a request for comment.

Wagstaffe, Von Loewenfeldt, Busch & Radwick and Labaton Keller Sucharow filed the original complaint on behalf of the Plumbers and Steamfitters Local 60 Pension Trust on March 8, 2022. Meta and its CEO Mark Zuckerberg, Chief Strategy Officer (formerly CFO) David Wehner and former Chief Operating Officer Sheryl Sandberg were listed as co-defendants.

According to the judge’s order, Apple unveiled a new privacy feature, “App Tracking Transparency,” in 2020, which provided iPhone users with the choice to opt out of online behavior tracking by apps such as the app “family” operated by Meta, including Facebook, Instagram, Messenger and WhatsApp. Selling ads accounted for as much as 98% of Meta’s total revenue in the class period specified by the complaint, it said.

Meta revealed in its 2021 Q4 financial results that the rollout of Apple’s new privacy measures had dented its advertising bottom line by \$10 billion. A day later, Meta’s market capitalization plummeted by 26% and the value of its common stock declined over \$85 a share, the complaint stated.

The plaintiff class, which encompassed all those who acquired Meta securities between March 2, 2021, and Feb. 2, 2022, accused Meta of securities fraud under the Securities Exchange Act of 1934 and SEC Rule 10b-5.

According to the judge’s order, the second amended complaint filed in the case claimed that Meta had deceived investors about Sheryl Sandberg’s alleged misappropriation of company funds for her own benefit, including promoting her second book, supporting her personal foundation and planning her wedding. Meta also misled investors about the financial impact that the debut of its “Reels” feature, which transitioned its ads into a harder-to-monetize video format, had on its revenue, the complaint said.

The court ruled that the plaintiffs had not “plausibly alleged” violations of federal securities law, finding that executives’ prediction of economic headwinds in 2022 was not a “corrective disclosure” of its performance in 2021 and that it was in line with previous warnings by Meta to investors about the adverse effect of new iOS privacy measures on its ad business made “during and prior to Q3 2021.” It also concluded that the plaintiffs failed to provide “supporting factual allegations” against Sandberg’s misuse of corporate assets.

Finally, the court corroborated the defendants’ argument that the plaintiffs had not “alleged any negative impact on Meta’s business caused by the transition to Reels during Q1 or Q2” or “offered a cognizable theory of falsity as to statements concerning Meta’s performance during those quarters.”

“Having carefully considered the briefing and pleadings, as well as documents subject to judicial notice and incorporated by reference in the SAC, the Court determines plaintiffs have not carried their burden,” wrote Gonzalez Rogers. “Despite its girth of over 100 pages, the SAC fails to state actionable securities law claims under the law, and dismissal is therefore required. Given plaintiffs have amended their pleadings twice, including to remedy substantially similar issues previously identified by this Court, further amendment would be futile.”

The plaintiffs’ counsel and Meta did not immediately respond to requests for comment.

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Wells Fargo board must face 'Caremark' claims over alleged mortgage lending bias

 [reuters.com/legal/transactional/column-wells-fargo-board-must-face-caremark-claims-over-alleged-mortgage-lending-2024-09-23](https://www.reuters.com/legal/transactional/column-wells-fargo-board-must-face-caremark-claims-over-alleged-mortgage-lending-2024-09-23)

Alison Frankel

Wells Fargo Bank branch is seen in New York City, U.S., March 17, 2020. REUTERS/Jeenah Moon/File Photo Purchase Licensing Rights , opens new tab

Sept 23 (Reuters) - For the second time in the last two months, a federal judge has allowed shareholders of a company that experienced a corporate trauma to move forward with derivative claims against board members accused of allowing disaster to strike.

On Friday, U.S. District Judge Trina Thompson of San Francisco ruled , opens new tab that Wells Fargo shareholders can stand in the bank's shoes to sue directors for failing to assure compliance with "mission-critical" fair lending requirements. Investors filed the derivative lawsuit , opens new tab in the wake of Bloomberg articles describing racial disparities in Wells Fargo's mortgage refinancing loan practices.

Thompson concluded that plaintiffs' lawyers adequately accused Wells Fargo (WFC.N) , opens new tab directors of neglecting to implement systems and controls to monitor the bank's lending practices. Even when employees raised concerns, the judge said, their complaints failed to reach the board.

Thompson didn't entirely side with shareholders in Friday's decision. She granted Wells Fargo's motion to dismiss , opens new tab derivative claims arising from allegations that bank employees conducted "sham" interviews with minority applicants in order to meet corporate diversity goals. (Part of the judge's reasoning was that a diverse workforce, while "undisputably crucial" to a major bank, "is not precedentially mission critical to its operations like fair lending compliance.") Thompson also dismissed claims against Wells Fargo officers, ruling that shareholders had not shown it would have been futile to ask the company itself to sue top executives.

Wells Fargo said in court filings that the bank was already taking steps to shrink the racial gap in its mortgage refinancing loans when the Bloomberg articles appeared and that it took the issue "very seriously."

In a statement responding to my query on Thompson's ruling, a Wells Fargo spokesperson said shareholders' allegations "stand in stark contrast to our significant and long-term commitment to closing the minority homeownership gap."

Thompson's decision follows a decision , opens new tab last month from U.S. District Judge Sunil Harjani of Chicago, who ruled that shareholders of Abbott Laboratories (ABT.N) , opens new tab could move ahead with derivative claims that Abbott's board members

failed to put in place safety and compliance systems that would have averted the shutdown of an Abbott baby formula factory. Like Thompson, Harjani said Abbott shareholders adequately alleged deficient board oversight of a core aspect of the company's operations.

An Abbott spokesperson did not provide comment on Harjani's Aug. 7 ruling.

The derivative lawsuits before Thompson and Harjani, as you probably know, are known as Caremark claims, after a 1996 ruling [opens new tab](#) by William Allen, then the head judge of Delaware's Chancery Court, in a derivative suit accusing board members of health care company Caremark of breaching their fiduciary duties by failing to avert a Medicare and Medicaid kickback scheme that led to a guilty plea by the company in 1995.

The idea is that board members can't be expected to pursue breach of duty claims against themselves, so shareholders must step in. But as Allen warned in an oft-quoted line from his 1996 Caremark decision, such claims are "possibly the most difficult theory in corporation law," given Delaware's presumption that board members are exercising good-faith business judgment.

Despite Allen's warning, lawsuits alleging Caremark claims have enjoyed a resurgence in the last few years, following a handful of Delaware decisions that allowed shareholders to pursue derivative claims after corporate scandals.

The key rulings were in lawsuits against board members from Blue Bell Creameries [opens new tab](#) after a deadly listeria outbreak; Clovis Oncology [opens new tab](#) after an allegedly botched clinical trial of a lung cancer drug; and Boeing [opens new tab](#) (BA.N) [opens new tab](#) after its fatal 737 MAX crashes. Last December, the Delaware Supreme Court revived [opens new tab](#) a dismissed Caremark suit alleging that AmerisourceBergen's board members failed to heed red flag warnings about the company's role in the opioids epidemic.

Even after those decisions, though, Caremark claims remain a tough sell in Delaware. In an analysis [opens new tab](#) published last May, Fried, Frank, Harris, Shriver & Jacobson looked at four Chancery Court decisions from late 2023 and 2024 dismissing Caremark lawsuits. Those rulings, Fried Frank concluded, "re-emphasized a very high bar to success" for Caremark claims in Chancery Court.

There's significantly less precedent on Caremark lawsuits outside of Delaware, mainly because so many corporations have forum selection clauses requiring shareholders to litigate derivative claims in Chancery Court. That's why the Abbott and Wells Fargo cases are notable: Federal judges don't have much occasion to evaluate this "most difficult theory," so it's worth paying attention when they do.

In the Wells Fargo case, Thompson relied on Delaware's 2019 Blue Bell Creameries decision to conclude that Wells Fargo's board wasn't paying enough attention to the bank's fair lending practices.

Wells Fargo did not dispute that fair lending regulations are a critical issue for the bank, but argued that its directors fulfilled their oversight duties: The board's audit and risk committees supervised regulatory compliance, according to Wells Fargo, and the entire board received an extensive presentation in August 2020 on fair lending practices from the executive in charge of compliance oversight.

But Thompson said plaintiffs offered sufficient allegations that the board wasn't focused on the all-important risk of discriminatory lending practices.

"Defendants are not required to create a board-level committee specifically devoted to fair lending compliance or redlining or pricing exceptions," she wrote. "But plaintiffs do not plead this. Rather, plaintiffs adequately plead that, like in [Blue Bell] and Boeing, no board committee existed to directly address the mission-critical issue."

Shareholders' counsel from Cotchett, Pitre & McCarthy; Bleichmar Fonti & Auld; and Motley Rice said in a joint statement that the judge made a "well-reasoned and thoughtful" ruling on their Caremark claims.

"This is an important corporate governance case for our clients, Wells Fargo and other stakeholders," they said.

Wells Fargo is represented by Sullivan & Cromwell. Willkie Farr & Gallagher is counsel to individual board members and officers.

It's hard to know if the Wells Fargo and Abbott decisions are mere outliers or early signals that federal judges are sympathetic to Caremark claims. In journalism, the old saying is that three examples make a trend.

We've got two.

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Reporting By Alison Frankel

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Sept. 23, 2024, 1:03 PM PDT

Wells Fargo Must Face Derivative Suit Over Racial Bias Lending

By Isaiah Poritz

- Risk committees failed to address lending fairness compliance
- Board of directors did act on red flags in hiring practice

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Wells Fargo Must Face Derivative Suit Over Racial Bias Lending

By Isaiah Poritz 2024-09-23T16:03:19000-04:00

- Risk committees failed to address lending fairness compliance
- Board of directors did act on red flags in hiring practice

A group of shareholders suing Wells Fargo & Co. plausibly alleged that the San Francisco-based bank violated its fiduciary duties by failing to have a board committee or reporting protocol to monitor fairness in its home mortgage lending practice, a federal judge said.

But the opinion docketed Sept. 20 and written by Judge Trina L. Thompson also said the shareholders failed to allege that the bank's board of directors didn't act on red flags relating to a discrimination scandal over its hiring practices.

The mixed ruling from in the US District Court for the Northern District of California also said Wells Fargo and its directors must faces claims that they violated sections of the Securities Exchange Act for making false statements about hiring practices, but dismissed similar claims about lending practices.

The shareholder derivative case consolidated before Thompson earlier this year stems from a pair of widely publicized discrimination scandals at the bank.

Reporting by Bloomberg News revealed the bank approved home mortgage loans to Black and Hispanic applicants at a disproportionately lower rate than White applicants, the order said. And The New York Times found that the bank gave sham job interviews to minority candidates with no intention of hiring them, but only to fulfill a company rule of considering diverse candidates, according to Thompson.

The shareholders first sued the bank in 2022, arguing the board of directors breached their duties by making no good faith attempt to monitor and report on “mission critical” issues around lending and hiring.

Wells Fargo moved to dismiss the case in June.

Thompson said she wasn’t persuaded that the Wells Fargo board’s audit and risk committees sufficiently dealt with fair lending. The shareholders had plausibly alleged that from August 2020 to April 2022, those committees never “discussed fair lending compliance” and another committee only mentioned it once over that period, Thompson found.

The bank was able to show that its board did take action in response to the sham job interviews scandal by pausing the bank’s diverse search requirement, Thompson said.

Parts of her ruling Monday parallel a different but similar shareholder case, where Thompson found that Wells Fargo had made 11 false or misleading statements about its diverse hiring practice.

Sullivan & Cromwell LLP represents Wells Fargo. Bleichmar Fonti & Auld LLP, Cotchett Pitre & McCarthy LLP and Motley Rice LLC are co-lead counsel for the shareholders.

The case is *In re Wells Fargo & Company Hiring Practices Derivative Litigation*, N.D. Cal., No. 3:22-cv-05173, 9/20/24 .

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Vanguard to Settle Investors' 'Elephant Stampede' Sell-Off Suit

By Tristan Navera

Documents

 [Order](#)

 [Docket](#)

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- Details of mediated settlement to be hammered out by Nov. 4
 - Suit centered on eligibility change for Vanguard Chester Funds

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Vanguard to Settle Investors' 'Elephant Stampede' Sell-Off Suit

By Tristan Navera 2024-09-23T11:46:05000-04:00

- Details of mediated settlement to be hammered out by Nov. 4
- Suit centered on eligibility change for Vanguard Chester Funds

Vanguard Group Inc. has reached a settlement with a group of investors who accused the firm of breaching its fiduciary duty by causing them “massive” capital gains tax bills, prompting a federal court to pause their litigation Monday.

The two sides plan to continue to hammer out the details of the settlement, but they have reached an agreement in principle to resolve all claims, they said in a joint stipulation filed Sept. 20 at the US District Court for the Eastern District of Pennsylvania.

Vanguard was sued in late 2022 by a group of investors who'd said they were hit with high capital gains taxes after Vanguard Chester Funds lowered the eligibility minimum for some of its low-fee institutional accounts from \$100 million to \$5 million. The complaint said this led to an “elephant stampede” of an estimated 8,500 401(k) investors out of retail funds into the institutional funds.

Vanguard's retail funds then had to sell off assets and distribute the capital gains to those who remained. The plaintiffs alleged those who'd stayed in the retail funds each faced an extra tax bill of \$9,000 to \$36,000 as a result.

The settlement comes after private mediation before retired judge Layn Phillips Sep. 19, and ahead of scheduled oral arguments at the court next month.

The parties told Judge John F. Murphy they need more time to negotiate and memorialize the details of the settlement, and intend to move for preliminary approval of the proposed class settlement by Nov. 4.

Vanguard was previously able to fend off some of the claims related to gross negligence and unjust enrichment, but the court gave investors a green light to proceed on other claims last year.

The Rosen Law Firm PA represents the class. Debevoise & Plimpton LLP and Welsh & Recker PC represent Vanguard.

The case is In Re Vanguard Chester Funds Litig. , E.D. Pa., No. 22-cv-00955, joint order and stipulation 9/23/24 .

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'\$20 Billion in Damages': FTX Bankruptcy Estate and MDL Resolve Differences

"We're optimistic that in each of these cases, in FTX, in Voyager, we're going to be able to get people back their damages," said Adam Moskowitz, co-lead counsel in the FTX multidistrict litigation. "But that's looking backward. If you look forward, how will you deal with this situation?"

September 23, 2024 at 03:05 PM

Cryptocurrency



Michael A. Mora



What You Need to Know

- The FTX bankruptcy estate and the FTX multidistrict litigation attorneys have been feuding for months.
- The two sides have begun to work together based on their realization that there is a '\$20 billion out-of-pocket loss for damages.'
- The move comes ahead of Caroline Ellison's sentencing, which is scheduled for Tuesday.

After a six-month battle, attorneys from the FTX bankruptcy estate and the FTX multidistrict litigation are now working together.

Adam Moskowitz, the managing partner at the [Moskowitz Law Firm](#) in Coconut Grove, Florida, is co-lead counsel with David Boies, the chair of [Boies Schiller Flexner](#) in New York, in the FTX multidistrict litigation. In an interview, Moskowitz attributed the full credit for the breakthrough to [John J. Ray III](#), who took over the reins at FTX as its CEO following its collapse.

"Due to his insight and perspective, we've come together and we've realized that there is going to be a \$20 billion out-of-pocket loss for damages," Moskowitz said. "He's done a great job getting back full relief of over 100% for the bankruptcy claims. But there are a lot of damages that are outstanding, and we're going to work with the estate on certain defendants to try to make up that shortfall."

Those in the MDL have argued that U.S. District Judge Michael Moore of the Southern District of Florida—and not Chief U.S. Bankruptcy Judge John Dorsey of the District of Delaware—should be in charge of claims by the defrauded customers of the now-bankrupt cryptocurrency exchange.

Stephanie Wheeler, a partner at [Sullivan & Cromwell](#) who is counsel for third-party petitioner FTX Trading and its affiliated debtors and debtors-in-possession, did not respond to a request for comment.

The bankruptcy lawyers have argued that FTX owns substantial money misappropriated by founder and disgraced crypto mogul Sam Bankman-Fried, meaning that some of the forfeited funds should be allocated to FTX's creditors through the bankruptcy process. The potential resolution comes as Caroline Ellison, a close colleague of Bankman-Fried, is due to be sentenced Tuesday. Federal prosecutors have signaled that Ellison should receive a lenient sentence, and so has Moskowitz.

"She gave us a lot of testimony, a lot of declarations, which is helping us go after other people for that \$20 billion in damages," Moskowitz said. "We're optimistic that in each of these cases—in FTX, in Voyager—we're going to be able to get people back their damages. But that's looking backward. If you look forward, how will you deal with this situation?"

State of Cryptocurrency

Moving forward, the state of cryptocurrency and other digital technologies, such as nonfungible tokens, is increasingly uncertain. In the November election, voters will decide whether former President Donald Trump or Vice President Kamala Harris will lead the country and, by extension, which candidate's vision for the future of digital assets will take effect.

However, Harris has not yet taken an official position on crypto during her brief campaign as the Democratic nominee. Meanwhile, crypto backers have seen the Biden administration as unfriendly to the industry, mainly due to the U.S. Securities and Exchange Commission's aggressive regulatory action and fear the crackdown will continue.

As a result, the crypto community has donated an outpouring of capital to the Trump campaign. So far, Trump has indicated that he intends to [fire U.S. Securities and Exchange Commission Chair Gary Gensler](#) and have the Commodity Futures Trading Commission perform much of the regulation. His policy proposals include a government stockpile of bitcoin and a crypto advisory council.

'How Do We Best Regulate NFTs?'

In the meantime, Moskowitz said the cooperation between the bankruptcy estate and the MDL factions exemplifies how those with contrasting agendas can come together to solve the regulatory hurdles in the emerging industry. He also pointed to a securities class action complaint filed Friday against [Ozone Networks Inc., or OpenSea](#).

In that lawsuit, Anthony Shnayderman and Itai Bronshtein, on behalf of themselves and all others similarly situated against the defendant, alleged a scheme to mislead investors into thinking that the NFTs sold on its website did not constitute the sale of securities. Despite what the defendant argued, there has been a clear indication from the SEC that it construes NFTs as securities.

9/24/24, 8:18 AM

'\$20 Billion in Damages': FTX Bankruptcy Estate and MDL Resolve Differences | National Law Journal

“Instead of fighting each other and wasting hundreds of millions of dollars on legal fees, why don’t we sit down and say, ‘Going forward, how do we best regulate NFTs?’” Moskowitz said. “We hope they take our olive branch, meet with us, and start a bigger discussion with other lawyers and experts. Whether Trump wins or Harris wins, something has got to change.”

However, that appears to be unlikely, at least in OpenSea’s case.

“Conjuring from thin air a purported class action lawsuit based on our disclosure of an SEC Wells notice won’t make the allegations in the complaint true,” an OpenSea spokesperson said. “We refute these allegations and look forward to defending against this baseless lawsuit.”

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NEWS

'I'm Staying Everything': Texas Bankruptcy Judge Halts Talc Trials Against J&J

At a Monday hearing, U.S. Bankruptcy Judge Christopher Lopez in Texas ordered an automatic stay on J&J talc litigation after dual motions were filed to move the Chapter 11 case to New Jersey.

September 24, 2024 at 09:36 AM



Amanda Bronstad
staff reporter



What You Need to Know

- A coalition of talc claimants filed a motion to change venue to New Jersey, where the U.S. Trustee in the prior bankruptcy filed a similar request before Chief U.S. Bankruptcy Judge Michael Kaplan in New Jersey.
- The stay order temporarily moots an injunction motion to apply the bankruptcy's automatic stay to talc litigation against Johnson & Johnson.
- A coalition lawyer said he would be filing motions this week for discovery relating to the vote, which he said was 'teetering on a foundation of fraud.'

A federal judge in Texas immediately stayed Johnson & Johnson’s latest talc bankruptcy after dual motions were filed to transfer the Chapter 11 case to New Jersey.

At a Monday hearing, U.S. Bankruptcy Judge Christopher Lopez, of the Southern District of Texas, ordered the automatic stay after motions to change venue were filed – one before him, and one before Chief U.S. Bankruptcy Judge Michael Kaplan, who oversaw Johnson & Johnson’s two previous talc bankruptcies.

“I have not made a decision one way or the other on it, but it seems like that’s a threshold issue that’s got to get teed up,” Lopez said at the first hearing in the third Chapter 11 case, filed by Johnson & Johnson subsidiary Red River Talc LLC [on Sept. 20](#). “I’m staying everything until we find out where this bankruptcy case will ultimately have a home.”

Lopez’s order halts trials alleging Johnson & Johnson’s baby powder causes ovarian cancer. It also temporarily moots an injunction motion that Lopez was scheduled to take up on Monday to apply the bankruptcy’s automatic stay to talc litigation against Johnson & Johnson .

The bankruptcy is the third attempt for Johnson & Johnson aimed at resolving thousands of lawsuits. The other two, filed in 2021 and 2023, were dismissed after the U.S. Court of Appeals for the Third Circuit found the debtor, Johnson & Johnson subsidiary LTL Management, wasn't in financial distress.

A group called the "Coalition of Counsel for Justice for Talc Claimants," which opposes the latest bankruptcy, filed a separate motion on Sept. 21 before Lopez to transfer the Chapter 11 case to New Jersey, citing Johnson & Johnson's "blatant forum shopping."

But the U.S. Trustee for the 2023 talc bankruptcy, which is still pending, brought motions to stay the latest bankruptcy and change its venue New Jersey. Although Kaplan dismissed the bankruptcy last year, the hearing on closing the case is on Nov. 7.

Jeffrey Sponder, a trial attorney for the U.S. Trustee, wrote in the Sept. 20 motion, "The decision to file for bankruptcy in Texas reflects a strategy to sidestep the ruling of this court and the Third Circuit in order to re-litigate the same issues in a different jurisdiction."

Kaplan has scheduled a hearing on that motion for Tuesday morning.

Lopez said he would impose his stay order through Oct. 11.

"Judge Kaplan will do what Judge Kaplan does," Lopez said. "I'm not going to put myself in any way to tell another bankruptcy judge what to do on a motion before her or him."

'Doomed to Failure'

Red River Talc LLC filed the third bankruptcy, which Johnson & Johnson announced four months after introducing a prepackaged plan that would pay \$6.48 billion up front to talc claimants. After negotiating with the Smith Law Firm, in Ridgeland, Mississippi, which has nearly 12,000 talc claimants, Johnson & Johnson upped the amount to \$9.1 billion, with a nominal value of \$10 billion when including future talc claims and other compensation.

On Monday, Lopez wanted to prioritize motions involving "really serious stuff," such as dismissing the Chapter 11 case and challenging the process under which Johnson & Johnson obtained a purported 83% vote of all talc claimants supporting the bankruptcy.

"This case is teetering on a foundation of fraud and, we submit, manipulative and deceptive voting process," said David Molton, a New York partner at Brown Rudnick.

He said the plan won't be confirmed.

"This case also is doomed to failure," he said. "It's déjà vu all over again for a lot of us."

The coalition already has filed a Sept. 21 motion to dismiss the Chapter 11 case.

At the hearing, U.S. Trustee Jayson Ruff agreed that it was "abundantly clear there does need to be at some point discovery to ensure solicitation efforts were proper."

Jones Day's Greg Gordon, debtor's counsel in Dallas, said that wasn't all the discovery needed.

"Notwithstanding the substantial and widespread support of this plan, this filing has triggered a veritable kitchen sink of oppositions," Gordon told Lopez. "On whose behalf are these firms objecting? From our point of view, discovery will be needed to determine what claimants if any these firms and others in this group, this coalition, represent."

J&J talc opponents decry bankruptcy as "deja vu all over again"

 [reuters.com/legal/litigation/jj-talc-opponents-decry-bankruptcy-deja-vu-all-over-again-2024-09-24](https://www.reuters.com/legal/litigation/jj-talc-opponents-decry-bankruptcy-deja-vu-all-over-again-2024-09-24)

Dietrich Knauth

A bottle of Johnson & Johnson baby powder is seen in a photo illustration taken in New York, February 24, 2016. REUTERS/Mike Segar/Illustration Purchase Licensing Rights , opens new tab

NEW YORK, Sept 23 (Reuters) - A Johnson & Johnson subsidiary got off to a contentious start Monday in its third attempt at a multibillion-dollar bankruptcy settlement that would end tens of thousands of lawsuits alleging that the company's baby powder and other talc products caused cancer.

Attorneys for cancer victims said the bankruptcy was a sham at the first court hearing in the case. They urged U.S. Bankruptcy Judge Chris Lopez in Houston to toss the case or send it to New Jersey, where J&J is headquartered and where the healthcare giant's previous attempts at bankruptcy were dismissed.

The J&J subsidiary, Red River Talc, filed for bankruptcy protection in Texas on Friday, seeking to finalize a proposed settlement that would pay as much as \$10 billion in value over 25 years to end litigation by over 62,000 current talc claimants and prevent anyone from bringing new talc cases against J&J.

J&J has said that its products are safe and do not cause cancer.

Lopez ruled that no talc litigation can proceed against J&J until Oct. 11, while he considers whether Red River's bankruptcy case should proceed in his Houston court or not.

"Right now everything needs to stop until we figure out where this bankruptcy case will ultimately have a home," Lopez said. "There has got to be one judge who is in charge of this."

David Molton, who represents law firms opposed to the deal, said at Monday's hearing that the third bankruptcy attempt was "doomed to fail," despite the company's efforts to present the settlement as a done deal.

"J&J's bankruptcy scheme buys delay, but not peace," Molton told Lopez. "It's deja vu all over again for many of us."

Red River said in court filings that the third bankruptcy could succeed where those others failed, in large part because Red River came to bankruptcy court with a "prepack" bankruptcy that is supported by 83% of people who have alleged that J&J talc products

caused ovarian cancer and other gynecological cancers. J&J has previously reached settlements with people that have alleged that the company's products caused mesothelioma, and with state governments that alleged the company failed to warn consumers about the dangers of talc products.

The proposed bankruptcy settlement has deeply divided attorneys representing cancer victims. Some support the deal as the best way to get compensation for their clients, while others argue that the settlement value is too low and that wealthy companies like J&J should not be allowed to game the legal system to gain bankruptcy protections meant for people and companies that cannot afford to pay their debts.

At Monday's hearing Molton and his colleagues pushed back against Red River's description of its bankruptcy as a "prepack," arguing that J&J's pre-bankruptcy voting should not be trusted and pointing out that Red River's attorney began his presentation with a "broadside attack" against plaintiffs lawyers opposed to the deal before even describing the benefits of the settlement.

Red River's attorney Greg Gordon acknowledged that the case was "unusual," and he argued that certain lawyers "hypocritically" opposed the deal despite never recovering "a single dollar" for their clients in their lawsuits against J&J.

"Whose interests are they representing?" Gordon asked. "The breadth and scope of the opposition, from my perspective, is breathtaking."

J&J has a mixed record in talc trials, winning many cases outright but also being hit with huge verdicts in other cases, including a \$2.1 billion judgment in 2021 awarded to 22 women with ovarian cancer.

Roy Barnes, a former Georgia governor and attorney who has 53 talc cases, said that some of his clients cried when they heard that the third bankruptcy would stop their lawsuits from moving forward.

"I can't explain it to them," Barnes told Lopez. "All I want to do is try my cases."

The U.S. Department of Justice's bankruptcy watchdog has also argued that the case should be heard in New Jersey. It has asked U.S. Bankruptcy Judge Michael Kaplan, who oversaw the J&J subsidiary's first two bankruptcies, to block the bankruptcy from proceeding in Houston until the bid to transfer the case is decided.

The case is In Re: Red River Talc LLC, U.S. Bankruptcy Court for the Southern District of Texas, No. 24-90505

For Red River Talc: Greg Gordon of Jones Day

For the Coalition of Counsel for Justice for Talc Claimants: David Molton and Jeffrey Jonas of Brown Rudnick, Melanie Cyganowski of Otterbourg

For the Ad Hoc Group of Supporting Counsel: Kris Hansen of Paul Hastings

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Reporting by Dietrich Knauth and Mike Spector

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J&J's talc plan gains supporter, which gets him sued by Beasley Allen

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September 24, 2024

Attorney Allen Smith of The Smith Law Firm, PLLC | The Smith Law Firm, PLLC

NEW BRUNSWICK, N.J. (Legal Newsline) – After Johnson & Johnson made an offer to increase its settlement proposal by \$1 billion to plaintiffs claiming its cosmetic talcum powder gave them cancer, the offer garnered the support of one member of plaintiff counsel who had previously rejected such proposals.

Johnson & Johnson found itself in this situation after plaintiff lawyers **hired scientific experts who claimed to find asbestos contamination** in cosmetic talc. Johnson & Johnson denies there was any asbestos in its talc products, but enough judges have allowed plaintiff experts to testify in court that juries have delivered unpredictable and sometimes huge verdicts, including \$4.7 billion – since reduced to \$2.1 billion – which a Missouri jury ordered J&J to pay to 22 women with ovarian cancer.

Faced with the risk of crippling liability, J&J tried to settle talc litigation by creating a special subsidiary called LTL Management and placing it in bankruptcy in 2021, with a promise from the parent company to pay up to \$60 billion to settle claims. The U.S. Court of Appeals for the Third Circuit threw that bankruptcy out, ruling J&J's rich guarantee meant LTL wasn't in financial distress.

J&J tried again by reducing its commitment to \$30 billion, but that was rejected as well. Now, the company has **proposed a third attempt** with the support of lawyers representing more than 75% of ovarian-cancer talc claimants, through a bankruptcy filing in a Texas federal court.

The plan, if successful, would be one of the largest settlements for a mass tort and would see J&J pay in excess of \$9 billion over 25 years.

It would specifically be directed to only the strongest talc-related exposure claims, including those for ovarian cancer and also net smaller, guaranteed financial payments for those who claims may not prevail in court. Meanwhile, J&J would avoid defending against each individual suit in court and then rolling the dice at trial.

A proponent of the proposal is Allen Smith, an attorney who filed the first talc exposure lawsuit against J&J 15 years ago and who, until now, has staunchly opposed the company's prior attempts to resolve the claims in bankruptcy court.

What changed Smith's mind this time around, according to ***The Wall Street Journal***, was J&J's promise to sweeten the financial pot and lessen the wait for claimants to receive their settlement proceeds.

Inquiries made by *Legal Newsline* asking for comment from Smith ultimately went unreturned.

The proposed settlement plan is opposed by Beasley Allen, a Texas law firm which, alongside Smith, represents thousands of claimants – and which says the proposal both doesn't pay enough, and that it can get more for its clients in court.

Beasley Allen has since sued Smith's firm, alleging it now wants the settlement approved in order to pay outside funders of the litigation.

Beasley Allen partner Andy Birchfield issued a statement on J&J's settlement proposal.

"Our singular objective is fair compensation for our clients and also certainty that they will be compensated in a timely manner. The pain and suffering cancer victims have endured at the hands of Johnson & Johnson requires our total commitment to justice," Birchfield said.

But those in favor of the settlement say such an arrangement is preferable to waiting years, and potentially, many years for their cases to be heard in a courtroom. And that by the time the majority of the cases have been resolved, the lion's share of financial recovery may be gone.

When lawyers seek clients for a mass tort, like they've done with products like Roundup and talc, they get so many potential claimants that the normal litigation system breaks down.

The prospect of driving a company into liquidation inspires a "race to the courthouse" that "can destroy going concern value and lead to the dismemberment of valuable firms," wrote University of Chicago Law School Professor Anthony Casey and Joshua Macey of Yale law in a 2023 article titled, **"In Defense of Chapter 11 for Mass Torts."**

"When a firm is unable to pay all its tort claims, claimants who file early, or who find themselves before a sympathetic jury, or whose injuries happen to manifest quickly, may receive a large payout. Late claimants risk being left with nothing."

The U.S. Supreme Court delivered a curveball to J&J's strategy this year by striking down agreements that previously allowed non-bankrupt parties to buy their way out of mass-tort liability by putting money into a company's bankruptcy plan.

The opinion, written by Justice Neal Gorsuch, found Purdue Pharma couldn't protect the founding Sackler family from opioid lawsuits in exchange for \$6 billion in bankruptcy funding, unless all opioid claimants agreed.

This contrasts with the treatment other creditors get in bankruptcy, where a judge can compel a settlement with only majority approval.

Justice Brett Kavanaugh dissented, saying the decision will only make it harder for tort claimants to receive compensation.

“Outside of bankruptcy,” Kavanaugh wrote, victims face “significant administrative costs” of multidistrict litigation, “which has limited coordination mechanisms and no tools for binding future claimants.”

Chief Justice John Roberts concurred with Kavanaugh’s dissent.

*From Legal Newsline: Reach Reporter Nicholas Malfitano at
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ORGANIZATIONS IN THIS STORY

Johnson & Johnson

Rules for use of AI-generated evidence in flux

 [reuters.com/legal/legalindustry/rules-use-ai-generated-evidence-flux-2024-09-23](https://www.reuters.com/legal/legalindustry/rules-use-ai-generated-evidence-flux-2024-09-23)

Lauren Leipold, Owen Wolfe

AI (Artificial Intelligence) letters and robot hand are placed on computer motherboard in this illustration taken, June 23, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

September 23, 2024 - A recent federal district court ruling suggests that generative AI prompts and outputs are discoverable in litigation — even those that were part of pre-suit investigation. Parameters around use of this type of evidence are still relatively unclear. Nonetheless, litigants should be thinking carefully about privilege, spoliation, reliability and authentication issues that will inevitably arise around AI-generated materials.

Use of prompts and outputs as evidence has arisen most prominently in the context of copyright infringement lawsuits that large classes of authors and creators such as Sarah Silverman and Ta-Nehisi Coates have filed against AI companies.

In *Tremblay v. OpenAI*, filed in the U.S. District Court for the Northern District of California last June, the authors accused OpenAI of using their copyright-protected materials without permission to train its ChatGPT platform. They alleged that both copying at the input/training stage and at the output stage constituted infringement.

The court granted OpenAI's motion to dismiss the majority of the authors' claims, finding the authors had failed to allege facts sufficient to support their allegation that ChatGPT outputs were "substantially similar" to the original inputs. However, the court allowed the authors to replead with additional support for their claims.

In hopes of avoiding dismissal the second time around, the authors alleged in their amended complaint that particular prompts in ChatGPT would cause ChatGPT to reproduce portions of their books almost verbatim. This additional detail elicited discovery requests for pre-suit testing of ChatGPT.

OpenAI argued to the court that the authors should be required to hand over the ChatGPT account information for anyone who entered the prompts listed in the authors' complaint, as well as all prompts and ChatGPT outputs that the authors or their lawyers tested, but did not ultimately include in the complaint.

The authors argued that because the ChatGPT prompts were entered in connection with preparing the lawsuit, the prompts, outputs, and related information were protected from discovery by the attorney work product doctrine. That doctrine protects documents that were

prepared by a lawyer, or by someone else at a lawyer's direction, in connection with anticipated or pending litigation.

A magistrate judge handling discovery disputes in the case agreed with OpenAI, finding that the authors had waived work product protection by referencing the prompts and outputs in their complaint. The authors appealed the ruling to the district judge, who overturned the magistrate judge's decision.

The district judge concluded that the authors' waiver of the work product doctrine should be limited only to those prompts and outputs actually referenced in the complaint, as well as the ChatGPT account setting in place when those prompts were entered. Although this decision put some guardrails around the magistrate's original ruling, it signals that other plaintiffs looking to sue generative AI platforms for infringement are likely going to find themselves in the difficult position of having to reveal information that might otherwise be considered privileged in order to plead viable claims against the platforms.

In the United States, AI companies do not have to disclose what data their generative AI programs were trained on, though there has been legislation proposed to address this issue at the federal level. For now, plaintiffs alleging infringement generally have no direct way to show whether their works were copied for use in AI training. As a result, they have to offer indirect evidence of copying by, among other things, prompting the AI programs to see if the resulting output is similar to their works.

Under the *Tremblay* district judge's approach, plaintiffs who make those types of allegations will at least have to turn over all prompts and outputs referenced in the complaint and certain account settings. But if judges in other parts of the country find the magistrate judge's reasoning more persuasive, plaintiffs may find themselves being forced to turn over the keys to their generative AI program accounts. Plaintiffs will either have to take care in drafting their complaints to try to avoid a privilege waiver, or otherwise be ready to give the AI company their AI program account information.

The *Tremblay* ruling will reverberate far beyond the copyright context as use of ChatGPT and similar programs becomes relevant and discoverable in all types of litigation. For example, where AI is used for employment screening, records of the AI program usage and outputs may be highly relevant in discrimination cases. And where a vendor uses generative AI as part of its provision of services to a client pursuant to a contract, the generative AI prompts and outputs could be relevant to a lawsuit for breach of that contract.

This triggers preservation obligations to avoid sanctions for spoliation of evidence. If they are not already doing so, companies that use generative AI should take measures similar to those implemented for email retention. They should ensure that employee use of generative

AI is appropriately monitored, and that prompts and outputs are preserved for a set period of time or, when litigation is imminent, indefinitely.

Moreover, when litigation has commenced or is imminent, companies or their lawyers often issue "litigation hold" notices to advise company employees to preserve all relevant documents and communications. Most litigation hold notices have already been updated to cover relatively recent forms of communication (e.g., social media), but companies and lawyers that have not already done so should update their litigation hold notices to cover generative AI prompts and outputs where applicable.

Litigants should also consider what steps may be required to authenticate AI-generated evidence for use in court. This past spring, the U.S. Judicial Conference's Advisory Committee on Evidence Rules heard testimony from experts on AI to evaluate whether the current Federal Rules of Evidence are equipped to address use of AI-generated material as evidence.

The committee released a report considering questions such as whether experts or validation studies are required to testify to reliability of AI-generated content, and whether a special rule should be created to address authentication of potential "deepfakes." Report [opens new tab](#) of the Advisory Committee on Evidence Rules for the Judicial Conference of the United States' Committee on Rules of Practice and Procedure, May 15, 2024. No definitive changes have been made. Because rulemaking is such a lengthy process, it is likely that courts will be forced to start weighing in on the application of existing rules in the context of this rapidly evolving technology.

On a piecemeal basis, some courts have already issued standing orders requiring disclosure of the use of AI to draft pleadings, and/or requiring attorneys to certify the accuracy of AI-generated material before submitting to the court. Meanwhile, state bars, including those in Florida and New Jersey, have issued ethics opinions addressing use of AI. Florida Bar Ethics Opinion 24-1, 2024 Florida Court Order 0005 (C.O. 0005), issued Jan. 19, 2024; Preliminary Guidelines on the use of Artificial Intelligence by New Jersey Lawyers, 2004 New Jersey Court Order 0004 (C.O. 0004), issued Jan. 24, 2024.

Although the technology is still in its relatively early days, generative AI presents new issues and challenges to which U.S. courts, companies, lawyers, and others are all trying to adapt. The *Tremblay* rulings are a reminder that, as with any new technology, individuals and businesses need to consider how generative AI impacts their practices and whether those practices need to change to address generative AI.

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Bonta, Environmental Groups Sue Exxon Mobil Over Plastic Recycling Claims

California Attorney General Rob Bonta said his office will "in all likelihood" seek to recover billions of dollars from Exxon Mobil for misleading consumers into thinking their plastic products can be readily recycled.

September 23, 2024 at 07:07 PM

Environmental Law



Cheryl Miller



California and four environmental groups will pursue [parallel lawsuits](#) accusing Exxon Mobil Corp. of lying for decades about the feasibility of recycling the massive amount of plastic it produces, Attorney General Rob Bonta announced Monday.

The suits, filed in San Francisco County Superior Court, seek an array of remedies and damages. The Burlingame plaintiffs firm of Cotchett, Pitre & McCarthy is representing Sierra Club Inc., Surfrider Foundation Inc., Heal the Bay Inc. and Baykeeper Inc. in the groups’ complaint against the oil and chemical giant.

“More is more and more is better,” Bonta said at a press conference. “And while these may be the first cases of their kind, my personal view is, I hope that they won’t be the last. Other states who have been harmed by Exxon Mobil ... should respectfully consider bringing their own lawsuit and fighting to hold Exxon Mobil accountable.”

Cotchett Pitre partner Niall McCarthy said the two suits will be coordinated in the San Francisco trial court.

“At the end of the day, when you combine the resources available to the attorney general’s office and the knowledge and resources available on the nonprofit side, it greatly enhances the chance for success and success is what is needed in this case,” McCarthy said.

A statement provided by Exxon Mobil spokesperson Kelly Davila blamed California officials for failing to offer adequate recycling options for consumers.

“Instead of suing us, they could have worked with us to fix the problem and keep plastic out of landfills,” the statement said.

While Bonta framed the litigation as an attack on Exxon Mobil’s public promotion of “the myth of recyclability” of its polymer products, the suits also pursue more traditional environmental law claims of water pollution and public nuisance.

Bonta’s office is seeking an order forcing Exxon Mobil to stop using terms such as “advanced recycling,” as well as civil penalties under the state’s Unfair Competition Law and disgorgement of profits that the attorney general said were “enjoyed because of the lies.” The environmental groups’ suit asks for injunctive relief as well as clean-up costs.

“We are demanding that Exxon Mobil fund, in all likelihood, to the tune of billions of dollars to abate the harm caused by their deceit,” Bonta said.

“It would include things like reeducation, telling people the truth to reeducate them away from the lies that have taken root and are internalized and understood and believed to be true when they’re not,” Bonta added. “It also could involve research and development with respect to ways to actually recycle successfully plastics that are recyclable. It could also be cleaning up plastic pollution.”

Beyond the litigation announced Monday, growing concern about microplastics findings in food, water and even human tissue have fueled lawsuits against manufacturers and distributors.

Two dozen false advertising suits have been filed since 2021 related to undisclosed plastics in consumer products or allegedly misleading claims about the ability to recycle plastic goods, according to a plastics litigation [tracker](#) run by New York University School of Law’s Guarini Center on Environmental, Energy & Land Use Law.

Many of the recent suits challenge labels that fail to disclose actual or potential microplastics in their products. Others, including a [suit](#) filed by the state of New York, say companies led consumers to believe they could recycle their wrappers or containers even when such technology isn’t widely available.

Cotchett Pitre is representing Earth Island Institute in a similar but separate suit targeting plastic distributors. In July, a San Mateo County Superior Court dismissed Earth Island’s claims under California’s Unfair Competition Law but [allowed](#) its nuisance claim against Crystal Geyser Water Co., the Clorox Co., Coca-Cola and other companies to proceed.

NOT FOR REPRINT

California accuses ExxonMobil of lying to public about recyclability of plastics

 [courthousenews.com/california-accuses-exxonmobil-of-lying-to-public-about-recyclability-of-plastics](https://www.courthousenews.com/california-accuses-exxonmobil-of-lying-to-public-about-recyclability-of-plastics)

Michael Gennaro

SAN FRANCISCO (CN) — California Attorney General Rob Bonta filed a lawsuit against ExxonMobil on Monday morning accusing the big oil company of misleading the public for 50 years about the efficacy of plastic recycling.

In the 147-page complaint filed in San Francisco Superior Court, Bonta claims for the past 50 years, ExxonMobil has used deceptive marketing and misleading public statements to promote recycling as an effective solution for plastic pollution, even though the oil giant knows most plastics are not recycled and cannot be recycled.

Bonta also accused ExxonMobil of upholding the “myth” of plastic recycling to this day.

The lawsuit centers on the claim that ExxonMobil's messaging led consumers to purchase and use more single-use plastic than they otherwise would have. Though most consumers know ExxonMobil as an oil company, it is also the world's largest producer of polymers, materials made from fossil fuels that are used in single-use plastics like utensils and packaging.

“In the past decade, as we've been drowning in plastic waste, ExxonMobil has increased its production capacity by roughly 80%. They are bullish on the plastics market. Our coastline, oceans, rivers and bays are swimming with plastic pollution that costs California municipalities, California taxpayers, over a billion dollars each year. While Californians are stuck to foot that bill, just last year, in one year, ExxonMobil raked in \$36 billion,” Bonta said in a virtual press conference announcing the suit.

Bonta said that since the 1970s ExxonMobil had hid behind industry trade and front groups with environmentally friendly names to peddle the deception that plastic is recyclable, flooding the market with ads that hide the truth about plastic's recyclability.

“It's time for ExxonMobil to tell the truth. It's time to hold ExxonMobil accountable for its role in creating and exacerbating the plastic pollution crisis. It's time for ExxonMobil to pay for the damages its lies have cost,” Bonta said.

The state does not seek traditional damages, but instead remedies such as an abatement fund to the tune of billions of dollars, Bonta said. That abatement fund could consist of reeducation efforts to tell the public the truth about plastic recyclability through advertisements and similar work, Bonta said. The state also seeks disgorgement of profits and civil penalties under California's Unfair Competition Law.

Monday's suit is the first in the country to take on a fossil fuel company for its messaging around plastic recycling, and comes one day after California Governor Gavin Newsom signed a law banning all plastic bags in California grocery stores starting in 2026.

Monday's filing caps a state Department of Justice investigation that lasted over two years that probed the role of fossil fuel and petrochemical companies in the global plastics waste crisis.

The subpoenas uncovered never-before-seen documents, according to a press release announcing the lawsuit.

Four environmental organizations, Sierra Club, Surfrider Foundation, Heal the Bay and Baykeeper, separately filed their own lawsuit raising similar issues regarding ExxonMobil's role in causing the global plastics pollution crisis on Monday as well. Bonta said that he hopes the two suits are related by a judge and move along a similar path procedurally.

Neil McCarthy, counsel for the environmental plaintiffs, said ExxonMobil had multiple opportunities to tell the truth but chose to chase record profits instead.

Allison Chin, Sierra Club president, said during the press conference Monday that by 2050 there will be more plastic waste in the world's ocean than fish by mass, and that ExxonMobil generates 6 million metric tons of plastic waste annually — the equivalent of 300,000 garbage trucks.

"Our complaint alleges that, like the tobacco industry before them, Exxon has run a decades-long campaign to hide the true risk of plastic from the public. Exxon profited by claiming plastics are safe, disposable and recyclable. That wasn't true. The truth is that plastics are largely not recyclable, yet Exxon perpetuated the myth of recyclability to keep consumers buying more," Chin said. "Meanwhile, our sea life, our beaches and our environment have been drowning in a constant stream of plastic waste, and our children are ingesting microplastics, the consequences of which scientists are still unsure of."

ExxonMobil did not immediately respond to requests for comment.

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California sues ExxonMobil over deceptive recycling claims

DJ [dailyjournal.com/articles/381036-california-sues-exxonmobil-over-deceptive-recycling-claims](https://www.dailyjournal.com/articles/381036-california-sues-exxonmobil-over-deceptive-recycling-claims)

Sep. 24, 2024

California is again targeting an oil major for what it describes as deceptive conduct, this time over ExxonMobil's alleged decades-long scheme to push recycling as the solution to plastic waste despite knowing its limitations.

A pair of lawsuits separately filed Monday in San Francisco County by the California attorney general and environmental organizations accused oil company Exxon Mobil Corp. of engaging in a decades-long campaign of deception to promote plastic use by misleading the public about the efficacy of recycling.

If the state prevails in its action, the company could be on the hook for billions of dollars in abatement funds.

ExxonMobil, which produces the base material used in plastic products, has in turn described the lawsuit as an attempt by California leaders to deflect attention from the inadequacy of the state's recycling initiatives.

"For decades, California officials have known their recycling system isn't effective. They failed to act, and now they seek to blame others. Instead of suing us, they could have worked with us to fix the problem and keep plastic out of landfills," an emailed statement from the company said.

In a news conference Monday, Attorney General Rob Bonta accused ExxonMobil and its predecessor companies of downplaying the environmental risks associated with plastics as early as the 1970s, when public concern over plastic pollution began to rise. Instead of addressing these concerns transparently, the companies "used, funded, created and hid behind industry, trade and front groups to peddle this deception" that recycling was an adequate solution for plastic waste, he said.

"ExxonMobil and these industry groups have flooded the market with ads that seek to hide the truth and persuade the public" about the viability of recycling, Bonta said, citing industry groups including the Council for Solid Waste Solutions. The company used symbols such as

the iconic chasing arrow symbol found on packaging as a ploy to push the onus of dealing with plastic waste onto consumers, he added.

More recently, ExxonMobil is accused of improperly promoting "advanced recycling" technology as a new way to deal with plastic waste. The practice of advanced recycling, also known as chemical recycling - heating or treating plastics to break them down - has had mixed reactions. While California has taken a prohibitive approach, some other states have been more receptive to including the method in their recycling schemes.

"The truth is plastics produced through so-called advanced recycling contain so little recycled plastic waste that they are effectively new plastics. But ExxonMobil deceptively calls this circular and sells these products at a premium," Bonta said.

The inadequacy of recycling as a method for dealing with plastic waste had resulted in the increased production of virgin plastics - those created from new materials - the lawsuit claims. It has also resulted in increased pollution of the natural environment and the proliferation of microplastics, some of which have been ingested by humans and animals. *The People of the State of California v. Exxon Mobil Corporation*, (S.F. Super Ct., filed Sept. 23, 2024).

"The bottom line is the vast majority of plastic waste does not make it into new plastic products. ExxonMobil has failed to meaningfully invest in the sham solution of recycling, instead spending millions of dollars to market the sham itself," Bonta said.

However, ExxonMobil's statement responded, "The first step would be to acknowledge what their counterparts across the U.S. know: advanced recycling works. To date, we've processed more than 60 million pounds of plastic waste into usable raw materials, keeping it out of landfills. We're bringing real solutions, recycling plastic waste that couldn't be recycled by traditional methods," the email stated.

The state's lawsuit is the first to target a plastic manufacturer, Bonta said. It asserts six causes of action, including public nuisance, violation of Government Code Section 12607 regarding the protection of natural resources, water pollution, untrue or misleading advertising, misleading environmental marketing, and unlawful, unfair or fraudulent business practices.

In addition to equitable and injunctive relief, the state seeks the establishment of an abatement fund which Bonta said would "in all likelihood" run to the "tune of billions of dollars."

The second lawsuit -- filed by the Sierra Club, Surfrider Foundation, Heal the Bay and Baykeeper -- claims the environmental groups have had to divert significant resources to clean up plastic pollution and educate the public on the issue because of ExxonMobil's

actions. They accuse ExxonMobil of public nuisance and violation of California's Unfair Competition Law. *Sierra Club, Inc. v. ExxonMobil Corporation*, CGC-24-618321 (S.F. Super Ct., filed Sept. 23, 2024).

"Exxon has known since the '70s that these products were non-recyclable and in fact Exxon made more money by creating new plastics and Exxon ignored all the red flags. And if you look at the complaint filed by the nonprofits, we go through that in great detail, that there was a time where they could have avoided or at least lessened this crisis, and they chose the path to make more and more money for Exxon," the groups' attorney, Niall P. McCarthy, said during Monday's news conference. McCarthy is a partner at Cotchett, Pitre, and McCarthy LLP.

"Unfortunately, California is currently paying for those decisions," he added.

The two lawsuits differ slightly in remedies sought. The state's lawsuit alone contains claims of harm to natural resources, a claim specific to the attorney general's enforcement authority, as well as a water pollution claim and false advertising and greenwashing claims that differ from those presented in the nonprofits' lawsuit.

Despite this, Bonta expressed his hope that the lawsuits will be joined.

"They're both filed in San Francisco Superior Court. We believe and hope they'll be related because they're similar and we hope to be working in collaboration and partnership as we hold ExxonMobil accountable and develop the appropriate remedies for their illegal conduct," he said.

It's not the first time California has targeted Exxon over alleged deceptive conduct. Last year Bonta filed suit against ExxonMobil and several other oil majors accusing them of spreading disinformation since the 1960s about the impact of fossil fuels on the environment. The defendant companies are Apache Corp., American Petroleum Institute, British Petroleum, ConocoPhillips, Devon Energy Corp., Eni Oil & Gas, Exxon Mobil, Phillips 66, and Shell. The case is ongoing. *In re: Fossil Industry Climate Cases*, CJC-24-005310 (S.F. Super. Ct. filed March 19, 2024).

Environmental law experts welcomed the lawsuits.

Julia Stein, deputy director of the Emmett Institute at UCLA Law School, said that the lawsuit complemented recent efforts to rein in plastic production by the state Legislature.

"The state has been battling plastic pollution in the Legislature and through regulatory rulemaking proceedings for years, and today's lawsuit by the AG opens another front in the battle against harmful single-use plastics," Stein wrote in an email.

"Similar to the AG's suit against oil and gas majors for climate damages, the AG's complaint against ExxonMobil documents, in painstaking detail, decades of efforts -- continuing to this day-- to convince consumers that the plastic products they bought were environmentally-friendly, when in reality they were causing serious pollution disproportionately harming the most vulnerable Californians," she added.

"Petrochemical companies have lied about plastic recyclability for years, with dire consequences. I wholeheartedly support Attorney General Bonta taking this logical step to hold these shamelessly polluting profiteers accountable," said Julie Teel Simmonds, a senior counsel at the Center for Biological Diversity in an email. "Every corner of the world is infiltrated by plastic pollution and we're all carrying microplastics in our bodies. Only bold actions like those of Attorney General Bonta can stop Big Oil and the plastics industry from telling lies to keep making harmful products we don't need."

#381036

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General Mills Investors Reject Bid to Cut Plastic Packaging (1)

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General Mills Inc. investors on Tuesday voted against an environmental proposal calling on the maker of Cheerios cereal and Betty Crocker baking mixes to scale back its plastic packaging use.

The plastics proposal, put forward by Green Century Capital Management, asked General Mills for a report disclosing metrics on plastic use and detailing efforts to employ more sustainable packaging. The bid secured approximately 40% of the preliminary vote at the meeting.

A similar proposal passed with more than 55% investor support in 2022, but the company has not yet produced the specific report that bid sought on how it could increase the scale of its sustainable packaging efforts, Green Century said.

General Mills said in its proxy statement before the latest vote that the plastics proposal is unnecessary because the company annually discloses progress toward a goal of designing 100% of its packaging to be recyclable or reusable by 2030. The report for fiscal year 2023 says that 93% of its packaging was recyclable or reusable by weight, and only 11% of its packaging by weight was plastic. The company also launched a new effort to reduce plastic packaging for fruit snacks, the report said.

“This strong 40% vote sends a clear message: Investors agree that General Mills’ heavy emphasis on recyclability over plastic reduction measures fundamentally undermines its ability to mitigate rising plastics-related regulatory, legal and reputational risks,” said Annie Sanders, director of shareholder advocacy at Green Century. “We urge the company to take immediate action to reduce its plastic use.”

The move comes as US state laws increasingly seek to address single-use plastic pollution. Hotel chains are responding by replacing plastic toiletry bottles that are used once and then thrown out with full-size containers, among other measures. Meanwhile, the Biden administration committed this summer to cutting out single-use plastics across the federal government to reduce pollution. There also has been a recent rise in consumer concerns about ingesting chemicals from plastic food packaging.

Another shareholder proposal that did not pass sought more details on General Mills’ efforts to curb the use of pesticides in farming for its product ingredients.

General Mills didn’t immediately respond to a request for comment on Tuesday’s results at its annual shareholder meeting.

The shareholder proposal on plastic use pointed out that labels like “recyclable” can be misleading because there are often obstacles that hinder materials from actually being reused.

General Mills said it is doing a better job of tracking and reporting information on its plastic packaging.

“Understanding the importance of accurate, reliable and timely information, the company has invested in a cross-functional effort to improve and strengthen our packaging data and reporting,” the proxy statement said.

General Mills also emphasized that, when considering its plastic packaging approach, the business has to maintain the safety and quality of its products.

Pesticide Reduction

The pesticides proposal presented by shareholder advocacy group As You Sow asked General Mills for a report disclosing details about its reduction of pesticides—particularly through regenerative agriculture, which aims to limit environmental harm and promote healthier soil through practices such as growing cover crops to help control pests. The bid secured about 28% of investor support.

The company said in its proxy statement that it’s a “leader in regenerative agriculture” and aims to implement such farming techniques on 1 million acres of land by 2030. The proxy statement pointed to a General Mills webpage that lists regenerative agriculture as a way to reduce the need for synthetic pesticides and fertilizer.

Touting regenerative agriculture as a pesticide reduction strategy without reporting data on its program could lead to greenwashing claims, As You Sow said. The investor group noted that other major food companies including Campbell Soup disclose the percentage of pesticides avoided in certain supply chains.

In its proxy statement, General Mills said that the proposal would do more harm than good. “Requiring farmers to specifically track pesticides would decrease farmer participation in regenerative agriculture practices by making it even more complex and costly,” the statement said.

(Updated with comment in paragraph five and the vote percentages in paragraphs two and 13)

To contact the reporter on this story: Clara Hudson in Washington at chudson@bloombergindustry.com

<https://x.com/cleantechfacts/status/1838580710178758913>



Dave Anderson

@cleantechfacts

The @OCC4Consumers calls on @PUCOhio to impose a \$53.2 million fine on FirstEnergy for violating Ohio's corporate separation laws designed to protect captive customers from being forced to cross-subsidize affiliates of regulated monopoly utilities dis.puc.state.oh.us/DocumentRecord...

14 **Q5. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS**
15 **PROCEEDING?**
16
17 **A5.** To explain how FirstEnergy Ohio Utilities compromised the interests of Ohio
18 consumers by violating the PUCO's corporate separation rules.¹ For the violations
19 of having an insufficient corporate separation plan as found by the PUCO auditor
20 and described by OCC during the period of January 1, 2016 through November 1,
21 2021, OCC recommends that the PUCO impose a forfeiture on FirstEnergy of
22 \$53,225,000 (at \$25,000 per day).²

7:06 AM · Sep 24, 2024 · 6 Views





Dave Anderson @cleantechfacts · 1m

...

The OCC says PUCO improperly narrowed the scope of a corporate separation audit of FirstEnergy while under the leadership of Sam Randazzo, who was later indicted on charges involving millions of dollars in bribes paid by FirstEnergy + committed suicide dis.puc.state.oh.us/DocumentRecord...

GIVEN THE ALLEGATIONS REGARDING MR. RANDAZZO'S CONNECTION TO THE HOUSE BILL 6 SCANDAL, SHOULD THE PUCO'S ACTIONS IN THE CORPORATE SEPARATION INVESTIGATION BE CLOSELY SCRUTINIZED?

Yes. The PUCO took action at the onset of this investigation when Mr. Randazzo was PUCO Chair (but now appears questionable). The PUCO unnecessarily narrowed the scope of its investigation into FirstEnergy's corporate separation activities.

PLEASE EXPLAIN THE ACTION TO WHICH YOU REFER.

It involved a November 17, 2020 email from Dennis McCarter, Chair of the PUCO Division conducting the audit, to one of the potential bidders for the corporate separation audit. I have attached the email as Attachment (PD-4). The email was obtained through a public records request that OCC served on the PUCO on December 26, 2020. The request concerning this email was provided to OCC on April 5, 2021.

*Direct Testimony of Joseph P. Buckley
In Behalf of the Office of the Ohio Consumers' Counsel
PUCO Case No. 17-974-EL-UNC*

ial bidder asked whether the audit would involve examining FirstEnergy's political and charitable spending on House Bill 6 tests to determine whether FirstEnergy used revenues collected to fund its House Bill 6 activities. Ms. McCarter replied that it would be outside the scope of this audit.

action was at odds with the PUCO's stated scope of the audit in the 2, 2020 Entry.



Q24. GIVEN THE ALLEGATIONS REGARDING MR. RANDAZZO'S CONNECTION TO THE HOUSE BILL 6 SCANDAL, SHOULD THE PUCO'S ACTIONS IN THE CORPORATE SEPARATION INVESTIGATION BE CLOSELY SCRUTINIZED?

A24. Yes. The PUCO took actions at the outset of this investigation when Mr. Randazzo was PUCO Chair that now appear questionable. The PUCO unreasonably narrowed the scope of its investigation into FirstEnergy's corporate separation activities.

Q25. PLEASE EXPLAIN THE ACTION TO WHICH YOU REFER.

A25. It involved a November 13, 2020 email from Doris McCarter, Chief of the PUCO Division conducting the audit, to one of the potential bidders for the corporate separation audit. I have attached the email as Attachment JPB-4. The email was obtained through a public records request that OCC served on the PUCO on December 28, 2020. The request containing the emails was provided to OCC on April 5, 2021.

*Direct Testimony of Joseph P. Buckley
On Behalf of the Office of the Ohio Consumers' Counsel
PUCO Case No. 17-974-EL-UNC*

1 The potential bidder asked whether the audit would involve examining the source
2 of funds for FirstEnergy's political and charitable spending on House Bill 6 or
3 conducting tests to determine whether FirstEnergy used revenues collected from
4 consumers to fund its House Bill 6 activities. Ms. McCarter replied that such
5 issues would be outside the scope of this audit.

6
7 This instruction was at odds with the PUCO's stated scope of the audit in its
8 November 2, 2020 Entry.

9

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Dave Anderson

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...

The same Householder attorney has been involved in efforts to derail a solar farm project outside Columbus energyandpolicy.org/fossil-fuel-fu...



Laura Bischoff @lbischoff · 1h

While ex-Ohio speaker Householder is in prison, attorney pays himself out of campaign funds dispatch.com/story/news/pol... via @DispatchAlerts

6:11 AM · Sep 24, 2024 · **251** Views



UniCredit Did a Commerzbank Trade

Published: Mon Sep 23 14:41:21 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

UniCredit

Here are two equity derivatives trades that you might do if you wanted to be a big shareholder of a public company.

First, you might want to buy shares *on swap*. You might decide one day that you'd like to own 11.5% of some public company. But you can't just go out and buy 11.5% of the company, for some regulatory reason. In the US, for instance, you might need to get antitrust approvals, or you might want to avoid filing a Schedule 13D disclosing your position. Or in Europe, there are European Central Bank regulatory restrictions on owning more than 10% of a bank, so if you want to buy 11.5% of a European bank you need to get ECB approval first. But if you go and get the approvals, that will tip off the company and the market, and then the stock will go up ("ooh there's a big buyer") and/or the company will scramble to fight you off ("ooh there's a big hostile buyer").

So what you want to do is to buy the stock without buying the stock: to get economic exposure to the stock without actually owning it. So you go to a bank (or several banks) and ask them to sell you the stock on swap. You enter into a total return swap with the bank, in which the bank effectively gives you economic ownership of the stock. Say the stock is at \$100 now and you want to own a million shares. You do a one-year million-share total return swap in which the bank agrees to pay you \$1 per share for every dollar the stock goes up, and you agree to pay the bank \$1 per share for every dollar the stock goes down. If the stock ends up at \$117, the bank pays you \$17 million; if the stock ends at \$88, you pay the bank \$12 million.

The bank hedges this derivative in a fairly straightforward way: It buys a million shares of the stock.¹ That way, if the stock goes up to \$117, it has a \$17 million profit on the stock, which it uses to pay you the \$17 million it owes you on the swap. If the stock goes down to \$88, it has a \$12 million loss on the stock, but it gets back \$12 million from you on the swap. The stock and swap hedge each other.

And then you file for whatever approvals you need, and get them, and then buy the stock for real. If the stock is at \$117 at the time, you pay \$117 million for your million shares, and you get back \$17

million from your swap, and you end up paying exactly \$100 million for the stock. By doing the swap, you lock in the \$100 price today, even if you have to wait months to actually buy the stock.

And in fact you'd probably do something even simpler: When you get your approvals, instead of going out and buying \$117 million of stock for yourself and getting \$17 million back from the bank, what you'd probably do is "physically settle" the swap: You pay the bank \$100 million, and the bank tears up the swap gives you the 1 million shares that it bought for \$100 million and held as a hedge. (I am ignoring the financing cost and fees that the bank charges you for doing this.)

Okay, that's the first trade, buying a stake on swap. It's pretty common: There are various people who want a big economic exposure to a public company but can't buy a big chunk of stock immediately, and this is a normal way to solve that problem.

The second trade is: If you *already* own shares of a public company, you might want to *hedge*. So for instance you might own 1 million shares of some public company, but you don't want to lose money if the stock goes down. The stock is at \$100 per share now, and you want to floor your downside. You go to a bank and ask it for help, and it says "well are you willing to give up some upside?" "Sure," you say. "Okay," says the bank, "I can make you a derivative. I'll give you a one-year *collar*, guaranteeing that you won't get less than \$90 or more than \$110 for your stock. ²" The bank sells you a put option: If the stock is below \$90 in a year, it will buy the stock from you at \$90 (or, equivalently, you can keep the stock and the bank will pay you cash for the difference between the final price and \$90). In return, instead of paying cash, ³ you sell the bank a call option: If the stock ends up above \$110, you will sell the bank the stock at \$110 (or, equivalently, keep the stock and pay the bank cash for the difference between the final price and \$110). The bank gets upside in exchange for protecting you from downside. If the stock ends up at \$94, or \$103, you keep the stock and no money changes hands.

When you enter into this trade *today*, you cap your upside (at \$110) and floor your downside (at \$90), so you have less economic exposure to the stock. But you still *own* the stock; you still have the million shares today. In a year, when the collar expires, you might sell the stake to settle the collar, but you might not. Probably you'll have the option to "cash settle": Instead of delivering the stock, you can pay cash to terminate the collar and keep the stock. So if the stock ends up at \$140 but you want to keep holding it, you can just pay your bank \$30 million (to settle the call option) and keep the stock.

This is a pretty classic way for big stake holders to hedge, and you do it for reasons that are sort of the opposite to why you'd do the first trade (buying a stake on swap). You buy a stake on swap if you want economic ownership without *actual* ownership: You want to have exposure to the stock price, but actually owning the shares triggers some sort of regulatory or other problem, so you buy economic ownership on swap. You do a collar if you want actual ownership without (as much) economic ownership: You have some reason to own the stock (you want to keep the votes to control the company, you are a big shareholder and don't want to freak out the market by selling, etc.), but

you want to reduce your economic exposure, so you keep the stock and take risk off with the collar.⁴

I should say that my numbers — the stock is at \$100, you buy a put at \$90 and sell a call at \$110 — are fake and designed for ease of use. The *width* of that collar — the collar covers a 10% stock move in either direction — is pretty normal, but there is no magic to it. You could imagine a wider or tighter collar. In particular you could imagine a \$100/\$100 collar: If the stock goes below \$100, the bank buys the stock from you at \$100 (or pays you the difference), and if the stock goes above \$100, the bank *also* buys it from you at \$100 (or you pay it the difference). No matter what, you get \$100 per share; you have completely gotten rid of your stock price risk. Effectively, you own one million shares, and you have *sold short* one million shares, so net you have no economic exposure at all.

That's just a total return swap⁵: It's the same as our first trade, except you're on the other side of it. Instead of buying the stock on swap, here you own the stock in real life and *sell* it on swap.

This is much less common than doing a collar, for various reasons.⁶ I mention it only as a clarifying limit case of the collar: Hedging your stock price risk with a collar is *like* selling all of your stock on swap, but less so. Selling your stock on swap is economically equivalent to selling 100% of your stock. Doing a normal collar is economically roughly like selling, you know, 75% or 80% of your stock.⁷

What I mean by that, in particular, is: If you sold all your stock on swap, the bank would go out and hedge by selling the million underlying shares short. And then if the stock went up, the bank would make money on the swap and lose money on its short, and vice versa. Whereas if you do a collar with the bank, it will go out and hedge by selling, like, 800,000 shares short. And then if the stock goes up, the bank will make money on the collar (it is more likely to profitably buy the stock at \$110 and less likely to lose money buying it at \$90) and lose money on its short, and vice versa.⁸ The rough result of the collar is “the bank probably ends up owning these shares, but maybe not,” so the bank hedges the collar by selling many, but not all, of the underlying shares.

Here is the synthesis of those trades:

Consistent with its statement on 11 September 2024, UniCredit submitted the required regulatory filing for acquiring a stake in Commerzbank in excess of 10% up to 29.9%.

Meanwhile, UniCredit has today entered into financial instruments relating to ca. 11.5% Commerzbank shares. Physical settlement under the new financial instruments may only occur after the required approvals have been obtained. Together with the position of ca. 9% communicated previously, UniCredit's overall position now totals ca. 21%.

The majority of UniCredit's economic exposure has been hedged to provide it with full flexibility and optionality to either retain its shareholding, sell its participation with a floored

downside, or increase the stake further. This will depend on the outcome of engagement with Commerzbank, its management and supervisory boards as well as its wider stakeholders in Germany.

UniCredit SpA has been taking a run at buying Commerzbank AG. It is now in a weird position:

- It wants to buy more stock.
- It has to get ECB regulatory approvals first, so it can't.
- It can buy more stock on swap, sure.
- But that is complicated too: If it buys 11.5% of the stock on swap, that requires its banks (its counterparties on the swaps seem to include Barclays Plc and Bank of America) to buy all that stock as a hedge, which might be costly and time-consuming. That 11.5% of Commerzbank is something like 136 million shares; Commerzbank has traded an average of under 7 million shares per day this year.⁹ It could take UniCredit's banks weeks to buy all that stock, and they'd push up the price. And they'd be unlikely to agree to a swap on 11.5% of the stock at a fixed price today, if they still have to go out and hedge it.

So my best guess is that its trade today is, roughly:

1. UniCredit buys 11.5% of the stock on swap, today, from its banks.
2. It *sells most of the stock back to them*, today, presumably in the form of a collar¹⁰: "The majority of UniCredit's economic exposure has been hedged," so that (1) UniCredit doesn't have that much economic exposure to Commerzbank's stock price and (2) its banks don't have to go out and buy a bunch of stock to hedge their swaps.¹¹

UniCredit's derivatives counterparties have to buy Commerzbank stock to help UniCredit accumulate its position (on swap), and they have to sell Commerzbank stock to help UniCredit hedge its position (via collar), and the net result is that they don't have to do much trading. So UniCredit can say "we signed swaps today to get 11.5% of Commerzbank, and it's all hedged," and the whole transaction happens at once.

Because it's not much of a transaction! You buy stock on swap because you want economic exposure to a stock without owning it. You hedge a stock with a collar because you want to own the stock without much economic exposure. When you combine those transactions you get *not owning the stock and not having much economic exposure to it*. (In particular, if Commerzbank's stock doubled, would UniCredit have to pay more than today's price to acquire that 11.5% stake? It would if it has collared the stake.)

Why would you do that? What is the point of owning the stock on swap and hedging it? Well. This is the most efficient way to *accurately tell everyone* that you have bought 11.5% of the stock. Actually

buying the stock would take time: You'd need to wait for ECB approval, and then go out in the market and buy stock. Buying the stock on swap, unhedged, would take time: Your banks might need weeks to hedge all that exposure. Doing this lets you announce a 11.5% stake whenever you feel like it, which is nice if you are, for instance, trying to build public pressure to acquire the company. Bloomberg reports:

UniCredit SpA Chief Executive Officer Andrea Orcel moved to more than double the lender's stake in Commerzbank AG, in a dramatic development that's likely to escalate tensions with the German government. ...

The step effectively makes UniCredit the largest shareholder ahead of the German government and puts it on course for a takeover.

The move is almost certain to exacerbate tensions between Orcel, one of Europe's most prolific dealmakers who surprised markets this month by saying he's considering a full takeover of Commerzbank, and the German government, which has indicated it opposes a deal. Late Friday, Berlin announced that it will pause a planned disposal of its stake in Commerzbank, with some officials apparently blindsided by Orcel's approach. ...

The additional 11.5% stake UniCredit disclosed on Monday is linked to derivatives, which means that the Italian bank has the right to take ownership of the shares in the future. UniCredit, which currently doesn't have regulatory clearance to raise its stake beyond 10%, has submitted a request to increase its stake to as much as 29.9%.

It's a strategy Orcel also used to buy around 4.5% in Commerzbank ahead of the government share sale this month. UniCredit purchased derivatives known as total return swaps for an 1.7% stake, a filing shows. That helped the Italian lender stay below 3% in physical holdings and avoid triggering a shareholder notification that would have tipped off Berlin and the competition to Orcel's intentions.

Announcing a big stake all at once gives you the element of surprise, which seems to be helpful in Orcel's game. Actually buying the stake can wait.

Arbitrage

Apparently the way Citi Bike works is:

1. Lyft Inc. runs Citi Bike, the New York bike-share program.
2. If you use Citi Bike, it is inconvenient for you to encounter an empty bike station (no bikes for you) or a full one (nowhere to return a bike).

3. Therefore Lyft incentivizes users (called “Bike Angels”) to move bikes from full stations to empty ones. It pays them in “points,” which are apparently worth \$0.20 each, and you can earn up to 24 points for moving a bike from a completely full station to a completely empty one. (You can also earn points for moving a bike from a somewhat full station to a somewhat empty one, but fewer.)
4. There is an arbitrage.
5. Assume there are two stations, two blocks away from each other, each with 40 slots for bikes, each half full (20 bikes). You and 19 friends get on the 20 bikes at Station 1 and move them to Station 2, where you dock them. Now Station 2 is totally full and Station 1 is totally empty. You wait 15 minutes, then take the 20 bikes out and bring them back to dock at Station 1, earning \$4.80 per bike for moving them from a full station to an empty one. You do this every 15 minutes (when the algorithm resets), earning up to, uh, I calculate \$19.20 per hour for each of you? “One legendary Bike Angel, known to other riders only as Tommy, was rumored to have earned \$60,000 last year,” reports the New York Times, which presumably means *either* that he did this trade over and over again for 60 hours a week *or* that I am slightly misunderstanding the mechanics or math here. ¹²
6. I ... okay?

That Times article is very entertaining, in that (1) this really is a rigorous and amusing gamification of Lyft’s Bike Angel algorithm and (2) it makes the ordinary customer experience *worse*, since a Bike Angel doing this arbitrage is having the opposite of the intended effect. (Instead of redistributing bikes around the system, he’s intentionally creating shortages and surpluses in order to maximize rewards for fixing them.) And people give very good quotes:

“How are we cheating?” said one Angel in a baggy gray T-shirt, black athletic shorts and sneakers, who declined to give his name. “If Lyft wants something else, they can change the algorithm.”

And:

“People run scams across the city every day,” someone wrote under the username Nomotho. “There’s not really a large societal cost to this behavior.”

But also ... just ... it’s not a very *good* arbitrage, is it? We talked a couple of weeks ago about a Spotify arbitrage, which is basically that if you pay \$12 a month for Spotify and listen to your own songs 24 hours a day, seven days a week, Spotify will pay you on the order of \$100 per month as your cut of its streaming revenue. That is a good percentage return on investment, but it is not a very large number. I argued that there is another crucial step in making it a good trade: You need to *scale it up*. With Spotify listening, that is doable, and someone did it. (And was then arrested so, you know, not legal advice.) The way he did it was he set up like 10,000 bot accounts, all streaming his music

24/7 on cloud computers, so that he could turn this gameable feature of Spotify's algorithm into something like \$10 million of profits.

And, again, he was arrested, so I suppose that's bad, but other than its arguable illegality it's a nice trade. He put a lot of work into it — it's not just like "set up the bots and they generate profits automatically forever" — but the work was scalable and the money was good.

But with the bikes you have to ride the bikes? Back and forth? Yourself? Someone in the article calls these Bike Angel arbitrageurs "real life bots," which is very apt, but does sort of point to the essential problem here, which is that you can program lots of bots to run in parallel but you can only pedal one bike at a time. If you optimize it perfectly and work at it a lot, you can apparently make \$60,000 a year and get a lot of cardio,¹³ but that seems like the cap. This is not the arbitrage for me, is I guess what I am saying.

Also, when we talked about the Spotify thing, I wrote:

Basically much of modern economics, and life, has the following characteristics:

Everything is intermediated through some depersonalized automated electronic exchange.

The automated electronic exchange has a *mechanism* — how it actually works, what the exchange's software allows you to do — and also *rules*, the terms of service regulating how you can use the mechanism, which are fuzzier than the mechanism and written in small print, things like "don't do fraud" or "you have to be a human" or whatever.

The mechanism is much more legible and salient than the rules, and in a depersonalized electronic world people treat the mechanism as the rules: They don't believe that the rules exist, because the rules seem to contradict *how the service works*. The basic description of Spotify's mechanics suggests Smith's alleged arbitrage; if he didn't do it surely someone else would.

And ... right? Like even real life is like this now? "If Lyft wants something else, they can change the algorithm," says a guy, as he pointlessly rides bikes back and forth to earn points from Lyft's algorithm. "Code is law," he pants as he rides away. Okay!

Biblewashing

In the US, at least, there is no official definition of ESG (environmental, social and governance) investing. If you advertise that you are an ESG fund and put all your money in coal stocks, the US Securities and Exchange Commission can't stop you. Who is the SEC to say what is good for the

environment, or for society, or how to weigh trade-offs between the environment and society? “ESG” is a matter for you and your investors.

Still the SEC, like everyone else, worries about “greenwashing,” where a firm says it cares about ESG factors but really doesn’t. And the SEC has fined investment firms for greenwashing. But it can’t make substantive objections; it can’t say “your supposedly ESG investment process produces results that are bad for the environment.” It can just object to process. If you say to your investors “we carefully consider five ESG factors and write a memo about them before buying any stock,” and in fact sometimes you *didn’t* write the memo, the SEC will fine you. If you always wrote the memos, but they all say “actually coal is good for the environment,” there is not much the SEC can do. (Not legal advice!)

Similarly: If you advertise that you invest using biblical principles, the SEC just *obviously* cannot come in and say “actually you’ve got the Bible all wrong.” But if you don’t always apply the biblical processes that you say you apply, sure:

The Securities and Exchange Commission today charged Idaho-based investment adviser Inspire Investing LLC with making misleading statements and for compliance failures related to the execution of its “biblically responsible investing” strategy.

According to the SEC’s order, Inspire Investing represented that it used a data-driven methodology to evaluate companies and that it would not invest in companies that had “any degree of participation” in certain enumerated business practices that Inspire determined did not align with biblical values. However, the SEC’s order finds, from at least 2019 to March 2024, Inspire Investing in fact relied on a manual research process and did not typically perform research on individual companies to evaluate them for eligibility under its investing criteria. According to the SEC’s order, Inspire Investing also lacked written policies and procedures setting forth a process for evaluating companies’ activities as part of its investment process, which at times resulted in inconsistent application of its investment criteria. As a result, Inspire Investing invested in companies engaged in activities that did not align with Inspire Investing’s own stated criteria and in which the advisory firm represented that it would not invest.

They settled for \$300,000. Basically they advertised a rigorous process:

Inspire elaborated on its methodology and touted its reliability in a white paper published on its website. According to the white paper, by relying on data science and analysis of faith-based screening data, the Inspire Impact Score “reflects a rules-based, scientifically rigorous methodology of faith-based ESG analysis which creates a level of consistency and reliability of results necessary for making well-informed, quantitatively sound, biblically

responsible investment decisions.”

But mostly they just checked donor lists of abortion rights groups?

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.

So the SEC checked donor lists too and caught them in a contradiction:

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. At the same time, multiple companies held within the Inspire ETF portfolios donated to organizations or sponsored events that were the same or similar.

That is about all the biblical regulation that the SEC can do.

Cell phones

We talk a lot around here about the US Securities and Exchange Commission’s crackdown on financial industry employees who text about work on their personal phones, and I have become sort of a clearinghouse for the absurdities of this crackdown. Last week I mentioned a woman who allegedly texted her building manager about water pouring through the ceiling and got in trouble for texting about work. Because *any* use of personal phones to discuss *anything* business-related is, in the SEC’s view, a problem, no matter how innocent the actual message is.

One thing that this suggests — not legal or compliance advice! — is that you shouldn’t even give your personal phone number to a client, because what if they text you? That’s off-channel communications, and thus bad.

It gets worse. A reader who works in compliance in Asia at a global financial firm writes: “The irony is that because of common standards, we and other global banks tried lobbying numerous local regulators to stop messaging our staff on WhatsApp, WeChat etc. One guess as to their response!”

Things happen

Intel Gets Multibillion-Dollar Apollo Offer as Qualcomm Circles. How Intel Fell From Global Chip Champion to Takeover Target. BGC’s Howard Lutnick takes on CME with interest rate futures debut. BofA returns to margin loans after seven years. Chip Giants TSMC and Samsung Discuss Building

Middle Eastern Megafactories. World's biggest banks pledge support for nuclear power. Johnson & Johnson Files Third Bankruptcy Case Seeking to End Talc Lawsuits. Goldman's Old Headquarters Turned Into \$4,000-a-Month Apartments. Hedge fund mogul who helped topple Marissa Mayer sued by own mom for \$13M: 'World's worst son.' Zoo admits that their pandas are 'painted dogs' after backlash from visitors. Cards Against Humanity Sues Elon Musk's SpaceX for Trespassing.

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1. People doing this to get around regulatory restrictions might use several banks, each of which can stay below the restriction threshold. Also to be clear the bank *could* hedge the swap in some other way (maybe it has another client who wants to be short on swap?), though the default assumption is that it just goes and buys stock.
2. Numbers are made up for simplicity. Just plugging default assumptions into Bloomberg (CBK GR Equity OV), it looks like the one-year costless collar is actually around 88% by 107.5%, which seems unpleasant.
3. Again my collar is symmetrical (the put is 10% below spot, the call 10% above spot) for ease of use, but that's not realistic here. You could have an asymmetric costless collar, or pay some cash for a symmetric one.
4. It is also often combined with **borrowing**: Since the stock price is floored at 90%, the bank will lend you money against that 90% pretty cheaply. This is called a "funded collar," or sometimes a "prepaid variable share forward."
5. Or a forward sale, but those are roughly equivalent.
6. For one thing, you probably like the stock and want some upside. Also it looks bad (as a sign of your confidence in your company, etc.) to do a complete forward sale, while a collar has some deniability. Also wider collars sometimes get better tax treatment than just pre-selling the stock today.
7. That is, when I just do it in CBK GR Equity OV, I get a delta of about 77%.

8. The bank will dynamically hedge, selling more shares or buying some back as the price moves and time goes on.
9. From Bloomberg's HP page, average for calendar 2024. Recent numbers are higher: It traded over 30 million shares on Sept. 11, when UniCredit started its approach, and more than 19 million today.
10. I am guessing a bit here, and UniCredit did not actually say it has collared the stock; it says "hedged" and "floored downside," but conceivably it just bought puts without selling calls. (Or, rather: Conceivably it just *bought call options rather than total return swaps*.) That would be expensive though.
11. In fact it's a little unclear what is happening here, and remember that UniCredit already owns a lot of actual Commerzbank stock (including the stock it bought from the German government in an offering this month). You could imagine a trade in which (1) Unicredit buys 11.5% of the stock on swap from its banks today and (2) it simultaneously does a collar on *more than* 11.5% of the stock (today's 11.5% *plus* some of its existing holdings), with the collar sized so that the banks' hedge matches that 11.5%. The banks need to buy 11.5% of the stock to hedge their swap, and they need to sell 11.5% of the stock to hedge the collar, so on net they don't have to do anything.
12. Or both, but please don't email me to be like "actually the way the Citi Bike algorithm works is ...," because I don't really care that much. Unless you're like "here's how to make \$6 million a year doing this trade" in which case, yes, email me.
13. Many readers sent me the Times story, including one who pointed out that the Citi Bike arbitrageurs are probably in better shape than the Spotify arbitrageurs.

CIBC, Invesco, Stifel Pay Millions to Settle WhatsApp Probes (1)

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Securities Law

Sept. 24, 2024, 8:42 AM PDT

Tom Schoenberg

Bloomberg News



- CIBC and affiliates agree to pay \$42 million to the SEC, CFTC
- Fines are the latest wave to stem from years-long probe

US regulators levied more than \$118 million in penalties against several financial firms for failing to keep employees' electronic communications, the latest fallout from the so-called WhatsApp investigations.

The largest penalty, totaling \$42 million, was paid by Canadian Imperial Bank of Commerce and two of its affiliates, according to statements by the Securities and Exchange Commission and the Commodity Futures Trading Commission. Stifel, Nicolaus & Co. agreed to pay \$35 million to the SEC, as did Invesco Distributors and Invesco Advisers.



Gurbir Grewal

Photographer: Mark Kauzlarich/Bloomberg

The firms admitted the facts and have begun making internal changes, according to both the SEC and CFTC.

“Today’s enforcement actions reflect the range of remedies that parties may face for violating the recordkeeping requirements of the federal securities laws,” **Gurbir Grewal**, director of the SEC’s enforcement division, said in a

Tuesday. “Widespread and longstanding failures, including where those failures potentially hinder the Commission’s investor protection function by compromising a firm’s response to SEC subpoenas, may result in robust civil penalties.”

Financial firms are required to monitor and save communications involving their business to head off improper conduct. Tuesday’s penalties add to the more than \$2.5 billion that big banks previously agreed to pay the SEC and the CFTC to settle similar investigations into use of text messages on personal phones and WhatsApp.

“We respect the decisions of the SEC and CFTC on these matters,” a spokesperson for the bank said in a statement. “Throughout this process, CIBC offered its full cooperation to both regulators and took immediate steps to implement remedies internally.”

An Invesco spokesperson saith the firm “takes compliance matters incredibly seriously and we are pleased to have resolved this matter,” adding that Invesco has taken “significant steps to further strengthen the firm’s compliance processes related to record keeping electronic communications.”

Lawyers for Stifel didn’t immediately respond to messages seeking comment.

Read More:

The SEC’s full list of the fines and firms included:

- \$2 million from Glazer Capital
- \$1.5 million from Intesa Sanpaolo IMI Securities Corp.
- \$1.25 million from Canaccord Genuity
- \$750,000 from Regions Securities
- \$400,000 from Alpaca Securities
- \$325,000 from Focused Wealth Management

Qatalyst Partners was included in Tuesday’s statement, but the SEC said the firm self-reported the conduct and therefore wasn’t ordered to pay a monetary penalty. On Monday, the SEC found Atom Investors violated recordkeeping requirements regarding off-channel communications, but didn’t issue a fine, citing self-reporting, remediation and cooperation with another investigation.

A lawyer for Alpaca declined to comment. Lawyers for the other firms didn’t immediately respond to messages seeking comment.

(Adds names of more firms that settled with regulators.)

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Securities Law News

Sept. 23, 2024, 10:46 AM PDT

EU Raids Financial Firms in Derivatives Antitrust Probe (1)

By Samuel Stolton

Bloomberg Law News 2024-09-24T11:10:47708162164-04:00

EU Raids Financial Firms in Derivatives Antitrust Probe (1)

By Samuel Stolton2024-09-23T13:46:32700-04:00

European Union antitrust watchdogs raided the premises of unidentified financial services firms suspected of involvement in a cartel related to “financial derivatives.”

The Brussels-based European Commission gave no further details in a statement on Monday beyond confirming that the raids took place across two EU states and that the targeted firms may “have violated EU antitrust rules that prohibit restrictive business practices.”

The inspections are the latest round of a decade of EU probes targeting the finance industry and key benchmarks — including how traders swapped information in chat-rooms to distort pricing components for euro interest rate derivatives as well as to manipulate euro-dominated bonds and government-guaranteed securities. The investigations followed EU approval for government support to keep many European lenders alive during the financial crisis in the wake of the 2008 collapse of Lehman Brothers Holdings Inc.

Read More: JPMorgan, Credit Agricole Lose EU Fight Over Euribor Rigging

EU antitrust commissioner **Margrethe Vestager**, who is about to leave office after two terms, has made collusion between banks one of her main targets alongside US tech firms accused of abusing their dominance. She has said it was “unacceptable” that in the middle of the financial crisis, when many financial institutions had to be rescued by public funding, traders at numerous investment banks misbehaved at the expense of taxpayers.

While so-called dawn raids can be a precursor for fines of as much as 10% of companies’ global sales, regulators seldom levy penalties of that size. The EU’s antitrust arm also pointed out that while the companies are under suspicion, they’re not yet guilty of any wrongdoing. There is no legal deadline for the conclusion of the commission’s investigation.

SEC Drops Auditor Misconduct Cases After In-House Judges Ruling

By Amanda Iacone

Documents

 [SEC v. Jarkesy](#)

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- Supreme Court ruling chills SEC tool to police accountants
 - High profile cases tossed involve restatements, fraud

Bloomberg Law News 2024-09-24T11:11:53860130138-04:00

SEC Drops Auditor Misconduct Cases After In-House Judges Ruling

By Amanda Iacone 2024-09-24T04:45:00000-04:00

- Supreme Court ruling chills SEC tool to police accountants
- High profile cases tossed involve restatements, fraud

The SEC has dropped misconduct charges against at least eight auditors in the wake of a recent Supreme Court ruling that limited the regulator's use of its in-house courts.

The accountants had faced Securities and Exchange Commission charges of shoddy audit work that failed to catch in some cases misstatements, even fraud. They faced suspensions or permanent bars from working as accountants before the regulator, an onerous penalty that can end careers.

Among the cases the regulator tossed out in August was an action against a Marcum LLP audit partner who is suing the SEC challenging its administrative enforcement process. The SEC also dismissed a case against a former audit partner at PwC, also known as PricewaterhouseCoopers. The commission said the former partner had failed to document and report a \$109 million error in toymaker Mattel's financial statements.

The SEC declined to comment on the reason for the dismissals, but securities lawyers say the regulator is taking stock of how the high court's June *SEC v. Jarkesy* decision could alter which cases to pursue before its in-house judges. In the ruling, the Supreme Court found that defendants accused of securities fraud, like former hedge fund manager George Jarkesy, have the right to a jury trial when the SEC seeks financial penalties.

Bars and suspensions could be considered punitive under the *Jarkesy* decision, said Richard Hong, a former SEC trial attorney and partner with Morrison Cohen LLP.

"The SEC might be concerned that *Jarkesy* can be read broadly to cover those things," Hong said.

The ruling's impact was expected to reach beyond the US securities regulator to administrative courts at agencies throughout the federal government. But even without any additional legal challenges, the decision has quietly altered the SEC enforcement landscape.

The commission's sweep of the auditor misconduct charges could quash a powerful tool the regulator has long relied on to police accountants and lawyers accused of improper conduct including violations of SEC rules or professional standards.

Fighting the SEC

The stakes are high for those facing disciplinary actions that range from suspensions lasting several years to permanent bars from appearing before the commission.

Ira Viener plans to steer clear of auditing and stick to providing his clients with tax and financial consulting services after his brush with the SEC that "upset my entire life," he said. The regulator accused the New Jersey accountant with not being independent of his client for preparing the same financial statements he was hired to audit, among other violations.

"I pride myself on being very honest and doing business on a handshake," Viener said. "Keeping my reputation is more important than anything else."

Attorneys for Edward Hackert, the Marcum partner, declined to comment on his dismissed disciplinary case but stand by the constitutional arguments laid out in his suit against the commission. Hackert in February sought to block the SEC's administrative proceeding against him, saying that its in-house process violates his right to a jury trial.

Other auditors whose cases were dismissed did not respond to requests for comment.

The tossed cases included one in which accountants issued clean audit opinions despite signs of revenue fraud at biotech company MiMedx Group Inc. and another that involved undisclosed related party transactions at grocer iFresh Inc.

Hackert's suit compounds the litigation risks posed by Supreme Court ruling in Jarkesy and staff may have decided to drop the cases rather than risk losing again in court, said Christina Zaroulis Milnor, a partner with Mincey Bell Milnor and a former SEC attorney specializing in administrative cases.

History of In-House Scrutiny

The SEC has increasingly filed securities law violations in federal district courts amid questions over the constitutionality of its administrative court. But unlike most other enforcement cases, the regulator must use its in-house review to seek professional suspensions and bars.

The commission for decades had the ability to seek suspensions and bars, in addition to censures, for gatekeepers like accountants under a rule called 102(e). Congress added the measure to US securities laws in 2002 as part of a corporate governance and accounting reform law known as the Sarbanes Oxley Act.

Jarkesy successfully argued that he was due his day in court, and so accountants also could prevail under a similar argument that a jury trial is required, Milnor said.

SEC "staff is probably really thinking about the consequences of Jarkesy and trying to be strategic," Milnor said. "And that might mean that they're going to go pencils down with a lot of administrative activity."

The commission similarly scratched active cases from its enforcement docket last year after discovering that its enforcement staff had access to records meant for its in-house adjudication employees, leading to 42 dropped cases.

Still this doesn't mean the end of the SEC's administrative options, Hong said. "It is severely impaired, but I don't think it's dead."

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Law firm must face Leon Black lawsuit over rape accuser's case

 [reuters.com/legal/legalindustry/law-firm-must-face-leon-black-lawsuit-over-rape-accusers-case-2024-09-23](https://www.reuters.com/legal/legalindustry/law-firm-must-face-leon-black-lawsuit-over-rape-accusers-case-2024-09-23)

David Thomas

By David Thomas

September 23, 2024 11:18 AM PDT Updated 20 hours ago

Leon Black, then Chairman and CEO Apollo Global Management, LLC, takes part in Private Equity: Rebalancing Risk session during the 2014 Milken Institute Global Conference in Beverly Hills, California April 29, 2014. REUTERS/Kevork Djansezian/File Photo Purchase Licensing Rights , opens new tab

Sept 23 (Reuters) - Billionaire investor Leon Black can move ahead with his lawsuit against the Wigdor law firm and its ex-client Guzel Ganieva over their failed case accusing the Apollo Global Management co-founder of defamation and rape, a judge has ruled.

New York County Supreme Court Justice David Cohen on Friday denied , opens new tab Wigdor and Ganieva's requests to dismiss the case, finding that Black's allegations of malicious prosecution were sufficient for his lawsuit to proceed for now. Black has claimed Wigdor knew or should have known that Ganieva's rape allegations were false and her lawsuit was improper.

A lawyer for Black, Susan Estrich, praised Cohen's ruling in a statement and said Wigdor and Ganieva were "committed to destroying Mr. Black's reputation in an effort to extract a monetary settlement from him."

Wigdor partner Jeanne Christensen in an email called the lawsuit "a billionaire's attempt to intimidate victims and lawyers who represent victims." She said the firm would appeal Cohen's ruling.

Ganieva's lawyer Kevin Mintzer declined to comment. Ganieva fired Wigdor as her legal counsel in March 2023.

Black sued New York-based Wigdor in August 2023, claiming the firm's business model is based on threatening "to sue defendants with scandalous allegations that can be avoided only at the cost of a large settlement, of which Wigdor takes a substantial cut." He said Wigdor's lawsuit on behalf of Ganieva cost him multiple business opportunities, including a \$2 billion investment for his new fund.

In refusing to dismiss the case, Cohen ruled in part that Black's claims did not violate a New York statute barring frivolous lawsuits that are designed to silence critics, known as an anti-SLAPP law. Cohen said there was no precedent "establishing that a malicious prosecution claim constitutes a SLAPP claim."

Wigdor represented three women who claimed they had been raped by Black — Ganieva, Virginia resident Cheri Pierson, and an anonymous plaintiff. Black has denied each of the women's claims.

The lawsuit from Ganieva, a Russian model, claimed Black defamed her by falsely claiming she tried to extort him after accusing him of rape. Cohen ruled last year that Ganieva could not pursue her defamation claims against Black after receiving \$9.5 million from him under a nondisclosure agreement that followed their six-year relationship.

Pierson dismissed her own lawsuit against Black in February. She had claimed Black raped her two decades ago at the Manhattan mansion of disgraced financier and sex offender Jeffrey Epstein.

The third lawsuit, from the anonymous plaintiff, is pending in Manhattan federal court.

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Reporting by David Thomas

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Thomson Reuters

David Thomas reports on the business of law, including law firm strategy, hiring, mergers and litigation. He is based out of Chicago. He can be reached at d.thomas@thomsonreuters.com and on Twitter [@DaveThomas5150](#).

US Supreme Court justices, other judges can stay at corporate-owned homes without disclosure

 [reuters.com/world/us/us-supreme-court-justices-other-judges-can-stay-corporate-owned-homes-without-2024-09-24](https://www.reuters.com/world/us/us-supreme-court-justices-other-judges-can-stay-corporate-owned-homes-without-2024-09-24)

Nate Raymond

A woman sits on the steps of the U.S. Supreme Court in Washington, U.S., August 14, 2024. REUTERS/Kaylee Greenlee Beal/File Photo Purchase Licensing Rights , opens new tab

- Critics say move waters down ethics requirements
- Supreme Court Justice Thomas has faced ethics criticism

Sept 24 (Reuters) - U.S. Supreme Court justices and federal judges on lower courts do not have to publicly disclose when they dine or stay at someone's personal residence, even one owned by a business entity, under a revised ethics rule.

The amended policy , opens new tab was issued on Monday by the U.S. Judicial Conference's Committee on Financial Disclosure, which sets rules followed by the nine justices and other federal judges. Critics said the move diluted ethics requirements.

The committee has been reviewing allegations that Justice Clarence Thomas, a member of the court's 6-3 conservative majority, improperly failed to report gifts including luxury travel from wealthy Texas businessman and Republican donor Harlan Crow.

"They might as well call it the Clarence Thomas exemption," said Donald Sherman, chief counsel at the group Citizens for Responsibility and Ethics in Washington (CREW), said of the amended policy.

The U.S. Supreme Court has been embroiled in mounting ethics controversies, with some Democratic lawmakers and court reform advocates pointing to instances of undisclosed trips and gifts involving Thomas and some other justices. The court last year announced its first formal code of conduct governing the ethical behavior of its justices, though the policy lacked any enforcement mechanism.

The judiciary's rule-making body said the disclosure regulations were updated this week to "clarify" the extent to which gifts received at personal residences owned by corporate entities could be deemed "personal hospitality" that judges did not need to list on their disclosure reports.

Gabe Roth, who heads the advocacy group Fix the Court, said the new policy watered down stricter regulations announced last year and "twisted" the meaning of personal hospitality in ways that could result in some of the past stays by Thomas at Crow's properties being deemed exempt from disclosure.

Those stays include ones at Camp Topridge, a private lakeside resort in upstate New York's Adirondack Mountains owned by an entity affiliated with Crow, Topridge Holdings, as first reported by ProPublica.

Thomas last year said that he had been advised he did not have to report that type of "personal hospitality."

Lawyers for Thomas and Crow and representatives for the Supreme Court did not respond to requests for comment.

The disclosure committee, at the urging of Democratic U.S. Senator Sheldon Whitehouse and others, in March 2023 adopted stricter regulations that made it harder for judges to claim a personal hospitality exception.

Those rules stated judges still did not have to disclose gifts that include food, lodging or entertainment extended by an individual for a non-business purpose. But the regulations said the exemption did not apply to stays at commercial properties, such as hotels and resorts, and gifts of hospitality paid for by an entity or third-party other than the person providing it.

Under Monday's rule change, stays at a host's personal residence would not need to be disclosed if an entity, rather than a person, owns the property, as long as the residence was not regularly rented out and was not a commercial property.

Reporting by Nate Raymond in Boston, Editing by Alexia Garamfalvi and Will Dunham



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Auto AI Co.'s \$30M Settlement With Investors Gets Initial Nod

By **Brian Dowling**

Law360 (September 23, 2024, 6:15 PM EDT) -- An automotive software company's \$30 million settlement to end an investor fraud class action won initial approval from a Boston federal judge on Monday.

U.S. District Judge Allison D. Burroughs approved the deal between Burlington, Massachusetts-based Cerence Inc. and the lead plaintiff — the Public Employees' Retirement System of Mississippi — which claimed to have lost \$4.4 million when the company's stock price tanked in late 2021 through early 2022.

The eight-figure sum will be allocated to the unknown number of shareholders who held Cerence's 38 million shares during the class period, and a portion of the settlement will be spent on attorney fees. The settlement's initial approval papers didn't detail how funds would be allocated to class members.

The lawsuit claimed Cerence — which makes artificial intelligence-powered virtual assistants for the automotive market — hid sliding revenues caused by the global semiconductor shortage by pulling forward or "pre-banking" licensing sales for its products. Cerence was spun off from Nuance Communications in 2019.

Cerence's financial troubles first hit the markets in November 2021, when its stock price had topped \$104 a share.

However, the resignations of the company's chief executive in December 2021 and its chief financial officer in February 2022 — accompanied by lower financial guidance — caused Cerence stock to settle at \$43.61 on Feb. 7, 2022, according to the complaint.

Cerence's stock price closed Monday at \$2.51 per share.

The complaint claimed Cerence and former CEO Sanjay Dhawan and former CFO Mark J. Gallenberger — violated the federal Securities Exchange Act to deceive the investing public and inflate the market price for Cerence stock.

The settlement emerged from talks that began this spring, resulting in an agreement in principle in late August, according to the plaintiff.

"Lead plaintiff and lead counsel believe that the proposed settlement is an excellent result for settlement class members in light of the substantial risks of litigation — including significant risks of proving falsity, scienter, and loss causation — and the risk that protracted litigation would reduce the funds available to satisfy a larger settlement or judgment," the lead plaintiff said.

The pension plan said it risked having to face Cerence's defenses that it made no false or misleading statements regarding its contracts and that it never acted with fraudulent intent.

There also was potential that available coverage under Cerence's policy for directors' and officers' liability insurance could "waste away" and continue to be run down during ongoing litigation, the pension plan said.

A Cerence spokeswoman declined to comment when reached Monday.

Representatives for the pension plan were not immediately available for comment Monday.

The Public Employees' Retirement System of Mississippi is represented by Hannah Ross, John Rizio-Hamilton, Alec T. Coquin, Mathews R. de Carvalho and Jonathan D. Uslaner of Bernstein Litowitz Berger & Grossmann LLP, Maya Saxena, Joseph E. White III, Steven B. Singer, Joshua H. Saltzman and Sara DiLeo of Saxena White PA and T. Christopher Donnelly, Peter E. Gelhaar and Peter K. Levitt of Donnelly Conroy & Gelhaar LLP.

The defendants are represented by Deborah S. Birnbach, Justin D. Ward and Brendan Blake of Goodwin Procter LLP.

The case is City of Miami Fire Fighters' And Police Officers' Retirement Trust v. Cerence Inc. et al., case number 1:22-10321, in the U.S. District Court for the District of Massachusetts.

--Editing by Janice Carter Brown.

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Credit Suisse Can't Ditch Investor Fraud Suit, But PwC Can

By **Jon Hill**

Law360 (September 23, 2024, 10:36 PM EDT) -- A New York federal judge has declined to fully dismiss a proposed class action alleging Credit Suisse misled investors about its condition in the run-up to its collapse and takeover by UBS, ruling that a narrow part of the litigation can proceed while much of it — including claims against PwC — must go.

In a Sept. 19 decision on multiple dismissal bids, U.S. District Judge Colleen McMahon cut down the **securities fraud case** to focus on a subset of investor allegations against Credit Suisse Group AG and top executives who ran the Swiss bank, which rival UBS Group AG ended up buying last year in a government-backed rescue.

The surviving portion of claims is tied to public statements that Credit Suisse and three such executives — former Chairman Axel Lehmann, CEO Ulrich Körner and Chief Financial Officer Dixit Joshi — made during the time from October 2022 to March 2023, when the UBS deal was announced.

In those six months, Credit Suisse was allegedly dealing with heavy customer outflows and a then-undisclosed U.S. Securities and Exchange Commission inquiry into potential control deficiencies that, according to the suit, helped render the bank's contemporaneous assurances of strength misleading.

Although the suit also challenged numerous other pre-October 2022 statements, Judge McMahon rejected those as inactionable. But the bank's alleged monthslong silence about the SEC inquiry could cast "various statements about its financial condition in a half-true light," she said.

"I conclude that the plaintiff's bare-bones allegation about the existence of this correspondence gets it past a motion to dismiss," Judge McMahon wrote, referring to the SEC's interactions with Credit Suisse on the inquiry.

Plaintiff throws around the word 'sham' throughout his pleading. But to quote the immortal Inigo Montoya, 'You keep using that word. I do not think it means what you think it means.'



Judge Colleen McMahon

"That the adequacy of a failing company's [internal controls over financial reporting] was being seriously questioned is something that could have significantly altered the 'total mix' of information made available, and could result in a reasonable investor concluding that the company's representations about its overall financial health (e.g., the company's stability) were less than reliable," the judge added.

The litigation was consolidated under lead plaintiff Ali Diabat after several Credit Suisse investors sued last year in the wake of the UBS merger announcement, a deal hastily put together to avoid a broader crisis when prolonged turmoil at Credit Suisse took a turn for the worse.

The operative complaint, filed last fall, named Credit Suisse and certain key executives among its defendants, alleging fraud based on more than 80 statements drawn from press releases, interviews, financial reports and other sources spanning nearly two years from April 2021 to March 2023.

The complaint also named PricewaterhouseCoopers AG, Credit Suisse's independent auditor during this period, as a defendant, alleging it had failed to scrutinize the bank closely enough and given false "blessings" to its financials as a result.

Judge McMahon's more than 300-page dismissal decision narrows the scope of potential liability facing Credit Suisse's now-owner UBS from the case, trimming it — with prejudice — to a more limited period from October 2022 to March 2023 that reflects the surviving challenged statements.

In what she described as a "painstaking analysis," Judge McMahon ruled that the other challenged statements from before October 2022 did not and could not legally support the case's fraud claims, often concluding that they weren't plausibly pled as having been false or deceptive when made.

Those included remarks in which Credit Suisse executives discussed, for example, efforts to improve risk management and get the bank back on track after costly losses tied to the 2021 implosions of investment outfits Greensill Capital and Archegos Capital Management.

"In essence, plaintiff has alleged that because it all ended badly [for the bank], Credit Suisse never intended to make any changes that might have had meaningful effects," the judge wrote. "This is classic 'it didn't turn out well, so obviously it was never intended to turn out well' — fraud by hindsight."

Judge McMahon expressed frustration with the investors' lengthy complaint, calling it "prolix yet woefully undetailed" and suggesting that she could have just dismissed the entire thing as a "puzzle pleading." She also mused that she was beginning to "sound like a broken record" by repeatedly dismissing its allegations as fraud by hindsight.

"Plaintiff throws around the word 'sham' throughout his pleading. But to quote the immortal Inigo

Montoya, 'You keep using that word. I do not think it means what you think it means,'" Judge McMahon wrote, referring to a character from the 1987 fantasy film "The Princess Bride."

Plaintiff "uses 'sham' to indicate that the strategies adopted by the company did not work in the end. That is not what the word means," the judge continued. "And the fact that strategies adopted in good faith ultimately fail is not actionable."

Judge McMahon similarly dismissed PwC from the litigation altogether, ruling that the complaint failed to show fraudulent intent or recklessness on the part of the accounting giant.

"Though Credit Suisse's deeply troubling history is certainly something that should cause an auditor to be cautious, plaintiff once again fails to plead that PwC AG did not have cautionary procedures in place in light of Credit Suisse's unfortunate history," the judge wrote. "He simply assumes that, because the PwC AG failed to catch the controls problems in earlier audits, PwC AG failed in its duty. That is the accounting equivalent of fraud by hindsight."

Representatives for Credit Suisse and PwC did not immediately return requests for comment on Monday. Counsel for the proposed investor class also did not immediately respond.

The proposed investor class is represented by Kim E. Miller, J. Ryan Lopatka, Lewis S. Kahn, Craig Geraci, Melissa H. Harris and Matthew P. Woodard of Kahn Swick & Foti LLC.

The Credit Suisse defendants are represented by Herbert S. Washer, Jason M. Hall, Edward N. Moss, Tammy L. Roy, Nicholas N. Matuschak and Lauren Riddell of Cahill Gordon & Reindel LLP.

PwC is represented by Michael G. Bongiorno, Andrew Rhys Davies and Brad E. Konstandt of WilmerHale.

The case is Diabat v. Credit Suisse Group AG et al., case number 1:23-cv-05874, in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.



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Ford Investor Claims Automaker's Execs Hid Warranty Costs

By **Danielle Ferguson**

Law360 (September 23, 2024, 6:09 PM EDT) -- Directors and executives of Ford Motor Co. have been hit with a shareholder derivative suit alleging they covered up problems with the company's quality assurance procedures and made misleading statements about how much money was in warranty reserves, leading the company to overpay about \$115 million when it bought back its own stock at artificially inflated prices.

Shareholder Paul Gagne, on behalf of the company, alleges in a complaint filed Friday in Michigan federal court that the company's directors and executives hid quality issues that led to late-reported increases in warranty costs.

In addition to nominal defendant Ford, the complaint names Ford's President and CEO James D. Farley Jr., Chief Financial Officer and Vice Chair John Lawler and members of the company's board of directors as defendants.

According to the complaint, Ford's quality assurance procedures were deficient between April 27, 2022, when the company announced its first quarter 2022 financial results, and July 24, 2024, when the company issued a press release announcing its fiscal year results with "higher warranty costs than originally planned."

Because of the inadequate quality assurance procedures, the company had to pay out warranties at a higher rate, increasing warranty costs for the company, according to the complaint. Since the warranty reserves were not up-to-date and were improperly funded, the company reported inaccurate warranty reserve numbers on its financial reports with the U.S. Securities and Exchange Commission, the complaint alleges. Because of this, the company's warranty reserves aren't a predictor of quality issues and the company's profitability was likely damaged, the complaint says.

These misrepresentations caused Ford to repurchase its own stock at artificially inflated prices, according to the complaint. Between November 2022 and June 2024, the company repurchased about 54.7 million shares, costing it more than \$727 million, the complaint says. The company overpaid by about \$115.9 million because the stock was worth less than the price at which it was trading when the markets closed in July, the suit says.

The complaint alleges company leaders conspired to conceal the deficient procedures and higher costs and were "improperly interested in increasing their future compensation" by asking shareholders to vote on a misrepresented stock plan and proxy statement that also asked for their reelection. The shareholders may not have approved the proposed plans had they known of the alleged misconduct, according to the complaint.

"The conduct of the individual defendants complained of herein involves a knowing and culpable violation of their obligations as directors and officers of Ford, the absence of good faith on their part, or a reckless disregard for their duties to the company and its shareholders that the individual defendants were aware or should have been aware posed a risk of serious injury to the company," the complaint says.

Gagne is asking for damages to cover a securities class action against the company that also allegedly stems from the same misrepresentations, internal investigations related to any potential law violations, the purported overpayment for the stock repurchase and any compensation the

leaders received because of shareholders approving the stock plan.

"As a direct and proximate result of the individual defendants' conduct, Ford has also suffered and will continue to suffer a loss of reputation and goodwill, and a 'liar's discount' that will plague the company's stock in the future due to the company's and their misrepresentations and the individual defendants' breaches of fiduciary duties and unjust enrichment," the complaint says.

The complaint includes claims of Exchange Act violations, unjust enrichment and waste of corporate assets.

In **August**, a class of investors sued Ford over similar allegations that the company hid quality issues starting in 2022 and didn't disclose those deficiencies and higher warranty costs to investors. That case seeks to represent those who purchased or acquired Ford securities between Ford announcing its first quarter 2022 financial results and when it announced the higher-than-expected warranty costs in July 2024.

A spokesperson for Ford declined to comment. An attorney for Gagne did not immediately respond to a request for comment Monday.

Gagne is represented by Timothy Brown of The Brown Law Firm PC.

Counsel information for the company or the individual defendants was not immediately available Monday.

The case is Gagne v. Farley Jr. et al., case number 2:24-cv-12486, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Rae Ann Varona. Editing by Drashti Mehta.



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Mallinckrodt Brass Can't Avoid Investor Suit Over 2nd Ch. 11

By **Katryna Perera**

Law360 (September 23, 2024, 9:07 PM EDT) -- A New Jersey federal judge ruled Monday that senior leaders of drugmaker Mallinckrodt cannot escape a lawsuit brought by shareholders alleging the company tricked them into thinking it had recovered from bankruptcy and would make a \$200 million payment to opioid claimants, finding the investors sufficiently pleaded securities law violations.

U.S. District Judge Zahid N. Quraishi issued an **opinion** denying a dismissal motion filed by Mallinckrodt PLC CEO Sigurdur Olafsson, Chief Financial Officer Bryan Reasons and Chair Paul Bisaro. The executives and the director had argued that the stockholders' amended complaint should be tossed because it failed to plead misleading or material statements or scienter, and since the statements that are cited in the case are forward-looking.

Judge Quraishi disagreed with all three arguments from the defendants. First, he said, the amended complaint "clearly and in detail" alleged the officers made false and misleading statements and explained why the statements were misleading.

All the statements the shareholders described as misleading are material, the judge added, since a reasonable investor would want to know the truth about a company's financial projections and standing after it recently emerged from bankruptcy.

"Arguably, if there is a time to be honest to investors, it is right after filing for bankruptcy," the opinion said. "Plaintiffs also allege that there were omitted facts that would have helped plaintiffs anticipate a second bankruptcy proceeding. It is likewise plausible that the important omissions would have 'significantly altered' the information available to plaintiffs."

The amended complaint also plausibly pleaded scienter, the judge concluded.

"All that is required at this stage of the proceedings is that plaintiffs plead particularized facts to support a strong inference of scienter, which the court concludes they have done," Judge Quraishi wrote. "Contrary to defendants' contentions, the allegations in the amended complaint show scienter as to each individual defendant. The statements further set forth reasons why each defendant knew or recklessly disregarded the facts explained."

Lastly, Judge Quraishi rejected the defendants' position that the challenged statements were forward-looking and therefore protected, saying that, read as a whole, the statements appear to be more than opinions, beliefs or future projections.

"Many of the 'optimistic' statements, when read together with the background facts, demonstrate that defendants likely knew contradictory facts and/or acted recklessly in making such statements, especially after emerging from bankruptcy," the opinion said. "To a reasonable investor, the statements ... create an illusion that the company was thriving, when indeed, it was not."

The **stockholders sued Mallinckrodt** in July 2023 after its share price tumbled in the wake of admissions that the pharmaceutical company was weighing a second bankruptcy and wouldn't pay interest on two bonds.

Mallinckrodt, which initially sought bankruptcy protection in 2020, said in a U.S. Securities and Exchange Commission filing on June 5, 2023, that it might do so again to make its \$200 million

payment to an opioid victims' fund, leading to a 40% drop in its stock price. The company, which produces opioids, agreed under its 2020 Chapter 11 bankruptcy plan to make nine payments to a compensation trust, and then spoke optimistically about its financial prospects and ability to make those payments, the investors' suit noted.

However, before it completed its second payment, **lenders asked** the Dublin-based company to consider entering bankruptcy again to meet the payment, according to an SEC filing.

When Mallinckrodt followed up on June 15 last year with a notification to the SEC that it wouldn't pay the interest due that day for two bonds, its stock price dove again, this time by 30%, the shareholders said.

The drugmaker **declared bankruptcy a second time** in August 2023, presenting a prepackaged Chapter 11 plan intended to buck nearly \$1.9 billion in debt in a restructuring.

Mallinckrodt was initially named as a defendant in the current action, but claims against it have been stayed and administratively terminated in light of its latest bankruptcy case.

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

The investors are represented by Brian Calandra and Jeremy A. Lieberman of Pomerantz LLP and David J. Schwartz of DJS Law Group LLP.

Olafsson, Reasons and Bisaro are represented by Allison M. Wuertz, William M. Regan and Jacey L. Gottlieb of Hogan Lovells.

The case is Continental General Insurance Co. et al. v. Olafsson et al., case number 3:23-cv-03662, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Emlyn Cameron. Editing by Covey Son.



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Petco, Shareholders Battle In Chancery Over Controller Clout

By **Jeff Montgomery**

Law360 (September 23, 2024, 8:50 PM EDT) -- Attorneys for Petco Health & Wellness Co. Inc. face an "uphill battle" in branding as "wrongly decided" a landmark Court of Chancery ruling earlier this year that struck down an agreement giving a company's controlling stockholder board-trumping power, Delaware's chancellor cautioned on Monday.

The comment by Chancellor Kathaleen St. J. McCormick came during arguments on dismissal of a stockholder suit seeking a court invalidation of an agreement giving Petco controller Scooby Aggregator LP – made up of two affiliates of the Canada Pension Investment Board — a veto right over the hiring or firing of the company's CEO or other officers.

Attorneys for Petco stockholder Chamandeep Kaur argued that the company's actions conflict with [West Palm Beach Firefighters' Pension Fund v. Moelis & Co.](#) In that case, Vice Chancellor J. Travis Laster ruled in February that a Moelis board decision giving founder Kenneth Moelis effective control of the global investment bank's business was "facially invalid."

Moelis, however, touched off a light-speed amendment to Delaware's General Corporation law, backed by big Delaware-chartered companies and the corporate bar and overwhelmingly approved by Delaware legislators and Delaware's governor in June. The measure authorized Moelis-type board arrangements.

Left hanging in what was described as a litigation "donut hole," meanwhile, were cases like Petco, filed and underway at the time of the Moelis decision.

On Monday, Paul J. Lockwood of Skadden Arps Slate Meagher & Flom LLP, counsel to controller Scooby Aggregator LP and Petco's board, argued in support of a brief that branded Moelis — now under appeal in the Delaware Supreme Court — as "wrongly decided."

"On its face, the restriction has to have some wrongful element to it — if there's some wrongdoing inherent in that contract. Every case prior to Moelis had a 'black hat,' or improper limitations on the board, Lockwood said after the Chancellor asked if the defense viewed the relevant DGCL section, 141.

"I hear what you're saying. I think you have an uphill battle saying Moelis was wrongly decided," Chancellor McCormick said, noting later that "everyone knew there's a line somewhere" The chancellor later likened transactional attorneys at one point to "border collies, kind of pushing the limits a little bit."

Lindsay Faccenda of Block & Leviton LLP, counsel to the stockholders, described Lockwood's comment as "very creative," noting that she had not seen a distinction in case law regarding whether or not those involved are "bad guys."

Faccenda said some internal governance agreements have passed muster with the court, but those agreements "do not take authority away from directors.

"Plaintiff is not arguing that Section 141 categorically prevents boards from entering into governance agreements," Faccenda said. But "divesting boards of authority to make hiring and firing decisions regarding executive officers" is "plainly invalid."

The stockholder suit argued that Vice Chancellor Laster's Moelis decision held that stockholder agreements violate state corporation law if they are part of a corporation's governance arrangement and have "the effect of removing from [the] directors in a very substantial way their duty to use their own best judgment on management matters" or "tend to limit in a substantial way the freedom of director decisions on matters of management policy."

Faccenda said investors expecting that they will be consulted on corporate matters "is very different from a preapproval right," that can become a bar to board decisions.

"This argument assumes that directors are mere passive instrumentalities," Faccenda said. "Delaware makes clear that directors are fiduciaries," and independent.

Lockwood told the chancellor that Scooby holds more than 67% of Petco's outstanding voting power, giving it clout with or without the agreement. That clout, including the right to remove board members, diminishes if the controller's stake falls below 50%.

"The reason we think this case is different is, here you have 68%" ownership by Scooby. "They had the ability to remove directors at will," Lockwood said. "You can act immediately to discipline the board if you wish to. The present deterrent effect already exists whether or not this contract is in place."

Chancellor McCormick said she would consider the arguments.

Chamandeep Kaur and the stockholder class are represented by Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax, Robert Erikson, Jason Leviton and Nathan Abelman of Block & Leviton LLP and Douglas E. Julie and W. Scott Holleman of Julie & Holleman LLP

Scooby Aggregator LP and Petco's directors are represented by Paul J. Lockwood and Matthew P. Majarian of Skadden Arps Slate Meagher & Flom LLP.

The case is Chamandeep Kaur v Scooby Aggregator LP et al., case number 2024-1029, in the Court of Chancery of the State of Delaware.

--Editing by Linda Voorhis.



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Chamber Says X Ruling Boosts Bid To Nix Calif. Climate Laws

By Sarah Jarvis

Law360 (September 23, 2024, 10:48 PM EDT) -- The U.S. Chamber of Commerce and the state of California have filed competing briefs on how a recent Ninth Circuit decision blocking parts of a social media law applies to the state's corporate climate disclosure rules, with the Chamber arguing the ruling reinforces how the latter violate the First Amendment.

A coalition of groups including the U.S. Chamber of Commerce and American Farm Bureau Federation argue in a **Friday brief** to a California federal court that the Ninth Circuit's decision earlier this month in **X Corp. v. Rob Bonta** supports its stance that the Golden State is unconstitutionally compelling speech to combat climate change.

The appellate panel ruled that a trial judge wrongly denied a bid from X, formerly called Twitter Inc., to block parts of a new California law that requires social media giants to disclose their content-moderation policies. Provisions of the law requiring the companies to disclose how and whether they define extreme content are likely unconstitutional, the panel found.

The Chamber of Commerce and its co-plaintiffs contend that that decision "represents another application of First Amendment principles to strike down an unlawful attempt by California to compel speech to target actors and activities it disfavors." They urge the court to grant summary judgment on their First Amendment claim against the laws, known as Senate Bill 253 and S.B. 261.

"In X Corp., the challenged law required social-media companies to submit 'content category reports' detailing their terms of service and content-moderation practices," the plaintiffs say. "The Ninth Circuit held that a facial challenge was appropriate because 'all aspects of the content category report, in every application to a covered social media company, raise the same First Amendment issues,' as 'every' report 'must detail' the same types of 'policies and actions.'"

"The same reasoning applies here, as S.B. 253 and 261 require 'every covered' company to speak to the same 'state-specified categories of content,'" the plaintiffs continue.

The groups also argue that California's commercial speech defense is meritless, saying climate disclosure laws don't compel commercial speech and should thus be subject to strict scrutiny. And they argue the current case is similar to the X case because both involve the state seeking to compel companies to reveal their policy opinions about intensely contentious topics.

In its own Friday brief, officials with the California Air Resources Board argue that the X case involved heightened First Amendment concerns because every covered social media company had to reveal its policy opinion on contentious issues. But that isn't the case with the climate rules because "thousands of companies voluntarily disclose the information at issue, and no one demonstrates a burden on speech," the officials state.

The climate disclosure laws "fall on the commercial speech side" of a line drawn in the X decision, in which the appellate court declined to find that other provisions of the social media statute were unconstitutional, "including those requiring companies to disclose how they respond to user reports of violations of terms of service," the state officials say.

"Neither SB 253 nor 261 require companies to express their policy views on any topic, much less one that is politically fraught," the officials argue, adding that both laws "require companies to follow

already-established and widely-accepted protocols and definitions to disclose factual information regarding corporate operations."

The **climate disclosure laws** were signed into law by Gov. Gavin Newsom in October 2023. S.B. 253 requires companies making more than \$1 billion in gross annual revenue to disclose the scope of their emissions for their operations and supply chains, and S.B. 261 requires every company with more than \$500 million in annual revenue to develop a biennial report on its climate-related financial risks.

The business groups **filed suit** in January, arguing the laws violate the First Amendment, are precluded by federal law and "run headlong into the dormant commerce clause and broader federalism principles."

Counsel for the plaintiffs and a representative of the California Attorney General's Office didn't immediately respond to requests for comment Monday.

The plaintiffs are represented by Eugene Scalia, Brian A. Richman, Bradley J. Hamburger, Samuel Eckman and Elizabeth Strassner of Gibson Dunn & Crutcher LLP, and the Chamber of Commerce is additionally represented in-house by Daryl Joseffer, Tyler Badgley and Kevin Palmer.

The CARB officials are represented by Rob Bonta, Tracy Winsor, Myung J. Park, M. Elaine Meckenstock, Caitlan McLoon, Emily Hajarizadeh, Dylan Redor and Katherine Gaumond of the California Attorney General's Office.

The case is Chamber of Commerce of the United States of America et al. v. California Air Resources Board et al., case number 2:24-cv-00801, in the U.S. District Court for the Central District of California.

--Additional reporting by Dorothy Atkins. Editing by Kristen Becker.

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Autism Played Role In Bankman-Fried Case, 2nd Circ. Told

By **Elliot Weld**

Law360 (September 23, 2024, 2:51 PM EDT) -- A group of experts on neurodiversity told the Second Circuit that Sam Bankman-Fried, who has said he has autism and attention deficit hyperactivity disorder, may have been hurt at trial by a "cognitive and communication style" that at times frustrated the trial judge.

In an amicus brief filed Friday, eight doctors of psychological studies, including professors at the Yale and University of Pennsylvania medical schools, cited in particular Bankman-Fried's challenge to a court ruling requiring him to undergo government **cross-examination** outside the presence of the jurors prior to testifying before them.

The unusual arrangement was part of what Bankman-Fried argued in an **appellate brief** earlier this month was a pattern of prejudicial rulings by U.S. District Judge Lewis A. Kaplan of the Southern District of New York.

Bankman-Fried, the founder of crypto trading platform FTX, was **sentenced to 25 years in prison** in March after being convicted of defrauding the company's customers and investors out of roughly \$11 billion.

The doctors said Friday that even before Bankman-Fried's rise into the spotlight, his neurodiversity had been well documented in the press.

"Profiles on him during that period rarely fail to mention his idiosyncratic speaking style, poor eye contact, peculiar adherence to routine and fidgeting," the brief said. "Mr. Bankman-Fried's atypicality persisted through his and his company's meteoric fall. And it was apparent during his criminal trial, to Mr. Bankman-Fried's detriment. The press noted Mr. Bankman-Fried's unusual affect, his long-winded answers, and how poorly both were received by the court."

The brief did not disclose whether the doctors had personally met or examined Bankman-Fried, whose attorneys have said in court filings that he has autism spectrum disorder and ADHD.

The testimony Bankman-Fried was required to give outside the jury's presence about part of his defense — that the presence of lawyers during the fraud led him to believe that he was acting lawfully — was tainted by "an affect and communication style characteristic of ASD," the brief said.

During that provisional testimony, Bankman-Fried's answers to questions from his own lawyers were relatively concise, but he became evasive and wordy when questioned by a prosecutor — prompting Judge Kaplan to comment, "The witness has what I'll simply call an interesting way of responding to questions."

However, people on the autism spectrum tend to understand language in a concrete and literal way, and Judge Kaplan's "clear hostility" toward efforts to provide fuller responses might have altered Bankman-Fried's later responses before the jury in an effort to avoid further admonishment, the brief reads.

Bankman-Fried may have overcorrected his ordinarily verbose answers when questioned in the jury's presence by giving extremely succinct answers, the doctors said. On the first day of his testimony, he answered with "yup" over 250 times out of about 1,300 answers, the brief said, and gave other one-

word affirmative responses on 400 other occasions.

The doctors also argued that the prosecution's open access to certain FTX documents that the defense did not have could have hampered Bankman-Fried's ability to participate in his defense, since people on the autism spectrum could be put at "a serious handicap" without concrete documentation.

Bankman-Fried may have had issues focusing during the first three weeks of his trial due to a lack of access to ADHD medication, the brief said, citing statements by his lawyers.

"To be transported to trial, Mr. Bankman-Fried would be woken up at 4 a.m. To maintain proper focus through the day, Mr. Bankman-Fried needed ADHD medication in extended-release form, and potentially further medication at noon," the brief reads. "But, at the government's insistence, Mr. Bankman-Fried was given half the dose he previously was taking. Moreover, he was not given extended-release formulations for much of that critical period —indeed, until well into trial."

On Friday, a group of bankruptcy law experts submitted another amicus brief in which they offered no opinions on the sufficiency of the government's evidence but argued that the FTX bankruptcy case had offered far more assistance to the prosecution team than a healthy boundary between a Chapter 11 case and the criminal justice system should support.

The bankruptcy experts said the contributions of the FTX bankruptcy estate to Bankman-Fried's prosecution were "extraordinary" compared with previous cases, in particular the bankruptcy estates of Enron Corp. in 2001 and WorldCom Inc. in 2002.

"Every dollar spent to support the prosecution — and estate professionals have billed hundreds of millions of dollars in the FTX bankruptcy — is a dollar not returned to creditors," the brief said. "This is especially concerning given the bankruptcy court's lack of, and the debtors' resistance to, detailed oversight of such activity."

A representative of the U.S. Attorney's Office for the Southern District of New York declined to comment Monday. Counsel for Bankman-Fried and the doctors did not immediately respond to requests for comment.

The government was represented at trial by Danielle R. Sassoon, Nicolas Roos, Danielle Kudla and Thane Rehn of the U.S. Attorney's Office.

Bankman-Fried is represented by Alexandra A.E. Shapiro, Theodore Sampsell-Jones and Jason A. Driscoll of Shapiro Arato Bach LLP.

The doctors are represented by Jeffrey Lamken of MoloLamken LLP.

The bankruptcy experts are represented by Joshua Seifert of Joshua Seifert PLLC.

The case is USA v. Bankman-Fried, case number 24-961, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Karin Roberts.