

Meta Takes Incorrect View of Risk Disclosure, Supreme Court Told

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- Risk disclosures about Facebook user data in spotlight
- Investors counter description of risks as forward-looking

By Martina Barash

(Bloomberg Law) --

Meta Platforms Inc. should face securities fraud claims over disclosures that improperly treated the risk of user data misappropriation as hypothetical, investors told the US Supreme Court.

The investors asked the high court in a brief Tuesday to uphold a split decision of the US Court of Appeals for the Ninth Circuit that revived their multibillion-dollar suit, a proposed class action that focuses on a data-harvesting scandal involving political consulting firm Cambridge Analytica.

The investors allege their stock in the company, then called Facebook, took two significant hits in the wake of that scandal.

Meta brought the case to the justices, arguing that it “was making only forward-looking disclosures about how future events might affect Meta’s business” in its 2016 10-K risk disclosure statements submitted to the Securities and Exchange Commission.

Shareholders Amalgamated Bank and the Public Employees’ Retirement System of Mississippi sought to counter that argument. “In common usage and at common law, describing an event as a hypothetical risk can be reasonably understood to imply that the risk is just that—a future possibility, not a present reality,” they said.

10-K Exception?

There’s no exception to that principle for Item 105 risk disclosures in a 10-K report, the investors said. “Moreover, the SEC has instructed issuers that risk-factor statements appropriately address both future and past events that make an investment risky and that treating a materialized risk as a merely hypothetical possibility can be misleading,” they said.

The 2018 suit followed reports that British consulting firm Cambridge Analytica harvested personal data from millions of Facebook users, providing it to Sen. Ted Cruz (R-Texas) and later Donald Trump during their 2016 presidential campaigns.

Meta quickly confirmed internally that Cambridge Analytica had private information after a 2015 report by The Guardian, but the company kept its findings secret, the investors said. Later revelations about the scandal contributed to two price drops that cost the company more than \$200 billion in market capitalization, according to the suit.

The company's risk disclosures, prior to the revelations, that data breaches and improper disclosure of user data "could harm" its reputation and negatively impact the business were misleading because they presented the risks as hypothetical, the investors said.

The Ninth Circuit, in a split opinion, agreed. The ruling deepened a three-way split among the circuit courts, Meta said in its bid for Supreme Court review in March.

The investors' new brief, in addition to challenging Meta's view of the disclosures as only forward-looking, casts doubt on the relevance of the question the Supreme Court accepted for review: "Are risk disclosures false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm?"

If the past event presents no risk of future harm, it would be immaterial to investors, the bank and pension fund said. Failing to disclose an immaterial event wouldn't be misleading, they said.

"The only reason Facebook has ever given to explain why the misappropriation risk no harm was that the event was allegedly disclosed to the public in 2015 and no one cared," they said. "The Ninth Circuit rightly rejected that factual claim as unsupported by the allegations in the complaint."

Goldstein, Russell & Woofert LLC; Bernstein Litowitz Berger & Grossmann LLP; and Robbins Geller Rudman & Dowd represent the investors. Paul, Weiss, Rifkind, Wharton & Garrison LLP and Gibson, Dunn & Crutcher LLP represent Meta.

The case is *Facebook, Inc. v. Amalgamated Bank*, U.S., No. 23-980, brief 9/24/24.

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Gibson Dunn Recruit Former Google Privacy Chief

[lawfuel.com/adam-moskowitz-the-crypto-lawyer-battling-the-ftx-bankruptcy](https://www.lawfuel.com/adam-moskowitz-the-crypto-lawyer-battling-the-ftx-bankruptcy/)

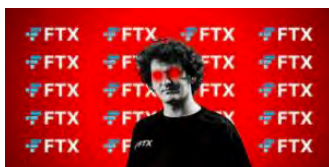
September 25, 2024



The Rise of a Crypto Lawyer Crusader

Ben Thomson, LawFuel contributing writer

In the rapidly evolving world of cryptocurrency and the scandalous collapse of the FTX exchange, one name has emerged as a formidable force in the legal arena: Adam Moskowitz, the 'Crypto Crusader' who has become synonymous with high-profile class action lawsuits against major players in the crypto industry.



In the FTX crypto exchange case set up by former CEO Sam Bankman Fried has involved an increasingly bitter legal battle between lawyers and the courts who should handle the distribution of billions of dollars to be allocated from the liquidation.

And Moskowitz is in the midst of the battle, assisting in the consolidated court action (MDL) which has even lead to a class action accusing FTX law firm Sullivan & Cromwell of helping FTX insiders to defraud customers.



Sullivan & Cromwell has denied wrongdoing and moved to dismiss the class action.

Moskowitz is working on the consolidated claim with famed attorney and LawFuel Law Star David Boies (pictured) in resisting attempts to alter the proposed plan for FTX

bankruptcy plan, claiming that FTX is misleading customers about their proposed recovery and how it will be affected by settlements in the claim they are acting on.

Trending

Gardere's Segrest Named Distinguished Alumnus by Texas Tech Law School

Setting Up The Firm

A graduate of the University of Miami School of Law, Moskowitz cut his teeth in the legal world by working on complex class action suits in various fields, including consumer protection and financial services.

He founded his eponymous The Moskowitz Law Firm in 2017, capitalizing on his experience and reputation to build a boutique practice focused on class action litigation.

The big growth for the firm came with the explosive growth of the cryptocurrency market that would soon define Moskowitz's legal career and push him into the headlines.

Crypto in the Crosshairs

As cryptocurrencies gained mainstream attention, Moskowitz recognized a pattern of what he perceived as misleading marketing practices and potential violations of securities laws leading him to spearhead a series of class action lawsuits against some of the biggest names in the crypto world.

And the legal battlers some came along, including –



1. **Celebrity Endorsements:** A lawsuit alleging that celebrities like Tom Brady, Gisele Bündchen, and Larry David promoted FTX cryptocurrency exchange without disclosing their compensation, potentially violating securities laws. Tom Brady, for instance, was an 'ambassador' for the ill-fated FTX exchange.
2. **Binance and Coinbase:** Separate legal actions against these major exchanges, claiming they sold unregistered securities to U.S. investors.
3. **Voyager Digital:** A suit alleging that the now-bankrupt crypto lender operated as an unregistered securities exchange. When the company went bankrupt in mid-2022 Moskowitz leaving investors with losses of around 3.5 billion on the coins, Moskowitz took aim at the deep pockets of Mark Cuban and his NBA team who had trumpeted the merits of the currency

Legal Strategy and Key Claims

At the heart of Moskowitz's legal strategy is the assertion that many cryptocurrencies should be classified as securities under U.S. law which in turn would subject them to strict regulatory oversight by the Securities and Exchange Commission (SEC).

His claims include the fact that there was a failure to register cryptocurrencies as securities, misleading marketing and breaching fiduciary duty.

Moskowitz argues that these practices have led to significant financial losses for retail investors who were inadequately informed about the risks involved in crypto investments.

Building a Niche Crypto Practice

Moskowitz's success in carving out a niche in cryptocurrency litigation can be attributed to several factors, the major one being his early entry into the whole cryptocurrency legal market. His key law market advantages include –

1. **Early Mover Advantage:** By focusing on crypto-related cases early, Moskowitz positioned himself as an expert in an emerging field of law at a time when many were getting their heads around what it was all about, let alone the legal implications.
2. **Media Savvy:** Moskowitz has effectively used media appearances and interviews to raise awareness about his cases and attract potential clients, which has lifted his profile as his major cases have advanced through the court system.
3. **Collaborative Approach:** The attorney frequently collaborates with other law firms, pooling resources and expertise to take on well-funded opponents.
4. **Adaptability:** As the crypto landscape evolves, Moskowitz has shown an ability to quickly adapt his legal strategies to address new issues and challenges.

The Road Ahead

As regulatory scrutiny of the cryptocurrency industry intensifies, Moskowitz's caseload is likely to grow, along with the competition in this space.

The outcomes of his current lawsuits could have far-reaching implications for how digital assets are regulated and marketed in the United States.

A number of big law competitors and boutique firms like Moskowitz's are entering the market.

Crypto Competitors

Five of the emerging big law competitors include –

1. **Roche Freedman LLP**: This firm has been at the forefront of crypto litigation, filing numerous high-profile cases against major exchanges and issuers.
2. **Boies Schiller Flexner LLP**: Known for handling complex litigation, this firm has taken on cases involving cryptocurrency fraud and securities violations.
3. **Robbins Geller Rudman & Dowd LLP**: A powerhouse in securities litigation, they have expanded into crypto-related class actions.
4. **Latham & Watkins LLP**: While often defending crypto companies, they've also built a practice advising on regulatory compliance and potential litigation risks.
5. **Skadden, Arps, Slate, Meagher & Flom LLP**: Skadden have established a dedicated blockchain and cryptocurrency group to handle both advisory work and litigation and will doubtless increase their 'digital footprint' in this space.

Among the boutique law practices that have emerged are –

Silver Miller: Led by David Silver, this firm has been involved in numerous cryptocurrency-related lawsuits and class actions and is set for further involvement.

Levi & Korsinsky LLP: Known for securities litigation, they've expanded into crypto-related cases.

Kyle Roche: Although he faced controversy and stepped back from crypto cases in 2022, Roche was previously a major competitor in this space.

While critics argue that Moskowitz's actions may stifle innovation in the crypto space, supporters view his work as necessary to protect investors and bring accountability to an industry often described as the "Wild West" of finance.

Regardless of one's stance on cryptocurrency, it's clear that Adam Moskowitz has established himself as a pivotal figure in shaping the legal landscape of this emerging asset class. His journey from a traditional class action attorney to a crypto-focused litigator serves as a case study in how lawyers can adapt to new technologies and build influential practices in rapidly evolving fields.

As the crypto industry continues to mature, all eyes will be on Moskowitz and his firm to see how their legal challenges unfold and potentially reshape the future of digital finance.

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About The Author

Ben Thomson

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Rent the Runway Investors Advance Lawsuit Over IPO Statements

By Martina Barash 2024-09-26T07:47:19000-04:00

[Rent the Runway Inc.](#) investors can proceed with part of their proposed class action against the internet clothing rental company over statements before its initial public offering, a federal court ruled.

The investors adequately alleged that Rent the Runway made misleading statements in its registration and prospectus documents about shipping costs, thefts, and insurance coverage, Judge Orelia E. Merchant said Wednesday for the US District Court for the Eastern District of New York.

The investors allege the undisclosed adverse factors caused the company's share price to drop from \$21.00 per share at the time of the October 2021 IPO to \$1.58 on Nov. 14, 2022.

Merchant trimmed some claims from the case.

The case is [Sharma v. Rent the Runway, Inc.](#) , E.D.N.Y., No. 1:22-cv-06935, 9/25/24 .

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Even With New Business Courts, Texas Is a Long Way from Taking Delaware's Corporate Law Mantle

[law.com/litigationdaily/2024/09/26/even-with-new-business-courts-texas-is-a-long-way-from-taking-delawares-corporate-law-mantle](https://www.law.com/litigationdaily/2024/09/26/even-with-new-business-courts-texas-is-a-long-way-from-taking-delawares-corporate-law-mantle)

Ellen Bardash



Texas has a new system of business courts up and running on the heels of an ongoing conversation about Delaware's corporate primacy.

While Texas attorneys have been upfront with their hope that the state's newest courts will help raise Texas' corporate law to Delaware's level, corporate attorneys across the country are all but unanimous: Delaware remains the champ, and that's not changing, at least not any time soon.

"Obviously Delaware's come under a lot of fire lately. We take that seriously," said **Ray DiCamillo**, chair of **Richards, Layton & Finger's** corporate department. "It's unfair to focus on a few opinions that some people weren't happy with as showing that there's a huge problem in the Delaware Court of Chancery and the Delaware court system as a whole."

Stephen Bainbridge, a law professor at UCLA, put out a paper this summer that takes a look at whether there's any evidence Delaware's corporate dominance is at risk. It gives a ton of historical context for this conversation and the factors that play into it, and his conclusion is a pretty decisive "no."

Some of the most clear-cut evidence in Bainbridge's paper is the stark contrast between how many companies incorporate in Delaware each year and how many reincorporate in other states. From 2012 to 2022, Delaware recorded more than 486,000 new incorporations. In the same period, the number of "DExits," as he refers to them, totaled 71. That means for every 6,845 corporations created in Delaware, one leaves.

Granted, those stats don't include 2023 or 2024, when, in addition to the Texas court forming, the Court of Chancery issued some decisions that raised alarm bells within the corporate bar, so it's possible more corporations are leaving or more are choosing to incorporate outside Delaware in the first place.

But in all the conversations I've had in the last year or so with both litigators and corporate attorneys, the consensus has been that something seismic would have to happen for existing Delaware corporations to start fleeing Delaware at any significant rate. And yes, the answers have been so consistent from all sides and from all over the country that I'm comfortable saying "all."

"Overall, given the substantial inertia behind incorporation decisions and the weakness of the various DExit drivers, it seems unlikely that Delaware's Cassandras will prove correct anytime soon," Bainbridge wrote. "To use a colloquial expression, DExit is not a thing and is unlikely to become a thing."

The biggest reason for that: it would be nearly impossible for any newer court to catch up with the body of case law Delaware has developed since the Court of Chancery opened in 1792. That was more than 200 years before any other state made an attempt at a business court of its own.

DiCamillo said it would likely take decades, if not a century, for Texas or any other state business court to be able to build up a body of law that could compete with Delaware's, but that significantly more work would also need to be done outside the state court itself, as Delaware's appeal doesn't come from a court operating in a bubble.

Among the other factors that make Delaware's system the gold standard are its secretary of state and its legislature, which passes amendments to Delaware's corporation law every year.

"One of the great hallmarks of Delaware law is the flexibility of the statute itself, the ability to amend it and the frequency with which it is amended to react to market practices, to react to case law, to react to things that don't make sense anymore," DiCamillo said.

On top of that, Texas' courts will be using juries, unlike the Court of Chancery's more predictable bench trials. Plus, Chancery decisions can be appealed directly to and decided relatively quickly by the Delaware Supreme Court, while Texas business court appeals will go to a newly established appellate court before they can be addressed in the state's court of last resort.

What may be more up in the air, and where Texas may have a chance to pick up some ground, is whether new companies will be more likely to choose to incorporate outside Delaware to begin with. But Texas attorneys, even the most optimistic ones, say that while having a designated business court is definitely a draw, it's not something that's going to single-handedly make a company incorporate in Texas rather than Delaware or vice versa.

Morgan, Lewis & Bockius partner **Jared Wilkerson**, who is based in Houston, told me that's because putting full faith in the political process without considering the other pros and cons of a potential state of incorporation isn't a smart business move. The Texas courts may make decisions that sway how business-friendly the state is viewed—like the decisions from the Delaware courts that have given some companies pause.

"There are a lot of advantages under our law to incorporating in Texas, things that businesses find favorable—in some cases more favorable than what Delaware has," said **Thad Behrens**, a partner in **A&O Shearman**'s Dallas office. "What we don't have is a consistent body of precedent yet that companies feel like they can rely on to take that step to reincorporate in Texas."

Meta fails in bid to block Zuckerberg's AI testimony

DJ [dailyjournal.com/articles/381161-meta-fails-in-bid-to-block-zuckerberg-s-ai-testimony](https://www.dailyjournal.com/articles/381161-meta-fails-in-bid-to-block-zuckerberg-s-ai-testimony)

Technology,

Intellectual Property

Sep. 26, 2024

Plaintiffs need not exhaust other forms of discovery before deposing Zuckerberg as they had sufficiently established his direct involvement in Meta's AI initiatives, U.S. Magistrate Judge Thomas S. Hixson ruled.

A federal magistrate judge denied Meta Platforms Inc.'s motion for a protective order barring CEO Mark Zuckerberg from testifying in a case brought by a group of creators accusing the company of infringing on their copyright by using their work to train its artificial intelligence software.

It came a week after the federal judge overseeing the matter in the U.S. District Court for the Northern District of California expressed concerns about the way plaintiffs' counsel were litigating the case.

Meta had argued that deposing Zuckerberg would be unduly burdensome, citing Federal Rule of Civil Procedure 26(c)(1). The company argued that Zuckerberg's deposition should be disallowed because the information sought could be obtained from other, less intrusive sources.

However, in an order Tuesday, U.S. Magistrate Judge Thomas S. Hixson ruled that the plaintiffs need not exhaust other forms of discovery before deposing Zuckerberg as they had sufficiently established his direct involvement in Meta's AI initiatives. The plaintiffs had established Zuckerberg's role as the key decision-maker for the Generative AI branch, his involvement in open-sourcing the language model and his direct supervision of Meta's AI products.

Neither Meta nor its legal team with Cooley LLP and Cleary Gottlieb Steen & Hamilton LLP responded to a request for comment.

The putative class action was filed in 2023 by a class of authors and creative professionals, including comedian Sarah Silverman and author Christopher Golden. It claims that Meta used datasets containing copyrighted materials from pirated content libraries without the permission of the copyright holders.

Meta had most of the initial claims against it dismissed in November, though a sole claim for direct copyright infringement remains.

A Sept. 18 order from U.S. District Judge Vince Chhabria advising parties to be ready to discuss the plaintiffs' motion to extend the case schedule at a Sept. 20 status conference stated that the court was "under the impression that there's no real dispute about whether Meta fed copyrighted works to its AI programs without authorization, and that the only real legal question to be presented at summary judgment is whether doing so constituted 'fair use' within the meaning of copyright law."

The plaintiffs have been represented by The Joseph Saveri Law Firm LLP and sole practitioner Matthew Butterick in Los Angeles. *Kadrey et al. v. Meta Platforms Inc.*, 23-cv-03417, (N.D. Cal., filed July 7, 2023).

A Sept. 20 minute entry following the status conference stated that the court had "expressed concern regarding the way plaintiff's counsel is litigating this case. If this matter reaches the class certification state, the Court will not certify the class represented by the current legal team."

It added that the court will consider "a renewed extension of time if Mr. Saveri comes in with a newly constituted team and can articulate clearly what is missing that is critical for the resolution of the fair use issue."

On Tuesday, the Joseph Saveri Law Firm announced it would - along with co-counsel - be partnering with Boies Schiller Flexner LLP on the case. In an email Wednesday, Saveri said that the addition of Boies Schiller was only partly in response to Chhabria's concerns.

"As I said at the hearing, we take any criticism seriously. It is one reason, not the only one. We are always interested in [adding] law firms of the caliber of Boies Schiller to the team. Our clients stand to benefit greatly," Saveri wrote.

The news regarding Zuckerberg's deposition came a day before Meta announced its latest AI model, Llama 3.2, as part of its annual Connect conference.

In an interview with technology website The Verge about the conference, published Wednesday, Zuckerberg said, "Individual creators or publishers tend to overestimate the value of their specific content in the grand scheme" of training AI models.

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California's ExxonMobil Suit Marks New Front in Plastics Fight

By Drew Hutchinson 2024-09-26T05:30:03000-04:00

- Public nuisance claims come with challenges, attorneys say
- California attorney general says he hopes to 'fuel inspiration'

California's decision to target the root of plastic pollution instead of downstream companies sets its [ExxonMobil lawsuit](#) apart from a swirl of other environmental cases, but several attorneys say the strategy could prove difficult to litigate.

The [lawsuit](#), filed Sept. 23 in San Francisco County Superior Court, accused the energy giant of promoting all plastics as recyclable when few were. This caused consumers to buy more single-use plastic products than they would have otherwise, causing and worsening a plastic pollution crisis, the complaint said.

California's case against ExxonMobil Corp. is the latest example of a growing push for extended producer responsibility, a policy framework that holds manufacturers accountable for their products' end lives, said Daniel Esty, director of the Yale Center for Environmental Law and Policy.

Many states have [propped up laws](#) to make manufacturers collect, recycle, or otherwise safely dispose of their materials. But litigation like California's extends that statutory structure into a liability concept, signaling a possible "opening shot of a new line of legal assault," Esty said.

States have sued over plastics before, but those lawsuits were aimed at consumer brands. New York, for example, [sued](#) PepsiCo. Inc. last year over Buffalo River plastic pollution. That case is still tied up in the New York Supreme Court for Erie County.

California Attorney General Rob Bonta is seeking from ExxonMobil a multibillion-dollar abatement fund for recycling reeducation and other programs, disgorgement of profits, and other penalties, he told a [Climate Week NYC crowd](#) on Tuesday afternoon.

"We think we'll win this one," he said.

Litigating the Plastics Case

Bonta's "landmark case" against ExxonMobil Corp. marks the first time a government official has taken legal action against an oil company for plastic pollution, said Pat Parenteau, senior climate policy fellow at the Environmental Law Center.

The lawsuit's false advertising and unfair competition claims have the most "bite" due to their "reasonably strong factual foundation," Esty said. But public nuisance claims, which have long been vehicles for environmental litigation, could be the hardest to push through in this case, he said.

Nuisance claims against a point source of plastic will require "indirect inference" to reach a conclusion about pollution liability, Esty said. That means Bonta's case will be harder to prove than a case that goes after, for example, people who were caught on camera littering, he said.

California has some of the country's strongest public nuisance laws—but that doesn't mean they'll sail through in the Exxon case, Parenteau said.

"It's one of those counterfactual arguments, which is 'What would the world have been like if you hadn't lied?'" Parenteau said.

Exxon will likely argue that it didn't lie—that it had always explained its practices in the fine print, or that its marketing was aspirational and not misrepresentation, Parenteau said. First amendment claims about political and commercial speech are also likely, he said.

In response to the lawsuit, which was accompanied the same day by a [similar one](#) from environmental groups, ExxonMobil said California is to blame for "ineffective recycling."

"Instead of suing us, they could have worked with us to fix the problem," the company wrote in a Sept. 23 statement.

Overall, the lawsuit reflects a broader trend of penalizing companies whose business model depends on "spilling harm onto others," Esty said. The movement has targeted oil and gas, but also manufacturers of [chemicals](#) and other pollution sources.

"I always found it quite risky" that ExxonMobil claimed plastics were recyclable when recycling rates never hit double digits, said Judith Enck, president of nonprofit Beyond Plastics and a former EPA regional administrator. "I always wondered when someone was going to look at the numbers."

It's unclear if California's lawsuit will be enough to show consumers that plastics aren't recyclable, Enck said.

"The public is confused, and it's because the plastics industry has purposely confused people," she said.

Fueling Inspiration

Blue states like New York, Massachusetts, Connecticut, and Minnesota could soon follow with similar plastics lawsuits, Parenteau said. Chances of a larger state litigation trend are better if California can make it past the inevitable first round of motions to dismiss the case, he said.

"Some of these states may wait and see how the California case progresses before they jump in," Parenteau said.

After his lawsuit announcement went live earlier this week, Bonta urged other states to file similar litigation against ExxonMobil.

"We hope we can fuel inspiration," Bonta said of his state's climate leader status at Climate Week NYC.

With the US Supreme Court rolling back federal regulations, states concerned with their environmental protections are increasingly going to the courts instead of relying on federal law, Parenteau said.

"It is disappointing that legal action has diverted time and resources away from our industry's efforts to scale up a circular economy for plastics, where more plastics are reused and remade instead of discarded," the American Chemistry Council, another party that Bonta is [fighting in court](#) over alleged plastic recycling deception, said in an emailed statement.

The case is [People v. ExxonMobil Corp.](#) , Cal. Super. Ct., No. CGC24618323, filed 9/23/24 .

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UFC Inks Revised \$375 Million Settlement with Fighter Plaintiffs

By Katie Arcieri 2024-09-26T11:34:36000-04:00

- UFC's new deal follows denial of a \$335 million settlement
- Former athletes brought antitrust claims over fighter pay

TKO Group Holdings Inc., the parent company of Ultimate Fighting Championship, has reached a revised \$375 million deal to settle antitrust claims with former mixed martial artists who claimed the fighting powerhouse organization suppressed their wages.

TKO [mentioned](#) the proposed agreement Thursday in a filing with the Securities and Exchange Commission that noted the company's plans to submit a long-form deal for court approval.

Judge Richard F. Boulware of the US District Court for the District of Nevada [rejected](#) a previous agreement for \$335 million that would have settled claims across two class actions, with the majority going to the former fighters.

The new proposed deal covers only one case, named for lead plaintiff Cung Le, that was brought by roughly 1,200 fighters who won class action status last year and seeks to stop the litigation from going to trial in February 2025. A related case, with lead plaintiff Kajan Johnson, isn't covered by the settlement and remains pending. That case covers fighters who fought for UFC from 2017 to present.

"While we believe the original settlement was fair — a sentiment that was also shared by Plaintiffs — we feel it is in the best interest of all parties to bring this litigation to a close," UFC said in a statement. "As for the Johnson case, that process is in very early stages, and a motion to dismiss the complaint remains pending."

The new proposed settlement for the *Le* case is an "excellent result" for that class of UFC fighters, said Eric Cramer, partner with Berger Montague PC, which represents the plaintiffs.

"If approved, it would provide immediate monetary relief to over one-thousand fighters, who each would recover a significant enhancement to what he or she earned from the UFC during his or her

fighting career,” Cramer said. “We also plan on vigorously pursuing claims on behalf of the fighter class in the later filed Johnson case, including claims for injunctive relief against the UFC.”

UFC is represented by law firms including Paul Weiss, Rifkind, Wharton & Garrison LLP.

The case is [Le v. Zuffa](#) , D. Nev., No. 2:15-cv-01045 .

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Norfolk Southern \$600 Million Ohio Derailment Deal Approved (1)

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A federal judge on Wednesday approved a \$600 million settlement Norfolk Southern Corp. reached for a fiery train derailment in East Palestine, Ohio, in February 2023 that traumatized a small community.

Judge Benita Y. Pearson of the Northern District of Ohio said during a hearing in her courtroom in Youngstown that the agreement the railroad giant reached with a class of residents in and around the small village was “fair, adequate, and reasonable.” She noted the overwhelming buy-in from those affected by the derailment and overruled objections made by a small group of residents, some of whom were present.

“I want you to understand that perfection isn’t the goal in this case,” Pearson said at the end of a nearly three-hour hearing.

The judge also approved \$162 million in attorney fees—again overruling objections from a small group of lawyers who sought to have their client contingency fees come from that pot of money—as well as \$18 million for costs, separate class representative awards, and the means to distribute the proceeds.

The order, which Pearson said she’ll memorialize in writing before the close of the week, means the end is near for more than 18 months of litigation residents launched against Norfolk Southern. Lawsuits started getting filed shortly after the train derailed and after the rail giant launched a controlled burn of the chemicals to mitigate the explosion risk, creating plumes of black smoke that blanketed the small village about 90 miles southeast of Cleveland near the Ohio-Pennsylvania border.

While nobody was killed or injured, the spilled chemicals sparked public outrage, a political firestorm, and concerns of current and future illnesses.

The railroad and attorneys representing a class of people affected by the derailment announced the settlement in April, and since then nearly 55,000 claims have been filed, according to numbers released earlier this month. The company separately agreed to pay \$310 million to resolve claims brought by the federal government, though a different federal judge must also sign off on that settlement.

Residents’ attorney Mark P. Chalos of Lieff Cabraser Heimann & Bernstein LLP said after the hearing that “justice has been served for this community.” Norfolk Southern also put out a statement that said “today marks an important day for East Palestine and the surrounding communities.”

Some Objections

Residents of East Palestine and surrounding communities, as well as attorneys from across the US, were present at Wednesday's hearing, which drew a crowd large enough to require an overflow room.

While most of the hearing were for arguments in support of the deal, the judge did hear from dissenters. But she appeared skeptical of statements made by Daniel N. Abraham of Colley Shroyer & Abraham Co., who argued against the settlement's approval on behalf of 35 residents.

While Abraham argued that those affected by the derailment were asked to give their blessing to a settlement before they had enough information about its health and other effects, Pearson pushed him on what would be a better solution. She noted that litigation over the water crisis in Flint, Mich. dragged on for years before any settlements were reached.

Attorney M. Elizabeth Graham of Grant & Eisenhofer PA, representing the class, said Abraham had access to the same data that other lawyers did and that he never accessed the online system that housed it.

"Mr. Abraham's actions belie his objections," Graham said.

The hearing produced few fireworks until the end. Upon Pearson's approval of the deal, East Palestine advocate Jami Wallace vocally and loudly expressed her displeasure. The judge ordered court security to "put them on the pavement" and remove Wallace from the courthouse.

"Respect is all I require and all I offer," Pearson said. "I will not tolerate disobedience."

The class is also represented by Zoll & Kranz LLC, Burg Simpson Eldredge Hersh & Jardine PC, Simmons Hanly Conroy LLP, and Morgan & Morgan PA, among others. Norfolk Southern is represented by Wilmer Cutler Pickering Hale and Dorr LLP and Dickie, McCamey & Chilcote PC.

The case is In re: E. Palestine Train Derailment, N.D. Ohio, No. 4:23-cv-00242, settlement approved 9/25/24 .

(Updates throughout.)

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Photo: John Disney/ALM

NEWS

Norfolk Southern Replaces Fired CLO With Fast-Rising Internal Candidate

Jason Morris has extensive crisis management experience, which may come in handy if the independent law firm probe that found the CEO and CLO were having a romantic relationship turns up other problems.

September 25, 2024 at 09:00 AM

🕒 3 minute read

In House Moves



Greg Andrews

The original version of this story was published on Corporate Counsel

Just two weeks after firing its CEO and chief legal officer, saying they were having an inappropriate, consensual relationship, Norfolk Southern has promoted a legal department veteran with extensive crisis management expertise to CLO.

The Atlanta-based rail giant late Tuesday announced the appointment of Jason Morris. He's been with Norfolk Southern 14 years, starting at the bottom with the plain old title of attorney and then receiving a string of promotions.

Morris worked in the legal department's operations and transformation divisions before his promotion to vice president of law in 2022. The company's news release says that "in addition to his highly impactful career as a lawyer, he has a robust background in public service," including serving as legislative director



Jason Morris, chief legal officer of Norfolk Southern.
Courtesy photo

of the U.S. House of Representatives, a logistics readiness officer in the Virginia Air National Guard, and an officer in the U.S. Air Force.

In what could be interpreted as a reproach of fired CEO Alan Shaw and fired CLO Nabanita Nag, newly appointed CEO Mark George said, "We have no doubt Jason will push Norfolk Southern to meet the highest standards for our employees, our customers, our shareholders, and the communities where our railroaders live and operate."

Norfolk Southern promoted George from chief financial officer to CEO on Sept. 11, the same day it dismissed Shaw and Nag, saying that an independent law firm investigation had documented the relationship and that it violated the company's policies and code of ethics.

Shaw was a 30-year Norfolk Southern veteran who'd been CEO since 2021, while Nag had joined the company in 2020 after holding in-house roles at Prudential and Goldman Sachs. Neither Shaw nor Nag have commented publicly.

Morris joined Norfolk Southern in 2010, the year he received his law degree from the University of Virginia.

He received his undergraduate degree from the U.S. Air Force Academy. On graduation, he spent four years with the Air Force and two years with the U.S. House.

Nag served as Norfolk Southern's legal chief for 27 months, which actually is a longer tenure than any of the four legal chiefs who followed James Hixton. Hixton retired in December 2016 after more than a decade in the role.

Legal chiefs gave up the role for a variety of reasons, including being promoted to another Norfolk Southern role, leaving for a job elsewhere, and not wanting to follow the company when it moved its headquarters from Norfolk, Virginia, to Atlanta in 2019.

As Nag's successor, Morris may have to manage additional fallout from the law firm's independent investigation, which Norfolk Southern said is continuing. The company declined to identify the law firm handling the probe.

Norfolk Southern also is continuing to wrestle with fallout from a massive toxic-material derailment in East Palestine, Ohio, in February 2023. The company agreed in May to pay \$600 million to settle class action litigation from residents impacted by the derailment and the evacuation that followed.

Norfolk also agreed to pay \$15 million as part of a settlement with the Justice Department and Environmental Protection Agency, and committed to spend \$1 billion on to clean up contamination and improve rail safety and operations.

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You Might Like

Poppi's 'Gut Healthy' Sodas Are Harmful To The Gut, Suit Says

 [law360.com/articles/1881883/print](https://www.law360.com/articles/1881883/print)

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Law360 (September 25, 2024, 5:59 PM EDT) -- The maker of Poppi-brand sodas misleadingly advertises the products as "prebiotics for a healthy gut," despite the fact that it's full of sugar, which is harmful to overall health and heightens the risk of obesity, Type II diabetes and other issues, alleges a putative class action filed in California federal court.

The makers of Poppi prebiotic sodas face a proposed class action filed in California federal court accusing it of misleadingly advertising its products as being beneficial to overall health and gut health, despite it's being full of free and added sugar. (Court Documents) *Click to zoom in.*



The makers of Poppi prebiotic sodas face a proposed class action filed in California federal court accusing it of misleadingly advertising its products as being beneficial to overall health and gut health, despite that it's full of free and added sugar. (Court Documents)

In a 39-page **complaint** filed Monday, San Diego County resident Vanessa Jackson accused Texas-based VNGR Beverage LLC, the maker of Poppi sodas, of falsely claiming on its labels that the sugar-sweetened drinks are beneficial to overall health, namely, gut health.

Jackson takes issue with several statements found on Poppi's labels, including phrases like "for a healthy gut," "be gut healthy," "better for you prebiotic soda," "gut health never tasted this good," "bubbles with benefits," "immunity sidekick," and "prebiotics for a healthy gut."

Jackson said it's misleading for Poppi makers to tell shoppers to drink the soda for a healthy gut when most of its calories come from free and added sugars.

"First, Poppi is a sugar-sweetened beverage, containing up to 100% of its calories from free and added sugar, and there is a vast body of scientific evidence demonstrating that consuming sugar-sweetened beverages harms rather than supports overall health — and digestive health in particular," the complaint alleged.

Furthermore, the sodas only contain a negligible amount of fiber, which means that drinking it doesn't provide consumers with any material gut health benefits, Jackson said. The labels also leave out the fact that consuming too much free and added sugar is harmful and could damage gut health, the suit alleged.

The company's conduct isn't limited to its product labels, as Poppi also markets its wellness message and branding through its large internet following across several social media platforms like Instagram, Facebook and TikTok.

Poppi's social media posts tout that the sodas support glowing skin, gut health, extra immunity boosts and could help with bloating, Jackson added. The company's founder even went on the Today Show to say that the product is a drink that tastes good and is good for consumers, the suit said.

However, Poppi makers have to be aware that consuming free and added sugar is harmful, but they routinely omit that information in its marketing and advertising, Jackson alleged.

Jackson said she started buying packs of Poppi sodas from myriad retailers like Sprouts, Ralphs, Costco and Smart & Final, according to the complaint. Jackson said the sodas she bought came in different flavors including cola, orange, strawberry lemon, ginger ale and root beer.

Jackson alleged that she bought Poppi after reading and believing the statements on the label touting the benefits to gut health. She said that she wouldn't have bought them or would've paid less for them had she known the representations were misleading.

The sugars in Poppi could negatively impact the immune system, and high sugar intake could disrupt the microbiota balance and contribute to increased inflammation, the suit said. Consuming sugar also affects the permeability of one's gut barrier, allowing adverse substances to enter and ultimately contribute to the development of metabolic disorders and cognitive dysfunction, Jackson alleged.

The suit asserts violations of California's Unfair Competition Law, False Advertising Law and Consumer Legal Remedies Act against the defendant, and also asserts claims for breach of express warranty and breach of implied warranty of merchantability on behalf of a putative class of Golden State consumers who bought the Poppi sodas.

She asks the court to certify the proposed class, appoint her attorneys as class counsel and order Poppi makers to disgorge its profits, and pay restitution, compensatory and punitive damages, along with attorney fees and costs.

Representatives for the parties did not immediately respond to inquiries seeking comment Wednesday.

Jackson is represented by Jackson Fitzgerald, Melanie R. Monroe, Trevor Flynn and Peter Grazul of Fitzgerald Monroe Flynn PC.

Counsel information for the defendant was not immediately available.

The case is Vanessa Jackson v. VNGR Beverage LLC, case number 3:24-cv-06666, in the U.S. District Court for the Northern District of California.

--Editing by Rich Mills.



(Photo: Jason Doiy/ALM)

NEWS

Who Got the Work: Quinn Emanuel Enters Appearance for Snowflake Amid Flurry of Data Breach Class Actions

The complaint, filed on Aug. 5, is one of a national wave of class actions targeting Snowflake after a series of high-profile cyberattacks on the company compromised consumer data at over 165 businesses that implement its data storage services, including Ticketmaster and AT&T.

September 26, 2024 at 09:34 AM

🕒 3 minute read

Big Data



Kat Black

What You Need to Know

- Quinn Emanuel Urquhart & Sullivan has entered an appearance for Snowflake in a pending data breach class action.
- The complaint is one of a torrent of cases targeting the cloud data storage provider following an April cyberattack that compromised consumer data at over 165 businesses that implement its services.
- A hearing is scheduled for a motion to consolidate all cases against Snowflake in an MDL on Sept. 26.

Quinn Emanuel Urquhart & Sullivan is set to defend Snowflake in a pending data breach class action against the cloud data platform and its co-defendants, Ticketmaster and Live Nation.

Quinn Emanuel Urquhart & Sullivan partner Stephen A. Broome entered an appearance for Snowflake on Sept. 18 in the U.S. District Court for the Central District of California. The case has been assigned to District Judge Stephen V. Wilson and Magistrate Judge Alka Sagar.

The complaint, filed on Aug. 5, is one of a national wave of class actions targeting Snowflake after a series of high-profile cyberattacks on the company compromised consumer data at over 165 businesses that implement its data storage services, including Ticketmaster and AT&T.

This action was surfaced by [Law.com Radar](#).

The claim, *Williams Yarbrough et al v. Ticketmaster LLC, et al*, accuses Snowflake of effectively causing a massive data breach in April that allegedly exposed the personally identifiable information of 560 million Ticketmaster customers by failing to implement appropriate industry standards for cybersecurity, such as multifactor authentication.

It alleges negligence per se; breach of implied contract; unjust enrichment; breach of the implied covenant of good faith and fair dealing. and violations of the California Consumer Privacy Act, the California Consumer Legal Remedies Act and the California Unfair Competition Law. Plaintiffs are seeking actual, nominal, statutory, consequential and punitive damages.

At least 15 [complaints](#) against Snowflake and its partnered organizations flooded federal courts in Montana, Florida, Texas, North Carolina and California last month. On July 29, Kopelowitz Ostrow filed a [memorandum of law](#) to transfer and consolidate all such federal cases in multidistrict litigation on behalf of Emmanuel Chaidez, the lead plaintiff in a class action brought against Snowflake in the US District Court for the District of Montana. The District of Montana was selected for the MDL since Snowflake maintains its headquarters in Bozeman, Montana.

According to the motion to transfer, the first data breach claim naming Snowflake as a defendant was filed in Montana on June 13. As of its filing, it said, 48 related actions were pending in 11 federal district courts. "This is a typical 'hub-and-spoke' data breach that occurred in April 2024, expected to involve over one hundred 'spokes and impacting hundreds of millions of people," it stated.

Per court documents, the United States Judicial Panel on Multidistrict Litigation has scheduled a hearing session on Chaidez's motion, *In Re: Snowflake, Inc., Data Security Breach Litigation*, on Thursday, Sept. 26 in the Fred D. Thompson U.S. Courthouse and Federal Building in Nashville, Tennessee. U.S. District Judge Stephen V. Wilson had previously issued an order that stayed the proceedings in *Yarbrough* pending the MDL panel's decision on Sept. 18.

Snowflake declined to comment on active litigation. Quinn Emanuel's Broome and the plaintiff's counsel at Francis Mailman Soumilas, Kohn, Swift & Graf, and Laukaitis Law did not immediately respond to requests for comment.

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

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You Might Like

John Quinn Goes Toe to Toe With Other Big Law Leaders in Podcast

By Roy Strom 2024-09-26T05:05:01000-04:00

Welcome back to the [Big Law Business column](#) . I'm Roy Strom, and today we look at a law firm leader who moonlights as a podcast host. [Sign up](#) to receive this column in your Inbox on Thursday mornings.

I've asked Big Law leaders all kinds of questions for more than a decade. Speaking this week with Quinn Emanuel's founding partner, I tried a brand-new query: "What's the twinkle in John Quinn's eye?"

Forgive me. The answer didn't elicit much. But I had a reason (or an excuse) for asking: Quinn recently put the same question to the head of the world's largest law firm.

Quinn, the Los Angeles litigator at the helm of Quinn Emanuel, in recent months has taken on the role of a quasi journalist. He interviews Big Law leaders on his podcast, "Law, Disrupted," which launched in 2022 and covers a range of legal topics. He's hosted Marc Kasowitz, Brad Karp, and Jon Ballis, who run Kasowitz Benson Torres, Paul Weiss, and Kirkland & Ellis, respectively.

The episodes offer a rare peek into how Big Law leaders speak to each other—or at least how they converse with a microphone in front of them. For a reporter covering the business of law, it feels like a slight shift in the traditional media landscape. Law firm leaders are incredibly cautious in how and where they discuss their business, and they've rarely turned to new outlets like podcasts. Now, they have a new platform, a friendly space offered by a peer.

Quinn says he doesn't dedicate too much time to his side gig.

He told me he couldn't remember how the idea came up to interview Kasowitz, the first of his Big Law leaders to join the podcast. It seemed to Quinn, he said, like a natural fit. Law firm leaders are "just another category" of lawyer, he said, for a podcast that speaks with attorneys about the work they do.

Outside of the podcast, he said he doesn't speak to other law firm leaders about their business very frequently.

My favorite parts of the episodes with Big Law leaders are when Quinn attempts what seems like his impression of a journalist, imploring Karp and Ballis to give him "a scoop."

Trying to break news with Kirkland's leader, he asked: "What's the twinkle in Jon Ballis' eye?"

For his part, Ballis said the firm builds practices around new ways its private equity clients are using money. He cited a recent push by large asset managers to provide retail access to alternative capital.

Quinn did manage to pull out some other newsy tidbits from the Kirkland chair: The firm's litigation business will approach \$2 billion in revenue on its own this year. Ballis also hinted that the firm overall may break the \$8 billion total revenue barrier this year.

As an interviewer and their peer, Quinn has the advantage of forming questions from his own experience. For instance, with Ballis, he predicted Kirkland would open its next office in Singapore, joking he knew that because Kirkland had previously opened offices in cities Quinn Emanuel had recently entered.



John Quinn

Marco Bello/Bloomberg

“I try to be friendly, but maybe a little bit challenging too,” Quinn told me. “I don’t get in their faces. I mean, they don’t have to do these interviews.”

He does challenge his guests.

He told Ballis how Quinn Emanuel pitches clients to work on disputes arising from deals Kirkland lawyers drafted. He tells potential clients that Kirkland’s litigators aren’t disinterested enough to view the disputes objectively, he said. Ballis pushed back, saying Kirkland’s litigators deserve more credit.

Quinn confronted Karp with accusations that the Paul Weiss leader was responsible for an increase in partners moving between firms.

“There are people out there that blame you for this,” Quinn said on the podcast. “This is Brad Karp, going out there with a checkbook and writing big checks.”

“I think that would be misplaced,” Karp responded. The firm’s increase in lateral partner acquisitions is a reaction to a “couple of firms” who were successful in recruiting top partners from the best firms, he said.

Quinn views the podcast mostly as a marketing opportunity, helping his firm gain “mind share.” In at least one case, he said a client called after listening to a podcast and hired the firm.

He’s never spent more than an hour preparing for an interview, rarely devoting even 30 minutes, he said.

He doesn’t style the podcast off any others. That would be difficult, considering he doesn’t listen to podcasts. He prefers audio books—histories and biographies but not fiction—finishing one per week.

“I’m a genuinely curious person and I just go where my own curiosity takes me,” he said, asked to describe his interview style. “And I’m also kind of like most other lawyers, I’m compulsive. So I try to cover the subject.”

Quinn told me the Big Law leader interviews generate “above average” listeners compared to his other podcasts. But he doesn’t have any other leaders lined up for interviews at the moment.

“I have a couple of ideas,” he said.

Worth Your Time

On M&A: Simpson Thacher & Bartlett, Kirkland & Ellis, and Fenwick & West advised on the acquisition of software provider Smartsheet Inc. for about \$8.4 billion by Blackstone Inc. and Vista Equity Partners, Mahira Dayal [reports](#).

On Bankruptcy: A former Jackson Walker attorney caught up in a judicial scandal over her relationship with a prominent ex-bankruptcy judge has asked a court to stop a government subpoena seeking her personal bank records as part of a probe, James Nani [reports](#).

On Antisemitism: City University of New York must revamp its hate speech policies, according to a Latham & Watkins report responding to antisemitism and discrimination on campuses, Tatyana

Some top partners in BigLaw will bill nearly \$3,000 per hour next year, data says

 [abajournal.com/news/article/some-top-partners-in-biglaw-will-bill-nearly-3000-an-hour-next-year-report-says](https://www.abajournal.com/news/article/some-top-partners-in-biglaw-will-bill-nearly-3000-an-hour-next-year-report-says)

Partners

By Debra Cassens Weiss

September 26, 2024, 12:07 pm CDT

Billing rates for some of the nation's highest-grossing law firms are expected to continue an upward climb next year. (Image from Shutterstock)

Billing rates for some of the nation's highest-grossing law firms are expected to continue an upward climb next year.

Some senior partners are expected to bill nearly \$3,000 per hour, and a few might top that amount, Law.com reports in a story citing data by Valeo Partners, which analyzes public disclosure documents to discern upcoming rate changes.

Currently, nine firms have standard hourly rates for senior partners that range from about \$2,400 to \$2,875, according to Chuck Chandler, the CEO of Valeo Partners. Seventeen others will be in that range by 2025, he told Law.com.

Standard billing rates for the nation's 50 top-grossing firms, however, are expected to be \$2,100 for senior partners and \$1,900 for other partners.

Valeo Partners didn't disclose which firms are charging the highest rates for senior partners. Bankruptcy filings reveal, however, that some top partners billed \$2,720 per hour this year at Wilson Sonsini Goodrich & Rosati and billed \$2,590 per hour last year at McDermott Will & Emery, according to Law.com.

Bankruptcy filings from 2024 reveal that some senior associates billed \$1,575 per hour at Sullivan & Cromwell and \$1,560 per hour at Paul, Weiss, Rifkind, Wharton & Garrison.

Hat tip to Above the Law.



U.S. Court of Appeals for the Ninth Circuit Judge Danielle Forrest. Photo: Diego M. Radzinski/ALM

'Error in Our Case Law': 9th Circuit Overturns False Claims Act First-to-File Precedent

"When our law is wrong, it is our duty to correct it," Judge Danielle Forrest wrote for the Ninth Circuit.

September 25, 2024 at 04:34 PM

🕒 4 minute read

Whistleblower Laws



Avalon Zoppo

The original version of this story was published on National Law Journal

Judges cannot dismiss federal False Claims Act actions based on the law's first-to-file rule on jurisdictional grounds, the full U.S. Court of Appeals for the Ninth Circuit ruled Tuesday in overturning its own precedent.

The en banc decision means defendants now bear the burden of persuading courts to toss FCA actions under the first-to-file bar, rather than be entitled to dismissal if a claim has already been filed, said William Hanagami, an attorney for two individuals who filed a qui tam action alleging Medicare fraud by health care company Kaiser.

The first-to-file rule forbids FCA claims if they are "related" to earlier-filed, pending FCA actions against the same defendants.

"[The Ninth Circuit ruling] shifts the burden on the defendant to establish that the first-to-file bar applies, and if they do meet that burden, then the burden shifts over to the relator to show that it does not," Hanagami said following the court's ruling. "My clients are pleased because if the Ninth Circuit had not ruled the way they did, essentially, the cases would be over."

O'Melveny & Myers, which represented Kaiser, did not immediately return a request for comment Wednesday.

The circuits disagree over whether the first-to-file bar is jurisdictional.

The Ninth Circuit, in overruling its 2015 precedential decision *United States ex rel. Hartpence v. Kinetic Concepts*, joins the D.C., First, Second and Sixth circuits in saying the bar is nonjurisdictional. The Fourth, Fifth and Tenth circuits are on the other side of the split.

The unanimous 11-member en banc court relied on a U.S. Supreme Court ruling from last year, *MOAC Mall Holdings v. Transform Holdco*, that held a statutory bar is jurisdictional only if Congress clearly says so.

Here, the judges said the FCA does not explicitly state that the first-to-file rule is jurisdictional.

"Rather, the text speaks only to who may bring an action and when," Judge Danielle Forrest wrote for the Ninth Circuit. "It says nothing about the 'court's adjudicatory authority.' Nor does it include any other textual clue that points to jurisdiction.

"When our law is wrong, it is our duty to correct it," Forrest added. "This case brings to light an error in our case law. All we do today as an en banc court is bring ourselves in line with current Supreme Court doctrine."

The Ninth Circuit sent the case back to a three-judge panel to decide if the first-to-file rule bars the FCA complaint against Kaiser.

Concurring with her own opinion, Forrest said the circuit wrongly treats dicta as binding law, which led to the incorrect earlier ruling that the first-to-file bar is jurisdictional.

She said the circuit first held the first-to-file rule to be jurisdictional in a 2001 case without any explanation, and then cited that ruling again in an en banc opinion more than a decade later.

Elevating dicta—judges' opinions on legal issues that don't arise in a case—to binding law leads to "unnecessary inefficiency and wastes resources," wrote Forrest, joined by Judge Patrick Bumatay.

"Fixing our error regarding the False Claims Act's first-to-file rule is good, but the proper role of dicta is what we really need to set right," Forrest added. "Our treatment of dicta is contrary to our common-law tradition, the jurisprudence of the Supreme Court and all our sister circuits, and our ... constitutional role. It is within our power to get back on track."

The appeal is *Stein v. Kaiser Foundation Health Plan*, No. 22-15862.

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You Might Like

Bloomberg Law News 2024-09-26T13:07:20662400818-04:00

Super Micro Probed by US Following Hindenburg Report, WSJ Says

By Sabrina Willmer2024-09-26T11:35:19803-04:00

Super Micro Computer Inc. is under investigation by the US Justice Department following a short-seller report that raised questions about the company's accounting practices, the Wall Street Journal reported.

A prosecutor at the US attorney's office in San Francisco recently reached out to people who possibly held relevant information, according to the report. The prosecutor was seeking information that appeared to be related to a former employee who accused the company of accounting violations and had earlier filed a whistleblower lawsuit against the company and its chief executive officer, according to the report.

The shares fell as much as 17% to \$382.29 in New York on Thursday, marking the biggest decline in almost a month. They had been up 61% this year through Wednesday.

Representatives of Super Micro Computer and the Justice Department didn't immediately respond to requests for comment.

In August, Hindenburg Research [wrote](#) that the company had "glaring accounting red flags, evidence of undisclosed related party transactions, sanctions and export control failures, and customer issues."

--With assistance from **Chris Strohm** and Ian King.

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EXCLUSIVE TECHNOLOGY

Justice Department Probes Server Maker Super Micro Computer

Former employee accused AI server maker of accounting violations

By [Jonathan Weil](#) [Follow](#) and [Ben Foldy](#) [Follow](#)

Sept. 26, 2024 10:47 am ET



Super Micro Computer's headquarters in San Jose, Calif. PHOTO: DAVID PAUL MORRIS/BLOOMBERG NEWS

Super Micro Computer **SMCI -15.57% ▼**, the server maker that saw its business take off with the artificial-intelligence boom, is being probed by the Justice Department following a critical report by an activist short-selling firm, according to people familiar with the matter.

The probe is at an early stage, the people said. A prosecutor at the U.S. attorney's office in San Francisco recently has contacted people potentially holding relevant information.

The prosecutor asked for information that appeared to be connected to a former employee who accused the company of accounting violations. The former

employee filed a whistleblower lawsuit in April against Super Micro and its chief executive.

A Super Micro spokesman declined to comment, as did a spokesman for the U.S. attorney's office.

Short seller Hindenburg Research published its report about Super Micro on Aug. 27, and said it had placed bets against the company's stock. The report focused in part on allegations made by the former employee, Bob Luong, as well as transactions between Super Micro and companies run by family members of its chief executive, Charles Liang.

Shares of Super Micro surged with the bull market in AI-themed stocks. The company, commonly known as Supermicro, makes specialized servers that use the chips Nvidia designs for generative AI.

The stock rose 14-fold from the start of 2023 through March and has since tumbled 59%. At its peak, the company was worth \$66 billion.

Super Micro in 2020 paid \$17.5 million to settle Securities and Exchange Commission claims of widespread accounting violations, without admitting or denying the accusations. The SEC also reached a settlement with a former Super Micro chief financial officer, and it required Liang to reimburse the company \$2.1 million in stock-sale profits even though it didn't accuse Liang of misconduct.

In his lawsuit, Luong said Super Micro fired several employees associated with the past accounting violations, only to hire them back later. Hindenburg highlighted the same point in its report. Hindenburg also said it had found instances of Super Micro products being shipped to companies in Russia after the war in Ukraine began, despite U.S. sanctions.

On Aug. 28, the day after the Hindenburg report, Super Micro said it would be late filing its fiscal 2024 annual report with the SEC. The company soon afterward said its board of directors had formed a committee "to review certain of the company's internal controls and other matters." The company still hasn't filed its annual report.

In a Sept. 3 letter to customers, Liang said the short-seller report "contains false or inaccurate statements about our company," and that "we will address these

statements in due course.”

Liang said the company didn’t anticipate making any significant changes in its previously released financial results for fiscal 2024.

Luong in his lawsuit alleged Super Micro in some instances recognized revenue improperly from fiscal 2020 to 2022. He said in some cases it booked revenue on sales that hadn’t been completed. He said another method for booking revenue prematurely “was to ship and bill certain customers for incomplete equipment that was not ready for sale.”

Luong said Super Micro fired him in April 2023, after placing him on unpaid leave months earlier. His last job there was as a general manager responsible for providing leadership and guidance for Super Micro’s global service team.

Super Micro has asked the court to put Luong’s lawsuit on hold and send his claims to arbitration. A hearing on the company’s request is scheduled for Thursday.

Tanya Gomeran, an attorney for Luong, said in a statement, “Mr. Luong came forward to report what he believed were significant accounting irregularities, and instead of taking steps to investigate or fix these problems they terminated him and swept the matter under the rug.”

Write to Jonathan Weil at jonathan.weil@wsj.com and Ben Foldy at ben.foldy@wsj.com

Videos

US Senate votes to hold Steward Health CEO in criminal contempt

 [reuters.com/world/us/us-senate-votes-hold-steward-health-ceo-criminal-contempt-2024-09-25](https://www.reuters.com/world/us/us-senate-votes-hold-steward-health-ceo-criminal-contempt-2024-09-25)

Nate Raymond, Dietrich Knauth

Signs on the doors of the shuttered Carney Hospital, which is owned by bankrupt hospital operator Steward Health Care, read "Hospital Closed" in various languages in Boston, Massachusetts, U.S., September 13, 2024. REUTERS/Brian Snyder/File Photo Purchase Licensing Rights , opens new tab

Sept 25 (Reuters) - The U.S. Senate voted to hold Steward Health Care CEO Ralph de la Torre in criminal contempt of Congress on Wednesday after the executive refused to testify about cost-cutting decisions at the company's 31 hospitals before it filed for bankruptcy.

The unanimous vote came after de la Torre declined to attend a Sept. 12 hearing before the Senate Committee on Health, Education, Labor and Pensions, even after he was subpoenaed, that examined Steward's financial decline.

The committee instead heard testimony from nurses and public officials who said that Steward prioritized corporate profits over patient care. The panel voted last week to issue a contempt resolution, leading to Wednesday's vote in the full Senate.

Senator Bernie Sanders, who chairs the committee, said it was important that the full Senate send a message that even a wealthy individual like de la Torre, who could afford yachts, jets and high-priced lawyers, was "not above the law."

"If you defy the congressional subpoena, you will be held accountable no matter who you are or how well connected you may be," Sanders said.

The vote marked the first time since 1971 that the Senate had voted to make a criminal contempt referral to the U.S. Department of Justice, which would ultimately decide whether to bring charges.

"For everyone who has suffered due to Ralph de la Torre's greed and Steward's collapse, I hope the Department of Justice will move swiftly to bring charges against him," said Democratic Senator Ed Markey of Massachusetts, where several impacted hospitals were based.

Rebecca Kral, a spokesperson for de la Torre, in a statement called the vote disappointing, saying it ignored his right under the U.S. Constitution's Fifth Amendment not to incriminate himself.

"The U.S. Constitution stands above the government to protect all Americans from precisely the kind of assault on our rights that we are witnessing here," Kral said.

Steward declined to comment.

Steward, the largest privately owned hospital network in the United States, filed for bankruptcy in May, seeking to sell all of its 31 hospitals and address its \$9 billion in debt. The company has sold several hospitals since filing for bankruptcy.

Federal prosecutors in Boston have been investigating de la Torre and Steward, a person familiar with the matter has said.

De la Torre had previously said that it would be inappropriate for him to testify before Congress about Steward's finances while the company is negotiating court-supervised bankruptcy settlements.

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Reporting by Nate Raymond in Boston and Dietrich Knauth in New York; Editing by Bill Berkrot and Mark Porter

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Matt Levine's Money Stuff: Masimo Has a New Boss

By Matt Levine 2024-09-25T14:31:14419-04:00

Masimo

"Who controls a company," I often ask around here, and generally I am writing about some weird corner case in which the standard legal rules don't exactly match up with the practical realities. Sometimes they do though.

For instance, if you are the founder and chief executive officer of a tech company, and you take the company public, and the company has a single class of stock and you [own about 9% of it](#), then you work for the shareholders, but it is not exactly easy for them to supervise you. You are the CEO, and you mostly get to make the decisions. You answer to the board of directors, who are elected by the shareholders, but the directors are probably friendlier with you than they are with the shareholders, and as we discussed yesterday the election of directors is usually just symbolic.

But if shareholders are really unhappy with you, there can be a proxy fight, which is a binding, non-symbolic director election: An activist shareholder can nominate its own director candidates to join the board, make changes and supervise you. This is expensive and difficult, but sometimes an activist will win some board seats. You can protect yourself, though, with a "classified board": Instead of having all of your directors elected each year, the directors have staggered three-year terms, so only one-third of them are elected each year. Then, even if an activist wins a proxy fight, it will get only one-third of the board seats, and can't outvote you.

Of course at that point the board meetings could get very awkward, since your board is now two-thirds your buddies and one-third your critics. You can protect yourself against *that*, though, by, like, giving those guys the wrong address for the board meetings? Or, at least, you can freeze out the new directors a bit: They are formally in charge of the company, but you are *actually* in charge of the company, and if they ask to review documents or meet with your division heads you can just ignore them. The employees are loyal to you, not them.

But if you do that, the shareholders might get even more annoyed, and the activist might run *another* proxy fight next year. And if it wins that proxy fight, it will control *two-thirds* of the board, not just one-

third. And then a majority of directors will actually be able to make decisions about the company, including firing you.

It takes a while, but at that point you really have lost control of the company and might as well just [quit in a huff](#):

Joe Kiani has resigned as chief executive of Masimo, the US-based medical technology company he founded more than three decades ago.

Results published in a securities filing on Wednesday showed Kiani and another director were defeated in a shareholder vote by nominees from the hedge fund Politan Capital, which now controls the board.

The filing also said Kiani had sued the company to ensure he received a change of control payment that had been previously valued at more than \$400mn.

Here are [the filing](#) and the [press release](#). *Last* year, Politan [won](#) a bitter [proxy fight](#) and got two of its candidates elected to the (at the time) five-member board. This apparently did not go over well with Kiani, the founder, CEO, board chairman and 9% owner of Masimo. [Politan says](#) that its directors (Quentin Koffey, who runs Politan, and Michelle Brennan, a former Johnson & Johnson executive) were frozen out of talking to employees:

Promptly after the 2023 Annual Meeting, and regularly thereafter, the 2023 Newly-Elected Directors requested the opportunity to meet and speak with senior management, to receive and analyze information about the Company and its financial condition and operations, and to participate in other customary onboarding and orientation activities for new Board members. The Politan Parties believe that the Company failed to properly act on these requests.

And potential mergers-and-acquisitions decisions:

On March 20, 2024, the Company entered into a confidentiality agreement with a potential joint venture partner in connection with the separation of the consumer business. The full Board knew nothing about the existence of the joint venture partner or any discussions that had occurred. The full Board was never notified that a confidentiality agreement had been entered into or that any confidential information had been exchanged until nearly eight weeks later on May 13, 2024.

So Politan [nominated](#) two more directors this year, there was [another proxy fight](#), there was a fairly nasty campaign with lawsuits and claims of “[empty voting](#),” and the Financial Times [reported last week](#):

A sense of fatigue around Kiani is apparent. People close to Masimo and Kiani admitted to the FT that shareholders had become exasperated by the founder's aggressive 2023 proxy campaign tactics against Politan, even if they also believe giving up control to the hedge fund was the wrong move.

The shareholder vote was held last Thursday, and today Politan was [declared the winner](#). Politan now has four of the six directors. So Kiani quit and sued for a payout under his [employment agreement](#), and Brennan took over as interim CEO. The stock is up since the vote; apparently the Kiani fatigue was real.

Once, in discussing another “who controls a company” situation, I wrote:

It is sort of a miracle that hostile takeovers and proxy fights can work. You've got a company. The company is a collection of people who all go to the same building and do things together. ... As in any group there will be some infighting and dysfunction but it is basically a group of people who have come together for a common purpose and spend a lot of time together working toward that purpose.

And then one day some stranger shows up and says “I have bought 4% of your company and I want you to do different things.” ...

You could imagine it not working. You could imagine the CEO barricading himself in his office and saying “who put you in charge? ‘Shareholders’? Sounds fake.” ...

A company is built around a set of fairly thick social ties, and also around knowing the computer passwords and having keycards that work on the doors and stuff like that. And then it is connected to its shareholders by rather thin social ties, and when the shareholders decide to come in and mess with the internal workings it is strange that they can.

And you see a bit of that here. Shareholders elected new directors last year, but the company — Kiani and his executives — allegedly froze them out; the employees and executives allegedly wouldn't talk to them or share information. In this year's [proxy statement](#), Kiani wrote:

This latest proxy contest—which threatens to hand control of Masimo to an activist investor—puts both our recent momentum and Masimo’s spirit of innovation and success at risk. Our relationships with our customers and partners, and ultimately our value to stockholders, depend on the strong culture of innovation, honesty and unity that we have developed over 35 years. Similarly, our key talent, responsible for the advances that have driven and will drive our growth, deeply values Masimo’s vision and commitment to innovation. If we lose our vision, our spirit and our talent through an ill-conceived change of control, I fear the long-term growth and potential in which we all have so much invested will die on the vine.

I *think* you can read that to say “if we lose this proxy fight, I will quit, and a lot of our best employees will go with me.” And in fact Masimo’s proxy-fight website — protectmasimosfuture.com — includes [letters](#) from various executives and employees saying [things like](#) “if Joe is no longer at Masimo, I would have to seriously contemplate if I would like to continue working at Masimo and I am sure many others feel the same” [and](#) “we, the undersigned from Masimo Healthcare Engineering, wanted you to be aware that we may not continue with the company if Joe Kiani is replaced by Quentin Koffey and Politan Capital.” Here’s one from [Bilal Muhsin](#), saying “I intend to resign my position as Masimo’s Chief Operating Officer in the event that Joe is removed as Chairman and CEO ... and have no intention of remaining with the company if Quentin Koffey and Politan take control of it.”

And then Politan won, and Kiani really did quit. And I suppose it is possible that the culture that made Masimo work will fall apart in short order now that its founder is gone, that “the company” is not so much the set of assets and patents and public-company institutions that the shareholders control, but rather the set of social ties and relationships and knowledge that Kiani controls.

Or not. From [today’s press release](#) about the management changes:

Chief Financial Officer Micah Young and Chief Operating Officer Bilal Muhsin, added:

“We are excited about the strong momentum of the business and its future prospects for growth. We look forward to providing more details on the upcoming third quarter earnings call next month.”

Muhsin “intend[ed] to resign” if Politan won its proxy fight, and “[had] no intention of remaining,” but it’s easier to say that you’ll quit *if* your boss quits than it is to actually quit when he does.

Operating

What does a private equity firm do? Here are two possible answers. One is an abstract financial answer, the sort of answer that a finance professor might give. What a private equity firm does, in this view, is essentially *levered small-cap value investing*:

- It buys smaller companies with fairly low stock prices relative to their earnings, often companies with steady earnings in unglamorous or declining industries.
- It borrows money to pay for them.
- It waits a few years and then sells them for more than it paid for them.

This is, often, a lucrative strategy. Value investing often *works* — often companies with low stock prices relative to their earnings eventually get higher stock prices — and if you add leverage on top of it then you magnify those returns. The private equity business model, of borrowing money to acquire companies with those characteristics, just happens to track an investing approach that tends to do well.

And so here is a 2015 paper by Erik Stafford, a finance professor at Harvard Business School, titled “[Replicating Private Equity with Value Investing, Homemade Leverage, and Hold-to-Maturity Accounting](#),” that basically argues you can replicate private equity returns yourself (and save on fees) by (1) buying “a passive portfolio of small, low EBITDA multiple stocks,” (2) using “modest amounts of leverage” and (3) not looking at the stock prices for a few years. And [people](#) sometimes [build](#) exchange-traded funds that capitalize on this idea, trying to buy shares of public companies with financial characteristics similar to private equity investments.

This all strikes me as theoretically appealing but also a bit rude? Because the other possible answer to the question “what does a private equity firm do” involves describing, you know, what it *does* all day. It employs a lot of highly paid, well trained professionals who work long hours. Much of what they do is try to find companies that are undervalued, negotiate to buy them and borrow the money to do so. But also then, you know, the firm owns those companies for a while. The companies have board meetings, and the private equity firm sends its employees to the board meetings. It hires and fires the executives of the companies. It approves their budgets and business plans and gives them advice on cost-cutting and operations. It sometimes buys multiple companies in the same industry and combines them to try to get synergies.

Private equity firms, in other words, are not in their day-to-day operations mainly in the business of passively buying an index of stocks with low EBITDA multiples. They are mainly in the business of

owning and running companies. They are in the business of business; they make their money by running companies successfully rather than by leveraged exposure to the value factor.

The great thing about finance is that both things can be true, that a private equity firm can employ all those people working so hard to find and manage the best possible companies, and a finance professor can be like “ah yes that’s leveraged exposure to the value factor” and be basically correct. Everything they actually do all day can be extracted away into a factor model. The work of a private equity firm can be described in a detailed practical way and in an abstract theoretical way, and those descriptions are somehow both accurate and completely unrelated to each other.

Anyway in recent years value investing has **worked** less **well** than it used to, which means that a strategy like “passive leveraged exposure to value” is less appealing than it used to be, which means that private equity firms have to do more stuff? Bloomberg’s Marion Halftermeyer and Layan Odeh report:

Financial engineering just isn’t working as well as it once did for private equity shops. Some of the biggest, including Goldman Sachs Group Inc. and Blackstone Inc., have added veterans with operations experience from industry giants like Walmart Inc. and Honeywell International Inc. Others like Brookfield Asset Management Ltd. and Partners Group are leaning even more into their roots as operators.

They’re looking for tangible results such as wider margins and higher cash flow instead of gauzy “multiple expansion.” It’s a more hands-on approach that includes building five- and 10-year strategic growth plans for the companies they own, and sometimes helping them market and sell their products. Goldman, without being specific, said its efforts have yielded hundreds of millions of dollars in extra revenue.

“Helping companies operate well should always be an important initiative,” said Lou D’Ambrosio, the former CEO of Sears Holdings who leads Goldman’s unit devoted to boosting growth at the firm’s private holdings. “But if several years ago it was a ‘nice to have,’ now it’s a ‘need to have.’”

They need it because private equity firms are contending with a drought in the deals market and holding periods as much as three years longer than historical averages. Acquisitions that seemed like a good idea when interest rates were at rock bottom are stuck shoveling cash into debt payments, and meanwhile, private equity clients are clamoring to receive long-delayed payouts.

Yes “buy a portfolio of small-cap low-multiple companies with leverage” used to be a good enough strategy that “help them operate well” was a “nice to have” addition, but now, if you are going to own a bunch of companies, you *have* to run them well too.

Cell phones

We keep talking about it because the SEC [keeps doing it](#):

The Securities and Exchange Commission [yesterday] announced charges against 12 firms, comprising broker-dealers, investment advisers, and one dually-registered broker-dealer and investment adviser, for widespread and longstanding failures by the firms and their personnel to maintain and preserve electronic communications in violation of recordkeeping provisions of the federal securities laws.

Yesterday's fines for texting about work totaled more than \$88 million, ranging from \$325,000 for Focused Wealth Management Inc. up to \$35 million for Stifel, Nicolaus & Co. (“For example, a Stifel desk head exchanged numerous off-channel business-related text messages with at least 15 Stifel colleagues and about 10 brokerage customers, investors, or other market participants.”) But Qatalyst Partners LP won't pay a fine:

“Firms that self-report and otherwise cooperate with the SEC's investigations may receive significantly reduced penalties. Here, despite recordkeeping failures that involved communications by senior leadership and persisted after our first recordkeeping matters were announced in 2021, Qatalyst took substantial steps to comply, self-reported, and remediated and, therefore, received a no-penalty resolution.”

Still Qatalyst got in trouble; [the SEC found](#) that Qatalyst “willfully violated Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder,” and censured it, because some of its employees “sent and received a number off-channel communications involving other Qatalyst personnel and Qatalyst's brokerage customers or other participants in the securities industry.”

Two SEC commissioners, Hester Peirce and Mark Uyeda, [dissented](#):

Under the standard applied in this case, even well-intentioned firms could find themselves in the

Commission's enforcement queue time and again. Qatalyst has been working to address the off-channel issue for at least sixteen years. The Commission's Order outlines some of the firm's efforts:

"As early as 2008, Qatalyst personnel were advised that the use of unapproved electronic communications methods, including on their personal devices, was not permitted, and they should not use personal email, chats or text messaging applications for business purposes, or forward work-related communications to unapproved applications on their personal devices. Qatalyst reinforced its policies at least annually with regular, mandatory training and reinforcement from compliance and senior management. Qatalyst personnel were specifically advised not to list personal phone numbers in email signatures."

Then, "beginning in March 2017, Qatalyst provided its personnel with a compliant text-messaging process that could retain business communications" and "instructed its personnel to use only this process to communicate about Qatalyst's broker-dealer business by text message." "Beginning in 2020, Qatalyst required all personnel to have a firm-issued device on which to conduct Qatalyst business, and encouraged personnel to use firm-issued devices when communicating with both business and personal contacts." Further updates to capture Slack and LinkedIn messages came in 2020 and 2022. Qatalyst trained its employees, monitored communications sent through firm-approved communication methods, and disciplined employees who violated the firm's policies. Even with all that, Qatalyst violated the recordkeeping requirements. ...

If we assess reasonableness based on whether policies and procedures always are being followed, firms will never escape our enforcement net. People are not perfect and so compliance will not be perfect—even at a firm that tries as hard as Qatalyst. Firing up our enforcement machinery every couple years to haul the industry in for headline-making penalties will not make people perfect, so firms will continue to discover violations of firm policies. We cannot enforce to perfection, but there is a way to achieve better compliance.

Qatalyst had policies saying that its employees shouldn't text about work on their personal phones, "prohibited personnel from responding substantively to, or initiating a substantive business conversation with, a firm customer" on unapproved channels or personal phones, and put a lot of effort into making sure that its employees followed those policies, including encouraging them "to use firm-issued devices when communicating with both business and personal contacts." (The idea being that if you use your monitored work phone for all of your personal texting, you'll be more likely to reach for it to do your business texting. Maybe you'll get rid of your personal phone entirely.) But if you have a lot of employees, will a few of them (1) keep their personal phones and (2) sometimes text about work from them? Absolutely, yes. (Will a few of them send WhatsApp messages about work? I

guess?) And so Qatalyst got in trouble. It didn't pay a fine, but it *could* have, and next time it might. Because there will be a next time! Because people will keep texting about work!

Anyway Peirce and Uyeda think this is a bad thing, and I suppose I agree, but it depends on what you are optimizing for. If your goal is something like "be fair to companies that are trying their best to keep records of all their business conversations," then, sure, censuring Qatalyst seems rough. If your goal is "maximally threaten companies so that they try even harder to keep records of all their business conversations," then censuring Qatalyst might be good.

And if — as I have suggested — the goal of the SEC's cell-phone fines program is to *maximize revenue*, by creating a machine for extracting fines from every securities firm, then this is *ideal*. Peirce and Uyeda object that the SEC has found a way to fine *every* financial firm, *every* few years, no matter what: "Firms will never escape our enforcement net," and "even at a firm that tries as hard as Qatalyst," the SEC can "[fire] up our enforcement machinery every couple years" to extract some more fines. Perpetual universal fines! You can see how a regulator might want that.

ESG bonuses

A minimal theory of "stakeholder capitalism" goes something like this:

- 1. Modern theory and practice mostly measure corporate chief executive officers on how much value they create for shareholders. The more the stock price goes up, the better the CEO has done, and the more she gets paid.
- 2. These things tend to be *relatively* easy to measure and hard to game: It's pretty easy to tell if the stock went up, and pretty hard to fake that.
- 3. CEOs who are really good at making the stock go up will make a lot of money.
- 4. But not every CEO will create a lot of shareholder value every year, and every CEO runs some *risk* of not creating enough value next year to get her bonus.
- 5. It is good, for CEOs, to muddy things a little bit. If 100% of your bonus is contingent on meeting pre-set net income milestones, and you don't meet those milestones, you get no bonus. If 50% of your bonus is contingent on those net income milestones, and 25% is contingent on Being a Good Corporate Citizen and 25% is based on Treating Employees Nicely, things are fuzzier. Those milestones might be softer and more subjective than the net income ones. They might leave some discretion to the board of directors, who are probably your buddies and want you to get paid.

The general point is that if the job of a CEO is to maximize shareholder value, there will be a lot of variance in CEO pay: Maximizing shareholder value is hard, and some people will be better at it than others.

But if the job of a CEO is to maximize shareholder value and *any other thing*, there will be less variance in CEO pay. Part of this is just that the variance might offset: Some CEOs might be good at shareholder value and bad at the other thing, some will be the opposite, and they'll both be lumped in the middle. But most of it is that the other thing will probably be fuzzier, easier to game and more CEO-friendly than maximizing the stock price.

Therefore, you should expect (many) CEOs to *want* to get paid for things other than value maximization, to make their compensation larger and less risky.

This was an argument I made a few years ago when the Business Roundtable, a group of chief executive officers, put out a statement saying that actually “the purpose of a corporation” is not just to make profits for shareholders but “to deliver value to all of [its stakeholders], for the future success of our companies, our communities and our country.” What that *means*, I think, is that the CEOs don't want to be held accountable to shareholders: “Hold us accountable to shareholders and also all of our stakeholders” means, in practice, “don't hold us accountable to anyone.”

Anyway here's a paper by Adam Badawi and Robert Bartlett, titled “[ESG Overperformance? Assessing the Use of ESG Targets in Executive Compensation Plans](#),” finding that, when US public companies pay their executives in part based on meeting environmental, social and governance targets, they pretty much always hit those targets:

We find that 315 of [S&P 500] firms (63.0%) include an ESG component in their executives' compensation and that the vast majority of these incentives are part of the annual incentive plan (AIA) rather than a part of the long-term incentive plan (LTIP). While executives miss all of their financial targets 22% of the time in our sample, we show that this outcome is exceptionally rare for ESG-based compensation. Only 6 of 247 (2%) firms that disclose an ESG performance incentive report missing all of the ESG targets.

One possible interpretation here is that corporate executives are much *more* focused on improving their ESG outcomes (and more skilled at doing so) than they are on increasing profits, so they meet ambitious ESG goals more reliably than they meet ambitious financial goals. That would not be a good interpretation:

We ask whether the ESG overperformance that we observe is associated with exceptional ESG outcomes or, instead, is related to governance deficiencies. Our findings that meeting ESG-based targets is not associated with improvements in ESG scores and that the presence of ESG-linked compensation is associated with more opposition in say-on-pay votes provides support for the weak governance theory over the exceptional performance theory.

Things happen

Justice Department [Sues Visa](#) for Monopolizing Debit Markets. UniCredit Flagged Commerzbank Interest to Germany Ahead of Move. UniCredit says it will not seek [Commerzbank board seat](#). US Mortgage Rates Fall Again, Triggering Big Wave of Refinancing. A Private-Equity Executive Pushes for [Workers' Stake](#) in U.S. Companies. FBI probes whether Silicon Valley venture firm [passed secrets to China](#). Money-market ETF. Star FTX Witness [Caroline Ellison](#) Sentenced to Two Years in Prison. "If Sam Walton had run Walmart the way a typical college president runs a university, there would just be one Walmart in Bentonville."

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- 1. It's not so relevant to what I'm discussing in the text, but "not looking at the stock prices for a few years" is important. (Stafford actually calls it "hold-to-maturity accounting of net asset value.") The pitch for private equity is not only that it offers better returns than public equity, but that it offers less volatility, because you can't see the stock price every day. We have talked about this somewhat questionable advantage and its critics.
- 2. Also we talked the other day about [this 2013 paper](#) arguing that Warren Buffett's track record can be largely explained by "his preference for cheap, safe, high-quality stocks combined with his consistent use of leverage to magnify returns while surviving the inevitable large absolute and relative drawdowns this entails," which is not *so* different from the abstract private equity model here.
- 3. Will they? I think a reasonable model is that in the future there will probably be some other popular form of communication — sending holograms or whatever — and it will be rolled out first by

general-purpose consumer-facing companies rather than secure archived financial chat providers. And so people will hologram each other all the time, and then some financial-services employees will hologram each other about work, and then they'll get fined. Because the SEC will take the view that *every future form of communication* is equivalent to a formal memo that needs to be preserved, rather than a face-to-face conversation that doesn't. I wrote once: "In like five years, technology — and the SEC's interpretation of the rules — will have advanced to the point that banks will get fined if their bankers talk about business with clients on the golf course. 'You should have been wearing your bank-issued virtual reality headset and recorded the conversation,' the SEC will say, or I guess 'you should have played golf in your bank's official metaverse, which records all golf conversations for compliance review, rather than on a physical golf course.' The golf course is an unofficial channel! No business allowed!"

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Securities Law News

Sept. 25, 2024, 3:48 PM PDT

FTX Examiner Clears Sullivan & Cromwell in Robinhood Shares Deal

By James Nani

- FTX's LedgerX deal likely can't be unwound, examiner finds
- Examiner can't find cause of US customer asset discrepancies

Bloomberg Law News 2024-09-26T10:43:39790573326-04:00

FTX Examiner Clears Sullivan & Cromwell in Robinhood Shares Deal

By James Nani 2024-09-25T18:48:30000-04:00

- FTX's LedgerX deal likely can't be unwound, examiner finds
- Examiner can't find cause of US customer asset discrepancies

FTX Trading Ltd. counsel Sullivan & Cromwell LLP wasn't conflicted and didn't ignore red flags in its role helping the crypto firm's co-founder Sam Bankman-Fried acquire a stake in Robinhood Markets Inc. worth more than \$600 million, a court-approved examiner said in a report made public Wednesday.

The examiner also concluded that the bankrupt cryptocurrency company likely doesn't have claims to unwind a money-losing deal for derivatives exchange LedgerX, which FTX bought for \$300 million but sold for just \$50 million, according to the examiner's latest report filed in the US Bankruptcy Court for the District of Delaware.

"The Debtors likely do not have any viable claims to avoid the LedgerX Transaction and recover value for the FTX Group bankruptcy estates," the examiner said.

Examiner and former federal prosecutor Robert J. Cleary was tasked by US Bankruptcy Judge John T. Dorsey to review potential conflicts of interest involving Sullivan & Cromwell; probe past investigations by FTX's current management team, its creditors, and government regulators; and determine whether other employees were involved in fraudulent activity before FTX's collapse in November 2022.

Cleary in a previous report said Sullivan & Cromwell shouldn't participate in the probe of the 2021 LedgerX purchase because the law firm was involved in the deal. In Cleary's last report, he was critical of several actions taken by Sullivan & Cromwell lawyers, but ultimately found it was acceptable for the firm to be hired as FTX bankruptcy counsel.

"Sullivan & Cromwell is pleased that the Examiner has again found no truth to allegations about our prepetition work for FTX," a Sullivan & Cromwell spokesperson said in an email Wednesday. "Our focus remains fully on achieving plan confirmation to facilitate the return of recovered assets to creditors."

Claims against LedgerX would likely fail because there's not enough evidence that the purchase was part of FTX's fraudulent scheme, and it would be difficult to show FTX received less than the company's value for the exchange, the examiner said.

Robinhood Deal

Sullivan & Cromwell didn't learn of any FTX misconduct as part of its Robinhood-related work, the examiner said. The firm was paid \$195,000 for legal services to Bankman-Fried as part of a May 2022 purchase of a 7.6% stake—more than 55 million shares—in Robinhood.

Antigua-based Emergent Fidelity Technologies Ltd. bought the shares for about \$648.3 million, according to US Securities and Exchange Commission records.

Bankman-Fried misappropriated FTX customer funds to buy the Robinhood shares, according to the examiner's first report issued in May.

The examiner also found that FTX.US, like other components of FTX, "maintained an egregiously poor internal control environment" when it came to managing and reconciling customer assets. US customers used the FTX.US exchange instead of FTX.com.

Because of that poor bookkeeping, Cleary said he couldn't "definitely determine" the root causes of balance sheet discrepancies in customer assets in November 2022, or whether there were shortfalls before that time.

"The Examiner did not find evidence that FTX.US customer assets were misappropriated in the same manner as FTX.com customer assets," the examiner said.

Nonetheless, because of systemic deficiencies, FTX.US customer assets "were at grave risk of loss and misuse and the business was wholly unprepared to confirm that customer assets were sufficient to satisfy customer liabilities in a time of crisis," the examiner said.

Cleary and his firm, Patterson Belknap Webb & Tyler LLP, declined to comment.

An FTX spokesperson told Bloomberg Law via email that the company is pleased with the latest examiner findings, which are consistent with its views that it abided by the law.

"The bankruptcy estate and its professionals acted quickly, decisively and prudently to preserve assets of the estate and to avoid more substantial harm to creditors that could have arisen absent a chapter 11 filing," the spokesperson said.

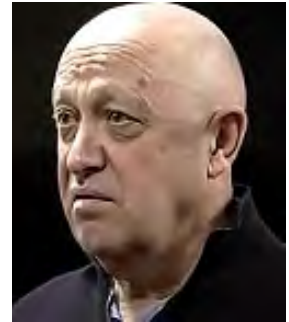
The case is FTX Trading Ltd. , Bankr. D. Del., No. 22-11068, report 9/25/24 .

What Did Madoff, Jeffrey Epstein and Sanctioned Russian Mercenary Group, Wagner, Have in Common? They All Banked at JPMorgan Chase

 wallstreetonparade.com/2024/09/what-did-madoff-jeffrey-epstein-and-sanctioned-russian-mercenary-group-wagner-have-in-common-they-all-banked-at-jpmorgan-chase

By Pam Martens and Russ Martens: September 26, 2024 ~

On Tuesday, the Financial Times broke the story that JPMorgan Chase and HSBC had been named in a new report by the U.S.-based think tank, the Center for Advanced Defense Studies (C4ADS), for their role in laundering payments for the notorious mercenary group, Wagner, that has supported Russian military operations in Ukraine, the Middle East, Latin America and Africa. The think tank wrote that the involvement of the banks with Wagner had been done “unwittingly.”



Yevgeniy Prigozhin

That’s also how JPMorgan Chase explained its money laundering for Ponzi kingpin Bernie Madoff for decades and for the international sex trafficker of children, Jeffrey Epstein, for at least 15 years.

Curiously, neither the Wall Street Journal nor the New York Times found the information in the think tank’s report worthy of sharing with their readers. *Wall Street On Parade*, on the other hand, finds it highly relevant to report to our readers that the largest bank in the United States, with a storied history of laundering money for unsavory characters over long stretches of time, has now been linked to Wagner, which was sanctioned by the U.S. Treasury and designated as a Russian proxy and Transnational Criminal Organization. The U.S. Treasury wrote this about Wagner last January:

“PMC Wagner (Wagner Group) is a Russian private military company led by Yevgeniy Prigozhin, a Putin crony and the target of multiple U.S. sanctions. Wagner Group has been involved in Kremlin-backed combat operations around the world in support of Putin’s war on Ukraine. As Russia’s military has struggled on the battlefield, Putin has resorted to relying on the Wagner Group to continue his war of choice. The Wagner Group has also meddled and destabilized countries in Africa, committing widespread human rights abuses and extorting natural resources from their people. Today, the Wagner Group is being redesignated pursuant to Executive Order (E.O.) 13581, as amended by E.O. 13863, for being a foreign person that constitutes a significant transnational criminal organization. Wagner personnel have engaged in an ongoing pattern of serious criminal activity, including mass executions, rape, child abductions, and physical abuse in the Central African Republic (CAR) and Mali.”

Prigozhin died in a plane crash on August 23, 2023. The private jet was carrying him and his top lieutenants. All 10 people on board the jet were killed in the crash, which came just two months after Prigozhin had staged a failed Wagner mutiny against Russian military leadership.

The think tank revelations come one year after JPMorgan Chase settled two federal lawsuits for a combined \$365 million which alleged that the bank had laundered money for the international sex trafficker of children, Jeffrey Epstein, from at least 1998 to 2013.

One of the lawsuits had been brought by Epstein's sex assault victims. JPMorgan Chase settled that case for \$290 million after the plaintiffs' lawyers agreed to dubious terms.

The second lawsuit was brought by the Attorney General of the U.S. Virgin Islands, where Epstein had owned a private island compound. JPMorgan Chase was able to settle that case for just \$75 million after launching a scorched-earth public relations campaign that focused on politicians in the U.S. Virgin Islands' unsavory ties to Epstein themselves.

Lawyers for the bank seemed particularly angry at just how much internal bank information the Attorney General for the U.S. Virgin Islands chose to share with the American people. In one court filing, the Attorney General wrote this:

"Even if participation requires active engagement...there is no genuine dispute that JPMorgan actively participated in Epstein's sex-trafficking venture from 2006 until 2019. The Court found allegations that the Bank allowed Epstein to use its accounts to send dozens of payments to then-known co-conspirators [redacted] provided excessive and unusual amounts of cash to Epstein; and structured cash withdrawals so that those withdrawals would not appear suspicious 'went well beyond merely providing their usual [banking] services to Jeffrey Epstein and his affiliated entities' and were sufficient to allege active engagement."

The U.S. Virgin Islands had previously alerted the court to the unfathomable sums of hard cash that Epstein was able to take from the accounts he maintained at JPMorgan Chase without the bank filing the legally mandated Suspicious Activity Reports (SARs) to law enforcement. In one court filing, it tallied up the giant piles of cash, writing as follows:

"Between September 2003 and November 2013, or approximately ten years, JPMorgan handled more than \$5 million in outgoing cash transactions for Epstein — ignoring its own policy discouraging large cash withdrawals...."

The U.S. Virgin Islands' attorneys cited to internal emails at JPMorgan Chase showing that employees at the bank were aware of Epstein's "[c]ash withdrawals ... made in amounts for \$40,000 to \$80,000 several times a month" while also being aware that Epstein paid his underage sexual assault victims in cash.

Epstein was found dead in his New York City jail cell on August 10, 2019 while awaiting trial. The Medical Examiner ruled his death a suicide.

There is a serious and deeply disturbing pattern of looking the other way at crime in order to gain a business advantage at JPMorgan Chase under its long-tenured Chairman and CEO, Jamie Dimon. The bank has admitted to an unprecedented five criminal felony counts brought against it by the U.S. Department of Justice since 2014. Two of those felony counts were for money laundering for Ponzi mastermind Bernie Madoff.

In January 2014, JPMorgan Chase paid \$2.6 billion in fines and restitution, signed a deferred prosecution agreement with the Justice Department, and walked away from their 22-year involvement with Bernie Madoff's Ponzi scheme.

The Justice Department prosecutors who settled the case against JPMorgan Chase used much of the investigative material from Irving Picard, the Trustee of the Madoff victims' fund, to bring their charges against JPMorgan Chase. According to Picard, JPMorgan Chase used unaudited financial statements from Madoff and skipped the required steps of bank due diligence to make \$145 million in loans to Madoff's business.

Lawyers for Picard write that from November 2005 through January 18, 2006, JPMorgan Chase loaned \$145 million to Madoff's business at a time when the bank was on "notice of fraudulent activity" in Madoff's business account and when, in fact, Madoff's business was insolvent. The reason for the JPMorgan Chase loans was because Madoff's business account was "reaching dangerously low levels of liquidity, and the Ponzi scheme was at risk of collapsing." JPMorgan, in fact, "provided liquidity to continue the Ponzi scheme," according to Picard.

But was Madoff also generating new business deals or profits for JPMorgan Chase as was the case with Epstein? The accounts of Norman F. Levy come immediately to mind.

JPMorgan Chase and its predecessor banks extended tens of millions of dollars in loans to Norman F. Levy and his family so they could invest with the insolvent Madoff. (Levy died in 2005 at age 93 without being charged with any crimes.)

According to Picard, Levy had \$188 million in outstanding loans in 1996, which he used to funnel money into Madoff investments. Picard's lawyers told the court that JPMorgan Chase referred to these investments as 'special deals,' adding:

"Indeed, these deals were special for all involved: (a) Levy enjoyed Madoff's inflated return rates of up to 40% on the money he invested with Madoff; (b) Madoff enjoyed the benefits of large amounts of cash to perpetuate his fraud without being subject to JPMC's due diligence

processes; and (c) JPMC [JPMorgan Chase] earned fees on the loan amounts and watched the 'special deals' from afar, escaping responsibility for any due diligence on Madoff's operation."

A critical piece of evidence against JPMorgan was that despite funneling loans to both Madoff and Levy, the bank "advised the rest of its Private Bank customers not to invest with Madoff," according to Picard.

On paper, according to Picard, Levy was worth \$1.5 billion in 1998. He was such an important customer to JPMorgan and its predecessor firms that he was given his own office at the bank.

Levy was a commercial real estate broker and, according to a 2009 Vanity Fair article, at one point Levy "had an ownership stake in 70 properties, including the Seagram Building and 21 shopping centers across America..."

According to Picard, once Levy was a Madoff client, the relationship included classic, unchecked evidence of money laundering for years and years that should have resulted in legally-mandated Suspicious Activity Reports (SARs) filed with the Financial Crimes Enforcement Network (FinCEN), a unit of the U.S. Treasury. But even after a different bank detected the suspicious activity in the late 1990s and reported the transactions to FinCEN, JPMorgan Chase and its predecessor banks failed to file their own mandated SARs. JPMorgan Chase not only allowed the activity to continue but allowed it to increase dramatically in dollar terms.

In September of 2020, the International Consortium of Investigative Journalists (ICIJ) dropped a bombshell investigative report on money laundering by international banks.

The ICIJ investigation was based on secret documents leaked from FinCEN. The documents "show that five global banks — JPMorgan, HSBC, Standard Chartered Bank, Deutsche Bank and Bank of New York Mellon — kept profiting from powerful and dangerous players even after U.S. authorities fined these financial institutions for earlier failures to stem flows of dirty money."

The report had this to say about JPMorgan Chase:

JPMorgan Chase was involved in moving illicit funds for Jho Low, involving the notorious looting of public funds in Malaysia. JPMorgan Chase moved \$1.2 billion in money for Jho Low from 2013 to 2016, according to the report.

The ICIJ bombshell includes the charge that JPMorgan also "processed more than \$50 million in payments over a decade, the records show, for Paul Manafort, the former campaign manager for President Donald Trump. The bank shuttled at least \$6.9 million in

Manafort transactions in the 14 months after he resigned from the campaign amid a swirl of money laundering and corruption allegations spawning from his work with a pro-Russian political party in Ukraine.”

More troubling activity at JPMorgan Chase includes the following, according to ICIJ investigators:

“JPMorgan also moved money for companies and people tied to corruption scandals in Venezuela that have helped create one of the world’s worst humanitarian crises...

“One of the Venezuelans who got help from JPMorgan was Alejandro ‘Piojo’ Isturiz, a former government official who has been charged by U.S. authorities as a player in an international money laundering scheme. Prosecutors allege that between 2011 and 2013 Isturiz and others solicited bribes to rig government energy contracts. The bank moved more than \$63 million for companies linked to Isturiz and the money laundering scheme between 2012 and 2016, the FinCEN Files show...”

Wall Street megabanks like to brag about their “KYC” rule (Know Your Customer). But the ICIJ investigators reveal that JPMorgan Chase paid little attention to that rule. The report found this:

“Take the case of a mysterious shell company called ABSI Enterprises. ABSI sent and received more than \$1 billion in transactions through JPMorgan between January 2010 and July 2015, the FinCEN Files show.

“This amount included transactions through a direct bank account with JPMorgan, which ABSI closed in 2013, and through so-called correspondent banking arrangements, in which a bank with significant U.S. operations, such as JPMorgan, allows foreign banks to process U.S. dollar transactions through its own accounts.

“Compliance watchdogs based at the bank’s Columbus, Ohio, operations hub decided to try to figure out ABSI’s actual owner in 2015 after a Russian news site reported that a similarly-named shell company — which JPMorgan’s records indicated was the parent of ABSI — was linked to an underworld figure named Semion Mogilevich.

“Mogilevich has been described as the ‘Boss of Bosses’ of Russia mafia groups. When the FBI put him on its Top Ten Most Wanted list in 2009, it said his criminal network was involved in weapons and drug trafficking, extortion and contract murders. The chain-smoking, beefy Ukrainian’s signature method of neutralizing an enemy, The Guardian once reported, is the car bomb.

“The records show the compliance officers searched in vain through their files on the shell company, unable to determine who was behind the firm or what its true purpose was.

“While those details still remain unclear, JPMorgan had plenty of reasons to examine ABSI years earlier: it operated as a shell company in Cyprus, considered a major money laundering center at the time, and it was directing hundreds of millions of dollars through JPMorgan...

“Through a spokesperson, Mogilevich said he had no knowledge of ABSI.”

In March 2022, the United States ranked number one on the Financial Secrecy Index, “earning the worst rating ever recorded since the ranking began in 2009.”



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Meta Wants 'License' To Cover Up Past Events, Justices Told

By **Jessica Corso**

Law360 (September 25, 2024, 7:12 PM EDT) -- Meta Platforms Inc. shareholders say the U.S. Supreme Court should not be swayed by the social media company's attempt to shake off a proposed class action tied to the Cambridge Analytica data scandal, warning a high court ruling in favor of Facebook's parent company could give publicly traded companies "license to intentionally mislead investors."

Suing investors **filed a brief** Tuesday outlining their views on the case, which is scheduled to be heard by the justices in November. They asked the court to reject Facebook's argument that it was not obliged to discuss an already-disclosed data misuse scandal as an ongoing risk factor in its post-2015 earnings statements.

Investors objected to company statements that the misuse of customer data "could" harm the business when Facebook in fact knew such an event had already occurred.

"Facebook's rule does not simply deprive investors of material information — it provides a license to intentionally mislead investors about the occurrence of hugely material events by describing those events as purely hypothetical prospects," the investors told the high court.

Meta, the parent company of Facebook, successfully petitioned the high court to hear the appeal after the Ninth Circuit **ruled last year** the proposed class action, led by investor Amalgamated Bank, could move forward.

Shareholders have accused Facebook of hiding what it knew about data harvesting on its platform by British firm Cambridge Analytica, which reportedly obtained stolen data in order to target users with conservative political ads ahead of the 2016 election.

The scandal first broke in 2015 with reporting from the British newspaper The Guardian, but its full impact was not revealed until 2018, at which time Facebook released a statement acknowledging it had known for years that many more people were impacted than initially reported, according to investors' version of events.

Facebook was then targeted by a number of government investigations. In 2019, it **agreed to pay \$5 billion** to the Federal Trade Commission and **\$100 million** to the U.S. Securities and Exchange Commission to resolve allegations it had repeatedly deceived users and shareholders about the access third parties had to users' personal data.

Suing investors said the scandal caused Facebook's stock price to plummet, and they alleged the company shed \$100 billion in market capitalization within a week of the 2018 news.

Facebook said investors already knew about the data breach due to the 2015 Guardian reporting and that it was not, therefore, required to disclose it as an ongoing or future business risk.

The Ninth Circuit's ruling, **the company argued**, was "deeply flawed" and "will disincentivize companies from making forward-looking projections — to the detriment of investors and public companies alike."

The Supreme Court agreed to weigh the question put forth by the platform: whether a risk disclosure

is false or misleading when it doesn't disclose that a risk has materialized in the past, "even if that past event presents no known risk of ongoing or future business harm."

Investors said Tuesday they agree with Facebook that the answer to that question is "no," but argue that is not the scenario that has been put forth in this case. The company did know a risk to its business had occurred, and it shouldn't have been allowed to continue describing that risk as a hypothetical in its disclosures, investors said.

"In common usage and at common law, describing an event as a hypothetical risk can be reasonably understood to imply that the risk is just that — a future possibility, not a present reality," Facebook shareholders said Tuesday.

"Telling a prospective land investor that there's a risk the government may put a road through the middle of a property, for example, is misleading if the speaker knows the land has already been condemned for that purpose," they said.

An attorney for Facebook declined to comment Wednesday.

The investors are represented by Kevin K. Russell and Daniel H. Woofter of Goldstein Russell & Woofter LLC, Salvatore J. Graziano and Jeremy P. Robinson of Bernstein Litowitz Berger & Grossmann LLP, and Luke O. Brooks, Joseph Daley and Darryl J. Alvarado of Robbins Geller Rudman & Dowd LLP.

Meta and its executives are represented by Kannon K. Shanmugam, William T. Marks, Matteo Godi, Jake L. Kramer, Anna P. Lipin, Audra J. Soloway and Kristina A. Bunting of Paul Weiss Rifkind Wharton & Garrison LLP, and Joshua S. Lipshutz, Trenton J. Van Oss, Brian M. Lutz, Michael J. Kahn and Patrick J. Fuster of Gibson Dunn & Crutcher LLP.

The case is Facebook Inc. et al. v. Amalgamated Bank et al., case number 23-980, in the Supreme Court of the United States.

--Additional reporting by Allison Grande and Sarah Jarvis. Editing by Lakshna Mehta.



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Bumble Investor Says Dating App Overhyped Premium Model

By **Rae Ann Varona**

Law360 (September 25, 2024, 10:00 PM EDT) -- A Bumble Inc. investor has launched a proposed securities class action in Texas federal court accusing the dating app's parent company of misleading investors about its financial outlook and success of a "premium plus" subscription tier, and causing a dramatic decline in Bumble's common stock price.

Michal Holzer **alleged in a new complaint** filed Tuesday that he purchased Bumble common stock at artificially inflated prices and was damaged after truth began to emerge that the company's attempts at growing through a relaunch of Bumble and new subscription tier efforts were futile.

Holzer said the company and members of its brass created the "false impression" of confidence that a relaunch and Premium Plus subscription tier revamp would expand the app's user base and increase revenue per paid user in the second half of 2024.

But Bumble's expectations, in reality, "had little, or an otherwise erroneous, basis," Holzer alleged.

"In truth, much like Bumble's premium plus pricing tier, the company's app relaunch was merely a desperate attempt to keep pace with competition overshadowing Bumble's growth in the sector," the shareholder said.

Holzer seeks to represent a class of investors who purchased or acquired Bumble securities between Nov. 7, 2023, and Aug. 7, 2024.

Among the defendants named in the suit is Bumble founder Whitney Wolfe Herd, who also co-founded the dating app Tinder, and has been Bumble's executive chair since January and was the CEO till Jan. 2, when Lidiene Jones took over the role.

Herd had previously been hit with a securities suit in February 2023 **accusing her** and controlling shareholder Blackstone Inc. of misusing a September 2021 secondary public offering.

Holzer alleged in his Tuesday complaint the company provided investors with "overwhelmingly positive statements" while also disseminating materially false and misleading statements about its strategy for relaunching the Bumble app, including plans for its premium plus and base tiers, focused engagement and more personalized experiences for the app's younger users, and enhanced premium offerings for paying subscribers.

He said Herd had, for instance, said during a November 2023 earnings call unveiling the premium plus tier that it was "largely one of the most requested features" and that the company has been "really pleased with the very early indicators and the early results we're seeing."

Holzer said Bumble Chief Financial Officer Anuradha B. Subramanian had also said during the 2023 UBS Global Technology Conference that the company expects to upsell users from a Bumble premium tier to the premium plus tier, and that "should be a nice RPP [revenue per payer] driver for us."

Holzer said "the truth began to emerge" on Feb. 27 when Bumble reported disappointing fourth-quarter fiscal 2023 results despite the premium plus subscription tier launch in December 2022.

He said Bumble management then announced during a subsequent earnings call that the premium

plus tier would be revamped as part of a planned Bumble app relaunch since it didn't have a "clear enough market fit" at launch.

Bumble lowered its fiscal year 2024 guidance as a result, the shareholder said. He said Bumble's stock price fell as a response to the news from \$13.18 per share on Feb. 27 to \$11.23 per share on Feb. 28.

The truth finally came out on Aug. 7 when the company released mixed second-quarter 2024 results, Holzer alleged.

He said the company disclosed during a corresponding earnings call that the app relaunch wasn't going to plan and that the company needed to "reset" its outlook to focus on the "consumer ecosystem" and "rebalance" the app's subscription tiers. He said that included a pause in the revamp of what Holzer said was a "poorly received" premium plus tier.

Holzer said the price of Bumble stock again declined from \$8.06 per share on Aug. 7 to \$5.71 per share on Aug. 8.

Counsel for Holzer and Bumble did not respond to requests for comment Wednesday.

Holzer is represented by Stuart L. Cochran of Condon Tobin Sladek Thornton Nerenberg PLLC and Adam M. Apton of Levi & Korsinsky LLP.

Counsel information for Bumble was not available Wednesday.

The case is Holzer v. Bumble Inc. et al., case number 1:24-cv-01131, in the U.S. District Court for the Western District of Texas.

--Additional reporting by Emilie Ruscoe. Editing by Lakshna Mehta.



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Rent The Runway, Gwyneth Paltrow Can't Escape Investor Suit

By **Katryna Perera**

Law360 (September 25, 2024, 9:33 PM EDT) -- A New York federal judge on Wednesday trimmed a proposed class action suit against actress Gwyneth Paltrow and online clothing rental company Rent the Runway Inc., claiming the company failed to inform investors about major challenges it was facing in the run-up to its 2021 initial public offering.

U.S. District Judge Orelia E. Merchant issued an **order** tossing claims that Rent the Runway's offering documents for its IPO materially misled on consumer demand and that the company's subscription services were trending downward. Paltrow has served on the company's board of directors since 2021.

According to the order, lead plaintiffs, the Delaware Public Employees Retirement System and Denver Employees Retirement Plan, relied "heavily" on the accounts of former Rent the Runway employees to support their claims about consumer demand.

However, Judge Merchant said, "taking even the most specific and on point allegation that RTR was potentially misstating consumer demand — [former employee one's] statement that at some point 'leading up to the IPO' 100 subscribers a day were canceling or 'churning,' their subscriptions — this is insufficient to plausibly plead that RTR made a material misrepresentation in the offering documents."

The claim, while specific in itself, is too conclusory and vague when put into context, Judge Merchant said, and she further noted that the operative complaint does not establish that Rent the Runway failed to disclose a trend that was known to management, let alone material.

The judge also tossed the suit's claims that Rent the Runway failed to disclose to investors that the number of subscribers was trending down at the time of the IPO and that the company had experienced a substantial loss in revenue attributable to theft that created uncertainty about its future revenue and continued viability.

Judge Merchant pointed out that the offering documents included a "risk factor" section that "candidly and accurately stated the risk that it 'may incur significant losses from fraud' and 'in the past incurred' losses from failure to return rentals."

She also stated that while the plaintiffs have alleged plausible materiality in failure to disclose revenue losses from fraud, she "is not convinced" that the suit alleges enough facts showing that Rent the Runway was required to disclose more.

Judge Merchant declined to toss from the suit claims that Rent the Runway failed to disclose that its shipping costs were rising due to a hike in rates and a decision to switch shipping vendors, and that customer thefts were increasing at the time of the IPO, along with control person liability claims.

The suit is on behalf of all individuals and entities who purchased Rent the Runway common stock in connection with the company's IPO. Rent the Runway is an online platform through which consumers can rent clothing for everyday wear or events through a subscription or one-off basis.

Following the COVID-19 pandemic, demand for designer clothing rentals decreased significantly and Rent the Runway lost almost two-thirds of its subscribers, according to investors.

The suit claims offering documents for Rent the Runway's IPO were negligently prepared and contained several misstatements and omissions that were material to investors. A year after the IPO, in September 2022, Rent the Runway announced a major restructuring plan, according to Wednesday's order, which included firing approximately 24% of the company's corporate employees to save roughly \$25 million to \$27 million in 2023.

Investors say RTR's stock price fell from its offering price of \$21 per share to \$1.58 on Nov. 14, 2022, the day the current action was filed.

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

The investors are represented by Jonathan Gardner, Alfred L. Fatale III, Guillaume Buell and Robert S. Rowley of Labaton Sucharow LLP.

Rent the Runway and the individual defendants are represented by Mary Eaton, Meredith Kotler and Marques Tracy of Freshfields Bruckhaus Deringer US LLP.

The underwriter defendants are represented by Todd G. Cosenza and Charles D. Cording of Willkie Farr & Gallagher LLP.

The case is *Sharma v. Rent the Runway Inc. et al.*, case number 1:22-cv-06935, in the U.S. District Court for the Eastern District of New York.

--Editing by Emily Kokoll.

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Boies Joins Authors' Meta IP Suit After Judge Blasts Lead Atty

By **Ivan Moreno**

Law360 (September 25, 2024, 6:00 PM EDT) -- Veteran litigator David Boies and a top member of his firm have joined the team heading a proposed class action against Meta Platforms Inc. for allegedly using copyrighted material to train its artificial intelligence product "Llama" — days after a California federal judge told the lead plaintiff's attorney, "You are not doing your job."

Boies and partner Joshua Irwin Schiller of Boies Schiller Flexner LLP — which Boies co-founded — on Tuesday made their appearance in the case whose high-profile plaintiffs include comedian Sarah Silverman, Ta-Nehisi Coates and Junot Diaz. The authors sued Meta in July 2023, alleging they never gave Meta permission to use copyrighted works that were in a dataset to train versions of Llama.

Boies, who **announced** last year he would step down as his firm's chairman at the end of 2024, has attracted acclaim for handling high-profile cases, including representing Democratic presidential candidate Al Gore in Bush v. Gore and working on the case that invalidated California's gay marriage ban. Boies also has attracted criticism for his representation of infamous movie mogul Harvey Weinstein and for his alleged role in digging up dirt on women accusing Weinstein of rape and sexual misconduct. Under different counsel, Weinstein was **convicted** in 2020 of sexually assaulting former "Project Runway" assistant Miriam Haley in 2006 and raping aspiring actress Jessica Mann in 2013. The conviction was later **overturned** and he is being retried.

"We are pleased to join this team of lawyers," Schiller said in a statement Wednesday to Law360. "We look forward to working with this talented group who have been working on this important case from the beginning."

The Meta case is one of dozens where AI developers are mounting fair-use defenses against content creators who have sued alleging copyright infringement. In a status hearing Friday on the Meta case, U.S. District Judge Vince Chhabria became incensed at the plaintiffs' lead counsel, Joseph R. Saveri of the Joseph Saveri Law Firm LLP, for not moving the discovery process along fast enough.

Before the hearing, Judge Chhabria told the parties that "there's no real dispute about whether Meta fed copyrighted works to its AI programs without authorization" and that "the only real legal question" for summary judgment would be whether that was fair use.

Judge Chhabria asked during the status hearing what other material Saveri's team needed that was relevant to the fair-use question on summary judgment, and when Saveri answered with what Judge Chhabria deemed "vague" answers that indicated more time would be needed beyond the Sept. 30 discovery cutoff, the judge tore into him, brushing off Saveri's explanations.

"You are teed up to get a ruling that I think would be the first ruling on whether this is fair use, and you're not doing your job to work the case up," Judge Chhabria said. "You're not even coming close to moving the ball forward in this case."

Saveri responded by saying, "I think that's 100% wrong, Your Honor," but later acknowledged he took the criticism seriously.

Judge Chhabria called the case "important for society" and questioned whether Saveri's team was up to the task, warning that he would not certify a class if nothing changed regarding his team's makeup.

"You and your team appear to have taken on a case that you were either unwilling or unable to litigate properly. And so I will tell you right now that if this case gets to the class certification stage, I will not certify the class represented by this legal team based on the way you've litigated the case so far," Judge Chhabria said, before suggesting Saveri "bring in somebody who can help you litigate the case."

On Tuesday, Saveri welcomed Boies and Schiller to the team.

"We look forward to joining our collective expertise and experience to continue to prosecute this novel, important case to a successful conclusion," Saveri said in a statement. "This case represents a significant chapter in a larger fight for preserving ownership rights for all artists and other creators."

Counsel for Meta did not immediately respond to requests for comment Wednesday.

Judge Chhabria extended the discovery deadline by two weeks, but only to finish previously scheduled depositions.

Meta moved to block the deposition of CEO Mark Zuckerberg, but U.S. Magistrate Judge Thomas S. Hixon denied the motion Tuesday, saying that "plaintiffs have made an evidentiary showing that Zuckerberg is the chief decision maker and policy setter for Meta's generative AI branch and the development of the large language models at issue in this action."

The plaintiffs are represented by Joseph R. Saveri, Cadio Zirpoli, Christopher K.L. Young, Holden Benon and Aaron Cera of Joseph Saveri Law Firm LLP, David Boies and Joshua Irwin Schiller of Boies Schiller Flexner LLP, Bryan L. Clobes and Alexander J. Sweatman of Cafferty Clobes Meriwether & Sprengel LLP, Daniel J. Muller of Ventura Hersey & Muller LLP and Matthew Butterick.

Meta is represented by Bobby Ghajar, Mark Weinstein, Kathleen Hartnett, Judd Lauter, Elizabeth L. Stameshkin and Colette Ghazarian of Cooley LLP, Mark A. Lemley of Lex Lumina PLLC and Angela L. Dunning of Cleary Gottlieb Steen & Hamilton LLP.

The case is Richard Kadrey et al. v. Meta Platforms Inc. et al., case number 3:23-cv-03417, in the U.S. District Court for the Northern District of California.

--Additional reporting by Xiumei Dong. Editing by Janice Carter Brown.



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Ohio Train Derailment Plaintiffs Win Final OK Of \$600M Deal

By **Lauren Berg**

Law360 (September 25, 2024, 11:45 PM EDT) -- An Ohio federal judge on Wednesday gave her final blessing to a \$600 million settlement resolving claims brought by residents and others affected by the Norfolk Southern train derailment and toxic chemical spill in East Palestine, Ohio, last year.

During a hearing in her Youngstown courtroom, U.S. District Judge Benita Y. Pearson granted final approval of the settlement and overruled objections to the deal and the \$162 million payout for the plaintiffs' attorneys, according to a text entry on the docket for minutes of the proceedings.

The plaintiffs filed their **final approval motion** earlier this month, saying they've provided evidence that the settlement is reasonable and do not need to wait until remediation is complete to evaluate the costs Norfolk Southern and others would pay.

While some objectors had challenged the distribution plan's structure of paying based on household rather than by individual, the plaintiffs told the court the payouts were designed to address damages faced by entire households, and that doing so reduces processing time.

Other objectors had challenged the voluntary exposure settlement, which allows class members to release their personal injury claims for a payout now, but the plaintiffs argued that these objectors misunderstood that this was an additional benefit that was not compulsory, and any plaintiffs who wished to wait until symptoms present themselves could do so.

Class counsel noted in a statement at the time that only 0.083% of the estimated 451,672 total household class members are opting out, and 97% of East Palestine residents are filing claims for the voluntary exposure payment.

The class' counsel asked for \$162 million in fees, or 27% of the total relief, plus \$18 million in class expenses and \$15,000 in service awards for each class representative, according to their request.

The attorneys argued that their percentage-of-the-fund calculation was reasonable in light of the significant benefits to the class, as well as their taking the case on contingency basis and society's stake in rewarding attorneys who take on cases like this.

The attorneys also touted their skills and experience, saying it allowed them to tackle the complex and novel litigation and achieve the settlement.

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

The deal, first **announced in April**, received **preliminary approval** in May, with Judge Pearson finding it a fair and reasonable settlement reached without collusion that outweighed the risks of continued litigation.

The deal resolves all class claims— including negligence, strict liability, nuisance and trespass — from residents, businesses and property owners, and other plaintiffs within 20 miles of the derailment, as well as personal injury claims for residents within 10 miles of the derailment through the voluntary exposure settlement.

The **consolidated litigation** alleged numerous harms such as lost income, property damage,

contamination at residences and workplaces, and increased risk of serious and potentially fatal illnesses, including cancer and organ damage, necessitating ongoing medical monitoring, according to court documents.

The settlement also ends the plaintiffs' claims against co-defendants Oxy Vinyls LP, Trinity Industries Leasing Co., GATX Corp. and its subsidiary General American Marks Co., which owned or leased cars involved in the derailment, but it does not include Norfolk Southern's third-party claims against those defendants.

Norfolk Southern was also **hit with claims** over the derailment from the U.S. Environmental Protection Agency and the state of Ohio **seeking reimbursement** for government funds spent in the cleanup. According to a statement from the plaintiffs' counsel earlier this month, Norfolk Southern has settled the claims with the EPA for \$25 million.

The plaintiffs are represented by M. Elizabeth Graham of Grant & Eisenhofer PA, Jayne Conroy of Simmons Hanly Conroy LLP, Seth A. Katz of Burg Simpson Eldredge Hersh & Jardine PC, Michael Morgan of Morgan & Morgan PA, Michelle L. Kranz of Zoll & Kranz LLC and Mark P. Chalos, Patrick I. Andrews and Christopher Coleman of Lieff Cabraser Heimann & Bernstein LLP.

Norfolk Southern is represented by Alan Schoenfeld, Davina Pujari, Christopher Rheinheimer and Albinas Prizgintas of WilmerHale, and J. Lawson Johnston, Scott D. Clements, Aaron Ponzo and Paul A. Roman Jr. of Dickie McCamey & Chilcote PC.

GATX is represented by Hariklia Karis, Robert B. Ellis, Jonathan O. Emmanuel and Sydne K. Collier of Kirkland & Ellis LLP, and Joseph A. Castrodale and Meggan A. Loudon of Benesch Friedlander Coplan & Aronoff LLP.

Trinity Industries is represented by Jeffrey A. Bartolozzi of Barnes & Thornburg LLP, Ronald W. Breaux, Bradley W. Foster and Carrington M. Giammittorio of Haynes and Boone LLP, and Sean Gallagher, John Byars, John Fitzpatrick, Nora Eccles and Lindley Brenza of Bartlit Beck LLP.

Oxy Vinyls is represented by Alycia N. Broz, Kimberly Weber Herlihy, Emily J. Taft and Claire A. Halffield of Vorys Sater Seymour and Pease LLP.

The consolidated case is In re: East Palestine Train Derailment, case number 4:23-cv-00242, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Mike Curley, Ryan Harroff, Linda Chiem, Hailey Konnath and P.J. D'Annunzio. Editing by Kristen Becker.



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What PCOAB's Broadened Liability Rule Means For Auditors

By **John Carney, Teresa Goody Guillén, and Nikita Mistry** (September 25, 2024, 3:14 PM EDT)

Last month, the U.S. Securities and Exchange Commission **approved** the Public Company Accounting Oversight Board's proposed ethics rule, which governs the standard of liability for associated persons who directly and substantially contribute to an audit firm's violations.

The amended rule expands liability for associated persons who directly and substantially contribute to a firm's violations by reducing the liability standard from knowing or reckless conduct to negligent conduct.

Rule 3502 provides that an individual who contributes to a registered firm's primary violation does not need to be an associated person of the firm that commits the primary violation; the individual need only be an associated person of any registered firm.

The rule clarifies that directly contributing to the firm's violation means that an associated person's conduct should either essentially constitute the firm's violation or be a reasonably proximate facilitating event of the violation. Substantially contributing to the firm's violation means that an associated person's conduct must contribute to a violation in a material or significant way.

Amendment

For nearly two decades since its enactment in 2005, PCAOB Rule 3502 prohibited any "person associated with a registered public accounting firm" from taking or omitting to take an action knowingly or recklessly in a way that would directly and substantially contribute to a violation of audit standards by that registered public accounting firm.[1] PCAOB Rule 3502 codified associated persons' ethical obligations to not contribute to a registered firm's violations of the laws, rules and standards that the PCAOB is charged with enforcing.

Prior to the amendment, the rule provided grounds for secondary liability when an associated person of a registered firm acted at least recklessly to directly and substantially contribute to such a violation.

On June 20, the PCAOB, an independent agency created by the Sarbanes-Oxley Act to oversee auditors for publicly traded companies, submitted a proposed amendment to Rule 3502 to the SEC.[2] Amended Rule 3502, "Responsibility Not to Knowingly or Recklessly Contribute to Violations," changed the liability standard from recklessness to negligence for actionable contributory conduct by associated persons. On Aug. 20, the SEC voted 3-2 to adopt the PCAOB's proposed rule.

Accordingly, the SEC approved the amendment and lowered the standard from recklessness to negligence for an associated person's contributory liability, while maintaining the requirement that to be held liable, an associated person must have contributed to the firm's violation "directly and substantially." [3]

Under the former recklessness standard, to be held liable, associated persons were required to have



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had an "extreme departure from the standard of ordinary care" that "presents a danger to investors or to the markets that is either known to the (actor) or is so obvious that the actor must have been aware of it." [4] Under the new negligence standard, associated persons will be liable if there is "failure to exercise reasonable care or competence" on their part. [5]

According to the PCAOB, the amended standard aligns with the same standard of reasonable care that auditors are required to exercise when executing their professional duties. The PCAOB explained that under the prior version of Rule 3502, an incongruity existed between the respective requisite mental states for liability of a registered firm resulting from an associated person's conduct and for liability of the associated person.

Specifically, a firm, which acts through its associated persons, could violate certain laws, rules or standards by acting negligently, but an associated person who directly and substantially contributed to that violation was held to a higher standard of recklessness to be secondarily liable. The PCAOB determined that this incongruity meant that associated persons may have weaker incentives to exercise the appropriate level of care.

The PCAOB also determined that the previous version of Rule 3502 prevented the board from fully executing its investor-protection mandate under the Sarbanes-Oxley Act. There had been instances in which the PCAOB had instituted proceedings against firms for negligence-based violations but was unable to charge individuals who negligently, directly and substantially contributed to the firms' violations.

The amendment allows the PCAOB to pursue charges against individuals whose conduct is now subject to the lower negligence standard. PCAOB Chair Erica Williams described the amendment as a "win for investors." [6]

PCAOB Rule 1001(p)(i) defines "person associated" with a registered or a public accounting firm to include

any individual proprietor, partner, shareholder, principal, accountant, or professional employee of a public accounting firm, or any independent contractor or entity that, in connection with the preparation or issuance of any audit report — (1) shares in the profits of, or receives compensation in any other form from, that firm; or (2) participates as agent or otherwise on behalf of such accounting firm in any activity of that firm.

The new standard applies broadly to professional employees of a public accounting firm. The definition of "associated person," however, does not include people engaged only in clerical or ministerial tasks. Rule 3502 further clarifies that an individual who contributes to a registered firm's primary violation does not need to be an associated person of the firm that commits the primary violation; the individual need only be an associated person of any registered firm.

Rule 3502 allows the PCAOB to hold associated persons accountable when they directly and substantially contribute to an accounting firm's violations. The associated persons contribute directly when their conduct either essentially constitutes the firm's violation or is a reasonably proximate facilitating event of the violation. For its part, the "substantially" element continues to require that the associated person's conduct contribute to the violation in a material or significant way, though their conduct does not need to have been the sole cause of the violation.

The amendment to Rule 3502 will go into effect Oct. 19, 60 days after SEC approval. The amendment does not apply to conduct before the effective date.

Practical Takeaways

The amended Rule 3502 is expected to have major consequences for registered firms and other associated persons. Seasoned auditors could find themselves subject to enforcement action if they unknowingly — but negligently, directly and substantially — cause a primary audit firm's violation of PCAOB standards or rules. Component auditing firms, service centers and other associated persons responsible for overseeing a firm's quality controls or PCAOB-based disclosures could now be exposed to enforcement liability if they fail to exercise their oversight duties with reasonable care.

During the comment period on the amendment to Rule 3502, commenters questioned the need for the amendment and criticized the economic and investor-protection rationales put forth by the PCAOB. One commenter argued that the cost associated with enforcement actions could disproportionately affect small and midsize firms, which could result in some firms withdrawing from the issuer and broker-dealer audit market. In turn, this could cause a greater concentration of audit services.

The amendment could also adversely affect the talent pool and have anticompetitive outcomes.

The PCAOB's ability to take action against individuals for negligence would undermine the cooperative spirit of inspections. It could discourage potential auditors, who might opt for different career paths to avoid an adversarial atmosphere and the potential reputational harm from the publication of a mistake, difference of opinion with the PCAOB or minor violation. Auditor stress is increasing, and the heightened risk of PCAOB actions may escalate the attrition rates.

In conclusion, Rule 3502 enables the PCAOB to hold associated persons accountable when, regardless of their intent, they negligently, directly and substantially contribute to an accounting firm's violations.

This is a dramatic change to the legal standard that will likely be followed by increased enforcement activity against individual members of audit teams who the PCAOB believes contributed to an audit firm's violations. There will likely be continued legal challenges to this rule, as well as to the PCAOB itself, in light of recent U.S. Supreme Court opinions curtailing administrative adjudication.

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Teresa Goody Guillén is a partner at BakerHostetler. She previously served as litigation counsel for the U.S. Securities and Exchange Commission in its Office of the General Counsel.

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BakerHostetler partners Jimmy Fokas and Jonathan R. Barr contributed to this article.

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[1] See Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Amendment to PCAOB Rule 3502 Governing Contributory Liability, Release No. 34-100429 (June 26, 2024), <https://www.sec.gov/files/rules/pcaob/2024/34-100429.pdf>.

[2] 15 U.S.C. 78s(b).

[3] See Securities and Exchange Commission, Release No. 34-100772; File No. PCAOB-2024-04 (Aug. 20, 2024), <https://www.sec.gov/files/rules/pcaob/2024/34-100772.pdf>.

[4] In re S.W. Hatfield, C.P.A., SEC Release No. 34-69930, at 29 (July 3, 2013).

[5] Id. at 35 n.169 (citation and quotation marks omitted).

[6] See Public Company Accounting Oversight Board, Press Release (Aug. 20, 2024), <https://pcaobus.org/news-events/news-releases/news-release-detail/chair-williams-statement-on-sec-approval-of-three-pcaob-standard-setting-and-rulemaking-actions-that-will-protect-investors>.



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Feds Say 'Wall Of Evidence' Supports Petrobras Bribery Case

By **Aaron Keller**

Law360, Bridgeport, Conn. (September 25, 2024, 6:44 PM EDT) -- A Connecticut oil trader violated the Foreign Corrupt Practices Act by sending millions in bribes to officials at Brazilian state oil giant Petrobras through a shady intermediary, federal prosecutors told a jury during closing arguments Wednesday, arguing that a "wall of evidence" points to the defendant's intent.

Capping a **three-week-long trial**, Jonathan P. Robell, of the U.S. Department of Justice's Criminal Fraud Division, told a jury of six men and six women that Glenn Oztemel knew he was engaging in illegal activity by funneling \$4.5 million over 8 years to shell companies connected to Eduardo Innecco. Innecco, an international operative, in turn paid some of the cash as bribes to Petr leo Brasileiro SA official Rodrigo Garcia Berkowitz and others, prosecutors alleged.

"The defendant knew exactly what he was doing; he designed it to work the way that it did," Robell said.

The government characterized Oztemel, of Westport, as an "intimately involved" experienced trader with a Georgetown international economics degree and decades of experience. He worked for Arcadia Fuels Inc. from 2010 until 2012 and for Freepoint Commodities LLC after leaving Arcadia, according to the DOJ; the scheme allegedly lasted until 2018.

Robell pointed to emails among Oztemel, Innecco and others that referred to inviting others to "breakfast," a word prosecutors said was employed as a synonym for bribes. Oztemel later responded to the messages by claiming he didn't know what Innecco meant, moves the DOJ said were attempts to cover his tracks.

Rather, according to Robell, Innecco received backchannel information about Petrobras oil trades from Berkowitz and transmitted the data to Oztemel to help Arcadia and Freepoint score successful fuel oil trades.

The data included "express instructions about how to win by being just a little bit better" than a competitor's offer, Robell told the jury.

Meanwhile, Oztemel engaged in official communications with Berkowitz that Robell characterized as a "sham negotiation."

"The defendant was getting inside information from WhatsApp from the man who was evaluating his bids," Robell explained. "Two channels, one official and the other secret."

Oztemel knew he was engaging in illegal conduct because he used encrypted communications, disposable phones, his personal email address, code words and a secret "investment fund" spreadsheet to track his bribes, according to prosecutors.

Oztemel is charged with seven felonies, including conspiring with others to launder money and to violate the FCPA.

Oztemel attorney Nelson A. Boxer of Petrillo Klein & Boxer LLP, told the jury that the DOJ's case was "built on a poor foundation of assumptions that fall apart when you carefully look at them."

He said the information Oztemel gleaned while trading oil commonly gathered by others in the industry was standard practice. He said Berkowitz, who testified for the government that he accepted bribes from Oztemel through Innecco, **could not be trusted**.

According to Boxer, the evidence at trial showed Berkowitz lied to the police in Brazil, lied to his wife and lied to his colleagues. He said Berkowitz's cooperation agreement enticed him to embellish the truth about Oztemel because it requires the government to help Berkowitz and his family retain a U.S. visa after the witness provided "substantial cooperation."

"Berkowitz is a proven, very skilled liar, and he's lying to preserve his freedom and life in the United States," Boxer said. "He's not a person you can rely on for proof beyond a reasonable doubt."

The defense attorney also characterized Innecco as Oztemel's official agent, arguing his role was vetted by legal and compliance officers at both of Oztemel's employers.

Boxer said Innecco was dubbed "Edweirdo" by Oztemel's colleagues and characterized his emails, sent under a chain of aliases, as "a bunch of confusing and weird behavior" that could not be taken seriously as efforts to cover up a bribery scheme.

He also referred to Innecco as "bizarre," "the Count from Sesame Street," the "man in the trench coat," and "secret Eddie of Uruguay," pointing to the country in which one of Innecco's companies was located.

During a rebuttal, prosecutor Michael McGarry said Innecco's behavior pointed to an illegal scheme and that Berkowitz was just one of many witnesses who explained what occurred.

"This is not a whodunnit, and it's not a 'what happened?'" he said. "You saw all the evidence. You saw all the witnesses. You know what happened. The only real question is the knowledge, intent, and willfulness of the defendant."

McGarry noted that a Freepoint compliance officer and Oztemel's best friend and colleague both admitted on the witness stand that the use of burner phones was a concerning way to conduct company business.

"That shows the defendant's intent, the way he was willing to lie to his friend to cover up the scheme," McGarry said, pointing to what he called a "wall of evidence in this case."

"This is a bribery scheme," he concluded.

The jury left the courthouse on Wednesday without returning a verdict and is scheduled to return at 10 a.m. Thursday to continue deliberations.

Gary Oztemel, Glenn Oztemel's brother, in June **pled guilty** to one felony count of money laundering, admitting to siphoning some of the cash in question through his company Petro Trade Services Inc.

Berkowitz was charged separately in the Eastern District of New York. He pled guilty in February 2019 but does not appear to have been sentenced.

Freepoint in December entered a **deferred prosecution agreement** and paid \$106.1 million to settle federal bribery allegations, a figure that included a \$68 million criminal penalty, a \$30.5 million forfeiture and a \$7.6 million disgorgement.

The government is represented by Michael S. McGarry, Allison L. McGuire, Jonathan P. Robell and Clayton P. Solomon of the U.S. Department of Justice.

Glenn Oztemel is represented by Nelson A. Boxer, David A. Hoffman and Emma Spiro of Petrillo Klein & Boxer LLP and Paul H. McConnell of the McConnell Family Law Group.

The criminal case against the Oztemel brothers and Innecco is U.S. v. Oztemel et al., case number 3:23-cr-00026, in the U.S. District Court for the District of Connecticut.

The case against Freepoint is U.S. v. Freepoint Commodities LLC, case number 3:23-cr-00224, in the U.S. District Court for the District of Connecticut.

The case against Berkowitz is U.S. v. Berkowitz, case number 1:19-cr-00064, in the U.S. District Court for the Eastern District of New York.

--Editing by Rich Mills.

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