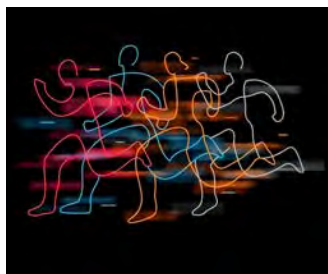


Litigator of the Week Runners-Up and Shout-Outs

 [law.com/litigationdaily/2024/10/04/litigator-of-the-week-runners-up-and-shout-outs-93](https://www.law.com/litigationdaily/2024/10/04/litigator-of-the-week-runners-up-and-shout-outs-93)

Ross Todd



First up this week is a team from **Jones Day** led by **Amanda Rice** and **Yaakov Roth**. They secured a ruling from the D.C. Circuit this week giving client KalshiEx a greenlight to offer derivative contracts allowing Americans to put money down on which political party will gain control of Congress after the November elections. The Jones Day team previously secured a summary judgment win at the district court against the U.S. Commodity Futures Trading Commission. That win blocked the CFTC order barring Kalshi from offering its "congressional control contracts." The D.C. Circuit this week declined to stay the district court ruling, finding the agency failed to show the contracts would incentivize political misinformation or harm election integrity. The Jones Day team includes associates **Sam Lioi** and **John Henry Thompson**.

Last week a team at **Robbins Geller Rudman & Dowd** took home the top Litigator of the Week spot after securing a \$490 million securities class action settlement from Apple. This week the firm struck another blow against Big Tech: a team led by partners **Jason Forge** and **Michael Albert** won final approval of a \$350 million settlement with Alphabet in a suit accusing the company of misleading investors about the company's privacy and cybersecurity practices. The Ninth Circuit revived the suit three years ago based on the company's initial failure to disclose information about a bug in the Google+ social network, which left the private data of hundreds of thousands of users exposed to third-party developers. The Robbins Geller team on the Alphabet case also included **Kenneth Dolitsky**, **Marco Janoski Gray**, **Ting Liu**, **Laura Andracchio** and **Sarah Fallon**.

Litigators at **Sullivan & Cromwell** and **Gibson, Dunn & Crutcher** helped eBay Inc. beat back a lawsuit brought on behalf of the Environmental Protection Agency that claimed in recent years the e-commerce site facilitated illegal sales of aftermarket emission defeat devices, pesticides and products containing methylene chloride. U.S. District Judge Orelia Merchant in Brooklyn found this week that the government's claims were barred under Section 230 of the Communications Decency Act, which exempts online platforms from being held liable as publishers for content generated by third parties. The Sullivan &

Cromwell team was led by **Jeff Wall** and **Laura Oswell**, and included partner **Sharon Nelles** and associates **Lauren Goff** and **Max Gottschall**. The Gibson Dunn team was led by **Stacie Fletcher** and **Rachel Levick** and included associate **Mia Donnelly**.

Shout-out to **Dipanwita Deb Amar**, **Joe Farris** and their team at **Arnold & Porter Kaye Scholer**, who brought home a verdict of more than \$25 million last week for medical device company Cynosure in a lawsuit against industry competitor Reveal Lasers and two former employees who spearheaded a corporate raid. After a month-long trial in Boston federal court, jurors found Cynosure's former head of sales in North America, Chris Chambers, and the company's former head of the Northeast, Robert Daley, breached numerous provisions in their respective contracts and their fiduciary duties of loyalty. Jurors also found that the former employees and Reveal tortiously interfered with the contracts of other Cynosure employees and awarded \$15 million in damages against Reveal and \$5 million against each of the individual defendants for lost profits. The Arnold & Porter team also included partner **Joshua Barlow** and senior associate **Matthew Diton**.

Shout out to a **Debevoise & Plimpton** team led by partner **David Bernstein** and counsel **Jared Kagan** that went to trial *against* the United States Patent and Trademark Office for client Snap Inc. The USPTO had refused to register the "Spectacles" trademark for Snap's line of augmented-reality glasses on the grounds that the Spectacles mark was generic for smart glasses. But after a bench trial in March, U.S. Magistrate Judge Steve Kim in Los Angeles last week found that the PTO had not met its burden to show Spectacles "is primarily understood by most consumers of smart glasses as a generic name for that product." The judge, however, stopped short of finding the mark carries enough secondary meaning in the market to be included immediately on the Principal Register, which is reserved for distinctive trademarks. The Debevoise team also included associates **Melissa Muse**, **Daniel Cohen**, former associate **Que Mykte Newbill**, case manager **Elliot Beaver** and legal assistant **Tiffany Ansley**.

Shout-out to a team at **DLA Piper** for knocking out a \$6.4 billion lawsuit against Bristol-Myers Squibb Co. claiming the company slow-rolled the regulatory approval process for a cancer drug to avoid triggering payouts to former Celgene shareholders under a contingent value rights agreement. U.S. District Judge Jesse Furman in Manhattan this week dismissed the lawsuit, finding that the plaintiff, UMB Bank, hadn't been properly appointed as a trustee for the contingent value rights holders and therefore couldn't file suit on their behalf. The DLA team includes partners **John Clarke Jr.** and **Jessica Masella**, as well as associates **Jessica Wright**, **Steven Rosato**, **Michael Lewis**, **Dan Lynch**, **Jennifer Delasco** and **Bradley Jennings**.

A team at **Kramer Levin Naftalis & Frankel** led by **Paul Andre** gets a shout-out for hitting Amazon Web Services with a \$30.5 million patent infringement verdict for client Acceleration Bay. Federal jurors in Delaware found last week that AWS's CloudFront content delivery system and Virtual Private Cloud virtual network infringed upon patents covering computer

networking and broadcasting technology. Jurors also found that the infringement was willful, opening the door for U.S. District Judge Richard Andrew to multiply damages by up to three times. The trial team also included **Lisa Kobialka, James Hannah, Aaron Frankel** and **Christina Finn** of Kramer Levin, as well as **Philip Rovner** of **Potter Anderson & Corroon**.

Shout-out to a team at **Quinn Emanuel Urquhart & Sullivan** that helped Tesla secure the dismissal of claims that the company and Elon Musk overstated the capabilities and safety of the automaker's self-driving technology. Judge Araceli Martinez-Olguin in San Francisco granted Tesla's motion to dismiss this week, finding many of the statements were "corporate puffery" and that the plaintiff had failed to show others were false or misleading. The Quinn Emanuel team was led by **Jesse Bernstein, Leigha Empson** and **Brenna Nelinson**.

Yvette Ostolaza, Ian Ross, Dee Dee Fischer and their team at **Sidley Austin** get a shout-out for fending off class certification for Univision in a case accusing the company of violating the Video Privacy Protection Act. Plaintiffs accused Univision of sharing subscriber video viewing history via a "pixel" on its website that sent certain personally identifiable information to Facebook. But U.S. District Senior Judge Robert Scola in Miami this week denied class certification, finding several conditions had to be met for the pixel to transmit the relevant information to Meta and that the plaintiffs failed "to supply anything more than speculation as to class size." The Sidley team also includes managing associates **Carmen Ortega** and **Brian Trujillo**.

Shout-out to a team at **Skadden, Arps, Slate, Meagher & Flom** that knocked out securities fraud claims against Chinese internet giant Baidu and iQIYI, one of China's largest streaming platforms in which Baidu owns a controlling stake. Plaintiffs sued both companies, drawing from a short seller report that pointed to third-party industry data and Chinese tax filings alleging discrepancies from what was reported in iQIYI's and Baidu's public filings in the U.S. However, U.S. District Judge Diane Gujarati in Brooklyn this week dismissed the Section 10(b) claims, finding the plaintiffs hadn't shown that any defendant was presented with specific data that contradicted their public statements. The court also dismissed plaintiffs' strict liability Section 11 claims, finding the plaintiffs couldn't point to any untrue statement regarding iQIYI's daily active users or deferred revenue figures. The Skadden team representing the companies included **Robert Fumerton, Steve Kwok, Scott Musoff, Beatriz (Bea) Paterno, Michael Griffin, Ian Lerman** and **Sophie Nguyen**.

NOT FOR REPRINT

© 2024 ALM Global, LLC, All Rights Reserved. Request academic re-use from www.copyright.com. All other uses, submit a request to asset-and-logo-licensing@alm.com. For more information visit Asset & Logo Licensing.

Who can claim compensation in Apple lawsuit?

[aol.co.uk/news/claim-compensation-apple-lawsuit-143223517.html](https://www.aol.co.uk/news/claim-compensation-apple-lawsuit-143223517.html)

Vicky McKeever



Apple (AAPL) settled a class-action lawsuit earlier this year, alleging that the tech company misled or failed to disclose information to investors. As the deadline approaches for shareholders to make a claim for compensation, here's what you need to know about the case.

The lawsuit alleged that between 2 November 2018 and 2 January 2019, Apple made "materially false and misleading statements and/or failed to disclose adverse information regarding Apple's business and prospects", according to an email sent to shareholders earlier this year.

Allegations included the failure to disclose that the "US-China trade war had negatively impacted demand for iPhones and Apple's pricing power in greater China".

Read more: The top stock sectors to watch for the rest of 2024

The litigation also claimed that Apple had not informed investors of the impact of reducing the cost of replacement batteries to "make up for the company's prior conduct of intentionally degrading the performance of the batteries in older iPhones".

Other claims centred on how sales growth was being "negatively impacted" and how Apple allegedly failed to inform investors that it had slashed production orders from suppliers for 2018 iPhone models.

The lawsuit also alleged that Apple's actions masked declines in unit sales of the company's flagship product.

Who can claim compensation?

An email was sent to a group of shareholders in July, informing them of the deadline by which they had to submit a claim for compensation. This covered investors who held shares in the company in those two months leading up to the revised revenue guidance.

The came after Apple reached a settlement on the lawsuit in March, agreeing to pay out \$490m (£369m). Part of this sum will go to Norfolk county council, the lead plaintiff on the case. The council said its pension fund had been impacted by Apple's alleged actions.

A spokesperson for the Norfolk pension fund said they were "proud of this recovery for investors".

Shawn Williams, a partner Robbins Geller Rudman & Dowd LLP, which represented investors, said the settlement was an "outstanding result".

The shareholder lawsuit stemmed from Apple's warning on 2 January 2019 that its quarterly revenue would be \$9bn lower than forecast, citing US-China trade tensions. This marked the first time Apple had cut revenue guidance since 2007, when the iPhone was released.

This update came after Apple CEO Tim Cook had told investors on a fourth-quarter results call on 1 November 2018 that while the business faced pressure in certain markets, he "would not put China in that category".

When is the deadline?

The email that was sent to the group of shareholders in July said they had until Friday 4 October 2024 to submit a claim for compensation.

More details of the litigation can be found via this link to the 2019 Apple Securities Settlement website. Those wishing to make claim need to do so using the form on this link and then submit it online or send to the address detailed on the form.

Read more: Pound, gold and oil prices in focus: commodity and currency check

In a confirmation email in response to submitting the form, Apple said: "Claims processing in settlements such as this can take an average of nine months to a year before distribution is approved, and in some instances there may be additional delays due to appeals or other issues."

Shares in Apple, the world's most valuable company, have faced pressure more recently amid concerns of softer demand for its latest iPhone 16 model. The shares fell 3% in Tuesday's session, after Barclays' research observed indicators of weaker demand for the phone, which was launched last month.

However, year-to-date the stock is still up 17%, with a market capitalisation of \$3.43tn.

A spokesperson for Apple had not responded to Yahoo Finance UK's request for comment at the time of writing.

Download the Yahoo Finance app, available for Apple and Android.

Nvidia Investors Backed by US in Supreme Court Crypto Sales Case

By Martina Barash

Documents

 [Amicus Brief](#)

 [Docket](#)

-
- Securities complaint's reliance on expert report at issue
 - US says it has interest in how to read litigation statute

Bloomberg Law News 2024-10-04T09:51:55701537565-04:00

Nvidia Investors Backed by US in Supreme Court Crypto Sales Case

By Martina Barash 2024-10-03T16:17:19000-04:00

- Securities complaint's reliance on expert report at issue
- US says it has interest in how to read litigation statute

Nvidia Corp. investors should be allowed to proceed with their suit alleging the chip maker misled the market about its dependence on sales to cryptocurrency miners, two federal agencies told the US Supreme Court.

The investors' complaint contained detailed allegations sufficient to survive dismissal, the Department of Justice and the Securities and Exchange Commission said Wednesday in a friend of the court brief. The high court should affirm the proposed class action's revival by the US Court of Appeals for the Ninth Circuit, the government said.

Solicitor General Elizabeth Prelogar also asked the justices for 10 minutes of argument time when the case is heard Nov. 13.

Private suits supplement the Justice Department's criminal prosecutions and the SEC's enforcement actions, she said. The government therefore has a strong interest in the proper reading of one of the statutes on investor litigation, the Private Securities Litigation Reform Act, she said.

The investors alleged that Nvidia and its CEO, Jensen Huang, misled them about how dependent the company was on revenue from crypto mining before a 2018 market downturn. A split panel of the Ninth Circuit revived the class action, saying the investors sufficiently alleged that Huang's statements were materially false or misleading and that he had the necessary level of intent, called scienter, for securities fraud.

Nvidia brought the case to the Supreme Court, arguing that the complaint relied on a hired expert's "invented" data about its revenue sources. "The panel's decision badly misunderstands the PSLRA and eviscerates the guardrails that Congress erected to protect the public from abusive securities litigation," Nvidia said Aug. 13 in a brief on the merits.

The investors responded Sept. 25, telling the high court that their complaint "draws on a wealth of reliable sources that collectively paint a clear picture of securities fraud."

The sources they cited include firsthand accounts from former Nvidia executives worldwide "describing Nvidia's and Huang's constant internal tracking of crypto sales"; a Royal Bank of Canada report independently concluding that Nvidia earned \$1.35 billion more from crypto-mining during the boom than it told the public, and other analyses; Nvidia's own public statements and SEC filings; internal documents and data sources; and the circumstances surrounding the stock drop.

The government sided with the investors. "Treating an expert's unsubstantiated opinion as a sufficient ground for inferring falsity or scienter would indeed be inconsistent with the PSLRA," the Justice Department and SEC said. "But that is not what occurred here."

The Ninth Circuit didn't "permit respondents to establish scienter based 'entirely' on generalized allegations about internal company documents," the government said. "That contention appears to be predicated on the absence of employee statements specifying the precise sales numbers reflected in NVIDIA's data."

Specific numbers recounted by the employees aren't necessary to support an inference of intent in the circumstances here, it said.

Similarly, falsity wasn't alleged on the basis of an unsubstantiated report, the agencies said. The Prism Group report was detailed and indicated the facts it drew on, they said. And the Ninth Circuit used the report in combination with "an outside report, the accounts of former employees, and the drop in NVIDIA's revenues after the crypto crash—each of which reinforced Prism's conclusion that crypto demand had accounted for a higher proportion of NVIDIA's sales revenues than Huang had publicly suggested," the government said.

Gupta Wessler LLP, Bernstein Litowitz Berger & Grossmann LLP, and Kessler Topaz Meltzer & Check LLP represent the investors. Hogan Lovells US LLP and Cooley LLP represent Nvidia.

The case is NVIDIA Corp. v. E. Ohman J:or Fonder AB , U.S., No. 23-970, amicus brief 10/2/24 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

To contact the editor responsible for this story: Brian Flood at bflood@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

<https://x.com/AnnMLipton/status/1842111496643342647>

 @annmlipton@esq.social reposted



@annmlipton@esq.social
@AnnMLipton

Of course! It's totally plausible that Kohl's truthfully denied receiving acquisition proposals on Jan 18, and then received bushel of them on Jan 19 & 20. How long does it take to develop an acquisition proposal anyway - just a couple of minutes, right?

[law360.com/securities/art...](https://www.law360.com/securities/art...)

B. Statements Regarding Potential Sale of the Company

The amended complaint alleges that defendants made a series of false or misleading statements regarding the potential sale of the company. Plaintiff first points to a statement in a January 18, 2022, press release denying Macellum's accusation that the Board had rebuffed purchased offers as "unfounded speculation." ECF No. 49, ¶ 128. Plaintiff asserts that this statement was false or misleading because news outlets reported on January 21 and 22, 2022, that Kohl's had received bids from multiple parties, and Kohl's confirmed in a press release on January 24, 2022, that it had received letters expressing interest in acquiring the company. *Id.*, ¶ 131. Plaintiff asserts that these allegations support an inference that Kohl's had received offers before the January 18 statement was made. But plaintiff fails to allege facts demonstrating that the challenged statement was false or misleading at the time it was made. At most, the amended complaint alleges facts that the statement was false as of January 21, but alleges no facts in support of his claim that the statement was untrue when made on January 18.

12:56 AM · Oct 4, 2024 · 836 Views



 2

 5

 1



Compare And Contrast – Midyear 2024

 10b5daily.com/2024/10/03/compare-and-contrast-midyear-2024

October 3, 2024

The 10b-5 Daily is catching up on posts after a very busy August and September, so thanks everyone for your patience. NERA Economic Consulting and Cornerstone Research released their 20224 midyear reports on securities class action filings in August. While the different methodologies employed by the two organizations usually lead to slightly different numbers, they managed mostly to match for this report.

The key findings include:

(1) The reports agree that filings are at steady levels as compared to 2023, with only a handful of merger objection cases. Both NERA and Cornerstone find that there were 112 filings in the first half of 2024 (up slightly from the second half of 2023).

(2) The categories of filings that both reports identify as potential growth areas for the year are COVID-19 (7-8 filings) and artificial intelligence (6 filings). In contrast, SPAC, cryptocurrency, and cybersecurity filings are down relative to past years.

(3) Both reports find that the annual number of filings against foreign companies is on track to be the lowest in the last ten years, even while the percentage of U.S. listings by foreign companies has steadily increased. For example, Cornerstone finds that foreign companies currently make up 24.7% of U.S. listings, but have only been the subject of 14.2% of the filings in the first half of 2024.

(4) NERA finds that there were 100 cases resolved in the first half of 2024, of which 52 were dismissed and 48 were settled.

The NERA report can be found [here](#) and the Cornerstone report can be found [here](#).

Agilon Board, Officers Sued Over Medical Cost Margin Statements

By Ben Miller

- Directors, officers allegedly made millions on insider sales
- Stock declined after Agilon revealed financial overstatements

Bloomberg Law News 2024-10-04T09:53:34691565713-04:00

Agilon Board, Officers Sued Over Medical Cost Margin Statements

By Ben Miller 2024-10-03T12:30:24000-04:00

- Directors, officers allegedly made millions on insider sales
- Stock declined after Agilon revealed financial overstatements

Agilon Health Inc. directors and top executives misled investors about the company's expenses, partnerships with physicians, and margins, according to a shareholder derivative suit filed in US District Court for the Western District of Texas.

The company's stock declined "precipitously" when disclosures revealed earlier this year that its margins had been hurt by a surge in medical costs, as well as data visibility gaps, which allegedly prompted Agilon to lower its fiscal year guidance for 2024, a shareholder said in the complaint filed Tuesday.

The health-care and technology company, which acts as an intermediary between insurers and medical providers, contracts with Medicare Advantage health plans and assumes full liability for medical service expenses in exchange for payment from the plans. Agilon also works with medical providers, sharing the proceeds from its health plan agreements with the physicians who provide those services to patients.

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

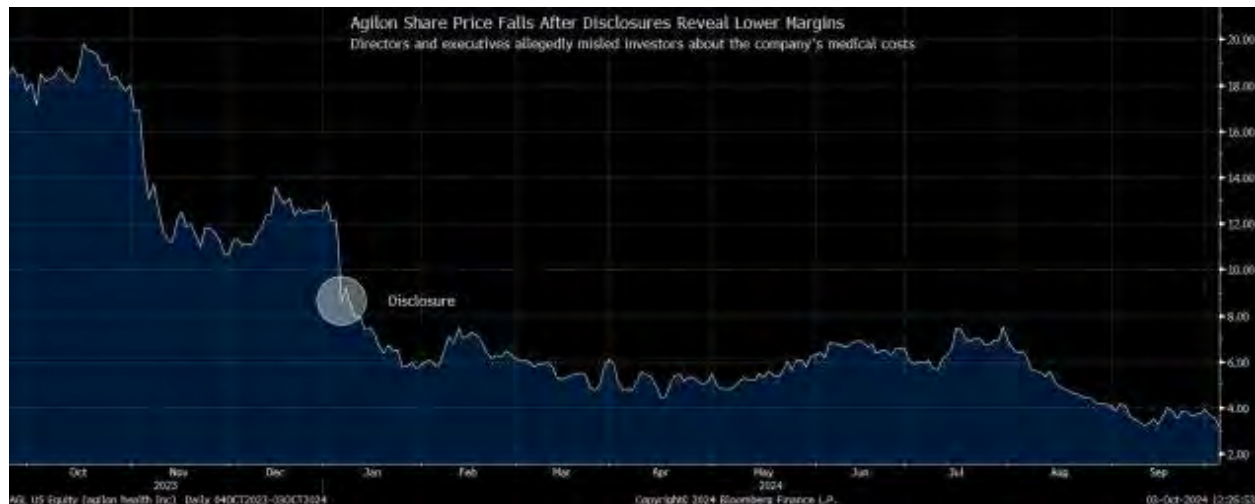
Agilon's board and top brass allegedly misled investors about this business model's profitability, which relies on adding new physicians across new and existing regional markets.

They failed to disclose that the company had understated its medical costs, didn't provide adequate onboarding for new physicians in existing markets, and didn't adequately monitor medical margins, according to the complaint.

After a Nov. 2, 2023, disclosure revealed that margins had been adversely impacted by the increased utilization rates and medical expenses, Agilon further revealed its margins had been driven down by the onboarding issues for new physicians in a Jan. 5 disclosure.

Then on Feb. 27, the company reported substantial medical costs for 2023 that were previously undisclosed, acknowledging the data visibility gaps and lowering its “already disappointing” guidance for 2024, the shareholder derivative complaint said.

Those disclosures prompted stock drops, including a 29% decline on Jan. 5, which was its biggest single-day decrease of all time, according to data compiled by Bloomberg.



The board and executives also opened the company up to legal issues by misleading investors, prompting a March securities class action, which is pending in the same district court.

Shareholder Julie Bingham seeks to recover money damages and punitive damages on behalf of the company, as well as legal fees. Briscoe Law Firm PC and Rigrodsky Law PA represent the plaintiff.

The case is Bingham v. Sell , W.D. Tex., No. 1:24-cv-01181, 10/2/24 .

To contact the reporter on this story: Ben Miller in New York City at bmiller2@bloombergindustry.com

To contact the editor responsible for this story: Rob Tricchinelli at rtricchinelli@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Peloton, Board Settle Insider Trading Cases on Treadmill Safety

By Mike Leonard

Documents

 [EDNY Letter](#)

 [Delaware Chancery Letter](#)

-
- Company discloses tentative deal to end three related lawsuits
 - Suits said top brass hid defects that caused a child's death

Bloomberg Law News 2024-10-04T09:54:05327546965-04:00

Peloton, Board Settle Insider Trading Cases on Treadmill Safety

By Mike Leonard 2024-10-03T13:28:05000-04:00

- Company discloses tentative deal to end three related lawsuits
- Suits said top brass hid defects that caused a child's death

Peloton Interactive Corp. and its senior leaders have an agreement in principle to end litigation over their alleged scheme to pocket millions in insider trading profits at prices inflated by the company's pandemic-era boom while concealing catastrophic safety problems.

Peloton and its top brass said in court filings that they're finalizing a global settlement to resolve a trio of parallel shareholder cases targeting their stock sales and statements about its treadmills. The company—best known for its flagship stationary bike—saw its fortunes soar after the Covid-19 outbreak shuttered gyms worldwide, forcing people to work out at home.

The three lawsuits, filed in 2021 and 2022, stemmed from dozens of injury reports involving the Tread+, which allegedly suffered from dangerous design flaws that gave it a tendency to trap and drag children and pets. At least one child died in a Tread+ accident. The suits said Peloton's top brass downplayed the problems while selling nearly \$500 million worth of stock based on inside information that a recall was virtually inevitable.

The cases are pending in Delaware's Chancery Court, the US District Court for the District of Delaware, and the US District Court for the Eastern District of New York. They involve shareholder derivative claims, which are technically filed on a corporation's behalf against its leaders. Damages in derivative cases are typically paid into a company's coffers by its officers, its directors, or their insurers.

The tentative accord was first disclosed Sept. 30, the day a federal judge in Manhattan dismissed a separate securities fraud lawsuit that said Peloton insiders sold hundreds of millions of dollars worth of stock while falsely hyping the sustainability of its explosive growth during the pandemic. Another case pending in Delaware involves similar allegations.

The settlement in principle was originally reached in late August, according to one of the court filings.

The cases are *In re Peloton Interactive Inc. Deriv. Litig.*, E.D.N.Y., No. 1:21-cv-2862, letter filed 9/30/24, *In re Peloton Interactive Inc. S'holder Deriv. Litig.*, Del. Ch., No. 2022-1051, letter filed 10/1/24, and *Blackburn v. Peloton Interactive Inc.*, D. Del., No. 22-cv-1618.

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Amy Lee Rosen at arosen@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

**Bloomberg
Law**[Request a Demo](#)[Login](#)[Securities Law News](#)

Oct. 3, 2024, 12:53 PM PDT

FibroGen Board Beats Lawsuit Over Failed AstraZeneca Partnership

By Mike Leonard

- Lawsuit stemmed from regulatory woes that doomed anemia drug
- Nothing board could have done to salvage project, judge says

Bloomberg Law News 2024-10-04T09:56:08940144303-04:00**FibroGen Board Beats Lawsuit Over Failed AstraZeneca Partnership****By Mike Leonard 2024-10-03T15:53:51000-04:00**

- Lawsuit stemmed from regulatory woes that doomed anemia drug
- Nothing board could have done to salvage project, judge says

FibroGen Inc.'s senior leaders prevailed in litigation blaming them for the fallout of its failed effort to develop an anemia drug through a partnership with AstraZeneca Plc.

A Delaware judge Wednesday dismissed claims that the board turned a blind eye to doctored clinical data, false statements by management, and a scheme by two executives to sell stock at inflated prices. The company's broad liability shield limits fiduciary breach claims against the board to those involving bad faith, and there's no reason to think its members deliberately ignored red flags, the judge said.

The "simple truth" is that the Food and Drug Administration rejected the drug candidate because it "proved inferior to the existing treatment," Vice Chancellor Sam Glasscock III wrote. "That would have become apparent with or without any management wrongdoing, and plaintiffs do not suggest anything that the board could have done."

The shareholder lawsuit in Delaware's Chancery Court stemmed from regulatory woes that began piling up in late 2022, when a citizen's petition to the FDA suggested FibroGen had manipulated data concerning the drug candidate, Roxadustat. The company's shares fell precipitously several times across the first half of 2021 as information trickled out about the extent of those problems, plunging from \$44 to \$14 over a three-month period, according to the April 2022 court complaint.

Meanwhile, FibroGen's interim CEO and chief medical officer—who ran the Roxadustat trials—sold a combined \$2.3 million in stock, the suit said. The medical officer allegedly resigned weeks after the citizen's petition was filed.

The allegations echoed a federal securities fraud case that ended in February with a \$28.5 million settlement. The Delaware case, by contrast, involved shareholder derivative claims, which are technically filed on a corporation's behalf against its senior leaders. Damages in derivative cases are typically paid into a company's coffers by its officers, its directors, or their insurers.

Because of that technicality, investors can generally only lead derivative litigation if they show a board majority faced legal exposure or other conflicts of interest that made it futile to demand an internal investigation, Glasscock said Wednesday. Given the lack of evidence that FibroGen's board acted in bad faith, the federal securities claims reflected the proper way to hold the company accountable for its stock plunge, the judge found.

"This matter is a natural securities action repurposed for equitable review," he wrote.

FibroGen and most of its leaders were represented by Morris, Nichols, Arsht & Tunnell LLP and Cooley LLP. The former chief medical officer was represented by Abrams & Bayliss LLP and Pillsbury Winthrop Shaw Pittman LLP. The shareholders were represented by Andrews & Springer LLC, Cooch & Taylor PA, Johnson Fistel LLP, and Glancy Prongay & Murray LLP.

The case is *In re FibroGen Inc. Deriv. Litig.*, Del. Ch., No. 2022-0331, 10/2/24.

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Kiera Geraghty at kgeraghty@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Legal Fee Tracker: Whistleblower lawyers could lose big in False Claims Act fight

 [reuters.com/legal/government/legal-fee-tracker-whistleblower-lawyers-could-lose-big-false-claims-act-fight-2024-10-03](https://www.reuters.com/legal/government/legal-fee-tracker-whistleblower-lawyers-could-lose-big-false-claims-act-fight-2024-10-03)

David Thomas, Mike Scarcella

U.S. flag and Judge gavel are seen in this illustration taken, August 6, 2024.

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

Oct 3 (Reuters) - A ruling by a Florida federal judge this week threatened to wipe out part of the federal False Claims Act, the Civil War-era statute designed to combat fraud against the U.S. government and reward whistleblowers who help uncover it.

The law's whistleblower provisions, which Congress strengthened in 1986, have fueled a lucrative practice for a segment of the U.S. plaintiffs bar. Last year False Claims Act whistleblowers and their lawyers collected about \$350 million in awards for bringing successful cases on the government's behalf, according to U.S. Justice Department records.

On Monday, U.S. District Judge Kathryn Mizelle ruled that those whistleblower, or qui tam, provisions are unconstitutional. Mizelle concluded , opens new tab in a False Claims Act Medicare fraud case that the qui tam provisions improperly allow whistleblowers to exercise federal executive power without accountability to the president.

The whistleblowers decide "whether to appeal and which arguments to preserve, thereby shaping the broader legal landscape for the federal government," Mizelle said, adding that they had more independence than a federal prosecutor.

The case could soon head to the 11th U.S. Circuit Court of Appeals and eventually to the U.S. Supreme Court. The federal government, which has collected more than \$75 billion , opens new tab under the False Claims Act since 1986, has argued , opens new tab that the whistleblower provisions are constitutional. But Mizelle's analysis, which False Claims Act defendants have increasingly advocated, could eventually win out at the high court.

"False Claims is not going to go away, but qui tam could," said Craig Margolis, a partner at Arnold & Porter Kaye Scholer who defends companies in False Claims Act cases.

Millions of dollars are at stake for whistleblower lawyers, who typically have a contingency stake in the qui tam award their client receives for a successful case. That award can range from 15% to 30% of the amount the government recovers, depending on whether the Justice Department intervenes directly in a case to litigate the whistleblower's claims.

The False Claims Act also contains a fee-shifting provision that requires defendants to cover a whistleblower's "reasonable" legal fees for a successful case. That gives the lawyers two potential paydays if they win -- their contingency interest in a whistleblower's award, plus

their regular hourly fees.

Whistleblower lawyers told Reuters that there's no standard contingency arrangement in False Claims Act cases. Some firms may rely more on the statutory fee provision of the law and advertise a smaller contingency fee than others.

"The practice varies so widely that I can't answer the question," said H. Vincent McKnight Jr., a qui tam practice vice-chair at Sanford Heisler Sharp. McKnight declined to say how his own firm charges False Claims Act clients.

McKnight and Gordon Schnell, a partner at Constantine Cannon who represents whistleblowers, downplayed the impact that qui tam's demise could have on their firms, noting they have a diversified set of practices.

Schnell predicted in any case that Mizelle's ruling would not survive on appeal. The Justice Department and Congress both strongly support the False Claims Act, he said, and the law's qui tam provisions could be amended through legislation to address constitutional concerns.

"The essential premise of whistleblowers helping the government uncover and prosecute fraud is not going to go away," Schnell said.

Mizelle's ruling came in a False Claims Act case brought by former Florida physician Clarissa Zafirov, who accused her former employer and several other Florida health care providers of defrauding Medicare by misrepresenting patients' medical conditions.

Zafirov's lawyers at Morgan Verkamp and Rabin Kammerer Johnson did not immediately respond to requests for comment, including on their plans regarding an appeal or their would-be stake in any whistleblower award.

The Florida healthcare defendants in the Zafirov case, whose arguments were backed by the U.S. Chamber of Commerce [\[link\]](#), opens new tab, were represented by Foley & Lardner and O'Melveny & Myers, among other firms.

Mizelle's ruling recognized that qui tam litigation has gone beyond "what the constitutional drafters intended," Foley partner Jason Mehta told Reuters earlier this week.

-- In other legal fee news, Baltimore County will pay 15% of any gross recovery it receives in litigation connected to the collapse of the Francis Scott Key Bridge to its private-sector attorneys, according to a contract obtained by Reuters [\[link\]](#), opens new tab.

The county hired Grant & Eisenhofer and Bekman Marder Hopper Malarkey & Perlin to pursue its claims against Grace Ocean Pte Ltd and Synergy Marine Group, the owner and operator of the cargo ship that struck the bridge in March.

The county's lawsuit is one of several that have been filed against Grace Ocean and Synergy Marine. The state of Maryland, the U.S. Justice Department, victims' families and

others are all pursuing their own claims in Maryland federal court.

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

Read More:

Legal Fee Tracker: Law firms line up in Baltimore bridge collapse cases

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

Legal Fee Tracker: Clearview AI's choose-your-own-adventure privacy settlement

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting by David Thomas

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab



David Thomas
Thomson Reuters

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

- [✉](#)
- [X](#)

DOJ's Visa Antitrust Suit Hands Class Action Lawyers New Line of Attack Against Payments Giant

 [law.com/corpocounsel/2024/10/04/dojs-visa-antitrust-suit-hands-class-action-lawyers-new-line-of-attack-against-payments-giant](https://www.law.com/corpocounsel/2024/10/04/dojs-visa-antitrust-suit-hands-class-action-lawyers-new-line-of-attack-against-payments-giant)

James Palmer

A Florida sign-making company has filed an antitrust class action against Visa, the first of what might become a tsunami of cases piggybacking on the suit the Department of Justice filed last month alleging the company monopolized the debit card market.

Like the DOJ's suit, Loxahatchee, Florida-based All Wrapped Up Signs and Graphix's complaint focuses on the technology that Visa uses to process debit payments, accusing the company of penalizing merchants that use alternative networks and paying potential competitors not to develop rival networks.

Class action attorneys often take their cue from regulators, which would suggest a deluge of similar cases are in the offing. A report by the consultancy National Economic Research Associates found that that 26% of class action lawsuits filed in 2023 came on the heels of regulatory actions.

Drawn-out, high stakes litigation is nothing new for the San Francisco-based company. Visa along with Mastercard had been battling lawsuits from merchants alleging the card giants levied excessive charges on credit and debit transactions for nearly two decades when the parties reached a \$30 billion settlement in March.

But just three months later, a judge rejected it, after the National Retail Federation and other critics argued that the deal left fees too high and Visa and Mastercard with too strong a grip on the market.

Visa disclosed in a securities filing late last month that on Sept. 24—the same day the DOJ filed its lawsuit, the company set aside an additional \$1.5 billion for its U.S. litigation escrow fund. That was on top of allocating \$1 billion for the fund last year, securities filings show.

Visa did not respond to Law.com's request for comment on the All Wrapped Up Signs lawsuit. But Visa General Counsel Julie Rottenberg has called the DOJ suit "meritless" and said the government "ignores the reality that Visa is just one of many competitors in a debit space that is growing, with entrants who are thriving.

A class action attorney who is not involved in Visa litigation told Law.com that while the two suits contain similar allegations, the relief each seeks is entirely different.

While the DOJ seeks a judgment forcing Visa to change its business practices, the All Wrapped Up Signs class action seeks financial redress for merchants, said Scott D. Gilchrist, a partner at Cohen & Malad in Indianapolis.

"The civil case that follows is looking to represent the merchants who were harmed by paying fees higher than they would have if not for visas actions," Gilchrist said.

The Washington, D.C.-based law firm Cohen Milstein Sellers & Toll, which is representing All Wrapped Up, has a history with Visa. In 2020, it sued the company in federal court in Brooklyn on behalf of gas stations in the borough, accusing it of imposing higher-than-necessary swipe fees. Visa denies the allegations in the suit, which remains pending.

"More than ever, America's merchants rely on debit transactions, the great bulk of which Visa controls," said Dan McCuaig, an antitrust partner at Cohen Milstein. "We applaud the DOJ for filing the United States' recent lawsuit challenging many Visa practices designed to maintain its dominant position and inflated fees, and we look forward to vigorously representing a class of businesses harmed by Visa's anticompetitive practices."

NOT FOR REPRINT

© 2024 ALM Global, LLC, All Rights Reserved. Request academic re-use from www.copyright.com. All other uses, submit a request to asset-and-logo-licensing@alm.com. For more information visit Asset & Logo Licensing.

Companies ask US judiciary group to force lawsuit funding disclosures

 [reuters.com/legal/government/companies-ask-us-judiciary-group-force-lawsuit-funding-disclosures-2024-10-03](https://www.reuters.com/legal/government/companies-ask-us-judiciary-group-force-lawsuit-funding-disclosures-2024-10-03)

Mike Scarcella

U.S. dollar banknotes are seen in this photo illustration taken February 12, 2018.

REUTERS/Jose Luis Gonzalez/Illustration/File Photo Purchase Licensing Rights , opens new tab

Oct 3 (Reuters) - More than 100 major companies from the technology, pharmaceutical, automotive and other sectors have urged the U.S. judiciary to adopt a nationwide rule requiring disclosure of third-party litigation funding in lawsuits.

Companies including Amazon.com, Google, Cisco, Meta, Comcast, Exxon, Zurich, Eli Lilly, Bayer, Ford, Pfizer and Novartis submitted the letter , opens new tab on Wednesday to the federal courts' Advisory Committee on Civil Rules, in advance of a hearing by the committee next week.

Litigation funding, where a financier backs clients' cases in exchange for a cut of an eventual settlement or judgment, has become a multibillion-dollar industry in recent years.

Some U.S. courts require disclosure of outside funding, but there is no uniformity across the judiciary.

The companies either had no immediate comment or did not immediately respond to a request for comment about the letter, which was organized by defense-focused Lawyers for Civil Justice.

Some of the signatories have previously expressed concern about litigation funding and the need for greater oversight. The U.S. Chamber of Commerce and other business groups have for years called on standardizing funding disclosure rules.

The Chamber's Institute for Legal Reform submitted , opens new tab a letter on Wednesday to the advisory committee urging greater oversight, and Republican U.S. Senators John Cornyn and Thom Tillis expressed , opens new tab a similar view. The companies' letter said disclosures about financial backers in cases are necessary to allow defendants to make informed decisions about the course of litigation. They said outside funding "fundamentally alters the dynamics and has a major impact on whether the dispute can be resolved through settlement."

Christopher Bogart, chief executive of litigation funder Burford Capital, in a statement on Thursday questioned the motives of the companies that signed onto the letter and rejected their call for mandatory disclosures.

"What they want is to keep their unfair advantage in the justice system and to drive up costs for anyone who sues them – which is exactly what they do whenever they find out about the identity of a litigation funder," Bogart said.

The International Legal Finance Association, a Washington, D.C. group that advocates for the funding industry, in a statement on Thursday criticized the drive for a nationwide disclosure rule.

"These companies yet again are attempting to further tilt the justice system in their own favor by forcing their challengers to disclose privileged information about their legal strategies," Shannon Campagna, the group's acting executive director, said.

The judiciary's civil rules advisory committee is meeting on Oct. 10 in Washington, D.C. The panel said its agenda includes a discussion of amending court rules to require disclosure of litigation funding. No formal proposal is up for a vote.

A representative for the committee declined to comment.

The committee last discussed litigation funding in late 2021.

Read more:

Louisiana law places new rules on litigation funders

Litigation funder Burford fights order denying bid to take over Sysco cases

US litigation funding in 'state of flux' as deal commitments dip, says report

Litigation funders deployed \$3.2 bln in U.S. investments last year - report

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting by Mike Scarcella

Companies seek rule for disclosure of litigation funders' agreements

DJ [dailyjournal.com/articles/381263-companies-seek-rule-for-disclosure-of-litigation-funders-agreements](https://www.dailyjournal.com/articles/381263-companies-seek-rule-for-disclosure-of-litigation-funders-agreements)

Oct. 4, 2024

A letter to the U.S. Courts from presidents and chief legal officers of 124 companies said such disclosure is needed so they know how to defend against plaintiffs' lawsuits.

A group of large companies, including several California technology giants, have sent a letter to the Administrative Office of the U.S. Courts asking for a uniform rule requiring disclosure of the identity of third-party litigation funders and their agreements with plaintiffs.

The letter -- sent Wednesday to the federal courts' Advisory Committee on Civil Rules by the presidents and chief legal officers of 124 companies in sectors from technology to insurance to pharmaceuticals -- said such disclosure is needed so they know how to defend against plaintiffs' lawsuits.

"We know from experience that when [third party litigation funding, or TPLF] is present in our cases, it fundamentally alters the dynamics and has a major impact on whether the dispute can be resolved through settlement," the unsigned letter stated.

"We cannot make informed decisions without knowing the stakeholders who control the litigation -- and we cannot understand the control features of a TPLF agreement without reading the agreement," it continued.

Christopher Bogart, CEO of Burford Capital LLC - one of the leading litigation funding companies in the nation - expressed disdain Thursday at what he described as his adversaries' attempts to gain an advantage.

"I used to represent big companies like this. They don't care about transparency - indeed, they resist it when their own activities are [at] issue," he said in a statement.

"What they want is to keep their unfair advantage in the justice system and to drive up costs for anyone who sues them - which is exactly what they do whenever they find out about the identity of a litigation funder," Bogart added.

Tony Rowles, a partner with Irell & Manella LLP who represents plaintiffs and defendants in intellectual property litigation, said a few judges - especially in the Northern District of California and in Delaware - require litigation funding companies to disclose their

involvement in lawsuits but none have local rules mandating they reveal their agreements with plaintiffs.

Other judges, such as those in Texas district courts - which are popular venues for plaintiffs in patent infringement lawsuits -- impose no disclosure requirements, he added in a phone interview Thursday. Rowles said a mandate forcing disclosure of agreements by the litigation funding companies with plaintiffs would be a new step.

"That would be broader than just about any judge in the country currently requires," he said.

The bid to ask courts to amend the rules of civil procedure is a new effort by companies that have expressed frustration about litigation funding companies providing the financial backing for lawsuits against them, although similar legislation was introduced in Congress in July.

"It's been brewing for a while," Rowles said.

Signatories of the letter include California companies Gilead Sciences Inc., Alphabet Inc.-owned Google LLC, Cisco Systems Inc. and Meta Platforms Inc.

U.S. Rep. Darrell Issa, R-Escondido, introduced the bill that would mandate disclosure of such agreements in federal civil lawsuits and said it would achieve transparency and reveal the involvement of funders backed by the People's Republic of China.

"If a third-party investor is financing a lawsuit in federal court, it should be disclosed at the onset of the case," he wrote in a statement when the bill was introduced. "Awareness by all parties will help ensure fair and equal treatment by the justice system and deter bad actors from exploiting our courts."

The companies, in their letter, said they are at a disadvantage under the current system and need a uniform rule in federal courts across the country.

"Absent such a rule, the continued uncertainty and court-endorsed secrecy of non-party funding in our cases will further unfairly skew federal civil litigation," they wrote.

#381263

Craig Anderson

Daily Journal Staff Writer
craig_anderson@dailyjournal.com

Texas sues TikTok for violating children's privacy

 [reuters.com/legal/texas-attorney-general-sues-tiktok-alleged-sharing-childrens-personal-data-2024-10-03](https://www.reuters.com/legal/texas-attorney-general-sues-tiktok-alleged-sharing-childrens-personal-data-2024-10-03)

Jonathan Stempel, David Shepardson

By Jonathan Stempel and David Shepardson

October 3, 2024 1:23 PM PDT Updated 18 hours ago

A TikTok logo is displayed on a smartphone in this illustration taken January 6, 2020.

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

Oct 3 (Reuters) - Texas sued TikTok on Thursday, accusing the social media platform of violating children's privacy and state law by sharing children's personal identifying information without consent from their parents or legal guardians.

The lawsuit filed by Texas Attorney General Ken Paxton seeks an injunction and civil penalties of up to \$10,000 for each violation of the state's Securing Children Online through Parental Empowerment Act, or SCOPE Act.

Paxton said TikTok, whose parent is China's ByteDance, does not provide tools to restrict children's privacy and account settings, even allowing information to be shared from accounts set to "private," and allows targeted advertising to children.

TikTok and other large technology companies must be held accountable "for exploiting Texas children and failing to prioritize minors' online safety and privacy," Paxton said in a statement.

The attorney general filed the lawsuit in a Galveston County, Texas state court. TikTok did not immediately respond to a request for comment.

Reporting by Jonathan Stempel in New York and David Shepardson in Washington; Editing by Chizu Nomiya

Texas AG sues over insulin price hike conspiracy

 [courthousenews.com/texas-ag-sues-over-insulin-price-hike-conspiracy](https://www.courthousenews.com/texas-ag-sues-over-insulin-price-hike-conspiracy)

Cameron Thompson

Ken Paxton accuses the three big insulin manufacturers of conspiring with the three largest pharmacy companies to overcharge patients hundreds of dollars per dose while raking in sizable profits.

AUSTIN, Texas (CN) — Texas sued drugmakers and pharmacy benefit managers Thursday, claiming they are conspiring to raise insulin prices by as much as 1000%, bringing in massive profits for themselves while pushing the costs onto consumers who rely on the life-saving drugs.

Texas Attorney General Ken Paxton filed the lawsuit Thursday in Travis County District Court. In the nearly 150-page document, Paxton accuses the three largest insulin manufacturers and the three largest pharmacy companies of conspiring to overcharge patients for insulin by artificially inflating list prices, thereby violating the Texas Deceptive Trade Practices-Consumer Protection Act.

Eli Lilly, Novo Nordisk and Sanofi-Aventis collectively hold a near-total monopoly on the global manufacture of insulin and other medicines for diabetes, earning tens of billions of dollars in revenue from these drugs.

Paxton argues in the lawsuit that these three companies artificially raised the prices they charged pharmacies. They then paid those pharmacies back a significant portion of the list price in exchange for being included in the pharmacies' standard offerings.

Paxton writes in the suit: "Insulins, which today cost manufacturer defendants less than \$2 to produce and which were originally priced at \$20 when released in the late 1990s, now range between \$300 and \$700."

Paxton plainly stated the consequences of those high costs.

"For Texas diabetics, the physical, emotional and financial tolls caused by the insulin pricing scheme are devastating. Unable to afford the drugs their doctors prescribe, many diabetics in Texas ration or under-dose their diabetes medications, inject expired insulin, reuse needles, and starve themselves to control their blood sugars. This behavior is extremely dangerous and has led to serious complications or even death," the attorney general writes in the suit.

Eli Lilly in particular raised the price of one of their drugs, Humalog, by more than 1500% from 1997 to 2018, according to the Bureau of Labor Statistics.

Meanwhile, the three main pharmacy benefit managers included as defendants — CVS Caremark, Express Scripts and OptumRx — make up a combined 80% of benefit managers while controlling three of the five largest pharmacy chains in the country, Paxton writes. Each of these three are owned by three massive insurance companies, respectively Cigna, Aetna and UnitedHealth Group. These conglomerates are each in the Fortune 500's top 20 companies.

Paxton claims these benefit managers encouraged drug companies to further raise prices by granting preferred status to whichever company paid them the most and charged the highest price. Moreover, while these companies claim to lower prices for their customers, in reality they regularly and willfully raise prices to keep their profits high, according to Paxton.

He says the manufacturers and pharmacies have conspired to raise prices and maximize their own profits while pushing the cost onto consumers.

In recent years, the extreme price of insulin has become a national issue. President Joe Biden's Inflation Reduction Act capped the out-of-pocket costs for seniors on Medicare at \$35. Since then, the president and others in Washington, including Senator Bernie Sanders, have pressured drug companies to match that cap while legislation is in the works.

Texas also passed legislation in 2022 capping co-pays for insulin prescriptions at \$25 for a 31-day supply or \$75 for a 60-day or 90-day supply.

Despite these efforts, insulin remains prohibitively expensive for many of the tens of millions of American diabetics, an estimated 11.6% of the total population, according to the National Institute of Health. Texas alone has roughly 3.4 million diabetics, while a further 7 million Texans are prediabetic.

Paxton is asking for an injunction against the companies to stop their deceptive practices, and is seeking unspecified financial penalties against them.

Paxton's office has not yet responded to a request for comment.

Categories / Courts, Health, Politics

Subscribe to Closing Arguments

Sign up for new weekly newsletter Closing Arguments to get the latest about ongoing trials, major litigation and hot cases and rulings in courthouses around the U.S. and the world.

Nasdaq Board Diversity Rules Face State Attorneys General Probe

By Andrew Ramonas

Documents



- Officials in 22 states ask if rules meet anti-discrimination laws
- Scrutiny comes amid legal challenge in the Fifth Circuit

Bloomberg Law News 2024-10-04T09:50:59391013411-04:00

Nasdaq Board Diversity Rules Face State Attorneys General Probe

By Andrew Ramonas 2024-10-03T13:26:35000-04:00

- Officials in 22 states ask if rules meet anti-discrimination laws
- Scrutiny comes amid legal challenge in the Fifth Circuit

Nasdaq rules encouraging diverse boards at companies listed on the stock exchange have drawn an investigation from 22 state attorneys general into whether the regulations are discriminatory.

The rules require thousands of companies to report director diversity information annually and have a diverse board or explain why they can't. Implementation is moving forward despite a legal challenge from conservative groups still pending in the US Court of Appeals for the Fifth Circuit.

Republican attorneys general led by Brenna Bird of Iowa announced their inquiry Thursday. They're giving Nasdaq Inc. until Oct. 23 to provide evidence and share any legal analysis it conducted to ensure its rules comply with anti-discrimination laws.

The Supreme Court was clear in its June 2023 *Students for Fair Admissions v. President and Fellows of Harvard College* decision limiting affirmative action at universities that "eliminating racial discrimination means eliminating all of it," the attorneys general said in a letter to Nasdaq CEO Adena Friedman.

"Nasdaq insists on continuing down the wrong path," the attorneys general wrote. Other signatories included Ashley Moody of Florida and Ken Paxton of Texas.

A Nasdaq spokesperson said the exchange is a "firm believer in the rule of law."

"The board disclosure framework was developed in response to strong demand from both investors and corporates, with pragmatism as a guiding principle," the representative said in a statement.

Bird, Moody, Paxton, and other Republican attorneys general previously urged the Fifth Circuit to toss Nasdaq's rules. The full Fifth Circuit is reviewing the regulations after a three-judge panel of the court ruled last year that the Securities and Exchange Commission had the authority to approve the rules in 2021.

Nasdaq and SEC lawyers faced pointed questions from the full Fifth Circuit about the rules in May during oral arguments in the case. Of the 17 judges who heard the arguments, 11 were appointed by Republican presidents. The remaining six judges, including the three who ruled in favor of the rules in 2023, were picked by Democratic presidents.

To contact the reporter on this story: Andrew Ramonas in Washington at aramonas@bloomberglaw.com

To contact the editors responsible for this story: Amelia Gruber Cohn at agrubercohn@bloombergindustry.com; Andrea Vittorio at avittorio@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Zero Individual FCPA Actions During Grewal's Tenure

 fcpprofessor.com/zero-individual-fcpa-actions-grewals-tenure

October 4, 2024

The SEC recently announced that Gurbir Grewal (Director of the Division of Enforcement) will depart the SEC on October 11, 2024.

The SEC release touts various enforcement figures during Grewal's tenure (which began in July 2021) such as "During Mr. Grewal's tenure, the Division of Enforcement recommended, and the Commission authorized, more than 2,400 enforcement matters resulting in orders for more than \$20 billion in disgorgement, prejudgment interest, and civil penalties, more than 340 industry bars against individuals, more than \$1 billion in awards to whistleblowers, and the return of billions of dollars to harmed investors."

But one meaningful enforcement figure is not mentioned.

FCPA enforcement is a "high priority" for the SEC and the SEC has a specialized FCPA unit "to further enhance its enforcement of the FCPA."

SEC officials, including Grewal, have long talked about the importance of individual accountability – in the FCPA context and for other securities laws violations. As Grewal stated "holding individuals accountable is also critical to our [enforcement] efforts."

During Grewal's tenure as Enforcement Director (July 2021 to the present), the SEC brought **20** corporate FCPA enforcement actions.

However, not one involved a related individual prosecution.

Zero. Zilch. Nada.

'More Than They Could Chew': EEOC Enforcement Suits Plummet

 [law.com/2024/10/02/more-than-they-could-chew-eeoc-enforcement-suits-plummet](https://www.law.com/2024/10/02/more-than-they-could-chew-eeoc-enforcement-suits-plummet)

Charles Toutant

The volume of lawsuits filed against employers by the Equal Employment Opportunity Commission took a surprising drop in 2024, according to an analysis by attorneys at Seyfarth Shaw.

Only 96 suits were filed nationwide in the 2024 fiscal year, which ended on Sept. 30, Seyfarth said in its report.

That's a decline of 35% from the 144 suits the agency filed in 2023, and one of the lowest numbers of EEOC merits suits filed in the last three decades, the report's authors said.

A tight financial picture could be part of the reason for the plunge in suits filed, the Seyfarth report said. The agency requested a \$26 million increase in funding, but the \$455 million Congress approved for 2024 was the same level as 2023. Meanwhile, the agency was saddled with an inventory of cases from the previous year's filing surge, the report said.

"I think that they are contending with perhaps biting off more than they could chew last year and dealing with it now, in this fiscal year," said Christopher DeGross, a Seyfarth litigator who worked on the report. "We know the lawyers at the EEOC that are frontline soldiers in this, and they're stretched very thin. These are good lawyers, but they have a huge inventory."

Finances were so strained at the EEOC that the agency put all its employees on notice of a one-day furlough in August. The agency was able to resolve its budget shortfall and avoid the furlough, but ultimately it had less money to devote to litigation, the report said.

[Click here to read the Seyfarth report](#)

Priority

Aside from finances, the Seyfarth analysis shows that workplace harassment, based on characteristics such as sex or race, remains a high priority.

In April, the EEOC released an updated Workplace Guidance to Prevent Harassment, which updated prior publications by addressing harassment in virtual work environments. And in June, the commission released antiharassment guidance targeting employers in the construction industry.

Enforcement actions over harassment spiked in 2024, said Andrew Scroggins, a labor and employment attorney at Seyfarth.

For the third straight year, the agency filed hostile-workplace suits in the double digits, the report said.

Enforcement for workplace harassment spiked as part of the #MeToo movement, which generated more litigation, Scroggins said. Then, activity in that category declined somewhat, but it's still important to EEOC leadership, he said.

"We saw reminders from the commission level earlier this year with publication of their guidance around harassment that it's still important to them, and then we saw with the filings from the regional attorneys who are shepherding the cases to litigation that it's important to them as well," Scroggins said.

Targeted Sectors

The agency has modified its strategic plans, which previously indicated it would pursue sexual harassment, to focus on systemic sexual harassment, DeGroff said.

That plan also focuses on certain target industries, including restaurants, which are seen as a place where sexual harassment is rampant, DeGroff said.

"They have focused lots of litigation firepower on that industry, particularly the harassment of teenage workers that they characterize as a vulnerable population that doesn't know their rights and are particularly susceptible to being victims. So the EEOC is laser-focused on those kinds of claims," DeGroff said.

"Another reason why I think that's a focus of the EEOC is that so many people have their first job working in the restaurant industry, that it's a good way to remedy that behavior to make sure that people beginning their working life work in an appropriate environment," Scroggins said.

Besides the restaurant business, the EEOC's antiharassment focus is also targeting construction and trades, Scroggins said.

That effort provides a "double dip" on carrying out EEOC priorities because, in addition to combating harassment, such actions can break down what are seen as historical barriers to employment for women or underrepresented minorities, he said.

The Americans with Disabilities Act remains a major priority for the EEOC, the Seyfarth report stated. The agency filed 42 disability-related suits in the 2024 fiscal year, which is more than it filed in 2022, despite higher overall filings in 2022, the report said. While it

focused on a range of disabilities, it put a priority on hearing-related disabilities, the agency said.

'Looking for the Right Test Case'

With the presidential election approaching, a change in administration is unlikely to have any immediate impact on the EEOC, DeGroff said. Because the way the terms are structured, the agency's Democratic majority would not change for a few years, he said.

Scroggins added that in the coming year, he expects the EEOC to place a priority on enforcement related to gender and racial and ethnic diversity in the high-tech sector, citing a report on that subject it issued in September. He also expects to see the agency bring enforcement actions related to use of artificial intelligence in employment decisions.

"We have not seen them bring a big case yet on that theory, but we know from the employers that we work with at the charge stage that the EEOC is looking at that issue very intently and seems to be looking for the right test case, and it's just a matter of time before they find it," Scroggins said. "So there's a lot of impetus for employers to be very deliberate and thoughtful about how they use AI in making employment decisions, because those are under scrutiny."

NOT FOR REPRINT

© 2024 ALM Global, LLC, All Rights Reserved. Request academic re-use from www.copyright.com. All other uses, submit a request to asset-and-logo-licensing@alm.com. For more information visit Asset & Logo Licensing.

SEC Enforcements Highlight Risk of Noncompliance—Gone Are 'You Pay Your Money and Takes Your Chance' Days in the U.S.

[law.com/newyorklawjournal/2024/10/04/sec-enforcements-highlight-risk-of-noncompliance-gone-are-you-pay-your-money-and-takes-your-chance-days-in-the-u-s](https://www.law.com/newyorklawjournal/2024/10/04/sec-enforcements-highlight-risk-of-noncompliance-gone-are-you-pay-your-money-and-takes-your-chance-days-in-the-u-s)

John G. Moon and Kenneth M. Silverman



The United States has the largest securities market in the world, with a value of over \$55 trillion. Foreign entities represent a substantial portion of U.S. market activity—cross-border investors hold approximately 20 percent of all U.S. securities across major asset types, including approximately 17 percent of all equity securities traded on U.S. stock markets.

Foreign portfolio holdings of U.S. securities reached \$26.9 trillion as of June 30, 2023, representing a \$2 trillion increase from June 2022. During the same period, equity holdings overall increased by \$1.5 trillion. [See Foreign Portfolio Holdings of U.S. Securities as of June 30, 2023, Department of the Treasury.]

The distinction between types of investing activity by foreign entities is significant. Foreign investment is classified as "direct investment" when it involves "the ownership or control, directly or indirectly, by one person or a group of affiliated persons, of 10 percent or more of the voting stock" of a company. [*Id.*]

Conversely, foreign portfolio investment covers all securities owned by foreign residents, except if a direct investment relationship exists with the domestic issuer. This article focuses on the regulation of portfolio investment in U.S. equities, by domestic and foreign money managers.

Money managers stand to gain substantially by investing in U.S. markets, due to their liquidity, efficiency and price discovery; however, they must navigate the complex regulatory scheme that fosters those attributes. The Securities Exchange Act of 1934 (Exchange Act), as amended, grants the Securities and Exchange Commission (SEC) the power to govern all securities transactions on the secondary market. Any foreign investor trading in NMS securities (i.e., U.S. exchange-listed equity securities and standardized options) falls under its jurisdiction and is subject to the reporting regime imposed by the SEC.

The extra-territorial nature of the SEC's jurisdiction over foreign money managers runs counter to our conceptions of jurisdiction that are generally based on the use of domestic wires or the mails, or where the defendant corporation is headquartered or registered. Recent SEC enforcement actions highlight the SEC's authority over an offshore money manager who instructs the foreign (non-SEC-registered) broker down the street to buy a U.S.-traded stock, potentially becoming subject to penalties for failing to file an applicable form with the SEC. And the Exchange Act is replete with these reporting requirements.

Less well-known, among those requirements are reports on Forms 13F and 13H. The SEC enacted the Form 13F requirement in 1975, based on the idea that significant investment in capital markets by large institutional investors creates the need for heightened SEC oversight and increased investor access to information. For example, an institutional investment manager that exercises investment discretion over \$100 million or more in Section 13(f) securities must file a Form 13F quarterly.

Form 13H was introduced in 2011 as part of the SEC's response to the 2008 financial crisis. This reporting obligation allows the SEC to increase supervision of "large traders" and their trading activity. Through Form 13H reporting, large traders must identify themselves to the SEC which, in turn, allows the SEC to obtain information about large trader activity in U.S. markets, reconstruct trading activity following periods of unusual market volatility, and analyze significant market events for regulatory purposes. Generally, a large trader is a natural or legal person whose transactions in NMS securities equal or exceed either: (i) two million shares or \$20 million during any calendar day, or (ii) 20 million shares or \$200 million during any calendar month.

Recently, SEC concerns over the influence of large investors on the securities markets have manifested a robust sweep of enforcement actions. On Sept. 17, 2024, the SEC settled 11 cases against institutional investment managers for failing to file required reports on Forms 13F and 13H [SEC Charges 11 Institutional Investment Managers with Failing to Report Certain Securities Holdings, Sept. 17, 2024]. Notably, the SEC Enforcement Staff reached across international borders, including two foreign investors in its sweep.

Nine of the respondents received civil penalties totaling \$3.4 million. The remaining entities, which avoided financial penalty, made self-reports to the SEC prior to filing past-due Forms 13F and 13H and cooperated with the SEC's investigations of these violations.

Highlighting the SEC's position that self-reporting is an important factor when determining whether to impose a financial penalty, NEPC LLC evaded financial punishment for its Form 13H violations by self-reporting before remediating delinquent filings. However, NEPC received a monetary fine of \$725,000 after it filed 16 Forms 13F in March 2024.

Notably, NEPC appears not to have self-reported its Form 13F violations to the SEC. One entity, a foreign pension fund manager, avoided financial penalty in connection with its delinquent Form 13H and Form 13F filing obligations by self-reporting both delinquencies and cooperating with the SEC's investigation.

In conjunction with the simultaneous institution and settlement of the proceedings, SEC Administrator Jason Burt stated in the SEC's press release, "These resolutions illustrate how seriously the Commission takes non-compliance as well as the benefits a firm may derive from self-reporting its non-compliance." [*Id.*] The decision not to impose monetary penalties on self-reporters underscores the value of self-reporting and cooperating with the SEC in its investigations.

In addition to navigating the SEC's existing regulatory structure, there are new compliance hurdles for both investors and U.S. securities counsel. By virtue of the obligation to file Forms 13F, institutional investment managers are also now subject to a newly minted filing requirement imposed by the Exchange Act.

Approved on Nov. 2, 2022, institutional investment managers were first required to file reports on Form N-PX by August 31, 2024 (with these reports covering the 12-month period ending June 30, 2024) to report to the SEC how proxies were voted on matters related to executive compensation where the institutional investment manager "exercised voting power" over a security. Even if an institutional investment manager did not exercise any voting rights, a notice report indicating that no votes were cast is nonetheless required.

Another new compliance obligation that may affect investors, depending on their trading strategies, is reporting via Form SHO pursuant to Rule 13f-2 promulgated under the Exchange Act. Effective January 2, 2025, a Form SHO filing will be required when an institutional investment manager's short-selling of equity securities exceeds applicable thresholds and triggers the obligation to disclose such positions and activity to the SEC.

To further complicate matters, the universe of securities that are in scope for Rule 13f-2 is substantially broader than "Section 13(f) securities" that are disclosed on Form 13F. Rule 13f-2 requires that short sales of Section 13(f) securities and equity securities issued by privately held issuers and those issued by companies that are only traded outside the United States, be taken into account when calculating whether reporting thresholds are met and, if so, those are subject to reporting on Form SHO.

Depending on an institutional investment manager's trading behavior and levels of shorting activity, it may be subject to a three-fold requirement to file Forms 13F, N-PX and SHO.

The vast amount of cross-border investment in the U.S. securities market and the SEC's ever-evolving reporting structure compels foreign investor compliance teams and U.S. securities counsel to stay informed of potential reporting responsibilities and keep abreast of

developments in the law. The costs of failing to do so can be extensive. If an investor is faced with delinquent filings, proactive self-reporting and cooperation with the SEC are critical tools for remediation.

John G. Moon *is a partner at Olshan Frome Wolosky and former SEC branch chief and enforcement attorney.* **Kenneth M. Silverman** *is a corporate partner at the firm.* **Judith R. Renner**, *a corporate associate, assisted in the preparation of this article.*

NOT FOR REPRINT

© 2024 ALM Global, LLC, All Rights Reserved. Request academic re-use from www.copyright.com. All other uses, submit a request to asset-and-logo-licensing@alm.com. For more information visit Asset & Logo Licensing.

**Bloomberg
Law**[Request a Demo](#)[Login](#)[Securities Law News](#)

Oct. 3, 2024, 11:14 AM PDT

Matt Levine's Money Stuff: Private Credit Wants Everyone's Money

By Matt Levine

Opinion

Bloomberg Law News 2024-10-04T09:57:25748858729-04:00

Matt Levine's Money Stuff: Private Credit Wants Everyone's Money

By Matt Levine 2024-10-03T14:14:34669-04:00

Mass private credit

Maybe the hottest topic in finance in the last few years has been private credit, and we've talked about it a lot around here. I often think of private credit as fundamentally a story about matching assets and liabilities. The story is something like:

1. Traditional banking involves banks, which are funded with short-term liabilities (deposits), making long-term illiquid loans (mortgages, corporate loans, etc.). This has obvious risks: The depositors can all ask for their money back at any time, and if they do, the bank won't have it, since it can't rapidly turn the long-term loans into cash. Much of the modern banking regulatory system is about mitigating this risk of bank runs, but it still comes up in various forms.

- 2. Meanwhile there are other firms that have very long-term liabilities. Pension funds, for instance, tend to have a good sense of how much they will have to pay out each year and a long time horizon. Life insurers, annuity providers, university endowments, sovereign wealth funds, etc. Also many individual investors saving for retirement. These investors traditionally bought bonds, which promise some defined payout years in the future.
- 3. Once upon a time it was sort of hard to turn bonds into cash: They didn't trade that often, because most bondholders were these sorts of long-term investors with long-term liabilities, so they would just buy bonds and hold them to maturity. But over time this shifted, and now bonds are actively traded and there are all sorts of firms that are in the business of holding bonds for the short term. And there are retail products built on that idea: Bond exchange-traded funds, for instance, allow investors to day-trade in and out of a bond portfolio, because bonds are thought of as essentially liquid tradeable things.

- 4. Still, those long-term investors with their long-term liabilities exist. The structure of their liabilities has not really changed: An endowment or pension or sovereign wealth fund or 40-year-old saving for retirement really does have some reasonably predictable need for cash reasonably far in the future. Those people don't really *need* instant liquidity from their bond investments.
- 5. It turns out that you can often get paid more interest by making private loans that don't trade than you can by just buying regular traded bonds. So "private credit" developed: Big alternative asset managers take big pots of long-term money (from pensions and insurers, from their own annuities businesses, etc.) and use it to make long-term illiquid loans to companies.
- 6. And to some extent private credit firms have been able to out-compete banks to make loans, in part because they have a more sensible business model for making loans: Banks have short-term funding and so sometimes can't make loans because they or their regulators get nervous, but private credit funds have long-term funding so are free to make loans that banks can't.
- 7. Seems good, no?

That's the idea, but now we talk a lot about the exceptions. One important exception is that a lot of private credit firms get leverage from banks — instead of *just* using their long-term investors' locked-up money to make loans, they also borrow some money from banks to fund those loans — and thus the run risk of banking sneaks back into private credit.

But also this?

Investment giants including Apollo Global Management, BlackRock, Capital Group, KKR and State Street are jostling to launch private-credit exchange-traded funds and other retail products. The funds would allow anyone to buy into the \$1.7 trillion market for loans made by Wall Street's nonbanks to corporations and consumers.

The winner will be whoever can offer a fund with shares that can be easily bought and sold and get the green light from government regulators. Their prize: full access to mom-and-pop investors when many sophisticated institutions are filling up on private credit.

The toughest problem is how to turn rarely traded portfolios of private loans into shares of funds that individuals can dip in and out of. That is a key requirement for regulators—and a task that many market veterans are skeptical can be achieved. ...

"There is a mismatch in terms of the liquidity profile between private credit as an underlying asset and the daily redemption of an ETF," said Aaron Filbeck, a managing director at the Chartered Alternative Investment Analyst Association, a professional group for money managers. "There is a question as to how exactly that is going to work."

In principle offering private credit to "mom-and-pop investors" makes a certain amount of sense: Many 40-year-olds saving for retirement really *can* lock up a portion of their money for a period of years, so they can invest in high-yielding illiquid credit. Put them in a private credit fund, why not? But offering private credit to retail investors *via an ETF* with daily liquidity kind of undoes the advantage.:

State Street is proposing the most ambitious ETF in a filing involving Apollo that was made to the SEC this month. The ETF managed by State Street would invest directly in a mix of liquid debt traded in public markets and private corporate, consumer and mortgage loans purchased directly from Apollo. At least 80% of the debt would have investment-grade ratings from credit-rating firms “or be of comparable quality” in the opinion of State Street, according to the filing.

To ensure the fund’s smooth operation, Apollo is committing to repurchase any of the private debt it has sold to the fund on a daily basis.

Modern finance definitely makes it possible to make long-term loans funded by money that can vanish in a day, but I thought private credit had found a way not to do that.

Poaching

Imagine that you are the chief executive officer of a public company. There are three projects you could do :

1. Project 1 will increase the value of your company by \$10.
- 2. Project 2 will *decrease* the value of your company by \$5, but increase the value of your main competitor by \$10.
- 3. Project 3 will decrease the value of your company by \$5, and also decrease the value of your main competitor by \$10.

Which project(s) should you do?

Conventional corporate finance theory would tell you to do Project 1, because it increases the value of your company, and not Projects 2 or 3, because they don’t. Your job is to maximize the value of your company, so you should do things that do that and not do things that don’t.

There are other theories. We have talked a lot around here about a controversial theory that is sometimes referred to as “common ownership,” and which I sometimes describe as “should index funds be illegal?” In this theory, (1) big diversified institutional shareholders are collectively the main owners of all of the public companies, including the main competitors in many industries, (2) the shareholders prefer to maximize the collective value of their holdings, rather than the value of any individual company and (3) the CEOs know all this and try to act in the shareholders’ best interest.

In this theory, you should probably do Project 1 (increasing the value of your company is good for shareholders), but you should also do Project 2. Increasing the value of your competitor is *also* good for your shareholders, because they also own your competitor; they are indifferent between \$1 of value at your company and \$1 at your competitor. Project 2 maximizes your shareholders’ overall welfare and so is good. Project 3 is still bad.

This theory is controversial in part because it often seems like corporate executives do not think or act this way. It certainly seems like most CEOs want to win, want to beat the competition; clever academic theories of shareholder value and diversification might not have entirely penetrated into the psyches of hard-charging CEOs.

Also, on a pragmatic level, a lot of CEOs are paid based in part on how their company performs relative to its competitors. So sacrificing your company's performance to help out a competitor is, for you, counterproductive: You will underperform, so you will get a lower bonus.

Which suggests a third theory? If you *are* a CEO who is paid based on your performance relative to your competitors, sacrificing your company's performance to *hurt* a competitor could be smart. If your pay structure is like "you get a bonus if your stock price goes up more than your leading competitor's stock price," then there are two ways to achieve that: Make your stock price go up, or make theirs go down.

In *that* theory, you should do Project 1 (make your stock price go up), avoid Project 2 (make yours go down and theirs go up), but do Project 3: Sacrificing your own company's performance to make your competitor's performance *even worse* is, for your selfish purposes, good.

I should say that the previous theory — "CEOs sacrifice their own performance to help competitors" — is popular in some quarters but quite controversial; this theory — "CEOs sacrifice their own performance to *hurt* competitors" — is, uh, not popular at all. No CEOs go around being like "we blew up our factory, but the fire spread and caused *two* of our competitors' factories to burn down, so we came out ahead."

Nonetheless! Here's a fun paper on "Executive Incentives and Strategic Talent Acquisition: Evidence from Poaching," by Matthew Bloomfield, Thomas Bourveau, Xuanpu Lin, Guoman She and Haoran Zhu.

In recent years, relative performance evaluation ("RPE") has become a common feature in CEO pay plans, used by the majority of S&P 500 companies as of 2017. While in most cases, RPE is used to shield risk-averse managers from common sources of uncertainty (à la Holmstrom, 1982), theoretical work shows that RPE can also have an incentive-distorting effect: it encourages agents to take actions that harm the performance of the peers against whom they are compared (e.g., Lazear, 1989). ...

In light of the central importance of human capital in generating and sustaining company value, we posit that poaching RPE peers' labor talent could be a viable approach that an RPE-using focal firm can use to harm its peers' performance—without having to sacrifice much of its own—thus bolstering its relative performance. ...

RPE-motivated poaching could occur even when poaching erodes the poaching firm's absolute performance, as long as it is even more detrimental to the peer from whom labor talent was poached. For example, suppose there is a highly productive employee at a peer who is generating considerable economic surplus for that peer. An RPE-using focal firm could potentially lure that employee away by overcompensating them. Doing so would cost the firm by the amount of the overcompensation, but would cost the peer the entire amount of the employee's surplus to them.

And they find that “firms hire significantly more labor talent away from their RPE peers than from their (otherwise fairly similar) industry rivals that are not their RPE peers” and that “focal firms’ tendency to poach labor talent from RPE peers is most prevalent for higher skilled and longer-tenured employees,” findings that “are consistent with deliberate peer-harm driven by executives’ RPE incentives.” (They’re also consistent with “it is good to hire skilled employees from similar firms,” though they do some tests to argue that “deliberate peer-harm” is a plausible explanation.)

Anyway I like this mechanism as sort of an antidote to the common-ownership-is-bad-for-competition theory: In this theory, executive pay incentivizes competition, even when the competition is bad for shareholders, even when it is bad for shareholders *of that firm*, because the executives are paid to win, not to maximize value.

Also though there are obvious parallels to the financial industry? If you run a hedge fund, you are mostly paid based on your absolute performance, though having higher returns than your competitors is probably good for attracting investors. But even your absolute returns are in large part a function of competition: If you are trading against idiots, you’ll make a lot of money, but if you are trading against sharp competitors you mostly won’t. Hiring away your competitors’ best employees can be a good business decision even if they don’t do anything for you; they can add value to your firm even from their year-long gardening leave. The value they add is not working for your competitors.

OpenAI

I’m sorry but this does not go far enough:

OpenAI has asked investors to avoid backing rival start-ups such as Anthropic and Elon Musk’s xAI, as it secures \$6.6bn in new funding and seeks to shut out challengers to its early lead in generative artificial intelligence.

The San Francisco-based group, led by chief executive Sam Altman, announced on Wednesday it had completed its latest fundraising at a \$150bn valuation, the highest in Silicon Valley’s history.

During the negotiations, the company made clear that it expected an exclusive funding arrangement, according to three people with knowledge of the discussions. ...

OpenAI can command unusual terms and an outsized valuation because investors believe the company could dominate the next wave of AI innovation, which they argue will be as significant a shift in consumer behaviour as the internet or mobile.

“Because the round was so oversubscribed, OpenAI said to people: ‘We’ll give you allocation but we want you to be involved in a meaningful way in the business so you can’t commit to our competitors,’” according to one person with knowledge of the deal.

A partner at one leading VC firm noted that ride-hailing app Uber had a similar policy “when they were in full world-domination mode”, adding: “If a company holds all the cards, they can force people to do things unnaturally.”

I mean I do sympathize with the business ask here: If you are in a capital-intensive winner-take-all race to dominate some economically important new technology, you will want to (1) get a lot of capital and (2) deny capital to your competitors. (See above!) It totally makes sense for OpenAI to ask for this. And then the investors have to choose: Bet on OpenAI to win the race, or sit out the round and bet the field.

But come on, I have argued that OpenAI's best fundraising move is Altman's performative nervousness that AI, if developed carelessly, could kill us all. “Ooh our product is so powerful that it could enslave humanity, aren't you a bit curious” is a great pitch. But it also fits seamlessly with this ask! “Our product is so powerful that it could enslave humanity, so give us money to build it carefully, but *don't* give money to Elon Musk to build it, have you seen that guy's X account?” OpenAI has a hilariously good, like, business and ESG case for exclusive funding; it's weird that they just relied on “the round is oversubscribed.” It's almost like they've stopped believing in the stuff about developing AI for the good of humanity.

PYUSD

The usual way that a business pays an invoice is that the business tells its bank to subtract \$100 from its account at the bank and add \$100 to its supplier's account at a different bank. And then the payor's bank tells the Federal Reserve to subtract \$100 from its account at the Fed and add \$100 to the supplier's account at the Fed, and tells the supplier's bank to add that \$100 to the supplier's account at that bank. This is a somewhat stylized story but close enough.

Sometimes the supplier and customer have the same bank, and the process is simpler: The customer tells the bank to subtract \$100 from its account and add \$100 to the supplier's account, and it does. Various efficiencies are enabled if two companies, or many companies in a related industry, share the same bank. We talked once about the Silvergate Exchange Network, where the basic point was that a lot of crypto companies all banked at Silvergate Capital Corp., so Silvergate could offer them services like “we can subtract money from your account and add it to your supplier's account at midnight,” instead of keeping normal banking hours limited by when the Fed is open.

And so I imagine that sometimes crypto companies would get bills from suppliers and would say to them “you know, we can write you a check or whatever, but it would really be a lot more convenient if you would open an account at Silvergate, because moving money to you at Silvergate is so much easier than using the general-purpose US financial system.” And I suppose sometimes that worked; if the supplier was also a crypto-y company then it probably got that request a lot, and probably did want the ease of transacting with its crypto-y customers through the Silvergate Exchange Network.

On the other hand, if the supplier was delivering, like, printer toner, it might find that request annoying. "Sure it would be easier *for you* if I opened an account at your bank, but *for me*, opening a new account at a new bank would be pretty *inconvenient*." "But we can disintermediate the broader financial system and just rely on Silvergate," the crypto company might say, but that is not a very good argument. Why rely on Silvergate? (Silvergate eventually shut down.)

Anyway here's this:

PayPal Holdings Inc. completed its first business payment using its proprietary stablecoin as a way to demonstrate how digital currencies can be used to improve often-clunky commercial transactions.

PayPal paid an invoice to Ernst & Young LLP on Sept. 23 using PYUSD, the stablecoin the firm launched last year, relying on an SAP SE platform to complete the transaction. SAP's platform, known as the digital currency hub, allows enterprises to send and receive digital payments instantly, around the clock. The invoice amount wasn't disclosed. ...

While the consumer-facing benefits of stablecoins often dominate conversations, this payment demonstrates other use cases for the digital currency, according to Jose Fernandez da Ponte, PayPal's senior vice president of its blockchain, cryptocurrency and digital currency group.

"The enterprise environment is very well-suited for it," he said. "It's a very rational conversation to have with the CFO."

Business-to-business transactions – especially those that cross borders – can be drawn out, expensive and, in some cases, risky, given the requisite reliance on third parties. The speed and availability of settlement with this use case is far more attractive, Fernandez da Ponte said.

Okay sure right. Instead of paying an invoice with dollars on the ledger of your bank, which requires the involvement of (1) PayPal's bank, (2) your bank and (3) possibly the Fed, PayPal can pay an invoice with dollars on the ledger of Paxos Trust Co., the issuer of its PYUSD stablecoin, which requires only the involvement of Paxos. I suppose that has less "requisite reliance on third parties" (not none!), and is probably faster than sending you dollars, though it leaves you with PYUSD rather than dollars. And then if you want dollars I suppose you can sell PYUSD on a crypto exchange and withdraw the dollars, or just, uh, I mean if you have an account at PayPal then you can sell PYUSD for dollars there?

PayPal is a payments company? It could in theory pay all its invoices by crediting the money to its suppliers' PayPal accounts. That seems like an annoying way to pay invoices. This seems like a slightly more complicated form of that.

Things happen

New CPA Paths Emerge as States Try to Stem Accountant Shortage. Mortgage Rates Near 6% Are Enough to Start Up a Refinancing Wave. Ghana Bondholders Overwhelmingly Support Debt Restructuring. Saudi Minister Warns of \$50 Oil as OPEC+ Members Flout Production Curbs. TSMC Gets Single-Stock ETF as Direxion Funds Allow Leverage Bets. Korea Zinc Teams Up With Bain Capital to Thwart Takeover Bid. Schools Make Millions Offering Degrees That Double as Work Visas. Steinhoff's Ex-CFO Sentenced to 10 Years in Prison for Fraud. "Forty percent of cybersecurity executives said they are covered by their companies' directors' and officers' liability insurance." CEOs turn to podcasts to control their message. Flying cars. Laughing heirs. Deseasonalized Aperol. Poopcopter.

If you'd like to get Money Stuff in handy email form, right in your inbox, please subscribe at this link. Or you can subscribe to Money Stuff and other great Bloomberg newsletters here. Thanks!

To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

- 1. They might have to be accredited investors to be allowed into the fund, but that's good, no? There are a lot of accredited investors, and the point is kind of that a 40-year-old with a high salary or net worth can probably lock up some of her money for years, while one with less money maybe can't. In any case there are closed-end retail private credit funds — business development companies — that **aren't** limited to accredited investors.
- 2. You could tell stories about what these projects are. Project 1 could be "make your product better." Project 3 could be "launch a mutually destructive price war." Project 2 could then be "**avoid** a price war, and so lose market share to your competitor." Or you could tell M&A stories, etc.
- 3. For simplicity I have not described the effect of Project 1 on your competitors, but if it would decrease the value of your competitor by \$20 then you probably **shouldn't** do it, on this theory.
- 4. Except oil and gas executives, these days.
- 5. Again, unless Project 1 makes their stock price go up **more**.
- 6. I wouldn't go overboard here. The executives still mostly hold stock and want it to go up.
- 7. We have talked a few times about a dispute between Jane Street Group and Millennium Management about some traders who did a very profitable Indian options strategy at Jane Street and left for Millennium, at which point Jane Street's profits on the trade allegedly collapsed — not because it needed those guys to do the trade, but because the trade was not as profitable with Millennium competing to do it. It's possible that Jane Street's lost profits were exactly (or more than) offset by Millennium's new profits doing the trade, but it's also possible that they weren't: There were fat profits to be found if one firm did the trade, but if two firms did it the profits would be competed down to nothing.
- 8. Also by "capital" in this specific case I mean money but also computing power, chips, etc.; both Nvidia and Microsoft are reportedly investors in this OpenAI round.
- 9. Is it the way JPMorgan Chase & Co. pays invoices? Kind of?

Rising Costs from High Inflation and Interest Rates Contribute to a Continued Increase in Large Corporate Bankruptcy Filings through the First Half of 2024

 [cornerstone.com/insights/press-releases/continued-increase-in-large-corporate-bankruptcy-filings](https://www.cornerstone.com/insights/press-releases/continued-increase-in-large-corporate-bankruptcy-filings)

- Press Release
- 2 October 2024

Filings in the services, manufacturing, finance, insurance, and real estate industries contribute to year-over-year increase.

Large corporate bankruptcy filings continued to climb in the latter half of 2023 through the first half of 2024, according to a report released today by Cornerstone Research.

The report, *Trends in Large Corporate Bankruptcy and Financial Distress—Midyear 2024 Update*, reveals a notable increase in Chapter 7 and Chapter 11 filings among public and private companies with assets exceeding \$100 million. Over the past 12 months (2H 2023–1H 2024), the number of filings rose by 8%, reaching 113 compared to 105 in the previous 12-month period (2H 2022–1H 2023). This figure is 43% higher than the annual average of 79 observed between 2005 and 2023. Notably, 60 of these bankruptcies were recorded in the first half of 2024, nearly 50% above the semiannual average of 40 filings between 2005 and 2023.

The recent rise in large corporate bankruptcies reflects the challenging economic environment many major companies have been navigating amidst high inflation and interest rates.

In the first half of 2024, the number of mega bankruptcies—those filed by companies with over \$1 billion in reported assets—reached their highest half-year numbers since 2020. Companies filing mega bankruptcies in the last 12 months most commonly identified the following contributing factors: (i) rising costs due to high inflation and interest rates, (ii) lingering impacts of COVID-19, (iii) increased competition for the company's products or services, and (iv) unsuccessful strategic initiatives.

“The recent rise in large corporate bankruptcies, with an 8% increase in filings over the past 12 months, reflects the challenging economic environment many major companies have been navigating amid high inflation and interest rates,” said Matt Osborn, a principal at Cornerstone Research and coauthor of the report. “As the economic landscape continues to evolve, it is clear that the rising costs, lingering effects from the COVID-19 pandemic, and increased competition have continued to take a toll on many large and established companies.”

Dr. Osborn noted that out-of-court refinancings known as “uptiering” transactions are also on the rise. He observed that despite the potential financial benefits for the borrower from this structure, a substantial fraction of the companies that undertook an uptiering transaction in past years have since filed for Chapter 11 bankruptcy. It remains to be seen if this trend continues for the more recent uptick in uptiering transactions observed in 2023 and 1H 2024.

The most common venues for bankruptcy filings were Delaware and the Southern District of Texas, accounting for 43% and 13% of filings in 1H 2024, respectively. Following the resignation of Judge David R. Jones in October 2023, bankruptcy filings in the Southern District of Texas decreased by 65% in 1H 2024 compared to 1H 2023. From 2017 to 2023, Judge Jones took on 81 large corporate bankruptcy cases, the highest number of cases among bankruptcy judges nationwide.

The services and manufacturing industries saw increased filings, with 17 and 15, respectively, in the first half of 2024. The finance, insurance, and real estate industry also experienced an increase in bankruptcies, with 10 filings in the first half of the year.

Cornerstone Research: Large Corporate Bankruptcy Filings Continue to Increase

K [dandodiary.com/2024/10/articles/bankruptcy/cornerstone-research-large-corporate-bankruptcy-filings-continue-to-increase](https://www.dandodiary.com/2024/10/articles/bankruptcy/cornerstone-research-large-corporate-bankruptcy-filings-continue-to-increase)

October 3, 2024



By Kevin LaCroix on October 3, 2024
Posted in Bankruptcy

CORNERSTONE RESEARCH

The accelerated pace of large corporate bankruptcy filings continued in the last 12 months, as high interest rates, inflation, and other factors continued to take their toll. According to a new report from Cornerstone Research, the number of filings during the second half of 2023 and the first half of 2024 were more than 40% above the long-term annual averages. The report, which is entitled “Trends in Large Corporate Bankruptcies – Midyear 2024 Update,” can be found [here](#). Cornerstone Research’s October 2, 2024, press release about the report can be found [here](#).

The report focuses on what the report calls “large corporate bankruptcies” – that is, Chapter 7 and Chapter 11 bankruptcies filed by public companies and private companies with over \$100 million in assets. The report is based on analysis of a database of 1,564 bankruptcies from January 1, 2005, through June 30, 2024.

According to the report, in the last 12 months, 113 companies with assets of over \$100 million in assets filed for Chapter 7 or Chapter 11 bankruptcy, 8% above the 105 large corporate bankruptcies in the 12-month period of the second half of 2022 and the first half of 2023. The 113 total of large corporate bankruptcies is well above the annual average number of bankruptcies (79.2) between 2005 and 2023.

The 60 bankruptcy filings in the first half of 2024 were nearly 50% higher than the semiannual average between 2005 and 2023 of 39.6 filings, though the total of 60 filings in the first six months is well below the 89 bankruptcy filings in the first half of 2020 (at the outset of the pandemic) and the 106 filings in the first half of 2009, at the peak of the global financial crisis.

In the last 12 months, there were 24 mega bankruptcies (those filed by companies with over \$1 billion in reported assets), below the 28 mega bankruptcies filed in the twelve month period of the second half of 2022 and the first half of 2023, but above the 2005-2023 annual average number of mega bankruptcies of 22.5. The largest bankruptcy in the last 12 months was filed by WeWork, Inc. (\$15.1 billion in assets).

Large corporate bankruptcy filings increased across almost all industries in 2023 compared to 2022, most notably in Retail Trade, Services, and Manufacturing Industries.

Companies with the mega bankruptcy filings during the 12-month period of the second half of 2023 and the first half of 2024 most commonly noted these factors contributing to the bankruptcy: “(i) rising costs due to high inflation and interest rates; (ii) lingering impacts of COVID-19; (iii) increased competition for the company’s products or services; and (iv) unsuccessful strategic initiatives.” Rising costs due to high inflation and interest rates was identified by 88% of the mega bankruptcies. The lingering impact of COVID-19 was identified by 79% of the mega bankruptcies. Other factors mentioned by the mega bankruptcies included logistical and supply chain issues caused by the Russia-Ukraine war.

The four top venues for bankruptcy filings in the last 12 months were the District of Delaware; the Southern District of Texas; the District of New Jersey; and the Southern District of New York, which take collectively accounted for 76% of the large corporate bankruptcy filings in the last twelve months. Consistent with prior years, Delaware continued to be the most common venue for large bankruptcy filings, accounting for 44% of the filings in the last twelve months.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Feds Want A Word In Meta, Nvidia High Court Cases

By **Jessica Corso**

Law360 (October 3, 2024, 7:04 PM EDT) -- The federal government is asking to participate in oral arguments in two private investor suits currently before the U.S. Supreme Court, saying that both Meta Platforms Inc. and Nvidia Corp. are wrong about the requirements that shareholders need to meet in order to move forward with lawsuits claiming they were misled about business risks.

The government, represented by the U.S. Securities Exchange Commission and the U.S. Department of Justice, has said that it has a strong interest in protecting the ability of shareholders to file meritorious lawsuits that are "an essential complement" to its enforcement of the securities laws.

It moved for leave to participate in oral arguments in both the Meta and Nvidia cases on Tuesday and Wednesday, respectively, and simultaneously filed briefs laying out its position in the cases. Both cases are scheduled to be heard by the justices in November.

Meta is accused of failing to disclose the business risks associated with the fallout caused by Cambridge Analytica's data harvesting on social media platform Facebook.

Suing shareholders said that Meta described potential data breaches as merely hypothetical risks to its business at a time when it knew that such an event has already occurred. The company **has asked the Supreme Court** to declare that corporate risk disclosures do not need to include descriptions of past events with no known risk of ongoing or future harm.

It says that the Cambridge Analytica scandal was first revealed in 2015 with little fanfare and before the risk disclosures at issue in the current lawsuit, but investors say that it took years for the company to disclose everything it knew about the consulting firm's access to its platform.

The government argued this week that Meta's arguments demonstrate "an insufficient appreciation of the likelihood that the investing public was misled."

"In the securities context as elsewhere, a forward-looking statement of risk can be misleading insofar as it implies that the relevant risk has not already come to fruition," the government wrote in its brief to the high court. "The antifraud provisions of the securities laws prohibit half-truths, not just flat-out lies, and there is no exception to that principle for risk-factor statements."

Nvidia investors sued in 2018, complaining that the company and its CEO, Jensen Huang, underplayed the link between its skyrocketing revenues and sales of its key product, graphic processing units, to crypto miners. Huang said in a 2017 interview that the company's reliance on the cryptocurrency industry was "small but not zero," according to investors.

But they said that the truth came to light in late 2018, when the company announced a 7% year-over-year quarterly revenue decline as crypto markets struggled. Suing investors said the announcement caused stock prices to drop by 28.5% over the next two trading days.

Nvidia **argues** that the investors should have to provide more detailed information about what exactly Huang knew when publicly discussing crypto sales.

It has asked the Supreme Court to declare that the Private Securities Litigation Reform Act, or PSLRA, requires plaintiffs to "plead with particularity" the content of internal documents and cannot simply rely on the testimony from former employees or a report submitted by an outside expert to make their case.

The government told the Supreme Court, however, that Nvidia was incorrect in arguing that the Ninth Circuit allowed the lawsuit to move forward on the basis of an "unsubstantiated" expert opinion about the crypto market.

"Petitioners are correct about the basic legal principle but wrong about what occurred in this case," the government said.

It said that the Ninth Circuit concluded that a combination of employee knowledge about the inner workings of Nvidia, the detailed expert analysis and the 2018 earnings report combined to make a strong case against the company.

"While the PSLRA's pleading standards are demanding, they are not intended to weed out every suit that might ultimately fail on the merits," the government said. "At this stage of the case, respondents have 'state[d] with particularity' enough facts to 'give[] rise to a strong inference' of scienter."

Other parties that stepped forward this week to support Nvidia investors by filing their own briefs with the Supreme Court include a group of former SEC leaders, institutional investors and plaintiffs-side attorneys with the advocacy group the American Association for Justice.

The AAJ said in its brief that it was concerned that Nvidia "has advanced an approach to pleading that is unworkable" because the PSLRA does not allow plaintiffs to conduct discovery prior to making it through the motion to dismiss stage.

"This is a formula calculated to sound the death knell of this type of litigation because, as NVIDIA well knows, it creates an obstacle so high that plaintiffs cannot reach it without insiders leaking the relevant internal corporate documents at great personal cost and risk," the AAJ said.

Nvidia has its own backers before the high court, including the Digital Chamber, **which worried** that the Ninth Circuit's opinion posed a "grave risk" to the entire crypto industry by threatening to expose it to costly litigation.

The government is represented in the Meta case by Megan Barbero, Michael Conley, Jeffrey Berger, Emily True Parise and Allison Bitz of the SEC and Elizabeth Prelogar, Malcolm Stewart and Kevin Barber of the Office of the Solicitor General.

The government is represented in the Nvidia case by Michael Conley, Daniel Staroselsky and Theodore Weiman of the SEC and Elizabeth Prelogar, Malcolm Stewart and Colleen Roh Sinzduk of the Office of the Solicitor General.

The American Association of Justice is represented by AAJ president Lori Andrus and senior associate general counsel Jeffrey White, as well as Robert Peck of the Center for Constitutional Litigation PC.

Nvidia and its executives are represented by Neal Katyal, Katherine Wellington, William Havemann, Reedy Swanson and Keenan Roarty of Hogan Lovells and John Dwyer, Patrick Gibbs, Samantha Kirby, Kathleen Hartnett, Sarah Lightdale and Patrick Hayden of Cooley LLP.

Nvidia investors are represented by Deepak Gupta, Jonathan Taylor and Greg Beck of Gupta Wessler LLP, Gregory Joseph, Rachel Cherington and Courtney Solomon of Joseph Hage Aaronson LLC, Matthew Mustokoff and Andrew Zivitz of Kessler Topaz Meltzer & Check LLP and John Rizio-Hamilton and Jonathan Uslaner of Bernstein Litowitz Berger & Grossmann 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, Katherine Moran Meeks, Trenton Van Oss, Brian M. Lutz, Michael J. Kahn and Patrick J. Fuster of Gibson Dunn & Crutcher LLP.

Meta shareholders are represented by Kevin K. Russell of Goldstein Russell & Woofert LLC, Bernstein Litowitz Berger & Grossmann LLP and Robbins Geller Rudman & Dowd LLP.

The cases are Facebook Inc. et al. v. Amalgamated Bank et al., case number 23-980, and Nvidia

Corp. et al. v. E. Ohman J:Or Fonder AB et al., case number 23-970, both in the Supreme Court of the United States.

--Editing by Vaqas Asghar.

All Content © 2003-2024, Portfolio Media, Inc.

2 High Court Securities Cases Could Clarify Pleading Rules

By **Michael Charlson, Marisa Antonelli and Meghan Natenson** (October 3, 2024, 3:42 PM EDT)

In granting certiorari in *Facebook Inc. v. Amalgamated Bank* and *Nvidia Corp. v. E. Ohman J:or Fonder AB*, the U.S. Supreme Court signaled its intention to provide further guidance concerning application of the heightened standard for pleading private securities fraud claims mandated by the Private Securities Litigation Reform Act.[1]

In the process, the high court may resolve disagreements among different courts of appeals regarding the requirements for pleading scienter and falsity — two key elements of claims brought under Section 10(b) of the Securities Exchange Act and U.S. Securities and Exchange Commission Rule 10b-5.[2]

The pair of securities cases is scheduled for argument before the high court in November.

In the Facebook action, the Supreme Court is **set to review** a decision of the U.S. Court of Appeals for the Ninth Circuit reviving Section 10(b) claims against Facebook — now Meta Platforms Inc. — related to alleged disclosure failures surrounding Cambridge Analytica's wrongful acquisition and use of Facebook user data.[3]

Specifically, the Supreme Court will examine whether risk disclosures are rendered false or misleading when they do not state that a disclosed risk has actually materialized in the past, even if that past event presents no known risk of ongoing or future business harm.[4]

Nvidia arises from a second Ninth Circuit decision involving a Section 10(b) claim against a technology company.[5] **That appeal** focuses on (1) whether plaintiffs seeking to allege scienter — basically, an intent to deceive — based on internal company documents must plead the content of those documents with particularity; and (2) whether a plaintiff can adequately plead falsity by relying on an expert opinion instead of particularized factual allegations.[6]

The Facebook Appeal

In the Facebook case, the plaintiffs alleged that Facebook and key executives committed fraud when Facebook stated in its Form 10-K filing that the misuse of personal user data by third parties posed a hypothetical risk that could negatively affect the company. The plaintiffs contended that at the time the statements were made, the misuse of data by Cambridge Analytica had already occurred, and so was not a hypothetical risk scenario.

The U.S. District Court for the Northern District of California dismissed the complaint, holding that Cambridge Analytica's misconduct had not caused the harm contemplated by the risk disclosure as of the time the statements were made.[7]

The Ninth Circuit, however, held that the plaintiffs adequately pled falsity as to statements in Facebook's Form 10-K that represented the risk of improper third-party access of user data as purely hypothetical.[8] The opinion found the complaint's allegations that Facebook executives knew about improper access of user data while presenting the risk as merely hypothetical could, if true, support a securities fraud claim.[9]

Before the Supreme Court, Facebook contends that this holding creates a circuit split. In particular, Facebook argues that the Ninth Circuit's opinion diverges from decisions of the U.S. Court of Appeals for the First, Second, Third, Fifth, Tenth and District of Columbia Circuits that a company must disclose that a risk has materialized only if the company knows that event will actually harm its business.[10]

The U.S. Court of Appeals for the Sixth Circuit has gone further still, holding that companies need not disclose past events because risk disclosures in SEC filings "are inherently prospective in nature." [11] The Facebook plaintiffs, however, dispute the characterization of other circuit case law and argue that Facebook would lose under such a rule in any event.

The Nvidia Appeal

In the Nvidia case, the plaintiffs alleged Nvidia and its CEO had misled investors by minimizing the extent to which the company's reported revenue growth was driven by the sale of Nvidia's graphics processing units for cryptocurrency mining — a market segment where demand was allegedly "notoriously volatile." [12]

The Supreme Court agreed to review two aspects of the Ninth Circuit's ruling: (1) whether plaintiffs adequately pled scienter based on executives' access to internal company reports, without pleading the reports' contents with particularity;



Michael Charlson



Marisa Antonelli



Meghan Natenson

and (2) whether plaintiffs can use expert testimony as their sole basis to allege falsity.

Scienter

Of the two issues, the Supreme Court's disposition of the scienter question is likely to have the most far-reaching implications. Under the PSLRA, plaintiffs alleging Section 10(b) violations must plead particularized facts that support a "cogent and compelling" inference that a defendant acted with scienter — that is, "a mental state embracing intent to deceive, manipulate, or defraud." [13]

The Ninth Circuit held that the Nvidia plaintiffs adequately pled scienter based on allegations from confidential witnesses — former Nvidia employees — that the company's CEO had reviewed internal company sales and finance documents that might have shown the complained-of statements were false.

Nvidia now contends that by failing to require the plaintiffs to plead the documents' specific contents, the Ninth Circuit deepened a growing circuit split over the scienter pleading standard.

The Second, Third, Fifth, Seventh and Tenth Circuits have held that to properly plead scienter, plaintiffs must describe the actual contents of internal company documents being relied on to show that a defendant knew that a public statement was false or misleading. [14] At the same time, the First and Ninth Circuits have held that it is sufficient for plaintiffs to merely allege what the company documents might show. [15]

Falsity

The Ninth Circuit further held that the plaintiffs' complaint adequately pled falsity, based at least in part on the plaintiffs' expert report.

In Nvidia's view, however, the plaintiffs did not allege specific facts, from company documents or otherwise, to show that Nvidia had misrepresented the import of the cryptocurrency industry to its business.

Instead, the Nvidia plaintiffs relied on an expert who estimated:

- The total amount of worldwide processing power added to major blockchain networks during the class period; and
- The percentage of graphics processing units contributing to that processing power that would have been manufactured by Nvidia over that time.

The expert opined that Nvidia's actual cryptocurrency-dependent revenue exceeded what it had disclosed. Permitting a plaintiff to plead falsity based on a such an expert opinion rather than particularized factual allegations, Nvidia says, creates another circuit split.

In particular, as Nvidia maintained in its certiorari petition, the Second and Fifth Circuits have held plaintiffs may use nonconclusory expert opinion to "bolster" allegations of falsity, but that such opinion "cannot substitute for facts under the PSLRA" — whereas Nvidia believed the Ninth Circuit's ruling allowed expert opinion in lieu of specific factual allegations. [16]

Takeaways

If the Supreme Court affirms the Ninth Circuit's holding in Facebook, it would represent a significant expansion of the sorts of allegations that could support a securities fraud claim.

Similarly, in Nvidia, a holding for plaintiffs could represent a serious erosion of the heightened pleading standard under the PSLRA.

Softening the particularity requirement could mean that plaintiffs could potentially plead scienter by pointing to defendants' management style and generalized access to documents that could have shown complained-of statements were false, without alleging details of the documents' content or an individual defendant's actual receipt of them.

This would be a significantly less stringent standard that what has pertained in most of the nation to this point and would arguably undermine the PSLRA's overriding purpose. That erosion of pleading rules central to the PSLRA's purpose would be further compounded if the Supreme Court holds that a plaintiff could rely solely on expert reports in lieu of case-specific facts pled with particularity.

The Supreme Court's disposition of this pair of appeals will be important in aligning standards for interpreting and applying the PSLRA pleading rules across the country. These rules were enacted as an effort to rein in meritless securities lawsuits that imposed substantial litigation costs and other burdens on public companies. [17]

Almost 30 years after the PSLRA's enactment, Facebook and Nvidia highlight the uneven application of the PSLRA standards that still creates uncertainty for public companies and their leaders, and that no doubt contributes to the increased number of securities class actions being filed in what are perceived to be plaintiff-friendly forums — with the Ninth Circuit having the greatest number of new securities filings of any circuit in 2023. [18]

The fact that the Supreme Court granted certiorari on two cases involving the Ninth Circuit's application of the PSLRA

pleading standard suggests a desire to bring greater consistency to resolving at least some aspects of these cases, and could signal concern that that particular court of appeals is somewhat out of step with the Supreme Court's historically rigorous application of the PSLRA pleading rules.

Michael Charlson is a managing partner and co-head of the securities litigation and enforcement practice at Vinson & Elkins LLP.

Marisa Antonelli is counsel at the firm.

Meghan Natenson is a senior associate at the firm.

V&E associates Bess Greenberg and Chris Menendez contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See generally 15 U.S.C. § 78u-4(b).

[2] 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5.

[3] *In re Facebook, Inc. Sec. Litig.* , 87 F.4th 934 (9th Cir. 2023).

[4] Petition for Writ of Certiorari, Facebook Inc. v. Amalgamated Bank, No. 23-980, https://www.supremecourt.gov/DocketPDF/23/23-980/302143/20240304124120337_Meta%20Petition%20for%20Certiorari.pdf; see also Brief for Petitioners, https://www.supremecourt.gov/DocketPDF/23/23-980/322124/20240809133545974_23-980_petbrief.pdf; Brief for Respondents, https://www.supremecourt.gov/DocketPDF/23/23-980/326742/20240924123045815_23-980%20Resp%20Brief.pdf.

[5] *E. Ohman J:or Fonder AB v. NVIDIA Corp.* , 81 F.4th 918 (9th Cir. 2023).

[6] Petition for Writ of Certiorari, NVIDIA Corp. v. E. Ohman J:or Fonder AB, No. 23-970, https://www.supremecourt.gov/DocketPDF/23/23-970/302146/20240304124922302_NVIDIA%20Cert%20Petition.pdf; see also Brief for Petitioners, https://www.supremecourt.gov/DocketPDF/23/23-970/322355/20240813143333491_NVIDIA%20Opening%20Brief%208-13-24%20Final.pdf; Brief for Respondents, https://www.supremecourt.gov/DocketPDF/23/23-970/326884/20240925232131577_Nvidia%20v.%20E%20Ohman%20J%20or%20Fonder%20AB%20response%20brief.pdf.

[7] Facebook, 87 F.4th at 948.

[8] *Id.* at 949.

[9] *Id.* at 949-50.

[10] *Karth v. Keryx Biopharmaceuticals Inc.* , 6 F.4th 123, 137(1st Cir. 2021); *Williams v. Globus Medical Inc.* , 869 F.3d 235, 241-42 (3d Cir. 2017); *Ind. Pub. Ret. Sys. v. Pluralsight Inc.* , 45 F.4th 1236, 1255 (10th Cir. 2022); *Set Capital LLC v. Credit Suisse Group AG* , 996 F.3d 64, 85-86 (2d Cir. 2021); *Lormand v. US Unwired Inc.* , 565 F.3d 228, 249-50 (5th Cir. 2009); *In re Harman Int'l Indus., Inc. Sec. Litig.* , 791 F.3d 90, 104, 108 (D.C. Cir. 2015).

[11] *Bondali v. Yum! Brands Inc.* , 620 F. App'x 483, 491 (6th Cir. 2015).

[12] 81 F.4th 918, 923 (9th Cir. 2023).

[13] *Tellabs Inc. v. Makor Issues & Rights Ltd.* , 551 U.S. 308, 319 (2007) (quoting *Ernst & Ernst v. Hochfelder* , 425 U.S. 185, 193-94, n. 12 (1976)).

[14] Petition for Writ of Certiorari, NVIDIA Corp. v. E. Ohman J:or Fonder AB, No. 23-970, 16-20; see also *In re Scholastic Corp. Sec. Litig.* , 252 F.3d 63, 72-73 (2d Cir. 2001); *Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.* , 394 F.3d 126, 147-48 (3d Cir. 2004); *Abrams v. Baker Hughes Inc.* , 292 F.3d 424, 432 (5th Cir. 2002); *Arazie v. Mullane* , 2 F.3d 1456, 1467 (7th Cir. 1993); *Anderson v. Spirit Aerosystems Holdings Inc.* , 827 F.3d 1229, 1241 (10th Cir. 2016).

[15] Petition for Writ of Certiorari, NVIDIA Corp. v. E. Ohman J:or Fonder AB, No. 23-970, 15; see also *In re Stone & Webster Inc., Sec. Litig.*, 414 F.3d 187, 210-211 (1st Cir. 2005).

[16] Compare *Fin. Acquisition Partners LP v. Blackwell* , 440 F.3d 278, 286 (5th Cir. 2006), and *Ark. Pub. Emps.' Ret. Sys. v. Bristol-Myers Squibb Co.* , 28 F.4th 343, 354 (2d Cir. 2022) (quoting Blackwell, 440 F.3d at 286), with NVIDIA, 81 F.4d at 930-32, 941-43.

[17] See Tellabs, 551 U.S. at 320 ("Designed to curb perceived abuses of the § 10(b) private action—'nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers,'—the PSLRA

installed both substantive and procedural controls.") (internal citation omitted).

[18] <https://www.cornerstone.com/wp-content/uploads/2024/01/Securities-Class-Action-Filings-2023-Year-in-Review.pdf>.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Wash. AG Wants Albertsons Sanctioned In Opioid Suit

By **Rachel Riley**

Law360 (October 3, 2024, 8:06 PM EDT) -- Washington state's attorney general has accused Albertsons of using a state-court-ordered stay to shield itself from discovery in a consumer protection suit that accuses Rite Aid and grocery store pharmacies of exacerbating the opioid epidemic, seeking the appointment of a "discovery referee" in a new sanctions motion.

Washington State Attorney General Bob Ferguson's office claimed in **the Wednesday motion** that Albertsons Companies Inc. and affiliate Safeway Inc. have insisted they have no obligation to respond to the state's second set of questions and document requests, served on the grocery chain owner nearly a year ago before the case was stayed amid Rite Aid's pending bankruptcy. After a King County Superior Court judge lifted the stay on Aug. 30, Albertsons ignored the original Sept. 9 deadline to fulfill the state's request, pointing out that the fact discovery cut-off deadline passed during the stay, according to the Attorney General's Office.

"The stay, which Albertsons sought in the first place, cannot be weaponized into a shield from any further discovery, and Albertsons' attempt to do so shows bad faith," the state said in the motion.

The state **filed the opioid-related case** against the pharmacies in December 2022, claiming Rite Aid, Kroger, Albertsons and their affiliates contributed to soaring overdose rates by dispensing a flood of prescription opioids without taking steps to ensure they were used properly. The attorney general claims the pharmacy chains failed to decline suspicious orders and instead focused on filling prescriptions quickly to maximize profits, contributing to the oversupply of painkillers.

According to the motion, the grocery store chain has not produced key information including dispensing data and the names of Washington pharmacists and employees at its headquarters handling opioid due diligence matters. The state seeks a court order to waive Albertsons' "untimely objections" to the discovery requests and the appointment of a "discovery referee to adjudicate future discovery disputes between the parties, with both parties equally splitting the associated costs."

The sanctions motion comes as Ferguson's office is arguing other consumer protection claims against Kroger and Albertsons over the grocery giants' pending merger at a **bench trial** unfolding in the same state district court.

King County Superior Court Judge Jim Rogers previously denied dismissal bids in the opioid litigation by Rite Aid and the grocers, which had contended the pharmacies cannot be held liable by for filling prescriptions for federally regulated opioid medications written by state-licensed healthcare providers.

"It is perfectly legitimate that the defendants fill prescriptions for patients in pain, but the allegations go beyond that," Judge Rogers wrote in an **August 2023 order**.

The following month, Kroger and Albertsons filed **a motion** seeking to compel the state to conduct a wide-ranging keyword search across documents held by a series of custodians, accusing the Attorney General's Office of failing to produce records created since the state launched **prior opioid litigation** against opioid distributors Purdue Pharma, McKesson and Johnson & Johnson. The judge has not ruled on the motion.

The grocery stores successfully moved in November 2023 to pause the case pending the resolution of Rite Aid's bankruptcy proceedings.

Ferguson announced last April his office had signed onto a pending billion-dollar **multi-state settlement agreement** ending opioid claims against Kroger, which would entitle Washington to \$47.5 million if finalized by the litigating states and local jurisdictions.

Rite Aid's Chapter 11 **reorganization plan**, which accounts for opioid claims by state and local governments, took effect at the end of August after receiving court approval over the summer.

Judge Rogers has repeatedly extended the stay in the opioid litigation with respect to the various defendants and recently declined a bid by Albertsons to keep the claims against it on pause past Aug. 30, court records show.

Ferguson's office said in the Wednesday motion that Albertsons has taken the position that the June 2024 discovery cutoff shields it from having to respond to the state's outstanding request now that the stay is over. But at the same time, the grocery chain served third-party subpoenas and asked that the state supplement its own discovery responses.

"Ultimately, it remains unclear why Albertsons failed to respond to the discovery requests by the September 9 deadline," the state said. "But Albertsons' own conduct confirms that it was not because 'fact discovery had closed.' In light of the surrounding facts and circumstances, it is clear that Albertsons manufactured this excuse after realizing the mistake it had made."

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

The State of Washington is represented by Martha Rodríguez López, Kelsey E. Endres, Johnathan J. Guss, Susan E. Llorens, Alison E. Cordova and Jonathan Tebbs of the Washington State Attorney General's Office.

Albertsons is represented by Mary Re Knack and Alexandria M. Smith of Ogden Murphy Wallace PLLC and Francis A. Citera and Gretchen N. Miller of Greenberg Traurig LLP.

The case is State of Washington v. Rite Aid Corp. et al., case no. 22-2-20910-1, in King County Superior Court, Washington.

--Editing by Peter Rozovsky.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Symbotic's Top Brass Hid Risks To Earnings Goals, Suit Says

By **Brian Dowling**

Law360 (October 3, 2024, 3:54 PM EDT) -- Symbotic investors sued the supply chain automation company's board of directors and top executives for allegedly downplaying risks in achieving the aggressive financial goals it promised shareholders.

The shareholder derivative suit, filed in Boston federal court Wednesday by investors Mukesh Kukreja and Timothy Welsh, is the second complaint related to the Wilmington, Massachusetts-based company's report of third-quarter earnings that fell \$12 million short of the guidance it gave less than two months prior.

A **putative class action** filed in August brought claims on behalf of all investors against Symbotic and its top executives, while the latest lawsuit brings claims on behalf of the company against the board, chief executive Richard B. Cohen and finance chief Carol J. Hibbard.

Wednesday's suit said the board's proxy statement to investors in January failed to disclose risks associated with slow deployment times for Symbotic's warehouse automation products, seasonality, and the potential effects of macroeconomic factors on the company's bottom line.

Through Symbotic's quarterly financial reporting and related analyst calls involving executives, the board permitted the company to create a "false impression that they possessed reliable information pertaining to the company's projected earnings outlook and anticipated growth while also minimizing risk from seasonality and macroeconomic fluctuations," the complaint said.

Those "optimistic reports of growth, improvements to gross margin, and overall stability of its ongoing projects fell short of reality," the investors said. "The company was not equipped to timely deploy their systems or otherwise appropriately manage its expenses through project delays."

In May, Hibbard allegedly told analysts that Symbotic expected to hit \$27 million in earnings before interest, taxes, depreciation and amortization on revenues of \$450 million to \$470 million for the third quarter.

But when it closed the books on the quarter in late July, Symbotic had only \$15 million in earnings before interest, taxes, depreciation and amortization to show investors, despite booking \$492 million in revenue, according to the complaint.

The market reacted, and Symbotic's stock allegedly declined from the previous day's closing of \$35.63 to \$27.25 per share after the underwhelming financials went public, a nearly 24% drop accompanied by numerous analysts downgrading their ratings on the stock, according to the suit.

The derivative suit faulted the board for failing to exercise the required oversight of the executives and maintain adequate systems to stop its leaders from issuing false and misleading statements.

The executives and directors are accused of gross mismanagement, wasting corporate assets, unjust enrichment, breaching their fiduciary duties, and violating an Exchange Act requirement barring companies from issuing false or misleading statements in their proxy reports. The complaint requests damages and an order directing Symbotic to reform and improve its corporate governance.

Representatives for the parties were not immediately available for comment on Thursday.

The investors are represented by Michael P. Utke of Law Office of Michael P. Utke LLC and Thomas J. McKenna and Gregory M. Egleston of Gainey McKenna & Egleston.

Counsel information for the defendants was not immediately available on Thursday.

The case is Kukreja et al. v. Cohen et al., case number 1:24-cv-12523, in the U.S. District Court for the District of Massachusetts.

--Editing by Patrick Reagan.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Chancery Tosses Barry Diller From Match.com Class Suit

By **Jeff Montgomery**

Law360 (October 3, 2024, 2:20 PM EDT) -- Media mogul Barry Diller escaped for a second time a Delaware Court of Chancery stockholder challenge to Match.com's \$30 billion reverse spinoff from IAC Interactive, in a post-U.S. Supreme Court remand decision that also kept alive related, previously dismissed claims against five allegedly Diller-loyal "dual fiduciaries."

Vice Chancellor Morgan T. Zurn's 15-page decision late Wednesday followed a Delaware Supreme Court finding in April that rejected the same lower court's toss of the entire case in September 2022 based on eligibility for business judgment deference rather than tougher entire-fairness tests.

Although the new decision again ruled for dismissal of claims against Diller, it found one of Match's separation committee members lacked independence from IAC, running afoul of an independence requirement that the vice chancellor found ultimately required further scrutiny for all five others caught up in the case.

"Plaintiffs have failed to plead Diller exerted actual control over Old Match, at all or through his inferred actual control of Old IAC. It follows they cannot plead a claim that he breached any fiduciary duty to Old Match stockholders," the vice chancellor wrote in the decision on remand, while rejecting dismissal for directors who remained.

The suit focused in part on a reverse spinoff of Match.com, previously part of IAC/Interactive, in July 2020 that left the dating business behind in "Old IAC," along with debt, while spinning IAC and other interests into "NewIAC." The moves ultimately put IAC and Match into new separate entities, with IAC allegedly transferring a huge debt burden to Match while gaining a \$700 million dividend.

In Wednesday's decision, the vice chancellor worked through a chain of findings regarding Diller's holdings and his real or alleged connections with others connected through "Old" or "New" IAC before finding, again, that the suit failed to show a reasonably conceivable claim that Diller and his alleged conflicts unfairly tipped the scale.

Diller "controlled Old IAC, and Old IAC controlled Old Match," the vice chancellor noted. "Diller and his family owned 42.9% of Old IAC's voting power, primarily through their sole ownership of Old IAC's high-vote Class B common stock" and packed Old IAC's board with "loyalists."

The vice chancellor noted that "Diller's 42.9% voting power in Old IAC, together with his apparent input into Old IAC's strategy and his deep ties with Old IAC's board, support the reasonable pleading-stage inference that he actually controlled Old IAC."

But the vice chancellor found that stockholders "have not pled Diller has hard control of Old IAC's voting power that would necessarily grant him control of Old Match's voting power," noting the court's precedents fail to "satisfy or excuse plaintiffs' burden of pleading Diller, in the absence of any voting power at Old Match, still exercised actual control over it."

Left for further argument and possible trial were allegations against five "dual fiduciaries," members of both IAC and Old Match's board, whose involvement and connections potentially tainted the deal through self-interest adverse to stockholders, bad faith or ties to another conflicted, interested party. Those named included Joey Levin, Glenn Schiffman, Mark Stein, Gregg Winiarski and Alan Spoon.

"Each dual fiduciary defendant voted to approve the separation. At this stage, it is reasonably conceivable that each participated in the separation by voting to approve it while laboring under the inherent conflict of being a dual fiduciary," the vice chancellor said in finding the stockholders raised claim that barred dismissal.

"If the interests of the beneficiaries to whom the dual fiduciary owes duties diverge, the fiduciary faces an inherent conflict of interest," the vice chancellor wrote, quoting an earlier case. "The dual fiduciary defendants each face such a conflict, so the claims against them are not exculpated," and remain alive.

Vice Chancellor Zurn's 2022 decision had rejected stockholder arguments that the deal was structured — in part by making a merger part of the overall spinoff — in order to scuttle opportunities to raise derivative claims. The lower court also rejected claims that the transaction was meant to deprive stockholders of standing or aimed at just reorganizing the original entities.

Although the justices earlier this year agreed with Vice Chancellor Zurn's reasons for tossing other claims in the case in September 2022, they found one of Match's separation committee members lacked independence from IAC, running afoul of an independence requirement for all members.

The vice chancellor's decision had prompted warnings from some plaintiffs' counsel that it would weaken a longstanding requirement — dating to the *Khan v. M&F Worldwide* decision of 2014 — that in conflicted mergers, corporations must show "entire fairness," obliging a defendant to prove a transaction is fair in both price and process.

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

Construction Industry and Laborers Joint Pension Trust for Southern Nevada Plan A and Hallandale Beach Police Officers' and Firefighters' Personnel Retirement Trust are represented by Michael Hanrahan, J. Clayton Athey, Corinne Elise Amato, Kevin H. Davenport and Jason W. Rigby of Prickett Jones & Elliott PA and Lee D. Rudy, Eric L. Zagar, J. Daniel Albert and Maria T. Starling of Kessler Topaz Meltzer & Check LLP.

Barry Diller et al. are represented by William M. Lafferty, John P. DiTomo and Elizabeth A. Mullin of Morris Nichols Arsht & Tunnell LLP and Theodore N. Mirvis, Jonathan M. Moses, Alexandra P. Sadinsky and Canem Ozyildirim of Wachtell Lipton Rosen & Katz.

The case under review is 2020-0505, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

FibroGen Suit Alleging Disclosure Failures Tossed In Del.

By **Jeff Montgomery**

Law360 (October 3, 2024, 8:42 PM EDT) -- Biopharmaceutical company FibroGen has beaten a stockholder derivative lawsuit in Delaware's Chancery Court that accused the business and its top officers of fiduciary breaches and insider trading related to its flagship anemia drug, which was once projected to bring in \$3.5 billion for the drugmaker before regulators refused to approve its use in the U.S.

Vice Chancellor Sam Glasscock III entered a 38-page **decision** Wednesday that concluded the suit failed to show a majority of the company's board knew FibroGen Inc. submitted false and misleading disclosures and submissions to the U.S. Food and Drug Administration for its drug Roxadustat. It also failed to establish that a "lack of knowledge evinced willful blindness to the affairs of the company, amounting to bad faith," according to the ruling.

The case, which investors brought in April 2022, sought damages on the company's behalf, as well as governance reforms, citing a series of stock drops after FibroGen filed an accelerated new drug application in 2019 while riding a wave of positive news.

The tide turned against the company amid reports of data manipulation and an FDA ruling that Roxadustat would not, at that time, be approved for any patient group, dragging FibroGen's stock price sharply lower beginning in late 2020.

"So long as FibroGen directors act (or fail to take action) loyally, they are exculpated for resulting liability to the company, even in light of negligence or gross negligence," Vice Chancellor Glasscock found. He also concluded that only two members of the company's board, short of a majority, lacked independence, ruling out claims of disloyalty or bad faith by a majority.

As a result, the judge said, the stockholders failed to show that claims demanding action by independent directors of the company would have been futile.

The decision described the case as a natural securities action repurposed for equitable review. In fact, a federal securities action has been brought against FibroGen, the nominal defendant, and settled for over \$28 million dollars.

The federal securities action accused those named as defendants of having "manipulated Roxadustat's clinical trial data by making blatantly improper 'post hoc changes' to that data in order to make the drug appear significantly better and safer than it really was."

In addition to insider trading and breach of fiduciary claims against directors, the Chancery Court suit aimed an unjust enrichment claim at the company's former chief medical officer, Dr. K. Peony Yu, who retired one month after a citizen group called for the company's new drug application to be rejected based on claims that safety concerns had been "disguised," according to the complaint.

The derivative suit alleged the company directors were faced with seven "red flags" indicating trouble with the drug's clinical trial data and public disclosures. Among them was a report that federal regulators would likely require a "black box" warning on the drugs later to highlight potential risks.

"Defendants dispute, however, that the information regarding a black box warning is a red flag at all, and I agree," Vice Chancellor Glasscock wrote, observing separately that the claims failed to

overcome exculpatory protections in the drugmaker's certificate of incorporation shielding those named from liability.

"Plaintiffs have failed to plead facts from which I can infer bad faith here," the judge added, finding the stockholders alleged "no particularized facts showing that the independent directors prepared, reviewed, or even knew about the statements at issue."

Counsel for the stockholders and FibroGen did not immediately respond to requests for comment Thursday.

The proposed class of investors is represented by Peter B. Andrews, Craig J. Springer and David M. Sborz of Andrews & Springer LLC, Blake A. Bennett of Cooch & Taylor PA, Frank J. Johnson, Brett M. Middleton and Jonathan M. Scott of Johnson Fistel LLP, and Matthew Houston, Benjamin I. Sachs-Michaels and Robert V. Prongay of Glancy Prongay & Murray LLP.

FibroGen and its directors and officers are represented by D. McKinley Measley, Elizabeth A. Mullin Stoffer and Courtney Kurz of Morris Nichols Arsht & Tunnell LLP and Patrick E. Gibbs, Tijana Brien and Brett De Jarnette of Cooley LLP.

Yu is represented by J. Peter Shindel Jr. of Abrams & Bayliss LLP and Bruce A. Ericson and Lee Brand of Pillsbury Winthrop Shaw Pittman LLP.

The case is In re FibroGen Inc. Derivative Litigation, case number 2022-0331, in the Court of Chancery of the State of Delaware.

--Editing by Covey Son.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Hecla Avoids Investor Suit Over \$462M Gold Mine Buy

By **Katryna Perera**

Law360 (October 3, 2024, 4:52 PM EDT) -- A gold mining operation secured the permanent dismissal of an investor suit alleging that \$462 million in new mines the company bought in Nevada that were supposed to be lucrative turned out to be duds, with a New York federal judge finding the investors failed to plead any actionable false or misleading statements.

U.S. District Judge Andrew L. Carter Jr. issued an **opinion and order** on Monday stating that the suit's lead plaintiffs have failed to cure any of the deficiencies from their first amended complaint and that they have not put forth sufficient factual allegations to carry their claims against Hecla Mining Co. and its top officers "beyond the speculative level."

According to the order, the investors added eight new alleged misstatements to the operative complaint, but Judge Carter said none of them, either individual or considered holistically, are actionable.

A majority of the newly challenged statements are forward-looking, he said, and were accompanied by meaningful cautionary language that discussed or disclosed specific risk factors that could impact Hecla's overall growth strategy and operating costs, among other things.

"In fact, the disclosure explained the risks of acquiring new properties, even with extensive due diligence, noting that Hecla may not be able to 'identify liabilities associated with the acquired properties' and that '[e]ven a detailed review of records and properties may not necessarily reveal existing or potential problems or permit a buyer to become sufficiently familiar with the properties to fully assess their condition, any deficiencies, and development potential,'" the order states.

Judge Carter said these and similar warnings were "substantially repeated" during the class period and, when read together, cautioned investors of the very risks that the suit alleges ultimately occurred — that the Nevada mines "were not in the condition they were initially thought to be and that the cost of operating those mines would ultimately be higher than expected."

Many of the newly challenged statements are also corporate puffery, the judge said.

"These vague statements, including phrases such as 'we saw extraordinary grades,' noting 'excite[ment] about the exploration opportunities in northern Nevada,' and detailing belief in 'significant opportunity for improvement' are precisely the kind of language that courts in this district have found inactionable corporate puffery," the order states.

The order further states that because the investors failed to plead any actionable false or misleading statements, their claims for scienter and control person liability also fail.

The suit, **filed in 2019**, alleged that Hecla and its top officers misled investors into believing the Nevada properties would be at least "self-funding" in the beginning, if not somewhat profitable.

But in reality, they knew very well that the land was troubled by a lack of proper equipment, too much water, inconsistent production, and a lack of breakdown as to ore types on the property, according to the suit.

Hecla's stock fell by 23.5% over two trading days, after it was announced in May 2019 that the Nevada mines were "cash flow negative" and being reviewed "to determine the best path forward." Hecla also reported a net loss of more than \$25 million for the first quarter of 2019, which was

largely due to a \$13.8 million loss from the Nevada operations, according to the suit.

Counsel for the defendants declined to comment on Thursday, and counsel for the investors did not immediately respond to requests for comment.

The investors are represented by Robert N. Kaplan, Jeffrey P. Campisi and Jason A. Uris of Kaplan Fox & Kilsheimer LLP.

Hecla and the other defendants are represented by Joshua Z. Rabinovitz, Stefan Atkinson and Kate Guilfoyle of Kirkland & Ellis LLP.

The case is Batter et al. v. Hecla Mining Company et al., case number 1:19-cv-04883, in the U.S. District Court for the Southern District of New York.

--Editing by Vaqas Asghar.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Kohl's Beats Investor Class Action Over Activist Bid, For Now

By **Katryna Perera**

Law360 (October 3, 2024, 9:55 PM EDT) -- A Wisconsin federal judge has dismissed an investor class action alleging that Kohl's attributed positive financial results to executives' strategic planning instead of unrelated, pandemic-related factors in an attempt to defeat an activist at a board meeting, finding that the investors have failed to plead any actionable false or misleading statements.

U.S. District Judge Lynn Adelman issued an **order** on Monday, finding that all three categories of alleged misrepresentations in the investors' amended complaint failed to meet the pleading standards.

According to the order, investors first asserted that Kohl's and its top brass failed to disclose that the retailer's success in 2021 was attributable to the return of in-person shopping after the height of the COVID-19 pandemic and increased retail spending due to the issuance of government stimulus checks, among other factors.

Kohl's argued in its dismissal motion that several of the challenged statements did acknowledge the impact of macroeconomic factors on its business, but regardless, it wasn't required to make such acknowledgments since the impact of COVID-19 and the stimulus checks on consumer spending was "well-known."

Judge Adelman agreed on Monday, saying there isn't a duty to disclose information already known to the public.

"Defendants were thus not required to disclose these macroeconomic factors every time they discussed the strategic plan because the effects of the COVID-19 vaccine and stimulus checks on the economy were well known by the general public," the order stated. "Furthermore, the amended complaint fails to allege facts in support of plaintiff's claim that the only thing driving Kohl's success in 2021 was the rebounding economy."

Judge Adelman also said the amended complaint does not allege any facts showing that the executive defendants' strategic plan had no impact on Kohl's success in 2021.

Additionally, the judge said the amended complaint fails to plead scienter, or knowledge of wrongdoing, for any of the challenged statements made before Jan. 18, 2022.

The suit alleged that nonemployee board members engaged in fraud in an attempt to defeat activist investment firm Macellum Capital Management's proposed slate of directors at Kohl's 2022 annual shareholders meeting, maintain control of the board and ensure that they retained their positions and perks.

"But according to the amended complaint, Macellum did not announce its slate of director candidates until Jan. 18, 2022. Plaintiff challenges several of defendants' statements about the strategic plan that were made in August and November of 2021," the order stated. "The amended complaint thus fails to plead scienter for any of the challenged statements made before Macellum's announcement."

The judge also said the investors failed to identify any corrective disclosures revealing that statements about the strategic plan were false, and therefore, the suit's loss causation claim fails.

The second category of challenged statements in the amended complaint relates to the potential sale of Kohl's. According to the order, the investors pointed to a statement made in a Jan. 18, 2022, press release denying Macellum's accusation that the board had rebuffed purchased offers. The investors said this statement was false and misleading because news outlets reported a few days later that Kohl's had received several bids and letters of interest in acquiring the company.

"Plaintiff asserts that these allegations support an inference that Kohl's had received offers before the January 18 statement was made. But plaintiff fails to allege facts demonstrating that the challenged statement was false or misleading at the time it was made," Judge Adelman said. "At most, the amended complaint alleges facts that the statement was false as of Jan. 21, but alleges no facts in support of his claim that the statement was untrue when made on Jan. 18."

The investors also pointed to several statements made in March, April and June 2022 about the potential sale of the company that was "ongoing" and claimed these statements were false and misleading since the board never actually had an intention of selling.

Judge Adelman said the investors are correct that these statements can be considered false or misleading if the sales process had stopped, but the amended complaint failed to adequately plead that this had happened when the statements were made.

Finally, the amended complaint challenged statements about Kohl's financial results for the first quarter of 2022.

According to the order, the amended complaint specifically identified a statement made on April 13, 2022, about the upcoming director election and the ongoing sales process and a statement in an April 29, 2022, letter to shareholders encouraging shareholders to vote for existing directors over the slate proposed by Macellum.

Judge Adelman noted that no representations about Kohl's financial performance in the first quarter of 2022 are made in either of these statements.

"Plaintiff instead argues these statements, which quoted Kohl's previous success and indicated that similar efforts were still ongoing, were false or misleading because they were made towards the end of the quarter when the defendants knew that Kohl's Q1:22 financial results were going to be significantly below expectations," the order stated.

"I cannot conclude that statements about Kohl's past performance created a duty to provide updated financials," the order further stated. "Such a requirement would mean that no company could give a statement on a previous quarter without also disclosing how the in-progress quarter's results compare. This would effectively create a system of continuous disclosure."

The judge also found other challenged statements about the retailer's financial performance to be corporate puffery and said he would allow the investors to move for leave to file an amended complaint.

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

The investors are represented by Kim E. Miller, J. Ryan Lopatka, Lewis S. Kahn and Jyoti Kehl of Kahn Swick & Foti LLC and by K. Scott Wagner of Attolles Law SC.

Kohl's and the individual defendants are represented by Michele Johnson, Colleen Smith, Christopher Turner, Zachary Rowen and Jordan Cook of Latham & Watkins LLP.

The case is Thomas Frame et al. v. Kohl's Corp. et al., case number 2:22-cv-01016, in the U.S. District Court for the Eastern District of Wisconsin.

--Editing by Dave Trumbore.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Drivers Rip GM's Bid For Full 6th Circ. Redo In Emissions Row

By **Linda Chiem**

Law360 (October 3, 2024, 9:52 PM EDT) -- A group of drivers on Thursday balked at General Motors' bid to get the full Sixth Circuit to review a divided panel's recent decision partly reviving consolidated litigation alleging the automaker deceptively marketed Chevrolet Silverado and Sierra vehicles as being more environmentally friendly than they actually were.

The drivers **opposed** General Motors' petition for an en banc rehearing, saying the automaker has sought to "fabricate a conflict between judges in this circuit and to mislead the court into accepting this case for en banc review."

A 2-1 panel **held in August** that this dispute over Duramax diesel engine trucks that GM touted as "clean diesel" or "low emission" vehicles involved "fraud on the consumer" claims that were **not impliedly preempted** by the Clean Air Act, as a Michigan federal judge ruled last year. The drivers maintained that the majority's ruling does not conflict with a different Sixth Circuit **ruling** from April 2023 in a separate case against Ford Motor Co. There, the panel found that the "fraud on the agency" claims were preempted by the federal Environmental Policy and Conservation Act.

The GM drivers argued Thursday that the majority correctly found that the reasoning for finding preemption in **Ford Motor Co. F-150 & Ranger Truck Fuel Economy Marketing and Sales Practices Litigation**  doesn't apply to this case. As such, GM's rehearing petition should be denied, they said.

"Although the petition complains that the panel majority reached a different conclusion than Ford, it does not claim that the decisions actually conflict, but only that the majority distinguished Ford," the drivers said. "GM omits the critical fact that the federal statutes at issue here and those at issue in Ford were entirely different: While this case involves an implied preemption analysis under the Clean Air Act, Ford involved preemption under the Energy Policy and Conservation Act."

The drivers have alleged GM violated state law through its misleading omissions to the public about the Duramax trucks' emissions compared to their gasoline counterparts and about what a reasonable consumer might expect and what GM advertised — none of which implicate or challenge the U.S. Environmental Protection Agency's determinations, according to the majority's Aug. 21 opinion.

While the Sixth Circuit reasoned in Ford that the plaintiffs' claims would effectively allow a jury to second-guess the EPA's fuel economy figures and usurp the EPA's fraud-policing powers, that's also not applicable here to GM, according to the majority.

GM on Sept. 18 **petitioned** for the full Sixth Circuit to review the majority's opinion, which the company said "robbed district courts of that clarity and rendered this court's preemption precedent incoherent."

"GM fails to identify any compelling reason why the issue of implied preemption under the CAA is 'exceptionally important,'" the drivers said. "Instead, they simply assert that the issue arises 'frequently' because the Sixth Circuit includes Michigan, the home of the 'Big Three auto manufacturers,' and there are now three appeals pending from defeat-device cases dismissed on preemption grounds. This argument is self-serving and groundless."

The drivers in this case alleged GM deceived customers into overpaying for trucks that were marketed as environmentally friendly and fuel-efficient when they were, in fact, emitting high levels

of pollutants called nitrogen oxides. They alleged GM tweaked the emissions-control systems in the Silverado and Sierra diesel trucks with a special "dosing algorithm" that purportedly kept the trucks' emissions within legal limits under test conditions to fool regulators, but allowed emissions to spike under normal real-world driving conditions.

The majority had reversed part of the district court's July 2023 **decision** granting summary judgment to General Motors LLC, auto parts supplier Robert Bosch GmbH and its subsidiary Robert Bosch LLC on the drivers' state-law consumer protection, fraud and deceptive trade practices claims. But the panel affirmed the lower court's finding that the plaintiffs were indirect purchasers who lacked standing to pursue their Racketeer Influenced and Corrupt Organizations Act claim based on the bright-line rule set by the U.S. Supreme Court's 1977 **Illinois Brick Co.** ruling, which established that a plaintiff must be the "direct victim" of any such RICO violation in order to assert that claim.

Meanwhile, industry groups such as the Alliance for Automotive Innovation, the U.S. Chamber of Commerce and the National Association of Manufacturers have supported GM's request for a full Sixth Circuit rehearing. They said in a Sept. 26 amici curiae brief that if left untouched, the majority's ruling could jeopardize the regulatory regime for designing and securing approvals for complex emissions control systems in modern diesel engines and vehicles.

"Only EPA can strike these balanced decisions about regulatory compliance and make judgments that account for the full scope of relevant considerations, including the fact that some AECDs [auxiliary emission control devices] may be imperfect or incomplete solutions to ongoing emissions reduction challenges but nonetheless comply with the Clean Air Act," the groups said. "Allowing private plaintiffs and juries to question those decisions would dramatically impair both EPA's ability to implement Congress's directives and manufacturers' ability to design and deliver vehicles that reliably balance durability, performance and safety."

The **appeal** involved drivers who sued over emissions from 2011-2016 Chevrolet Silverado 2500HD or 3500HD trucks and GMC Sierra 2500HD or 3500HD trucks outfitted with the Duramax diesel engine.

The Duramax diesel litigation **kicked off** in 2017, and both GM and Bosch fought relentlessly to purge claims from named plaintiffs in the broader putative class of consumers and from bellwether plaintiffs in a separate trio of lawsuits — the so-called Anderton, Bulaon and Pantel actions that cover approximately 3,000 plaintiffs — that were **consolidated** for pre-trial purposes with that class.

The drivers are represented by Steve W. Berman and Garth D. Wojtanowicz of Hagens Berman Sobol Shapiro LLP, E. Powell Miller and Dennis A. Lienhardt of the Miller Law Firm PC, James E. Cecchi, Donald A. Ecklund and James A. O'Brien III of Carella Byrne Cecchi Brody & Agnello PC and Christopher A. Seeger, Jennifer R. Scullion and Shauna Itri of Seeger Weiss LLP.

The Anderton, Pantel and Bulaon plaintiffs are represented by Eric D. Pearson and Charles W. Miller of Heygood Orr & Pearson.

GM is represented by Jay P. Lefkowitz, Renee D. Smith, Jeffrey S. Bramson and Cole T. Carter of Kirkland & Ellis LLP.

Bosch is represented by Carmine D. Boccuzzi Jr., Matthew D. Slater and Abena A. Mainoo of Cleary Gottlieb Steen & Hamilton LLP and William R. Jansen, Jonathan E. Lauderbach and Michael G. Brady of Warner Norcross + Judd LLP.

The amici curiae are represented by Jonathan S. Martel, Samuel I. Ferenc and S. Zachary Fayne of Arnold & Porter Kaye Scholer LLP.

The Chamber of Commerce is represented by Stephanie A. Maloney and Mariel A. Brookins of the U.S. Chamber Litigation Center.

The consolidated cases are Andrei Fenner et al. v. General Motors LLC et al., case numbers 23-1648, 23-1696, 23-1697 and 23-1698, in the U.S. Court of Appeals for the Sixth Circuit.



Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

'Let's Go Brandon' Coin Trustee Knocks Buyers' Class Claims

By **Aislinn Keely**

Law360 (October 3, 2024, 7:45 PM EDT) -- The trustee of the meme-inspired cryptocurrency LGBcoin sought to block class action certification from buyers who claim he sold them unregistered securities by leading them to believe the token would take off through a purported partnership with NASCAR.

James Koutoulas and the firm LGBCoin Ltd. said in a Wednesday court filing in Florida federal court that the group of buyers hasn't shown how the token meets the characteristics of an investment contract or detailed any purchases they made directly from him or the firm to bring their securities class action claims. According to Koutoulas, the alleged lack of standing precludes any of the buyers from serving as a class representative.

"Plaintiffs, whose certified transactions were exclusively secondary purchases on digital asset exchanges, would have no basis for alleging that LGBcoin is a security even if they had privity with defendants, which they do not," Koutoulas said.

He also argued that the buyers haven't met the monetary threshold for certification now that NASCAR has been dismissed from the action, and their unjust enrichment claims against him don't take into account "numerous charitable and political donations" he allegedly made from the proceeds of the token sales.

In a statement to Law360, Aaron Zigler of Zigler Law Group LLC, counsel for the buyers, said Koutoulas' filing "rehashes arguments already lost at the motion to dismiss stage and asserts arguments built on a fundamental misunderstanding of the law."

"The court already held that plaintiffs' plausibly alleged LGBCoin was a security," said Zigler. "It already rejected his demand for privity and found plaintiffs' plausibly alleged he was a statutory seller. There is no monetary threshold for class certification and the court's jurisdiction is determined by the claims at the time of filing. I'm looking forward to our reply brief."

Sandra Bader, Eric De Ford and Shawn R. Key in July **asked** a Florida federal judge to certify a class of those who bought LGBcoin from November 2021 to March 2022. The token at issue was inspired by the "Let's Go Brandon" meme, when a TV news reporter mistakenly described profane chanting directed at President Joe Biden during a NASCAR event as "Let's go, Brandon" in support of a racer.

The buyers claim they purchased the coin, in part because the project touted an upcoming announcement of a NASCAR partnership. However, the buyers said they suffered losses when the deal never materialized and the token's price dropped near zero. The suit has been amended three times since its April 2022 filing, and **previously named NASCAR** as a party before the stock car racing company won dismissal.

Koutoulas, a purported Republican influencer, argued that the suit he initiated against NASCAR in Florida state court through the LetsGoBrandon.com Foundation is more likely to recoup losses for token holders. That suit **accused** the stock car racing company of unjustifiably revoking the LGBcoin sponsorship, and does not allege securities law violations.

"Although plaintiff's surviving claims are separate from the foundation's claims in the state court case, they arise out of common facts," Koutoulas said. "The relief that plaintiffs seek is mutually exclusive to the foundation's claims and are vastly inferior to the foundation's claims against NASCAR

from both an adequacy standpoint and in terms of the amount of damages each lawsuit has a reasonable chance of recovering."

Koutoulas told Law360 that he plans to distribute any proceeds from the suit against NASCAR to LGBCoin tokenholders through a crypto transfer known as an airdrop, while the foundation itself would use its share to buy back successor token LETSGO on the secondary market. If the securities claims in the buyers' proposed class action prevail, they would render LETSGO untradeable as an unregistered security, he said.

The state suit led by Koutoulas is not a class action and does not currently have plans to distribute potential proceeds through a traditional court-appointed process.

"The foundation has standing to sue on behalf of all coins pursuant to a trust agreement. ... Much more efficient than a class action and judge has recognized foundation as real party in interest already," he said in an email.

The plaintiffs are represented Aaron M. Zigler, Mary Jane Fait and Nidya S. Gutierrez of the Zigler Law Group LLC and John T. Jasnoch and Sean T. Masson of Scott + Scott Attorneys at Law LLP.

The defendants are represented by Nicole Martell of Di Pietro Partners PLLC.

The case is De Ford v. Koutoulas et al., case number 6:22-cv-00652, in the U.S. District Court for the Middle District of Florida.

--Additional reporting by Emilie Ruscoe and David Minsky. Editing by Michael Watanabe.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Trump Media's COO Resigns As Stock Is Released To Investor

By **Tom Zanki**

Law360 (October 3, 2024, 9:44 PM EDT) -- The parent of Donald Trump's social media platform had a busy Thursday, announcing that its chief operating officer has resigned and separately disclosing that it released nearly 800,000 shares to a backer of the vehicle that took Trump's entity public in connection with a court order.

Trump Media & Technology Group Corp. said COO Andrew Northwall resigned on Sept. 28, according to a Thursday U.S. Securities and Exchange Commission filing. Trump Media, the holding company for the former president's Truth Social site, did not disclose a reason for Northwall's resignation, saying it "plans to transition his duties immediately."

In a statement posted on Truth Social, Northwall said it was his decision to resign and that working for Trump Media was among the "most rewarding experiences" of his career.

"As I step back, I look forward to focusing more on my family and returning to my entrepreneurial journey, where my heart truly lies," said Northwall, who was previously a chief architect of conservative social media site Parler and has held other technology jobs.

Separately, Trump Media said Thursday it released 785,825 of its common shares from escrow to ARC Global Investments II, a sponsor of the special purpose acquisition company that acquired and took Trump's business public. The release of the shares — worth more than \$12.7 million based on Thursday's closing price — follows a Sept. 17 opinion by a Delaware Chancery judge, who sided with ARC in a dispute over whether Trump Media diluted an equity stake that ARC was entitled to after the merger closed.

Vice Chancellor Lori W. Will **last month** ruled last month that Trump Media's predecessor company, Digital World Acquisition Corp., breached its contract with ARC by diluting its equity through an improper conversion rate.

Vice Chancellor Will ruled that Digital World's certificate of incorporation set a conversion rate of 1.49 to 1 when determining how many of ARC's Class B shares should convert to Class A shares of Trump Media upon the closing of Digital World's acquisition of Trump Media in March.

ARC alleged that Trump Media's predecessor company had illegally diluted its equity stake as both parties fought over what the appropriate level of conversion should be.

However, the ratio Will decided upon was less than the 1.82 to 1 ratio sought by ARC, but greater than the 1.35 to 1 ratio that Digital World said was appropriate. The ratio was not an even 1 to 1 given that Digital World issued additional Class A shares following its 2021 initial public offering, which triggered certain anti-dilution protections for prior investors.

Trump Media determined that 785,825 common shares represented the appropriate quantity that should be released to ARC following the Chancery's order, according to Thursday's filing. The filing noted that both retain a 30-day option to appeal the order.

Thursday's filing makes no connection between Northwall's resignation and the Delaware litigation regarding ARC's stake.

A representative from Trump Media declined to comment.

Trump Media's shares **listed publicly** under the symbol DJT in March after the company merged with Digital World, a SPAC that formed in 2021 with the intent of acquiring a private business and taking it public. Shares of Digital World began trading on Nasdaq after its 2021 offering. Trump Media has since inherited Digital World's stock listing, as is customary with SPAC mergers.

ARC's top investor is Patrick Orlando, the CEO of Digital World until his firing in 2023. Orlando is separately embroiled in litigation with the SEC, which in July **accused him of illegally hiding merger talks** involving Trump's company as far back as 2021, around the time that Digital World disclosed that it had not selected a merger target.

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

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

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

--Additional reporting by Lauren Berg. Editing by Linda Voorhis.

All Content © 2003-2024, Portfolio Media, Inc.