

HB 6 Updates: Fact-finding limits could frustrate shareholder cases

ohiocapitaljournal.com/2024/10/16/hb-6-updates-fact-finding-limits-could-frustrate-shareholder-cases

By Kathiann M. Kowalski, Energy News Network

October 16, 2024



FirstEnergy's headquarters in Akron. (Photo from Google Maps.)

This monthly newsletter provides updates on Ohio's ongoing utility corruption scandal. Was this forwarded to you? [Click here to subscribe.](#)

The Ohio Attorney General's office wants to keep information it produced in a state criminal case from going to plaintiffs in federal shareholder litigation. State lawyers also want to limit what former FirstEnergy executives Chuck Jones and Michael Dowling – who are defendants in both cases – can ask various witnesses in the shareholder proceeding.

The move to limit evidence is among the latest developments in Ohio's ongoing corruption scandal surrounding the state's 2019 nuclear and coal bailout law, House Bill 6. Other recent news includes:

- The Securities and Exchange Commission agreed to settle claims against FirstEnergy for \$100 million, but filed a separate court case against former CEO, Chuck Jones, for alleged securities law violations.
- Ohio regulators limited evidence from challengers' experts in one of four HB 6-related cases last week, while letting a FirstEnergy witness testify about issues challengers said were beyond the scope of the hearing.
- An audit report in another of the regulatory cases found FirstEnergy allocated only a small share of its spending on the HB 6 bribery scheme to Ohio utilities, and concluded there was little or no impact on customers.
- HB 6 is an issue in at least one Ohio congressional campaign this fall, while a new report reviews FirstEnergy's work to secure federal bailouts when Donald Trump was president.

State seeks to limit fact-finding

The Office of the Ohio Attorney General has gotten involved in ongoing shareholder litigation related to HB 6. An October 10 filing seeks to pause the disclosure of materials it turned over to former FirstEnergy executives Chuck Jones and Michael Dowling in the state criminal case against them. The motion also asks the court to block their depositions — questioning under oath — of several witnesses the state plans to call in the criminal case.

Stays of this nature in civil proceedings pending criminal prosecutions are not automatic. Among other things, courts typically weigh whether ongoing civil proceedings will impair defendants' constitutional right against self-incrimination or otherwise hinder their ability to prepare a defense against the government's criminal charges.

The motion says Jones' lawyer agrees that sharing discovery from the criminal case with plaintiffs could infringe on his right to a fair trial. However, the Ohio Attorney General notes that lawyers for Jones and Dowling have said they would oppose the stay on the depositions.

In other words, it appears the state is trying to block something lawyers for Jones and Dowling think might be helpful to their civil or criminal cases — or both.

“The State of Ohio has an interest in ensuring that Jones and Dowling do not ‘expand rights of criminal discovery beyond the limits’” of what they could otherwise get, the state's filing said. Criminal lawyers can generally try to talk with the state's witnesses, but those people generally can't be compelled to answer under oath before trial, which would be the case for the depositions.

FirstEnergy spokesperson Jennifer Young declined to comment on the litigation. The company still has not turned over its internal investigation report to plaintiffs in the same litigation, despite a trial court order earlier this year directing them to do so. Briefing before the Sixth Circuit Court of Appeals on that issue wrapped up last month.

Read more:

Ex-First Energy executives, Ohio utility regulator charged by state in bailout and bribery scandal (Ohio Capital Journal)

Indicted ex-FirstEnergy executives ask judge to dismiss bribery charges against them (Cleveland.com)

SEC settles with FirstEnergy but sues ex-CEO

Jones is also a defendant in a civil securities fraud case filed last month by the Securities and Exchange Commission. Separately, the SEC also agreed to a \$100 million settlement with FirstEnergy. The charges and settlement with the company and the complaint against Jones were both announced September 12.

Among other things, the SEC's investigation found FirstEnergy and its former CEO Chuck Jones made misrepresentations to investors about the company's role in the alleged HB 6 corruption scheme.

FirstEnergy's securities filings had already noted a reserve of \$100 million related to the SEC investigation, so the similar amount is not a surprise. Nonetheless, it drew criticism.

"The settlement is disappointingly small, and does little to deter future legislative or regulatory capture by special interests," said Nolan Rutschilling, managing director of energy policy for the Ohio Environmental Council.

The SEC's order setting forth its charges and the settlement with FirstEnergy notes the company's consent to its entry is limited to that proceeding. Thus, FirstEnergy's settlement with federal securities law regulators can't be used as admissions of liability in the shareholder litigation.

Read more:

FirstEnergy to pay \$100M in HB 6 settlement with SEC; ex-CEO to face civil fraud charges (Statehouse News Bureau)

FirstEnergy reaches \$100M settlement with SEC over corruption case (Power Engineering)

FirstEnergy to pay \$100M to settle SEC HB 6 bribery investigation (Utility Dive)

Tunnel vision?

Administrative law judges at a PUCO hearing last week granted FirstEnergy's request to strike parts of testimony by experts for the Office of the Ohio Consumers' Counsel and IGS Energy. Both parties and others claim the company violated Ohio law requiring corporate separation between utilities and unregulated affiliates.

The PUCO had already split off HB 6-related issues for an undetermined future review. But FirstEnergy objected to any mention of HB 6 and to any mention of former PUCO chair Sam Randazzo, even incidentally to matters before passage of the 2019 law.

“Such scope expansion would risk confusing the issues and result in a series of proceedings in which the same conduct is addressed more than once,” company lawyers wrote.

Letting FirstEnergy “hide the ball” does not mesh with the company’s public claims that its core values include integrity, openness and trust, the Consumers’ Counsel’s October 4 filing said in response. “And it will not aid in dispelling the black cloud that remains over the PUCO concerning its involvement in the HB 6 scandal,” it added.

“For consumers, the whole truth about HB 6 needs to come out sooner rather than later,” said Maureen Willis, the Ohio Consumers’ Counsel.

Among other things, Joseph Buckley’s written testimony for the Office of the Ohio Consumers’ Counsel argued FirstEnergy should pay penalties of nearly \$53.3 million for violations of Ohio rules and an inadequate plan to maintain corporate separation. He calculated the proposed forfeiture at \$25,000 per day from January 1, 2016 through November 21, 2021. That did not include any violations related to HB 6 itself, he said.

The PUCO’s website lists the corporate separation case as one of four HB 6-related cases. Earlier this year, other parties wanted all four cases consolidated, while FirstEnergy wanted three cases joined and the corporate separation case split off.

Randazzo helmed the PUCO when it began the piecemeal approach to issues related to HB 6. Two months later, he resigned after being implicated in the scandal. The PUCO, now chaired by Jenifer French, continued the same approach.

Two cases were consolidated in June, but the other two remain separate, with the corporate separation case being further split up.

Read more:

HB 6 Updates: Ohio regulators continue piecemeal review (Energy News Network)

What can Ohio regulators do to prevent future utility corruption scandals? (Energy News Network)

Audit says customers didn’t pay for HB 6

Although FirstEnergy spent roughly \$75 million on HB 6 efforts and associated lobbying, the company only allocated about \$5 million to its Ohio utilities, a September 30 audit report by the accounting firm Marcum found. Most of that related to a \$4.3 million payment to Randazzo shortly before Gov. Mike DeWine appointed him as PUCO chair. FirstEnergy previously admitted that payment was meant to secure Randazzo’s help on HB 6 and other matters.

However, the Marcum report said, customer charges for some of those accounts maxed out at a certain point. So, utility customers only paid about \$15,000 more than they otherwise would have been charged, it concluded.

“We already agreed to refund this amount, with interest,” said Young at FirstEnergy, noting the new audit results are consistent with a previous report for a capital investment rider. She also noted efforts the company has made since 2021 to strengthen ethics and accountability.

On one hand, the report’s findings appear positive: Although FirstEnergy spent millions for activity it admitted was corrupt, most was not charged to ratepayer accounts.

Yet the audit still documented improper charges to Ohio utility accounts. And it confirmed FirstEnergy did only a limited review before its assertion in 2020 that ratepayer funds were not used for HB 6.

Also, charges to utility accounts aren’t necessarily the same as spending ratepayer money. The audit team could not say how money put into a joint money pool was spent. That especially matters for a credit support rider the company collected about \$450 million for, but which the Ohio Supreme Court ultimately held unlawful.

The audit team also didn’t review all depositions from HB 6-related shareholder litigation, some of which are subject to a protective order. Multiple witnesses also have not yet answered questions under oath in that litigation and in some of the HB 6 regulatory cases.

The audit also didn’t address amounts related to Cleveland-area entrepreneur Tony George, who helped set up a meeting between FirstEnergy leaders and former Ohio House Speaker Larry Householder. Nor did the audit include amounts FirstEnergy steered to dark money groups that supported Gov. Mike DeWine, Lt. Gov. Jon Husted, Ohio Senate President Matt Huffman, Ohio Secretary of State Frank LaRose and others.

Comments on the audit report must be filed with the PUCO by October 22. Any replies are due November 5.

Read more:

FirstEnergy didn’t charge customers to fund bribery scheme, state audit finds (Cleveland.com)

FirstEnergy fought for a federal bailout

Although Donald Trump’s presidential administration pushed for a massive bailout for coal and nuclear power plants, the Federal Energy Regulatory Commission ultimately rejected that bailout. But it wasn’t for lack of trying by FirstEnergy, a new report by the Energy and

Policy Institute shows.

While much of the information in the report was previously known, various documents and details have only become public after Trump left office in 2020. He is the Republican nominee in this fall's presidential election.

"The internal FirstEnergy records released this year after years of delays describe in shocking detail the lengths FirstEnergy went to as the utility lobbied for this bailout," said Dave Anderson, author of the report. The issue is especially relevant now that Trump has made a campaign promise to slash energy prices in half, Anderson said.

The report tells about meetings and other communications between FirstEnergy executives and Trump, former Vice President Mike Pence, and others. It also notes that in 2017, FirstEnergy gave \$5 million to America First Policies, a pro-Trump dark money group. That same year, FirstEnergy also hired a lobbying firm founded by Trump's former campaign manager Corey Lewandowski. Lewandowski has denied working for FirstEnergy.

Read more:

Subpoenaed records detail FirstEnergy's secret political spending to influence then-President Donald Trump (Energy and Policy Institute)

FirstEnergy gave heavily to Trump and Trump worked for a federal bailout, report says (Ohio Capital Journal)

Loyalty to Trump helped Corey Lewandowski survive harassment scandal (Washington Post)

Congressional campaign attacks Team Householder candidate

U.S. House Rep. Marcy Kaptur has made HB 6 a campaign issue in ads attacking Republican challenger Derek Merrin. Merrin is finishing his fourth term in the Ohio House of Representatives. He voted for HB 6 in 2019.

Merrin also was among the "Team Householder" candidates listed on a government exhibit introduced last year at the criminal trial of former Ohio House Speaker Larry Householder. The government claimed Householder directed the use of dark money funds to help candidates whom he expected to support his bid to become speaker and then to pass a bailout for FirstEnergy.

One of Kaptur's ads said Merrin increased Ohioans' electric bills. Ohioans have paid more than a third of a billion dollars for HB 6's coal plant subsidies so far. A separate ad noted Householder and his co-defendant Matt Borges went to prison but said Merrin "kept their

money — nearly \$20,000.”

Kaptur campaign spokesperson Josh Strassberger pointed to a 2024 Daily Beast article saying Merrin received a total of more than \$17,000 from Householder’s campaign committee and from one of the dark money groups involved in the HB 6 corruption scandal. Strassberger also referenced campaign donation and spending records adding up to those amounts.

Energy News Network reached out multiple times to Merrin’s campaign office but has not received a response.

Merrin was not under a legal obligation to return funding from the dark money group or Householder’s campaign. Nor have any criminal allegations been made against him relating to HB 6.

Read more:

Truth Test: Kaptur defends record, criticizes Merrin in new ad (WTVG)

Criminal cases continue

Householder was forced out of the Ohio House of Representatives in mid-2021, nearly a year after his arrest on the federal criminal charges. Yet the Friends of Larry Householder campaign committee is still active, with disbursements through early this year.

State records reflect multiple payments through last fall to the Pullins Law Firm as payments or retainers for legal services. Approximately \$70,000 of that amount was paid out after Householder went to prison last year.

Lawyer Scott Pullins told the Columbus Dispatch, which uncovered the payments, that he represents Householder in two cases before the Ohio Elections Commission, as well as a civil lawsuit.

Pullins told the Energy News Network he had no further comment, adding that various questions dealt with privileged and confidential matters. Among other things, the Energy News Network asked what share of charges was for the civil lawsuit. Pullins’ appearance in the case was filed in August 2024, after other lawyers for Householder and the campaign committee had filed a motion that could end the case.

Another question related to the state’s criminal case against Householder. Charges include a count for aggravated theft of \$1.2 million from the campaign committee for the period from August 2020 through September 2022. State records show Pullins is treasurer of the campaign committee.

Read more:

While ex-Ohio speaker Householder is in prison, attorney pays himself out of campaign funds (Columbus Dispatch)

Digging into the latest indictment of former Ohio House Speaker Larry Householder (Ohio Capital Journal)

This article first appeared on Energy News Network and is republished here under a Creative Commons license.  `PARSELY = { autotrack: false, onload: function() { PARSELY.beacon.trackPageView({ url: "https://energynews.us/newsletter/hb-6-updates-fact-finding-limits-could-frustrate-shareholder-cases/", urlref: window.location.href }); } }`

YOU MAKE OUR WORK POSSIBLE.

GET THE MORNING HEADLINES.



Our stories may be republished online or in print under Creative Commons license CC BY-NC-ND 4.0. We ask that you edit only for style or to shorten, provide proper attribution and link to our website. AP and Getty images may not be republished. Please see our republishing guidelines for use of any other photos and graphics.

Subpoenaed records detail FirstEnergy's secret political spending to influence then-President Donald Trump

 1.next.westlaw.com/Document/laa9874608b2a11efa341ae0b6a5129d5/View/FullText.html

NewsRoom

10/15/24 Energy and Policy Inst. (No Page)

2024 WLNR 19346633

Energy and Policy Institute

Copyright (c) 2024 Energy and Policy Institute

October 15, 2024

Subpoenaed records detail FirstEnergy's secret political spending to influence then-President Donald Trump

Dave Anderson

Oct 09, 2024

How FirstEnergy, one of America's most corrupt utilities, secretly spent millions of dollars as it pursued a multi-billion-dollar federal bailout for its coal and nuclear plants during Donald Trump's presidency, a bailout Trump promised, but failed to deliver.

Key takeaways and table of contents

Records obtained via subpoena now identify previously unnamed individuals and entities that FirstEnergy admitted in a 2021 agreement with prosecutors were involved in the utility's bid to secure a bailout from then-President Donald Trump. FirstEnergy paid more than \$12 million to dark money groups to "influence issues of key importance to FirstEnergy in 2017, such as saving our baseload generation" – including \$5 million to Trump-aligned America First Policies Company. Records show FirstEnergy hired Trump advisor Corey Lewandowski to lobby for the bailout and was invoiced for \$300,000 in 2017 by Lewandowski's consulting firms, while Lewandowski maintains that he "never lobbied for or was paid by First Energy." FirstEnergy's indicted former CEO secretly met with Trump at Trump Tower days after Trump became the Republican Party's presidential nominee in 2016. Jones claimed that he "in an indirect fashion" helped Trump win in Ohio, Pennsylvania, and West Virginia in 2016, according to talking points Jones provided to Corey Lewandowski. Jones also dined with Vice

President Mike Pence and met with high-ranking members of Trump's cabinet and White House staff Trump campaign advisor Bob Paduchik made phone calls to state lawmakers to support Ohio's House Bill 6 bailout of FirstEnergy, which later agreed to pay Paduchik \$12,500 a month under a political consulting agreement Jones and FirstEnergy lobbyists met at the Trump International Hotel in D.C. to discuss the "DOE initiative" and spent thousands of dollars on a room, meals, and cocktails

Records obtained via subpoena now identify previously unnamed individuals and entities that FirstEnergy admitted in a 2021 agreement with prosecutors were involved in the utility's bid to secure a bailout from then-President Donald Trump

In 2021, FirstEnergy admitted as part of a deferred prosecution agreement with federal prosecutors:

In 2017 and 2018, FirstEnergy Corp. attempted to seek relief for its nuclear power generation facilities through a federal solution for its energy generation business. To further a federal solution, certain FirstEnergy Corp. executives met with federal officials and hired consultants with close connections to federal officials to lobby and assist in securing official action to subsidize the nuclear and coal plants through DOE action and the FERC rulemaking process. FirstEnergy Service also approved a \$5,000,000 wire to a 501(c)(4) entity connected to federal official(s), on or about May 1, 2017, shortly after hiring a consultant with close connections to those federal officials(s).

The agreement between FirstEnergy and the U.S. Attorney's Office for the Southern District of Ohio did not name the federal officials, consultants, or the 501(c)(4) entity.

FirstEnergy records subpoenaed by the Ohio Consumers Counsel (OCC) in related Public Utilities Commissions of Ohio (PUCO) cases show that FirstEnergy hired Trump advisor Corey Lewandowski in April 2017 to lobby for the federal coal and nuclear plant bailout. The records also show FirstEnergy paid \$5 million to the Trump-aligned 501(c)(4) America First Policies on May 1, 2017.

The Energy and Policy Institute (EPI) obtained copies of the records through Open Records Law requests filed with the OCC and PUCO. The records were among the hundreds of thousands of pages of FirstEnergy communications and documents released to EPI and reporters this year, leading to new revelations about how FirstEnergy secretly spent millions of dollars to support Republican elected officials in Ohio, including Ohio Gov. Mike DeWine, Lt. Gov. Jon Husted, and Ohio Senate President Matt Huffman.

In this report, EPI highlights key records that detail FirstEnergy's secret efforts to influence then-President Donald Trump and secure a multi-billion dollar public bailout for coal and nuclear plants during Trump's first term in the White House. A collection of the emails, text messages, and documents cited in this blog post is available on DocumentCloud.

The federal criminal investigation of FirstEnergy and the PUCO inquiries spurred by that investigation have focused on bribes the utility paid to Ohio's former Republican House Speaker Larry Householder and PUCO Chairman Samuel Randazzo. In 2019, Householder and Randazzo helped FirstEnergy secure a since-repealed \$1 billion ratepayer bailout for several coal and nuclear plants owned by a bankrupt subsidiary, FirstEnergy Solutions, via Ohio's House Bill 6. State lawmakers have not repealed other provisions of H.B. 6, including a rollback of Ohio's renewable energy and energy efficiency standards for electric utilities, and a ratepayer bailout of two Ohio Electric Valley Electric Corporation coal plants that has primarily benefited other utilities like AEP, AES, and Duke Energy.

The deferred prosecution agreement described how FirstEnergy also deployed Householder to ask Trump about the status of the federal bailout at a 2018 roundtable event in Ohio.

Householder and lobbyist Matt Borges were convicted last year in a racketeering case in which a 501(c)(4) entity called Generation Now, which pleaded guilty in the case, was used to conceal \$60 million in bribes from FirstEnergy. Householder political aide Jeffrey Longstreth and FirstEnergy Solutions lobbyist Juan Cespedes also pleaded guilty. Lobbyist Neil Clark committed suicide after he was charged.

Randazzo also committed suicide after he was separately indicted on state and federal criminal charges centered on a secret \$4.3 million payment FirstEnergy made to Randazzo's consulting firm shortly before his 2019 appointment by DeWine as Ohio's top utility regulator.

In 2021, FirstEnergy was charged with a federal crime for the Householder and Randazzo bribes. The utility agreed to pay a \$230 million legal penalty to avoid prosecution and admitted it paid the bribes.

FirstEnergy fired its CEO Charles Jones and top lobbyist Michael Dowling in 2020. Earlier this year, Jones and Dowling were indicted on state criminal charges centered on FirstEnergy's payments to Randazzo.

No one else has been charged in the state and federal criminal investigations involving FirstEnergy.

The Trump administration initially attempted to deliver the bailout sought by FirstEnergy through a controversial 2017 Notice of Proposed Rulemaking (NOPR) by Secretary of Energy Rick Perry, a proposal that was rejected by the Federal Energy Regulatory Commission (FERC) in early 2018.

In June 2018, a leaked memo revealed that the Trump administration was considering using the Department of Energy's emergency powers under the Defense Production Act and Section 202(c) of the Federal Power Act to prop up coal and nuclear plants. Trump then

publicly ordered Perry to bail out the plants. FirstEnergy Solutions had petitioned and lobbied the Department of Energy to use Section 202(c) to support the plants earlier that year, shortly before it filed for bankruptcy.

In 2019, Perry shifted focus and called on states to provide financial support to coal and nuclear plants. In Ohio that year, a Trump campaign advisor named Bob Paduchik made phone calls to state lawmakers urging them to support H.B. 6. FirstEnergy later agreed to pay Paduchik \$12,500 per month under a 2020 consulting agreement.

Trump's attempts to deliver the bailout sought by FirstEnergy ultimately collapsed amid broad public opposition and concerns raised by White House insiders. In one 2018 email, Dowling shared intel that Trump's economic advisor Larry Kudlow was worried "that a lot of people think it's a bailout."

Earlier this year, Trump said he plans to deliver the "#1 lowest cost" electricity on earth if elected to a second term as president. A Brattle report estimated the cost to the public of the Trump Administration's bailout plan outlined in the 2018 leaked memo could have reached as high as \$17 billion per year, and earlier estimates pegged the potential cost of Perry's 2017 NOPR at over \$10 billion.

FirstEnergy paid more than \$12 million to dark money groups to "influence issues of key importance to FirstEnergy in 2017, such as saving our baseload generation" – including \$5 million to Trump-aligned America First Policies

"On May 1, 2017, FirstEnergy made a \$5 million payment to America First Policies, Inc.," according to a legal document prepared by FirstEnergy's lawyers for the deposition of Joseph Storsin, the utility's Vice President of Strategy.

"America First Policies, Inc. is a 501(c)(4) associated with supporters of former President Trump," the document from Storsin's deposition said.

America First Policies was founded by Trump campaign aides, including Nick Ayers, David Bossie, Marty Obst, Katrina Pierson, and Brad Parscale.

Storsin was deposed on FirstEnergy's deferred prosecution agreement in a civil lawsuit filed by company shareholders in response to the federal criminal investigation. A two-volume transcript and exhibits from the deposition were among the FirstEnergy records released this year.

FirstEnergy contributed over \$12 million to 501(c)(4)s in 2017, according to a draft 2018 presentation by Dowling to FirstEnergy's Corporate Governance Committee on the company's political spending.

"This is strictly money spent to influence issues of key importance to FirstEnergy in 2017, such as saving our baseload generation or to gain support for the Pleasants transaction," said speaker notes that accompanied Dowling's draft presentation.

The "Pleasants transaction" was a proposal by FirstEnergy to transfer ownership of a West Virginia coal plant from one of its competitive power subsidiaries to Mon Power, a regulated monopoly utility owned by FirstEnergy. The proposal was later rejected by FERC, which found the transfer would unfairly force captive ratepayers of Mon Power to pay to cross-subsidize FirstEnergy's competitive subsidiary.

The Akron Beacon Journal and E&E News first started to piece together the money trail from FirstEnergy to America First Policies in 2022, based on information from the deferred prosecution agreement, records FirstEnergy turned over in a Maryland Public Service Commission investigation, and federal tax records. It wasn't until this year that documents from FirstEnergy lawyers that confirmed America First Policies as the unnamed 501(c)(4) described in FirstEnergy's agreement with prosecutors became available.

Company records show FirstEnergy hired Trump advisor Corey Lewandowski to lobby for the bailout and was invoiced for \$300,000 in 2017 by Lewandowski's consulting firms, while Lewandowski maintains that he "never lobbied for or was paid by First Energy."

"In April 2017, FirstEnergy engaged Avenue Strategies LLC to lobby for federal relief for nuclear and coal-fired plants," according to the same document from Storsin's deposition that confirmed the \$5 million FirstEnergy payment to America First Policies.

"FirstEnergy engaged Avenue Strategies LLC for the purpose of 'seek[ing] the DOE to submit a rule to FERC' and 'an emergency stop gap measure issued by the Secretary of Energy under the Federal Power Act,'" the document said.

"Through its engagement with Avenue Strategies LLC, FirstEnergy hired Corey Lewandowski, a close advisor to then-President Trump, to further the federal solution effort," the document continued.

"FirstEnergy does not admit that its engagement with Avenue Strategies LLC or Lewandowski, or any lobbying performed by Avenue Strategies LLC or Lewandowski, was illegal or improper," the exhibit said.

Avenue Strategy does not appear to have registered to lobby for FirstEnergy, based on a search of federal lobbying reports filed by the lobbying firm and FirstEnergy in 2017.

Avenue Strategies invoiced FirstEnergy for \$150,000 in April 2017, according to a spreadsheet that an employee in FirstEnergy's financial services department emailed to Dowling's executive assistant Kristina Housely in early 2018. On April 14, Perry ordered a

controversial grid study that paved the way for his NOPR later that year.

In May 2017, Public Citizen called for an investigation into whether Lewandowski had violated the Lobbying Disclosure Act by not registering as a federal lobbyist. He left Avenue Strategies later that month.

"The most important thing is my reputation," Lewandowski told Bloomberg at the time.

Public Citizen did not specifically mention FirstEnergy, whose relationship with Lewandowski was first reported by Politico that August. Lewandowski denied that he worked for FirstEnergy, as Politico reported.

Lewandowski Strategic Advisors invoiced FirstEnergy for \$150,000 in July 2017, according to the same FirstEnergy spreadsheet that listed the Avenue Strategies invoice. A consulting agreement, signed by Lewandowski and Dowling, was dated June 28, 2017. The consulting agreement between FirstEnergy and Lewandowski Strategic Advisors was first reported by the Washington Post this summer after Lewandowski rejoined the Trump campaign as a senior advisor.

An exhibit in the June 2017 consulting agreement delineating the services to be provided noted that Lewandowski's new firm "cannot and will not engage in any lobbying or advocacy services (as defined by the Lobbying Disclosure Act of 1995, (2 U.S.C. § 1601 et seq., as amended) under the terms of this Agreement."

"Your information is inaccurate," Lewandowski told the Energy and Policy Institute via email when asked about the new information found in the FirstEnergy records released this year. "I never lobbied for or was paid by First Energy."

On June 1, 2018, Paduchik emailed the breaking news that Trump had publicly ordered Perry to "prepare immediate steps" to prevent the closure of coal and nuclear plants.

"Boom!!!" Lewandowski responded.

"Well done, Bob and Corey. We had to respond fast and we did, thanks to you both!" Dowling emailed back.

"The WH did the right thing on this ... with a little encouragement from us," Lewandowski said.

"A little encouragement??" Jones chimed in. "This can't be the articulate suave Corey Lewandowski I've been watching on TV the last year and a half. We need to find out where Fitz is working for our celebration cocktail."

A photo of Lewandowski from a 2019 text message exchange between Lewandowski, Jones, Paduchik, and Boich Companies President Matt Evans

FirstEnergy's indicted former CEO secretly met with Trump at Trump Tower days after Trump became the Republican Party's presidential nominee in 2016

Jones met with Trump at Trump Tower on July 28, 2016, nine days after Trump officially became the Republican nominee for president at the GOP convention in Cleveland. Jones later described the meeting in communications and documents made public here for the first time. FirstEnergy had contributed \$1.25 million to the Cleveland 2016 Host Committee that organized the GOP convention.

In a 2017 email to Andrew Joblow of Turnbridge Equities, Jones said he was part of a "small Ohio contingent" that met with Trump at Trump Tower. Jones was joined by Cleveland area businessman Tony George and Nick Nardi of Teamsters Local 416.

"Tony and I attended a group meeting with about 20-25 other thought leaders from a number of industries," Jones said in the email. "Mr. Trump used the meeting to solicit advice on how to take his success from to [sic] Republican Primary Victory to actually make it to the White House."

"When it was over, he invited me into his office for about 20 minutes of private conversation on energy issues – renewables, coal, nuclear, fuel mix, etc.," Jones said. "Tony and I then brought Nick Nardi and and [sic] Geoffrey Hoffa, son of Teamsters International President James Hoffa into meet with Mr. Trump and then left."

"I then attended a fundraising dinner in Canton Ohio [sic] few weeks later where we chatted again," Jones also said. "I did explain to Mr. Trump that while I was working behind the scenes to help his campaign, because of a \$400M/year rate case in Ohio I could not be out front and he completely understood that."

At the time, FirstEnergy was seeking PUCO's approval of a proposal to charge its Ohio customers to bail out several of the company's coal-fired and nuclear plants. FirstEnergy estimated the plan would cost ratepayers \$400 million, while consumer advocates pegged the plan's longer-term cost at \$3.9 billion.

"I've been on a mission from then candidate Donald J Trump that was given to me in his Trump Tower office on July 28, 2016," an unsigned letter to Kudlow later said.

The text of the unsigned letter makes clear it was from "the CEO of FirstEnergy," which was Jones, and was written shortly after FirstEnergy Solutions filed for bankruptcy in 2018.

"When I get elected, help me deliver on my promise to save coal jobs," Trump told Jones during that meeting, the letter to Kudlow stated.

“Coal/Electricity Talking Points” Jones provided to Lewandowski in 2017 show FirstEnergy and its coal industry allies seized the opportunity to pursue a federal bailout:

Mr. Jones began a process of putting a team in place at his Company and hired two different Washington DC law firms to research possible solutions to the ongoing power plant closures. The research pointed to the Federal Power Act Section 202C as the only feasible solutions that could arrest the decline of coal burning power facilities and as such the decline of the coal industry. That effort was joined by Mr. Bob Murray and Mr. Joe Craft in January.

Jones and Murray met with Trump multiple times. Murray Energy contributed \$1 million to the Trump Super PAC America First Action in 2018.

“In three different discussions with President Trump where I was present and one with Mr. Bob Murray where I was not present, he directed his team to fix the issue,” Jones said in a 2017 letter to Trump’s Chief of Staff General John Kelly.

Text messages between Jones and Lewandowski indicate the letter was delivered to Kelly by Craft on August 17, 2017, in Bedminster, where Trump was on a 17-day vacation at his golf course. Craft, a fundraiser for Trump, is the CEO of Alliance Resource Partners.

In July 2018, Lewandowski and an associate named Mike Rubino arranged for Jones to get some face time with Trump during a photo op with the president.

“We’re doing it, period,” Jones said Trump told him at the event in a series of text messages with Lewandowski, Dowling, and Rubino.

“I’m well aware of the memo, it’s coming, we’re on it,” Trump told Jones, according to the texts.

Jones claimed that he “in an indirect fashion” helped Trump win in Ohio, Pennsylvania, and West Virginia in 2016, according to talking points Jones provided to Corey Lewandowski

“During the campaign both Bob Murray, CEO of Murray Energy in a direct fashion and Chuck Jones, CEO of FirstEnergy in an indirect fashion helped the President be successful in the key States of Ohio, Pennsylvania, and WV,” the talking points Jones texted to Lewandowski in 2017 said about the 2016 election.

An internal company report that detailed FirstEnergy’s outside payments for external affairs in 2016 in a spreadsheet (in the tabs “St Leg Aff” and “Data – 8+4 actuals) revealed FirstEnergy contributed money to several 501(c)(4)s that supported Republican candidates in Ohio, Pennsylvania, and West Virginia that year, including:

FirstEnergy's PAC did not directly contribute money to the campaigns of Donald Trump or his Democratic opponent Hillary Clinton during the 2016 election, when the PAC spent more than \$2 million. FEC data shows the utility's PAC did target Ohio, Pennsylvania, and West Virginia with campaign cash in 2015-2016. Around 80 percent of the federal campaign contributions from the utility's PAC went to Republicans that election cycle, according to OpenSecrets.

Jones also dined with Vice President Mike Pence and met with high-ranking members of Trump's cabinet and White House staff

On September 18, 2018, Jones emailed a photo of himself seated at a table with hedge fund billionaire Paul Singer and Vice President Mike Pence next to several executives at FirstEnergy.

"Talked to VP today," Jones texted to Paduchik the following day. "We'll fill you in tomorrow."

Singer's hedge fund, Elliott Management, made what FirstEnergy dubbed a "transformational" investment in the utility company earlier that year.

Jones' email to Joblow, letters to Kelly and Kudlow, and talking points provided to Lewandowski listed other key members of Trump's administration and White House staff with whom Jones met. The list included EPA Administrator Scott Pruitt, Trump's Chief of Staff Rick Dearborn, Chief Strategist Steven Bannon, White House Counsel Don McGahn, Energy and Environmental Policy Advisor Mike Catanzaro, and National Economic Council Director Gary Cohn and Deputy Director Jeremy Katz.

A "Rick Perry gathering" at the W Hotel Bar in Washington, D.C., was listed on a FirstEnergy travel itinerary for a two-hour window on January 18, 2017, two days before Trump's inauguration. The travel itinerary was presented as evidence by prosecutors at Householder's racketeering trial. Householder had flown to D.C. for the inauguration aboard FirstEnergy's corporate jet.

During Householder's trial, FBI agent Blane Wetzel and Longstreth, who appeared as a prosecution witness after he pleaded guilty in the case, were asked to testify about a photo of Longstreth (pictured on left), posing with Perry at an Inaugural event. Longstreth testified under cross-examination by Householder's defense lawyer that Dowling wanted an introduction to Perry, who was expected to become Trump's Secretary of Energy. Longstreth said he was friends with Joe Whatley (pictured on right), whom he described as Perry's relative.

Whatley has no other known ties to FirstEnergy.

Jones met with Perry a few months later in March 2017. Perry called Jones that August and Jones met later that month with "DOE and White House representatives," according to an email from Dowling.

Jones and Dowling also "spent many hours" with Deputy Secretary of Energy Dan Brouillette on September 5, 2017, Dowling's email said.

"I don't know what Dan can do to help at this point – but I can tell you this, he's a big fan of using 202(c) for our situation and he's attending the meeting with [sic] have on September 27 with Secretary Perry," the email said.

Jones met again with DOE officials in late September of 2017, according to the FirstEnergy legal document from Storsin's deposition:

On September 28, 2017, Matt Evans (Boich Companies President) texted Jones and Dowling shortly before Jones was scheduled to meet with the DOE, "Don't **** this up Chuck." Per Jones, "Should be somewhere it [sic] out today. We have to evaluate it but could be as good as 202C."

The same day, the Secretary of the DOE, Rick Perry, sent a NOPR to FERC that would have subsidized nuclear and coal plants in order to ensure grid reliability.

"I don't think the DOE initiative has anything to do with FirstEnergy, despite what's been reported in some of the media," Jones said publicly in November 2017 after Perry issued the NOPR.

Perry later helped found a Trump-aligned 501(c)(3) nonprofit think tank called the America First Policy Institute in 2021. Brouillette is now the President of the Edison Electric Institute, the industry association for the nation's investor-owned utilities.

Trump campaign advisor Bob Paduchik made phone calls to state lawmakers to support Ohio's House Bill 6 bailout of FirstEnergy, which later agreed to pay Paduchik \$12,500 a month under a political consulting agreement

Paduchik was "Individual C" described in FirstEnergy's deferred prosecution agreement, according to another FirstEnergy legal document from Storsin's deposition that listed the identities of unnamed individuals and entities by pseudonyms used in the deferred prosecution agreement.

Another Storsin deposition document prepared by FirstEnergy's lawyers focused on two 501(c)(4)s involved in the Householder scheme said:

On November 7, 2018, Jones and Householder texted regarding race results. They also discussed Householder's request for a meeting with "Bob P" and to engage "in getting this Spkrs race worked out so the way we want it." [DPA at 25]... FirstEnergy understands that

"Bob P" is Bob Paduchik, who is a political consultant.

In January 2019, Jones, Dowling, Paduchik, and Lewandowski texted about Householder winning the race for Ohio House Speaker, according to the deposition document.

"2019 could be FE's year," Paduchik wrote.

At the time, FirstEnergy viewed getting Householder elected as Speaker as a key step toward securing a state bailout for FirstEnergy Solutions' coal and nuclear plants in Ohio.

In May 2019, Bloomberg reported that Paduchik called state lawmakers and urged them to support HB 6. Paduchik told Bloomberg that he was acting as a private citizen when he made the calls.

Ohio State Rep. David Greenspan, who opposed HB 6, received text messages from a "Jeff" with the initials "JL" (Jeff Lonstreth's initials):

I also know that if 4000 jobs are lost in an election year, you'll get the blame. That's why the Trump Campaign is putting on the full scale press to save the jobs. Everyone in office will get the blame. Call Bob Paduchik if you don't believe me.

Paduchik's firm Agincourt Consulting received nearly \$17,500 from the Republican National Committee that May.

Paduchik and Dowling later signed a political consulting agreement, dated February 17, 2020, in which FirstEnergy agreed to pay Agincourt \$12,500 a month. The agreement was set to continue through March 2021, "then month-to-month to be extended by mutual consent."

During that time period, Agincourt also received payments from the RNC.

"Bob is the man. You want help from DOE. He's your guy," Dowling texted to John Kiani, the Executive Chairman of Energy Harbor (previously known as FirstEnergy Solutions), in March of 2020.

Paduchik's LinkedIn page says he was State Director for Ohio for the Trump campaign in 2016, a job he took after leaving a gig as Chief of Staff for the American Coalition for Clean Coal Electricity. Paduchik then served as:

Co-Chairman of the RNC from January 2017 to January 2019
Senior Advisor to Donald J. Trump for President, Inc. from January 2019 to March 2021
Chairman of the Ohio Republican Party from March 2021 to January 2023

A December 2020 presentation to FirstEnergy's board of directors listed Agincourt and Paduchik's contract as "Suspended – Notified of Potential Termination" on a list of retainers for external affairs consultants whose contracts had been terminated, suspended, or put under review.

Trump's campaign resumed payments to Agincourt in September of 2023, and made its latest reported payment to Paduchik's firm this March.

Paduchik did not respond to a request for comment from the Energy and Policy Institute.

Jones and FirstEnergy lobbyists met at the Trump International Hotel in D.C. to discuss the "DOE initiative" and spent thousands of dollars on a room, meals, and cocktails

One of Jones' travel expense reports from July of 2017 documents \$13,800 in expenses Jones racked up while on a trip to D.C. to "attend Golf Cup Event w/ Congressman Bill Johnson and DOE Initiative Meetings." Jones flew roundtrip from Ohio to D.C. and back aboard FirstEnergy's private corporate jet.

The expenses included:

\$1,421.70 for refreshments and \$5,401.10 for dinner at the Trump International Hotel in D.C. with Dowling and Eckard, Lewandowski, financial consultant Jeff Loving, and Bill Sherman, an attorney at Latham & Watkins, where the DOE initiative was discussed. \$400 in caddy fees at the Trump National Golf Club in D.C. for the event with Johnson. \$910.28 for hotel accommodations at the Trump hotel

Copies of some of the receipts from Jones' expense report

There was also a \$739.00 dinner with Dowling and Sherman at the Mastros restaurant and \$3,764 for limo transportation.

The Energy and Policy Institute emailed FirstEnergy and attorneys for Jones and Dowling, but had not received any responses at the time this blog post was published.

The views expressed in any and all content distributed by Newstex and its re-distributors (collectively, the "Newstex Authoritative Content") are solely those of the respective author(s) and not necessarily the views of Newstex or its re-distributors. Stories from such authors are provided "AS IS," with no warranties, and confer no rights. The material and information provided in Newstex Authoritative Content are for general information only and should not, in any respect, be relied on as professional advice. Newstex Authoritative Content is not "read and approved" before it is posted. Accordingly, neither Newstex nor its re-distributors make any claims, promises or guarantees about the accuracy, completeness, or adequacy of the information contained therein or linked to from such content, nor do they take responsibility

for any aspect of such content. The Newstex Authoritative Content shall be construed as author-based content and commentary. Accordingly, no warranties or other guarantees are offered as to the quality of the opinions, commentary or anything else appearing in such Newstex Authoritative Content. Newstex and its re-distributors expressly reserve the right to delete stories at its and their sole discretion.

---- Index References ----

Company: FIRSTENERGY CORP.; DUKE ENERGY CORPORATION; ALLIANCE RESOURCE PARTNERS, L.P.; Energy and Policy Institute; FIRSTENERGY SERVICE COMPANY; Maryland Public Service Commission; ELLIOTT MANAGEMENT CORPORATION; FE Battery Metals Corp; FEDERAL ENERGY REGULATORY COMMISSION; MURRAY ENERGY CORPORATION; Turnbridge Equities LLC; American Coalition for Clean Coal Electricity; Federal Bureau of Investigation; LATHAM & WATKINS LLP; FIRSTENERGY SOLUTIONS CORP.; OHIO VALLEY ELECTRIC CORPORATION; OPENSECRETS; The U.S. Environmental Protection Agency; PRESIDENT Inc.; ENERGY HARBOR HOLDINGS LLC; Republican National Committee Inc; EDISON ELECTRIC INSTITUTE, INC.

News Subject: (Government (1GO80); Lobby & Pressure Groups (1LO18))

Industry: (Coal (1CO39); Coal Power Generation (1CO71); Electric Utilities (1EL82); Electric Utilities Generation (1EL37); Electric Utilities Generators (1EL15); Energy & Fuel (1EN13); Metals & Mining (1ME07); Mining (1MI65); Natural Resources (1NA60); Utilities (1UT12))

Region: (Americas (1AM92); North America (1NO39); Ohio (1OH35); Pennsylvania (1PE71); U.S. Mid-Atlantic Region (1MI18); U.S. Midwest Region (1MI19); U.S. Southeast Region (1SO88); USA (1US73); West Virginia (1WE81))

Language: EN

Other Indexing: (America First Policies Company; White House; U.S. Attorney's Office; Ohio Consumers Counsel; Public Utilities Commissions of Ohio; AEP; AES; Generation Now; Department of Energy; Trump Administration; America First Policies, Inc.; Mon Power; Avenue Strategies LLC; Avenue Strategy; Teamsters International; PAC; FEC; National Economic Council; America First Policy Institute; Agincourt Consulting; FirstEnergy Corp.; Duke Energy; Alliance Resource Partners; Energy and Policy Institute; FirstEnergy Service; Maryland Public Service Commission; Elliott Management; First Energy; Federal Energy Regulatory Commission; Murray Energy; Turnbridge Equities; American Coalition for Clean Coal Electricity; FBI; Latham & Watkins; FirstEnergy Solutions; Ohio Electric Valley Electric Corporation; OpenSecrets; EPA; President, Inc.; Energy Harbor; Republican National Committee; Edison Electric Institute) (President Donald Trump)

Keywords: (Featured); (FirstEnergy); (America First Policies); (Bob Paduchik); (corey lewandowski); (Donald Trump); (Freedom Vote); (Go West Virginia); (Growth and Opportunity Fund); (house bill 6); (Public Utilities Commission of Ohio)

Word Count: 4679

End of
Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

NewsRoom

<https://x.com/AnnMLipton/status/1846459159002124522>



@annmlipton@esq.social

@AnnMLipton

...

Such a weird 10b case. Hedge fund sues Overstock in putative class action over the short squeeze it effectuated by issuing a nontradeable dividend on the block chain.

ca10.uscourts.gov/sites/ca10/fil...

12:52 AM · Oct 16, 2024 · **960** Views



1



1



7



5



@annmlipton@esq.social @AnnMLipton · 10h

...

But the plaintiff also alleges Overstock lied about its financial performance.



1



56



@annmlipton@esq.social @AnnMLipton · 10h

...

Court dismisses the latter claim for lack of reliance. The court doesn't go for the obvious issue - can short sellers ever sue under 10b, if they don't believe the lie? Short sellers may react to the market's belief in the lie, but they don't believe themselves; it's a 10b puzzle



1



54





@annmlipton@esq.social @AnnMLipton · 10h

...

Here, though, the court points out this plaintiff specifically it was forced to cover the short bc of the dividend - not because of the lie about Overstock's performance. So, the court says, no reliance for this plaintiff:

Neither party contests that Plaintiff's complaint entitles him to the Basic presumption of reliance.¹⁸ But Defendants have rebutted the presumption with statements in Plaintiff's complaint. Plaintiff admitted that Overstock's looming crypto dividend—not the retail statements or the fairness of Overstock's market price—caused it to buy its Overstock stock. Indeed, this is an overarching theme in Plaintiff's complaint and appeal. In Plaintiff's own words, "Overstock forced a huge group of investors to purchase Overstock stock to cover their positions in very short order *who would not have otherwise done so*" (emphasis added). For this reason, the district court concluded that "Plaintiff appears to concede it would have purchased no matter the price." Plaintiff cannot have it both ways: if Plaintiff bought its shares to avoid breaching its lending contracts, it cannot also have bought its shares because of Defendant's alleged misstatements.¹⁹



65



@annmlipton@esq.social @AnnMLipton · 10h

...

Then it turns to the question whether the plaintiff can sue for market manipulation due to the dividend. Answer: No! Because, per prior caselaw, a claim for market manipulation relies on deception - simulating ordinary market activity, so traders think market forces are at play



49





@annmlipton@esq.social @AnnMLipton · 10h

...

Then it turns to the question whether the plaintiff can sue for market manipulation due to the dividend. Answer: No! Because, per prior caselaw, a claim for market manipulation relies on deception – simulating ordinary market activity, so traders think market forces are at play



49



@annmlipton@esq.social @AnnMLipton · 10h

...

Here, by contrast, Overstock openly said what it was doing, and everyone knew exactly why its price rose:

From these cases we draw a principle: for market activity to “artificially” affect the price of securities, the manipulative conduct must be “aimed at deceiving investors as to how other market participants have valued a security.” Wilson, 671 F.3d at 130; accord Regents of the Univ of Cal., 482 F.3d at 391 (citing Hundahl, 465 F.Supp. at 1359, 1362) (holding that manipulation is only “conduct that . . . constitutes deception”). Here, Defendants’ truthful disclosure of the terms of the upcoming dividend transaction did not deceive investors as to how the market valued Overstock.



323





@annmlipton@esq.social @AnnMLipton · 10h

...

10b doctrine, apparently:



319



Investors sue Starbucks over alleged securities fraud

 legalnewsline.com/stories/665189249-investors-sue-starbucks-over-alleged-securities-fraud

October 16, 2024

Lawsuits



Attorney Laurence Rosen (pictured left) and Starbucks CEO Brian Niccol | The Rosen Law Firm | LinkedIn

SEATTLE (Legal Newsline) - A class action lawsuit against Starbucks has been filed in Washington by investors who accuse the coffee chain of making "false and misleading" statements about its financial health.

According to the investors, Starbucks committed securities fraud by misrepresenting information about its 2023 revenue and expected guidance for fiscal year 2024.

The suit, which was filed on Aug. 28 in the U.S. District Court in the Western District of Washington, claims that Starbucks provided "overwhelmingly positive statements" regarding the company's current and possible future performance.

Additionally, the plaintiffs say the company deliberately concealed "adverse facts" about Starbucks' reinvention strategy, leading to artificially inflated securities prices.

When more accurate details about Starbucks' performance were made available to the public, investors suffered damages, according to the suit.

The allegations surround Starbucks' activities during the second quarter of 2024, during which Starbucks reported negative same-store sales for the first time since the height of the pandemic in 2020. The company's shares dipped by 16% in a single day.

In an earnings call in May, CEO Laxman Narasimhan connected the company's disappointing sales figures to inflation.

"In this environment, many customers are being more exacting about where and how they choose to spend their money, particularly with stimulus savings mostly spent," Narasimhan said.

Starbucks' third-quarter performance was similarly abysmal, with the company reporting a 3% same-store sales decline. Narasimhan again attributed the company's disappointing performance to decreased traffic driven by nationwide economic woes.

In August, Narasimhan was abruptly removed from his role as Starbucks CEO amid continued slow sales and slumping stock prices. He was replaced with Chipotle's Brian Niccol, who took the helm on Sept. 9.

In an open letter, Niccol indicated that significant changes are on the way for Starbucks. Nonetheless, he acknowledged that the company is failing to meet expectations at some locations, particularly in the U.S.

"We aren't always delivering," Niccol said. "It can feel transactional, menus can feel overwhelming, product is inconsistent, the wait too long or the handoff too hectic."

Amid the recent filing of the class action suit, some experts are warning the Seattle-based coffee chain will continue to face performance challenges for the foreseeable future.

In September, Jeffries analyst Andy Barish downgraded Starbucks shares to Underperform, saying that the company will face "a lot of uncertainty over the next 12 months" following Niccol's takeover.

The class action lawsuit seeks to recover the losses of all Starbucks shareholders who were adversely impacted by the alleged securities fraud between the period of Nov. 2, 2023, and April 30, 2024.

In a statement to *Legal Newsline*, a Starbucks spokesperson denied the suit's allegations.

"The allegations in the complaint are without merit," the spokesperson said. "Starbucks takes great care in communicating transparently and authentically with its stakeholders, including its investors, partners, customers, and community."

New York's Rosen Law Firm is actively recruiting a lead plaintiff as well as other investors to join the class action lawsuit. The firm did not respond to *Legal Newsline's* request for comment.

ORGANIZATIONS IN THIS STORY

Starbucks Corporation

Restaurant Brands Hit With Challenge to \$1 Billion Carrols Deal

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1030](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-10-16T10:26:55808289124-04:00

Restaurant Brands Hit With Challenge to \$1 Billion Carrols Deal

By Mike Leonard 2024-10-15T16:21:00000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1030](#) (Bloomberg Law subscription)

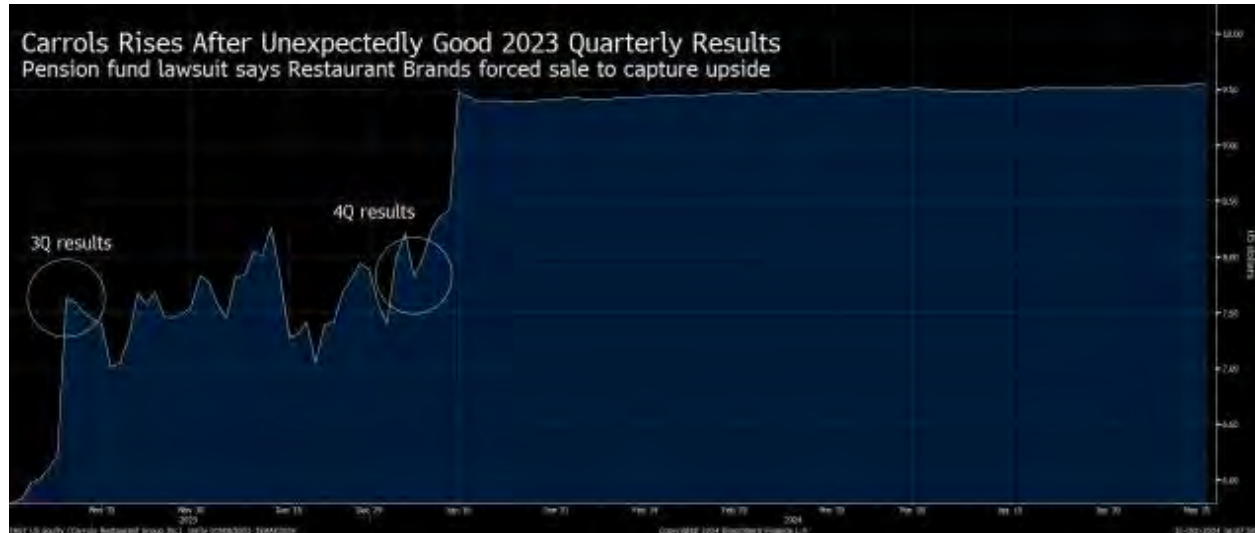
Restaurant Brands International Inc. exploited its control over Carrols Restaurant Group Inc., a top owner of Burger King and Popeyes locations, to force the company into an unfair \$1 billion buyout, according to an unsealed lawsuit.

A pension fund is suing RBI—a fast food conglomerate that holds the Burger King, Popeyes, and Tim Hortons brands—over claims it leveraged extensive veto rights to coerce Carrols into an underpriced transaction. RBI made clear it would block the franchise owner from expanding, giving investors a “Hobson’s choice” between letting the company wither or taking the only deal they could get, according to the proposed class action.

The suit in Delaware’s Chancery Court also targets two board members who founded Garnett Station Partners LLC, which held a significant stake in Carrols through an affiliate, Cambridge Franchise Holdings LLC. Because the private equity firm was in the midst of exiting its investment—and had extensive ties to RBI—the two men allegedly weren’t able to negotiate neutrally on behalf of minority shareholders. But they still served on the board committee that hammered out the deal, the court complaint says.

RBI, Carrols, and Garnett didn’t immediately respond to requests for comment Tuesday. The transaction closed May 17.

According to the lawsuit, RBI made its move just as Carrols was set to realize the upside of a remodeling plan dubbed “reclaim the flame.” Carrols was allegedly poised for profit growth and stock market gains after beating third quarter 2023 expectations and announcing it would begin issuing regular dividends, something the company had rarely done.



Meanwhile, Cambridge was holding back the share price by dumping stock into the open market, a somewhat self-defeating way of liquidating its stake, the suit says. Unlike public shareholders who might prefer to see Carrols continue as a standalone enterprise, the investment firm knew it was better off unloading its shares all at once—even if it had to accept a minimal premium—by selling out to RBI while Carrols was artificially depressed, according to the court complaint.

Regulatory filings urging investors to approve the transaction made clear they had no real choice but to cave, the lawsuit says. It was made public Oct. 10 after being filed under seal Oct. 7.

The pension fund, the Plymouth County Retirement Association, is represented by Bernstein Litowitz Berger & Grossmann LLP, Andrews & Springer LLC, Labaton Keller Sucharow LLP, Kaskela Law LLC, and Wohl & Fruchter LLP. Several individual investors are also participating as plaintiffs.

The case is Plymouth Cty. Ret. Ass'n v. Rest. Brands Int'l Inc. , Del. Ch., No. 2024-1030, complaint unsealed 10/10/24 .

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

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

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Edwards Misleadingly Touted Demand for Heart Device, Suit Says

By Martina Barash

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [No. 8:24-cv-02221](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-10-16T10:29:50842399187-04:00

Edwards Misleadingly Touted Demand for Heart Device, Suit Says

By Martina Barash 2024-10-15T14:27:11000-04:00

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [No. 8:24-cv-02221](#) (Bloomberg Law subscription)

Edwards Lifesciences Corp. made public statements claiming that market factors pointed to accelerated growth in its aortic valve sales, even though it knew of issues that would slow growth, an investor alleges.

The revelation in July of below-expectation fiscal year 2024 financial results blamed on decelerating growth led to a 31% single-day stock drop, Dhimant Patel says. Patel filed his proposed class action Monday in the US District Court for the Central District of California.

Beginning in February, the medical device company cited a population of untreated patients and opportunities to expand sales in certain countries as reasons for FY 2024 optimism about its transcatheter aortic valve replacement product, Patel says.

In announcing disappointing financial results, Edwards and its leadership allegedly said there was a bottleneck in hospitals because heart teams were burdened by new procedures and products that they had to learn and manage. Analysts doubted that explanation, suspecting the TAVR market wasn't as strong as management had claimed.

Edwards' stock price fell 31% to close at \$59.70 per share on July 25, the day after the announcement. The drop was the stock's largest since Oct. 31, 2000, according to data compiled by Bloomberg.



The proposed class of those who acquired Edwards securities between Feb. 6, 2024 and July 24, 2024, inclusive, consists of hundreds or thousands of members, the complaint estimates.

Patel seeks damages on his claims for securities fraud.

Edwards didn't immediately respond to an emailed request for comment.

Levi & Korsinsky LLP represents Patel.

The case is Patel v. Edwards Lifesciences Corp. , C.D. Cal., No. 8:24-cv-02221, complaint 10/14/24 .

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

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Squarespace's \$7 Billion Sale Draws Scrutiny From Pension Fund

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1041](#)

Bloomberg Law News 2024-10-16T09:50:43414820495-04:00

Squarespace's \$7 Billion Sale Draws Scrutiny From Pension Fund

By Mike Leonard 2024-10-15T14:57:18000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-1041

Squarespace Inc.'s founder and private equity backers may have steered it into an underpriced \$7.2 billion take-private buyout that favors insiders standing on both sides of the deal, according to a preliminary shareholder lawsuit.

A pension fund is suing the software company for internal documents, pointing to concerns about the fairness of the two-part sale to a consortium led by Permira Advisers LLC. The second stage of the transaction—a short-form merger squeezing out the public investors remaining after a \$46.50-per-share tender offer—is expected to close by Oct. 17.

The suit, filed Oct. 10 in Delaware's Chancery Court, says CEO Anthony Casalena appears to have placed a thumb on the scales by threatening to wield his greater than 70% stake against any alternative deal. The 29-page court complaint, which stops short of alleging outright wrongdoing, is light on details. But it cites equity rollover pacts involving Casalena, General Atlantic LP, and Accel, which allegedly held a collective 89% of Squarespace's voting power.

Those agreements and other circumstances—including Casalena's negotiating demands, several competing bids he rejected out of hand, and the level of control he's set to maintain—raise the inference that the transaction was tainted by conflicts of interest, the lawsuit says.

It seeks files from the company under a law giving investors broad access to corporate records if they have credible but preliminary suspicions about self-dealing. Records cases often reflect an attempt to drum up fiduciary breach claims for future litigation.

Another lawsuit by individual shareholders was filed in Sept. 26 raising similar concerns.

Squarespace didn't immediately respond to a request for comment Tuesday. Casalena and the investment firms aren't named as defendants.

The fund that filed the complaint, the Michigan Electrical Employees' Pension Fund, is represented by Bernstein Litowitz Berger & Grossmann LLP and Kessler Topaz Meltzer & Check LLP. Squarespace hasn't yet made a court appearance.

The case is Mich. Elec. Emp. Pension Fund v. Squarespace Inc. , Del. Ch., No. 2024-1041, complaint filed 10/10/24 .

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

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Santander Pays \$163 Million to End Elliott-Led Buyout Challenge

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X9ATS1L4000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X9ATS1L4000000)

Class Action

A golden logo sits on display outside a Banco Santander SA bank branch in Barcelona, Spain, on Friday, March 6, 2020.

Photographer: Angel Garcia/Bloomberg

- Suit said Santander sought to capture pandemic-related profits
- Accord averts bruising public battle over Signal messaging app

Banco Santander SA plans to pay \$162.5 million to settle a court challenge led by Elliott Investment Management LP to the Spanish bank's \$12.7 billion buyout of its US auto loan division.

The agreement entered Tuesday would resolve claims that Santander affiliates and board members of the loan unit manipulated the take-private transaction, known as a "squeeze-out," to keep billions in pandemic-related profits away from public investors. The detente also cuts short a bruising public battle over Santander's use of a self-deleting messaging app, Signal, that has been in the crosshairs of banking industry regulators worldwide.

The court filing includes lengthy denials of liability by Santander, which says it's settling "solely to avoid the substantial burden, expense, inconvenience, and distraction of continued litigation." Because the case is a proposed class action, the accord requires court approval.

The formal agreement comes a month after the two sides told Delaware's Chancery Court they'd reached a last-minute deal in principle to avert a Sept. 16 trial. The presiding judge, Vice Chancellor Lori W. Will, hadn't yet ruled on the hedge fund's bid for litigation sanctions that would have handicapped the bank's defense.

The lawsuit, filed in 2022, said Santander sought to capture excess capital reserves stemming from pandemic-related stimulus payments that significantly improved US consumer credit, leading to fewer and less costly loan defaults. Santander owned about 80% of the business before the deal closed in January of that year.

Elliott, which said it owned about one-third of the other 20%, first raised the Signal-related allegations over the summer in a motion arguing the bank had destroyed evidence. Santander board chair Ana Botin was allegedly among the company executives who discussed the buyout in a group chat.

The hedge fund is represented by Bernstein Litowitz Berger & Grossmann LLP and Kessler Topaz Meltzer & Check LLP. The Central Laborers Pension Fund, which co-led the litigation, is represented by Block & Leviton LLP. Santander is represented by Ross Aronstam & Moritz LLP and Wachtell, Lipton, Rosen & Katz.

The case is In re Santander Consumer USA Holdings Inc. S'holders Litig. , Del. Ch., No. 2022-0689, settlement filed 10/15/24 .

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

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

Walmart Board Pays \$123 Million to End Pension Fund Opioids Case

By Mike Leonard

- Lawsuit said retail giant's leaders condoned drug trafficking
- Board says it's settling to eliminate expense and distraction

Bloomberg Law News 2024-10-16T09:50:05278403652-04:00

Walmart Board Pays \$123 Million to End Pension Fund Opioids Case

By Mike Leonard 2024-10-15T13:43:45000-04:00

- Lawsuit said retail giant's leaders condoned drug trafficking
- Board says it's settling to eliminate expense and distraction

Walmart Inc.'s senior leaders have agreed to a \$123 million settlement of a pension fund lawsuit blaming them for its role in fueling the nationwide opioid epidemic.

The proposed accord filed Monday will resolve claims that the retail giant's top brass—including billionaire Rob Walton—turned a blind eye to a business model based on rampant drug trafficking. A judge who let the case move forward last year said the allegations, if true, showed the board “consciously condoned illegality,” putting profits ahead of the law.

Walton, the eldest son of founder Sam Walton, is the world's 16th-wealthiest person, with a net worth of roughly \$101 billion, according to the Bloomberg Billionaires Index. His younger brother Jim, who wasn't involved in the litigation, is worth \$103 billion. The settlement will be paid by Walmart's insurers, according to Monday's court filing.

The dispute is part of a wave of shareholder lawsuits in Delaware's Chancery Court seeking to hold the board and executives of drug distributors and major retail pharmacies accountable for huge penalties and settlements stemming from claims they spent years mishandling prescription painkillers.

Walmart announced in 2022 that it would pay \$3.1 billion to end opioid-related litigation by state, local, and tribal governments. The investor cases in Delaware included another involving AmerisourceBergen Corp.—which has paid \$6 billion in settlements—that its board defeated in 2023.

The accord disclosed Monday included lengthy denials of wrongdoing by the Walmart board members, who said they're settling "solely to eliminate the burden, expense, disruption, and distraction inherent in further litigation." The settlement requires court approval.

The pension fund is represented by Labaton Keller Sucharow LLP, Bernstein Litowitz Berger & Grossmann LLP, and Berman Tabacco. The board members and company executives are represented by Richards, Layton & Finger PA and Latham & Watkins LLP. One former senior executive is also represented by Hogan Lovells US LLP, another by Abrams & Bayliss LLP and Sidley Austin LLP. The company is represented by Wilson Sonsini Goodrich & Rosati PC and Jones Day. Its special litigation committee is represented by Heyman Enerio Gattuso & Hirzel LLP and Wachtell, Lipton, Rosen & Katz.

The case is Ont. Prov. Council of Carpenters' Pension Trust Fund v. Walton , Del. Ch., No. 2021-0827, settlement filed 10/14/24 .

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

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Musk, dogecoin investors go yet another round with post-dismissal sanctions motions

 [reuters.com/legal/government/column-musk-dogecoin-investors-go-yet-another-round-with-post-dismissal-2024-10-15](https://www.reuters.com/legal/government/column-musk-dogecoin-investors-go-yet-another-round-with-post-dismissal-2024-10-15)

Alison Frankel



Representation of cryptocurrency dogecoin is seen in this illustration taken November 29, 2021. REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights [↗](#), opens new tab

Oct 15 (Reuters) - A Manhattan federal judge may have thought he'd heard the last of a securities class action by dogecoin investors who accused Elon Musk and Tesla of rigging the price of the cryptocurrency when he tossed investors' fourth amended complaint in late August.

Oh how wrong he was.

Lawyers for Musk and the dogecoin investors' class, who have traded vicious barbs throughout the litigation, have now filed cross-motions for post-dismissal sanctions.

Musk and Tesla contend [↗](#), opens new tab that after filing a series of frivolous "whack-a-mole" complaints, dogecoin plaintiffs' lawyer Evan Spencer tried to extract a settlement [↗](#), opens new tab by obliquely offering to drop investors' appeal in exchange for \$5 million. Spencer, in turn, insists [↗](#), opens new tab that his complaints were all filed in good faith and were backed by "numerous scientific studies." He moreover asserts [↗](#), opens new tab that Musk's outside lawyers from Quinn Emanuel Urquhart & Sullivan must be sanctioned and disqualified for improperly disclosing his confidential settlement order and trying to shut down his appeal.

U.S. District Judge Alvin Hellerstein of Manhattan previously denied sanctions motions [↗](#), opens new tab by both sides in this made-for-headlines case. The judge ruled in December that investors had "presented non-frivolous and good-faith issues to litigate," but that Spencer hadn't offered hard evidence to back his claim that Quinn Emanuel improperly leaked information about the case to news outlets.

Hellerstein's December order nonetheless left the door open for renewed sanctions motions. So, of course, both sides took him up on the offer.

Spencer in an emailed statement said that he was "confident that defendants' motion for sanctions will be denied."

Musk's lawyers from Quinn Emanuel did not respond to my email queries on the latest sanctions spat. Tesla lawyer Allison Huebert also did not respond.

In case you've somehow managed to avoid hearing about the dogecoin litigation before this story, dogecoin investors alleged that Musk and Tesla engaged in a scheme to boost the price of dogecoin through Twitter posts and "publicity stunts," including Musk's appearance on Saturday Night Live. One iteration of the class complaint claimed that Musk engaged in insider trading when he allegedly sold \$124 million in dogecoin.

Musk and Tesla have said throughout more than two years of litigation that there is no proof they even owned two crypto wallets that allegedly engaged in suspicious dogecoin trading – or, for that matter, that either Musk or Tesla ever sold dogecoin.

Hellerstein allowed the dogecoin investor class to refine their theories in four amended complaints but finally dismissed [the case](#), opens new tab the case with prejudice on Aug. 29. The two-page dismissal ruling concluded that Musk's allegedly deceptive comments about dogecoin were nothing more than puffery that no reasonable investor could have relied upon. Hellerstein also said it was "not possible to understand" investors' allegations of a pump-and-dump insider-trading scheme.

Plaintiffs' lawyer Spencer filed a notice of appeal on Sept. 19.

But a few days later, on Sept. 25, according to an exhibit attached to Musk's motion for sanction, Spencer emailed Quinn Emanuel to say that "multiple top class action firms" had expressed interest in taking over the case if it was revived by the 2nd U.S. Circuit Court of Appeals. Spencer said in the email that his 130 or so dogecoin investor clients had lost about \$5 million but that his expert witness estimated classwide losses to be on the order of \$5 billion.

His appeal, Spencer said, could therefore "turn a \$5 million case into a \$5 billion case."

Quinn Emanuel said in its Sept. 27 sanctions motion that it regarded Spencer's email as an attempt "to extort a quick handout" after a prolonged "harassment campaign."

Under the Private Securities Litigation Reform Act, defense lawyers argued, Spencer is liable for litigating unfounded claims with the improper purpose of extracting a settlement. Quinn Emanuel asked Hellerstein to sock Spencer for \$750,000 – its legal fees for defending the allegedly frivolous case.

Spencer's Oct. 10 opposition brief pointed out that Hellerstein already said, in his December order refusing to grant Musk's previous motion for sanctions, that investors' claims were brought in good faith. Spencer conceded that his pleadings may have been "imperfect," but argued that each complaint, including the fourth amended complaint, was well-founded on studies showing Musk's heavy influence on dogecoin trading.

Spencer vehemently objected to Quinn Emanuel's description of his settlement proposal as "extortionate," arguing that there was nothing unethical or inappropriate about offering to settle the case for an amount that would make his clients whole.

On the same day that he filed his opposition to Quinn's motion for sanctions against him, Spencer docketed his own sanctions motion, accusing Quinn Emanuel of improperly disclosing his settlement offer in the hope of pressuring him to drop his appeal. Spencer also said Musk's lawyers had "fraudulently inflated their legal bills" as part of that pressure campaign.

He asked Hellerstein to disqualify the firm, seal the confidential settlement offer and award him and his clients \$375,000.

On Monday, Quinn Emanuel filed a letter [\[link\]](#), opens new tab asking Hellerstein temporarily to seal the Spencer email it previously filed as an exhibit to its sanctions motion. The firm said Spencer had not previously designated the settlement proposal as private or confidential. As of Tuesday afternoon, the judge had not acted on the request.

Quinn also asked for an extension until Oct. 25 to respond to Spencer's sanctions motion. Hellerstein, in other words, won't see the end of this case for a while.

Read more:

Elon Musk, Tesla win dismissal of lawsuit claiming they rigged dogecoin

Musk, Tesla go on attack against Dogecoin plaintiffs lawyer

Dogecoin plaintiffs lawyers move to oust Musk, Tesla counsel after 'leaked' sanctions letter

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

Reporting By Alison Frankel

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

Opinions expressed are those of the author. They do not reflect the views of Reuters News, which, under the Trust Principles, is committed to integrity, independence, and freedom from bias.



Alison Frankel
Thomson Reuters

Hawaiian Electric Fends Off Investor Lawsuit Over Lahaina Fire

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XILPVO4000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XILPVO4000000)

An aerial image taken on Aug. 10, 2023 shows destroyed homes and buildings burned to the ground in Lahaina in the aftermath of wildfires in western Maui, Hawaii.

Photographer: Patrick T. Fallon/AFP via Getty Images

Hawaiian Electric Industries Inc. investors can't proceed with a securities fraud suit alleging the utility misrepresented its wildfire risk management in advance of the August 2023 Lahaina fire, a federal court ruled.

The investors failed to adequately allege the company and its leaders made false statements about power line insulation, utility pole maintenance, vegetation trimming, and other issues, Judge Jacqueline Scott Corley said Tuesday for the US District Court for the Northern District of California. The investors also fell short of alleging the necessary level of intent, she said.

The investors will have another chance to plead their claims.

The case is Bhangal v. Hawaiian Elec. Indus., Inc. , N.D. Cal., No. 3:23-cv-04332, 10/15/24 .

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

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

**Bloomberg
Law**

Request a Demo

Login

Securities Law News

Oct. 15, 2024, 7:30 AM PDT

Travelers Unit Sued by Mall Seeking Coverage for Investor Case

By Bloomberg Law Automation

- **COURT:** D.V.I.
- **TRACK DOCKET:** [1:24-cv-00026](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-10-16T10:28:16360806539-04:00

Travelers Unit Sued by Mall Seeking Coverage for Investor Case

By Bloomberg Law Automation 2024-10-15T10:30:04000-04:00

- **COURT:** D.V.I.
- **TRACK DOCKET:** [1:24-cv-00026](#) (Bloomberg Law subscription)

A Travelers Cos. insurance unit was hit with a suit by a mall owner in the US Virgin Islands seeking insurance coverage for its executives named in a derivative shareholder case.

Travelers Excess and Surplus Lines Co. breached its duty to defend and indemnify the policyholders under a directors and officers liability insurance policy by denying coverage for the underlying shareholder case, the mall owner plaintiffs said in a suit filed Oct. 12 in the US District Court for the District of the Virgin Islands.

The underlying shareholder suit naming the officers of Sunshine Shopping Center Inc., which operates the Mall of St. Croix, alleges damages resulting from embezzlement of funds and negligent operations. That case should be covered by the Travelers D&O insurance policy as a "Security Holder Derivative Claim," but the insurer denied coverage based on an exclusion for claims brought by major shareholders, according to the mall owner suit.

The interpretation by Travelers renders its coverage illusory because all of the mall's shareholders own more than 5% of the company's stock, the policyholders said.

Sunshine and its officers are seeking damages for breach of contract, a declaratory judgment that Travelers must defend and indemnify them, damages for bad faith, attorneys fees and costs, and other relief.

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

Anderson Kill PC and MirochaLaw represent Sunshine.

The case is Sunshine Shopping Center Inc. v. Travelers Excess and Surplus Lines Co. , D.V.I., No. 1:24-cv-00026, complaint 10/12/24 .

This story was produced by Bloomberg Law Automation.

To contact Bloomberg Law Automation: automation@bloombergindustry.com

To contact the editor responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

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

Oct. 15, 2024, 2:42 PM PDT

Argentina Rejected by UK Top Court in \$1.5 Billion Bond Case (2)

By Kevin Simauchi

- Hedge funds demand country to pay losses on securities
- Government lawyers warned of debt woes if ruling not reversed

Bloomberg Law News 2024-10-16T10:28:44685485028-04:00

Argentina Rejected by UK Top Court in \$1.5 Billion Bond Case (2)

By Kevin Simauchi2024-10-15T17:42:59171-04:00

- Hedge funds demand country to pay losses on securities
- Government lawyers warned of debt woes if ruling not reversed

Argentina lost a bid at the UK Supreme Court to hear its appeal on a ruling that would force the South American nation to pay \$1.5 billion in damages to holders of the country's growth-linked bonds.

In an order signed Monday, the UK's top court refused to hear an appeal over payments to hedge funds including Palladian Partners LP. The holders of those notes argued the losses were a result of a change by a previous Argentine government in how it calculated gross domestic product.



The Supreme Court building at Parliament Square in London.

Photographer: Jose Sarmiento Matos/Bloomberg

The court's decision puts pressure on the country's buffer of foreign currency reserves, money that Argentina needs for bond payments and to eventually lift capital controls. Lawyers for Argentina argued in May that it would struggle to service some of its debt if it had to pay damages stemming from the GDP-linked bonds.

UK courts established Argentina now has 45 days to pay the GDP bondholders. The Milei administration would be subject to enforcement action if it misses that deadline and it would also lose \$334 million already paid to UK authorities.

"During the course of this case, Argentina has repeatedly said to the court that if a final decision is made in favor of the warrant holders that the money to pay its creditors will need to be found," said **Aidan O'Rourke**, partner at Quinn Emanuel acting for the hedge funds. "That time has now come."

President **Javier Milei**'s administration needs to make some \$9.45 billion in hard-currency bond payments in 2025, according to data compiled by Bloomberg. While there's consensus among Wall Street analysts about the country's willingness to pay, funding sources remain tight.

Milei's finance secretary **Pablo Quirno** last week said that monetary authorities were working on a repurchase loan agreement, or repo, to secure some cash ahead of its next debt payment in January.

Lawyers for Argentina declined to comment. A spokesperson for the Milei administration didn't immediately respond to requests for comment.

(Adds no comment from Argentina's lawyers in eighth paragraph.)

--With assistance from **Upmanyu Trivedi** and **Manuela Tobias**.

To contact the reporter on this story:

Kevin Simauchi in Buenos Aires at ksimauchi1@bloomberg.net

To contact the editors responsible for this story:

Julia Leite at jleite3@bloomberg.net

Stephen Wicary, Nina Trentmann

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

DE Shaw, Bracebridge Lose Bid for Libor Zombie Payout (1)

By Tasos Vossos and Lucca de Paoli

- Judges rule StanChart can ditch Libor in preference shares
- Libor zombie trade was one of most lucrative of 2023

Bloomberg Law News 2024-10-16T10:29:2300664267-04:00

DE Shaw, Bracebridge Lose Bid for Libor Zombie Payout (1)

By Tasos Vossos and Lucca de Paoli 2024-10-15T12:48:36960-04:00

- Judges rule StanChart can ditch Libor in preference shares
- Libor zombie trade was one of most lucrative of 2023

Funds seeking a payout on an obsolete type of capital issued by Standard Chartered Plc lost a London court ruling, triggering the biggest drop in the securities since early 2023.

DE Shaw & Co. LP and Bracebridge Capital LLP had bought up preference shares issued by the lender in 2006 that are pegged to the now-defunct London interbank offered rate, or Libor. They were betting that the securities would be called at par since Libor is no longer available.

But the London High Court ruled Tuesday that the shares contain “an implied term that the reasonable alternative” to Libor is to be used where the definition of the rate is no longer available. Currently this is based on the Secured Overnight Financing Rate, or SOFR.

“Our clients respect the decision handed down by the High Court today, but are disappointed with the outcome, which enables Standard Chartered to impose a fundamentally different commercial bargain on its investors from what had been agreed,” said a spokesperson for Quinn Emanuel Urquhart & Sullivan, which is advising holders of the preference shares. The group of shareholders are actively considering their next steps, the spokesperson said.

The bet on so-called Libor zombies paid off handsomely for investors last year, with hedge funds generating overnight profits of as much as 35%. Some banks have already chosen to repay the securities, even if it means handing windfall gains to investors, while some have yet to relent.

Read More: Libor Zombies Pit Hedge Funds Against Banks in High-Stakes Feud

The shares no longer count as part of Standard Chartered's core capital because they're not compatible with rules adopted after the global financial crisis. To raise core capital, the lender now issues so-called Additional Tier 1, or contingent convertible, bonds.

Libor fell victim to a fixing scandal more than a decade ago and was discontinued last year. A synthetic version, based on SOFR, ran out last month.

Pricing on Standard Chartered US-dollar denominated preference shares is indicated down 2.5 cents to 93.2 cents on the dollar on Tuesday, based on data compiled by Bloomberg. Representatives from DE Shaw and Bracebridge didn't immediately respond to requests for comment.

(Updates with comment from advisor to investors in paragraph four.)

--With assistance from **Eleanor Duncan**.

To contact the reporters on this story:

Tasos Vossos in London at tvossos@bloomberg.net;

Lucca de Paoli in London at gdepaoli1@bloomberg.net

To contact the editors responsible for this story:

Helene Durand at hdurand8@bloomberg.net

Natasha Doff, Rheaa Rao

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Meta Can't Escape States' Claims It Hooked Kids on Platforms (4)

By Isaiah Poritz (Bloomberg Law) and Rachel Graf2024-10-15T18:02:47006-04:00

- Federal judge allows some claims by 34 states to proceed
- Judge limits scope of case in light of federal immunity law

Meta Platforms Inc. must face a lawsuit by dozens of state attorneys general alleging it knowingly contributed to a youth mental health crisis by getting kids hooked on social media.

A federal judge in California on Tuesday sided with 34 attorneys general in allowing some of the claims over Meta's Facebook and Instagram platforms to proceed in sprawling litigation over the harmful effects of social media.

[WATCH: Is Social Media Big Tobacco 2.0? The Lawsuits Over Big Tech and Teens' Mental Health](#)

US District Judge Yvonne Gonzalez Rogers, who issued the ruling, is overseeing hundreds of lawsuits alleging that a handful of social media companies — including Google's YouTube, ByteDance's TikTok and Snap, as well as Meta — have profited from the addiction of young people to their products. Tuesday's ruling involves only the allegations brought by the state attorneys general against Meta.

[Read More: Meta Sued by California, States Over Harmful Youth Marketing](#)

The attorneys general have alleged that despite research showing Facebook and Instagram use is associated with depression and other mental health issues, Meta won't remove the platforms' harmful features. They also claimed that Meta unlawfully collected data of children under 13 years old. In October, TikTok was sued over similar claims in 13 state courts and in Washington, DC. The states accused the company of deceiving users about its child safety tools and using harmful features to keep children on the platform longer to maximize profits. A TikTok spokesperson called the claims "inaccurate and misleading."

A Meta spokesperson said the company disagrees with the overall ruling even while it welcomes the

dismissal of some claims under Section 230 of the Communications Decency Act, a longstanding federal law shielding internet companies from lawsuits.

"We've developed numerous tools to support parents and teens, and we recently announced that we're significantly changing the Instagram experience for tens of millions of teens with new Teen Accounts, a protected experience for teens that automatically limits who can contact them and the content they see," the spokesperson said in an email. "We believe the evidence will demonstrate our commitment to supporting young people."

Meta's stock fell about 1% after the ruling to \$581.77 before rising to \$586.27 at the close of New York trading.

Rogers said "Meta's alleged yearslong public campaign of deception as to the risks" of social media addiction and mental health harm to children is a potential violation of state and federal laws against deceptive and unfair business practices. But she said Section 230 "provides a fairly significant limitation on these claims."

Section 230 prevents the states from challenging certain platform features such as "infinite scroll" and the display of likes on a post, Rogers said. But the states can challenge "appearance-altering filters" that allegedly promotes body dysmorphia among young people, she said, while declining to dismiss claims about the company's failure to warn about the known risks of addiction.

How Lawsuits Seek to Make Social Media Safer for Kids: QuickTake

The judge also ruled on individual personal injury claims brought against the major social media platforms brought on behalf of hundreds of children, adolescents and young adults. She concluded that some claims based on violations of consumer protection laws can proceed.

Lexi Hazam and **Previn Warren**, lead lawyers for the plaintiffs, hailed the decision, saying it confirms that the companies "must face our claims that they failed to warn of significant risks to users' safety and mental health, and that they engaged in deceptive marketing and business tactics."

The social media companies also face hundreds of lawsuits by public school districts alleging the platforms have created a public nuisance. The companies won a ruling in June dismissing claims filed by some districts in state court in Los Angeles. Rogers has yet to rule on a request for dismissal of

cases consolidated in her court.

The case is People of the State of California v. Meta Platforms Inc., 4:23-cv-05448, US District Court, Northern District of California (Oakland).

(Updates with school district cases against social media companies.)

--With assistance from **Olivia Carville**.

To contact the reporters on this story:

Isaiah Poritz in Arlington at iporitz@bloomberg.net;

Rachel Graf in San Francisco at rgraf27@bloomberg.net

To contact the editors responsible for this story:

Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net;

Stephanie Gleason at sgleason32@bloomberg.net

Peter Blumberg, Anthony Aarons

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

Meta fails to knock out states' claims that Facebook, Instagram are addictive for young users

 [courthousenews.com/meta-fails-to-knock-out-states-claims-that-facebook-instagram-are-addictive-for-young-users](https://www.courthousenews.com/meta-fails-to-knock-out-states-claims-that-facebook-instagram-are-addictive-for-young-users)

While much of the massive suit against social media companies lives on, a federal judge still found that several of the states' liability claims were barred by the Communications Decency Act.

Edvard Pettersson / October 15, 2024



Meta Platforms CEO Mark Zuckerberg at a 2019 event. (Meta via Courthouse News)

(CN) — A federal judge on Tuesday mostly denied Meta's request to dismiss claims by 34 states that it designed social media apps like Facebook and Instagram to make them addictive for minors, resulting in a variety of harms to children, local governments and the public health.

U.S. District Judge Yvonne Gonzalez Rogers said in a 102-page decision that many of consumer protection claims brought by the state attorney generals are "cognizable."

The judge denied Meta's bid to dismiss part of the states' claims under the Children's Online Privacy Protection Act, or COPPA, which prohibits collecting data from social media users younger than 13 without notifying and obtaining permission from their parents. The company sought to have these claims thrown out in so far as, it argued, neither Facebook or Instagram is directed at children.

But whereas Meta maintained that the content directed at children that third parties post on these platforms shouldn't make the platforms themselves directed at children, Gonzalez Rogers disagreed and said this third-party content a platforms hosts can be considered in determining whether the platform, or a portion thereof, is directed to children under the act.

"Meta's design, development and deployment of certain product features plausibly constitutes unfair or unconscionable practices under all at-issue federal and state standards," the judge said, but added that Section 230 of the Communications Decency Act — which shields online businesses, including social media platforms, from liability for content posted by users — limits some elements of the social media giant's claims.

As far as the states' consumer protection claims were concerned, some Facebook and Instagram features that the states claim get children hooked are protected under Section 230 from liability for content posted by users, Gonzalez Rogers wrote.

By challenging these features, the judge said she already had concluded in a related ruling from last year, the lawsuits directly target the platforms' roles as publishers of third-party content and run afoul of Section 230.

The features that are protected include things like infinite scroll and autoplay, ephemeral content, disruptive audiovisual and vibration notifications and alerts, and quantification and displays of "likes."

Other features, however, such as appearance-altering filters, features to restrict time spent on the platform and Instagram's multiple account function, aren't shielded under Section 230 because they don't involve altering the publishing of third-party content, Gonzalez Rogers said, again referencing her ruling from last year.

The judge also rejected Meta's request to dismiss under Section 230 the states' failure to warn theory, which they say involves a "constellation of acts which, viewed both individually and holistically, constitute an unfair trade act or practice."

"This court must determine ultimately, 'at root,' whether the states' failure-to-warn theory seeks to treat Meta as a publisher of third-party content," she wrote. "At a minimum, and consistent with the court's conduct-specific approach, alleged failures to warn about known risks of harms attendant to platform features that do not implicate Section 230 as described under the unfair and unconscionable acts prong of the States' consumer-protection claims survive."

Gonzalez Rogers pointed out that, nonetheless, the failure to warn about purported harm to children from social media use can plausibly pertain to a combination of the platform's features, some of which are insulated by Section 230, and some of which are not.

In addition, she said, the application of Section 230 in this failure-to-warn context was still a developing area of legal interpretation.

"As to the balance, and given the new and myriad opinions of other jurisdictions, the court declines to dismiss the claims at this early juncture," the judge said. "Thus, because these novel theories test the boundaries of an area of law in some flux, the court declines to foreclose the states' (and personal injury plaintiffs') failure-to-warn theories as to known risks of addiction attendant to any platform features or platform construction in general as barred by Section 230."

A Meta spokesperson said that, while the company welcomes the judge's decision to limit the focus of some claims, consistent with prior rulings on Section 230, it disagrees with the overall ruling.

"We've developed numerous tools to support parents and teens, and we recently announced that we're significantly changing the Instagram experience for tens of millions of teens with new Teen Accounts, a protected experience for teens that automatically limits who can contact them and the content they see," the spokesperson said. "We believe the evidence will demonstrate our commitment to supporting young people."

The ruling is part of the multi-district proceeding that consolidates hundreds of personal injury lawsuits on behalf of children and adolescents, by school districts and local governments, and by state attorneys general before the judge in Oakland. The plaintiffs claim that Facebook and Instagram, as well as Google's YouTube, ByteDance's TikTok, and Snapchat are designed to foster compulsive use by minors.

Gonzalez Rogers took up Meta's motion to dismiss the claims in the state attorneys general lawsuit as well as a separate lawsuit by Florida in Tuesday's ruling.

"Meta needs to be held accountable for the very real harm it has inflicted on children here in California and across the country," said California Attorney General Bonta in a statement. "As the home to the greatest innovators in the world and a robust technology sector, California has a particular opportunity and obligation to be a catalyst for change. Meta can and must do better. Our children deserve their childhoods back."

In their joint lawsuit filed last year, 33 states including California claim that Meta built a business model focused on maximizing young users' time on its platforms and employed psychologically manipulative platform features. They accused the social media giant of publishing reports purporting to show misleadingly low rates of user harms and said it refused to address existing harms to users to conceal and downplay its platforms' adverse effects.

The social media giants are also fighting a similar consolidated case in Los Angeles County Superior Court, where last week they asked to trim more than a thousand lawsuits claiming the apps have fomented an epidemic of teen addiction and depression.

Follow @edpettersson

Categories / Courts, National, Technology

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.

Meta must face US state lawsuits over teen social media addiction

 [reuters.com/legal/meta-must-face-us-state-lawsuits-over-teen-social-media-addiction-2024-10-15](https://www.reuters.com/legal/meta-must-face-us-state-lawsuits-over-teen-social-media-addiction-2024-10-15)

Brendan Pierson

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

REUTERS/Dado Ruvic/Illustration/File Photo Rights 

- Judge rejects Meta's bid to dismiss the claims
- States seek injunction and monetary damages

Oct 15 (Reuters) - Facebook parent company Meta (META.O) , opens new tab must face lawsuits by U.S. states accusing it of fueling mental health problems among teens by making its Facebook and Instagram platforms addictive, a federal judge in California ruled on Tuesday.

Oakland-based U.S. District Judge Yvonne Gonzalez Rogers rejected Meta's bid to toss the claims made by the states in two separate lawsuits filed last year, one involving more than 30 states including California and New York and the other brought by Florida.

Rogers put some limits on the states' claims, agreeing with Meta that a federal law known as Section 230 regulating online platforms partly shielded the company. However, she found that the states had put forward enough detail about allegedly misleading statements made by the company to go forward with most of their case.

The judge also rejected motions by Meta, ByteDance's TikTok, Google parent Alphabet's (GOOGL.O) , opens new tab YouTube and Snap's (SNAP.N) , opens new tab SnapChat to dismiss related personal injury lawsuits by individual plaintiffs. The other companies are not defendants to the states' lawsuits.

The ruling clears the way for states and other plaintiffs to seek more evidence and potentially go to trial. It is not a final ruling on the merits of their cases.

"Meta needs to be held accountable for the very real harm it has inflicted on children here in California and across the country," California Attorney General Rob Bonta said in a statement.

Lawyers for the personal injury plaintiffs in a joint statement called the ruling "a significant victory for young people nationwide who have been negatively impacted by addictive and harmful social media platforms."

A Meta spokesperson says that the company disagreed with the ruling overall and that it had "developed numerous tools to support parents and teens," including new "Teen Accounts" on Instagram with added protections.

A Google spokesperson called the allegations "simply not true" and said, "providing young people with a safer, healthier experience has always been core to our work."

The other social media companies did not immediately respond to requests for comment.

The states are seeking court orders against Meta's allegedly illegal business practices and are seeking unspecified monetary damages.

Hundreds of lawsuits have been filed by various plaintiffs accusing the social media companies of designing addictive algorithms that lead to anxiety, depression and body-image issues among adolescents, and failing to warn of their risks.

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

Reporting by Brendan Pierson in New York; Editing by Will Dunham, Stephen Coates and Shri Navaratnam

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

Critical Mass With Law.com's Amanda Bronstad: J&J's 3rd Talc Bankruptcy Will Stay in Texas, Could Digital Payments Benefit More Than Class Members?

 [law.com/2024/10/16/critical-mass-with-law-coms-amanda-bronstad-jjs-3rd-talc-bankruptcy-will-stay-in-texas-could-digital-payments-benefit-more-than-class-members](https://www.law.com/2024/10/16/critical-mass-with-law-coms-amanda-bronstad-jjs-3rd-talc-bankruptcy-will-stay-in-texas-could-digital-payments-benefit-more-than-class-members)

Amanda Bronstad

Welcome to **Law.com Class Actions: Critical Mass**, a weekly briefing for class action and mass tort attorneys.

This week: **U.S. Bankruptcy Judge Christopher Lopez** resolved a venue fight in **Johnson & Johnson's** talc bankruptcy, ordering that the Chapter 11 case should remain in the **Southern District of Texas**. Class action administration expert **Todd Hilsee** released a white paper today suggesting a financial motive could lie behind the popularity of digital payments. Find out who got appointed in **antitrust multidistrict litigation** over reimbursement rates paid to **healthcare providers**.

I'm **Amanda Bronstad**. Feel free to reach out to me with your input. My email is abronstad@alm.com. Follow me on LinkedIn or X: [@abronstadlaw](#).

U.S. Bankruptcy Judge Christopher Lopez for the Southern District of Texas. Courtesy photo

Mesothelioma Trials March Ahead Amid J&J's Talc Bankruptcy

A bankruptcy judge resolved the first fight in **Johnson & Johnson's** third talcum powder bankruptcy: where it should be.

Here's my story on **U.S. Bankruptcy Judge Christopher Lopez's** order on Oct. 10 finding that the Chapter 11 case should remain in the **Southern District of Texas**. A group called the **Coalition of Counsel for Justice for Talc Claimants**, and the **U.S. Trustee** in Houston wanted to move the Chapter 11 case to New Jersey, where **U.S. Chief Bankruptcy Judge Michael Kaplan** threw out the first two talc bankruptcies last year. But Lopez said the case before him, filed on Sept. 20 by Johnson & Johnson subsidiary **Red River Talc**, not **LTL Management**, was not the same case as the prior talc bankruptcies and had the support of 83% of claimants for a \$9 billion prepackaged plan.

The bankruptcy is focused on ovarian and other gynecological cancer victims, not those with mesothelioma, who continue to pursue their cases in the courts.

On Oct. 15: A Connecticut jury awarded \$15 million in compensatory damages in a mesothelioma trial. Ben Braly (**Dean Omar**), whose firm has won three prior mesothelioma verdicts against Johnson & Johnson this year, said the judge could add punitive damages at

a later date. Johnson & Johnson vowed to appeal.

On Oct. 8: A New York appeals court ruled that Johnson & Johnson could subpoena a leading plaintiffs' expert, **Dr. Jacqueline Moline**, and her employer, **Northwell Health Inc.**, for the names of individuals in her two groundbreaking reports linking cosmetic talc to mesothelioma. The ruling reversed a **New York Supreme Court** judge's decision not to grant the subpoenas, which Johnson & Johnson sought in a mesothelioma case in New Jersey.

Credit: Blue Planet Studio/Adobe Stock

'Nothing Different Than A Kickback Scheme'

In 2023, digital disbursements in class action and mass tort settlements nearly doubled to 323 from the prior year, according to a second annual report published this year by **Digital Disbursements**, owned by **Western Alliance Bank**. That's because digital payments have a 98% success rate, compared to 77% in cases with a check and a claims process, the report said.

However, a leading critic of digital payments has a different view of what's happening. Todd Hilsee (**The Hilsee Group**), an expert in class action administration for 34 years, unveiled his white paper Wednesday that found the popularity of digital payments "appears to be nothing different than a kickback scheme."

The white paper (see here) cites an unnamed leading bank for class action settlements and a 2020 email provided to a large claims administrator from a financial technology firm. The white paper suggests unredeemed digital payments end up as additional revenue, not back in the hands of class members, and judges who approve the settlements don't know anything about it. Here's how he says it works:

"If they do not spend the money, the financial tech companies recapture that leftover money in activity fees, called breakage. But many, many emails go unread or buried, go into spam, and that breakage is a substantial source of income for fintech companies."

And it's not a small amount. Hilsee's white paper, which looked at 110 class action settlements since 2020, calculated that such "discounts" could generate between \$12 million and \$225 million.

Hilsee said he released the white paper to alert judges and the **Federal Judicial Center** about the business practice. He told me:

"We want to have a conversation and expose this practice. What is really happening? What should be happening? What's right and wrong here? And if there's some untoward activity, put a stop to it."

Christopher Seeger of Seeger Weiss. Courtesy photo

Who Got the Work?

A federal judge appointed Chris Seeger (**Seeger Weiss**) as overall coordinating counsel in the multidistrict litigation, alleging a conspiracy to fix reimbursement rates paid to healthcare providers for out-of-network services. In a Sept. 23 order, **U.S. District Judge Matthew Kennelly**, of the **Northern District of Illinois**, granted motions that proposed interim co-lead class counsel of **Edelson's** Natasha Fernández-Silber and Yaman Salahi; **Susan Godfrey** partners Bill Carmody, Shawn Rabin, Halley Josephs and Tom Boardman, of counsel; and **Berger Montague's** Eric Cramer, Zachary Caplan and Patrick Madden. A separate direct action plaintiff executive committee is comprised of Stephen Medlock (**Vinson & Elkins**), Matthew Lavin (**Arnall Golden Gregory**), Hunter Shkolnik (**Napoli Shkolnik**) and Jennifer Scullion (**Seeger Weiss**).

Here's what else is happening:

Zantac Settlement: **GlaxoSmithKline** has agreed to pay up to \$2.2 billion to settle 80,000 lawsuits tying recalled heartburn medication **Zantac** to cancer. The Oct. 9 announcement comes weeks after GlaxoSmithKline settled out of the first Zantac trial in California.

GlaxoSmithKline, which has won two defense verdicts in Illinois, said the settlement would resolve 93% of all Zantac cases against the drug manufacturer in state courts, mostly of which are in Delaware.

Roundup Verdict: A Philadelphia jury hit **Bayer** with a \$78 million verdict over **Monsanto's Roundup** pesticide. The Oct. 10 verdict comes in the sixth Roundup trial in **Philadelphia Court of Common Pleas**. Monsanto has won two defense verdicts, while three prior juries have awarded \$175 million, \$3.5 million and \$2.25 billion. Meanwhile, in Seattle, Monsanto has moved to halt a trial this week over **PCB** exposure at a school after the **Washington Supreme Court** granted review on Oct. 9 of a related case.

Plea Deal: The former chief financial officer of **Tom Girardi's** law firm entered a guilty plea on Oct. 11 in downtown Los Angeles. **Christopher Kamon**, 51, who's been incarcerated in federal prison for two years, pleaded guilty to two counts of wire fraud and agreed to pay victims \$3.1 million. He was accused of stealing funds from **Girardi Keese's** operating accounts and conspiring with Girardi, who was convicted on Aug. 27, to embezzle at least \$15 million in client funds. Kamon, who faces 40 years in prison, has a Jan. 31 sentencing hearing.

US judge orders Boeing, DOJ to detail diversity policy before deciding on plea

 [reuters.com/legal/us-judge-orders-boeing-doj-detail-diversity-policy-before-deciding-plea-2024-10-15](https://www.reuters.com/legal/us-judge-orders-boeing-doj-detail-diversity-policy-before-deciding-plea-2024-10-15)

David Shepardson, Mike Spector

The Boeing logo is pictured on a flag at the 54th International Paris Air Show at Le Bourget Airport near Paris, France, June 20, 2023. REUTERS/Benoit Tessier/File Photo Purchase Licensing Rights , opens new tab

Oct 15 (Reuters) - A federal judge on Tuesday ordered Boeing (BA.N) , opens new tab and the U.S. Justice Department to detail the impact of diversity and inclusion policies on the selection of an independent monitor before he decides whether to accept the planemaker's plea deal.

U.S. District Judge Reed O'Connor held a hearing Friday as he considers whether to approve Boeing's agreement to plead guilty to conspiring to defraud regulators. The deal would include oversight for three years by an independent monitor.

The order is the latest hurdle Boeing faces to avoid a potentially embarrassing trial and plead guilty to misleading the Federal Aviation Administration and violating a 2021 deferred prosecution agreement.

O'Connor on Tuesday told DOJ and Boeing to answer questions by Oct. 25 about the DOJ policy of selecting a monitor in keeping with the government's commitment to diversity and inclusion.

A DOJ spokesperson said the government "will comply with the judge's order and respond before the court's deadline." Boeing did not immediately comment.

While ordering DOJ and Boeing to respond to a series of questions about the diversity and inclusion policy and how it might affect the selection of an independent monitor, he also pointed out that it was not a disputed facet of the plea agreement.

"Critically, Boeing did not voice any objection to this provision," the judge said in his order.

O'Connor also wants the planemaker to detail how its existing diversity, equity and inclusion policies "are used in its current compliance and ethics efforts."

The planemaker agreed to pay up to a \$487.2 million fine and spend at least \$455 million on improving safety and compliance practices over three years of court-supervised probation as part of the plea deal.

O'Connor Friday pressed the Justice Department to justify the terms of Boeing's agreement to plead guilty to fraud in the wake of the two fatal 737 MAX crashes in Indonesia in 2018 and Ethiopia in 2019 that killed 346 people.

Attorneys for Boeing and DOJ argued Judge O'Connor should accept the plea deal, while lawyers for relatives of the crash victims urged him to reject it. Boeing agreed in July to plead guilty to conspiring to defraud regulators.

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

Reporting by David Shepardson, Mike Spector and Sheila Dang; Editing by Stephen Coates

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

Mike Spector
Thomson Reuters

Mike Spector is an Investigative Reporter for Reuters' legal team. He strives to pursue special reports and other enterprising and exclusive stories that expose wrongdoing, highlight threats to consumers and illuminate how ordinary people are affected by the decisions of judges and lawyers across the United States. His stories often involve corporate crises linked to bankruptcy proceedings, mass tort litigation and government investigations. He was the first journalist to expose Johnson and Johnson's plan to offload into bankruptcy lawsuits alleging its iconic Baby Powder and other cosmetic talc products caused cancer. A series he led explaining how companies and nonprofits use the bankruptcy system to evade lawsuits over sexual abuse and deadly products received the Deadline Club's Daniel Pearl Award for Investigative Reporting. He has also investigated pervasive secrecy in American courts that covers up evidence of deadly products and allegations from Black women that chemical hair relaxers sold by large cosmetics companies caused cancer. He previously worked at The Wall Street Journal covering bankruptcy, private equity, mergers and acquisitions and the automotive industry.

Los Angeles Secures \$35M Settlement From Monsanto in Water Contamination Lawsuit

 [law.com/therecorder/2024/10/16/los-angeles-secures-35m-settlement-from-monsanto-in-water-contamination-lawsuit](https://www.law.com/therecorder/2024/10/16/los-angeles-secures-35m-settlement-from-monsanto-in-water-contamination-lawsuit)

Kat Black

What You Need to Know

- Los Angeles reached a \$35 million settlement with Monsanto, now owned by Bayer, over the company's alleged contamination of local waterways.
- Monsanto was the primary manufacturer and seller of toxic chemicals known as PCBs in the United States before they were banned in 1979.
- Monsanto had previously paid more than \$10 billion to settle thousands of claims alleging that its weedkiller product, Roundup, was carcinogenic.

Los Angeles has reached a \$35 million settlement with Monsanto and two affiliated companies in a lawsuit that accused the agricultural biotech conglomerate of producing synthetic chemicals that contaminated local waterways, despite being aware of their toxicity for decades.

Los Angeles City Attorney Hydee Feldstein Soto announced the settlement with Monsanto Co., Pfizer subsidiary Pharmacia LLC and Eastman Chemical Co. subsidiary Solutia on Oct. 11. Both Pharmacia and Solutia were formerly a part of Monsanto Co.

"With this settlement, Monsanto is being held accountable for the damage its dangerous PCBs have inflicted upon Angelenos for decades," Soto said in a news release. "This is a significant step towards cleaner, safer waterways and justice for our City's residents."

Monsanto was acquired by German pharmaceutical giant Bayer and incorporated into its crop science division in 2018 following years of litigation that targeted the company's sale and manufacturing of harmful chemicals. In 2020, Bayer paid more than \$10 billion to settle thousands of claims that an active ingredient in Monsanto's weedkiller product Roundup, glyphosate, had resulted in plaintiffs developing cancer.

The Los Angeles city attorney sued Monsanto in California Superior Court in Los Angeles County in 2022. The complaint alleged that Monsanto had "embarked on a decades-long campaign of misinformation and deception to prolong the manufacture, sale, and use" of polychlorinated biphenyls in its products. Outside counsel at Seeger Weiss and Grant & Eisenhofer assisted the city attorney's office with the litigation.

The synthetic chemical compounds, often used in industrial equipment and construction equipment, were banned in the United States in 1979 due to the health and environmental risks associated with PCB exposure, including changes to the immune, neurodevelopmental, neurobehavioral and reproductive systems in humans.

According to the complaint, Monsanto manufactured 99% of all PCBs used and sold in the U.S. and had confirmed as early as 1937 that "PCBs produce systemic toxic effects upon prolonged exposure." The news release states that to this day, PCBs, which can bioaccumulate and persist in the environment for extensive periods of time, have continued to drain into local bodies of water, including Ballona Creek, Marina Del Rey, Santa Monica Bay, the Los Angeles Harbor, Machado Lake and Echo Park Lake.

Monsanto is not the only chemical manufacturer in the Los Angeles city attorney's sights. In April, Soto announced that her office had filed a lawsuit against more than 24 companies, including 3M, DuPont and Carrier, for allegedly contaminating Los Angeles property and resources with toxic per- and polyfluoroalkyl substances.

Bayer, Pharmacia and Solutia will pay the \$35 million settlement, said the news release, as compensatory restitution and remediation for the alleged actions.

A spokesperson for Monsanto said in an email that the settlement "contains no admission of liability or wrongdoing by the Company."

"Monsanto remains committed to defending cases at trial and will only consider settlements when it is in the Company's interest to do so," the spokesperson said. "The Company never manufactured or disposed of PCBs in the Los Angeles area, discontinued its own legal production of PCBs nearly five decades ago, conducted hundreds of studies on PCB safety, provided appropriate warnings to its customers based on the state of the science at the time, and has committed to participation in agency processes where it has been determined to be a potentially responsible party."

The spokesperson noted that the company is retaining plaintiffs attorney Mark Lanier in a pending lawsuit in Missouri against six former PCB customers "seeking to enforce contracts under which these companies agreed to fully defend and indemnify Monsanto."

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. 16, 2024, 2:01 AM PDT

Fortress' Billions Quietly Power America's Biggest Legal Fights

By Emily R. Siegel

Exclusive

- Fortress describes litigation finance strategy in depth for first time
- Asset management giant commits \$6.6 billion to legal assets, \$2.9 billion to IP

Bloomberg Law News 2024-10-16T10:27:32455011573-04:00

Fortress' Billions Quietly Power America's Biggest Legal Fights

By Emily R. Siegel 2024-10-16T05:01:00000-04:00

- Fortress describes litigation finance strategy in depth for first time
- Asset management giant commits \$6.6 billion to legal assets, \$2.9 billion to IP

The easy explanation for how Fortress Investment Group worked its way to the top of the polarizing, opaque business of litigation funding would be: It has a ton of money.

With about \$6.6 billion committed to legal assets, Fortress backs law firms behind some of history's biggest mass tort suits, such as the Roundup cases against Bayer AG and talcum powder litigation against Johnson & Johnson. It funds other litigation funders.

And with another \$2.9 billion committed to intellectual property, the asset-management giant claims to be the world's largest institutional investor in patents.

But its secret may be its intensity and a meticulous streak that comes with all of that money.

As a patent owner, Fortress aggressively pursues alleged infringers in court, making it a thorn in the side of tech giants like Apple Inc. and Intel Corp. In litigation funding, law firms that take money from Fortress have their bank accounts tracked weekly and their cases monitored closely. One litigation funder said he passed on taking money from Fortress because "they choke you to death."

Told that a person in the industry described Fortress as "pirates," the firm's intellectual property lead, Eran Zur, joked to a reporter that he forgot his eye patch that day.

"We're a tough counterparty if you don't do what you say you're gonna do," Jack Neumark, a Fortress managing partner and co-CIO, said during a nearly three-hour interview in which Fortress discussed litigation finance activities in depth for the first time. "We see where funds go. If you do something you're not supposed to do, we're gonna be upset."



Jack Neumark, Managing Partner and Co-CIO.

Photo courtesy of Fortress Investment Group LLC

Once on the fringes of alternative investing, backing lawsuits to get a piece of the outcome has become a multi-billion-dollar, lightly regulated industry. Funders like to keep their activities close to the vest: In 2022, a Fortress-backed patent entity withdrew a \$4 billion lawsuit against Intel after a judge ordered it to identify its financial backers.

The occasional huge payoff aside, litigation finance is not an easy way to make money. Funders are at the mercy of the legal system's pace. Some states and judges have tried to force funders to operate more openly. The US Chamber of Commerce has for years fought an industry it views as funding frivolous lawsuits against its members.

Congress has tried at least four times to pass legislation that would regulate the industry. One of the proposed bills could have put Fortress out of the legal assets business.

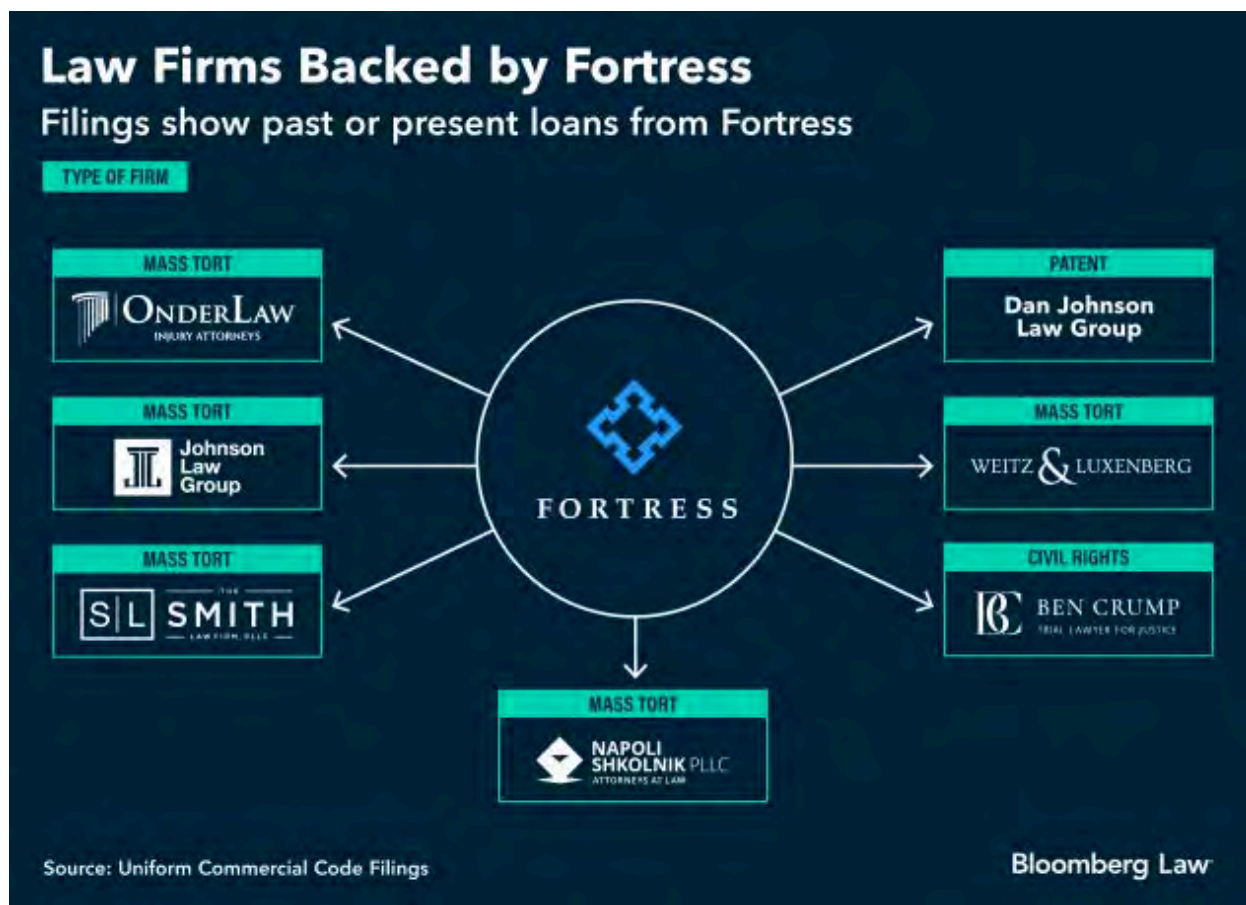
"I'm continually confused as to why someone decided that this was the most credible threat that they could have come up with," Neumark said.

Who They Fund

Fortress has \$48 billion in assets under management and recently said it expects to double that. It launched in 1998 as a private equity boutique and moved into credit and real estate. In 2007, it became the first alternative-investment manager to go public. Ten years later, Fortress was acquired for \$3.3 billion by Softbank Group Corp., which earlier this year completed the sale of its remaining 90.1% equity to Fortress management and Abu Dhabi's sovereign wealth fund, Mubadala Investment Co.

It's acquired and resold name-brand institutions, many of them in distress, in a variety of industries over the years. Most recently, it acquired Red Lobster and Vice Media out of bankruptcy. Less well known is how it's steadily built its litigation finance business, which has 32 employees making the calls on where to deploy capital. Its intellectual property arm has a separate team of 19 employees.

Burford Capital Ltd., one of two publicly traded funders, is often considered the face of the industry. It backed shareholders who won a \$16 billion judgment against Argentina, one of the largest jury awards ever in the Southern District of New York.



Graphic: Jonathan Hurtarte/Bloomberg Law

Burford's life-to-date commitment number for its balance sheet and private funds is around \$10.7 billion since its launch in 2009. But it mainly invests directly in commercial litigation, something Fortress rarely does. Burford issues non-recourse commercial funding and focuses on valuing litigation risk, while Fortress has a credit-like approach.

Mass tort firms are a huge part of Fortress' law lending and have emerged as an increasingly popular area for litigation funders.

What started as \$5 million to \$10 million investments in single commercial cases has grown into loans exceeding \$100 million to law firms for their entire caseloads. It's a built-in diversified portfolio that hedges risk.

"When we encounter mass tort law firms, the name we hear frequently as to where they have financed their portfolios today or historically, you'll hear Fortress more often than any other," said David Perla, Burford Capital's vice chair. "They're aggressive, they're smart, they understand the space."

A review of Uniform Commercial Code filings by Fortress over the past decade found seven law firms to which it has provided loans, some of which have terminated. The filings don't specify the amount of the loans or how the money is used but offer a glimpse into how firms do business with Fortress. Fortress wouldn't comment on the transactions.

They include Texas-based Johnson Law Group. The firm's founder, Nick Johnson, also owns a litigation funding company called Armadillo Litigation Funding that has been a Fortress partner. Johnson Law is involved in many major mass tort cases, including talcum powder, Camp Lejeune toxic-water claims, and sexual-assault claims against Uber Technologies Inc.

Nick Johnson and Johnson Law Group didn't respond to requests for comment.

Partners in Napoli Shkolnik are on executive and steering committees for many of the biggest mega-cases, including ones over PFAS water contamination and opioids. Napoli said it no longer has a loan with Fortress but credits the asset manager with putting it on a self-sustaining path.

"Their partnership was critical to our past achievements, and we're grateful for their support," the firm said in a statement.

It also previously loaned to the Smith Law Firm, a co-counsel of Beasley Allen, which has led the J&J talc litigation; St. Louis based OnderLaw; and personal injury firm Weitz & Luxenberg.

Neither Smith Law nor Onder Law responded to requests for comment. Weitz & Luxenberg declined to comment.

In 2020, California-based Dan Johnson Law Group had a lien with Fortress. Dan Johnson said the firm had a small funding effort during the pandemic.

Mike Papantonio of Florida mass tort law firm Levin Papantonio says his firm has a line of credit with Fortress for only operational expenses. He said they don't use any of it for case acquisition.

"They're nothing but a bank to us and we may choose to use their credit line or not," he said.

Fortress has also loaned to firms with specializations other than mass torts, the UCC filings show. One is the firm of civil rights lawyer Ben Crump, who represented the families of George Floyd, Trayvon Martin, and Breonna Taylor. Crump Law didn't respond to requests for comment.

When Fortress lends to a law firm, it keeps a close eye on how its money is used.

"There are good lenders and bad lenders, and I think there are some bad loans out there in the mass tort space," Neumark said. "I think one of the major traps that people get sucked into is not having the resources internally to do a thorough review of the files."



The 'Super Funder'

In the litigious world of intellectual property, Fortress works with companies that own undervalued patents or acquires patents from companies that are cash poor but invention rich. Then it identifies operating companies allegedly infringing the patents, seeking license payments from those willing to pay or jury verdicts from those who aren't.

"I do believe we pioneered the patent lending business," said Zur, who co-founded RPX, a provider of patent risk management services with a number of the world's biggest tech companies as paying members. "It existed as a concept before we did this, but it wasn't an active investment with large financial institution money behind it."

Fortress first began investing in IP with its General Opportunities Fund, dedicating an \$800 million component to the sector. It then raised two closed end funds: \$900 million for its first bespoke IP fund and \$1.25 billion for its second.

But Zur doesn't consider himself a litigation funder.

"We do not invest passively as opposed to litigation funders. It's private equity. We sit on the board, we advise," Zur said.



Eran Zur, Head of Intellectual Property.

Photo courtesy of Fortress Investment Group LLC

Jonathan Stroud, general counsel at Unified Patents, a membership organization with a mission to deter abusive patent assertions, says Fortress' claim to not be an IP litigation funder is "weird."

"Because you have more control of the entities, it doesn't mean you're not a funder, you're a super funder," he said. "You're funding the case and you're a client."

The likes of Apple and Intel have special animus for entities like Fortress that sue over patents they own but don't use in a product or service. Officially, they refer to them as non-practicing entities. The less flattering term is patent troll.

Ironically, it's a term used in Zur's writing.

In 2015, he co-wrote an article, titled "Why Investment-friendly Patents Spell Trouble for Trolls," that Big Tech opponents have tried to use against him. Intel, in one court brief, used Zur's words to argue how Fortress takes advantage of the court system.

"These oversized awards stem from the sheer complexity of interoperable components and systems sold as part of functional units, if not integrated devices," he wrote. "And because technology invention tends to be incremental, to the extent an individual patent owner can be awarded damages on the price of the entire end product as opposed to their specific patent claim, a litigation incentive arises."

Asked about his foes turning his words against him, Zur joked that he's flattered.

Given the chance to write the article over, he said, he might be more judicious. "But, you know," he said, "I can't take it back."

Patent Disclosure

One of Fortress' patent-assertion entities is VLSI Technology LLC, which owns a portfolio of patents that formerly belonged to Dutch chipmaker NXP Semiconductors NV.

VLSI obtained two jury verdicts for patent infringement totaling more than \$3 billion against Intel, one of which was partially reversed. In a third case before Delaware District Judge Colm F. Connolly, who often oversees patent cases in one of the most popular venues for that litigation, VLSI was seeking \$4.1 billion against Intel.

VLSI brought that case in 2018, four years before Connolly issued a standing order requiring disclosure of litigation finance agreements. The judge nonetheless sought to enforce his mandate. Told to disclose its owners, VLSI said there were 10, describing them as pension, retirement, and sovereign wealth investments, foundations, high net worth individuals, and endowments.

Connolly wanted names and put the case on hold until VLSI complied. A few months later, VLSI dropped the case. Zur declined to say if the case was dropped due to the disclosure requirement.

"Any judge who's asking us 'who are your investors?' I say, okay, but who are Apple's investors? I mean, what's the difference?" Zur said. "Does the identity of the plaintiff or the characteristics of the plaintiff matter in a patent claim?"

Intel declined to comment, and Apple didn't respond to requests for comment.

The Disclosure Battle

The Chamber has pressed, with mixed results, for state and federal legislation requiring more disclosure of funding arrangements. Louisiana, Indiana, and West Virginia have passed legislation in various forms, while proposals died in Florida and Kansas.

"We're not fearing disclosure, but I just worry it distracts the judge or delays the case and ultimately results in the defendants being able to create more leverage to slow down a verdict or a settlement that is ultimately going to benefit the plaintiff," Neumark said.

The Chamber has also called litigation funding a national security risk. In 2022, its Institute for Legal Reform published a paper describing how adversaries like China and Russia could fund lawsuits to obtain confidential information on US companies. The paper was largely theoretical and didn't cite examples. But since it was published, Bloomberg Law has identified Russian and Chinese funders that have operated in the US court system. Among them is A1 LLC, a subsidiary of Russia's Alfa Group that has been under US sanctions since September 2023.

Last year, Sens. Joe Manchin (I-W. Va.) and John Kennedy (R-La.) introduced the Protecting Our Courts from Foreign Manipulation Act. The bill would have required disclosure from a foreign person or entity funding litigation in federal courts.

The legislation also would have banned sovereign wealth funds and foreign governments from participating in litigation finance. That would have effectively banned Fortress from the business, given Mubadala's 68 percent ownership. Fortress said it controls its board of directors and balance sheet, and is autonomous in its business operations.

Neumark called the proposed law, which died in committee, a transparent effort to stop lawsuits against corporations. Litigation funding "might be the most inefficient way possible for a foreign entity to try to gain access to confidential information," he said.

Sen. Chuck Grassley (R-Iowa) has twice, unsuccessfully, introduced the Litigation Funding Transparency Act. The latest legislation was introduced in the House by Rep. Darrell Issa (R-Calif.) this month, after the House Judiciary Committee in June held a hearing on litigation finance in the IP space.

In October, the US Judicial Conference's Advisory Committee on Civil Rules agreed to study the rules requiring disclosure of litigation funding.

"As much as 30% of patent litigation could be funded by third parties, and that number could be even higher because there is no uniform disclosure requirement for litigation funding agreements," said Stephen Waguespack, president of the US Chamber of Commerce Institute for Legal Reform. "Without transparency, judges, defendants, and even plaintiffs do not know who is funding or possibly controlling US patent litigation cases, which could undermine US economic and national security. It is time to bring third-party litigation funding out of the shadows."

Funder Takeovers

One of the tightly held aspects of Fortress' business is how it funds other litigation funders.

A person with knowledge of investor arrangements, who declined to be named due to confidentiality agreements, said that they're aware of at least four funders who've received capital from Fortress.

Neumark won't confirm that but said Fortress' funding to funders can take the forms of debt, investing in general partners, or partnering on an investment.

One consistent principle is that if Fortress agrees to provide capital to a funder, it will be hands on.

A former employee at a funder Fortress offered to back said it declined because "they choke you to death and then put you out of business." The person asked not to be named because of confidentiality agreements surrounding the conversation.

Neumark and Zur balked at some of the descriptions used by their peers. "I think it's definitely misguided," Neumark said. "I think our biggest borrowers have been with us for years."

Fortress has taken over funders when financing arrangements went sour.

It contributed with other creditors to a loan to Vannin Capital amounting to a total debt of £88 million in 2018, just as the industry was taking shape. Vannin planned to go public that same year, but the IPO fell through, and Fortress told Vannin's founders to kick in more equity or find a buyer. They opted for the latter. Fortress bought Vannin and then let go its US staff, though it retained some employees in Europe and Australia.

Affiniti Capital Management, a UK-based lender to law firms, received a £30 million loan from Fortress in 2020. A year into the deal, Neumark said, Fortress started to lack confidence in Affiniti's reporting and the quality of the underlying portfolio.

"Ultimately we had to pull the trigger and put it into administration and take it over so that we could get closer to the assets," Neumark said.

He says Fortress invested around £25 million or £30 million and will probably get back between 20 and 35 percent of that investment.

"Across Fortress and every asset manager you lose money occasionally, and this is definitely the one that there's a strong chance we're going to lose some money on," he said.

The former CEO of Affiniti, Ian Cunningham, refuted the allegations about the portfolio and said Fortress never mentioned reporting issues.

What's next?

Fortress has closed out about 40% of its litigation finance deals, Neumark said. On the deals that haven't fully realized, it's returned a significant amount of capital to investors.

"As long as people are happy with the product, I think there's going to be more and more uptake and so I think the asset class is going to grow for sure over time," he said. "I just don't know how much."

The criticism "does bother me," Neumark said. "There's a lot of defaulting to ambulance chasers or things like that. And when you're talking about big antitrust litigation or big product liability litigation, like, there's really no margin for doing stuff that's frivolous."

In their view, they are Davids. Even with billions of dollars behind them, they reason, the Goliaths have more billions.

But that's as far of a biblical reference as they'll go.

"My business does believe in going and helping those who cannot be funded otherwise," IP lead Zur said. "But no, I don't do God's work here. I don't want to pretend like I am putting on the white hat."

To contact the reporter on this story: Emily R. Siegel at esiegel@bloombergindustry.com

To contact the editors responsible for this story: Bernie Kohn at bkohn@bloombergindustry.com; Chris Opfer at copfer@bloombergindustry.com;

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Quinn Emanuel client sanctioned over expert testimony

DJ [dailyjournal.com/articles/381429-quinn-emanuel-client-sanctioned-over-expert-testimony](https://www.dailyjournal.com/articles/381429-quinn-emanuel-client-sanctioned-over-expert-testimony)

Expert Advice,

Discipline,

Civil Procedure,

Civil Litigation,

Business Law

Oct. 16, 2024

U.S. District Judge Edward M. Chen has barred the admission of an expert witness' evidence related to a medical trial after he found the doctor had lied under oath.

U.S. District Judge Edward M. Chen sanctioned a company represented by Quinn Emanuel Urquhart & Sullivan LLP on Tuesday after the firm admitted an expert witness concealed emails and lied to the court in a Lanham Act dispute between two oncology testing companies that's set for trial on Nov. 5.

Chen "turned back the clock" on evidence submission, barring Natera Inc., Quinn Emanuel's client, from admitting most evidence accumulated after the initial March 11 trial date.

Quinn Emanuel attorneys admitted to Chen that they erred in not investigating the actions of a key oncology witness, Dr. Howard Hochster, who Chen said "lied" under oath about his early access to a clinical trial that was key to Natera's case. *Guardant Health, Inc. v Natera, Inc.*, 21-cv-04062-EMC (N.D. Cal., filed May 27, 2021).

"I guess what I can say is we regret not connecting the dots earlier," Brian C. Cannon, a Quinn Emanuel partner, said in court Tuesday. "We should have investigated further. We should have dug into the way that he got that data. We did not and we do apologize."

The case stems from a \$100 million false advertising lawsuit Guardant Health Inc., a rival oncology testing company, filed against Natera in May 2021. Guardant, represented by Keller/Anderle LLP, claimed that Natera launched a "false and misleading" ad campaign

against one of its new testing products.

Natera quickly countersued, claiming that Guardant's "misleading commercial statements" about the efficacy of the product caused Natera's competing product to lose sales.

Tuesday's motion for sanctions centered on Hochster's testimony, where he opined that a cancelled clinical trial demonstrated "that Guardant's test design was susceptible to false positives, and that false positives can lead to negative undesirable health consequences."

Jennifer Keller of Keller/Anderle LLP and one of Guardant's lead attorneys, argued that Quinn Emanuel and Hochster worked in tandem to conceal the discovery of 1,500 emails detailing Hochster's early access to the test results, a claim he repeatedly denied.

"[Quinn Emanuel] filed briefs opposing our motion and appeared at the February 26 and July 26 hearings, knowing all along that Dr. Hochster had sent them these confidential COBRA results that he had gotten through his emails into the COBRA investigator in September," Keller said in court Tuesday. "Your honor, in the supplemental opposition, they're still not coming clean to you. They're still not being straight with your honor."

Cannon rebutted, denying that the firm had knowledge of Hochster's actions but added, "We did not know he had the [date] ... One thing we said in the briefs, which is true and remains true, is that, to some degree, we were learning in real time the significance of all this information and all this data.

"We knew the trials had been shut down because a public letter had been sent out, but the significance of the data, the finality of the data, that really it truly, did not become final, and did not become truly relevant until" an American Society of Colon Oncology Gastrointestinal conference in January, he added.

The conference Cannon referenced in his rebuttal is the annual ASCO GI Cancers Symposium, where the latest scientific findings related to treatments of gastrointestinal cancer and related illnesses are presented.

Despite the COBRA Trial being cancelled by its sponsor in the summer 2023, the findings were displayed at the January 2024 conference.

Prior to the reveal of the COBRA Trial's findings, trial in the case was set to begin on March 11 and the parties stated in an October 2023 minute order that discovery was complete.

However, the trial date was pushed back after one of Cannon's colleagues, Quinn Emanuel partner Kevin P.B. Johnson, sent a Feb. 26 letter to Chen explaining the importance of these findings to the case.

"As this Court knows, this case arises out of claims of false advertising asserted by both parties. The COBRA Trial results are directly relevant to technical questions at the heart of this case regarding the truth or falsity of the parties' advertisements," Johnson wrote.

Chen eventually agreed with the parties to move the trial date back, a decision he said he regretted during Tuesday's hearing. "If I knew then what I know now, I wouldn't have opened that door," Chen said.

Chen told the parties at the end of the hearing that he would issue an order memorializing the ban on COBRA Trial related evidence but allowed Natera to offer Hochster to the jury for a very limited purpose. Chen added that the jury will be informed of his "lies" to the court.

"This is federal court; there will be some instruction. The idea that there will be no instruction when he lied under oath, I won't tolerate that," Chen told the Quinn Emanuel lawyers. The parties will appear for the final pretrial conference on Nov. 4.

#381429

Wisdom Howell

Daily Journal Staff Writer
wisdom_howell@dailyjournal.com

To Use AI as Admissible Evidence, Understand the Basics First

- *Barton attorneys say AI evidence requires show of reliability*
- *Lawyers must know clients' AI design, data sets, monitoring*

Bloomberg Law News 2024-10-16T10:30:23746320499-04:00

To Use AI as Admissible Evidence, Understand the Basics First

By Kenneth Rashbaum and Lani Medina 2024-10-16T04:30:04000-04:00

- *Barton attorneys say AI evidence requires show of reliability*
- *Lawyers must know clients' AI design, data sets, monitoring*

Most lawyers know their main task is communication—explaining issues and educating clients, courts, or regulatory agencies to arrive at informed decisions or allow a dispute to end in their favor.

So why do the words “artificial intelligence” cause some communicators to stammer, freeze, or lean on poorly defined jargon? Lawyers who counsel clients in acquiring AI tools or offering their output as evidence in litigation must know what to ask to understand and advise on the technology.

This basic element of a lawyer’s work is more than just a matter of business; it goes to the heart of the lawyer’s obligation to provide appropriate representation. It’s been 12 years since the American Bar Association updated Model Rule 1 on competence to state that lawyers must “keep abreast of changes in the law and its practice including the benefits and risks associated with relevant technology.”

A lawyer advising on AI-related matters doesn’t need a computer science degree or coding experience; they just need to know the right questions to ask and be familiar with certain terms to explain the legal issues—that is, render sound advice or make cogent arguments on behalf of their clients.

This simple framework, or explainable AI, is critical to establishing trustworthiness for stakeholders funding its use and those relying on its outputs. Legal admissibility of the tool requires a showing of reliability, which in turn requires explainability to establish trustworthiness—or lack thereof if challenging its admissibility.

What is the design objective of the AI tool? In other words, what does or should the tool do? What is its business purpose? These questions help determine if an AI tool is right for the job.

Is the tool truly AI, or is it machine learning? AI mimics human intelligence, acting on its own once prompted according to its algorithm (that is, rules of operation), while machine learning uses algorithms to teach a machine how to perform very specific tasks.

What type of AI is involved? Is it predictive AI, where the tool analyzes a defined data set, and its outputs can be a trend such as costs predictions, optimal shipping routes, and so on? Or is it generative AI, where the tool creates text, art, or code based on its training data? Hybrid AI tools also exist, generating reports based on analysis from predictive AI findings.

What was the data set used to train the AI tool, and from where was it derived? Poor data input, including bias, can undermine reliability and pose discrimination risks. It also can create the risk of intellectual property claims if the data is protected by copyright, trademarks, trade secrets, or patents and the developer failed to obtain proper licenses.

How is the quality of the tool's output monitored? Generative AI is notorious for making mistakes or creating "facts" that are untrue, known as "hallucinations." A defined quality assurance or control process is necessary to ensure reliability, and clients should be advised that this requires headcount and budget—critical for a business plan for acquiring and deploying an AI tool. Reviewing output is essential to establishing reliability as evidence.

Litigators face similar issues, but with additional hurdles for the admissibility of evidence. The US District Court for the District of Nevada based its guidance on evaluating AI evidence on the National Institute of Standards and Technology AI Risk Management Framework. This framework equates reliability with trustworthiness, requiring explainability, accuracy (or validity), security, and bias mitigation.

Considerations for AI evidence include whether a challenge to AI evidence will entail a request by the challenger for proprietary information (such as a trade secret) in the algorithm, as well as training and testing of the tool or its source code.

If so, counsel should request a strong confidentiality or protective order signed by the court. Some clients will still be skittish about revealing this information. This could become a factor in settlement negotiations or deciding whether to bring the claim at all.

Another consideration is whether the evidence can withstand a reliability challenge under *Daubert v. Merrell Dow*, which considers error rates, general acceptance, testability, and peer review.

Proponents must build an admissibility argument, addressing concerns that new technologies such as generative AI may struggle with these standards. Most AI hasn't faced such scrutiny, especially peer review. This is where explainable AI and effective communication are crucial. The proponent must articulate the tool's purpose, function, and relevance to argue for its admission.

This navigational aid to explaining and arguing for or against AI tools or AI-based or generated evidence will evolve with changes in the relevant tools and technologies. As the landscape shifts, understanding these fundamentals will be crucial for effectively advising clients and meeting the challenges of AI-related legal issues.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

Author Information

Kenneth N. Rashbaum is partner at Barton focusing on privacy, cybersecurity, and e-discovery.

Lani E. Medina is a senior associate in Barton's corporate practice.

Write for Us: Author Guidelines

To contact the editors responsible for this story: Rebecca Baker at rbaker@bloombergindustry.com; Daniel Xu at dxu@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

ASML draws investor scrutiny after warning shocks global chip markets

 [reuters.com/technology/asml-warning-shocks-global-chip-investors-2024-10-16](https://www.reuters.com/technology/asml-warning-shocks-global-chip-investors-2024-10-16)

Toby Sterling, Nathan Vifflin

ASML headquarters is seen in Veldhoven, Netherlands August 30, 2018.

REUTERS/Piroschka van de Wouw//File Photo Purchase Licensing Rights , opens new tab

- Customers delay new plants and upgrades, weakening outlook
- Share price reached all-time high in July
- Suffered biggest selloff in two decades on Tuesday
- ASML bosses to address analyst call
- Export restrictions on China also a factor

AMSTERDAM, Oct 16 (Reuters) - Investors and analysts are looking sceptically at computer chip equipment maker ASML (ASML.AS) , opens new tab, they said on Wednesday, after the company cut 2025 financial guidance, citing weakness in markets other than AI and delayed orders.

The position of ASML, Europe's most valuable technology company, as an essential supplier to chipmakers is not in question. But doubts have emerged over short-term sales, and, for the longer term, whether it can continue to outgrow the overall market.

Tuesday's change to guidance triggered the biggest selloff in ASML's shares in two decades.

Shares fell by another 4.9% to 635.60 euros at 0840 GMT on Wednesday. In July, it had reached an all-time high above 1,000 euros (\$1,088) a share, the peak of a decade-long surge based on ASML's dominance of the market for lithography tools, needed to create circuitry.

ASML's executives are expected to address analysts on a call later on Wednesday.

ASML posts biggest one-day fall since 1998

After tanking nearly 16% after its earnings were released early in error, ASML shares are now 35% below July's record high



Source: LSEG/Reuters - Amanda Cooper

A blue line chart showing the share price of ASML from the start of the year to the present day.

After the pandemic leap in demand, ASML said some customers have announced delays of new plants and upgrades, including makers of the logic chips used in smartphones, PCs and other devices.

Manufacturers that make the memory chips that go into them also plan fewer expansions, meaning they can rely on existing equipment for longer.

"There need to be limits to the expectations we investors put in any single company," said Nick Rossolillo of Concinnus Financial, who has owned ASML stock since 2022.

"That's especially the case for an upstream equipment supplier highly reliant on the spending plans of its manufacturing customers."

ASML did not identify which customers were behind the guidance cut, but analysts looked first at TSMC, which makes AI chips for Nvidia and smartphone chips for Apple.

"The strong sales trends at TSMC are a misleading indicator for the overall health of the semiconductor industry," said analyst Michael Roeg of Belgian investment bank Petercam Degroof.

"TSMC has been spending rather low capex numbers so far this year, and they may do so again next year because their overall (plant) utilisation is not as good as their sales numbers suggest."

Among ASML customers that make logic chips, Intel said in August it would cut capital spending by \$10 billion in 2025, while Samsung has said it faces challenges at the factory it is building in Texas.

Roughly a quarter of chipmakers' spending on tools goes to ASML, though some analysts say changes in chipmaking techniques could lead that to be lower.

Han Dieperink, chief investment officer at investment firm Aureus, said customer delays are also a negotiating tactic that may force pricing concessions from ASML, squeezing margins.

ASML remained a cornerstone investment, even though Aureus reduced its stake in August on valuation concerns, he said. He also cited declining orders from Chinese chipmakers as U.S.-led export restrictions bite.

"China of course knew the (restrictions) were coming and they front-loaded" purchases in the 2022-2024 period, he said.

(\$1 = 0.9190 euros)

The Technology Roundup newsletter brings the latest news and trends straight to your inbox. Sign up here.

Reporting by Toby Sterling and Nathan Vifflin; editing by Barbara Lewis

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

Bloomberg Law News 2024-10-16T14:06:39062804871-04:00

ASML Questioned by Dutch Regulator After Results Release Mistake

By Cagan Koc2024-10-16T12:12:00437-04:00

- ASML published quarterly results a day earlier than expected
- CEO Fouquet called the early publication 'very unfortunate'

ASML Holding NV is in talks with the Dutch market regulator about the company's erroneous publication of its financial results a day earlier than scheduled.

Regulator AFM confirmed the discussions but said it can't comment at this stage on whether the company will face any repercussions for the mistake. A spokesperson told Bloomberg News by phone on Wednesday that the authority is required to keep conversations with companies confidential.

ASML published weak third-quarter results on Tuesday and cut its outlook for next year, triggering a 16% decline in its share price in Amsterdam, the biggest since June 12, 1998. On Wednesday, shares fell 5.1% and ASML lost its place as Europe's most valuable technology company to software firm SAP SE.

Read More: ASML Shares Plunge as Bookings Miss Signals Chipmaker Woes

"We took immediate action to publish the full release when we noticed the incident and reached out to the relevant financial authorities," ASML spokesperson **Monique Mols** said.



Chief Executive Officer **Christophe Fouquet** apologized on an investor call for the premature publication of the release, which was expected before the market opened on Wednesday.

“This was very unfortunate,” he said, attributing the issue to a “technical error.”

To contact the reporter on this story:

Cagan Koc in Amsterdam at ckoc2@bloomberg.net

To contact the editors responsible for this story:

Chad Thomas at cthomas16@bloomberg.net

Jake Rudnitsky, Peter Elstrom

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

UK Firms Fear Big Four Domination of Sustainability Audit Market

By Michael Kapoor

- Investors rely on independent checks of ESG disclosures
- Consolidation around Big Four could limit assurance options

Bloomberg Law News 2024-10-16T10:31:20986392932-04:00

UK Firms Fear Big Four Domination of Sustainability Audit Market

By Michael Kapoor 2024-10-15T15:18:15000-04:00

- Investors rely on independent checks of ESG disclosures
- Consolidation around Big Four could limit assurance options

The Big Four accounting firms are the top providers of sustainability audits to large London-listed companies, prompting fears from some companies that this market will be led by the same firms that already dominate financial audits, the UK's accounting watchdog said.

The Financial Reporting Council on Tuesday announced initial results from a market study of sustainability assurance launched in March. A majority of FTSE 350 companies disclosed sustainability data in 2022 even though such reporting was not mandatory, with many of them having the figures checked by an external firm, the study found.

The UK government hasn't said yet whether it will require companies to make comprehensive sustainability disclosures and whether these reports must be audited. However, regulators plan to decide by March 2025 whether International Sustainability Standards Board rules are suitable for UK use, and which companies must use them if so.

Global standard-setters approved the first dedicated rules for audits of corporate sustainability statements in mid-September, but countries must adopt them individually.

Even if sustainability report assurance is not yet mandatory in the UK, checks on the accuracy of environmental, social, and governance disclosures are critical to investors, the FRC said.

"For many investors, sustainability related reporting is becoming an increasingly prevalent factor in their decisions to allocate capital and invest in UK companies. Independent assurance of this reporting is vital," Mark Babington, the FRC's executive director of regulatory standards, said in a statement.

Demand for Sustainability Assurance

A growing share of companies in the UK's FTSE 350 index hire an audit firm to validate their sustainability reporting.

■ Percentage of FTSE 350 companies obtaining sustainability assurance



Source: Financial Reporting Council analysis of publicly available data collated by Minerva Analytics Ltd

Bloomberg Tax

The FRC said that the listed companies in its review reported an adequate choice of sustainability auditors, with most performing limited checks on the figures rather than doing a full audit. In total, the 350 companies analyzed used 64 different firms for sustainability assurance.

Among the Big Four firms, PricewaterhouseCoopers audited the largest number of FTSE 350 companies' sustainability disclosures in 2022, followed by Ernst & Young, Deloitte, and KPMG, the watchdog found. The next most common providers of sustainability assurance were firms that specialize in areas such as greenhouse gas emissions.

Some companies expressed concern to the FRC that the market would consolidate further around the largest audit firms. They noted "fears that this may limit choice and effective competition in the market in the future," the watchdog said.

About half of FTSE 100 companies used a financial auditor for their sustainability assurance in 2022, compared to 29% of FTSE 250 firms. That same year, one-third of FTSE 100 companies used their existing financial auditor for sustainability assurance too.

To contact the reporter on this story: Michael Kapoor in London at correspondents@bloomberglaw.com

**Bloomberg
Law**

Request a Demo

Login

[Securities Law News](#)

Oct. 15, 2024, 11:27 AM PDT

Trump Crypto Project Website Crashes as Its Tokens Go on Sale

By Teresa Xie

Bloomberg Law News 2024-10-16T10:30:53777719102-04:00

Trump Crypto Project Website Crashes as Its Tokens Go on Sale

By Teresa Xie2024-10-15T14:27:21951-04:00

World Liberty Financial, a crypto project promoted by Donald Trump and his sons, experienced technology issues as it began selling tokens on Tuesday.

The token went live this morning to accredited investors on the World Liberty Financial website, which experienced numerous outages. As of 1:48 p.m. New York time, more than 500 million of the Ethereum-based tokens were sold for 1.5 cents each, according to the site.

World Liberty Financial planned to raise \$300 million at a \$1.5 billion valuation through the initial token sale on Tuesday. On September 30, the project began accepting names for its approved list of accredited investors, which are individuals who meet certain income or professional criteria such as having a net worth in excess of \$1 million.

Over the weekend, Trump touted the sale in a post on X. World Liberty Financial's accounts on X and Telegram have not yet posted about the sale on Tuesday. Representatives for the project did not reply to requests for comment.

The Trump-backed crypto project is part of the decentralized finance segment of digital assets and launched a day after the former president emerged from a second apparent assassination attempt. An early white paper, a type of research-based document often used to promote crypto projects, had a disclaimer that said the effort is "not owned, managed, operated or sold" by the Trump family, while noting they may receive compensation.

"We plan for all Americans to be able to use this platform in the future, giving everyone access to the tools and opportunities that have been restricted for far too long," according to one of the project's posts.

Like many crypto projects, World Liberty has had to fend off apparent scams and impersonators on social media, causing it to end its announcements on X with images that say “this is the last post in this thread. Any post below this that looks like us is likely a phishing scam.” For example, as some crypto traders complained Tuesday on social media about not being able to buy the tokens, an account on X that displayed the project’s logo under a similar user name as World Liberty’s posted that the the website was down and “We have taken steps to allow you to purchase \$WLFI tokens using the presale deposit address” and gave a blockchain address. The account was later suspended by X.

The platform’s token presale comes three weeks before the presidential election and accompanies Trump’s efforts to appeal to crypto voters. The former president headlined the world’s largest Bitcoin conference earlier this summer and launched his fourth collection of nonfungible tokens in August. Donald Trump is listed as World Liberty Financial’s chief crypto advocate, while his sons, Eric, Donald Jr. and Barron Trump are named as its web3 ambassadors. The project also includes Paxos co-founder Rich Teo as its stablecoin and payment lead, as well as Luke Pearson, a senior research cryptographer for Polychain.

--With assistance from **Olga Kharif**.

To contact the reporter on this story:

Teresa Xie in New York at txie63@bloomberg.net

To contact the editors responsible for this story:

stacy-marie ishmael at sishmael@bloomberg.net

Michael P. Regan

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Trump Social Media Investor Gets Prison for Insider Trading

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X6OHRRVG000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X6OHRRVG000000)

Litigation

Oct. 16, 2024, 9:38 AM PDT

Chris Dolmetsch



An investor in the company that took Donald Trump's social media startup public will serve 22 months for trading on confidential information about the firm's merger plans before the deal was announced.

Gerald Shvartsman was sentenced by a federal judge in Manhattan on Wednesday for trading on secret details he had learned about Digital World Acquisition Corp. before the Trump deal was revealed in October 2021.

Shavrtsman is one of three investors in Digital World who were charged by federal prosecutors in Manhattan in June 2023 with making more than \$22 million through their trading of Digital World shares. He and his brother Michael pleaded guilty to securities fraud in April, while the other person charged in the case, Bruce Garelick, was found guilty after a jury trial in May. Michael Shvartsman is scheduled to be sentenced on Thursday, while Garelick is slated to learn his fate on Nov. 7. Trump and his company weren't accused of wrongdoing.

The US had asked US District Judge Lewis Liman to impose a sentence of at least 24 months due to Gerald Shvartsman's "brazen corruption and greed," saying he made more than \$4.6 million trading on "valuable, confidential information" about the deal and not only misappropriated the information himself but tipped off friends and family.

Defense lawyers had sought a sentence of 18 months on probation, saying "there is nothing in the indictment to suggest that Mr. Shvartsman was a leader or organizer of an extended or sophisticated insider trading ring" and "traded or tipped opportunistically" when he was given inside information by others.

To contact the reporter on this story:

Chris Dolmetsch in Federal Court in Manhattan at cdolmetsch@bloomberg.net

To contact the editors responsible for this story:

Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net

Opinion **Inside Business**

Investors should be wary of Tesla's robotaxi hype

The pay-off from fully self-driving cars is likely to take much longer than expected

JUNE YOON



Tesla's robotaxi, on display at an unveiling event in Los Angeles last week. Robotaxis have the potential to be transformative — if they become mainstream © via Reuters

June Yoon YESTERDAY



Elon Musk has said Tesla's valuation could go as high as \$5tn as it pivots to autonomous driving and artificial intelligence — seven times its value today. The company's shares are down more than 10 per cent in the past week after its robotaxi event disappointed investors. But even if Tesla had delivered on the hype, should robotaxis be that big a deal for investors today?

Despite recent declines, Tesla shares trade at 80 times forward earnings — a steep premium to global peers. That reflects hopes that its heavy AI spending will make it a key beneficiary of a shift to fully [self-driving cars](#) and that the transformation will arrive fairly quickly. But the pay-off is likely to take much longer than expected, with the beneficiaries spread out over a wide range of industries and companies.

Robotaxis have the potential to be transformative — should they become mainstream. For that to happen, mass production and commercialisation must come first, which will mean many more years of development and testing. It could also require a whole new approach to car manufacturing.

Musk [did not provide details](#) on the technology behind the robotaxis or how he would cut the cost of self-driving cars. The latter is key: carmakers need to offer a compelling cost advantage for customers and robotaxi operators to justify the cost per mile of an unproven technology.

Critics have been sceptical about how soon [Tesla's](#) promised self-driving taxi, priced under \$30,000 and less than its cheapest Model 3, will hit markets. It has taken Chinese tech group Baidu, which operates fully driverless cabs in China, seven years of development, extensive road testing and six generations of robotaxis to get its latest model down to around \$28,500.

For now, the economic argument for robotaxis remains weak. There is a limit to how low costs can go because of the high prices of the cameras, radars, chips and lidar sensors that are in them. Traditional automakers would need to invest heavily in software development to catch up.

Mass adoption is also a long way off. Development and testing will take time. Addressing safety concerns will require even more. Operating driverless cars on highways and in urban environments, with pedestrians, animals and bicycles and other hard-to-predict obstacles, comes with a high safety bar.

Meanwhile, fares for robotaxi rides are typically lower than for traditional cabs. Robotaxi networks, which also need to provide cleaning and remote assistance, are not yet profitable. Baidu's operation, which has completed 7mn rides as of July, has yet to break even, despite using its own robotaxis at rock-bottom prices. Waymo, which runs more than 100,000 paid robotaxi rides per week in the US, is also lossmaking. GM's autonomous vehicle business, Cruise, booked a \$5.8bn loss from 2021 to 2023.

Tesla shares trade at a steep premium to global peers

Forward price-to-earnings ratios

150

FINANCIAL TIMES

Source: LSEG

With economic returns sufficiently uncertain, makers of self-driving cars will end up competing on cost for mass-market adoption. That could require a wholly different approach to making electric vehicles. Instead of each carmaker building their own from scratch, as Tesla is doing, outsourcing manufacturing will start making more sense. Standardising as much hardware production as possible and focusing on differentiation through software would squeeze costs down faster.

Waymo, the driverless car company owned by Google's parent company Alphabet, is an example of the right path. It entered a partnership with Hyundai Motor this month to integrate Waymo's fully autonomous technology into Hyundai's EVs. Elsewhere, Foxconn, the world's largest contract assembler for Apple, has set up a platform to make tailor-made EVs on contract, offering autonomous driving modifications.

Foxconn already supplies parts to EV makers including Tesla and makes EV car parts such as camera modules, electronic control units and sensors at high volumes. Its scale means stable, low-cost parts procurement for clients. Such EV outsourcing is expected to reach \$144bn, or 3.2mn EVs, by 2030, according to Goldman Sachs. That also means new growth for suppliers of autonomous driving-related components, for which the total market is expected to hit as high as \$80bn by 2030, [according](#) to McKinsey.

Despite the impressive speed at which EVs and self-driving functions have progressed, great areas of the nascent technology, especially around safety and regulation, remain sketchy. Given all the present uncertainties, the adoption of robotaxis in everyday life is likely to remain slow and cautious. That path is one that investors should follow.

june.yoon@ft.com

[Copyright](#) The Financial Times Limited 2024. All rights reserved.



Tim Onion ✓
@oneunderscore__

...

What a lede, damn.

nytimes.com/2024/10/13/bus...

BUSINESS The Secretive Dynasty That Controls the Boar's Head Brand

In May 2022, the chief financial officer of Boar's Head, the processed meat company, was asked a simple question under oath.

"Who is the C.E.O. of Boar's Head?"

"I'm not sure," he replied.

"Who do you believe to be the C.E.O. of Boar's Head?" the lawyer persisted.

The executive, Steve Kourelakos, who had worked at the company for more than two decades and was being deposed in a lawsuit between owners, repeated his answer: "I'm not sure."

2:34 PM · Oct 15, 2024 · 2,082 Views



3



12



39



1



Post your reply

Reply



David A. Tyler the only Ardhen @Ardhen26 · 27s

...

I'm sorry..

This is perjury.

A CFO not knowing who is in charge of a company is impossible.

Is this unnamed CFO a CPA?

He should have an ethics complaint to flying in a sworn statement...



2



Jeff M @UWMoose · 2m

...

Woah. Can't say I have ever heard of something like that before.



1



44



The Secretive Dynasty That Controls the Boar's Head Brand

 [nytimes.com/2024/10/13/business/boars-head-owners-listeria-outbreak.html](https://www.nytimes.com/2024/10/13/business/boars-head-owners-listeria-outbreak.html)

Maureen Farrell

October 13, 2024

In May 2022, the chief financial officer of Boar's Head, the processed meat company, was asked a simple question under oath.

"Who is the C.E.O. of Boar's Head?"

"I'm not sure," he replied.

"Who do you believe to be the C.E.O. of Boar's Head?" the lawyer persisted.

The executive, Steve Kourelakos, who had worked at the company for more than two decades and was being deposed in a lawsuit between owners, repeated his answer: "I'm not sure."

It is odd, to say the least, when a top executive of a company claims not to know who his boss is. And Boar's Head is no fly-by-night enterprise. The company is one of the country's most recognizable deli-meat brands; it generates what employees and others estimate as roughly \$3 billion in annual revenue and employs thousands of people.

But anonymity and secrecy have been central features of Boar's Head, a privately owned company run by two intensely guarded families, the Brunckhorsts and the Bischoffs.

"They're as secretive as anybody I can think of in the industry," said Tom Johnston, the editor of Meatingplace, a trade publication for meat processors.

That armor of secrecy has not cracked, even as the company is facing the biggest scandal in its history.

This summer, 10 people died and dozens were hospitalized with listeria, a dangerous food-borne bacteria, most after eating liverwurst prepared in a Boar's Head factory in Virginia. U.S. Department of Agriculture disclosed that law enforcement is looking into the matter, and at least six lawsuits for wrongful death and personal injury have been brought against the company. The Virginia plant, which employed some 500 people, was shut down.

Image



The factory in Jarratt, Va., was Boar's Head's first outside New York. It was the site of this year's listeria outbreak and has been shut down. Credit...Steve Helber/Associated Press

Yet no member of the Brunckhorst or Bischoff family has made a public statement. A meat recall notice and apology written on the company's website is signed, simply, "Sincerely, Boar's Head."

So who is in charge?

The day-to-day operations fall to the company president, Carlos Giraldo. Mr. Giraldo, the former head of marketing, was elevated when the longtime president, Michael Martella, retired in 2021.

But in legal testimony taken before the recent outbreak, Mr. Martella and others made clear that the final word on what happens at Boar's Head comes not from the president, but from three family members: Robert S. Martin, known as Bob, the 74-year-old grandson of one of the founders, who is referred to as co-chief executive in court documents; his 50-year-old son, Robert P. Martin, known as Bob Junior; and their cousin Frank Brunckhorst III, 61. (Be forewarned: There are a lot of Bobs and Franks in this story.)

"From morning until night, we're thinking about Boar's Head, how to do it. We're constantly in contact with each other," Frank Brunckhorst said in a deposition in 2022, referring to himself, Bob Martin and Bob Martin Jr. "It's our identities. It's our life. That's what we do."

Image



Frank Brunckhorst III at the Ritz-Carlton, Sarasota in Florida in 2019. Credit...Sarasota Observer

You won't see any of these names on the company's website, however, and that secrecy extends through the ranks. Even senior employees know few details about financials and sales. (Current and former employees, as well as other people who worked with the company spoke on the condition of anonymity for fear of retaliation.)

As Boar's Head expanded from a small deli-meat company based in Brooklyn to a well-known national brand, the families' wealth grew. Collectively, the owners, including the two Bob Martins and Mr. Brunckhorst, along with other cousins who don't work at Boar's Head, received around \$1.5 billion in cash distributions over almost a 15-year period, according to estimates derived from court records.

This probably would have remained hidden except for one family member's discontentment. Eric Bischoff has sued his cousins and the company several times over the allocation of corporate shares. Some of the records in those cases have been sealed or redacted, but from those that are public, a picture emerges of family members linked by history and a business, and torn apart by tensions over money and pride.

The two Bob Martins, Frank Brunckhorst and Eric Bischoff declined to comment. In response to questions, the company sent an unsigned email saying that "our entire team — from senior management to our employees on the facility floor — is committed to ensuring consumers can continue to trust the Boar's Head brand." The email said to attribute the statement to a "Spokesperson for the Company."

The Jay Gatsby of the Meat Industry



Image



The Waldorf-Astoria hotel in Manhattan, where the company celebrated its 100th anniversary. Credit... Karsten Moran for The New York Times

On a Saturday night in May 2005, hundreds of Boar's Head employees and distributors gathered in the ballroom of Manhattan's Waldorf-Astoria hotel in their tuxedos and gowns. They were there to celebrate Boar's Head's 100th anniversary.

The star that evening was Bob Martin, whose dashing good looks, charisma and wealth had given him the air of celebrity among his rivals. He was said to have multiple houses and a passion for boating. Some people called him the Jay Gatsby of the deli-meat industry — a reference to F. Scott Fitzgerald's enigmatic protagonist.

When Mr. Martin took to the stage, a map of the United States appeared on a screen behind him, according to two people who attended. He spoke of the company's founder, the first Frank Brunchhorst, and his decision to sell deli meats out of a horse-drawn carriage. One dot appeared on the map, in Brooklyn, marking the extent of the company's reach in its early days.

A few decades later, in 1933, the original founder's son (another Frank) teamed up with his brother-in-law Bruno Bischoff and a third partner, Ted Weiler. They bought a real estate business and built a meat processing plant in the Bushwick neighborhood of Brooklyn. Boar's Head was officially born.

At the Waldorf, Mr. Martin, who is Bruno Bischoff's grandson, spoke of his family's dream to take its high-quality deli meat across the United States. Dots started popping up across the map behind him, nearly blanketing the United States. The family had achieved the dream, he said, but it was just getting started.

His cousin Eric Bischoff came onstage a little later, walking the audience through the lives and ideas of his grandfather, uncles and cousins.

The night was a show of success, glamour and family bonds. It was also the last time all of these family members would come together in public celebration. The long-simmering fissures between branches of the family would soon pull them apart.

'You Have to Prove Something to These Guys'



Bob Martin and Eric Bischoff, both grandsons of Bruno Bischoff, graduated college in the mid-1970s. They started working for the family business right away.

Both Mr. Bischoff and Mr. Martin started in the Brooklyn processing plant, cycling through a variety of low-level jobs. But from the start, there was a gnawing disparity between them. In the 1960s, the company shares had been put into family trusts. When Eric Bischoff's father died, however, his shares had been bought back by the company; his son hoped that by putting in enough time at the business, he could recoup his family's shares.

After paying their dues, the men moved into managerial roles. Mr. Martin jumped into sales. At the time, the company was still very much a local New York business. Asking the sales team to pitch outside New York was "almost like a death wish for these guys because no one had ever heard of our product and we were very expensive," Mr. Martin said in a deposition.

Mr. Martin's answer was to treat Boar's Head cold cuts as a luxury item. According to industry lore, Mr. Martin was shopping with his girlfriend at Bloomingdale's and saw how Chanel and other companies had branded perfume stalls. He decided he'd do the same for cold cuts, persuading supermarkets to outfit their deli-counter workers with Boar's Head aprons and put Boar's Head posters around their stores.

While Mr. Martin was supercharging sales, Mr. Bischoff gravitated to operations. He moved to Virginia to open Boar's Head's first factory outside New York. (That factory is the site of this year's listeria outbreak.) He built a house on a working farm not far from Jarratt, where the plant was located.

"I was the only one from the company that was down there," Mr. Bischoff said in a deposition. "So I had to be everywhere at the same time."

Still, he seemed insecure about his role in the company, which was then run by Mr. Martin's father (another Robert). In a deposition, Mr. Martin recalled that in those days, he and Mr. Bischoff were both just employees without power. "We were at the total mercy of the elders," he said. He remembered visiting Virginia and driving along country roads with Mr. Bischoff, who became enraged and asked him, "Why doesn't anybody respect me?" Mr. Martin recalled answering, "You have to prove something to these guys." By 1987, Eric Bischoff had apparently proved himself; he got about 8 percent of the company's overall shares.

The same year, Mr. Brunckhorst, who is about a decade younger than Bob Martin and Eric Bischoff, graduated from Carnegie Mellon. Mr. Brunckhorst described in a deposition how he had wanted to take a few weeks off after final exams before starting at the company, but the elder Mr. Martin told him that he had to start right away "or you don't come in." Like his older cousins, Mr. Brunckhorst started at the bottom, learning how to bone ham, make bologna and mix spices. In a deposition, he estimated he worked at least 70 hours a week in the early years and earned \$7 an hour.

By the 1990s, Mr. Brunckhorst started taking on bigger roles, too. Trained as a computer scientist at Carnegie Mellon, he took charge of the company's financials — digitizing them and creating spreadsheets for cost projections.

As the Boar's Head name became better known, Mr. Martin's sales push became more aggressive. If stores wanted to offer high-end cold cuts from competitors like Thumann's or Dietz & Watson behind the deli counter, they could no longer carry Boar's Head.

Image



Boar's Head expanded from a small deli-meat company based in Brooklyn to a well-known national brand. Credit...Jeenah Moon for The New York Times

Boar's Head sold its products to a network of purveyors, who would have to buy the delivery routes and provide their own trucks and warehouses. It was worth it: A Boar's Head route could practically guarantee a profitable business. (One route in Connecticut, for example, cost \$914,000 and generated about \$3 million in sales a year, according to a 2020 lawsuit.)

Prospective distributors had to go through training and promise to abide by Boar's Head sales policies. According to one lawsuit, the company dictates how distributors paint the delivery trucks, how they handle and rotate merchandise and what branded apparel they wear. Purveyors were told to sign detailed sales policies, but they were given only lists of certain rules, not copies of the signed documents, according to three current and former employees. Every few years, the company would update distributors in person on policy changes and have them sign again.

In 2001, the company moved its headquarters to Sarasota, Fla., in an effort to bolster a successful, exclusive partnership with Publix, the Florida supermarket chain.

Top leadership moved, too. Mr. Brunckhorst moved to a house near the new company headquarters. Mr. Martin bought a house on the tip of Longboat Key, an island near Sarasota. Mr. Bischoff stayed in New York.

The business had grown to roughly \$1 billion in annual sales. The owners considered a new chapter. Mr. Brunckhorst started reaching out to investment bankers and lawyers with an eye to selling the company.

The intrafamily dynamics would quickly complicate a potential sale.

Family Feuding



Image



Information is tightly guarded in the company. One executive said it was “very, very privately held to the point where it’s very siloed.” Credit... John Taggart for The New York Times

Tensions had been brewing between Mr. Bischoff and his cousins over the years. Mr. Martin would later say in a deposition that Mr. Bischoff tried to undermine employees hired by him or his father. Things got so bad, Mr. Martin said, that he and Mr. Brunckhorst offered to pay Mr. Bischoff to stay home.

Mr. Bischoff eventually told Mr. Martin that he was frustrated that he still had a smaller stake in the company than his cousins. In early December 2005, about six months after the 100th anniversary party at the Waldorf, he declared war, suing the company, Mr. Martin and Mr. Brunckhorst.

The case was settled in 2008, with Mr. Bischoff getting a larger stake, equal to roughly 14 percent of the company. That stake entitled him to a huge payout. In a deposition in 2022, Mr. Bischoff was asked if he had received about \$225 million in cash payments from Boar's Head over the previous 14 years. He didn't contest the figure. "I don't know exactly, but I have collected a lot of money," he said. Based on that figure, the shareholders who owned the remaining 85 percent of the company would have received more than \$1 billion in payments in that time frame.

After the lawsuit, Mr. Bischoff no longer worked at the company. Mr. Martin, who was by that point the owner running the place, stopped talking to his cousin, and employees knew not to utter Mr. Bischoff's name around the office.

Mr. Brunckhorst had stepped down from day-to-day operations at the company in 2003, but "was as active as he always was" in the business, Mr. Martella said in a 2022 deposition. In that deposition, Mr. Martella, who served 20 years as the company's president, said Mr. Brunckhorst still decided how much Boar's Head would spend on capital improvements to update the plants and equipment as well as whether the company would pay distributions to the family.

Mr. Brunckhorst didn't go to headquarters often, but when he did he would arrive in a T-shirt, shorts and flip flops, according to three people who saw him, a striking contrast to his cousins, who typically sported blazers. Mr. Brunckhorst "didn't like talking over the phone," Mr. Martella said. "And he definitely didn't like email." When there were important matters to discuss, Mr. Martella would be summoned to Mr. Brunckhorst's house.

The tight rein on information extended down the ranks. In 2022, Craig Fair, who was senior director of finance at the time, called Boar's Head "very, very privately held to the point where it's very siloed." Employees on his finance team weren't allowed to see even basic information about Boar's Head sales or even the tonnage of meat the company shipped. "That's how ownership wanted it, and that's what we did," Mr. Fair said in a deposition, admitting the secrecy made his work difficult.

While the owners weren't always present at headquarters or at the plants, they were firmly in charge. "Frank and Bob were always directing the course of the company as far as what we should do and what we shouldn't do," Mr. Martella said in a deposition. "I suggested it. They approved it."

As Mr. Kourelakos, the chief financial officer, put it in his 2022 deposition: "The owners run the company."

A New Generation Arises



Image



After the listeria outbreak at the plant in Jarratt, Va., the company has said it would hire a food safety officer. Credit...Jeenah Moon for The New York Times

Bob Martin's son, Bob Jr., joined Boar's Head in the mid-2000s after working for a marketing agency in New York. As he moved into a leadership position, the younger Mr. Martin cut a far different figure from his charismatic father. Nervous about public speaking, Bob Jr. would often read from notes when he talked to the staff.

The elder Mr. Martin has long kept a private office in the penthouse of the company's headquarters in downtown Sarasota, where few gain admittance. Even Mr. Martella said in a deposition that in 10 years, he had entered the sanctuary only twice. Bob Martin Jr., by contrast, has an office on the floor with other executives.

Bob Jr. made his own mark. He championed packaged hummus, which the company started making in 2014 and has become a big seller. He became a shareholder. His father quietly transferred shares to his son, who, by 2016, held 15 percent of the company. This enraged Mr. Bischoff, who sued Bob Martin again, saying the transfers violated a shareholder agreement. (A Florida judge threw out the suit, but Mr. Bischoff is appealing the decision.)

By 2022, some senior executives said in depositions, Bob Martin Jr. had taken over his father's role as the elder Mr. Martin pulled back. But in a deposition that year, Bob Martin insisted that "we operate in a group." If there's an issue, "we'll speak together, Frank, myself, Bob, about damn near everything."

A nonfamily president runs the day-to-day operations of the company. Mr. Martella was known for checking on employees or even driving to their houses when they had difficulties. He flew frequently to the company's plants and had close relationships with the purveyors. He was replaced by Mr. Giraldo, who started at Boar's Head more than a decade ago after a career at Tropicana and other consumer products companies. Like the younger Mr. Martin, Mr. Giraldo was focused on marketing and innovation.

The listeria outbreak this summer forced the company to publicly address safety concerns. But there were signs of trouble at the Virginia plant for several years. In 2022, U.S. inspectors warned that conditions at the plant posed an "imminent threat" to public health. They pointed to extensive rust, deli meats exposed to wet ceilings, green mold and holes in the walls.

This September, Boar's Head said it would hire a food safety officer who would report to Boar's Head's president, though it never mentioned Mr. Giraldo's name. The company also announced the names of four food safety experts who would investigate problems at the company and come up with solutions.

The company released extensive biographies on each of these new safety members on its website. The names of Bob Martin, Bob Martin Jr. and Frank Brunckhorst were nowhere to be seen.

Shared with you by a Times subscriber



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

How Robbins Geller Turned A Google Win Into A \$350M Deal

By **Emma Cueto**

Law360 (October 16, 2024, 12:40 PM EDT) -- After six years of litigation against Google parent company Alphabet Inc., including a successful bid to revive the suit before the Ninth Circuit, class action firm Robbins Geller Rudman & Dowd LLP secured a \$350 million settlement for investors by not being deterred by setbacks.

Robbins Geller represented Rhode Island, which alleged its state pension system was negatively impacted by Google's failure to properly inform shareholders of a software glitch that potentially exposed private information of half a million Google Plus users, leading to a drop in the share price when the error was later reported on.

After the settlement, which included **\$66.5 million for the firm**, was finalized in September, attorneys Jason A. Forge and Michael Albert talked to Law360 Pulse about how they turned a dismissal into a record-setting outcome for their client.

"This was an unprecedented recovery, which wouldn't have been possible without our determined clients, the state of Rhode Island," Albert told Law360 Pulse.

Counsel for Alphabet declined to comment.

Forge and Albert said the firm identified a possible case against Alphabet through its usual practice of monitoring various portfolios for state and municipal clients for the impact of something that could be considered fraud. When the firm identifies a possible case, it alerts the client and carefully vets any possible claims, they said.

"We take a different approach than a lot of plaintiffs firms," Forge said. "We don't throw everything at the wall and see what sticks. ... Our objective is to identify a case that's winnable at trial."

Part of ensuring a case is winnable, Forge said, is ensuring that the firm has a coherent story it can present to the jury. In this case, he said, the team coalesced around the idea that the executives at Google, including CEO Sundar Pichai, were savvy people who chose to wait to reveal an issue until they had a coherent strategy for how to handle it and make the disclosure "from a place of strength, rather than weakness."

From one perspective, Forge allowed, this may have even been the right decision: The company's public relations strategy certainly seems to have paid off, he said.

"It's fraudulent, but it wasn't dumb," Forge said. "It's inconsistent with their mantra ... and with transparency. But it's very shrewd."

However, there were challenges to the case, including the fact that the news of the glitch impacted not only Google's share price, but reverberated through the tech industry, affecting other companies as well, Forge said.

Early on in the suit, however, the team faced a major hurdle in February 2020 when U.S. District Judge Jeffrey S. White in the Northern District of California **dismissed the case**. The judge's nine-page order said the plaintiffs hadn't demonstrated that Alphabet was required to disclose a bug that it had already fixed or that the bug was "material to Alphabet's overall business or that it materially

affected its earnings."

Forge said that he saw the order as "reflexive" rather than the judge's really grappling with the actual complaint the team put forward.

"The court is used to so many plaintiffs lawyers throwing everything at the wall," he said. "It seemed like a reflex to dismiss the whole thing, have us amend the complaint and try again."

Because the team had already refined its arguments and put forward a streamlined complaint, Forge said, they decided the only thing to do was appeal.

"I've never seen an order I was more confident was wrong," he said. "I was excited to go to the Ninth Circuit; I was anxious to get before three judges on this record."

That confidence would ultimately be vindicated on appeal. In **June 2021**, the Ninth Circuit found that two of the 12 statements the team identified in Alphabet's disclosures "omitted material facts necessary to make the statements not misleading."

The judges also rejected the idea that the company had no obligation to disclose the bug to investors simply because it had been fixed.

"Given that Google's business model is based on trust, the material implications of a bug that improperly exposed user data for three years were not eliminated merely by plugging the hole in Google+'s security," the decision said.

The team was "thrilled," Forge said.

"It takes a toll, the injustice of these situations," Forge said. "In a situation like this, you put time and effort into doing it the right way, only to have it swept away in a cavalier and unfair manner, and then it takes a year to be vindicated. ... It was a tremendous relief."

Upon returning to the district court, however, the team faced new hurdles in the form of a company determined to resist discovery and an overruled judge who Forge said did not provide "a warm and hospitable environment."

The court adopted Alphabet's suggested timeline for class certification, Forge said, and applied the "apex doctrine" with regard to depositions of top Alphabet executives named in the suit, a legal theory meant to shield executives and others in positions of power.

Forge described the idea as "a caste litigation system."

"It's an automatic protective order to a powerful person," he said, adding that he found it not only unfair but offensive that it implied some people were too important to be troubled by the normal demands of the legal system.

Those challenges weren't what prompted the team to settle, Forge said, but the parties were able to reach a deal after the case was reassigned to a new judge, U.S. District Judge Trina L. Thompson.

"Our response to adversity is what convinced them that we were not going away," Forge said. "We were constantly pivoting."

The case **ultimately settled for \$350 million**. Judge Thompson in September approved Robbins Geller's share as \$66.5 million, writing that "class counsel represented their clients with skill and diligence and obtained an excellent result for the class, taking into account the possible outcomes and risks of proceeding [to] trial."

It was a settlement that the judge noted was the largest privacy and cybersecurity-related securities class action settlement seen in the Northern District of California.

Forge said that despite believing in the merits of the case if taken to trial, the team was proud of the result: "It was a huge accomplishment."



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

Morgan Stanley, BofA Sued Over Cash Sweep Programs

By **Sydney Price**

Law360 (October 15, 2024, 6:02 PM EDT) -- Minnesota-based financial services company Safron Capital Corp. launched a pair of proposed class actions against Morgan Stanley and Bank of America in New York alleging the firms used their so-called cash sweep programs "to generate massive revenue for themselves at the expense of their customers."

Safron Capital alleged in the lawsuits Friday that Morgan Stanley and Bank of America subsidiary Merrill Lynch violated their fiduciary duties under federal law by using their sweep programs to enrich themselves at the expense of customers who were paid unreasonably low interest rates.

Under the programs, according to the suits, the banks swept customers' cash deposits into separate accounts at affiliate banks. Safron Capital, which claims to hold accounts at both banks, said the sweep programs' interest rates are "far below" the Federal Reserve's benchmark federal funds rates, currently at 4.75% to 5%.

Other brokerages, like Webull and Vanguard swept cash to unaffiliated banks and had set more reasonable rates of 4.25% and 4.15%, respectively, according to the suit.

Safron Capital noted that Morgan Stanley and Bank of America acknowledge in their agreements with customers that they act as their customers' agents.

Both banks owed a duty of care to their customers pursuant to Regulation Best Interest, a U.S. Securities and Exchange Commission rule requiring them to act in their retail customers' best interests and prohibiting them from placing their own interests ahead of their retail customers' interests, the suit claims.

Safron Capital also alleges that the banks violated the Investment Advisers Act of 1940 and the Racketeer Influenced and Corrupt Organizations Act.

The suit against Morgan Stanley notes that the bank is also facing regulatory scrutiny for the cash sweep programs. In August, Morgan Stanley told investors that it is **fielding enforcement inquiries** from the SEC about the programs related to potential violations of the Investment Advisers Act.

Other financial institutions including Wells Fargo, JPMorgan Chase & Co., Ameriprise and LPL Financial have recently been hit with **suits from customers** alleging that their respective **cash sweep programs** were unfair and **unjustly enriched the institutions**.

Earlier this month, a New York federal judge **combined two proposed class actions** accusing JPMorgan Chase of underpaying interest on customers' cash sweep accounts.

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

Safron Capital is represented by Stephen R. Astley, Andrew T. Rees and Rene A. Gonzalez of Robbins Geller Rudman & Dowd LLP.

Counsel information for Morgan Stanley and Bank of America was not immediately available on Tuesday.

The cases are Safron Capital Corp v. Morgan Stanley et al., case number 1:24-cv-07750, and Safron Capital Corp v. Bank of America Corp. et al., case number 1:24-cv-07743, both in the U.S. District Court for the Southern District of New York.

--Additional reporting by Jon Hill. Editing by Jay Jackson Jr.

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

Aurora Cannabis Gets First Nod For \$8M Investor Suit Deal

By **Ryan Harroff**

Law360 (October 15, 2024, 5:50 PM EDT) -- Aurora Cannabis Inc.'s \$8.05 million settlement with a proposed class of investors who accused it of orchestrating a \$21.7 million "round-trip sale" to keep its stock prices high got a U.S. magistrate judge's initial sign-off along with an order pausing the parties' dispute while the deal is reviewed.

U.S. Magistrate Judge James B. Clark III of the District of New Jersey gave preliminary approval Thursday to the \$8.05 million agreement that the investors presented to the court in June. Both parties negotiated the deal in good faith and at an arm's length, Judge Clark's order states, adding that the deal does not appear to have any undue bias toward lead plaintiffs Doug Daulton, Francisco Quintana, Donald Parrish and Quang Ma.

According to Judge Clark's order, the deal also puts forward relief for the proposed class members and eliminates the risks involved with further litigation. In the terms of the settlement — which were included as an exhibit to the investors' June notice — the proposed class stated that the deal "is a very good one under the circumstances."

The suit began in 2019 and has had multiple **amended complaints** since, all of which accuse Aurora Cannabis of running a sham, "round-trip" stock sale operation with another company it owned a financial stake in as a method to artificially meet its positive projections for its own EBITDA projections, or earnings before interest, taxes, depreciation and amortization.

Of the \$8.05 million settlement fund, up to 25% will go to attorney fees, the deal states.

The investors are represented by Samuel H. Rudman, Alan I. Ellman and Magdalene Economou of Robbins Geller Rudman & Dowd LLP and Steve W. Berman, Shayne C. Stevenson, Reed R. Kathrein and Lucas Gilmore of Hagens Berman Sobol Shapiro LLP.

Aurora Cannabis is represented by Kevin H. Marino and John D. Tortorella of Marino Tortorella & Boyle PC and Stephen L. Ascher, Andrew J. Lichtman and Howard S. Suskin of Jenner & Block LLP.

The case is *Wilson v. Aurora Cannabis Inc. et al.*, case number 2:19-cv-20588, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Mike Curley. Editing by Emily Kokoll.

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

Motley Rice May Avoid DQ In Boston Opioid Case, Judge Hints

By Julie Manganis

Law360 (October 15, 2024, 7:21 PM EDT) -- A Massachusetts federal judge on Tuesday appeared skeptical of a bid by pharmacy benefit manager OptumRX to disqualify Motley Rice LLC from representing the city of Boston in a lawsuit over the company's alleged role in the opioid crisis.

Optum has argued that because cities like Chicago, Honolulu and Washington effectively deputized Motley Rice to conduct "sweeping" investigations, the law firm could "improperly" use information it gained during that process to its advantage in the Boston litigation — but U.S. District Judge Patti Saris seemed unconvinced.

"I just don't see it," Judge Saris told Matthew P. McGuire of Alston & Bird LLP, who represents OptumRX and other entities in Boston's lawsuit. The suit also names Express Scripts Inc. and several of its related companies.

Judge Saris pointed to the repository of documents generated through similar multidistrict litigation being overseen by a federal judge in Ohio's northern district who in March **rejected** Optum's arguments to remove Motley Rice from the case on similar grounds.

"As a practical matter, all the stuff is available through the MDL," Judge Saris told McGuire. "It just feels like much ado about nothing since any new attorney would have access to the same documents."

McGuire said the situation in Boston's case, which was filed after the Joint Panel on Multidistrict Litigation capped the Ohio MDL, is different.

He cited the Massachusetts Rules of Professional Conduct prohibition on attorneys using information gained while working for the government in their representation of a private client. McGuire also said that in addition to documents, the firm gained potentially valuable insights into the case.

McGuire said Optum is appealing Northern Ohio District Judge Dan Aaron Polster's denial.

Motley Rice's Fred Baker urged Judge Saris to adopt Judge Polster's position.

"These documents are in the MDL repository," Baker told the judge. Both counsel for his firm and the city of Boston have signed off on protective orders and confidentiality agreements.

"You're right, no harm, no foul," Baker told the judge.

McGuire suggested, however, that even if no harm ever occurred, the appearance of potential harm should be enough to trigger disqualification.

The judge also heard arguments on a joint motion by Optum and Express Scripts to dismiss the complaint as time-barred. The complaint was **originally filed** in January in Suffolk County Superior Court and removed in March to the federal court.

Counsel for Express Scripts Inc. Jonathan Cooper of Quinn Emanuel Urquhart & Sullivan LLP told the court that the applicable statutes of limitations — three years for the city's public nuisance claim and four years for its Racketeer Influenced and Corrupt Organizations Act claims — had already run by

the time it sued.

"The facts here are unassailable that the city knew or should have known of its claims well before January 2020," Cooper told the judge.

"The question is did they know about the role that the PBMs played," said Judge Saris.

Cooper said the volume of complaints against PBMs starting in 2018 would have put the city on notice of their alleged role.

Not necessarily, countered Motley Rice's Mimi Liu on behalf of the city.

Boston was not part of the MDL, Liu told the judge. "The government is not expected to be on notice of every single lawsuit. The fact that Motley Rice was counsel to the MDL does not necessarily mean they knew."

"You're with Motley Rice," Judge Saris told Liu. "It's sort of like, can you have it both ways? You were privy to all those documents related to the PBMs."

Liu said many of those documents were not produced, however, until 2023 — when there was a "great expansion" of the number of complaints filed.

After hearing arguments on a third motion disputing personal jurisdiction of UnitedHealth and some of the affiliated Optum and Express Scripts entities, Judge Saris told the parties, "Don't expect a decision anytime soon. There's a lot here."

OptumRX and UnitedHealth are represented by Brian D. Boone, Reagan Drake, Matthew Hooker and Matthew P. McGuire of Alston & Bird LLP and by Zachary R. Hafer and Dane R. Voris of Cooley LLP.

The Express Scripts Inc. entities, Medco Health Solutions and ESI are represented by Patrick D. Curran, Alexander del Nido, Michael Lyle, Jonathan G. Cooper and Christopher G. Michel of Quinn Emanuel Urquhart & Sullivan LLP.

The city of Boston is represented by Elizabeth Smith, Vincent Greene, Mimi Liu and Fred Baker of Motley Rice LLP, Christopher C. Naumes and Robert T. Naumes Sr. of Naumes Law Group LLC, and its own Adam Cederbaum, Caesar P. Cardozo and Batool Raza.

The case is City of Boston et al. v. Express Scripts Inc. et al., case number 1:24-cv-10525, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Emily Field and Mike Curley. Editing by Linda Voorhis.

Meta Limits But Can't Shake Social Media Addiction MDL

By Allison Grande

Law360 (October 15, 2024, 11:02 PM EDT) -- A California federal judge on Tuesday refused to ax sprawling multidistrict litigation accusing Meta Platforms Inc. and other social media giants of designing their platforms to addict children, finding that a broad tech liability shield required claims pressed by dozens of state attorneys general to be narrowed but not tossed.



Meta Platforms Inc. must face unfairness, deception, fraudulent concealment and misrepresentation allegations that personal injury plaintiffs are pressing against other social media companies. (Photo by Jakub Porzycki/NurPhoto via AP)

In a mixed 102-page ruling, U.S. District Judge Yvonne Gonzalez Rogers largely denied a motion filed by Facebook and Instagram parent company Meta to dismiss consumer protection claims **brought separately by** a coalition of 34 state attorneys general and by Florida, in addition to similar unfairness, deception, fraudulent concealment and misrepresentation allegations being pressed by personal injury plaintiffs in the consolidated litigation against Meta, Snap Inc., TikTok Inc. and Google-owned YouTube LLC.

When it came to the attorneys general's claims, Judge Rogers found to be legally "cognizable" their allegations that Meta and the other platforms had violated their state consumer protection laws that bar unfair and deceptive practices by designing and deploying platform features that they knew were harmful to underage users and then hiding this knowledge from the public.

Specifically, Judge Rogers concluded that "Meta's alleged yearslong public campaign of deception as to the

risks of addiction and mental harms to minors from platform use fits readily within these states' deceptive acts and practices framework" and that the company's "design, development, and deployment of certain product features plausibly constitutes unfair or unconscionable practices under all at-issue federal and state standards."

However, the judge also found that the broad immunity shield afforded to tech giants under Section 230 of the Communications Decency Act "provides a fairly significant limitation on these claims" by "insulat[ing] the design and deployment of most features alleged to be unfair and unconscionable."

Section 230, which protects online service providers from being held liable for content posted by users and other third parties, also "to the same extent" shields the tech companies from the private plaintiffs' consumer protection, concealment and misrepresentation theories, according to Judge Rogers.

However, the judge noted that she was not ready at this juncture in the litigation to dismiss "theories of liability predicated on a failure-to-warn of known risks of addiction attendant to any platform features or as to platform construction in general," leading to the conclusion that both the states' and consumers' claims could proceed for the most part but should be limited in scope.

Lexi Hazam of Lieff Cabraser Heimann & Bernstein LLP and Previn Warren of Motley Rice LLC, who have been appointed by the court to serve as lead plaintiffs' counsel in the MDL, called Tuesday's ruling "a significant victory for young people nationwide who have been negatively impacted by addictive and harmful social media platforms."

"The ruling from the court confirms that the Defendants must face our claims that they failed to warn of significant risks to users' safety and mental health, and that they engaged in deceptive marketing and business tactics," the attorneys said in a joint statement. "Additionally, our claims against Meta related to their concealment of the health and safety risks of their products can also move forward."

The lead counsel added that they were "grateful" to have the support of the attorneys general coalition "that has united to address a root cause of the mental health crisis impacting our youth and standing up against social media companies' deliberate, profit-driven design choices."

"As we move forward with the litigation on behalf of the hundreds of families whose children have been harmed, our goal is to force social media companies to institute real changes to protect our young people," the attorneys added.

Washington Attorney General Bob Ferguson echoed these sentiments, saying in a statement Tuesday that the ruling "brings us one step closer to accountability."

"Meta can't get off the hook that easily," the attorney general said. "Meta and its top executives disregarded their own research and publicly downplayed the risks Facebook and Instagram posed to its most vulnerable users. I am committed to protecting the mental health of Washington youth."

Representatives for other members of the state coalition — which includes California, Connecticut, Arizona, Colorado, Pennsylvania, New York, New Jersey and Georgia — as well as the Florida attorney general and the social media platforms couldn't be reached for comment Tuesday.

The MDL consists of hundreds of actions brought by personal injury plaintiffs, school districts and local government entities, and state attorneys general over the allegedly addictive designs of social media. The litigants generally allege that Meta's Facebook and Instagram, Google's YouTube, ByteDance's TikTok and Snapchat designed their platforms to foster compulsive use by minors, resulting in a variety of harms to children, local governments and the public health.

Given the broad scope of the dispute, Judge Rogers has elected to phase motion practice into multiple tracks based on the claim and claimant. Meta's current motion to dismiss, which came before Judge Rogers at an **April hearing**, centers on the claims rooted in notions of unfair practices, consumer protection, misrepresentation and concealment that have been brought by the multistate coalition, Florida's attorney general and the personal injury plaintiffs.

While finding these claims to be cognizable, Judge Rogers pointed to a prior ruling in which she had found of the five of the eight challenged design features being deployed by the platforms — including infinite scroll and autoplay features, ephemeral content features and the quantification and display of "likes" — to be protected under Section 230.

While the state attorneys general continued to argue that the design, development, and deployment of each feature constitutes an unfair or unconscionable act or practice, Judge Rogers found that the previous reasoning still applied, meaning that the states' allegations that target those platform features couldn't move forward.

However, the judge allowed these consumer protection claims to move forward to the extent that they related to the other three product design features — appearance altering filters; platform features that hindered time restrictions; and Instagram's "multiple accounts" function — and that they are premised on a "failure-to-warn" theory.

"This Court must determine ultimately, 'at root,' whether the States' failure-to-warn theory seeks to treat Meta as a publisher of third-party content," Judge Rogers held. "At a minimum, and consistent with the Court's conduct-specific approach, alleged failures to warn about known risks of harms attendant to platform features that do not implicate Section 230 as described under the unfair and unconscionable acts prong of the States' consumer-protection claims survive."

Further, the judge noted that "among all the litigation against social media companies proceeding in parallel to this MDL, not one court has yet to hold that Section 230 bars such failure-to-warn theories in general."

The states were also permitted to move forward with their claims that Meta violated the federal Children's Online Privacy Protection Act by unlawfully collecting data from children under 13 without parental consent. While Meta had argued it wasn't covered by the law because its platforms aren't "directed to children," Judge Rogers held that Meta's concession for the purposes of the current motion that the states have adequately alleged that the company had actual knowledge that kids under 13 were using its platforms negated its contention.

As for the private plaintiffs' claims, Judge Rogers ruled that her reasoning with respect to the states' claims applied to the plaintiffs' consumer-protection claim as well, although the judge did agree with Meta that the plaintiffs are barred from imposing liability on its affirmative statements under the laws of Arizona, California, Georgia, Indiana, Iowa, Nevada, North Carolina, Pennsylvania, South Dakota, Texas and Virginia.

Additionally, Judge Rogers held that the personal injury plaintiffs' consumer protection claims against fellow defendants YouTube, Snap, and TikTok should be dismissed to the extent that they are based on affirmative statements made by these platforms, but can proceed to the extent they're based on an omissions or failure-to-warn theory.

The personal injury plaintiffs are represented by Lexi Hazam of Lief Cabraser Heimann & Bernstein LLP and Previn Warren of Motley Rice LLC.

The Meta defendants are represented by Timothy C. Hester, Ashley Margaret Simonsen and Phyllis A. Jones of Covington & Burling LLP.

YouTube is represented by Brian M. Willen of Wilson Sonsini Goodrich & Rosati PC.

TikTok is represented by Geoffrey Drake and Bailey J. Langner of King & Spalding LLP.

The case is In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, case number 4:22-md-03047, in the U.S. District Court for the Northern District of California.

--Editing by Emily Kokoll.



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

Santander Settles Investors' Squeeze-Out Suit For \$162.5M

By **Hailey Konnath**

Law360 (October 15, 2024, 10:26 PM EDT) -- Santander Consumer USA Holdings Inc. has agreed to shell out \$162.5 million to put to rest stockholders' consolidated class action challenging a \$2.5 billion minority squeeze-out merger, according to a stipulation filed Monday in Delaware's Court of Chancery.

Santander and the shareholders said in their joint **filing** that the deal was reached in early September, just before a five-day trial was set to kick off. The shareholder class includes all former holders of SCUSA common stock as of the January 2022 closing of the acquisition underlying the dispute, and who received \$41.50 per share in cash in exchange for their shares.

In their suit, **investors accused** Santander's board of directors of setting up a tender offer that had no minimum requirement for approval and that was completed with less than 30% of stockholders tendering their shares in favor of the \$41.50 per-share price.

The shareholders claimed that since the deal closed, controlling shareholder Santander Holdings USA Inc. has received \$6.3 billion in distributions, more than half the implied value of the company in the squeeze-out. In the absence of the merger, \$1.23 billion would have gone to minority shareholders, they said.

The class was certified in January, with Bernstein Litowitz Berger & Grossmann LLP appointed class counsel.

A trial was scheduled for Sept. 16. However, on Sept. 7, a mediator recommended the \$162.5 million settlement figure to both parties. Two days later, they accepted it, according to Monday's stipulation.

Santander and its board continue to deny the allegations, according to Monday's stipulation.

"The settlement amount to be paid, and the other terms of the settlement ... were negotiated at arm's-length, in good faith, and reflect an agreement that was reached voluntarily after consultation with experienced legal counsel and with the assistance of the mediator," the parties said in the filing.

Attorney fees, litigation costs and incentive awards for lead plaintiffs Liverpool LP and Elliott International LP weren't specified in the filing.

The first investor suit was filed in early August 2022. It was consolidated with another action filed later that month.

In August, shareholders **urged the chancery** to sanction Santander's board for deleting messages before the merger. They argued that the company's exclusive reliance on the Signal messaging app — and its optional, thorough auto-delete functions — for top-level communications about the deal warranted an adverse inference regarding alleged spoliation of records sought for a stockholder challenge to the deal and price. The app's auto-delete features hampered the class's investigations during the litigation, they said at the time.

Santander and counsel for the shareholders didn't immediately respond to requests for comment late Tuesday.

The shareholders are represented by Gregory V. Varallo, Andrew E. Blumberg, Benjamin M. Potts, Margaret Sanborn-Lowing, Jeroen van Kwawegen and Edward Timlin of Bernstein Litowitz Berger & Grossmann LLP, Kimberly A. Evans, Lindsay K. Faccenda, Jason M. Leviton, Irene Lax and Robert Erikson of Block & Leviton LLP and J. Daniel Albert, Eric L. Zagar, Matthew C. Benedict and Lauren Lummus of Kessler Topaz Meltzer & Check LLP.

Santander Consumer USA Holdings Inc., its controller and parent are represented by Garrett B. Moritz, Adam D. Gold, Thomas C. Mandracchia and Dylan T. Mockensturm of Ross Aronstam & Moritz LLP and William Savitt, Sarah K. Eddy, Ryan A. McLeod, Iliria Camaj and Emma S. Stein of Wachtell Lipton Rosen & Katz.

The consolidated case is In re: Santander Consumer USA Holdings Inc. Stockholders Litigation, case number 2022-0689, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Linda Voorhis.

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

10th Circ. Won't Reboot Short Sellers' Suit Against Overstock

By **Katryna Perera**

Law360 (October 15, 2024, 9:42 PM EDT) -- In a decision dealing with matters of first impression, the Tenth Circuit on Tuesday declined to revive a hedge fund's proposed class action accusing Overstock.com Inc. and its leadership of manipulating the market when it said it would pay shareholders using cryptocurrency but abandoned the plan to force short sellers into a "squeeze."

A three-judge panel for the Tenth Circuit issued a published **opinion** affirming the district court's dismissal of the suit, agreeing with the lower court's finding that a fully disclosed corporate transaction cannot be "manipulative" under the Exchange Act.

According to the opinion, hedge fund plaintiff Mangrove Partners Master Fund Ltd. alleged that Overstock and its top brass manipulated the market by issuing an unregistered dividend — the cryptocurrency — to force Overstock's short sellers to cover their positions, drive the company's stock price to artificially high levels, and allow former Overstock CEO Patrick Byrne to sell his shares for a massive profit.

But the panel said Tuesday, in a matter of first impression for the Tenth Circuit, that Overstock had fully disclosed the dividend's terms, and there is no evidence to suggest that the defendants acted with intent to deceive shareholders.

The opinion states that Overstock disclosed the cryptocurrency's terms almost eight weeks before its record date, revealed the nature of the security it planned to issue, the conversion rate and the distribution date.

The company also disclosed that the dividend shares would be unregistered and, therefore, not available for resale for a period after distribution, according to the opinion.

"On these disclosures, we conclude that the market received notice that short sellers might buy Overstock stock to cover their positions before the dividend's record date, evinced by market analysts' descriptions of the dividend's potential impact," the opinion states. "Because buyers and sellers possessed sufficient information to form judgments about how Overstock's dividend would impact Overstock's share price, plaintiff fails to allege that Overstock 'deceiv[ed]' investors as to how other market participants have valued a security."

According to the opinion, Mangrove also **argued** that the dividend was manipulative because Overstock omitted material information from the disclosures, such as that they were "bluffing" about issuing the unregistered dividend and that they planned to register it with the U.S. Securities and Exchange Commission all along.

However, the panel said Tuesday that Mangrove ignores the "obvious alternative explanation" for the defendants' actions — that discussions with the SEC resulted in Overstock filing for registration.

The panel also rejected Mangrove's claims that Overstock and the individual defendants made several false and misleading statements to hide the true financial condition of Overstock's retail division, saying the suit fails to plausibly allege that shareholders relied on these misrepresentations in purchasing or selling their stock.

"Plaintiff admitted that Overstock's looming crypto dividend — not the retail statements or the

fairness of Overstock's market price — caused it to buy its Overstock stock," the opinion states. "In plaintiff's own words, 'Overstock forced a huge group of investors to purchase Overstock stock to cover their positions in very short order who would not have otherwise done so.'"

"Plaintiff cannot have it both ways," the opinion further states. "If plaintiff bought its shares to avoid breaching its lending contracts, it cannot also have bought its shares because of defendant's alleged misstatements."

The panel also affirmed the dismissal of the suit's control person liability claims and the insider trading allegations against Byrne.

In the suit, the hedge fund firm said the promised digital dividend was withdrawn before shareholders could receive it. However, the planned issuance drove Overstock's stock price upward and hit short sellers like Mangrove, who profit from bets that a company's stock price will fall.

Byrne, who is also a defendant in the case, resigned in 2019 after it was reported that he had had a yearslong affair with Russian spy Maria Butina.

Mangrove says Byrne told the company of his intent to sell all of his stock during the short squeeze period after he learned that the affair would be revealed and would result in his leaving the company.

Following Byrne's resignation, Overstock abandoned the promise of a digital dividend.

Mangrove claims that the decision to pull the offering proved that the promised digital dividend was merely a "ruse" to enrich Byrne.

Counsel for Byrne declined to comment and representatives for the other parties did not immediately respond to requests for comment on Tuesday.

Mangrove is represented by Michael B. Eisenkraft, Laura H. Posner, Daniel H. Silverman and Molly J. Bowen of Cohen Milstein Sellers & Toll PLLC and Keith M. Woodwell and Katherine E. Pepin of Clyde Snow & Sessions PC.

Overstock, Gregory Iverson and David Nielsen are represented by John C. Dwyer, Jessica Valenzuela Santamaria and Jeffrey D. Lombard of Cooley LLP and Erik A. Christiansen and Alan S. Mouritsen of Parsons Behle & Latimer.

Patrick Byrne is represented by Robert N. Driscoll and Alfred D. Carry of Dickinson Wright PLLC and Cory A. Talbot and Holly Stein Sollod of Holland & Hart LLP.

The case is *In re: Overstock Securities et al.*, case number 21-4126, in the U.S. Court of Appeals for the Tenth Circuit.

--Additional reporting by Jessica Corso. Editing by Jay Jackson Jr.



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 Urged To Toss Smart & Final \$1.1B Sale Challenge

By **Jeff Montgomery**

Law360 (October 15, 2024, 7:26 PM EDT) -- An attorney for funds of Ares Alternative Management Corp. told Delaware's chancellor on Tuesday a stockholder suit alleging breaches of fiduciary duty and corporate waste in a \$1.1 billion sale of Smart & Final Stores Inc. failed to show disabling conflicts among company principals or advisers.

T. Brad Davey of Potter Anderson & Corroon LLP, counsel to Ares, said during a dismissal argument before Chancellor Kathaleen St. J. McCormick that attorneys for stockholder Glenn R. Krevlin had taken a "blunderbuss" approach in the proposed class action seeking damages on the company's behalf.

The four-count suit named two Ares funds — which held a purportedly controlling 57.8% of the company's outstanding stock — as well as company officers, directors and financial advisers for breaches of fiduciary duty or aiding those alleged breaches.

"There's no domination. We have an admittedly independent board and admittedly independent special review committee," Davey said, noting 74 different parties were contacted during a nine-month marketing of the business.

"At bottom, I think that what the court is being asked to do is substitute the petitioner's business judgment or the court's business judgment for the judgment of a majority of independent directors of this company," Davey said.

The company sold for \$6.50 per share, or \$497.3 million, to an affiliate of former owner Apollo Global Management in April 2019. By mid-2021, both Smart & Final segments were sold again for a combined nearly \$1.6 billion at what was described as a combined premium of \$470 million.

Krevlin sued two affiliates of Ares, financial advisers Citigroup Global Markets Inc. and Jefferies LLC, as well as former Smart & Final CEO David G. Hirz, Vice President Leland P. Smith and Chief Financial Officer Richard N. Phegley.

The complaint asserted Smart & Final was successfully executing on a long-term strategy but still sold itself to Apollo at \$6.50 per share, despite receiving but rejecting a non-binding offer for \$7 per share, as Ares wanted to quickly exit its investment.

Davey argued Krevlin waited until the day before time ran out on his right to challenge before filing the suit — and initially claimed inaccurately that the Ares fund involved pushed the deal because of a "secret desire" to cash out and liquidated shortly after the merger.

"We're now on the third iteration of that complaint. That's why we're here now before you, five years after the closing," Davey told the chancellor.

Neil R. Lapinski of Gordon Fournaris & Mammarella PA, counsel to Krevlin, argued in part that the scope of a fairness analysis of the deal was "circumscribed" to avoid discussion of alternatives.

"These folks knew what the mandate" to a board special review committee was from the start, Lapinski said. "The reality was, it was immediately a sale, a cash-out merger." He said separately that the Ares funds involved were winding down and in "harvest mode," cashing out on gains from their

investment.

Lapinski said although the company outperformed its five-year plan, those pushing the sale had other motives, "so we'll ignore that in disclosures. and we'll push the deal through."

Ares and others named in the suit argued the merger was approved by both an independent board special committee and holders of more than 90% of the company's stock, entitling the deal to business judgment deference.

Daniel Mason of Paul Weiss Rifkind Wharton & Garrison LLP, counsel to special committee adviser Citigroup Global Markets Inc., argued his client was not an adviser to Ares and was not subject to claims for breach of fiduciary duty that were not lodged against Ares or board members.

"Citi did not provide a fairness opinion," Mason said. "The crux of the complaint as to the financial advisers is they never told the board about that abstract possibility that it could remain freestanding," an allegation Mason said was inconsistent with disclosures that made the point repeatedly.

Zachary L. Rowen of Latham & Watkins LLP, counsel to Hirz, said the suit failed to support a breach of fiduciary duty claim against his client, who was accused of driving the deal to Apollo to support his interest in continued employment and a change of control payment.

"There are no allegations that Mr. Hirz drove the process at all," Rowen said. He argued there were no allegations that Hirz was the sole person in charge or had decision-making authority, tilted the deal to Apollo or was beholden to Apollo.

Glenn Krevlin is represented by Neil R. Lapinski, Phillip A. Giordano, Christopher P. Clemson and Madeline Silverman of Gordon Fournaris & Mammarella PA.

Ares Corporate Opportunities Fund III LP and Ares Corporate Opportunities Fund IV LP are represented by T. Brad Davey, J. Matthew Belger, Matthew A. Golden and Charles R. Hallinan of Potter Anderson & Corroon LLP.

David G. Hirz is represented by Raymond J. DiCamillo, Matthew W. Murphy and Mari Boyle of Richards Layton & Finger PA and Michele D. Johnson and Zachary L. Rowen of Latham & Watkins LLP.

Citigroup Global Markets Inc. is represented by Daniel A. Mason, Bruce Birenboim and Susanna M. Buergel of Paul Weiss Rifkind Wharton & Garrison LLP.

Richard N. Phegley and Leland P. Smith are represented by David E. Ross and Roger S. Stronach of Ross Aronstam & Moritz LLP and Matthew Solum, Mike Rusie and David A. Klein of Kirkland & Ellis LLP.

Jefferies LLC is represented by Martin S. Lessner and Mary F. Dugan of Young Conaway Stargatt & Taylor LLP and Scott S. Balber and Michael P. Jones of Herbert Smith Freehills New York LLP.

The case is Krevlin v. Ares Corporate Opportunities Fund III LP et al., case number 2022-0336, in the Court of Chancery of the State of Delaware.

--Additional reporting by McCord Pagan. 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

'Extraordinary' Blue Cross Deal Includes \$2.8B Payout

By **Bryan Koenig**

Law360 (October 15, 2024, 6:54 PM EDT) -- The Blue Cross Blue Shield network will shell out \$2.8 billion and invest "hundreds of millions" more overhauling its claims systems to soften barriers between members, in a massive antitrust settlement disclosed Monday in Alabama federal court under which healthcare providers' counsel stands to reap up to \$700 million.

Billed as "the largest-ever payment in a healthcare antitrust case, and one of the largest in any antitrust case," the deal with a class of providers comes on top of **a \$2.67 billion settlement** that the Blue Cross Blue Shield Association and its members previously cut with network subscribers, resolving **allegations** that the defendants illegally carved up the country and blocked competition between BCBS members.

In seeking preliminary approval for the deal Monday, the healthcare providers said the agreement resolves 12 years of litigation and nine years of negotiation. And it "will include never-before-available changes to the Blues' system and extraordinary relief for the healthcare providers who treat the Blues' members, including monitoring, compliance, and reporting processes."

Those changes, which come with five years of compliance monitoring, include efforts to improve billing between BCBS members when providers are billing claims for patients who belong to a plan outside their local service area, via the "BlueCard Program," according to the brief.

"For decades, providers have complained that BlueCard is a non-transparent program that causes additional costs, inefficiencies, and frustration. The settlement agreement significantly improves how providers will be able to deal with the Blues, bringing more transparency, efficiency, and Blue plan accountability," the providers said. "This relief is not something the Blues would have done on their own; the provider plaintiffs obtained this relief through years of litigation and negotiation, and the Blues estimate that implementing it will cost them hundreds of millions of dollars."

The BlueCard "transformation," according to the brief, will include the development "of a system-wide, cloud-based architecture" to facilitate claims transmissions. BlueCard claims will now be subjected to "a timeliness commitment for payment" where late payments incur interest charges, among other changes that also include new national leadership and real-time messaging to facilitate handling of issues.

"Improving the BlueCard program is not the only benefit the settlement agreement provides. Changes to rules governing contracts between providers and the Blues will allow providers' contiguous area contracts to cover more Blue plan members, and certain hospitals will be eligible to contract with more Blue plans than before," the providers said.

According to the motion for preliminary approval, the deal covers all U.S. healthcare providers who've provided healthcare, equipment or supplies to patients covered by plans administered by a Blue network member between July 2008 and this month.

The Blue Cross association acknowledged the deal and its resolution of "a long-running legal challenge to the Blue Cross Blue Shield Association license agreements and related rules" in a brief statement.

"We deny the allegations made in the lawsuit. However, to reach a settlement and put years of litigation behind us, we have agreed to make some operational changes and a monetary payment to the provider class involved in the case," a BCBSA spokesperson said. "Our members and health care

provider partners can rest assured that Blue Cross and Blue Shield companies continue to be strong and ready to deliver exceptional services."

The underlying multidistrict litigation dates to 2012, when plaintiffs accused the Blue Cross Blue Shield Association and its member plans of agreeing to carve up the country into exclusive geographic service areas using a series of trademark licensing agreements and other arrangements.

Multiple law firms are set to reap benefits of the new settlement that earmarks up to 25% of the pot, or \$700 million, for class counsel, in addition to "reimbursement of expenses and costs reasonably and actually incurred in connection with prosecuting the provider actions." According to the brief, the agreement "provides for a partial award of \$75 million to be paid from the escrow account to settlement class counsel no later than 45 days after entry of the final judgment."

Another \$100 million is earmarked for the notice and administration fund.

The work and costs getting to this point, the providers said, have "been astronomical," including "the better part of \$100 million" spent collecting and analyzing the data to "establish damages just for Alabama hospitals."

Co-lead counsel from Whatley Kallas LLP hailed the "monumental settlement" in a statement.

"In addition to the substantial damages fund, the settlement outlines crucial changes in the business relationship between Blue Cross Blue Shield Association member plans — all 33 independent Blues — that will transform the BlueCard Program," the firm said.

"The settlement also affects how the Blues process claims, communicate with, and make payments to healthcare providers," it continued. "The new transformation parameters outlined in the settlement help alleviate and address resource-draining administrative burdens and inefficiencies currently experienced by providers."

The providers are represented by Whatley Kallas LLP, Dominick Feld Hyde PC, Hayes Hunter PC, Wood Law Firm LLC, Wiggins Childs Pantazis Fisher Goldfarb, Podhurst Orseck PA, Reich & Binstock LLP, U.W. Clemon LLC, Eyster Key Tubb Roth Middleton & Adams LLP, White Arnold & Dowd PC, The Law Offices of David A. Balto, Bonnett Fairbourn Friedman & Balint PC, Bunch & James, Axelrod LLP, The Frankowski Firm LLC, Beasley Allen Crow Methvin Portis & Miles PC, the Law Office Of John C. Davis, Glast Phillips & Murray PC, Gray & White, Michael E. Gurley Jr., the Law Office of Stephen M. Hansen, Jinks Crow PC, Kozyak Tropin & Throckmorton PA, Penn & Seaborn LLC, The Pittman Firm PA, Strom Law Firm LLC, Shelby Roden LLC, Horn Aylward & Bandy LLC, Whitfield Bryson & Mason LLP, Cusimano Roberts & Mills LLC, Bailey Glasser LLP, Wojtalewicz Law Firm Ltd., Sears & Swanson PC, Archie Lamb & Associates LLC, Dillon & Findley PC, Lundberg Law PLC, Heidman Law Firm PLLC and Simons & Associates Law PA.

The defendants are represented by Hogan Lovells, Kirkland & Ellis LLP, White & Case LLP, Wallace Jordan Ratliff & Brandt LLC, Balch & Bingham LLP, Maynard Nexsen PC, Hill Hill Carter Franco Cole & Black PC, Nelson Mullins Riley & Scarborough LLP, Kilpatrick Townsend & Stockton LLP, Wallace Ellis Fowler Head & Justice, Shearman & Sterling LLP, Armbrecht Jackson LLP, Redgrave LLP, Allen Overy Shearman Sterling LLP, Bodman PLC, Shamoun & Norman LLP, Campbell Partners LLC, Axinn Veltrop & Harkrider LLP, Reichard & Escalera LLC, Richardson Clement PC, Adams and Reese LLP, Brunini Grantham Grower & Hewes PLLC, Phillips Lytle LLP, Baker Donelson Bearman Caldwell & Berkowitz PC, Lightfoot Franklin & White LLC, Foley & Lardner LLP, Spotswood Sansom & Sansbury LLC, Cravath Swaine & Moore LLP, Riley & Jackson PC and Crowell & Moring LLP.

The case is In re: Blue Cross Blue Shield Antitrust Litigation, case number 2:13-cv-20000, in the U.S. District Court for the Northern District of Alabama.

--Additional reporting by Matthew Perlman and Nadia Dreid. Editing by Kelly Duncan.



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 Seek Court's OK On \$350M Norfolk Southern Spill Deal

By **Linda Chiem**

Law360 (October 15, 2024, 7:47 PM EDT) -- The federal government has asked an Ohio federal judge to approve a nearly \$350 million settlement to close out the U.S. Environmental Protection Agency's legal claims against Norfolk Southern over the fiery February 2023 train derailment and toxic chemical spill in East Palestine.

The government said in a Thursday **motion** to U.S. District Judge John R. Adams that its consent decree with Norfolk Southern Railway Co. and parent company Norfolk Southern Corp. provides for comprehensive environmental cleanup, long-term medical monitoring, and rail safety enhancements, among other immediate relief to affected communities. The settlement, **announced in May**, would close out the federal government's claims that Norfolk Southern violated the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act.

The federal government said it received more than 120 public comments on the consent decree from residents, businesses, nonprofits and governmental entities — many of which sought more health-related relief or extended benefits.

Ultimately, the nearly \$350 million settlement is fair and reasonable, and above and beyond the roughly \$800 million that Norfolk Southern has already spent on the cleanup to date, according to the federal government. The fiery Feb. 3, 2023, derailment on the border of Ohio and Pennsylvania released **large volumes of contaminants**, left tank cars ablaze and prompted a one-mile evacuation of nearly 2,000 residents.

"The United States empathizes with the concerns expressed about human health risks posed by releases associated with the derailment, the completeness of the cleanup, as well as on a variety of other issues addressed in this complex settlement, and the United States will keep such concerns front of mind while implementing the relief provided by the consent decree," the federal government said.

"But the points raised by the public comments do not alter the United States' judgment that the settlement embodied in the proposed consent decree is fair, reasonable, and consistent with the public interest and the purposes of the Clean Water Act and CERCLA," it added. "More importantly, those comments do not overcome the extent and quality of the cleanup already performed, the data-demonstrated absence of hazardous substances at levels that presently warrant further cleanup, and the propriety of monitoring measures — of both the environment and of those most directly affected by the derailment — that will watch for hidden or late-emerging issues for years to come."

Under the consent decree, Norfolk Southern will also pay \$15 million for an additional decade of environmental monitoring, pay a maximum \$15 million civil penalty, and adopt system-wide rail safety enhancements and emergency response procedures meant to reduce future derailment risks. That would include installing more monitoring devices along its tracks and establishing more rigorous alarm protocols to detect overheated wheel bearings.

The rail giant will also set up an estimated \$6 million waterways remediation plan, pay \$175,000 to restore natural resources and wetlands, and reimburse all taxpayer-funded federal response costs estimated at approximately \$100 million. Norfolk Southern will also set up a \$25 million healthcare program to provide medical monitoring and mental health services to the community and first responders over 20 years.

If approved, the deal would resolve the EPA and the U.S. Department of Justice's **March 2023 lawsuit** against Norfolk Southern. A separate lawsuit from the state of Ohio against the rail giant is still pending.

Norfolk Southern reached a separate **\$600 million settlement** with thousands of impacted residents, property owners, businesses and other plaintiffs in sprawling **consolidated litigation**. U.S. District Judge Benita Y. Pearson **signed off** on that deal last month.

Meanwhile, Norfolk Southern has asserted **third-party claims** against the owners of five tank cars that were transporting vinyl chloride — a toxic, colorless and flammable chemical used to make a variety of hard plastics — that were among the total 38 cars that derailed that day. In this case, Judge Adams in March **rejected** Norfolk Southern's **bid to offload** at least some of the environmental cleanup costs onto the tank car companies.

But in the consolidated plaintiffs' litigation before Judge Pearson, Norfolk Southern is **seeking to shift** responsibility for at least some of that \$600 million settlement, claiming negligent actions by OxyVinyls LP and GATX Corp. and its subsidiary General American Marks Co. proximately caused the derailment itself or the controversial controlled vent and burn of the vinyl chloride. The National Transportation Safety Board determined in June that the vent and burn was "**unnecessary**."

A spokesperson for Norfolk Southern said Tuesday that the company had no additional comment.

The federal government is represented by Todd Kim, Jeffrey A. Spector, Lauren Grady, Traci N. Cunningham and Lauren Matosziuk of the U.S. Department of Justice's Environment and Natural Resources Division and Rebecca C. Lutzko, Brendan F. Barker and Elizabeth A. Deucher of the U.S. Attorney's Office for the Northern District of Ohio.

Norfolk Southern is represented by Davina Pujari and Christopher A. Rheinheimer of WilmerHale, Edward O'Callaghan of Cahill Gordon & Reindel LLP and Louis L. McMahon of McMahon Degulis LLP.

The case is State of Ohio et al. v. Norfolk Southern Railway Co. et al., case number 4:23-cv-00517, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Juan-Carlos Rodriguez. Editing by Janice Carter Brown.



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

'Gold Standard' PFAS Test Rejected In Tampax Class Suit

By **Rachel Scharf**

Law360 (October 15, 2024, 8:45 PM EDT) -- A California federal judge on Tuesday rejected the reliability of a testing method described by a putative consumer class as the "gold standard" for detecting so-called forever chemicals, tossing for now claims that The Procter & Gamble Co. falsely advertised its "pure cotton" Tampax tampons.

U.S. District Judge Araceli Martínez-Olguín granted, with leave to amend, P&G's latest **motion to dismiss** the proposed class action alleging the company's tampons secretly contain cancer-causing per- and polyfluoroalkyl substances, also known as PFAS or forever chemicals.

The plaintiffs say they conducted total organic fluorine analysis, the "gold standard" of PFAS testing, to determine that forever chemicals are present in Tampax products. But Judge Martínez-Olguín held Tuesday that this test is far from definitive.

"The exhibits plaintiffs cite in their complaint call into question this very inference," the judge's **dismissal order** said.

According to Judge Martínez-Olguín, the scientific articles and papers cited by the proposed class actually say the total organic fluorine test can pick up on dozens of different chemicals. Therefore, she said, the plaintiffs' positive test results do not necessarily mean there are PFAS in P&G's tampons.

The judge added that even if total organic fluorine analysis was a reliable testing method, the complaint would still be insufficient because it fails to allege Tampax contains harmful levels of forever chemicals. She cited California's Health and Safety Code, which defines "regulated PFAS" as chemicals concentrated above 100 parts per million.

"The threshold set forth in the statute is well above the 30 parts per million that plaintiffs allege they detected in the tampon products through their independent testing," Judge Martínez-Olguín wrote.

The judge gave the proposed class three weeks to fix these issues in an amended complaint. Counsel for the parties did not immediately respond to requests for comment Tuesday.

This is the second time Judge Martínez-Olguín has dismissed the lawsuit with leave to amend. The case, filed in February 2023, was initially tossed as factually insufficient in January 2024 and re-pled a month later.

The judge is also overseeing **two similar putative class actions**, brought by the same attorneys, accusing Edgewell Personal Care Co. of hiding the presence of PFAS in O.B. Organic and Playtex Gentle Glide tampons. Both Edgewell cases have been stayed pending the resolution of the P&G suit.

The proposed class is represented by Rachel Soffin, Harper T. Segui, Erin J. Ruben and Thomas A. Pacheco of Milberg Coleman Bryson Phillips Grossman PLLC and Melissa S. Weiner, Michael H. Pearson and Ryan T. Gott of Pearson Warshaw LLP.

P&G is represented by Adam R. Fox and Scott A. Kane of Squire Patton Boggs LLP.

The case is Bounthon et al. v. The Procter & Gamble Co., case number 3:23-cv-00765, in the U.S.

District Court for the Northern District of California.

--Editing by Janice Carter Brown.

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