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Securities Law News
Oct. 29, 2024, 2:28 PM PDT

Moderna Board, Top Execs Sued Over Statements About RSV Vaccine

By Martina Barash

- **COURT:** D. Mass.
- **TRACK DOCKET:** No. 1:24-cv-12722

Bloomberg Law News 2024-10-30T10:02:58704372504-04:00

Moderna Board, Top Execs Sued Over Statements About RSV Vaccine

By Martina Barash 2024-10-29T17:28:49000-04:00

- **COURT:** D. Mass.
- **TRACK DOCKET:** No. 1:24-cv-12722

Moderna Inc. directors and officers are responsible for misleading statements about the effectiveness of the company's RSV vaccine candidate, an investor says.

The leaders breached their duties to the company, James Chislock says in a derivative complaint filed Monday in the US District Court for the District of Massachusetts.

The harm to the company includes being subjected to a proposed securities class action, paying for internal investigations, and overpaying by $166 million on a $3 billion share repurchase, Chislock says.

Chislock brings claims for breach of fiduciary duties, unjust enrichment, waste of corporate assets, gross mismanagement, abuse of control, securities fraud, and proxy misstatements. He seeks compensatory and punitive damages, a constructive trust, and internal governance reforms.

Moderna didn't immediately respond to an emailed request for comment on behalf of the company and the individual defendants.

The Rosen Law Firm PA represents Chislock.

The case is Chislock v. Bancel , D. Mass., No. 1:24-cv-12722, complaint 10/28/24 .

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

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Securities Law News
Oct. 29, 2024, 4:01 PM PDT

ImmunityBio Misled Investors About Cancer Drug, Shareholder Says

By Mike Vilensky

- **COURT:** S.D. Cal.
- **TRACK DOCKET:** No. 3:24-cv-02014 (Bloomberg Law subscription)

Bloomberg Law News 2024-10-30T10:02:01978038739-04:00

ImmunityBio Misled Investors About Cancer Drug, Shareholder Says

By Mike Vilensky 2024-10-29T19:01:46000-04:00

- **COURT:** S.D. Cal.
- **TRACK DOCKET:** No. 3:24-cv-02014 (Bloomberg Law subscription)

ImmunityBio Inc. officers were hit with a lawsuit Tuesday alleging the biotech company misled shareholders by overstating regulatory approval prospects for a cancer treatment it was developing.

Investor Gary Van Luven filed the shareholder derivative complaint in the US District Court for the Southern District of California against ImmunityBio, its founder Patrick Soon-Shiong, and other top brass at the company.

Between March 2021 and May 2023, company executives made bullish statements about the development of its Anktiva bladder cancer therapy and failed to disclose it was using deficient manufacturing facilities, the complaint says.

On May 11, 2023, the company revealed that the Food and Drug Administration said it couldn't approve ImnunityBio's license application for Anktiva, citing manufacturing facility problems, the complaint says. ImmunityBio's stock dropped by $3.43 per share, or 55.14% that day, the complaint says.

Van Luven brings claims of fiduciary breach, unjust enrichment, and violations of the Securities Exchange Act. He's seeking damages and reforms to the company's corporate governance.

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

Judge M. James Lorenz is assigned to the case.

Wolf Haldenstein Adler Freeman & Herz LLP and Kuehn Law PLLC represent Van Luven.

The case is Luven v. Soon-Shiong , S.D. Cal., No. 3:24-cv-02014, complaint filed 10/29/24 .

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https://x.com/AnnMLipton/status/1851657182959587400

Michal Barzuza
@mbarzuza

How Nevada Secretary of State website is marketing Nevada ?

"Why Nevada?

...Director Immunity from Lawsuits..
Although Nevada generally requires both intentional misconduct, fraud or a knowing violation of the law and a breach of a fiduciary duty to impose liability on a director, under Delaware and California law, a director may be held liable for a breach of a fiduciary duty absent intentional misconduct, fraud or a knowing violation of the law"
nvsilverflume.gov/documents/Corp...

8:53 AM · Oct 30, 2024 · **529** Views

1 1 6 1

@annmlipton@esq.social
@AnnMLipton

so what was your take on the argument?

9:07 AM · Oct 30, 2024 · **94** Views

3

Michal Barzuza @mbarzuza · 1h
The court was bothered with the potential uncertainty and litigation. Clearly in the current environment, they prefer to let it go. Yet, Delaware law if applied correctly should not apply BJR to reincorporation to Nevada.

1 12

Michal Barzuza @mbarzuza

The defendants referred to the secretary of state amicus in arguing that Nevada does not exculpate for liability for duty of loyalty that amounts to intentional misconduct, fraud or knowing violation of law.
Yet, the amicus also acknowledges that Nevada rejects entire fairness.
So if Nevada applies BJR to self dealing you don't need exculpation for that.
Second, Nevada courts interpreted intentional misconduct as a very narrow category that does not apply to self dealing.
Third, in Nevada there are no shareholder inspection rights . so how would you show bad intention with no inspection rights?
Finally, Nevada legislature, and legislative history clarifies again and again that the exculpation statute is intended to protect from breaches of duty of loyalty

9:16 AM · Oct 30, 2024 · **45** Views

2

Michal Barzuza @mbarzuza · 1h

The defendants kept pressing the clear day argument. It is a weak argument and not consistent with the approach taken at QVC which took into account what the controller could have done after wards. I think the court was not convinced by this argument.

1 24

Securities Law Prof Blog

lawprofessors.typepad.com/securities/2024/10/new-securities-law-articles-in-print-2.html

Tuesday, October 29, 2024

New Securities Law Articles in Print

The following law review articles relating to securities regulation are now available in paper format:

Eric C. Chaffee, *Securities Regulation and Administrative Deference in the Roberts Court*, 47 Seattle U. L. Rev. 965 (2024).

Nick D'Addio, Comment, *Administrative Law Judges and the Erosion of the Administrative State: Why* Jarkesy *May Be the Straw That Break the Camel's Back*, 73 Cath. U. L. Rev. 273 (2024).

Jill E. Fisch, *Overseeing the Administrative State*, 47 Seattle U. L. Rev. 899 (2024).

Michaela Gines, Note, *Hostility against the Administrative State: What the New "Major Questions Doctrine" Means for SEC Climate Reform*, 57 UC Davis L. Rev. 3133 (2024).

Zachary J. Gubler, *How to Interpret the Securities Laws?*, 47 Seattle U. L. Rev. 863 (2024).

Eric Helland & George Vojta, *Legal Outcomes and Home-Court Advantage: Evidence from the Securities and Exchange Commission's Shift to Administrative Courts*, 66 J.L. & Econ. 797 (2023).

Jennifer Hill, Note, Jarkesy v. SEC*: Are Federal Courts Pushing the U.S. toward the next Financial Crisis?*, 51 Pepp. L. Rev. 381 (2024).

Paul G. Mahoney, *The SEC, the Supreme Court, and the Administrative State*, 47 Seattle U. L. Rev. 927 (2024).

Jocelyn Near, Comment, *A Look Back in Time: Analyzing the Success and Value of the 2014 Amendments to Rule 2a-7 and Reporting on Form N-CR in Light of the March 2020 Market Events*, 73 Cath. U. L. Rev. 297 (2024).

Elizabeth Pollman, *The Pioneers, Waves, and Random Walks of Securities Law in the Supreme Court*, 47 Seattle U. L. Rev. 883 (2024).

Joel Seligman, *On the Value of History: A Review of A.C. Pritchard & Robert B. Thompson's A History of Securities Law in the Supreme Court*, 47 Seattle U. L. Rev. 987 (2024).

Harwell Wells, *Three Stories: A Comment on Pritchard & Thompson's A History of Securities Law in the Supreme Court*, 47 Seattle U. L. Rev. 951 (2024).

Cherie Xinyi Zhang, Note, *When the Ant Gets Too Big: Understanding China's Financial Regulation through the Suspension of Ant Group's IPO*, 44 Nw. J. Int'l L. & Bus. 315 (2024).

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Securities Law News

Oct. 29, 2024, 8:11 AM PDT

Industry Groups Oppose Saba's Right to Sue, Back High Court Bid

By Ben Miller

- Private litigation imposes 'substantial burden,' Chamber says
- ICI, Sifma say activist suits limit closed-end fund availability

Bloomberg Law News 2024-10-30T10:00:35820444005-04:00

Industry Groups Oppose Saba's Right to Sue, Back High Court Bid

By Ben Miller 2024-10-29T11:11:13000-04:00

- Private litigation imposes 'substantial burden,' Chamber says
- ICI, Sifma say activist suits limit closed-end fund availability

Private litigation by activist investors like Saba Capital Management LP puts businesses and closed-end funds in the crosshairs, and the right to bring such lawsuits should be reviewed by the Supreme Court, industry groups said in amicus briefs.

The Chamber of Commerce, Investment Company Institute, and Sifma weighed in to support closed-end funds' high court bid to reverse a ruling in the US Court of Appeals for the Second Circuit, which upheld Saba's right to sue over "control share" resolutions that limit investor votes.

The justices haven't indicated whether they intend to grant the petition from FS Investments, Adams Funds, and Royce Investment Partners. The Second Circuit's recognition of a private right of action under the Investment Company Act has negative consequences for companies and a wide range of funds, industry groups argued in the briefs filed Monday.

Not only does the Second Circuit ruling create a circuit split, but it also violates Constitutional separation-of-powers principles and places a "substantial burden on the business community," the Chamber of Commerce said in its brief.

The private right of action recognized by the Second Circuit also poses a "back door threat" to the way all registered funds operate, according to ICI and Sifma.

"Saba's transparent agenda in asserting these claims is to further its closed-end fund 'arbitrage strategy,' seeking to dismantle funds to obtain short-term profits at the expense of other shareholders," ICI and Sifma said in their brief. "A flood of new litigation could risk contradictory interpretations and regulatory uncertainty, and would certainly impose massive litigation costs and distraction, all to the ultimate detriment of registered fund shareholders."

BlackRock Inc., Tortoise Captial Advisors LLC, and other fund sponsors named as defendants in Saba's underlying suit aren't among the petitioners seeking Supreme Court review of the Second Circuit ruling.

Susman Godfrey LLP represents Saba. Sidley Austin LLP, K&L Gates LLP and Skadden, Arps Slate, Meagher & Flom LLP represent the fund petitioners.

The case is FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd. , U.S., No. 24-345, 10/28/24 .

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Securities Law News
Oct. 29, 2024, 9:29 AM PDT

Advent's Funeral Chain Sale Yields Novel Ruling From Wary Judge

By Mike Leonard

- Investment firm relieved of pledge to backstop fraud claims
- Related criminal case can advance separately in Mexico

Bloomberg Law News 2024-10-30T10:01:10185950647-04:00

Advent's Funeral Chain Sale Yields Novel Ruling From Wary Judge

By Mike Leonard 2024-10-29T12:29:49000-04:00

- Investment firm relieved of pledge to backstop fraud claims
- Related criminal case can advance separately in Mexico

Advent International Corp. escaped a complex dispute over its sale of a funeral chain, but a judge issued a first-of-its-kind ruling ordering the private equity firm to face a related criminal case in Mexico.

The decision Tuesday appears to all but end litigation in Delaware's Chancery Court over the $225 million transaction handing Mexico's oldest funerary business, Grupo Gayosso SA de CV, to the El-Mann family, which controls a real estate empire. The presiding judge gave the investment firm a win when she said a family holding company violated its indemnification agreement with several Advent funds by filing fraud claims in multiple courts after pledging to sue only in Delaware.

Those breaches terminated the guarantee, leaving the holding company—Servicios Funerarios GG SA de CV—with few obvious avenues for recovering on its allegations of deal-related accounting fraud, Vice Chancellor Lori W. Will said. But she stopped short of blocking a case Servicios Funerarios brought against Advent under Mexico's private prosecution laws, saying in a novel ruling that an injunction against a foreign criminal action "would test equity's limits."

The "effort to flout bargained-for contractual protections by launching criminal proceedings over a merger gone bad is alarming," the judge said in a 46-page opinion. "But the proceedings are now in the hands of the Mexican criminal justice system."

She also declined to halt civil litigation in Mexico against Advent's affiliate there, saying it had waited too long to make the request—unlike Advent International, which sought an injunction "immediately" upon being dragged into that case. The decision's impact on a parallel lawsuit Servicios Funerarios filed in a federal court in Boston wasn't immediately clear. That case concerns fraud allegations involving the cost of caskets, vaults, and grave digging.

Will acknowledged in her ruling of first impression that there were good reasons to intervene and stop the Mexican prosecution. Most relevantly, the criminal case has "frustrated" the pledge to litigate only in Delaware that Advent bargained for, she said. But that's outweighed by the even better reasons for staying out of that part of the dispute, according to the judge.

For one thing, under Mexican law, Servicios Funerarios can only drop the case by issuing a private pardon "exonerating" Advent, a step that seems to go too far, Will said. She also cited "principles of international comity" and legal reciprocity between sovereign countries.

"Although I sympathize with the defendants facing prosecution," the "unusual and extreme relief Advent seeks would interfere with the Mexican government's prosecution of its own laws," the judge wrote.

She ordered the two sides to submit a joint court filing within 14 days outlining the case's remaining issues, if any.

Advent is represented by Morris Nichols Arsht & Tunnell LLP, Ropes & Gray LLP, and Quinn Emanuel Urquhart & Sullivan LLP. Servicios Funerarios is represented by Potter Anderson & Corroon LLP and Boies Schiller Flexner LLP.

The case is Advent Int'l Corp. v. Servicios Funerarios GG SA de CV , Del. Ch., No. 2023-0647, 10/29/24 .

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

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'Absurd Costs'?: Visa Faces Antitrust Class-Action Surge Following DOJ Complaint

law.com/nationallawjournal/2024/10/29/absurd-costs-visa-faces-antitrust-class-action-surge-following-doj-complaint

Sulaiman Abdur-Rahman

What You Need to Know

- Bathaee Dunne, Burns Charest, Cotchett, Pitre & McCarthy and Cohen Milstein Sellers & Toll have filed antitrust class actions against Visa Inc.
- This litigation surge follows a U.S. Department of Justice complaint accusing Visa of maintaining an unlawful debit network services monopoly.
- Arnold & Porter Kaye Scholer and Wilkinson Stekloff represent Visa in the DOJ antitrust case.

Plaintiffs' attorneys have filed multiple antitrust class actions against Visa Inc. following the Sept. 24 U.S. Department of Justice complaint alleging the global payments company maintains an unlawful monopoly in U.S. debit card network services markets.

At least four class actions filed in New York or California federal courts since Oct. 1 allege Visa has forced merchants and consumers to pay artificially inflated prices for debit card transactions. All of these lawsuits demand treble or triple damages and an injunction that would end Visa's alleged anticompetitive practices.

The litigation surge was surfaced by Law.com Radar.

Burns Charest sued Visa in U.S. District Court for the Southern District of New York on behalf of Yabla Inc. Oct. 22—the same date Bathaee Dunne filed a class action in the Northern District of California on behalf of TD Bank Visa debit card customer Richard Pantano.

"Visa prevents innovators and rivals from meaningfully competing with Visa, forcing merchants to remain in overpriced contracts and try to recoup those absurd costs from their customers through surcharges and higher prices," Cotchett, Pitre & McCarthy alleged in a complaint filed Oct. 21 on behalf of Nuts for Candy in the SDNY.

Cohen Milstein Sellers & Toll accused Visa of violating the Sherman Act in an antitrust complaint filed in the SDNY Oct. 1 on behalf of All Wrapped Up Signs and Graphix.

Similar to the DOJ complaint, all four class actions accuse Visa of using exclusionary and anticompetitive conduct without any legal justification.

CPM and Burns Charest in their complaints cite the following statement from U.S. Attorney General Merrick Garland alleging "Visa's unlawful conduct affects not just the price of one thing—but the price of nearly everything."

The Justice Department filed its complaint in the SDNY Sept. 24 seeking injunctions that would prohibit Visa from imposing fees on debit transactions routed over non-Visa networks and from imposing contractual limitations on potential competitors, among other restraints.

More than 60% of U.S. debit transactions run on Visa's debit network, and the San Francisco-based company charges more than $7 billion in related fees annually, according to the allegations in the DOJ and class action complaints.

When the Justice Department or Federal Trade Commission file antitrust complaints, it typically inspires the class action bar to consider bringing similar claims on behalf of plaintiffs seeking damages.

Wilkinson Stekloff and Arnold & Porter Kaye Scholer represent Visa in the DOJ antitrust case. Visa did not respond to a request for comment on this article.

Visa General Counsel Julie Rottenberg in a September statement called the DOJ's allegations "meritless."

This litigation surge was identified by Law.com Radar, which delivers artificial intelligence-enhanced case summaries and daily case reports from more than 2,200 state and federal courts. Click here to get started and be among the first to act on opportunities in your region, practice area or client sector.

Critical Mass With Law.com's Amanda Bronstad: Talc Bankruptcy Judge Sets Hearing on Vote Fight, Social Media Fails to Dismiss Schools' Addiction Lawsuits

law.com/2024/10/30/critical-mass-with-law-coms-amanda-bronstad-talc-bankruptcy-judge-sets-hearing-on-vote-fight-social-media-fails-to-dismiss-schools-addiction-lawsuits

Amanda Bronstad

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

This week: A federal judge allowed hundreds of school districts to sue **social media** for addicting students. A bankruptcy judge set a trial in three months that would decide whether **Johnson & Johnson** manipulated its vote to approve a $9 billion plan. Find out which firms filed the first lawsuits over the **McDonald's** E. coli outbreak.

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.

Lexi Hazam of Lieff Cabraser Heimann & Berstein. Courtesy photo

'We Are on A Path Towards Trial'

In a big win for lawyers suing social media sites, including **Instagram** and **TikTok**, a federal judge allowed claims brought by school districts to go forward. **U.S. District Judge Yvonne Gonzalez Rogers** ruled on Oct. 24 that negligence claims against **Meta Platforms**, which owns Instagram and **Facebook**, and the owners of TikTok, **Snapchat** and **YouTube** should not be dismissed.

Last year, the judge allowed some product liability claims relating to design defects by individual plaintiffs to move ahead. And, earlier this month, she green-lighted consumer claims brought by attorneys general in more than 30 states against Meta. As in those rulings, the judge found the school district claims that focused on certain features of the social media sites, such as the age verification process, parental controls and other protective limits, were not barred by the **Communications Decency Act's Section 230**, which immunizes tech companies from the actions of third parties, or the **First Amendment**.

Lead counsel in the social media addiction multidistrict litigation held a press conference on Tuesday to discuss the status of the cases. Co-lead Lexi Hazam (**Lieff Cabraser**) said she expected trials within a year's time, noting that:

"We are in the active discovery phase of the case where we're requesting documents from these defendants, deposing their witnesses, obtaining user data from them. That process is in full swing and we are on a path towards trial."

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

'Let's Find Out What Happened With The Votes'

Next week's presidential election isn't the only focus for lawyers in the talcum powder litigation: Many are now calling for a recount of votes for **Johnson & Johnson'**s $9 billion prepackaged bankruptcy plan.

Here's my report on **U.S. Bankruptcy Judge Christopher Lopez**'s decision this month to hear arguments about the vote as part of a trial to be scheduled for two weeks in late January and early February.

A quick recap: J&J announced its prepackaged bankruptcy plan on May 1, then solicited votes through July 26. Its subsidiary, **Red River Talc**, filed for Chapter 11 on Sept. 20 after what Johnson & Johnson insisted was 83% of about 93,500 talc claimants voted in favor of the plan.

However, a group called the **Coalition of Counsel for Justice for Talc Claimants** wants access to the sealed voting tabulation. The coalition has filed a flurry of motions accusing Johnson & Johnson of conducting a "rigged election" that is "tantamount to vote purchasing."

Those are "strong allegations," Lopez said at an Oct. 21 hearing.

In addition to the voting issue, Lopez intends to hear arguments on motions to dismiss filed by the coalition and the **U.S. Trustee**, and Johnson & Johnson's confirmation plan. He told lawyers, some of whom had argued against a hearing that combined everything at once:

"Why wouldn't we have one hearing where we can say both sides can bring people up? Let's find out what happened with the votes."

McDonald's quarter pounder meal.

Who Got the Work?

Houston attorney Ron Simon (**Ron Simon & Associates**) and Peter Flowers (**Meyers & Flowers**), in Chicago, filed the first two lawsuits over the **McDonald's** E. coli outbreak in **Cook County Circuit Court** in Illinois. McDonald's stopped selling its Quarter Pounder hamburgers last week after the slivered onions from a supplier were found to be contaminated. The first lawsuit, filed on Oct. 23, was brought by Eric Stelly, who was admitted to an emergency room in Colorado. The second, on Oct. 24, involved plaintiff Clarissa DeBock, who went to a hospital in Nebraska. On Monday, Ron Simon & Associates announced the firm had been retained by 33 victims, including the family of a 15-year-old suffering from kidney failure. The **U.S. Centers for Disease Control and Prevention** has confirmed 75 victims in 13 states, including 22 who were hospitalized.

Here's what else is happening:

Roundup Reversal? Monsanto filed a post-trial motion challenging a $78 million **Roundup** verdict last year in Philadelphia, citing the **U.S. Court of Appeals for the Third Circuit**'s Aug. 15 decision finding federal law preempted state claims that it failed to warn about the pesticide's alleged link to non-Hodgkin lymphoma. Another Roundup trial began this week in Philadelphia. Meanwhile, in another Roundup case where Monsanto cited the Third Circuit ruling, a judge in Massachusetts held on Monday that federal law preempted similar claims.

Mass Arbitration: The **U.S. Court of Appeals for the Ninth Circuit** on Monday found that **Live Nation**'s new mass arbitration claims were "unconscionable" under California law. The class action alleged anticompetitive ticket prices against Live Nation, which owns **Ticketmaster**. **U.S. District Judge George Wu** has denied Live Nation's motion to compel arbitration, which contained a "delegation clause" and batched five or more claims together as "bellwether cases," and the Ninth Circuit affirmed that ruling.

Formula Sanctions: A Missouri judge sanctioned James Hurst (**Kirkland & Ellis**) after he "overtly crossed the lines of the court's orders related to evidence and arguments before the jury" in a trial alleging infant formula caused a baby's **NEC**. Hurst, who represents **Abbott**, was banned from presenting evidence or closing arguments, which are expected Wednesday. **22nd Judicial Circuit Court Judge Michael Noble**, who issued the Oct. 24 order, handled a prior infant formula trial in which a jury hit Abbott with a $495 million verdict.

Thanks for reading Critical Mass! I'll be back next week.

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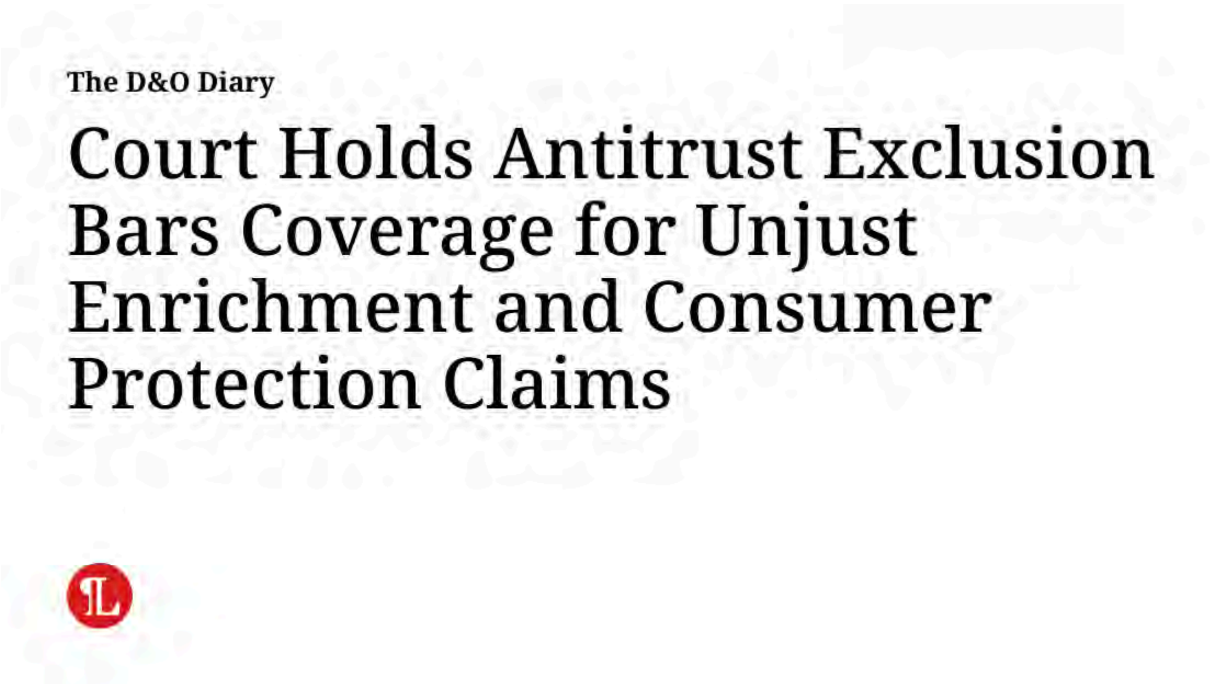
Latest

Court Holds Antitrust Exclusion Bars Coverage for Unjust Enrichment and Consumer Protection Claims

dandodiary.com/2024/10/articles/d-o-insurance/court-holds-antitrust-exclusion-bars-coverage-for-unjust-enrichment-and-consumer-protection-claims

October 29, 2024



By Kevin LaCroix on October 29, 2024
Posted in D & O Insurance

Many private company D&O insurance policies have a so-called antitrust exclusions that precludes coverage for claims alleging violations of the antitrust laws. However, these exclusions are written broadly and often seek to preclude a wide range of kinds of claims, beyond just claims alleging violations of the antitrust laws. A recent case from the Eastern District of California provides an illustration of the antitrust exclusion's coverage preclusive reach. The court, applying California law, held that the applicable policy's antitrust exclusion barred coverage for the unjust enrichment claim and consumer protection law violation claim filed as part of a larger antitrust lawsuit. The court's reasoning in concluding that the claims were precluded is interesting and provides some insight into the operation of the exclusion and its potential application to various kinds of claims.

The Court's August 22, 2024, opinion in the case can be found here. The Wiley law firm's October 14, 2024, post in its *Executive Summary* blog can be found here.

Background

Foster Poultry Farms is a chicken producer. It is one of several U.S. chicken producers named as defendants in the consolidated Broiler Chicken Antitrust Lawsuits. The plaintiffs in the antitrust lawsuit alleged four causes of action: violation of the Section 1 of the Sherman Act; violations of various state antitrust laws; violation of several state consumer protection and unfair competition laws; and unjust enrichment "by the receipt of unlawfully inflated prices and unlawful profits."

At the relevant time, Foster maintained a program of D&O insurance consisting of a layer of primary insurance and a layer of excess follow form insurance. Foster submitted the complaints in the antitrust litigation to its insurers. Both the primary insurer and the excess insurer denied coverage for the claim im reliance on the antitrust exclusion. Foster and the primary insurer later worked out a compromise in which the primary insurer agreed to pay a percentage of Foster's defense fees, up to an agreed-upon cap (the cap was less than the limits of liability of the primary policy).

The excess insurer filed an action seeking a judicial declaration that the antitrust exclusion precluded coverage for the entire antitrust litigation. In the coverage lawsuit, Foster did not dispute that the exclusion precluded coverage for the Sherman Act and state antitrust claims. Foster contended, however, that the antitrust exclusion did not apply to the separate causes of action in the underlying lawsuit for unjust enrichment and violations of the state consumer protection laws, and the separate allegations in the underlying lawsuit of fraud and false advertising. The parties filed cross-motions for summary judgment. The motions were ruled upon by Southern District of Texas Judge Lee Rosenthal, sitting by designation in the Eastern District of California.

Applicable Policy Language

The antitrust exclusion in the primary policy, to which the excess carrier followed form, excludes coverage for "any actual or alleged violation of any law, whether statutory, regulatory, or common law, respecting any of the following activities: antitrust, business competition, unfair trade practices or tortious interference in another's business or contractual relationships."

The Court's Opinion

In an August 22, 2024, opinion, Judge Rosenthal, applying California law, held that the antitrust exclusion applied to preclude coverage for all of the claims in the underlying litigation, including the unjust enrichment claim and the state consumer protection law violations claim, as well as the allegations of fraud and false advertising.

Judge Rosenthal said that Foster's arguments that the antitrust exclusion did not apply to the other claims "unpersuasive." He said that the unjust enrichment claim is "derivative of, and entirely dependent upon, the antitrust claims and underlying price-fixing allegations," noting that in support of the unjust enrichment claim the plaintiff had alleged that the defendants were "unjustly enriched by the receipt of unlawfully inflated prices and unlawful profits." The allegations in the unjust enrichment claims, he said, "are identical to the allegations underlying the excluded antitrust causes of action."

The state consumer protection law violation cause of action is, Judge Rosenthal said, "in this respect, no different from the unjust enrichment claims." The allegations in the consumer protection claims "are the same as the allegations underlying the claims for violations of the Sherman Act and the state antitrust statutes."

Judge Rosenthal also said that the same analysis applies to the separate allegations in the underlying litigation for fraud and false advertising. These claims are "exclusively allegations that the defendants omitted, concealed, and misrepresented material facts with the intent of hiding from the public their alleged conspiracy to fix the price of broiler chickens."

Judge Rosenthal acknowledged that the antitrust exclusion "could have been drafted to apply more clearly to the unjust enrichment, consumer protection, and deceptive trade practices claims." But he found no ambiguity that the antitrust exclusion applies to causes of action that "while not designated as 'antitrust causes of action,' are based entirely on allegations of anticompetitive conduct." He added that this application of the exclusion was consistent with the principle of California law that "allegations in the complaint, not the labels given to the causes of action, determine the duty to defend."

Discussion

Long-time readers know that in prior posts, I have sounded the alarm bell about the antitrust exclusion (as, for example, here). Antitrust exclusions are found in many, if not most, private company D&O insurance policies, as well as many kinds of professional liability insurance policies. But though these exclusions are referred to in shorthand terms as "antitrust exclusions," they usually sweep much more broadly, encompassing a broad variety of other kinds of claims as well – as was the case with the exclusion in this policy, which not only precludes coverage for antitrust claims, but also for other kinds of claims, including "business competition, unfair trade practices or tortious interference with another's business or contractual relationship."

Many of these enumerated additional kinds of claims are not at all what most people think of when the hear the word "antitrust," nor are they what most people would think of as being precluded from coverage by an exclusion denominated as an "antitrust exclusion."

The court in this coverage lawsuit found that the antitrust exclusion swept broadly to preclude coverage not just for claims denominated as antitrust claims, but also to other kinds of claims, even though these other causes of action were not expressly to be found among the "other" claims specified in the antitrust exclusion. In essence, Judge Rosenthal said what matters with respect to the preclusive reach of the antitrust exclusion is not the labels causes of action are given, but rather the nature of the underlying allegations. Because all of the claims, including even the claims not denominated as antitrust claims, were based “entirely on allegations of anticompetitive conduct,” all of the claims, including the ones not expressly alleging violations of the antitrust laws, are precluded from coverage by the antitrust exclusion.

The fact that the antitrust exclusion was held here to preclude all of the causes of action, and not just the claims denominated as antitrust claims, shows how the antitrust exclusion can operate as a kind of stealth coverage bar. It is particularly noteworthy here that the exclusion was held to bar coverage even as to causes of action that, as denominated, were not among the exclusions list of “other” claims that for which the exclusion bars coverage.

The reach of the antitrust exclusion, and its potential applicability to many kinds of claims not denominated as antitrust claims, matters because many private company D&O insurance claims involve causes of action for deceptive or trade practices, of violations of state consumer or business protection laws. The antitrust exclusion can come into play in a wide variety of kinds of claims, much more frequently that is often understood.

As it has developed over the years, at least some carriers will remove the antitrust exclusion upon request. Other carriers will upon request modify the exclusion to narrow its scope, or at least provide antitrust coverage subject to a sublimit or coinsurance. It may be that in many insurance placement transactions, there is no alternative for a particular insurance buyer than to get insurance with a full antitrust exclusion. Many buyers will want to seek and prefer other alternatives.

McDonald's sued by consumers in proposed class action over E.coli outbreak

reuters.com/legal/mcdonalds-is-sued-by-consumers-over-ecoli-outbreak-2024-10-29

Reuters

A McDonald's Quarter Pounder hamburger, fries and a coke, are seen in an illustration picture taken in New York City, U.S., October 24, 2024. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights, opens new tab

Oct 29 (Reuters) - McDonald's (MCD.N), opens new tab was sued on Tuesday by consumers in a proposed class action stemming from the E.coli outbreak linked to onions in the fast-food chain's Quarter Pounders.
Amanda McCray of Chicago and William Michael Kraft of Davie, Florida, said they experienced many symptoms associated with E.coli infection after buying Quarter Pounders this month.

Both said they would not have bought their burgers had McDonald's disclosed the risk of contamination, and have suffered damages because of McDonald's actions.

The lawsuit filed in Chicago federal court seeks unspecified damages, but exceeding $5 million, for all people in the United States who bought Quarter Pounders contaminated with E.coli.

McDonald's did not immediately respond to a request for comment. The chain also faces other lawsuits by individuals who said they were also sickened.

Last week, McDonald's halted Quarter Pounder sales in one-fifth of its 14,000 U.S. restaurants after an outbreak that killed at least one person and sickened 75 people.

The Chicago-based company began restoring Quarter Pounders to its menus this week.
After McDonald's reported quarterly results on Tuesday, Chief Executive Chris Kempczinski apologized to customers for the outbreak. He said on a conference call that the situation appeared contained, and that he was "confident in the safety of eating at McDonald's."
The case is McCray et al v McDonald's USA LLC, U.S. District Court, Northern District of Illinois, No. 24-11102.

Reporting by Jonathan Stempel in New York; Editing by Chris Reese and Nick Zieminski

A Case Study in How Susman Gets Associates Experience in BIG Trials

law.com/litigationdaily/2024/10/30/a-case-study-in-how-susman-gets-associates-experience-in-big-trials

Ross Todd

Getting a $1.6 billion trial win is impressive under any circumstances.

Landing that sort of trial win while also getting an associate valuable stand-up courtroom experience earns you some serious extra credit.

Last week **Jacob Buchdahl** and his team at **Susman Godfrey** landed top runners-up honors for Litigator of the Week after their $1.6 billion bench trial win for client BML Properties against China Construction America Inc. in connection with delays at the Baha Mar resort casino in the Bahamas.

Here's where the bonus points come in: during the 11-day bench trial last August before Manhattan Supreme Court Justice Andrew Borrok, associate **Stephanie Spies** handled three witnesses, including the direct testimony of two expert witnesses and cross-examination of a key fact witness who was a construction supervisor on the project.

This wasn't even the first time Spies has handled witnesses in a case that yielded a nine-figure-plus result for a Susman client. She previously handled five witnesses in an arbitration where telemedicine client Everly Health Solutions secured a $987 million award against Walgreens.

What's more, this wasn't even the first time Spies handled witnesses in a case that yielded a nine-figure-plus result in a dispute springing out of the Bahamas! Spies was part of the Susman team representing hedge fund manager Louis Bacon in a defamation showdown with fashion mogul Peter Nygard, his former neighbor in the Bahamas. In that case, where a special referee awarded Bacon more than $200 million, Spies handled the opening statement and presented the direct testimony of Bacon and a damages expert.

"If you're a billionaire in the Bahamas, all roads lead to Stephanie," quipped Buchdahl, when we connected with him and Spies to discuss the approach that's landed her so many courtroom reps in high stakes cases this early in her career. Spies is a 2016 graduate of New York University School of Law and, after clerkships at the Southern District of New York and the Ninth Circuit, she's been at the firm since 2018.

Buchdahl said that firm founder **Steve Susman** taught the value of getting all the members of a trial team involved.

"Time after time, we see a pretty significant contrast with how our team handles it and how the team on the other side handles it, and we can see that judges and juries appreciate what we do," Buchdahl said.

"We think it is good for our clients, because they get better results when they have different voices involved in the courtroom," he said. "We also are pretty confident it's better for our law firm, because it gives people a chance to develop as trial lawyers and learn skills, because you can only get better at this by doing it."

Buchdahl said that you can't wait until right before trial to get a client comfortable with the idea of letting an associate take the lead on witnesses. In Spies' case in the Baha Mar trial, Buchdahl pointed out that she had already had a role arguing summary judgment motions. That allowed the client to see how she prepared, how she approached the courtroom and how well she knew the case, he said. But he also added that one of the benefits of working under a contingency fee arrangement, as Susman often does, is that clients know that the firm's financial interest is implicated in decisions regarding who handles what. "I assume that it gives them a greater confidence in our decision-making, because they know that we have a lot riding on it," he said.

Spies said that one thing that tends to set Susman apart is that associates are treated the same as partners in terms of how they're integrated onto a trial team. "From day one, you're involved in the calls with the client, you're involved in making strategy decisions, you're involved in every every little piece of minute detail that goes into litigating a case—from filing the complaint all the way to trial and sometimes appeal," she said. That approach, she said, allows associates to develop a relationship with clients and build their trust. In the Baha Mar case, she said she was on weekly calls with the client for nearly two years, so she was able to show how much she knew.

She said she's often been the only associate on the cases she works on, meaning there's no junior person to handle the grunt work. She said she handles everything from working on late-night filings with legal assistants to reviewing documents to find the hottest ones in the case. She prepares others for depositions, takes some on her own and writes the first drafts of briefs. "I think when you're involved in every single aspect of the case like that, it gives you more of a stake in it," she said.

She added that the approach also allows associates to have a hand in developing strategy. She said the experience means senior lawyers start relying on associates to tell them which documents to use at trial and which questions to ask that aren't already in their outline. "It

just makes you feel like a valuable and important member of the team," she said. "It really makes it more fun than just doing something and then watching someone else get all the glory in the courtroom."
Buchdahl said that part of what's nice about practicing at Susman is that when the firm's teams go into a courtroom, the most junior member on the Susman team might actually have more trial experience than some of the partners on the other side. He said that it would be easy for lawyers like him who have tried a lot of cases to take all the plum assignments for themselves. "But the better thing to do is to make sure that all the people around you are also developing as trial lawyers," he said.

He compared the approach to putting together a baseball team with a bullpen full of strong relief pitchers.

"It's like every person who steps out on that mound is going to really be somebody talented," he said. "It's not the case where it's kind of just a one-person show."

Spies said that she wasn't as stressed as you might think she would be taking witnesses during the Baha Mar trial. She said participating in debate in high school and college has helped her avoid getting nervous about speaking in public. Partners on the team, including **Elisha Barron** and **Tamar Lusztig,** helped her with outlines on the direct examinations. And Buchdahl was on the phone with her the night before her cross-examination of the fact witness, walking through different approaches she could take. But she said nerves in a case of this size are natural. "I wasn't as nervous as I could have been given the stakes," she said. "But I still had the same jitters I think most trial lawyers get when they step up—no matter if it's their first or their 1,000th witness."

She said that, looking back at the trial, she's most proud that she was able to undermine the credibility of one of the other side's key fact witnesses and that the witnesses she prepared stood up so well on cross themselves.

"I spent a lot of time preparing those guys, and they were so well prepared and so great to work with," she said. "When you've prepared a witness, and they withstand all scrutiny on cross-examination, that's just something where you're really proud of the witness, but you're also proud of all the preparation that went in," she said.

Infant Formula Judge Sanctions Kirkland's Jim Hurst: 'Overtly Crossed the Lines'

law.com/2024/10/29/infant-formula-judge-sanctions-kirklands-jim-hurst-overtly-crossed-the-lines

Amanda Bronstad

What You Need to Know

- 22nd Judicial Circuit Court Judge Michael Noble sanctioned Hurst for 'bad faith on several occasions.'
- Closing arguments are expected to begin on Wednesday.
- The judge oversaw a previous infant formula trial in which a St. Louis jury hit Abbott with a $495 million verdict on July 26.

A Missouri judge in a closely watched trial over infant formula sanctioned Kirkland & Ellis partner James Hurst for "bad faith on several occasions."

The Oct. 24 sanction banned Hurst, a trial lawyer from Chicago who has regularly been featured in the Litigation Daily's Litigators of the Week, from presenting evidence or closing arguments for the remainder of the trial. The case alleges that cow's milk-based infant formula made by his client, Abbott Laboratories Inc., and another defendant, Reckitt Benckiser Group's Mead Johnson, caused a potentially lethal gastrointestinal illness called necrotizing enterocolitis, or NEC.

"Mr. Hurst's professional conduct has been reasonably called into question," 22nd Judicial Circuit Judge Michael Noble ruled in his order. "Mr. Hurst has repeatedly either attempted to violate or overtly crossed the lines of the court's orders related to evidence and arguments before the jury."

Specifically, the St. Louis judge noted that during the direct examination of Dr. David Stevenson, a professor of pediatrics at Stanford University's School of Medicine who specializes in genetic disorders, Hurst admitted to "eliciting testimony and introducing evidence to intentionally inflame and prejudice the jury in a manner previously precluded by this court."

Further, he held, Hurst's repeated "dilatory litigation tactics" violated the Missouri Rules of Civil Procedure and perhaps the rules governing the Missouri bar and judiciary.

"It appears this conduct and these tactics are an intentional attempt to elicit a mistrial," the judge found.

Closing arguments are scheduled for Wednesday.

Hurst could not be reached via email. However, a spokesperson for Kirkland & Ellis said, "As a world-class trial lawyer, Jim has successfully led cases for 30 years in jurisdictions around the country with supreme professionalism. His impeccable trial record speaks for itself."

Abbott spokesman Scott Stoffel said, "Mr. Hurst is a terrific trial lawyer and has acted professionally, ethically and in good faith throughout the case."

John Simon, of the Simon Law Firm in St. Louis who represents plaintiff Elizabeth Whitfield in the trial, declined to comment. In court, firm partner Timothy Cronin asked jurors for $73 million in medical care for Whitfield, whose son, Kaine Whitfield, was diagnosed 16 days after his 2017 birth with NEC, plus other nonmedical compensation and punitive damages.

Plaintiffs lawyers had moved to revoke Hurst's pro hac vice admission to practice law in Missouri and strike Abbott's pleadings. Noble, in his sanctions order, stopped short of granting those requests but noted that further violations would result in Hurst's removal from the litigation and revocation of his pro hac vice status in Missouri.

Previous Jury Hit Abbott With $495M Verdict

Sold to hospitals, not in retail stores, the formula is touted as a life-saving alternative to breast milk, but lawsuits contend that it is linked to NEC, which sickens or kills premature babies. Thousands more NEC lawsuits are pending in Illinois courts, and there are cases in California, Florida and Pennsylvania. Another 400 cases were coordinated in the U.S. District Court for the Northern District of Illinois before Judge Rebecca Pallmeyer.

22nd Judicial Circuit Judge Michael Noble. Courtesy photo

The trial, which began Oct. 2, is the first of its kind against both manufacturers, which make Enfamil and Similac. Each manufacturer has lost a verdict so far in prior trials over the same products. On March 13, a jury in St. Clair County Circuit Court in Illinois awarded $60 million to a woman who sued Mead Johnson after her premature boy died. And, on July 26, another St. Louis jury awarded $495 million to a mother suing Abbott.

Noble, who also oversaw the previous St. Louis trial, refused in an Oct. 23 order to allow Abbott and Mead Johnson to permit their defense experts to testify about the National Institute of Child Health and Human Development's NEC Advisory Council report, published on Sept. 16, and a subsequent Oct. 3 consensus statement from the U.S. Food and Drug Administration, the Centers for Disease Control and Prevention and the National Institutes of Health that found the absence of human milk, not exposure to infant formula, was responsible for increased risks of NEC.

Phyllis Jones, of Covington & Burling in Washington, D.C., represents Mead Johnson in the trial.

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Law Firms Mentioned

Kirkland & Ellis

Latest

After Saying COVID Would Only Kill 500 People, Law Professor Explains That He's ALWAYS Thought Courts Should Overrule Scientists

abovethelaw.com/2024/10/after-saying-covid-would-only-kill-500-people-law-professor-explains-that-hes-always-thought-courts-should-overrule-scientists

Joe Patrice October 30, 2024

Law Schools

Got to admire the consistency!

By Joe Patrice
onOctober 30, 2024 at 10:45 AM

There's a decent argument that no single human being did more to prove the merits of the *Chevron* doctrine than law professor Richard Epstein. Before the Supreme Court's last Term shift, the law recognized that, when it comes to scientific disputes over what constitutes toxic waste in vague, open-ended public safety laws, the courts should default to the actual government scientists charged with implementing those statutes. Now John Roberts gets to decide how much rat poison is safe to put in a hot dog. COMFORTING!

But Epstein was, unintentionally, way ahead of the game in proving why this result is so deadly.

Epstein took to the pages of the Hoover Institution on March 18, 2020, to explain to all the bedwetting doctors and public health experts out there that he, as a LAWYER, had already considered the arrival of COVID upon American shores and determined that it was all much ado about nothing. All Epstein really needed to reach this conclusion was some out-of-context data reported by the always-reliable-on-the-subject Chinese government. And while, at the time and to this day, there are actual medical debates over the relative merits of lockdowns vs. other prophylactic measures, Epstein bypassed citing these battles of the experts to issue his own analysis. In the end, Epstein reasoned, the virus then rampaging across Europe would only kill about 500 people!

Watch Video At: https://youtu.be/S3wsCRJVUyg

By noon of March 24, 2020 — less than one week after publishing his article! — the death toll in the U.S. already reached 592. Epstein said the "500" number was "smaller than I intended to state" and revised his figure to… 5,000. Epstein and Hoover stopped making corrections after his new estimate confirmed his buffoonery. But here's what he said at that time:

> So my adjusted figure, however tweaked, remains both far lower, and I believe far more accurate, than the common claim that there could be a million dead in the U.S…..

The current U.S. death toll from COVID is somewhere north of 1.2 million right now.

Fast forward to today and a Federalist Society webinar about the post-*Chevron* legal landscape. It seems Epstein's experience as an armchair scientist whiffing on public health with deadly consequences — Donald Trump's administration enthusiastically clung to Epstein's baseless analysis at the outset of the pandemic — has taught him some humility.

LOL, just kidding!

> On a great Fed Soc webinar just now, and Richard Epstein has just said that he was "against Chevron from day one."
>
> — Alison Somin (@AlisonSomin) October 29, 2024

I'll bet he was.

A shocking number of lawyers are positively convinced that they know more about every subject based on three years of torts and civ pro than real scientists. It develops when a lawyer confuses doing the research to *explain* the merits of 16th century oil painting with thinking they're qualified to be a painter. One is about cultivating a flexible mind respecting the lawyer's gift for marshaling and communicating expert information and the other is about being an idiot.

It's a special brand of hubris possessed only by lawyers and your friend who thinks you'd "have a lot of fun" at their improv night.

The irony, of course, is that the *Chevron* doctrine began as a right-wing troll that could allow Reagan-era administrators to bypass Congress and lift restrictions on whole swaths of sludge while finally counting ketchup as a vegetable for school lunches. But it quickly morphed into its more logical end — a vehicle for trained experts to fulfill laws that Congress intentionally leaves open-ended. Because legislators aren't equipped to predict every potentially toxic substance that could ever be invented, but can command agency scientists to "stop people from poisoning lakes."

But apparently Epstein knew even back then that he and his fellow law-degree-holding friends would be better at science than all the scienticians out there!

Now, thanks to the Supreme Court, he can realize his dream of empowering an army of J.D.s to "well, actually" every nerd who successfully passed organic chemistry.

Earlier: Remember When A Law School Prof Said Only 500 Americans Would Die Of COVID? Whatever Happened With That?
John Roberts Says Judges Should Decide How Much Rat Poison Is Too Much For Your Hot Dogs
Mask Mandate Struck Down Because 'Sanitation' Doesn't Mean 'Keeping Things Clean' For… Reasons

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Joe Patrice is a senior editor at Above the Law and co-host of Thinking Like A Lawyer. Feel free to email any tips, questions, or comments. Follow him on Twitter or Bluesky if you're interested in law, politics, and a healthy dose of college sports news. Joe also serves as a Managing Director at RPN Executive Search.

Topics

Courts, COVID-19, Federalist Society, Law Schools, Richard Epstein, Supreme Court

Super Micro Computer says Ernst & Young resigns as auditor, shares tank

reuters.com/technology/super-micro-computer-says-ernst-young-resigns-its-accountant-shares-tank-2024-10-30

Reuters

Logos of Super Micro Computer are pictured at COMPUTEX Taipei, one of the world's largest computer and technology trade shows, in Taipei, Taiwan May 30, 2023. REUTERS/Ann Wang/File Photo Purchase Licensing Rights, opens new tab

Oct 30 (Reuters) - Super Micro Computer (SMCI.O), opens new tab said on Wednesday Ernst & Young had resigned as its auditor, sending its shares tumbling more than 30% and deepening investor worries about accounting practices at the artificial intelligence server maker.
The company in late August delayed the filing of its annual report, citing a need to assess "its internal controls over financial reporting", after Hindenburg Research disclosed a short position and made claims of "accounting manipulation".

Super Micro disclosed on Wednesday EY had in late July raised concerns about its governance, transparency and internal control over financial reporting, after which the company appointed a special committee and began an investigation into the matter.

The accounting firm decided to resign after receiving additional information from the review process.

"We are resigning due to information that has recently come to our attention which has led us to no longer be able to rely on management's and the Audit Committee's representations and to be unwilling to be associated with the financial statements prepared by management," Super Micro quoted EY as saying in a filing with the Securities and Exchange Commision.

Super Micro said it disagreed with the accounting firm's decision and does not expect the "resolution of any matters raised by EY" to result in the restatement of its quarterly reports for fiscal 2024 or prior fiscal years.

EY did not immediately respond to a request for comment.

Super Micro was a big winner in the generative AI boom as businesses bet on the tech needed to power applications such as ChatGPT. The company's market value surged from roughly $4.4 billion at the beginning of 2023 to a March peak of $67 billion, before suffering a drop in recent months.

"As far as auditor statements go, E&Y's SMCI resignation letter is about as strongly worded as I have seen," Nathan Anderson, the founder of Hindenburg, said in a post on X.

The Wall Street Journal reported in late September that the U.S. Department of Justice was investigating Super Micro.

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

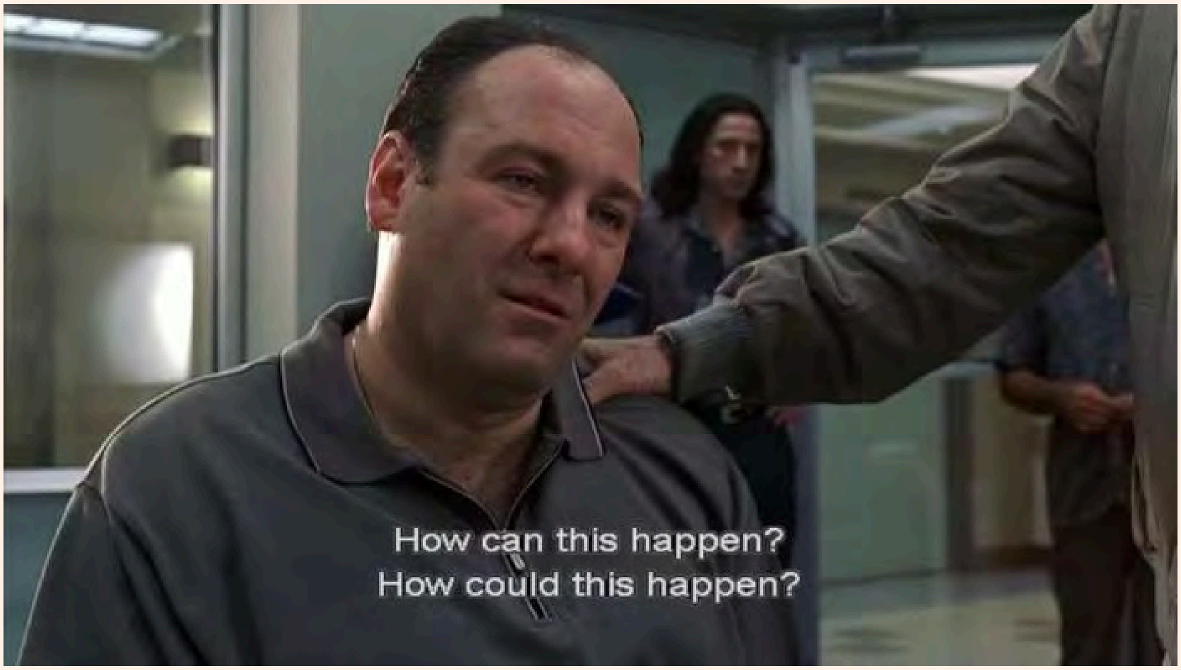
Reporting by Zaheer Kachwala in Bengaluru; Editing by Shreya Biswas and Devika Syamnath

Our Standards: The Thomson Reuters Trust Principles. , opens new tab

FT Alphaville Corporate governance

Super Micr– oh no!

EY says bye-bye



Louis Ashworth 3 HOURS AGO

Meanwhile, at Super Micro Computer, Inc:

> On October 24, 2024, Ernst & Young LLP ("EY") sent the members of the Audit Committee a letter of resignation as the Company's registered public accounting firm (the "Resignation Letter").

> The Chair of the Audit Committee discussed with EY the reasons for EY's resignation. The Company has begun the process of identifying a successor independent registered public accounting firm. The Company will authorize EY to respond fully to the inquiries of the successor independent registered public accounting firm, once selected. The Company does not currently expect that resolution of any of the matters raised by EY, or under consideration by the Special Committee, as noted below, will result in any restatements of its quarterly reports for the fiscal year 2024 ending June 30, 2024, or for prior fiscal years.

Ahha.

> “
>
> EY was engaged on March 15, 2023 to perform an audit for the Company's fiscal year ending June 30, 2024, and has not issued any report on the Company's financial statements or the Company's internal control over financial reporting. EY resigned while conducting the audit for the Company's fiscal year ended June 30, 2024, EY's first audit on the Company's behalf.

> In late July 2024, EY communicated to the Audit Committee concerns about several matters relating to governance, transparency and completeness of communications to EY, and other matters pertaining to the Company's internal control over financial reporting, and that the timely filing of the Company's annual report was at significant risk. In response, the Board appointed an independent special committee of the Board (the "Special Committee") to review the matters and certain of the Company's internal controls and certain governance procedures (the "Review"). The Special Committee engaged Cooley LLP, and forensic accounting firm Secretariat Advisors, LLC to perform an investigation on behalf of and at the direction of the Special Committee. EY and the Board received updates with preliminary information relating to the Review. As of the date of this Current Report on Form 8-K, the Review remains ongoing and final findings and recommendations have not yet been communicated to EY or the Board.

Ohho.

> "

> After receiving additional information through the Review process, EY informed the Special Committee that the additional information EY received raised questions, including about whether the Company demonstrates a commitment to integrity and ethical values consistent with Principle 1 of the COSO Framework, about the ability and willingness of the Audit Committee and overall Board to demonstrate and act as an oversight body that is independent of the CEO and other members of management in accordance with Principle 2 of the COSO Framework, and whether EY could rely on representations from certain members of management and from the Audit Committee. In the Resignation Letter, EY stated, in part: "we are resigning due to information that has recently come to our attention which has led us to no longer be able to rely on management's and the Audit Committee's representations and to be unwilling to be associated with the financial statements prepared by management, and after concluding we can no longer provide the Audit Services in accordance with applicable law or professional obligations."
>
> Although the Company recognizes EY's decision is final, it disagrees with EY's decision to resign as the Company's independent registered public accounting firm – the Special Committee has not yet obtained all information relevant for the Review and has not concluded the Review. Nevertheless, the Company has taken the concerns expressed by EY seriously, and will carefully consider the findings of the Special Committee and any remedial or other actions recommended by the Special Committee following conclusion of the Review.

Mmmhmmm.

Oh my.

Further reading:

— [Welcome to Super Micro galaxy]

— [Hindenburg hits Super Micro]

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Securities Law News

Oct. 30, 2024, 6:45 AM PDT

BofA Says US May Take Action Over Money Laundering, Zelle (2)

By Katherine Doherty

- Regulators may issue orders after examining internal controls
- Firm says it's cooperating with watchdogs, enhancing systems

Bloomberg Law News 2024-10-30T09:58:10992597084-04:00

BofA Says US May Take Action Over Money Laundering, Zelle (2)

By Katherine Doherty2024-10-30T09:45:19414-04:00

- Regulators may issue orders after examining internal controls
- Firm says it's cooperating with watchdogs, enhancing systems

Bank of America Corp. said US regulators may take action against the firm over its efforts to detect suspected money laundering and sanctions violations, as well as its handling of payments on the Zelle network.

Regulators may issue public orders after examining the firm's compliance programs "including transaction monitoring, training, governance and customer due diligence," the bank said in a regulatory filing Tuesday. The company said it's cooperating and already working to improve those systems.

The Charlotte, North Carolina-based firm said it's also responding to an inquiry from the Consumer Financial Protection Bureau into electronic payments on the Zelle network. The consumer watchdog is in talks to resolve the case or may bring an enforcement action. Bank of America said it's evaluating next steps, including the possibility of litigation.

Bank of America's stock fell more than 2% on Wednesday before paring some of those losses to trade down 0.4% to $42.36 at 9:42 a.m. in New York.

"Until regulators file formal actions, this issue will remain an overhang and likely to add a little pressure to the stock," JPMorgan Chase & Co. analyst **Vivek Juneja** said in a note following Bank of America's disclosure. As a result, JPMorgan removed the stock from its analyst focus list, it said.

US authorities have repeatedly expressed dissatisfaction with international banks' programs for detecting, thwarting and reporting illicit cashflows tied to criminal networks and rogue governments. Outcomes from inquiries can vary dramatically — including regulatory orders that require firms to address specific shortcomings or, in extreme cases, fines that can stretch into the billions of dollars.

In an exceptional case earlier this month, Toronto-Dominion Bank agreed to pay almost $3.1 billion in fines and other penalties and face a cap on its US retail banking assets, after failing to prevent money laundering by drug cartels and other criminals.

Financial Impact

Bank of America said in its filing that, based on its discussions with regulators, it doesn't expect reviews of its programs "will have a material adverse financial impact."

More broadly, the company reiterated its "reasonably possible" future costs for legal matters, beyond what it has already set aside, remains unchanged from the prior quarter, between zero and $800 million.

US regulators have been digging into consumer complaints about how banks handle reported abuses of the Zelle network. Lawmakers have called for action, saying banks — and their overseers — must do more to protect people from scams on the network, potentially including making victims whole.

In July, larger rival JPMorgan Chase & Co. said the CFPB may seek to punish it over Zelle payments. Like Bank of America, that firm also said it's evaluating next steps, including litigation.

(Updates share price and adds analyst comment starting in fourth paragraph.)

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David Scheer, Peter Eichenbaum

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Securities Law News

Oct. 29, 2024, 3:59 PM PDT

Lovesac to Pay SEC $1.5 Million Over Scheme That Buried Expenses

By Nicola M. White

Bloomberg Law News 2024-10-30T10:02:35290853328-04:00

Lovesac to Pay SEC $1.5 Million Over Scheme That Buried Expenses

By Nicola M. White2024-10-29T18:59:53622-04:00

Sectional sofamaker Lovesac Co. agreed to pay $1.5 million to settle US Securities and Exchange Commission allegations that two former executives devised a fraudulent accounting scheme to meet a key Wall Street metric.

The executives hid $2.2 million of shipping expenses after it was discovered the costs had been incorrectly recorded, the agency said in a statement on Tuesday.

The move let the company avoid the expense and public attention of restating prior financial results, and it helped the company hit its gross margin projections, the regulator wrote in settlement documents filed in federal court in Connecticut.

That "led to materially misleading financial statements," the agency said. The pair, both certified public accountants, also withheld information from the company's outside auditor, it said.

The company, which didn't admit or deny the allegations, didn't immediately respond to a request for comment.

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David Scheer

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Securities Law News

Oct. 30, 2024, 1:45 AM PDT

Crypto Suit Uses Texas Legal Strategy to Dial Up Attack on SEC

By Ben Miller

Deep Dive

- Fifth Cir. seen as strategic venue ripe for split with Second
- Crypto.com suit preemptively seeks judgment curbing SEC powers

Bloomberg Law News 2024-10-30T09:57:02905467894-04:00

Crypto Suit Uses Texas Legal Strategy to Dial Up Attack on SEC

By Ben Miller 2024-10-30T04:45:01000-04:00

- Fifth Cir. seen as strategic venue ripe for split with Second
- Crypto.com suit preemptively seeks judgment curbing SEC powers

A suit brought by a leading crypto trading platform seeking to preempt enforcement activity by Wall Street's top cops shows how much the industry is leaning on courts in the Lone Star State to fight US oversight.

Crypto.com's suit against the SEC, filed this month in Texas federal district court, represents an escalation in the industry's battle to rein in how the agency polices digital assets.

"In response to what some have called the SEC's war on crypto, some market participants have strategically filed suits against the SEC in jurisdictions that are considered to be more receptive to claims of regulatory overreach," said Helen Gugel, a litigation and enforcement partner at Ropes & Gray LLP.

Crypto.com sued the SEC after receiving a Wells notice, which indicated the regulator's plan to bring an enforcement action against the digital-asset exchange for operating as an unregistered broker-dealer and securities clearing agency.

The platform's sweeping preemptive suit—with broad implications for secondary trading of digital assets in the US—alleges the SEC has expanded its jurisdiction beyond its statutory limits and established an unlawful "de facto" rule that crypto trades are securities transactions, no matter how they are sold.

The Crypto.com suit uses a legal strategy of affirmative litigation against the agency, well-honed by financial companies, conservative groups, and others challenging the Biden administration.

The Singapore-based platform this year moved its US headquarters to Tyler, Texas, allowing it to file suit under the jurisdiction of the US Court of Appeals for the Fifth Circuit, which has struck down a slew of Biden regulations. It also deployed former US Solicitor General Noel Francisco, now with Jones Day, among the attorneys filing its suit, likely signaling the company's ambitions to advance the case to the Supreme Court if needed.

The Fifth Circuit could provide a haven for digital-asset companies that anticipate SEC enforcement actions cropping up elsewhere, like within the New York-based Second Circuit where the agency brings many cases.

Planting a flag in Texas by basing a company's operations there and initiating litigation against the agency could help crypto firms argue for a strategic transfer of enforcement actions to the state's conservative-leaning federal courts, according to Todd Phillips, assistant professor of legal studies at Georgia State University's Robinson College of Business and a former federal financial regulatory attorney.

The SEC declined to comment.

Home Court Advantage

The SEC under Chair Gary Gensler has taken an aggressive stance on crypto, treating most digital assets as securities under its oversight. It's also filed at least six enforcement actions against secondary-market crypto platforms, according to the Crypto.com suit.

The suit builds on previous cases filed in Texas federal courts challenging SEC actions, including a pending case brought by crypto startup Lejilex and the Crypto Freedom Alliance of Texas in February proactively seeking a court order that secondary-market sales of digital assets aren't within the SEC's purview.

Crypto.com and other industry players have made similar efforts to get their cases before Texas courts viewed as business-friendly.

"The SEC would make the claim that Crypto.com customers are everywhere in the United States, and so it could feasibly file a lawsuit in an SEC-friendly jurisdiction," Phillips said. "Crypto.com clearly doesn't want that to happen. It's headquartered in Texas for a very specific reason, which is hoping to get Fifth Circuit jurisdiction."

A Texas federal judge in September dismissed a case brought by crypto company Consensys Software Inc., finding that a Wells notice and subsequent suit from the SEC weren't final actions and that the case was therefore premature.

But a ruling by a district or appellate court in favor of Crypto.com responding to a similar Wells notice from the SEC, and seeking a preemptive declaratory judgment on the agency's power to policy secondary trading in digital assets, could have a major impact on how the industry broadly is overseen by regulators in Washington.

"If the strategy is successful, it could create a circuit split down the road that makes it more likely the Supreme Court will weigh in," Gugel said.

Justices, Take Note

The Fifth Circuit jurisdiction where Crypto.com and other industry players brought their suits has been a breeding ground for hot-button Supreme Court cases restricting agency powers, including the *Jarkesy v. SEC* decision this year limiting the SEC's ability to use its in-house judges in enforcement proceedings seeking civil penalties.

Crypto companies say they're seeking similar judicial clarity from higher courts on the SEC's authority over their industry.

"U.S. Courts have provided the crypto industry much-needed relief from the SEC's enforcement by regulation overreach by confirming what we've known all along—that crypto is not itself a security," said Nick Lundgren, chief legal officer at Crypto.com. "These rulings against the SEC put us on strong legal footing to prevail in our suit. We trust the U.S. Judicial Branch will ultimately provide the regulatory certainty the SEC has failed to deliver."

The Crypto.com case is assigned to Judge Jeremy Kernodle in the US District Court for the Eastern District of Texas, who ruled in July to freeze rulemaking by the Labor Department, citing the high court's decision in *Loper Bright Enterprises v. Raimondo* overturning the Chevron doctrine that courts had used to defer to reasonable agency interpretations of ambiguous statutes or unclear laws.

If any of the crypto industry challenges to the SEC pending in Texas federal district courts result in a circuit split and land in the Supreme Court as a petition, the justices could apply both *Jarkesy* and *Loper Bright* to curtail the SEC's crypto enforcement agenda.

"They're definitely hoping that the Supreme Court is going to reject the SEC's whole theory of the case," Phillips said.

Jones Day and Potter Minton represent Crypto.com.

The case is Foris DAX Inc. v. SEC , E.D. Tex., No. 6:24-cv-00373, complaint 10/8/24 .

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Investors Float $21M Deal To End Life Sciences SPAC Suit

By **Jeff Montgomery**

Law360 (October 29, 2024, 6:12 PM EDT) -- Shareholders in special purpose acquisition company CM Life Sciences Holdings have reached a tentative $21 million class settlement in Delaware's Court of Chancery after suing over alleged missing or misleading disclosures in the lead-up to the take-public merger of clinical data and genomics company Sema4 Holdings in July 2021.

Under the proposal, several law firms and attorneys would split more than $1.5 million in fees and nearly $75,000 in expenses for bringing the case to court and seeing it through discovery, mediation, negotiations and settlement.

In the suit filed in February 2023, lead stockholder Todd Katz accused CMLS and its officers and directors of driving through a bad public investor deal for Sema4 — initially valued at $2 billion — in order to avoid cancelations and losses of high-value, low-cost founder investments in the SPAC venture.

Full details of the agreement remained under seal on Tuesday. In a stipulation filed on Aug. 16, however, attorneys for the stockholders said they "continue to believe that the claims asserted in the action have merit, but also believe that the settlement set forth herein provides substantial and immediate benefits for the class."

Proposed along with the settlement are attorney fees and expenses.

Grant & Eisenhofer PA would receive $462,827.50 in fees and $20,958.16 for expenses; Robbins Geller Rudman & Dowd would get $461,909 in fees and $87,791.50 for expenses; Michael Klausner would receive $35,200 in fees; Robbins LLP would get $423,802.50 in fees and $13,301.48 for expenses; Andrews & Springer LLC would receive $40,972.50 in fees and $4,190 for expenses; and Johnson Fistel LLP would get $15,637.50 in fees and $1,350 for expenses.

Sema4, now named GeneDX, had been trading at $25.81 per share five months before the closing — but fell to under $12 per share by the time the deal was completed in mid-2021 and continued to sharply decline thereafter.

By the time attorneys for Katz docketed his suit, Sema4's stock price had fallen below $0.50 per share, a plunge Katz's counsel said reflected "the horrific deal solicited by defendants." The suit argued misrepresentations by architects of the transaction deprived public SPAC stockholders of an opportunity to hand back their shares before closing and exit for $10 apiece, "implying value destruction of over $400 million post-merger."

The lawsuit sought damages for breaches of fiduciary duty by directors, officers and controllers of CMLS as well as a reopening of the $10-per-share redemption window. Alternatively, the suit said the court could rescind the merger and return shareholder investments, along with other damages.

Those named in the suit include CMLS and its pre-merger CEO Eli D. Casdin, who also founded Casdin Capital LLC, as well as CMLS chairman Keith A. Meister, founder of Corvex Management LP.

In May, the parties joined in a full day of mediation before Greg Danilow of Phillips ADR Enterprises, which ended without a proposed deal. Subsequent independent talks led to an agreement in principle to settle on May 15.

Although attorneys for the stockholders said they still believed the suit had merit, they also said the settlement "provides substantial and immediate benefits for the class."

Sema4, which was originally a venture of Mount Sinai Health System called Mount Sinai Genomics Inc. until it was spun off, is described as a patient-centered health intelligence company with a mission of enabling personalized medicine through the use of artificial intelligence.

CMLS board members were provided with "almost no information" on Sema4's business during a presentation before the deal, the suit said. An earlier $1.75 million claimed valuation of Sema4 was later bumped to $2 billion, with directors receiving no information about discussions between CMLS officials and those of the target company.

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

Gregory Del Gaizo, Brian Robbins, Mario D. Valdovinos, Hickmon H. Friday, Richard N. Lozano, Lawrence Q. Truong, Anna Marie Miller, Jennifer Silverwood, Brennan P. Whalen, Chloe L. Javen and Miles F. Baird of Robbins LLP.

Xianming Zhou is represented by Christine Mackintosh, Kelly Tucker, David Wissbroecker, Casimir Szustak and Michalis Polygiannis of Grant & Eisenhofer PA and Michael I. Fistel Jr. of Johnston Fistel LLP.

Todd Katz is represented by Randall J. Baron, Benny C. Goodman III, Erik W. Luedeke, Brian E. Cochran, Michaela D. Park, Jason M. Avellino, Andrew T. Petix, Brad C. Sader and Omar C. Keita of Robbins Geller Rudman & Dowd LLP and David M. Sborz, Jackson E. Warren, Dara J. Cuppingood and Jackson R. Brandwende of Andrews & Springer LLC.

CM Life Sciences Holdings, LLC a/k/a CMLS Holdings LLC and the individuals named in the suit are represented by William M. Lafferty and Susan W. Waesco of Morris Nichols Arsht & Tunnell LLP and Gregory Starner and Joshua D. Weedman of White & Case LLP.

The case is In re GeneDX De-SPAC Litigation, case number 2023-0140, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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Purdue Creditors Can Sue Sacklers For $11.5B

By **Hilary Russ**

Law360 (October 29, 2024, 4:55 PM EDT) -- Creditors of bankrupt OxyContin maker Purdue Pharma LP will get the right to sue the company's owners — certain members of the Sackler family — and others for $11.5 billion, should they choose to do so, a New York judge said on Tuesday.

U.S. Bankruptcy Judge Sean H. Lane said during a hybrid hearing in White Plains that he would grant motions by the creditors to take over **prosecution of such claims** on behalf of Purdue's bankruptcy estate to recover what creditors say was money moved improperly out of the company into offshore trusts for the benefit of various Sackler family members. The judge's decision sets the stage for the case to advance should the current ongoing mediation fail to reach a new settlement.

Judge Lane said from the bench that he would issue an opinion in coming days, while the case speeds toward another critical hearing on Thursday about whether to allow the deadline for mediation to be extended to December.

Despite supporting the moves by the official committee of unsecured creditors, a lawyer for a group of more than 60,000 individual opioid victims said he hoped mediation would win the day in order to avoid a drawn-out litigation "conflagration" that would mire courts in lawsuits and take yet more time and money to pursue.

"There will be no such thing as litigation light," said Chris Shore, an attorney for the ad hoc **group of individual victims**, which represents a quarter of all the creditors who voted on the previous bankruptcy plan that was thrown out by the U.S. Supreme Court in June.

In an impassioned argument, Shore warned of the myriad issues that would need to be litigated if that is the course ultimately pursued.

The previous settlement was a "truly remarkable result" that would have represented "Chapter 11 at its best," but now the case is known instead for the plan's nonconsensual third-party releases that were invalidated by the Supreme Court.

Those waivers provided the Sacklers with protection against future lawsuits, in exchange for their contribution of $6 billion towards a trust to pay creditors' claims.

In the five years since Purdue filed for bankruptcy, at least 700 members of the ad hoc victims' group have died. One mother who had lost a son to opioid addiction before the bankruptcy filing lost a second son as the case dragged on, Shore said, lamenting that victims will get "no better deal" than the one originally hashed out.

"Litigation is never going to be the best solution," Shore said, but he was pleased to hear from the committee's counsel that "war is not a foregone conclusion."

Judge Lane rejected arguments from the one dissenting party, a group of Canadian municipal and First Nations creditors, which had said the committee was not the best plaintiff to take on claims, among other arguments.

The committee is facing a tangle of near-term deadlines to commence lawsuits - including a Nov. 1 end to the litigation hold and a Dec. 1 expiration of tolling agreements — that are complicated by the fact that one side of the Sackler family's wealth is largely held in a maze of trusts in the Bailiwick of Jersey in Europe, committee counsel Mitchell P. Hurley said.

Hurley, Shore and Allen Underwood, who represented the Canadian entities, declined to comment after the hearing.

Purdue is represented by Marshall S. Huebner, Benjamin S. Kaminetzky, Eli J. Vonnegut and Christopher S. Robertson of Davis Polk & Wardwell LLP.

The unsecured creditors committee is represented by Mitchell P. Hurley, Arik Preis, Katherine Porter, Sara L. Brauner, Theodore James Salwen and Erin E. Parlar of Akin Gump Strauss Hauer & Feld LLP and Justin R. Alberto of Cole Schotz PC.

The ad hoc group of individual victims is represented by J. Christopher Shore, Michele J. Meises and Thomas E. Lauria of White & Case LLP and Edward E. Neiger and Jennifer A. Christian of ASK LLP.

Certain Canadian Municipal and First Nations Creditors are represented by Allen J. Underwood II of Lite DePalma Greenberg & Afanador LLC.

The case is In re: Purdue Pharma LP, case number 7:19-bk-23649, in the U.S. Bankruptcy Court for the Southern District of New York.

--Editing by Alex Hubbard.

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NY Judge Tosses $14B Decongestant MDL

By **Craig Clough**

Law360 (October 29, 2024, 10:42 PM EDT) -- A New York federal judge threw out a streamlined complaint in a multidistrict litigation accusing companies such as Target and Bayer of making and selling ineffective over-the-counter decongestants, finding Tuesday the state claims are expressly preempted, and the proposed class lacks standing on a federal racketeering claim as indirect purchasers.

U.S. District Judge Brian M. Cogan's decision comes after an order from the U.S. Judicial Panel on Multidistrict Litigation **in December** resulted in the nearly 100 cases being consolidated in his courtroom. The plaintiffs consolidated their suits in May into a streamlined bellwether class action under the racketeering and New York state claims to "test claims and defenses common across the consolidated cases," according to the judge's dismissal order.

The plaintiffs, who are seeking roughly $14 billion in damages, allege the defendant companies have known since at least 2016 that orally ingested phenylephrine is no more effective than a placebo as a nasal decongestant but kept selling products with the ingredient that were tabled as being effective.

But Judge Cogan found all the state claims alleging the drugs were mislabeled are preempted by the federal Food, Drug, and Cosmetic Act. Only the U.S. Food and Drug Administration can determine if an ingredient in an over-the-counter drug is effective the judge held.

Congress allows "states to layer additional state protections atop federal ones, but only when those protections relate to safety; whether a drug is effective remains within the exclusive purview of the FDA," the judge held. "This division reflects a balance between twin aims of the FDCA: safety and uniformity."

The proposed class action claims the companies sold decongestant medication — including Sudafed PE, Tylenol Cold and Flu, TheraFlu, Vicks Nyquil and Dayquil Severe Cold and Flu — that was useless and ineffective. The primary ingredient in these drugs was phenylephrine.

Defendants also include Procter & Gamble Co., CVS Pharmacy Inc., Johnson & Johnson Consumer Inc. and Walgreen Co.

The FDA said in September 2023 that phenylephrine, when taken orally, is no more effective than placebo in decreasing nasal congestion.

After the FDA's Nonprescription Drug Advisory Committee, or NDAC, panel found in 2007 that more studies were needed to determine phenylephrine's effectiveness, several studies by 2016 had found it is not effective, yet the defendants kept manufacturing and selling products with the ingredient, according to the complaint.

Judge Coogan held Tuesday that even if true, the state claims alleging mislabeling are preempted and must be dismissed. The judge explained that for an active drug ingredient, the FDA will issue a monograph detailing the conditions in which the ingredient can be labeled as safe and effective.

"Plaintiffs even claim that labels using the monograph language itself were misbranded because the FDCA's misbranding provision prohibits labels that are 'false or misleading in any particular,'" the judge said, adding that the plaintiffs' interpretation "is strained. Most obviously, whether a drug is 'effective' is a term of art under the FDCA, and the statute empowers the FDA, not manufacturers, to make that determination."

"So, even taking plaintiffs' allegations as true, nothing on the labels was false or misleading — unless and until the FDA amends the monograph in response to the NDAC's findings, it is not misleading to state that PE is an effective nasal decongestant," Judge Coogan.

He also dismissed the plaintiffs' false-advertising, false-concealment and express-warranty claims as preempted by federal law.

"Although plaintiffs point to omissions outside of the label which they claim constitute false concealments and statements outside of the label which they claim constitute express warranties, defendants would have had to update their label to avoid liability under either theory," the judge said. "And, despite plaintiffs' arguments to the contrary, New York considers purely economic express-warranty claims to arise out of contract law, not product-liability law."

The Racketeer Influenced and Corrupt Organizations Act claim alleges the defendants committed mail and wire fraud as part of a scheme to mislead the FDA and defraud the public, but the judge found that as indirect purchasers of the products in question, they do not have standing under the U.S. Supreme Court's 1977 ruling in Ill. Brick Co. v. Illinois, which held a plaintiff must be the "direct victim" of a RICO violation in order to assert a claim.

"The Supreme Court, in interpreting federal antitrust law, has applied a 'direct purchaser" rule: a standing doctrine that bars downstream indirect purchasers from bringing an antitrust claim," the judge said.

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

The plaintiffs are represented by Melanie H. Muhlstock and Jason S. Goldstein of Parker Waichman LLP, Elizabeth J. Cabraser, Daniel R. Leathers, Jason L. Lichtman, Jonathan D. Selbin, David S. Stellings and Lexi J. Hazam of Lieff Cabraser Heimann & Bernstein LLP, Darren T. Kaplan of Kaplan Gore LLP, Andrew D. Bluth and Christopher R. Rodriguez of Singleton Schreiber LLP, George T. Williamson of Farr Law Firm PA, Conlee S. Whiteley and David J. Stanoch of Kanner & Whiteley LLC, Marlene J. Goldenberg of Nigh Goldenberg Raso & Vaughn PLLC, Bryan F. Aylstock and R. Jason Richards of Aylstock Witkin Kreis & Overholtz, Andrew D. Bizer of Bizer & DeReus LLC, and Ruben Honik of Honik LLC.

Procter & Gamble Co. is represented by Andrew Soukup of Covington & Burling LLP.

Albertson's Cos. Inc., CVS Pharmacy Inc.,Target Corp. and Walgreen Co. are represented by Mark J. Lesko and Sara K. Thompson of Greenberg Traurig LLP.

Amazon.com Inc. is represented by Robert W. Sparkes III of K&L Gates LLP.

Associated Wholesale Grocers Inc. and Valu Merchandisers Co. are represented by E. Paige Sensenbrenner of Adams and Reese LLP.

Bayer HealthCare LLC is represented by Christopher G. Campbell of DLA Piper.

GlaxoSmithKline Consumer Healthcare Holdings US LLC and Haleon PLC are represented by Jay P. Lefkowitz of Kirkland & Ellis LLP.

Johnson & Johnson Consumer Inc. is represented by Hannah Y. Chanoine of O'Melveny & Myers LLP.

RB Health (US) LLC is represented by Lauren S. Colton of Hogan Lovells.

Walmart Inc. and Wal-Mart Stores East LP are represented by Livia M. Kiser of King & Spalding LLP.

The case is In Re: Oral Phenylephrine Marketing and Sales Practices Litigation, case number 3089, before the U.S. Judicial panel on Multidistrict Litigation.

--Additional reporting by Jonathan Capriel. Editing by Lakshna Mehta.

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Chancery Shoots Down $9.5M Straight Path Atty Fee Claim

By **Jeff Montgomery**

Law360 (October 29, 2024, 7:19 PM EDT) -- Stockholder attorneys who waged a multiyear Delaware Court of Chancery battle over IDT Corp. founder Howard Jonas' campaign to scuttle damage claims against him arising from federal sanctions against Straight Path Communications on Tuesday lost a Chancery fight for a $9.5 million attorney fee.

Vice Chancellor Sam Glasscock III ruled that, despite Jonas' coercive conduct, Straight Path stockholders ultimately received a fair price for the company's sale of cellular phone frequency assets to Verizon Communications Inc., undermining justifications for shifting plaintiff costs to the IDT founder.

"Jonas is no longer a fiduciary for Straight Path. And the class has no more interest in whatever moderating effect this litigation has on Jonas' business practices going forward than does the general public," the vice chancellor wrote. "There is simply no common benefit here created by the litigation."

Jonas, who controlled both IDT and Straight Path at the time, was accused of coercing and threatening Straight Path's independent directors into accepting a $10 million settlement of claims against him ahead of that company's $3.1 billion merger with Verizon Communications in 2018.

While still subject to appeal, the ruling potentially ends a suit filed in July 2017 over events going back more than a decade. The case narrowed over time through litigation and settlements to a focus on Jonas.

At issue was Jonas' alleged role in coercing a special committee of the Straight Path board to bargain away rights to sue him to recover losses resulting from Federal Communications Commission sanctions and wireless license forfeitures levied against Straight Path while it was still controlled by IDT.

Prior to the deal, Straight Path lost a valuable chunk of its wireless frequencies and paid a penalty for fraudulent frequency renewal reporting in 2016. Although the sale proceeds from the Verizon deal more than covered the federal sanctions, IDT and Jonas remained under the shadow of a prior commitment to indemnify Straight Path for the penalties.

After a 10-day split trial in 2022, the vice chancellor found that Jonas breached his fiduciary duties to the minority stockholders through an unfair process that jeopardized what was at times described as a more than $1 billion stockholder litigation asset.

"However, I found that the indemnification asset was of minimal value, and that the price paid was fair. Under the circumstances, I awarded only nominal damages," the vice chancellor wrote in his ruling on Tuesday.

The fee motion argued that the litigation vindicated stockholder rights by holding a fiduciary accountable for a loyalty breach, potentially benefiting other public companies with which Jonas is involved and warranting payment of the stockholder fee by the IDT founder.

But the litigation failed to support "common benefit" claims for a fee based on litigation over what the court ultimately found to be a fair price for spiking the indemnification claim, the vice chancellor wrote.

During arguments on the fee in July, an attorney for Jonas argued that the damage claims failed to account for a finding that he was not found to have acted in subjective bad faith, a requirement for liability.

Also noted in the Tuesday ruling were Jonas' large defense costs, and a court finding that, although Jonas breached his fiduciary duties, the violations "ultimately caused no monetary harm to the class."

"Plaintiff reasons this will discourage the policing of corporate misconduct by intrepid plaintiffs' counsel that Delaware fosters," Vice Chancellor Glasscock wrote, acknowledging the incentive created by shifting fees and the resulting effect on "the quantity and quality of corporate litigation. But that is not itself an invocation of equity; and equity does not, in my view, demand fee shifting."

Straight Path's license holdings were described as a "golden goose" at times during the litigation, but the assets were tarnished by an FCC enforcement action relating to license rule violations that were settled only after an agreement that the agency would get 20% of the sale proceeds, along with other penalties.

In an email to Law360 on Tuesday, Jason Cyrulnik of Cyrulnik Fattaruso LLP — lead counsel for IDT, Jonas and the Patrick Henry Trust — said that "the court's findings after trial in this case confirmed that Howard Jonas' actions were in Straight Path stockholders' best interests. Straight Path settled its indemnification claim for a more than fair price that cleared the way for the company to move forward with a wildly successful auction process."

Cyrulnik said the court recognized that Jonas "acted on his conviction," with the vice chancellor's entire fairness review showing that the founder caused no harm to Straight Path's stockholders.

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

Shareholders are represented by Ned Weinberger and Mark Richardson of Labaton Keller Sucharow LLP, and Jeroen van Kwawegen, Edward G. Timlin and Eric Riedel of Bernstein Litowitz Berger & Grossmann LLP.

IDT, Jonas and the Patrick Henry Trust, which benefits Jonas and held his Straight Path stock, are represented by Rudolf Koch, Kevin M. Gallagher, Daniel E. Kaprow, John M. O'Toole and Melissa A. Lagoumis of Richards Layton & Finger PA, and Jason Cyrulnik and Paul Fattaruso of Cyrulnik Fattaruso LLP.

The case is In re: Straight Path Communications Inc. Consolidated Stockholder Litigation, case number 2017-0486, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas, Rose Krebs and Vince Sullivan. Editing by Melissa Treolo.

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'In-And-Out' Trades Don't Doom Lead Plaintiff Bid, Judge Says

By **Emilie Ruscoe**

Law360 (October 29, 2024, 10:53 PM EDT) -- A Manhattan federal judge appointed a Pomerantz LLP client as lead plaintiff in a shareholder suit against Nano Nuclear Energy Inc., rejecting arguments that the investor's handful of so-called in-and-out trades in the company's stock should preclude her from representing the proposed class in securities fraud allegations against the company.

In a Monday order, U.S. District Judge Jesse M. Furman rejected the idea that Nano investor Hongyu Xie was "an atypical in and out trader and day trader" who shouldn't be lead plaintiff in the suit alleging Nano misrepresented its path towards regulatory approval in statements to investors.

Judge Furman said Monday that Xie's trades bear "no resemblance to the trading activity" of day traders who'd been disqualified from representing proposed investor classes in other cases.

Xie, whose alleged losses in connection with the matter are nearly $245,000, has the largest financial interest in the case, the judge said Monday. She also satisfied the other requirements for serving as lead plaintiff, including having claims typical of the members of the proposed class, according to the court.

In declaring Xie the lead plaintiff, Judge Furman also designated her Pomerantz legal team as class counsel in the matter.

Xie's lead plaintiff bid came under fire from Olivier Anfry, another Nano investor who wanted to represent the class. In an Oct. 15 brief, Anfry asserted that Xie "appears to be an in-and-out day trader," citing Xie's loss chart, which showed what he described as "daily purchases and same day or next day sales."

Anfry, who is represented by counsel at Bragar Eagel & Squire PC, claimed that those trades were "repeated in-and-out trades and day trading," showing that Xie would be subject to unique defenses and wouldn't be an appropriate choice to represent the proposed class.

In a response, Xie said she "is not a day trader," linking to financial website Investopedia's article defining day trading in support of her contention.

"Xie's class period investment activity consisted, in the main, of purchasing and holding [Nano] shares and plainly does not evince an effort to capitalize on intraday market price action via high-volume trading," she said.

She pointed out that there were only four days during the action's proposed 71-day class period during which she'd both purchased and sold Nano shares, describing those days as "a de minimis interval relative" to the length of time during which she held nearly 26,000 Nano shares on which she saw losses following the alleged corrective disclosure at the end of the proposed class period.

On Monday, Judge Furman said that cases involving day-trader lead plaintiff movants "do not call for rejection of Xie's motion" because those holdings were dissimilar to this situation.

Xie will now represent a putative Nano investor class that purchased the company's shares between May 8, 2024, when the company went public, and July 18, 2024, the day before a report cited experts skeptical of Nano's timeline for bringing nuclear microreactors to market.

The suit, filed in August by Nano investor Yvette Yang, points to a series of declines in trading prices for Nano shares following the publication of the July 19 report.

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

Xie is represented by Jeremy A. Lieberman, J. Alexander Hood II and James M. LoPiano of Pomerantz LLP and Junbo Hao of the Hao & Han Law Firm.

Nano Nuclear Energy Inc. is represented by Eric N. Landau, Joanna Rebecca Cohen, John Brilling Horgan and Travis Biffar of Ellenoff Grossman & Schole LLP.

The case is Yang v. Nano Nuclear Energy Inc. et al., case number 1:24-cv-06057, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Sydney Price. Editing by Jay Jackson Jr.

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2 Firms Tapped To Lead Five Below Investor Suit

By **Emilie Ruscoe**

Law360 (October 29, 2024, 4:54 PM EDT) -- Berger Montague PC and Bernstein Litowitz Berger & Grossmann LLP will represent a proposed class of investors in a suit alleging that teen-focused retail chain Five Below overstated its growth prospects, then saw trading prices crater when it announced that its sales expectations fell short.

In **an order** in Philadelphia federal court Monday, U.S. District Judge Gerald A. McHugh found that the firms' clients Arkansas Public Employees' Retirement and the Arkansas Teacher Retirement System had the largest financial interest in the case "by a large margin."

Relevant factors "support selecting the Arkansas funds group as lead plaintiff," Judge McHugh said Monday.

The judge noted that the Arkansas funds' aggregated alleged losses are about $5 million, in contrast with its single remaining lead plaintiff competitor, an individual investor whose alleged losses were less than 2% of that.

The Arkansas funds purchased nearly 68,000 shares of Five Below stock during the proposed class period, a total far surpassing the number of shares bought by the individual investor, and the court noted that "based on the number of shares purchased and the range of security prices during the class period, it is reasonable to assume that the Arkansas funds group expended far more net funds."

Judge McHugh's order also consolidates a pair of proposed class actions against Philadelphia-headquartered Five Below. In consolidating the actions, the judge said he would accept the second-filed case's longer class period, which expands the proposed class period by about 14 months, noting that the Arkansas funds had asked to be appointed lead plaintiffs "for the most broadly defined proposed class."

The case's other lead counsel movants include Bielli & Klauder LLC — which launched the first-filed action — Glancy Prongay & Murray LLP, Pomerantz LLP and Ballard Spahr LLP.

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

The Arkansas funds and the proposed class are represented by Michael Dell'Angelo, Andrew D. Abramowitz and Alex B. Heller of Berger Montague PC and Hannah Ross, Avi Josefson and Scott R. Foglietta of Bernstein Litowitz Berger & Grossmann LLP.

Five Below is represented by Jay A. Dubow, Erica Hall Dressler, Hannah Baskind and Mary Weeks of Troutman Pepper Hamilton Sanders LLP.

The first-filed case is Himes v. Five Below Inc. et al., case number 2:24-cv-03638, in the U.S. District Court for the Eastern District of Pennsylvania.

--Additional reporting by P.J. D'Annunzio. Editing by Stephen Berg.

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2nd Circ. Revives Investor Suit Against Chinese News App

By **Katryna Perera**

Law360 (October 29, 2024, 5:24 PM EDT) -- The Second Circuit has revived a securities class action alleging that Chinese news aggregation app Qutoutiao hid changes in its advertising policies that allegedly spurred fraudulent advertisements on the app and eventually caused its share price to decline, finding that the lower court erred in determining that the suit's claims sound in fraud.

A three-judge panel for the Second Circuit issued an **order** on Monday saying U.S. District Judge Sidney H. Stein erred in applying a heightened pleading standard to the suit's claims and dismissing the action in its entirety last year.

The litigation alleged that Qutoutiao made a series of misleading statements to investors about its advertising practices in violation of federal securities laws, and the lack of disclosure caused the stock to plummet in December 2020, when quarterly revenues revealed steep declines due to regulatory actions against it over alleged false ads.

Judge Stein ruled **last year** that the suit's claims were "wholly conclusory" and insufficiently pled, and he held that the investors' lawsuit doesn't specify the magnitude of Qutoutiao's allegedly illicit advertising activity following the company's initial public offering in 2018, or that those ads accounted for more than a nominal amount of the company's revenue during the relevant class period.

However, on Monday, the Second Circuit panel said plaintiff James Pappas' claims sound in negligence rather than fraud.

"Plaintiff's Securities Act claims are framed in the classic language of negligence and strict liability: plaintiff claims that defendants failed to satisfy their 'duty to make [a] reasonable and diligent investigation' to ensure that the offering documents did not contain misstatements or omissions," the order stated. "Such allegations … will not be held to a higher standard because plaintiff also exercised his right to sue defendants for securities fraud under the Exchange Act."

The panel also said Pappas made "more than nominal efforts" to distinguish his negligence from fraud-based claims.

"Each claim is set forth under its own heading and incorporates only certain factual allegations such that, although all claims follow a general recitation of the factual background, the Securities Act claims expressly do not incorporate the allegations supposedly supporting a finding of scienter and reliance," the order stated.

According to the order, when dismissing the suit, Judge Stein also concluded that Pappas' allegations that Qutoutiao intentionally adopted profit-seeking business strategies to disseminate illegal advertisements "simply do not sound in negligence."

However, the panel said Monday that although Pappas alleges that the company intentionally designed and implemented the underlying strategies, his Securities Act claims allege the defendants negligently failed to disclose those strategies and their results.

"That a fact was known and not disclosed does not mean, as a matter of law, that the circumstances of the resulting omission sound in fraud," the panel said.

In finding that the district court applied the wrong standard to the suit's Securities Act claims, the panel did not reach the parties' other arguments, all of which remain available on remand, the order said.

In a statement to Law360 on Tuesday, Richard Cipolla of Freedman Normand Friedland LLP, counsel for Pappas, said: "This is an important win for domestic investors of foreign issuers. It demonstrates the continued importance of protecting investors through accurate and complete disclosures under the U.S. securities laws."

Counsel for Qutoutiao and the other defendants did not immediately respond to requests for comment on Tuesday.

U.S. Circuit Judges Denny Chin and Michael H. Park and U.S. District Judge Lewis J. Liman sat on the panel for the Second Circuit.

Pappas is represented by Ivy T. Ngo, Velvel (Devin) Freedman and Richard Cipolla of Freedman Normand Friedland LLP.

Qutoutiao and the other defendants are represented by George S. Wang, Bo Bryan Jin and Eric Yang of Simpson Thacher & Bartlett LLP and Jonathan Rosenberg, B. Andrew Bednark and Amber L. Covucci of O'Melveny & Myers LLP.

The case is James Pappas v. Qutoutiao Inc. et al., case number 23-1233, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Dorothy Atkins. Editing by Rich Mills.

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Biopharma Co. Escapes Investor Suit Over Drug Approval Lies

By **Sydney Price**

Law360 (October 29, 2024, 6:36 PM EDT) -- Biopharmaceutical company Spero Therapeutics Inc. has escaped a proposed investor class action accusing it of concealing warning signs that it would not secure regulatory approval of one of its drugs, with the court ruling that Spero's interactions with the U.S. Food and Drug Administration do not indicate Spero should have known its application would be rejected.

According to the suit, Spero identifies, develops and commercializes treatments for multidrug-resistant bacterial infections and other rare diseases in the U.S. Beginning in September 2020, Spero misled investors about the likelihood the FDA would approve its application for tebipenem pivoxil hydrobromide, an antibiotic treatment for complicated urinary tract infections, the suit claims.

On March 31, 2022, Spero's shares fell 18% when the company announced that the FDA had identified deficiencies in its drug application that "preclude discussion of labeling and post-marketing requirements/commitments at this time," the complaint states.

U.S. District Judge LaShann DeArcy Hall said on Monday that the facts pled in the complaint suggest, at best, that Spero was aware of some risk that the drug would not be approved, which is a "far cry from near certainty."

The court said it is unconvinced that Spero's heightened access to the FDA due to its so-called "fast track" designation supports an inference that the company knew of the FDA's specific concerns regarding the trial's patient population.

"Under these circumstances, the court cannot conclude that the frequent meetings were a red flag or otherwise made non-approval a near certainty," the order states.

The order also notes that Spero had no duty to disclose the FDA's interim feedback.

"The mere allegation that defendants failed to disclose relevant information does not in and of itself constitute strong evidence that they did so with scienter," Judge Hall said.

The complaint also alleges that the company engaged in "highly suspicious" conduct in early 2022, including a mass layoff, which suggests it knew of the upcoming application rejection, but Judge Hall said none of the suit's arguments are compelling.

"This timing demonstrates that defendants engaged in such conduct only when it was a near certainty that the drug would not be approved," the order states. "Thus, at most, these facts show that defendants were aware of a risk, not of a near certainty."

Additionally, Judge Hall said the suit's insider trading allegations against Spero's CEO Ankit Mahadevia and suggestions that other executives improperly benefited from the alleged fraud are not actionable.

"None of the alleged insider stock transactions were executed between March and May 2022, the period during which it would have been arguably 'unusual' for an insider to make trades, given defendants' receipt of the deficiency letter," the order states.

"Plaintiffs allege that 'suspicious' pay increases took place in 2021, well before Spero's receipt of the deficiency letter," the order continues.

Counsel for the investors declined to comment on Tuesday. Counsel for Spero did not immediately respond to requests for comment.

The investors are represented by Jeremy A. Lieberman, Matthew L. Tuccillo, Jennifer Banner Sobers and Brandon M. Cordovi of Pomerantz LLP, Brian Schall of The Schall Law Firm and Charles H. Linehan of Glancy Prongay & Murray LLP.

Spero is represented by Gabriel Rossman and John F. Sylvia of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

The case is In re: Spero Therapeutics Inc. Securities Litigation, case number 1:22-cv-03125, in the U.S. District Court for the Eastern District of New York.

--Editing by Jay Jackson Jr.

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Defunct Pot Co. CEO Says 'Grifter' Is Trying To Stop Settlement

By **Jonathan Capriel**

Law360 (October 29, 2024, 7:23 PM EDT) -- The founder of a defunct marijuana greenhouse claims the $1.5 million settlement it made with a class of investors has been stymied in unrelated legal action filed by a "sophisticated grifter" looking for personal gain, urging a Colorado federal judge to push aside the bankruptcy action.

The onetime CEO of Two Rivers Water & Farming Co., John McKowen, says he can't foreclose on certain property, as stipulated in the settlement with investors, because Greg Harrington, who claims to be the current manager of Two Rivers, has filed claims in bankruptcy court.

McKowen says that Harrington has taken control of Two Rivers and other entities through fraudulent means, and now looks to siphon whatever he can from the collapse of GrowCo, the subsidiary at issue in the class action, before investors get their cut, according to his **motion** filed Thursday.

"Harrington is a sophisticated grifter who through smoke & mirrors has cultivated a deceptive facade of financial strength and competence," McKowen said. "He is adept at maneuvering and twisting legal processes for his personal benefit."

"Harrington's bad faith use of bankruptcy to prevent foreclosure and development warrants release of the property to McKowen with trustee oversight," the motion said.

McKowen and Two Rivers were hit with a lawsuit headed by investor John Paulson. He claimed GrowCo made false and misleading disclosures in its offering documents by failing to note that McKowen had been fined and suspended by the National Association of Securities Dealers, among other claims. Paulson further said his investment in GrowCo was "effectively worthless" after the company filed for Chapter 11 protection in January 2019.

A **judge approved** the $1.5 settlement with investors and $500,000 in class counsel attorney fees in March 2023.

McKowen's motion said that settlement released him from "all" claims connected to securities fraud allegations and, as a GrowCo investor, gives him the right to "pursue the collections of amounts due under the GrowCo securities."

But in May, Harrington, through entities he controls including Two Rivers Farms F-2 Inc, filed an adversary complaint seeking damages against GrowCo investors and beneficiaries. McKowen also claims that Harrington has used the bankruptcy court to block him from selling GrowCo property, which is stipulated as part of the settlement agreement.

Neither side could immediately be reached for comment Tuesday.

McKowen is representing himself.

Counsel information for Harrington wasn't immediately available.

The case is Paulson v. McKowen et al., case number 1:19-cv-02639, in the U.S. District Court for the District of Colorado.

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Y-mAbs Therapeutics Investors Get Final OK For $19.7M Deal

By **Sydney Price**

Law360 (October 29, 2024, 10:18 PM EDT) -- A New York federal judge has granted final approval to a $19.7 million settlement between Y-mAbs Therapeutics and investors who claim the company misrepresented the likelihood that the U.S. Food and Drug Administration would approve the company's signature pediatric nerve cancer treatment, giving class counsel a $6.5 million cut of the deal.

The settlement, which received preliminary approval in July, ends claims that Y-mAbs misled investors on the prospects for its lead product candidate, a neuroblastoma treatment known as omburtamab, causing share prices to decline nearly 24% in October 2022 when the FDA revealed that an advisory committee had voted against approving the treatment.

Two years earlier, the FDA had declined marketing approval of omburtamab in a refusal to file letter dated Oct. 2, 2020, and informed Y-mAbs that additional data was necessary to provide the level of evidence needed to support an approval, according to the complaint.

But during an earnings call the following month, Y-mAbs' CEO at the time, Juan Moller San Pedro, told investors that it was "pretty clear" the company had resolved all the issues with omburtamab outlined by the FDA, the suit said. And months later, in June 2021, the company reiterated that it was "aligned" with the FDA on the next step towards resubmitting the application, according to the complaint.

The investors allege, however, that Y-mAbs had been repeatedly advised by the FDA that the agency was unlikely to approve the drug, making its statements false and misleading.

Y-mAbs argued in its motion to dismiss the suit that the plaintiffs did not adequately allege the company should have known its application would be rejected again and that its forward-looking statements are protected by the safe-harbor provisions of the securities laws.

In signing off on the settlement Monday, U.S. District Judge Arun Subramanian also noted that lead counsel from Pomerantz LLP did not fully comply with the Local Rule 23.1 requirement that the settlement notice make certain disclosures regarding fee sharing agreements. He said no remedial action was needed.

In a separate letter Monday, a Pomerantz attorney said the firm will share approximately $87,000 of the $6.5 million in attorney fees with Wolf Popper LLP, an amount in its lodestar in the matter. Pomerantz also will share 5% — or about $325,000 — in fees with Glancy Prongay & Murray LLP, according to the letter.

As reimbursement for litigation expenses, the firms will share more than $55,000, according to Monday's **order** granting final approval to the settlement. The suit's lead plaintiff will receive $5,000, it states.

Counsel for Y-mAbs declined to comment on Tuesday. Counsel for the investors did not immediately respond to requests for comment.

The investors are represented by Jeremy A. Lieberman and Michael J. Wernke of Pomerantz LLP, Gregory B. Linkh, Robert V. Prongay and Charles H. Linehan of Glancy Prongay & Murray LLP, and

Robert Craig Finkel of Wolf Popper LLP.

Y-mAbs is represented by Aric H. Wu, Sarah M. Topol and Koji Fukumura of Cooley LLP.

The case is Corwin v. Y-mAbs Therapeutics, Inc. et al., case number 1:23-cv-00431, in the U.S. District Court for the Southern District of New York.

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Alibaba's $433.5M Investor Suit Deal Gets Initial OK

By **Sydney Price**

Law360 (October 29, 2024, 2:45 PM EDT) -- A New York federal judge granted preliminary approval to a $433.5 million deal settling a suit between Alibaba Group and investors alleging the company made misstatements about its exclusivity practices and the planned $34 billion initial public offering of a fintech affiliate.

In an **order** Monday, U.S. District Judge George B. Daniels regarded the settlement as "fair, reasonable and adequate" and scheduled a settlement hearing for March 27, 2025. Judge Daniels also appointed four plaintiffs as class representatives for the settlement class.

The investors said in the **motion for preliminary approval** that the deal is the 21st-largest securities class action settlement in the Southern District of New York and among the top 50 largest in the U.S. since the Private Securities Litigation Reform Act was enacted in 1995.

Three proposed class actions were filed in the Southern District of New York beginning in November 2020 and were consolidated in April 2021.

The investors' most recent complaint, filed in April 2022, alleged that they were damaged in December 2020 when trading prices for Alibaba's American depository shares fell by about 13% after Chinese regulators announced they were looking into the company's allegedly monopolistic practices.

The investors are represented by Kara M. Wolke and Melissa C. Wright of Glancy Prongay & Murray LLP, Jeremy A. Lieberman, Jonathan D. Park and Patrick V. Dahlstrom of Pomerantz LLP, Peretz Bronstein of Bronstein Gewirtz & Grossman LLC, Frank R. Cruz of The Law Offices of Frank R. Cruz and Lesley Portnoy of The Portnoy Law Firm.

The Alibaba defendants are represented by Jonathan K. Youngwood, Stephen P. Blake and Bo Bryan Jin of Simpson Thacher & Bartlett LLP.

The case is In re: Alibaba Group Holding Ltd. Securities Litigation, case number 1:20-cv-09568, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Rae Ann Varona. Editing by Daniel King.

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BofA Faces Scrutiny Of AML Program, Zelle Payment Handling

By **Jon Hill**

Law360 (October 29, 2024, 10:23 PM EDT) -- Bank of America Corp. disclosed Tuesday that its anti-money laundering program is a focus of ongoing "discussions" with federal regulators and said it is mulling litigation with the Consumer Financial Protection Bureau over a potential enforcement action related to digital payment network Zelle.

Bank of America said Tuesday it was facing regulatory scrutiny of its anti-money laundering program and its processing of Zelle payments. (AP Photo/Mark Lennihan)

In its quarterly report filed with the U.S. Securities and Exchange Commission, the North Carolina-based banking giant said it has been interacting with "several" unnamed federal regulators regarding "certain aspects" of its programs for anti-money laundering and sanctions compliance.

Those "aspects," according to the filing, include transaction monitoring, training, governance and customer due diligence. Although the bank said it has been making "enhancements" to its compliance programs and plans to keep doing so in cooperation with regulators, it also signaled more could be coming.

Bank of America "is continuing discussions with its regulators about the programs, and resolution of these discussions may include one or more public orders by the regulators," the bank said.

The bank did not specify whether any monetary penalties are on the table as part of these discussions, but it did say it is not expecting "a material adverse financial impact" in connection with the matter.

The disclosure comes nearly three weeks after TD Bank's record-setting **$3 billion settlement** with U.S. authorities for persistent and pervasive anti-money laundering compliance failures, including flawed systems and other gaps that allowed huge sums of dirty money to flow through the bank for years.

As part of the settlement, TD Bank became the first bank ever to plead guilty to money laundering conspiracy and was ordered to pay the largest-ever fine imposed under the Bank Secrecy Act, which requires financial institutions to establish programs for detecting and preventing illicit financial activity.

TD Bank also consented to a cap on the growth of its U.S. operations, a rare and particularly harsh type of restriction that has further underscored how much federal regulators prioritize the fight against money laundering and how seriously they take violations.

In its Tuesday report, Bank of America also disclosed it is facing a CFPB inquiry into its "processing of electronic payments of funds through the Zelle network," confirming previous press reporting that it is one of several major banks whose Zelle-related practices have been **under investigation by the agency**.

Zelle, a leading mobile payment service, is owned and operated by Early Warning Services LLC, which in turn is co-owned by a consortium of seven big U.S. banks that includes Bank of America, Wells Fargo and JPMorgan Chase & Co.

Wells Fargo and JPMorgan have already **publicly disclosed** that the CFPB is looking into how they handle customer disputes for payments made using Zelle. With its Tuesday filing, Bank of America has joined their ranks.

Bank of America's report did not provide further detail on what specific practices or issues the CFPB is looking into, but Zelle has been at the center of public scrutiny amid concerns about how banks respond to frauds and scams perpetrated over the instant payment network.

The filing also indicated that the CFPB's inquiry is heating up. Staff from the agency have "initiated discussions with the corporation to pursue a resolution of the inquiry or file an enforcement action," Bank of America said, adding that it "is evaluating next steps, including litigation."

JPMorgan, which revealed its involvement in the CFPB's probe in August, has said that it, too, **is considering litigating** the matter.

Democratic lawmakers, public interest groups and consumers have argued that financial institutions — particularly those that own Zelle — **should be doing more** to root out bad actors on the service and compensate victims who have been ripped off.

Under federal law, consumers have a right to reimbursement for payments sent from their accounts without their authorization, but not for payments they are tricked into sending willingly.

Bank of America and its peers have maintained that they comply with these rules and already spend heavily on various fraud and scam prevention measures. Efforts like these have made Zelle actually quite safe to use, so expanding reimbursement rules would be costly, disruptive, unnecessary and unwise, banks say.

A Bank of America spokesperson declined to comment on the SEC filing. Representatives of the CFPB did not immediately respond to a request for comment late Tuesday.

--Editing by Covey Son.

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Lovesac To Pay SEC $1.5M Fine In Accounting Fraud Case

By **Katryna Perera**

Law360 (October 29, 2024, 9:31 PM EDT) -- Beanbag chair maker Lovesac has agreed to pay $1.5 million to the U.S. Securities and Exchange Commission to settle allegations that some of the company's former executives conspired to cover up an accounting debacle over how it recorded what's known as last-mile shipping costs.

The SEC filed a **complaint** and **motion** for entry of final judgment on Tuesday in Connecticut federal court. The suit names as defendants Connecticut-based Lovesac, its former Chief Financial Officer Donna Dellomo and former controller and vice president Yoon Um.

The $1.5 million deal will resolve claims that Lovesac failed to properly account for "last mile" shipping expenses, or the cost of shipping finished products from Lovesac's distribution centers to its customers. The suit's claims against Dellomo and Um will continue.

The SEC alleges in its complaint that the defendants engaged in fraudulent accounting of approximately $2.2 million in shipping expenses that led to misleading financial statements being filed with the commission and made available to the investing public.

According to the complaint, Um and Dellomo hid the expenses from investors and the commission to prevent the company from missing its projected gross margin and to avoid restating Lovesac's prior financial filings for the periods in which the expenses were incurred.

To accomplish the scheme, the complaint says, Dellomo and Um improperly accounted for the expenses, and, given that they are both experienced financial professionals and certified public accountants, they knew, or were reckless in not knowing, that what they were doing was not compliant with generally accepted accounting principles and caused some of Lovesac's financial statements to be materially false and misleading.

Dellomo furthered the scheme by submitting a false and misleading management representation letter to Lovesac's external auditor, according to the complaint.

"Further, Lovesac and Dellomo failed to implement sufficient internal controls over financial reporting … that may have prevented or detected Dellomo and Um's fraudulent accounting," the complaint stated.

The scheme was discovered in April 2023, according to the SEC, and Lovesac was required to restate its financial statements for fiscal year 2023 and the first quarter of fiscal year 2024 to correct Dellomo and Um's alleged fraud.

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

The SEC is represented in-house by Alfred A. Day, Xinyue Angela Lin and Martin F. Healey.

Counsel information for Lovesac and the other defendants was not immediately available.

The case is United States Securities and Exchange Commission v. Dellomo et al., case number 3:24-cv-01727, in the U.S. District Court for the District of Connecticut.