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Amazon denies duping US consumers over Alexa's recording practices

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Mike Scarcella

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October 31, 2024

(Reuters) - E-commerce giant Amazon.com has asked a U.S. judge to throw out a multibillion-dollar consumer lawsuit that claims the tech company's cloud-based voice service Alexa illegally collected and recorded private conversations without consent.

Amazon said in a federal court filing on Wednesday in Seattle that the consumers had failed after years of litigation to show it engaged in unfair or deceptive practices.

Amazon asked U.S. District Judge Robert Lasnik to rule for the company on the merits of the plaintiffs' claims, which would end the case before a trial.

"Plaintiffs' Alexa recordings in fact contain none of the private, salacious, or personal details they claimed in their complaint," Amazon told the court. The filing said the consumers "either knew or reasonably should have known how Alexa worked."

Amazon and the plaintiffs' lawyers did not immediately respond to requests for comment on Thursday.

The lawsuit, filed in 2021, claimed Amazon violated state wiretap laws through its collection and storage of data from its Alexa voice-assistant software.

Amazon launched Alexa in 2014 as a virtual assistant that responds to a command prompt, or "wake" word, such as "hi, Alexa."

The consumers alleged Amazon developed Alexa "to illegally and surreptitiously intercept billions of private conversations" that extended beyond commands aimed at Alexa.

Amazon countered that its Alexa-enabled devices "monitor only for an acoustic pattern that matches the wake-word, and they do not activate until that pattern is detected."

Amazon said there was no evidence that Alexa "ever captured any plaintiff's 'conversation' or other communication." It said it built Alexa with safeguards to prevent "accidental" activations.

Only a "tiny fraction" of Alexa recordings "undergo anonymized human review as part of Amazon's machine learning processes," Wednesday's filing said. Amazon denied that concealed the role of human review from Alexa users.

The plaintiffs have asked Lasnik to approve two classes of consumers in the case made up of millions of individuals. They are seeking billions of dollars in damages.

The plaintiffs also want a court order restricting Amazon's use of secret records and requiring it to destroy any related data.

The case is Kaeli Garner v. Amazon.com, U.S. District Court, Western District of Washington, No. 2:21-cv-00750-RSL.

For plaintiffs: Michael Canty of Labaton Keller Sucharow and Paul Geller of Robbins Geller Rudman & Dowd

For Amazon: Jedediah Wakefield and Brian Buckley of Fenwick & West

References

LABATON KELLER SUCHAROW LLP; AMAZON.COM, INC.; FENWICK & WEST, LLP

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Delaware SPAC-Related Direct Action Breach of Fiduciary Duty Suit Settles for \$21 Million

K [dandodiary.com/2024/10/articles/director-and-officer-liability/delaware-spac-related-direct-action-breach-of-fiduciary-duty-suit-settles-for-21-million](https://www.dandodiary.com/2024/10/articles/director-and-officer-liability/delaware-spac-related-direct-action-breach-of-fiduciary-duty-suit-settles-for-21-million)

October 30, 2024

The D&O Diary

Delaware SPAC-Related Direct Action Breach of Fiduciary Duty Suit Settles for \$21 Million



By Kevin LaCroix on October 30, 2024

Posted in Director and Officer Liability



Long-time readers know that the significant amount of SPAC activity in past years led to a surge in SPAC-related litigation. Some of this litigation has taken the form of traditional securities class action lawsuits. However, among the more noteworthy developments in the rise of SPAC-related litigation has been the emergence of a separate type of suit, the Delaware direct action breach of fiduciary class action lawsuit, sometimes referred to a *MultiPlan* claim in reference to the first suit of the type to be filed. As detailed below, these kinds of lawsuits have gone through a relatively swift evolution. Many of these kinds of

cases remain pending, have not yet reached the settlement stage. However, the GeneDX lawsuit, which is one of these kinds of cases, recently settled for \$21 million, subject to court approval. There are a number of interesting aspects of this settlement, as discussed below. The parties settlement stipulation in the case can be found [here](#).

Background

CM Life Sciences Holdings (CMLS) was a special purpose acquisition company (SPAC). It completed an IPO in September 2020. It merged with the clinical data and genomics company Sema4 Holdings in July 2021. Sema4 is now known as GeneDX. Following the merger, the share price of the merged company plunged.

In February 2023, as detailed here, a plaintiff shareholder filed the first of several Delaware Chancery Court direct action breach of fiduciary duty class action lawsuits against CMLS; certain of its pre-merger executives; as well as the sponsor and financial backers of CMLS. The various lawsuits were later merged. The lawsuits allege that the defendants pushed through the merger based on merger-related documents containing misrepresentations or omissions.

The plaintiffs allege that as a result of the way that the SPAC and the merger deal were structured, the defendants had “strong incentives” to convince investors to approve the merger, regardless of how illogical it may have been. The defendants were also motivated to convince the investors to vote in favor of the merger, rather than to redeem their shares as was their right under the SPAC structure. The plaintiff alleged the misrepresentations deprived the investors of their right to redeem their shares, which plunged in value after the merger, resulting in significant “value destruction” for the shareholders.

The Settlement

In May 2024, the parties engaged in mediation processes, which ultimately resulted in the parties’ agreement to settle the consolidated actions for \$21 million dollars for the plaintiff class, as discussed here. The settlement is subject to court approval. The parties’ settlement agreement including a provision for attorneys’ fees and expenses of more than \$1.5 million in fees and nearly \$75,000 in expenses.

Discussion

Readers may recognize this kind of lawsuit as a *MultiPlan* claim. This name is in reference to the MultiPlan lawsuit, which was the first of these Delaware direct action breach of fiduciary duty lawsuits to be filed, as discussed in detail here. MultiPlan was also the first of these kinds of suits to survive a motion to dismiss, in a January 2022 ruling by Vice Chancellor Lori Will. Significantly, in denying the motion to dismiss in the MultiPlan lawsuit, VC Will held that the “entire fairness” standard applied, an exacting standard making it much more difficult for defendants to succeed on motions to dismiss.

Additional rulings in which the motions to dismiss were denied quickly followed; a subsequent dismissal motion denial in the Gig3 case sounded alarm bells as observers became concerned that these rulings could result in a “gold rush.” The fears that there could

be a rush to file more of these MultiPlan claims arguably was well-founded, as the filings of many of these kinds of cases soon followed, as discussed here.

The concerns about the threat of this kind of litigation were further underscored by the fact that the MultiPlan case itself settled for \$33.75 million. Other settlements have followed. For example, as discussed here, the various ATI Physical Therapy lawsuits (inclusive of securities class action litigation; derivative litigation; and one of these Delaware direct action breach of fiduciary duty lawsuits) recently settled for a combined \$31 million, of which the settlement of the direct action fiduciary duty lawsuit represented \$6 million.

None of this has been lost on the Delaware Court of Chancery, which has begun to push back. As discussed here, in a May 2024 ruling in the Hennessey Capital Acquisition IV case, VC Will (who wrote the opinions in both the MultiPlan and Gig3 cases) said the following about the upsurge in MultiPlan lawsuits: that “the success of a few cases begat a host of others. Though the SPAC market has contracted, SPAC lawsuits are ubiquitous in Delaware. Remarkably similar complaints accuse SPAC directors of breaching their fiduciary duties base on flaws in years-old proxy statements that became problematic only when the combined company underperformed.”

In granting the motion to dismiss in the Hennessey Capital case, VC Will said that “It cannot be fairly inferred that the defendants withheld knowable information material to public stockholders deciding whether or not to redeem or invest in the combined company. To allow this faulty claim to proceed would fuel perverse incentives and invite strike suits.”

VC Will’s pushback in the Hennessey Capital case does not mean that the MultiPlan type lawsuits are dead, but it does show that these kinds of cases are not automatic winners for the plaintiffs, even with the benefit of the “entire fairness” standard at the motion to dismiss stage.

Another thing that is important to note with respect to the future possibilities for these kinds of suits is that the current SPACs are much less likely to be susceptible to these kinds of allegations. The SEC’s new SPAC disclosure rules, which were finalized in January 2024 and went into effect in July 2024, mandate disclosures of a type that are likely to address many of the ills alleged in these MultiPlan lawsuits.

So the phenomenon of MultiPlan litigation may have run full cycle. However, in the meantime, there is still the backlog of these kinds of lawsuits filed in the last several years still working their way through the system. Many of them may, like the GeneDX case, eventually result in settlements. This latest settlement will represent a reference point for future settlements of these kinds of cases.

There is one detail in the papers about the GeneDx settlement that caught my attention. The settlement papers provide unusually detailed information about which lawyers will be receiving fee payment as part of the settlement, as well as how much they are to receive. One particular name caught my eye. Among the lawyers to receive fees is Stanford Law Professor Michael Klausner, who is to receive \$35,200 in fees.

Readers with long memories may recall that the whole MultiPlan litigation phenomenon had its intellectual genesis in an academic paper Klausner wrote in November 2021 with NYU Professor Michael Ohlrogge, as discussed in detail [here](#). The two authors also wrote a subsequent paper in which they responded to the comments of SPAC defenders who criticized the authors' initial paper, as discussed [here](#). Klausner not only, along with Ohlrogge, provided the intellectual underpinnings for these kinds of lawsuits, he was actually involved in some of the first of these cases. For example, as discussed [here](#), Klausner acted a co-counsel in the Gig3 case to which I referred above.

The fact that Klausner is in line to receive fees in the GeneDX settlement suggests that he has remained involved in other cases as well, although the size of his fee in the GeneDX case suggests that his involvement may not have been as significant as it was in the earlier, trend-setting cases. Anyway, it is interesting to see an academic succeeding in finding a way to monetize his academic writings and research. I understand Klausner also had a role in developing the outlines for the SEC's new SPAC disclosure guidelines.

Legal Fee Tracker: Lawsuit reveals fight over awards after \$5.6 bln 'swipe fees' settlement

 [reuters.com/legal/legalindustry/legal-fee-tracker-lawsuit-reveals-fight-over-awards-after-56-bln-swipe-fees-2024-10-31](https://www.reuters.com/legal/legalindustry/legal-fee-tracker-lawsuit-reveals-fight-over-awards-after-56-bln-swipe-fees-2024-10-31)

David Thomas



A U.S. \$100 dollar bill is seen December 17, 2009. REUTERS/Sam Mircovich (UNITED STATES - Tags: BUSINESS) [Purchase Licensing Rights](#) , opens new tab

Oct 31 (Reuters) - Private deals between class action law firms to divide up attorney fee awards rarely see the light of day, leaving outsiders to wonder how hundreds of millions of dollars in court-approved fees are allocated each year.

A new lawsuit , opens new tab between Scott + Scott and Robins Kaplan peels back some of that secrecy in one of the biggest private antitrust cases of the century.

Scott + Scott sued Robins Kaplan in state court in Manhattan on Tuesday, demanding \$5 million it said it was promised in connection with a \$5.6 billion antitrust class action settlement with Visa Inc (V.N) , opens new tab and MasterCard Inc (MA.N) , opens new tab over credit and debit card transaction "swipe" fees.

According to the lawsuit, Scott + Scott reached an agreement in 2015 to pay Robins Kaplan \$6 million from its share of a \$195 million fee award in a different case, a class action against private equity firms for allegedly conspiring to depress the prices of corporate buyouts before the financial crisis of the 2000s.

The payment allowed Robins Kaplan to collect a total of \$50 million in fees from the private equity case. In return, the lawsuit said, Robins Kaplan agreed to make a payment to Scott + Scott from its winnings in the Visa-MasterCard litigation to ensure that Scott + Scott collected \$20 million in that case.

Last year the 2nd Circuit U.S. Court of Appeals finally affirmed the \$5.6 billion Visa and MasterCard settlement, which resolved nearly 20-year-old claims that retailers were overcharged when shoppers used credit or debit cards. The court also upheld \$523.2 million in fees for the plaintiffs' attorneys, led by court-appointed class counsel at Robins Kaplan, Berger Montague and Robbins Geller Rudman & Dowd.

According to Scott + Scott, the firm was told by Robbins Geller that its share of the award would be \$15 million. Robins Kaplan, the lawsuit said, then reneged on its deal to make up the \$5 million difference so that Scott + Scott could walk away with \$20 million.

Firm leaders from Scott + Scott and Robins Kaplan did not immediately respond to requests for comment on the lawsuit. Attorneys at Berger Montague and Robbins also did not immediately respond to requests for comment.

Class action fee awards are public because they must be approved by a judge. But how firms agree to split such awards, including with firms that did not secure a coveted class counsel appointment, is rarely disclosed. Past cases have shone a partial light in some instances, such as a fight over how to divvy up \$503 million in fees in litigation over Syngenta's genetically modified corn seed.

In general, judges presiding over class actions prefer to keep out of such disputes, said University of Michigan law professor Adam Pritchard. By the time a court has approved a settlement and awarded fees, it would rather clear the case from its docket, he said.

Pritchard noted that Scott + Scott did not include a written fee-sharing contract with Robins Kaplan as part of its lawsuit. He said such agreements, while common, are sometimes informal.

"If it were in writing, this would be the time to share it," Pritchard said.

There's another wrinkle to Scott + Scott's case that isn't mentioned in its lawsuit. The Robbins Geller teams in both the swipe fee litigation and the corporate buyout case were co- led by longtime antitrust lawyer Patrick Coughlin. In 2023, Coughlin left Robbins Geller and joined Scott + Scott.

Coughlin did not immediately respond to a request for comment.

Spokespersons for Visa and MasterCard did not immediately respond to requests for comment.

Robins Kaplan and Scott + Scott are currently co-leading antitrust litigation against the property management company RealPage and companies that allegedly used its software to overcharge for rental housing. The defendants have denied wrongdoing.

-- In other legal fee news, lawyers for DISH Network and its Sling TV video service are fighting to reinstate an award of \$3.9 million in attorney fees after it was wiped out by an appeals court earlier this year.

A U.S. Court of Appeals for the Federal Circuit panel tossed the fee award [here](#) , opens new tab in August after finding a judge made several errors in awarding the fees to DISH, which was the defendant in a failed patent lawsuit.

DISH's lawyers at Fish & Richardson filed an en banc petition [🔗](#), opens new tab last week for the full Federal Circuit to rehear the case, arguing that a fee-shifting provision for "exceptional" patent cases should apply.

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

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Reporting by David Thomas

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Purdue Pharma nears new bankruptcy deal with Sacklers, mediator says

 [reuters.com/legal/purdue-pharma-nears-new-bankruptcy-deal-with-sacklers-mediator-says-2024-10-31](https://www.reuters.com/legal/purdue-pharma-nears-new-bankruptcy-deal-with-sacklers-mediator-says-2024-10-31)

Dietrich Knauth

Bottles of prescription painkiller OxyContin pills, made by Purdue Pharma LP sit on a counter at a local pharmacy in Provo, Utah, U.S., April 25, 2017. REUTERS/George Frey/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, Oct 31 (Reuters) - Purdue Pharma is close to a new bankruptcy settlement with its owners, members of the wealthy Sackler family, and state and local governments that have filed lawsuits alleging that its painkiller OxyContin spurred a deadly opioid addiction crisis in the U.S., a court-appointed mediator said Thursday.

Mediator Shelley Chapman said at a court hearing in White Plains, New York that Purdue has made real progress in recent days on a comprehensive deal that would resolve the lawsuits, adding that she would soon file a written report on the results of mediation.

"The parties are getting closer and closer by the day and the remaining issues, in our view, are resolvable," Chapman said.

Chapman urged U.S. Bankruptcy Judge Sean Lane to extend a freeze on opioid lawsuits against the Sacklers until Dec. 2, saying that allowing lawsuits to resume would undermine settlement talks and deplete resources that should be reserved for paying opioid creditors. "You can't make war and peace at the same time," Chapman said. "In order for the mediation to succeed, we need the full, undistracted attention of all the parties."

Purdue was sent back to the drawing board after a landmark U.S. Supreme Court ruling upended its previous bankruptcy plan, which would have granted sweeping legal protections to the Sacklers in exchange for up to \$6 billion that would have been spent addressing the harms caused by the opioid epidemic in the U.S.

Chapman did not discuss any terms of the deal. Attorneys representing state and local governments also declined to address the terms under discussion, while saying they were optimistic that a new deal could be reached before Dec. 2, the date when the current litigation stay is scheduled to expire.

The Supreme Court ruled on June 27 that Purdue Pharma's bankruptcy settlement cannot shield the Sacklers, who did not file for bankruptcy themselves, from lawsuits over their role in the opioid epidemic.

Opioid lawsuits against Purdue and the Sacklers have been on hold since 2019, when the Stamford, Connecticut-based drugmaker filed for bankruptcy.

The lawsuits against Purdue and Sackler family members by state and local governments, as well as by individual plaintiffs, have accused them of fueling the crisis through deceptive marketing of its pain medication. The company pleaded guilty to misbranding and fraud charges related to its marketing of OxyContin in 2007 and 2020.

If mediation fails, a court-appointed committee representing Purdue's creditors has been allowed to sue the Sacklers over claims that the family drained over \$11 billion from the company and that their conduct made Purdue liable for other lawsuits.

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Reporting by Dietrich Knauth, Editing by Alexia Garamfalvi, William Maclean

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Ammo Inc. Top Brass Misled Investors on Executive Pay, Suit Says

By Ben Miller

- **COURT:** D. Ariz.
- **TRACK DOCKET:** [2:24-cv-02969](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-10-31T10:23:16798888261-04:00

Ammo Inc. Top Brass Misled Investors on Executive Pay, Suit Says

By Ben Miller 2024-10-30T14:49:00000-04:00

- **COURT:** D. Ariz.
- **TRACK DOCKET:** [2:24-cv-02969](#) (Bloomberg Law subscription)

Directors and officers of munitions manufacturer Ammo Inc. made misleading statements about their own compensation, as well as the company's financial reporting controls, according to a shareholder derivative suit.

The board and executives allegedly failed to disclose key details about related party transactions, fees paid for investor relations and legal services, and the value of stock awards, said the complaint filed Tuesday in the US District Court for the District of Arizona.

Shareholders began to learn of the allegedly lacking internal controls on Sept. 24, when Ammo announced its Chief Financial Officer Rob Wiley, who is named as a defendant, had resigned at the request of the board. Ammo also announced it had retained a law firm to investigate the company's financial reporting from fiscal 2020 through 2023.

The following day, Ammo's share price fell more than 5% to close at \$1.44 per share, according to the complaint.

The shareholder derivative suit follows a proposed class action brought against Ammo Inc. last month, alleging similar fraud claims against the company and its top executives. That case is still pending in the same Arizona district court.

Ammo's board authorized share repurchases that caused the company to overpay approximately \$960,884 to buy back its stock at artificially inflated prices in 2022 and 2023, according to the complaint.

Executives and directors also received excessive compensation, bonuses, or stock options that the company failed to adequately disclose, in addition to related party transactions, according to the complaint.

The suit seeks damages for the company, an order directing Ammo to improve its corporate governance and internal procedures, and legal fees.

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

Gainey McKenna & Egleston and Martin & Bonnett PLLC represent the shareholder plaintiffs.

The case is Laboeuf v. Wagenhals , D. Ariz., No. 2:24-cv-02969, complaint filed 10/29/24 .

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Sustainable Materials Maker Defeats Investor Suit Over Retooling

By Martina Barash

- Investors challenged timing of facility change announcement
- Confidential witness account of meeting too vague, court says

Bloomberg Law News 2024-10-31T10:22:55605569352-04:00

Sustainable Materials Maker Defeats Investor Suit Over Retooling

By Martina Barash 2024-10-30T13:55:40000-04:00

- Investors challenged timing of facility change announcement
- Confidential witness account of meeting too vague, court says

Origin Materials Inc. investors can't proceed with securities fraud claims over the company's alleged failure to disclose its need to shift manufacturing plans for alternative plastics and delay construction of a new facility, a federal court ruled.

An unidentified former employee's account of when Origin officials knew of the impending changes is too vague to sustain the proposed class claims, Judge William B. Shubb said Tuesday for the US District Court for the Eastern District of California.

The West Sacramento, Calif.-based company focuses on recycling, reducing carbon emissions, and other sustainable materials problems, according to its website. At issue in this suit are Origin's plans to convert wood- and other plant-based materials into substitutes for petroleum-based consumer plastics, according to the court.

Origin produces non-petroleum-derived building blocks for polyethylene terephthalate (PET) and polyethylene furanoate (PEF), the investors said. It planned to build a manufacturing facility for PET products, but it encountered chemical engineering challenges that led it to switch to PEF production, delaying construction by several years, they said.

The company knew about the change well in advance of its August 2023 announcement, which caused a stock drop, the investors said.

Shubb granted Origin's request for dismissal, saying allegations about what the confidential witness learned at meetings with the co-CEOs "are fatally vague."

"When questioned several times at oral argument, counsel was unable to provide any further detail concerning what CW1 'learned' and how he learned it," Shubb said, referring to the confidential witness.

"In evaluating the statements of a confidential witness, sufficient detail is all the more important, as both the court and the defendants lack a crucial piece of information—the witness's identity—traditionally used in weighing the credibility of the allegations," the judge said.

The investors will have another chance to plead their complaint.

Bernstein Liebhard LLP is lead counsel for the investors. Freshfields US LLP represents Origin.

The case is *In re Origin Materials, Inc. Sec. Litig.*, 2024 BL 387614, E.D. Cal., No. 2:23-cv-01816, 10/29/24.

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TripAdvisor's Supreme Court Oral Argument

 businesslawprofessors.com/2024/10/tripadvisors-supreme-court-oral-argument

October 31, 2024

Happy Halloween!

The Delaware Supreme Court just heard oral argument in the TripAdvisor case. Both sides had talented lawyers representing them. You can watch the oral argument here:

I'd like to offer three quick thoughts.

The Reincorporation Premium/Discount

At around the 28th minute, counsel for the stockholder made claims about there being a Nevada discount. This doesn't seem to be supported by the weight of the evidence—or recent evidence. Steven Davidoff Solomon summarized the evidence in a recent memorandum that was attached to The Trade Desk Proxy. This is what he found:

24. Professors Paul Gompers, Joy Ishii, and Andrew Metrick also examined Professor Daines' results as part of their study of 1,500 large firms to assess how firm governance affects stock returns. Consistent with the unique nature and heterogeneity of each company, they found that the premium observed in Professor Daines' study was attributed to various governance characteristics, such as a classified board, limited ability to call special shareholders' meetings, and state law and charter takeover protections. After controlling for these factors, they discovered that the Delaware premium was no longer statistically significant. In other words, Professors Gompers, Ishii, and Metrick concluded that any valuation increase in Delaware firms identified by Professor Daines was not due to incorporation in Delaware, but rather to the individual governance choices of those firms.

25. Finally, in a 2020 article, Professor Ed Fox investigated whether there is a premium for controlled companies incorporated in Delaware.³⁵ Replicating the Daines study with a smaller sample of firms, Professor Fox found a potential effect for middle-market diffusely held Delaware firms, but it was not significant. He also examined controlled firms, like The Trade Desk, and discovered that "controlled Delaware firms have a lower Tobin's Q compared to controlled firms incorporated elsewhere, after factoring in firm characteristics."³⁶ In other words, Professor Fox identified a Delaware effect, but it was negative for controlled firms. He found that controlled Delaware firms are, on average, worth 4.9% less than similarly situated firms incorporated elsewhere.

26. Regarding Nevada firms and the value of Nevada incorporation, the primary study by Professors Clark and Barzuza found that, as of 2011, Nevada is the place of incorporation for 8.0% of all public firms incorporating outside their headquarters state, making it second only to Delaware in attracting out-of-state incorporations.³⁷ Professors Clark and Barzuza also replicated the Daines study and found "no discernible valuation effect for firms that incorporate in Nevada," in contrast to Delaware firms, which are "valued higher than firms incorporated in Nevada and other states outside Delaware."³⁸ This discrepancy may be attributed to the fact that the Nevada firms in their sample are significantly smaller than Delaware firms, potentially leading to a lower overall value. Additionally, the value differential could reflect differences in the quality of firms incorporating in Delaware versus Nevada.³⁹

27. Professor Eldar has more recently analyzed studies of whether Nevada firms have a premium or discount. He states that "there seems to be no convincing evidence that incorporation in Nevada adversely affects share prices."⁴⁰ Professor Eldar also conducted his own study and concluded that "the evidence supports the hypothesis that Nevada's protectionist laws do not harm shareholder value...."⁴¹

28. Ultimately, these and other studies suggest that while incorporating in Delaware may have had some value in the past, the premium has diminished as capital markets have matured. Additionally, these findings are subject to limitations, such as the inability to fully control for selection effects and omitted variable bias. More specifically, it is possible that these studies observed higher or lower-quality companies choosing Delaware, Nevada, or elsewhere, and that these unobserved characteristics influenced the results. Furthermore, the findings of Professors Gompers, Ishii, and Metrick, along with subsequent research, support the idea that any observed valuation effects of incorporation may also be attributed to the unique governance characteristics of the companies.⁴²

In short, there doesn't seem to be any meaningful change in stock price when firms pick Nevada over Delaware. To the extent that controlled firms really do trade at a discount in Delaware, reincorporation might offer a minority stockholder benefit by helping reduce that discount.

What Companies Give Up When They Decamp to Delaware

If Delaware does start imposing liability for reincorporations, other states might respond. Nevada made this point in its brief by pointing out that stockholders might sue under the law of other states because a reincorporation to Delaware would deprive them of their rights to a jury trial.

But there are other differences between the states. Take constituency statutes for instance. Over thirty states have them. They generally provide that the corporation's board may consider constituencies other than shareholders when making decisions. Nevada's constituency statute allows a corporate board to take into account the interests of "the corporation's employees, suppliers, creditors or customers" among an array of other constituencies. Reincorporation to Delaware trims away a corporate board's ability to consider these other interests directly and makes it so that they must be considered through the lens of what best advances shareholder interests.

The states that charter corporations surely have an interest in them. As there isn't a good mechanism for these constituencies to sue for the loss of their ability to be considered as ends and not merely as means, states might authorize their attorney generals to seek damages for reincorporations to jurisdictions that apply different standards.

Damages Remain Speculative

Either for the loss of the constituency statutes or for other changes in rights between states, figuring out damages appears to be a really nasty thicket. I don't know any great way to do it. I don't think anyone does. How do you value a different set of statutes, different cases, and a

different court system? I don't know. I don't think the Delaware Supreme Court has a great answer either. It might be better to just treat damages here as too speculative.

Decongestant MDL on Death's Door After Judge Strikes Key Claims

 [law.com/newyorklawjournal/2024/10/30/decongestant-mdl-on-deaths-door-after-judge-strikes-key-claims](https://www.law.com/newyorklawjournal/2024/10/30/decongestant-mdl-on-deaths-door-after-judge-strikes-key-claims)

Amanda Bronstad



What You Need to Know

- The judge found that federal law preempted claims that the decongestants were mislabeled after an FDA advisory committee found they didn't work..
- The judge also struck separate racketeering allegations, concluding that the plaintiffs lacked standing because they were indirect consumers.
- The ruling leaves doubt about the future prospects of the oral phenylephrine-containing decongestant multidistrict litigation, created less than a year ago.

A federal judge in New York dismissed threshold consumer claims brought in a test complaint over decongestants, such as Sudafed PE and NyQuil Severe Cold & Flu, that a regulatory body found last year did not work.

In a Tuesday order, U.S. District Judge Brian Cogan, of the Eastern District of New York, found that federal law preempted claims that the decongestants, sold to treat nasal or sinus congestion, were mislabeled. The U.S. Food and Drug Administration, he wrote, through the Federal Food, Drug, and Cosmetic Act, regulates medications.

"The FDCA empowers the FDA, not drug manufacturers, to determine whether a drug is effective," Cogan ruled.

The judge also struck separate racketeering allegations, concluding that the plaintiffs lacked standing because they were indirect consumers.

The ruling leaves doubt about the future prospects of the multidistrict litigation, created less than a year ago. Plaintiffs' lawyers planned to file a master complaint following the ruling, which is limited to New York law as part of a streamlined complaint the judge ordered to be filed.

Nearly 100 class actions followed a unanimous vote last year by an FDA advisory committee that the decongestants did not actually work.

Andrew Soukup, of Washington, D.C.'s Covington & Burling, and Jay Lefkowitz, of Kirkland & Ellis in New York, argued for the defendants. Soukup represents Procter & Gamble Manufacturing Co., which makes Vicks NyQuil brands, and Lefkowitz is the attorney for Haleon U.S. Holdings LLC, maker of Advil, Robitussin and Theraflu.

Neither responded to requests for comment.

Other defendants include drug manufacturers Bayer HealthCare LLC, which makes Alka-Seltzer Plus; Johnson & Johnson Consumer Inc., now Kenvue Inc., maker of Sudafed and Tylenol; Perrigo Company plc, which makes the Good Sense brand; and RB Health (USA) LLC, which sells Delsym and Mucinex.

Retailers CVS Pharmacy Inc., Target Corp., Walgreen Co. and Walmart Inc., which sell generic brands of the decongestants, also are defendants.

Attorneys for other defendants in the case did not respond.

Plaintiffs' lawyers Michael London, of New York's Douglas & London, who is co-lead counsel in the multidistrict litigation, and Michael Sacchet, of Minneapolis-based Ciresi Conlin, and Jonathan Selbin, of Lieff Cabraser Heimann & Bernstein in New York, who both argued with him at a Sept. 23 hearing, did not respond, either.

'Serious and Substantial Ramifications'

In an April 16 order, Cogan, who is in Brooklyn, instructed plaintiffs' lawyers to file a New York complaint that alleged, "representative examples of the conduct and claims they allege to be at issue." Among those was preemption, he wrote. His order on dismissal, he wrote, "will apply to all cases in this multidistrict litigation."

Plaintiffs' lawyers argued that defendants knew since 2016 that their oral phenylephrine-containing products were not more effective at decongesting than a placebo. Given the new scientific studies that prompted the FDA advisory committee's review, the defendants had a duty to change the labels on the medications that were false and misleading, the complaint says. They cited federal preemption decisions by federal judges in multidistrict litigation over acetaminophen's use during pregnancy and recalled heartburn medication Zantac.

Plaintiffs also alleged that the defendants conspired, through the Consumer Health Product Association, to mislead consumers in violation of the U.S. Racketeer Influenced and Corrupt Organizations Act.



Andrew Soukup, partner and co-chair of Covington & Burling's Class Action litigation practice. Courtesy photo

However, the defendants insisted that changing the label would violate federal law. Moreover, the FDA hasn't actually changed its official position that oral phenylephrine-containing products are effective.

"Allowing plaintiffs' claims to proceed would have serious and substantial ramifications," defense lawyers wrote in a June 3 motion to dismiss. "It would clear the way for the judgment of lay juries to override the FDA's expert determinations about when medicine is safe and effective. It would also throw the door open for each of the 60 states to adopt 50 different approaches about when medicine is safe and effective and what information must be shared with consumers. In short, the uniform federal regulatory regime governing over-the-counter drugs created by Congress would be thrown in disarray. This court should bring this litigation to an end."

The judge agreed, citing the U.S. Court of Appeals for the Second Circuit's 2020 decision in *Critcher v. L'Oreal USA Inc.*, which found claims about the amount of cream in cosmetics were preempted by the FDCA.

"*Critcher* rests on a straightforward application of administrative law," Cogan held. "The FDCA generally commands that a drug's label cannot be false or misleading and, in turn, vests authority in the FDA to determine whether a label is false or misleading. And, so long as there is an applicable preemption clause, that authority is exclusive."

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You Might Like



November 21, 2023

Drug wholesalers, others ask US appeals court to revive Lipitor antitrust lawsuits

 [reuters.com/legal/litigation/drug-wholesalers-others-ask-us-appeals-court-revive-lipitor-antitrust-lawsuits-2024-10-30](https://www.reuters.com/legal/litigation/drug-wholesalers-others-ask-us-appeals-court-revive-lipitor-antitrust-lawsuits-2024-10-30)

Mike Scarcella

U.S. flag and medicines are seen in this illustration taken, June 27, 2024. REUTERS/Dado Ruvic/Illustration Purchase Licensing 

Oct 30 (Reuters) - A group of drug wholesalers, retailers, health plans and others have asked a U.S. appeals court to revive their lawsuits accusing pharmaceutical company Ranbaxy of conspiring with Pfizer to delay the release of a generic version of the cholesterol medication Lipitor.

The plaintiffs, including retailer CVS and distributors Rochester Drug Cooperative and Value Drug, urged , opens new tab the Philadelphia-based 3rd U.S. Circuit Court of Appeals on Tuesday to overturn key decisions denying class action status and tossing the cases before trial.

The lawsuits consolidated in New Jersey federal court allege that Pfizer sought to maintain its Lipitor monopoly through an illegal scheme with India's Ranbaxy, acquired by Sun Pharma in 2014.

Sun and Pfizer did not immediately respond to requests for comment, and neither did some of the leading plaintiffs' lawyers involved in the long-running litigation.

Pfizer and Sun have denied any wrongdoing.

Pfizer introduced Lipitor in 1997. The drug, used to treat high cholesterol, drove more than \$130 billion in sales during its first 14 years on the market.

The pharma distributors claimed Pfizer fraudulently sought to extend its patent rights over Lipitor. They accused the company of paying Ranbaxy to delay introducing a generic version of Lipitor and engaging in sham litigation with Ranbaxy over the drug.

The plaintiffs contend they would have paid less for Lipitor if a generic version had been marketed sooner than 2011. Pfizer agreed this year to pay \$128 million to direct-purchasers and other plaintiffs to resolve their claims. Ranbaxy remained in the litigation.

Ranbaxy, represented by law firm Kirkland & Ellis, had argued the plaintiffs failed to show that the U.S. Food and Drug Administration would have approved Lipitor any earlier.

In June, U.S. District Judge Peter Sheridan rejected two bids to certify groups of plaintiffs as class actions, and he issued , opens new tab an order rejecting the claims against Ranbaxy.

Sheridan said in his ruling that the “FDA is not glued to meeting earliest possible entry dates.”

The drug wholesalers in their appellate filing said Sheridan unfairly prohibited them from presenting a full case that would have included a model “showing an alternative generic entry date or date range.”

The case is In Re: Lipitor Antitrust Litigation, 3rd U.S. Circuit Court of Appeals, Nos. 24-2203 and others.

Read more:

Pfizer agrees to pay \$93 mln to settle Lipitor antitrust lawsuit
Reporting by Mike Scarcella

Jury asked to award more than \$6 billion in preterm formula case against Abbott, Reckitt's Mead

 [reuters.com/legal/jury-asked-award-more-than-6-billion-preterm-formula-case-against-abbott-2024-10-30](https://www.reuters.com/legal/jury-asked-award-more-than-6-billion-preterm-formula-case-against-abbott-2024-10-30)

Brendan Pierson

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

REUTERS/Dado Ruvic/Illustration/File Photo Rights 

Oct 30 (Reuters) - A lawyer for a Missouri mother on Wednesday asked a jury to make Abbott (ABT.N)  , opens new tab and Reckitt's (RKT.L)  , opens new tab Mead Johnson pay a total of more than \$6 billion in the latest trial over claims that the companies' formulas for premature babies caused a severe intestinal illness.

Litigation over the formulas has raised alarm from doctors who say it could threaten the formulas' availability or affect medical decisions.

Abbott CEO Robert Ford has told investors that it may pull its premature infant formula from the market because of the litigation. Reckitt in July said it was "considering options" for Mead Johnson, and CEO Kris Licht did not rule out a sale.

"Companies have to clearly and unambiguously tell us the truth about their products, especially those intended for the smallest and most vulnerable human beings on the planet," Tim Cronin, representing Elizabeth Whitfield and her son Kaine, told the jury in St. Louis, Missouri, in his closing argument at the end of a five-week trial.

Cronin said the companies failed to warn that their premature baby formulas could cause necrotizing enterocolitis, and that Kaine got the disease as a result of receiving the formula in the newborn intensive care unit at St. Louis Children's Hospital in 2017, leaving him with lifelong health and developmental problems.

Cronin asked the jury to award Kaine nearly \$277 million in compensatory damages for his past and future healthcare costs, lost earning potential and pain and suffering. He also urged them to order Abbott to pay \$5 billion in punitive damages, and Mead Johnson to pay \$1 billion, based on the companies' sizes.

Both companies have said that, while mother's and donated human milk is widely understood to protect against necrotizing enterocolitis, formula does not cause it.

Rebecca Fitzpatrick, a lawyer for Abbott, told jurors in her closing statement that formula could not have caused Kaine's illness because it was used only to "top off" his mother's milk. She said Kaine had numerous other risk factors, including anemia and infections treated with antibiotics, that greatly increased his chances of getting the disease.

"Kaine simply would have gotten (necrotizing enterocolitis) no matter what he was fed," she said.

The verdict Whitfield is seeking would be one of the largest in U.S. history. Even if the jury awards it, however, it could be reduced on appeal for a number of reasons, including that the U.S. Supreme Court has ruled that punitive damages should generally be less than 10 times compensatory damages.

While the hospital was also a defendant in the case, Cronin did not ask the jurors to award any damages against it, though he said they were free to do so.

Reuters watched the closing argument through Courtroom View Network.

Whitfield's case is one of close to 1,000 in courts around the United States alleging that Abbott's and Mead's specialized formulas used by hospitals to feed premature babies cause the illness. Two cases that previously went to trial resulted in verdicts of \$60 million against Mead and \$495 million against Abbott.

Following the earlier verdicts, U.S. regulatory agencies and a working group of scientists convened by the National Institutes of Health have said current evidence does not support the hypothesis that formula causes necrotizing enterocolitis. Abbott and Mead were not allowed to present those statements to the jury in the current trial.

Reporting by Brendan Pierson in New York, Editing by Alexia Garamfalvi, Lisa Shumaker and David Gregorio

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

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Companies boost social and climate reporting amid ESG backlash

 [reuters.com/sustainability/companies-boost-social-climate-reporting-amid-esg-backlash-2024-10-31](https://www.reuters.com/sustainability/companies-boost-social-climate-reporting-amid-esg-backlash-2024-10-31)

Ross Kerber

The One World Trade Center building stands amid the Manhattan skyline in New York City, U.S., July 26, 2023. REUTERS/Amr Alfiky/File Photo Purchase Licensing Rights , opens new tab

- Most S&P 500 companies disclose diversity data
- LGBTQ+ survey responses at a record high
- Lowe's, Ford to continue disclosures

Oct 31 (Reuters) - Many U.S. companies have stepped up reporting on environmental and social matters in recent years even with sustained pressure from conservative politicians, data reviewed by Reuters shows.

The trend shows the importance investors and regulators now place on environmental, social and governance (ESG) issues, analysts said, amid rapid global warming and shifting workforce demographics. Some political conservatives call the attention misplaced or worry the disclosures could give activists leverage to force companies to make unnecessary changes.

"Most ESG problems are business problems. I'm an accounting professor. I can tell you that if you pick any company's 10K and look at the risk factors, they are full of E and S problems," said Shiva Rajgopal, who teaches at Columbia Business School.

The data contrasts with a some high-profile cases where companies have dialed back ESG efforts such as working less with industry climate efforts and cooperating less with an LGBTQ+ advocacy group.

Many executives may be taking a wait-and-see approach until national elections on Nov. 5 set a new balance of power in Washington, D.C., starting next year, Rajgopal said.

"If you're a company and something is getting you into trouble with some constituents, it's simplest to back away from doing things that seem risky for now and just stay put and wait until January and then reassess," he said

Which party holds the White House and Congress could energize or squash efforts to restrict ESG investing, a cause that has lagged to date.

BE COUNTED

The share of S&P 500 companies making workforce data by race and gender public rose to 82.6% as of Sept. 1 from 5.3% in 2019, according to DiversIQ, which tracks diversity data for investors, consulting firms and corporate clients.

Lines show % of companies publicly disclosing data from their federal EEO-1 forms

The number of U.S. companies sharing environmental data, meanwhile, has also grown, with 85% of large-cap U.S. companies disclosing details of their greenhouse gas emissions at the end of last year, up from 54% disclosing in 2019, according to ESG investment advisor HIP Investor.

Chart shows the percentage of companies, by market capitalization, disclosing details of their Scope 1 & 2 GHG emissions

Obtaining public disclosures on ESG data has been a focus of pro-ESG activist investors [↗](#), opens new tab including Democratic public pension officials. The disclosure uptick also shows boards responding to new rules like the European Union's Corporate Sustainability Reporting Directive, said Ken Rivlin, partner at law firm A&O Shearman.

Many companies also made public commitments around climate, pay equity and workforce, details they cannot easily shift with the latest news cycle.

"Establishing corporate policy in reaction to the latest pro- or anti-ESG news story is not a recipe for success," Rivlin said.

KEEP THE REPORTS COMING

Various conservative politicians and social media figures have targeted companies' diversity efforts including their links to LGBTQ+ advocacy group Human Rights Campaign, which surveys companies on issues including same-sex partner benefits and transgender healthcare.

In August, home improvement retailer Lowe's (LOW.N) [↗](#), opens new tab said it would no longer participate in the survey and restructured diversity efforts. A Lowe's representative said at the time it would continue to report workforce diversity and pay-gap data [↗](#), opens new tab that investors had asked for.

A Ford representative said via email that "we will continue to disclose our human capital management and DEI data" in an annual sustainability report, but did not provide further details.

Despite the departures, more than 1,400 companies participated in this year's survey, to be released in January, up slightly from 1,384 in the most recent survey issued in November 2023, HRC said.

Companies "know that this is what their workforce and consumers demand," said HRC President Kelley Robinson [↗](#), opens new tab.

Jeremy Tedesco, senior counsel for the Alliance Defending Freedom, which calls itself a Christian law firm and opposes many corporate ESG efforts, said pullbacks like those by Lowe's and Ford stand in contrast to several years ago when many companies rushed to align with climate and social-justice activists.

Successful lawsuits targeting corporate diversity policies based on the 2023 U.S. Supreme Court ruling on college admissions could accelerate corporate changes, Tedesco said. "Unfortunately companies went too far and there's a lot of course-correction," he said.

ON THE BACK FOOT

Many corporate climate disclosures stem from pressure from top fund firms backing shareholder resolutions. Since around 2021, however, investors have cut their support including State Street's (STT.N) [↗](#), opens new tab asset-management arm [↗](#), opens new tab.

Like other investors, State Street said companies have already made significant changes. "Disclosure has dramatically improved, especially related to E and S issues over the past five years," said Ben Colton, State Street's stewardship chief. "I'd imagine we'll continue to see this kind of disclosure," he said.

Make sense of the latest ESG trends affecting companies and governments with the Reuters Sustainable Switch newsletter. [Sign up here.](#)

Reporting by Ross Kerber in Boston. Additional reporting by Isla Binnie in New York. Editing by Simon Jessop in London and Anna Driver

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

Ross Kerber
Thomson Reuters

Ross Kerber is U.S. Sustainable Business Correspondent for Reuters News, a beat he created to cover investors' growing concern for environmental, social and governance (ESG) issues, and the response from executives and policymakers. Ross joined Reuters in 2009 after a decade at The Boston Globe and has written on topics including proxy voting by the largest asset managers, the corporate response to social movements like Black Lives Matter, and the backlash to ESG efforts by conservatives. He writes the weekly Reuters Sustainable Finance Newsletter.

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Oct. 31, 2024, 2:00 AM PDT

Partners, Associates Have Totally Different Views on Long Hours

By Roy Strom

Column

Bloomberg Law News 2024-10-31T10:23:53920061353-04:00

Partners, Associates Have Totally Different Views on Long Hours

By Roy Strom 2024-10-31T05:00:07000-04:00

Welcome back to the Big Law Business column . I'm Roy Strom, and today we look at lawyers' satisfaction with logging lots of billable hours. Sign up to receive this column in your Inbox on Thursday mornings.

I'm going to tell you two stories about two different law firm partners.

Partner A is a grinder. This person eats, sleeps, and breathes billable hours. In fact, they billed more than 40 hours per week in every single week last year. It tallied up to 2,400 hours.

Partner B works differently. The job's important, but logging hours isn't exactly this partner's specialty. They billed about 29 hours a week last year. It totaled 1,500 hours.

Now, here's a question: When these partners get their paychecks, who is more satisfied?

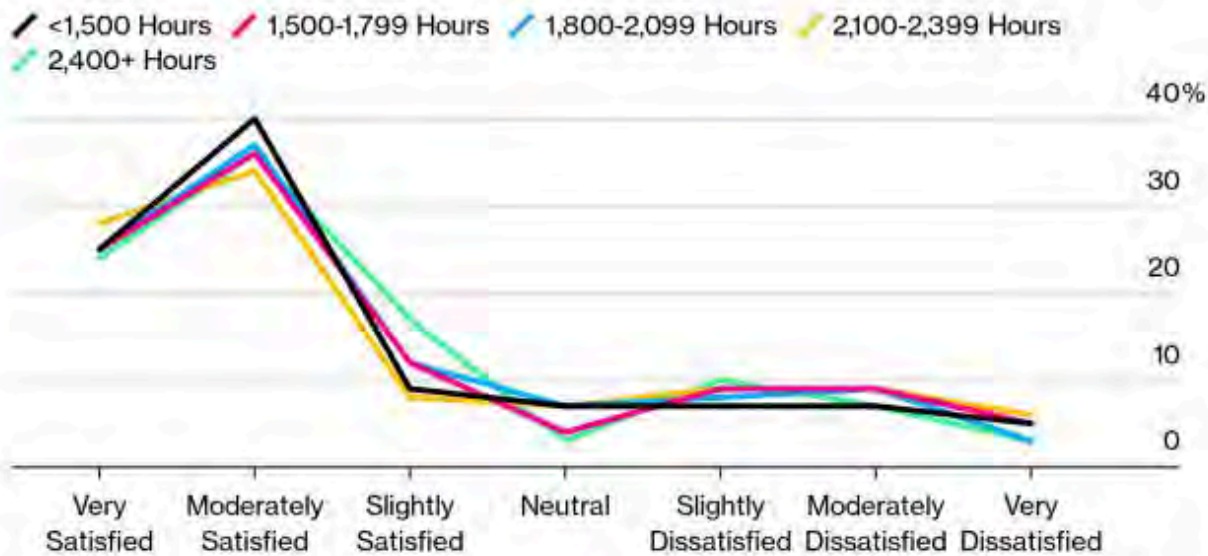
It turns out that both are just as happy.

That's according to a long-running survey of partners conducted by recruiting firm Major, Lindsey & Africa. The latest survey, released last week, shows 77% of partners who billed more than 2,400 hours were at least "slightly satisfied" with their compensation. Among partners who billed fewer than 1,500 hours, 74% reported being some level of satisfied with their wages.

The responses were virtually similar across all levels of billable hours. The survey included responses from more than 1,700 partners.

Have Law Degree, Will Work Hard For Pay

Despite disparities in how many hours they billed, law firm partners reported very similar levels of satisfaction with their compensation.



Source: Major, Lindsey & Africa's 2024 Partner Compensation Survey

Bloomberg Law

It's easy to assume that is because partners who bill more hours earn vastly more than their lower-billing peers. But that's not necessarily the case.

Higher compensation is most closely linked with higher origination (bringing in work) and higher billable rates (the cost to clients), the survey found.

"When we did the regression analysis, billable hours alone did not correlate to a statistically higher compensation," Karen Andersen, an MLA partner who helped with the survey, told me.

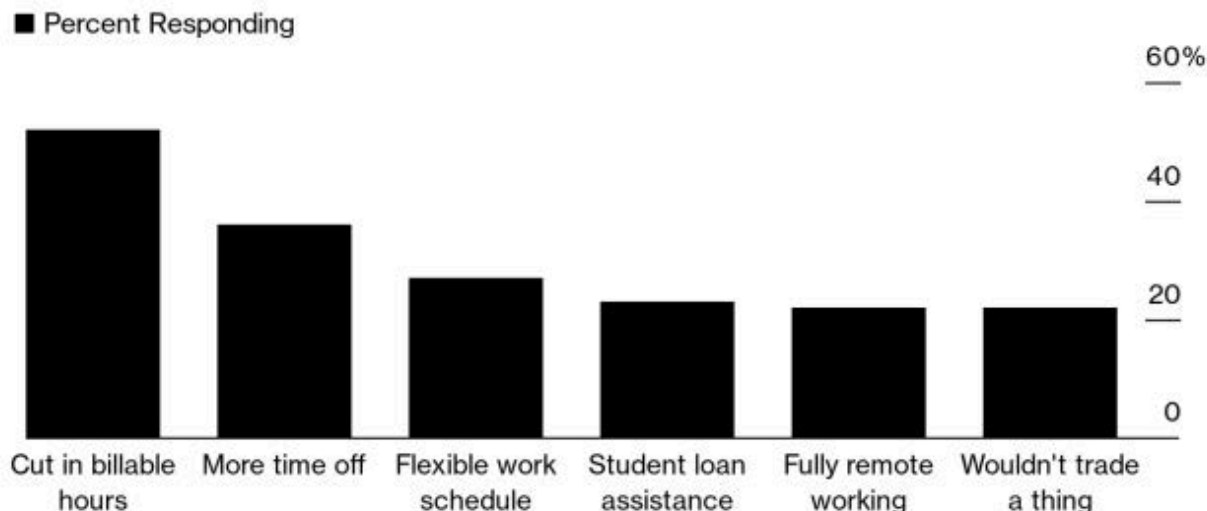
That doesn't seem like a bad thing: Big Law partners appear to like the deals they have with their firms. Whatever they're earning, and for whatever reasons, most seem to think the time they're investing billing hours is worth it.

But the survey results also highlight a stark divergence with associates. Those junior lawyers routinely report feeling overworked.

In a separate survey of "Gen-Z" associates, more than half of the lawyers told Major, Lindsey & Africa they'd trade a portion of their salary for fewer billable hours. The other most popular answers were time off and a more flexible work schedule.

Gen Z Lawyers Would Trade Money For Less Work

Big Law associates were asked: Which of the following would you trade a portion of your compensation for?



Source: Major, Lindsey & Africa

Bloomberg Law

In other words, many associates don't feel like they're getting a good deal for the time they invest billing hours.

One reason, no doubt, is that partners simply make more money. They earn multiples of the six-figure salaries associates bring home.

There may be another explanation. Partners are compensated for a wide range of behaviors, like experience, expertise, and the ability to land clients. But associate pay is very closely linked to the number of hours they bill to clients.

Consider another hypothetical: Replace Partner A and B with Associate A and B. Keep the hours the same. Ask them how satisfied they are with their pay.

The associate who billed 1,500 hours would likely be getting poor reviews while the one who billed 2,400 hours would be getting a nice, year-end bonus. Firms typically have billable hours requirements between 1,800 and 2,000 hours, with bonuses often tied to exceeding that threshold.

So, while MLA didn't survey associates on their compensation satisfaction vis-a-vis their billable hours, it's hard to imagine that junior lawyers would answer the question the same way as partners. I can't see many associates who billed 1,500 hours last year saying they are just as satisfied with their compensation as peers who billed 2,400 hours.

More so than with partners, law firms use compensation to incentivize long hours from associates. Some associates might like the deal. But plenty don't.

One thing won't change: Partners will always make more money for their time.

If law firms want associates to feel more satisfied with the time they're investing at their firms, they should look for ways to value them beyond simply billing hours.

That's one thing they do well for partners.

Worth Your Time

On Kirkland: In an unusual sanction, Kirkland partner James Hurst was barred by a judge from making further arguments in a high-profile trial over the safety of baby formula for preterm babies.

On Gibson Dunn: Manhattan litigator Barry Berke and a team of white collar attorneys from Kramer Levin are joining Gibson Dunn, Tatyana Monnay reports. Berke served as lead counsel for the US House of Representatives in former president Donald Trump's Senate impeachment.

On Freshfields: As the UK-founded firm looks to continue its momentum in the US, senior partner Georgia Dawson says she's considering opening new offices including in Boston and Texas.

That's it for this week! Thanks for reading and please send me your thoughts, critiques, and tips.

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Latham socked with sanctions in bitter fight involving short seller Muddy Waters

 [reuters.com/legal/government/column-latham-socked-with-sanctions-bitter-fight-involving-short-seller-muddy-2024-10-30](https://www.reuters.com/legal/government/column-latham-socked-with-sanctions-bitter-fight-involving-short-seller-muddy-2024-10-30)

Alison Frankel

The office of law firm Latham and Watkins in Washington, U.S., July 12, 2023.

REUTERS/Kevin Wurm Purchase Licensing Rights , opens new tab

Oct 30 (Reuters) - A federal judge in California has found law firm Latham & Watkins in civil contempt for “flagrant violations” of a protective order shielding discovery produced by short seller Muddy Waters in a securities class action against Banc of California.

U.S. District Judge Dolly Gee of Santa Ana ruled , opens new tab that Latham improperly disclosed to its client, California businessman Steven Sugarman, an expert witness report that incorporated highly confidential information from Muddy Waters. (Gee issued the sanctions opinion on Sept. 30, but it was only unsealed on Tuesday.) The judge also ruled that Sugarman improperly shared the expert witness report with an employee in an attempt to gin up negative news stories about Muddy Waters.

Gee ordered Latham and Sugarman to pay Muddy Waters’ fees and costs for investigating and litigating the short seller’s motion for sanctions and civil contempt. Muddy Waters’ counsel from Harder Stonerock said in an Oct. 21 declaration , opens new tab that it has incurred more than \$330,000 in fees and costs in connection with that motion. The firm also asked Gee to award additional fees and costs of more than \$800,000 to recompense Muddy Waters for litigating Sugarman’s initial subpoena for documents and for defending a pair of related lawsuits by Sugarman against the short-seller.

A Latham spokesperson declined to comment. Sugarman’s counsel from Michelman & Robinson did not respond to a query. I also sent a query to Sugarman via his current business, The Change Company, but did not hear back.

The background on this dispute, which I first told you about last year, is quite convoluted, but here are the essential details. A class of investors sued Sugarman and Banc of California (BANC.N) , opens new tab back in 2017 after Banc’s share price plunged in response to an anonymous blog post asserting that it had ties to a known securities fraudster. The company settled with investors in 2020 for about \$30 million. As part of the deal, investors agreed to dismiss claims against Sugarman.

In the midst of the class action, Sugarman and Latham subpoenaed documents from Muddy Waters, which was not a party in the case, to back defense arguments that the short seller published the anonymous blog post to profit from its short position in Banc shares. Muddy

Waters produced trading records and internal emails under a protective order that designated the material as attorneys' eyes only.

An expert defense witness subsequently wrote a report to support the defense theory that Muddy Waters had engineered and profited from the precipitous drop in Banc's share price. That report, according to Gee, incorporated the highly confidential information produced by Muddy Waters in response to the defense subpoena.

Sugarman escalated his feud with Muddy Waters after the class action settlement, suing the short seller in state and federal court. Muddy Waters won the dismissal of both suits.

Then in 2023, according to [\[1\]](#), opens new tab Muddy Waters founder Carson Block, the expert witness report resurfaced as a point of contention. A onetime Sugarman employee named Adam Levine told Block [\[2\]](#), opens new tab that Sugarman had instructed him "to leak complete, unredacted copies" of the expert witness report in order to "plant negative articles about Mr. Block and Muddy Waters."

Sugarman's ultimate goal, according to Levine, was to prompt the U.S. Justice Department and U.S. Securities and Exchange Commission to investigate Muddy Waters.

A caveat here: Sugarman and Levine are engaged in vicious litigation against one another, with Sugarman accusing Levine of stealing documents and threatening violence and Levine asserting that he was wrongly terminated.

Sugarman's brief [\[3\]](#), opens new tab opposing sanctions for Muddy Waters asserts that Levine "fabricated" evidence to suggest that Sugarman improperly shared the expert witness report with journalists.

Levine's counsel, Erica Gonzales of Brock & Gonzales, did not respond to an email query.

After Levine contacted him, Block moved for sanctions in the class action, asserting that Latham and Sugarman breached the protective order shielding Muddy Waters' trading records and emails. Latham, he said, should not have shared the expert report with Sugarman because it contained material designated to be seen only by attorneys. And Sugarman, Block alleged, violated the protective order by telling journalists about the report.

Latham offered two arguments in its brief [\[4\]](#), opens new tab opposing sanctions. The firm told Gee that the expert report, which it labeled as confidential, was not actually based on attorneys' eyes only discovery from Muddy Waters but was instead largely derived from trading records obtained from other sources. Latham also argued that even if the firm should have designated the expert report as for attorneys' eyes only, the error was a good-faith glitch.

"A technical error during a years-long, incredibly complex litigation requiring near-daily application of the protective order does not preclude a finding of substantial compliance or warrant imposition of civil contempt," the firm said. "Sanctions are particularly inappropriate

here where there is no evidence of bad faith.”

Gee rejected those arguments, concluding that the expert report included copious information designated to be seen only by attorneys.

“The evidence is clear and convincing that Latham violated the order and that the violation was not based on a good faith and reasonable interpretation,” the judge said. “The court takes such flagrant violations of a protective order seriously.”

Gee did acknowledge “insufficient evidence” that Latham “acted in bad faith as opposed to in serious error,” citing the firm’s 2019 query to a magistrate judge about sharing Muddy Waters’ discovery with Sugarman. The underlying class action settled, Gee noted, before the magistrate issued a ruling.

The judge also rejected Sugarman’s assertions that he did not realize the report contained highly confidential information and that he disclosed it only to his former employee, Levine, in the good-faith belief that he was entitled to share it.

Gee highlighted Levine’s evidence that Sugarman himself discussed the report with journalists.

“Sugarman’s claim that Levine did this independently, of his own initiative, and not at Sugarman’s behest is simply not credible,” she said.

In an email statement, Muddy Waters’ Block said Gee’s description of Latham’s conduct showed “pervasive rot in the American legal industrial complex.” Block also said the judge’s findings “make clear Steven Sugarman went way over the line in pursuing his misguided vendetta against Muddy Waters.”

Read more:

Muddy Waters LLC wants Latham sanctioned in escalating war with California businessman
Jumpstart your morning with the latest legal news delivered straight to your inbox from The Daily Docket newsletter. Sign up here.

Reporting By Alison Frankel

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

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Alison Frankel

Bloomberg Law News 2024-10-31T11:59:21514295126-04:00

Super Micro Turns Negative for 2024 After Auditor Resignation

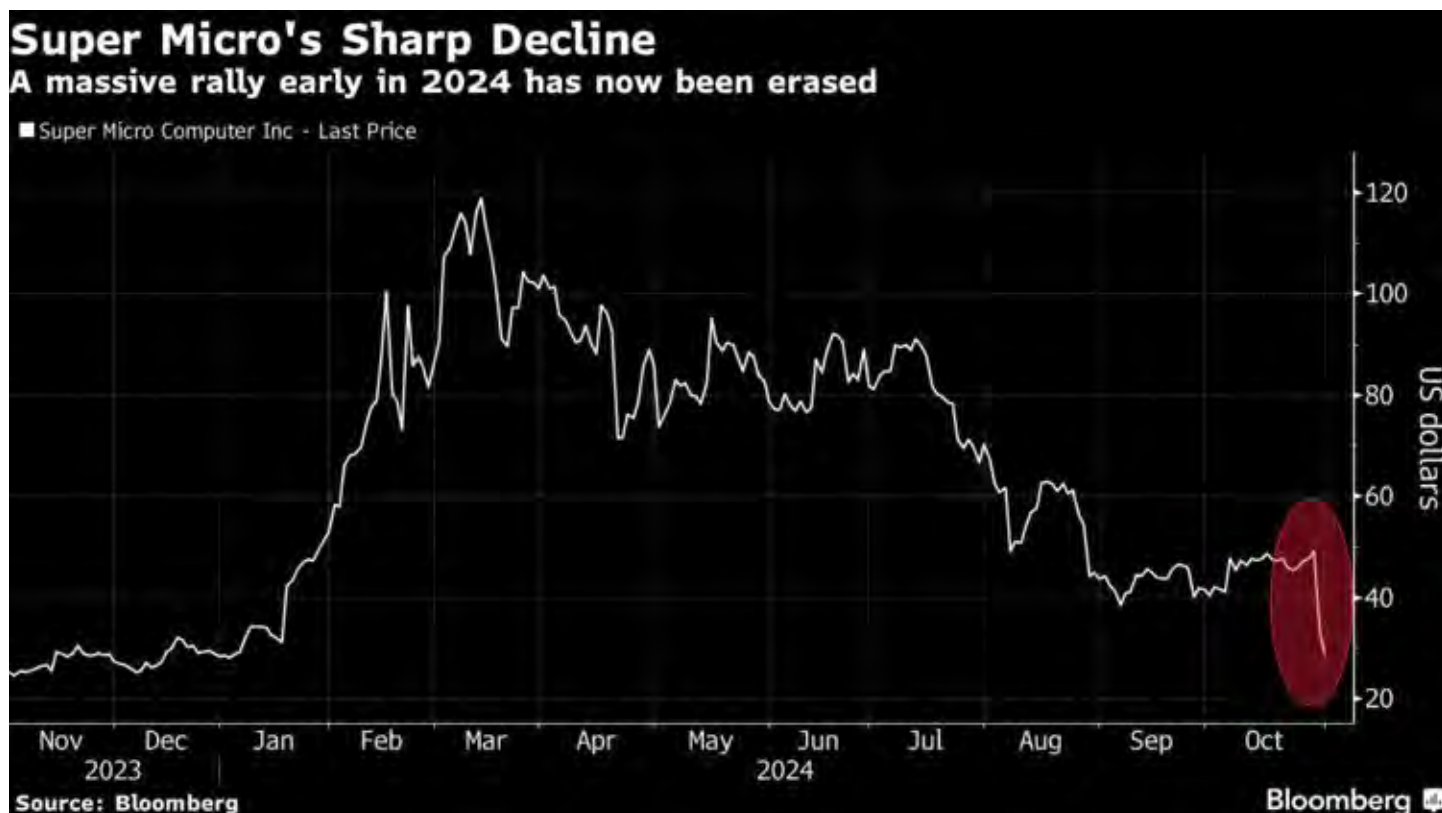
By Ryan Vlastelica2024-10-31T10:55:15026-04:00

- The one-time AI favorite more than quadrupled early this year
- Argus downgraded the shares following the auditor news

Super Micro Computer Inc. shares turned negative for the year on Thursday, as cascading concerns about the server maker's finances continued to weigh on the stock.

Shares fell 16% on Thursday, building on the previous session's slump of about 33%. The week's selloff came after Ernst & Young LLP resigned as the company's auditor, citing concerns about governance and transparency.

The stock had previously risen more than 300% to hit a peak in March of this year, making it one of the most prominent winners of investments in infrastructure related to artificial intelligence. It has now lost all of that advance, tumbling by more than 75% since the March peak.



The auditor news is the latest red flag for the stock. Earlier this year, a short seller alleged accounting problems at Super Micro, and the company subsequently delayed a 10-K filing, saying it needed more time to assess its internal controls.

Argus Research downgraded the stock to hold from buy on Thursday, writing that the company's loss of its auditing firm and a US Department of Justice probe "mean that the stock no longer trades on fundamentals."

Still, analyst **Jim Kelleher** remains positive on the company's long-term prospects, and "will look to get SMCI back on the BUY list once the company engages with a new accounting firm, becomes timely on its filings, and resolves all matters before the DoJ."

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Oct. 30, 2024, 10:34 AM PDT

Matt Levine's Money Stuff: Florida Banned Some Banks

By Matt Levine

Opinion

Bloomberg Law News 2024-10-31T10:24:35689927018-04:00

Matt Levine's Money Stuff: Florida Banned Some Banks

By Matt Levine 2024-10-30T13:34:54350-04:00

Bad actors

A central problem in securities regulation is that you want companies to be able to raise money, and you want ordinary investors to have access to the good lucrative investments, but you do not want the ordinary investors to get scammed. It is hard to get this right. There are various controversies about, for instance, the amount and types of disclosure that public companies have to provide, or about who gets to be an “accredited investor” and buy shares of private companies. Making it easy to sell stock has obvious benefits, but it also opens the door to frauds.

It is tempting to try to circumvent this problem with a rule that is something like “anyone can sell any securities to anyone, as long as it’s not a scam.” Obviously the devil is in the details, and I don’t think anyone has quite cracked it. But if you’re trying an approach like this — generally permissive rules letting companies sell securities to ordinary investors without onerous requirements for disclosure and review — one thing you might do is exclude people with a previous history of doing scams. A lot of securities scams seem to be done by repeat scammers — there are people who go to prison for securities fraud, get out and immediately start a new fraud — so surely *they* shouldn’t get to sell securities to ordinary investors without full disclosure.

And so many rules of the form “you can raise money from people without going through the full public-company disclosure requirements” do exclude people with a prior history of doing securities fraud. So for instance the US Securities and Exchange Commission’s Regulation D rules for letting private companies raise money contain a “bad actor disqualification” for people who have previously gotten in trouble for securities fraud. Or the SEC’s “well-known seasoned issuer” rules allow public companies to issue securities without much SEC review, but again there is an exception for “ineligible issuers” that have recently done securities fraud.

There is an amusing problem with these rules, though, which is that if you just wrote down a list of people who have done securities fraud you would get:

1. A lot of penny-stock scammers, and also
 - 2. Every big bank?

Whoops! If you are a big bank, somebody somewhere in your organization is pretty much *always* doing something that looks a bit like securities fraud, and periodically the SEC will add it all up and send you an invoice for a big fine. And because of the fraud, you are technically disqualified from many of these relaxed disclosure rules, which is very inconvenient for you (and your customers) as a giant bank that does tons of securities issuance.

And so, often, the SEC will accompany its fines with a “bad actor waiver,” saying “yes technically this fraud means that you’re not allowed to do various securities issuances, but the point of that rule is to punish repeat penny-stock scammers, not big banks, so we’re gonna let it slide this time.” We used to talk about these from time to time, because for a while these waivers were weirdly controversial. But it always seemed obvious to me that the point of the rule was *not* to make it harder for big banks to sell securities, and for the most part that’s how the SEC saw it.

Anyway here is a Wall Street Journal story reporting that, for a few weeks, the state of Florida ... forbade banks from trading with Citadel and Elliott?

The law sought to make it easier for startups and other companies to fundraise while ensuring that bad actors with a criminal record couldn’t take advantage of Floridians. But it wasn’t written as the Florida Legislature had intended. The law appeared to ban any bank that had been punished by the Securities and Exchange Commission or other authorities from selling a range of securities to investors, according to people familiar with the matter.

The problem is that nearly all of the country’s big banks—from JPMorgan Chase to Goldman Sachs—have been in trouble with the law at some point.

Big banks flagged the issue to the state and called Republican Gov. Ron DeSantis’s office, people familiar with the matter said. Some, such as JPMorgan and Bank of America, paused selling the securities to anyone with a Florida touchpoint, the people said.

Florida is home to some big investors, including the giant hedge funds Citadel and Elliott Investment Management.

This year, Florida revised its securities laws, mainly to make it easier for small companies to sell securities without meeting strict disclosure or registration requirements. Here's the revised law, and here's a law firm memo summarizing the highlights. The law also says that selling securities "to a bank, trust company, savings institution, insurance company, dealer, investment company, ... pension or profit-sharing trust, or qualified institutional buyer" is exempt from Florida registration. That's not a "small businesses can sell stock to ordinary investors easily" sort of rule; that's a "big institutions can do deals amongst themselves without filling out forms in Florida" rule. But as part of the revised law, there is a disqualification provision saying that registration exemptions are "not available to an issuer that would be disqualified under" the SEC's Regulation D bad-actor rule.

But that includes lots of banks: Most of the big banks have at one point or another run into securities-fraud trouble in a way that would technically trigger that disqualification. And so technically it seems that those banks can't sell securities to institutional investors without registering them in Florida, which seems daunting.

This was, it seems, an accident, but it's hard for legislatures to fix accidents quickly, so on Sunday Florida's financial regulation commissioner issued an emergency proclamation waiving the exclusion for trades with qualified institutional buyers. Because law is weird, the proclamation was technically issued under an executive order for hurricane relief, so the commissioner had to say that "strict compliance with" the law "could negatively affect financial markets that are vital to ensuring the availability of financial resources for recovery efforts and thus prevent, hinder, or delay necessary action in coping with the emergency." I am not sure that hurricane relief was the main purpose here, but you work with the rules you have.

Super Micro

An occasional minor mission of this column is to convince more people to become accountants because accounting is cool. Mostly I think that accounting is intellectually interesting and important to the financial system, but there are also fun fringe benefits. Here is one.

At many professional services jobs, you might come into contact with clients whom you dislike and think are bad. What can you do about it? Well, you could refuse to work with them. You could quit your assignment in a huff. You could send them a strongly worded resignation letter saying "you are unethical and bad and I no longer want to be around you." This is hard to do because of commercial pressures — they're paying you, and you want to get paid! — but maybe it is personally satisfying. But it is only so satisfying. "Whatever, killjoy," they will say, and then go out and hire one of your competitors who is less ethically meticulous and more driven by commercial pressures. Your exquisitely crafted nasty resignation letter won't really *hurt* your bad client, or change their behavior.

But accounting is different. If you are an auditor for a public company that you think is unethical, you can send them a letter saying “we quit because you are unethical” and it is an *absolute nightmare* for them, and surely *that* is satisfying. You should go into public accounting just for the possibility that one day you will be able to quit an audit assignment in a nuclear huff. How fun is this?

Ernst & Young LLP resigned as the auditor to troubled server maker Super Micro Computer Inc., citing concerns about the company’s governance and transparency.

Ernst & Young raised questions about the firm’s commitment to integrity and ethics, according to a filing from Super Micro on Wednesday. The resignation comes a month after the Wall Street Journal reported that Department of Justice had launched a probe into an ex-employee’s claims that Super Micro violated accounting rules. Super Micro has begun the process of identifying a new auditor, it added in the statement.

Shares of the server supplier plunged as much as 38% in premarket trading on Wednesday.

Here is Super Micro’s filing:

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”). ...

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.

See, if McKinsey quits a consulting assignment, the client can just say “whatever good riddance” and move on with its day. When EY threatens to quit an audit assignment, the board needs to appoint a special committee to take the problems seriously, and when EY quits anyway the company has to (1) disclose it, (2) see its stock plunge and (3) mope that “although the Company realizes EY’s decision is final, it disagrees.” That’s power.

There is also a letter from EY endorsing some but not all of this disclosure, paragraph by paragraph. In particular, Super Micro says that it “does not currently expect” to have to restate any of its financial reports, but EY says it has “no basis to agree or disagree” with that statement. That had to be fun letter to write.

The disclosure does not contain much detail on what made EY “no longer ... able to rely on management’s and the Audit Committee’s representations,” but one can guess. It has been reported that the US Department of Justice “is looking into an ex-employee’s claims that the server maker violated accounting rules,” and in August activist short seller Hindenburg Research put out a report alleging “glaring accounting red flags, evidence of undisclosed related party transactions, sanctions and export control failures, and customer issues.” Also, in 2020, Super Micro was fined \$17.5 million by the US Securities and Exchange Commission for improper revenue recognition; Hindenburg says that “Super Micro began re-hiring top executives that were directly involved in the accounting scandal” and “former employees told us that Super Micro’s business culture has not improved.” But “this company’s culture is bad,” coming from Hindenburg, doesn’t hurt *that* much; of course *Hindenburg* would say that. “We can’t trust you and don’t want to be associated with your financials,” *coming from its auditor*, hurts much more.

By the way, what are EY’s incentives here? Resigning means it won’t get any more revenue from Super Micro, but any one audit assignment is not particularly material. The real question is whether this helps or hurts at the margin in getting *other* auditing business. If you are an audit firm, do you want a track record of sometimes noisily resigning in a way that leaves your clients in an embarrassing lurch? Yes, right? Not a *lot*, but the right amount: A reputation like “we won’t work with companies we can’t trust” makes your audits seem more trustworthy, which arguably makes you a more appealing auditor for other companies that think they are trustworthy.

xAI

Here’s a story that seems to be almost true:

1. Elon Musk bought Twitter Inc. for \$44 billion two years ago.
- 2. He renamed Twitter “X,” and announced vague but ambitious plans to turn it from a social media site into a kind of everything company, one that would in particular do payments and artificial intelligence.
- 3. He also started charging for “premium” subscriptions to X.
- 4. Since Musk bought it, X/Twitter has become a less fun and popular social media site, and has had a drop in advertising revenue.
- 5. The payments stuff seems to have gone roughly nowhere, as far as I can tell?

- 6. But X rolled out a large language model chatbot called Grok, which is available to paying X premium users.
- 7. People seem pretty impressed with Grok, not necessarily in the sense of “this is the best LLM” but in the sense of “X was able to spin up a good LLM pretty quickly and go from nothing to being competitive with the big AI companies in short order.”
- 8. I do not know how much money Grok is making from premium X subscribers, but I’m not sure how much that matters. All LLM-based AI companies are in pretty early stages, and their valuations are very high based mostly on future expectations rather than current revenue.
- 9. Twitter’s old core business seems to have lost a lot of value — the bonds that Musk used to finance the acquisition seem to be underwater, and his equity co-investors have marked down their stock significantly — but the AI stuff is really valuable.
- 10. In fact, X is in talks to raise money for the AI business at a \$40 billion valuation, which would almost entirely pay for the acquisition; Musk effectively got the social media stuff (and payments?) for free because the AI business he built inside Twitter

Almost true! I suppose you could have some quibbles, but the main one is: X is *not* in talks to raise money for the AI business at a \$40 billion valuation. The AI business — the one that powers the Grok LLM available to X users — is a separate company called xAI. The Wall Street Journal reports:

Elon Musk’s xAI is in talks with investors for a funding round that would value it around \$40 billion, according to people familiar with the matter, escalating the tech industry’s race to build advanced generative AI technology. ...

Musk founded xAI a year and a half ago after seeing the overnight success of ChatGPT, saying he wanted to build the most “truth-seeking” AI. ...

For the last year and a half, xAI has been in catch-up mode, chasing companies such as OpenAI and Google that had a head start in the space. It introduced its Grok chatbot four months after launching the company.

Until last week, its lone publicly known revenue stream was the X Premium subscription, of which the Grok chatbot is a part. Last week, xAI released a tool that developers can use to build applications with Grok, broadening its revenue sources.

xAI has shared resources with Musk’s other businesses to help it catch up, raising concerns from investors about conflicts of interest.

The startup hired employees from Tesla, and Musk has also diverted thousands of Nvidia GPUs from Tesla to xAI. xAI relies on data from X to train its AI models. It has also discussed a deal where it would get some Tesla revenue in exchange for providing the carmaker access to its technology, The Wall Street Journal reported.

I suppose xAI didn't quite grow out of Twitter as its AI chatbot; rather Musk started it separately from scratch shortly after buying Twitter. He could have just started xAI and skipped buying Twitter entirely: Musk's ability to raise money for futuristic tech companies, rather than Twitter's training corpus, seems to be the big driver of value here. Still it does feel a little bit like Musk bought Twitter for \$44 billion, broke it in various ways, and nonetheless extracted a \$40 billion AI company out of it. That's not too bad!

Sentiment

One thing you could do is read a company's earnings releases and securities disclosures and earnings-call transcripts to see if they're mostly upbeat or mostly a bummer. Not, like, the numbers, but the prose: Does the company sound cheerful and optimistic about its results, or gloomy and careful? This is called "sentiment analysis." If the prose is cheerful, perhaps you figure that's a good sign and buy the stock; if it's not, you don't.

Enough people do some form of this (computerized sentiment analysis, or just reading the press releases and getting a vibe) that:

1. A stock will probably go up more if the release/filing/transcript is cheerful than if it's gloomy, even if the substance is the same, and
- 2. Companies know this and have some incentive to be cheerful, though it is counterbalanced by their "everything is securities fraud" incentive to be gloomy to avoid getting sued.

Which reduces the value of the signal. "This press release is cheerful because the executives are bullish about the company's prospects" is a useful signal, but "this press release is cheerful because they have been trained to sound cheerful to keep the stock up" is not. If everyone knows this, all the press releases will be cheerful.

Large language models offer the ability to (1) more subtly dissect sentiment when reading press releases and (2) more subtly *convey* sentiment when *writing* them. Here's a new paper on "The Future of Accounting: Sentiment Analysis in AI-Rewritten SEC Filings," by Sebastian Lehner:

This paper examines the impact of sentiment analysis on SEC 10-K and 10-Q filings, focusing on the Management Discussion and Analysis (MD&A) sections. By leveraging large language models (LLMs) to rewrite the filings, this study compares the sentiment of original versus LLM-rewritten texts using multiple sentiment analysis techniques, including dictionary-based methods and machine learning models. The results show a notable increase in positive sentiment in the LLM-rewritten filings. Furthermore, the rewritten filings were found to influence stock price reactions positively, indicating that AI-driven text generation can enhance market perception.

I don't think he actually rewrote filings with LLMs, filed them, and saw how the stock reacted; the point is that positive sentiment is correlated with positive reaction and so LLM rewriting *should* lead to positive stock-price reactions. The obvious questions are:

1. If you run investor relations at a public company, should you run your press releases through an LLM to make them more chipper? Don't you have a fiduciary duty to enhance your stock price with maximally appealing language?

- 2. What if the LLM is *too* chipper? What if the original draft was gloomy because it was accurate, and the new draft is cheerful because it is misleading?

"Everything is securities fraud," I often say, and eventually a company is definitely going to get sued for having an LLM write an inaccurate press release.

Cheese theft

What are good things to steal? I feel like I would want to steal stuff that is very valuable and easy to transport: diamonds, Bitcoin, stuff like that. But that stuff is relatively hard to steal: People tend to have security measures to keep their diamonds and Bitcoin safe, and there's a certain amount of traceability of those high-value objects. You can't just email a diamond dealer like "hey send me 20 diamonds on credit and I'll pay in 30 days"; they'll probably check up on you.

Whereas I do sometimes read stories about people stealing tons of nickel from smart trading firms. And I assume part of the story there is something like "nickel is quite heavy so it seems like kind of a pain to steal, so people are maybe a bit more trusting than they'd be with diamonds."

Meanwhile I guess if you email a cheese dealer asking to buy 22 tons of cheese on credit they'll be like "sure, who would pretend to buy 22 tons of cheese?" The New York Times reports:

It's been called "the grate cheese robbery."

But it's no joke to the tight-knit world of artisanal British cheese makers, which is reeling from the disappearance of 22 metric tons of rare Cheddar worth at least 300,000 pounds, about \$390,000, in what appears to be the biggest con to hit their industry in decades. ...

It all started in July. That's when Neal's Yard Dairy, a leading London cheese retailer, said that it had received a major order from what appeared to be a "legitimate wholesale distributor for a major French retailer." ...

Neal's Yard sent the cheese off in two shipments in September — and payment was due on Oct. 7, according to a partner in the company, David Lockwood. When the money had not come through a week later, Mr. Lockwood said, Neal's Yard tried to chase up the payment but got no response.

Now what?

Offloading the stolen cheese could prove difficult, [food writer Patrick] McGuigan said. "It's a bit like, you know, if you steal a Van Gogh painting, it's quite hard to sell it, because everybody knows it's a Van Gogh painting," he explained.

Okay okay okay it is cheddar cheese, not a Van Gogh; you could easily slap a “Vermont cheddar” label on it and sell some of it to me for a few bucks a pound. Still I take the point: You can’t exactly break this into eight-ounce blocks and sell them on street corners, so if you want to sell your ill-gotten cheese you have to either find a bulk buyer in the cheese world, who might be looking out for it, or have a whole cheese distribution network, which seems like a lot of work. I hope the explanation is that North Korea’s cheese markets are going to be well stocked with cheddar for the next few months.

Things happen

How FTX’s Young Executives Shattered Their Parents. How Arm could be the unexpected winner of the AI investment boom. Wall Street Giants to Make \$50 Billion Bet on AI and Power Projects. Visa Plans to Lay Off Around 1,400 Employees and Contractors. New Starbucks CEO Is About to Test Wall Street’s \$21 Billion Bet. Starbucks Tells Workers to Return to the Office or Risk Getting Fired. There Will Soon Be No Meatpackers Left in NYC’s Historic Meatpacking District. Jaywalking legalized in NYC. How many continents are there?

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- 1. Or maybe at all? Maybe repeat scammers shouldn’t be able to sell securities to ordinary investors, or to sophisticated investors, even *with* full disclosure. “If you’ve done securities scams you shouldn’t be able to sell more securities ever again” doesn’t seem like a *crazy* rule.
- 2. Not always. We talked once about how Barclays Plc periodically gets in trouble with the SEC, and each time it gets a “WKSJ waiver” allowing it to continue to sell securities without SEC review, and one time it didn’t get the waiver, and that led to a weird disaster.
- 3. Whenever I write about this I get a million emails saying “accounting firms should pay more if they want more accountants,” which, fine, fair.
- 4. Another good quibble would be “that \$40 billion xAI valuation includes a lot of new investment since Musk bought Twitter, so it’s not like you can really offset this \$40 billion against that \$44 billion.” Musk’s stake in xAI is not worth \$40 billion.

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Freeport Probed by SEC Over Quake Risk at Indonesia Copper Plant

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- Anonymous complaint alleges gap in disclosures to investors
- Mining giant rejects claims about \$3.7 billion smelter complex

The US Securities and Exchange Commission is looking into whether Freeport-McMoRan Inc. failed to disclose threats a severe earthquake could pose to its new \$3.7 billion copper smelter complex in Indonesia, according to people familiar with the matter.

SEC officials began reviewing whether the firm should have made certain disclosures to investors after a senior engineer who worked as a contractor for Freeport filed a whistleblower complaint with the regulator, said the people, who asked not to be identified discussing the confidential matter. The unidentified former contractor alleged the complex could collapse into the sea during a significant tremor, according to a copy of the document reviewed by Bloomberg News.

Freeport allegedly ignored the advice of experts and relied on engineering designs that didn't meet Indonesia's code for earthquake-resistant buildings, according to the complaint, which was filed in 2022. The document alleges that a collapse of the facility could threaten human lives and the environment, cause turmoil in metals markets, and hurt Freeport's business and its share price.



Indonesia's Former President Joko Widodo speaks to the media following a visit to the Freeport smelter in East Java in June 2023.

Photographer: Lily Rachev/Bureau for Press and Media of Presidential Secretariat

The SEC hasn't accused Freeport of wrongdoing. Its probes can end without a case being brought and can take months or even years to complete. Firms or people the agency alleges broke US securities rules can face fines or other civil penalties. The regulator requires public companies to disclose risks an average person would deem material to an investment decision.

A spokesperson for the SEC declined to comment.

Freeport rejects the whistleblower complaint's claims. In a statement, the company said the smelter project underwent "multiple subject matter expert reviews" confirming that the engineering design and construction were "fully compliant with all applicable Indonesian building codes."

"Safety remains Freeport's number one priority," said Linda Hayes, a spokesperson for Freeport. "It is a matter on which we do not compromise."

Hayes said the company discloses all material information about its business, including about any SEC inquiries, in its public filings.

Arizona-based Freeport derives a significant share of its revenue from Indonesia. It built the smelter in an industrial hub on the East Java coast to maintain access to one of the world's largest copper reserves. The complex takes up 272 acres in an area Indonesia designated as a special economic zone in 2021.

Read more:

Engineering experts recommended that the ground should be strengthened more than originally planned to support the complex, which sits on reclaimed coastal land in a "high hazard zone," according to the complaint.

Indonesia's government holds a majority stake in the Freeport subsidiary that operates the Manyar complex. The government fined Freeport tens of millions of dollars over construction delays and linked progress on completion of the project to reductions in export duties.

Representatives for the Indonesian government didn't respond to requests for comment. Freeport didn't respond to questions about its interaction with Indonesian officials.



Stacks of copper cathodes at the Freeport smelter during its inauguration on Sept. 23.

Photographer: Rizal Hanafi/Antara Foto

Shareholders in Freeport include some of the biggest money managers, hedge funds and US public pension plans. They have helped push the company's shares up more than fourfold in the past five years amid bets that demand for copper will keep rising as part of the transition to cleaner energy and electric vehicles.

Read more:

Freeport hired the engineer in 2019 to evaluate designs for company projects around the world. During a visit to the smelter site in August of that year, according to the complaint, the person found workers were strengthening the ground based on designs by Ontario-based engineering firm Golder Associates.

The person told the SEC that the designs that were used were flawed. According to the complaint, the person asked Youssef Hashash, an earthquake engineering expert at the University of Illinois Urbana-Champaign, to review the designs because he had developed software Golder used for its seismic analysis.

Hashash found Golder had misused his program, according to the complaint. He wrote in a summary of his findings that it was "imprudent to design and build a facility on soils that are known to liquefy," which could threaten structures, according to an excerpt included in the complaint. Hashash declined to comment for this article.

Two senior engineers on the project pushed for a separate opinion from Robb Moss, a California Polytechnic State University engineering professor and former Golder employee, according to the complaint. Moss delivered an "inconclusive" report, according to the complaint.

Moss declined to comment. WSP, which acquired Golder in 2021, said it wasn't "in a position to comment on client information."

Another analysis by an Indonesian engineering firm in May 2020 that was ordered by Freeport echoed the views of the contractor and Hashash, according to the complaint.

The contractor later received an internal report that showed Golder had reviewed its original analysis and concluded it was “valid” and “can be relied upon for project design,” according to the complaint.

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BlackRock, Vanguard Stakes in Banks Draw Labor Union Critics (2)

By Katanga Johnson

- Labor unions, investor advocates sign letter backing FDIC plan
- FDIC wants to keep firms from using stakes to influence banks

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BlackRock, Vanguard Stakes in Banks Draw Labor Union Critics (2)

By Katanga Johnson2024-10-30T15:36:40266-04:00

- Labor unions, investor advocates sign letter backing FDIC plan
- FDIC wants to keep firms from using stakes to influence banks

Consumer advocacy groups and labor unions are lining up to support plans by the FDIC to step up scrutiny of stakes in US banks held by money managers such as BlackRock Inc. and Vanguard Group Inc., citing the danger of too much concentration.

The groups made their case in a letter sent to the Federal Deposit Insurance Corp. late Tuesday that warned of the investment firms' growing influence over corporate decisions, including at banks. They also called on officials to address potential threats to financial stability posed by massive asset managers.

"Regulators need to catch up to the reality that the growth and concentration of the asset management industry has fundamentally reshaped how public companies — including listed banks — make decisions," said Natalia Renta, a senior policy counsel at the Americans for Financial Reform Education Fund. Her group signed the comment letter along with dozens of organizations, including the American Federation of Teachers and the AFL-CIO.

The coalition was responding to a request for comments from the FDIC, which has proposed more controls and oversight of the big money managers due to concerns that concentrated ownership could give them undue influence over lenders. The agency is charged with protecting trillions of dollars of domestic deposits at more than 4,500 banks.



The Federal Deposit Insurance Corp. (FDIC) headquarters in Washington

Photographer: Al Drago/Bloomberg

BlackRock has pushed back on the FDIC's plan, saying it would upend index funds that dominate many investor portfolios, make it more costly for banks to raise capital and disrupt the economy.

Read More: [FDIC Takes Harder Look at BlackRock, Vanguard Stakes in Banks](#)

Earlier this year, the regulator proposed additional controls and oversight for money managers' sizable stakes in banks due to concerns that concentrated ownership could give firms like BlackRock, Vanguard and State Street Corp. undue influence over lenders. The companies are among the biggest providers of so-called passive index funds, which seek to match returns of a specific market benchmark such as the S&P 500.

BlackRock didn't immediately provide comment. State Street didn't respond to an emailed request for comment.

"As an independent asset manager, Vanguard's interests are squarely aligned with empowering everyday investors to reach their long-term financial goals, leaving management decisions to companies and public policy decisions to policymakers," the company said in a statement Wednesday.

The FDIC added another layer of scrutiny in August by asking BlackRock and Vanguard for proof that they're operating as passive shareholders in banks rather than activists. The asset managers were put on notice that any stake held in an FDIC-supervised lender that exceeds the threshold of 10% could trigger tougher responses from the regulator.

The passive label is so important because it lets investors in lenders avoid stringent rules for bank owners. FDIC board members have questioned whether asset managers can truly operate as passive investors with a stake of 10% or more. Some have raised concerns about whether the firms can be passive when they pursue ESG goals, a hot topic for Republicans.

In its letter to the FDIC last week, BlackRock said the FDIC should withdraw its proposed restrictions on money managers' stakes in banks.

BlackRock is the world's largest asset manager, overseeing more than \$7 trillion of exchange-traded and index funds. It has pointed to its track record of voting with management 99.85% of the time on proxy items in the 39 listed lenders that control FDIC-supervised firms in which it holds substantial stakes.

Read More: BlackRock Says FDIC Plan Would Hurt Investors, Cost Banks

Three Republican members of the House Financial Services Committee — including Chairman Patrick McHenry — weighed in on Tuesday. They sent a letter to the FDIC taking issue with how the regulator handled demands that two asset management firms provide information on their passivity agreements.

The requests were made while the agency had the related rule proposal out for comment, which "potentially violates the law and raises questions regarding the FDIC's internal rulemaking process," the lawmakers said in a press release.

The coalition's comment letter backing the FDIC plan also was signed by the American Federation of State, County and Municipal Employees, Communications Workers of America, the National Education Association and the Service Employees International Union. Members of the unions that signed the letter include pension fund trustees overseeing trillions of dollars.

(Updates with Vanguard comment in eighth paragraph.)

--With assistance from **Silla Brush**.

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Starbucks Return to Office Policy Is Another Corporate Double Standard

Published: Thu Oct 31 07:30:02 EDT 2024

By Beth Kowitt

(Bloomberg Opinion) --

The face of a man who commutes by private jet.

Photographer: Robin Marchant/Getty Images North America

New Starbucks Corp. CEO Brian Niccol sent a stern warning to employees this week: Get back to the office three days a week or risk termination.

Pity the internal comms people who had to pass on that message with a straight face. The decree comes only two months after the company hired Niccol with a contract that lets him keep his main residence in Newport Beach, Calif., rather than relocate to Starbucks headquarters in Seattle.

Starbucks has said that Niccol will spend “a majority of his time” visiting stores or at the company’s Seattle office, despite living some 1,000 miles away. But while he may technically be meeting the hybrid rules, a key detail is left unsaid: He’ll be able to do it with the help of the company’s private jet and a monstrous pay package that allows him to throw money at whatever other inconveniences arise. (He won’t have to worry about his remote office in Newport Beach, however; Starbucks will foot the bill for that, along with the cost of an on-site personal assistant of his choosing.)

Meanwhile, Starbucks has touted that it provides subsidized transit, shuttles to public transportation, free electric-vehicle charging and bike lockers in order to entice the rank and file to get back to the office. These are nice benefits but look measly alongside Niccol’s company-funded commute by corporate jet.

The Starbucks board agreed to Niccol’s work arrangement as part of a larger deal designed to lure him away from Chipotle Mexican Grill Inc. to save the struggling coffee giant. If Niccol’s compensation package is paid out in full, he will be among the highest-paid CEOs in America. That will likely earn Starbucks a prime perch on the list of companies with the greatest CEO-to-worker-pay ratios — the classic measurement of the disparity between CEOs and their employees. It’s a metric that has soared over the last 60 years. According to the Economic Policy Institute, the average CEO-to-worker pay ratio at the 350 largest publicly owned US companies was about 344-to-one in 2022, the most

recent year available. In other words, it would take almost 350 years for a regular employee to match what their CEO made in just a single year. In 1965, the ratio was 21-to-one.

But the benefits being afforded to Niccol highlight how, in the post-pandemic era, a new form of disparity is on the rise. As more companies require their employees return to the old way of working (aka butts in seats), CEOs are being allowed more leeway in how and where they do their jobs. By perpetuating this flexibility gap between employees and the big boss, companies are giving the impression that management is both out of touch and above the rules, while also replicating broader society's growing inequality within their own organizations.

Some of the biggest employers in the US have been cracking down the hardest on employees. At Amazon.com Inc., workers have been called back to the office five days a week. Walmart Inc. is requiring thousands of remote employees relocate to corporate hubs and primarily its Bentonville, Ark., headquarters. 3M Co.'s new CEO has overhauled the company's "remote friendly" policy. Dell Technologies Inc. told remote workers in February they wouldn't get promoted, before requiring all salespeople back to the office full-time last month.

Meanwhile, CEOs are benefitting from the inverse shift. The same week that Starbucks announced Niccol's appointment, Victoria's Secret & Co. hired a new boss who it said would remain in New York while it paid for her travel to the company's Columbus, Ohio, headquarters. Bumble's CEO, on the job since January, works in Cambridge, Mass., rather than the company's Austin HQ. Notoriously, Boeing Co.'s former CEO David Calhoun, who started during the pandemic, never relocated to the company's Arlington, Va., office, instead commuting from his homes in New Hampshire and South Carolina by private jet.

Companies are picking and choosing which data they cite or ignore to justify their policies. Executives point to studies that show the benefits of in-office collaboration to support new RTO policies — then willfully ignore research that shows supercommuting chief executives underperform. (One paper found the decline in performance was even stronger for long-distance CEOs who lived near a premium golf course, resided in a beach home or owned a yacht.)

These two trends — return-to-office mandates for laypeople and the rise in CEO supercommuting — are both most visible when companies are struggling, or at least under investor pressure. When results are poor, demanding that workers get back to their desks is a fast and easy way CEOs can show they are taking action (side benefit: RTOs can reduce headcount without the need to pay the severance that comes with layoffs). But if things get bad enough for a management overhaul, a CEO candidate will have more leverage to demand their own flexible work arrangement and a board more likely to grant it out of desperation.

These dynamics were very likely at play at Starbucks when the company hired Niccol, and he made

the subsequent call to crack down on remote work. But the flexibility gap doesn't need to involve a private jet for employees to feel resentful. Those who look the least like a typical CEO — working mothers and people with disabilities — benefited the most from the flexibility that came with remote and hybrid work during the pandemic. That's what's made it a particularly tough pill to swallow that CEOs, who arguably need it the least, are the ones who get to keep it.

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Polymarket Influence on Wall Street Grows Despite Red Flags (2)

By Alexandra Semenova and Vildana Hajric

- Crypto exchange anchors election views, portfolio manager says
- JPMorgan assesses betting site's odds for long-short strategy

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Polymarket Influence on Wall Street Grows Despite Red Flags (2)

By Alexandra Semenova and Vildana Hajric2024-10-30T15:36:06010-04:00

- Crypto exchange anchors election views, portfolio manager says
- JPMorgan assesses betting site's odds for long-short strategy

Despite widespread skepticism about how much trust investors should place in the signals being sent by cryptocurrency-based predictions market Polymarket, Wall Street is paying close attention to betting on the platform that shows a high chance Donald Trump will win the US presidential election.

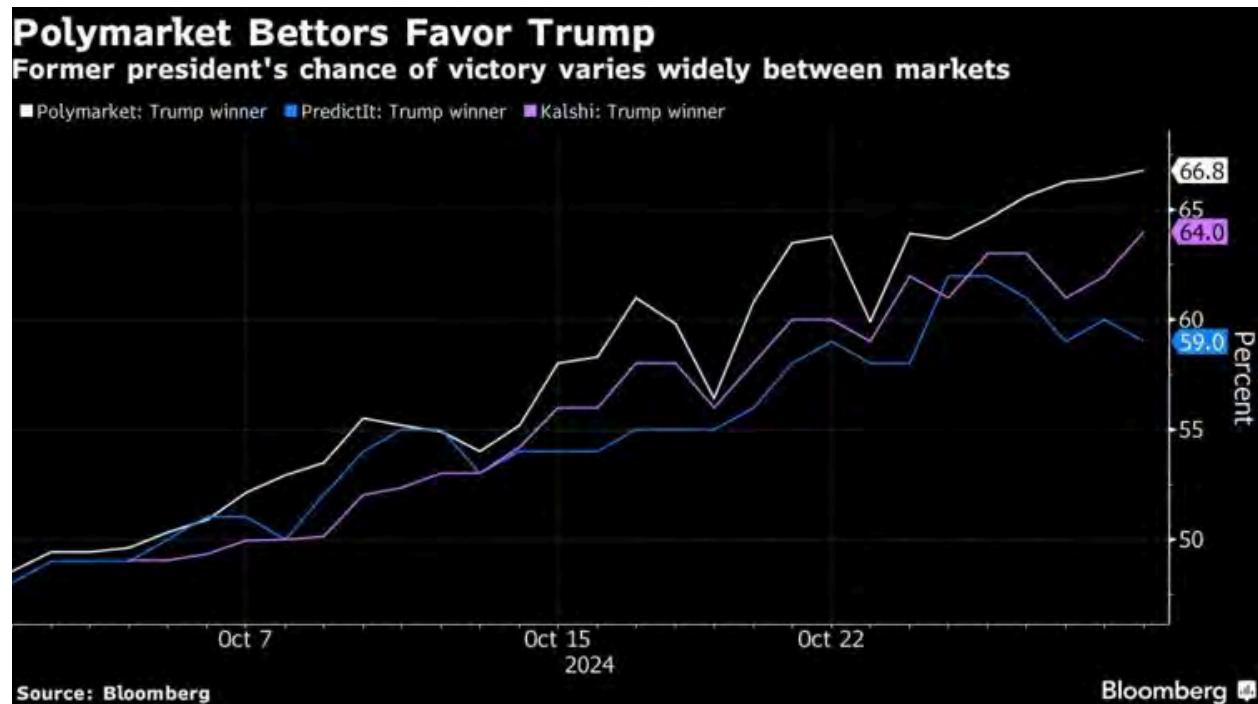
While naysayers argue that outsized bets and pro-crypto bias can skew the probabilities being presented on the site, some smart-money traders and strategists are following Polymarket very closely. Vice President Kamala Harris and former President Trump are basically in a dead heat ahead of the Nov. 5 election based on recent polling, yet wagers on Polymarket indicate a 67% probability that Trump will win.

"People are grasping for any type of edge they have because it's so close," **Keith Lerner**, co-chief investment officer at Truist Wealth, said from Atlanta.

Among big-name financial firms tracking the platform is JPMorgan Chase & Co., which has used the odds from the site to build long and short baskets of stocks that are expected to rise or fall depending on the outcome of the election. Rather than imposing their subjective views on which themes will be most-affected by the election results, the bank's trading desk said in a note that they are using a model that analyzes moves that align with Polymarket probabilities. A JPMorgan spokesperson declined to comment.

Digital-asset analysts at Bernstein and Standard Chartered also have cited Polymarket probabilities in recent research notes.

"Something has to anchor sentiment and thus views, so Polymarket is that proxy or benchmark," said Frank Monkam, senior portfolio manager at Antimo LLC. "Wall Street does game plan around it."



There are many caveats, however, to the implied probabilities reflected on the platform. For one, a small number of heavy bettors theoretically can move the market and distort election odds. Last week, Polymarket revealed that a trader who spent more than \$45 million on bets that Donald Trump will win was a French national.

Polymarket isn't available in the US, so wagers placed on the site don't reflect the intentions of American voters, as crypto analysts at Kaiko Research pointed out. And while betting on the outcome of the presidential election is currently New York-based Polymarket's most popular offering, with some \$2.7 billion in trading volume on the main market, open interest is only about \$330 million, according to an analysis on data platform Dune.

"The market is highly illiquid and has little predictive value on the outcome of the election," the Kaiko researchers concluded in an Oct. 24 note, when open interest was less than \$250 million. "As polls are too close to call and on-chain prediction markets are still in their infancy, it's important to consider other markets."

Bias in the website's user base is also a concern, since Polymarket is favored by Trump-friendly cryptocurrency investors. Wagers on Polymarket are producing implied probabilities that favor Trump by larger degrees than rival platforms PredictIt and Kalshi, which accept traditional currencies.

Adding to the scrutiny of Polymarket: Researchers say the market exhibits signs of wash trading, which is when traders buy and sell shares quickly to create a false impression of heavy volumes. About one-third of the volume for the presidential election winner's market appears likely to be wash trading, according to an analysis by Chaos Labs. Polymarket also appears to present share volume, or the number of tokens traded, in dollar terms regardless of their price at the time of the trade, according to Chaos Labs. In other words, one traded share is counted as \$1, even if the share traded at a price of 0.1 cent. One user had traded a total of \$8 in US contracts at an average price of 0.1 cent to 0.2 cents but Polymarket reports that user's volume as \$5,778.62, according to Chaos.

Fortune reported on the research by Chaos Labs earlier Wednesday, along with a separate investigation by Inca Digital that found wash trading potentially comprised a "significant portion of the volume." A spokesperson for Polymarket did not respond to a request for comment.

"While it feels like we have real-time data coming from Polymarket, the credibility of that data should certainly be called into question," said **Art Hogan**, chief market strategist at B. Riley Wealth, pointing out the handful of accounts betting big on Trump. "That calls into question the validity of the data, so I think being dependent on that real-time data without questioning the validity of that data is also a big mistake."

Proponents of betting platforms like Polymarket argue they offer a truer perspective than polls, given that there is cash on the line. At Bernstein, analysts led by **Gautam Chhugani** wrote in an Oct. 29 note that they believe that market forces are at play on Polymarket rather than an intrinsic pro-Trump bias. While the team at Bernstein acknowledges that a small group of large investors can sway the markets in a specific direction, they argue that critics miss that bettors have real "skin in the game."

"One group of investors can be easily countered by another group taking a contra bet, and some investors would be hurt in the process," they wrote.

Either way, the attention being focused on Polymarket highlights a lack of trust in traditional polling following some high-profile failures in recent elections. Although 2024 polling figures show Harris and Trump neck-and-neck, experts have called into question the accuracy of the data since survey engagement has fallen in recent years.

"It's more accurate, it's more real-time," **Bryce Doty**, senior portfolio manager at Minneapolis-based Sit Investment Associates, said of Polymarket. The way voters across different age groups and genders vote on single issues can stray from how someone may answer a poll, skewing what the surveys reflect, he added.

"Polymarket kind of just cuts through all of that," Doty said. "If you had to place a bet on the odds, where do people come down? And so it's a reflection of the general sentiment out there."

(Adds details of researcher's report on suspected wash trading in 11th paragraph.)

--With assistance from **Emily Nicolle** and **Olga Kharif**.



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3 Firms Vie To Lead Starbucks 'Reinvention' Plan Investor Suit

By **Sydney Price**

Law360 (October 30, 2024, 8:43 PM EDT) -- Robbins Geller Rudman & Dowd LLP, Levi & Korsinsky LLP and The Rosen Law Firm PA launched competing bids seeking to lead a proposed investor class action alleging Starbucks misled the markets about prospects for its reinvention strategy, causing share prices to drop when it announced disappointing quarterly results in April.

All three proposals claim to represent the "largest financial interest" in the **suit against Starbucks** launched by investor Charles Garbaccio in Washington federal court in August.

The suit claims Starbucks Corp. and two of its executives overestimated its so-called "Triple Shot Reinvention with Two Pumps" plan to elevate the brand. In April, according to Garbaccio's suit, Starbucks announced its financial results for the second quarter of its current fiscal year, telling investors that sales in its stores declined globally by 4%, customer traffic fell by 7% and its revenues fell 2% to \$8.6 billion.

According to a motion filed Monday by Robbins Geller, its clients — a collection of union funds known as Pavers & Road Builders District Council Pension Fund, Teamsters Local 237 Additional Security Benefit Fund and Teamsters Local 237 Supplemental Fund for Housing Authority Employees lost \$259,699 during the class period, which runs from Nov. 2, 2023, to April 30. The union funds propose Keller Rohrbach LLP as liaison counsel for the class.

In another motion filed by proposed lead counsel Levi & Korsinsky, movant Ishwar Bhatia claims to have lost approximately \$11,296 in connection with the events alleged in the suit. Bhatia requests Breskin Johnson Townsend PLLC serve as liaison counsel.

The Rosen Law Firm and its client Kyle N. Foley also seek to lead the suit. Foley claims to have lost approximately \$1,117 during the time period and asks the court to appoint attorney Daniel C. Kelly-Stallings as liaison counsel.

Counsel for the parties and a representative of Starbucks did not immediately respond to requests for comment Wednesday.

The union funds are represented by Danielle S. Myers, Michael Albert and Kenneth P. Dolitsky of Robbins Geller Rudman & Dowd LLP, and Juli E. Farris of Keller Rohrbach LLP.

Bhatia is represented by Adam M. Apton of Levi & Korsinsky LLP and Roger Townsend of Breskin Johnson Townsend PLLC.

Foley is represented by Phillip Kim and Laurence M. Rosen of The Rosen Law Firm PA, and Daniel C. Kelly-Stallings.

Counsel information for Starbucks was not immediately available on Wednesday.

The case is Garbaccio v. Starbucks Corp. et al., case number 2:24-cv-01362, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Emilie Ruscoe. Editing by Kristen Becker.



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Nvidia Case's Potential Impact On Securities Class Actions

By **Michael Canty, Lauren Ormsbee and Matthew Grier** (October 30, 2024, 3:16 PM EDT)

On Nov. 13, the U.S. Supreme Court will hear oral argument in *Nvidia Corp. v. E. Ohman J:or Fonder AB*, a securities class action where the court will consider the imposition of bright-line rules governing the pleading of claims already subject to the heightened pleading standards of the Private Securities Litigation Reform Act.[1]

In *Nvidia*, investors primarily allege violations of Section 10(b) of the Exchange Act and U.S. Securities and Exchange Commission Rule 10b-5, promulgated thereunder, against *Nvidia* and its CEO Jensen Huang.[2]

Two key elements of any Section 10(b) claim are whether the defendants issued materially false or misleading statements (i.e., the falsity prong), and whether they did so with the requisite knowledge or recklessness (i.e., the scienter prong).[3] Under the PSLRA, at the pleading stage, plaintiffs must allege both of these elements "with particularity."[4]

The Supreme Court has twice considered the PSLRA's heightened pleading standard. In 2007, the Court held in *Tellabs Inc. v. Makor Issues & Rights Ltd.* that plaintiffs must allege a "strong inference" — rather than mere plausibility — of scienter based on a "holistic" analysis of "all of the facts alleged, taken collectively," not by "scrutiniz[ing] each allegation in isolation." [5] In 2011, in *Matrixx Initiatives v. Siracusano*, the Supreme Court then firmly rejected a proposed bright-line rule governing pleadings that was at odds with the need to "review 'all the allegations holistically'" espoused in *Tellabs*. [6]

As described below in full, the Supreme Court is **poised** to again address the PSLRA pleading standard in *Nvidia*. Specifically, the court will consider whether to adopt the defendants' proposed bright-line rules (1) requiring specific allegations of the exact contents of any internal documents or data referenced in a complaint, and (2) limiting the plaintiffs' reliance on outside experts to allege a securities fraud violation.

Plaintiffs' Allegations of Securities Fraud Initially Dismissed by District Court

Nvidia is a technology company that sells computer chips called graphic processing units, which are powerful pieces of technology that are used in video games, among other things.[7] Demand for certain of *Nvidia*'s GPUs called GeForce spiked in 2017 and 2018.[8] During this time period, the plaintiffs allege that the defendants misrepresented to investors that the increased demand for these GPUs derived from gaming rather than much less stable crypto mining, even in response to direct questions concerning the cause of the surging demand.[9]

In late 2018, however, the profitability of crypto mining declined, leading to a stark decrease in demand for *Nvidia*'s GeForce GPUs.[10] When the truth of *Nvidia*'s reliance on waning crypto mining to drive demand for their GPUs was revealed, *Nvidia*'s stock cratered and investors launched a securities fraud action shortly thereafter.[11]



Michael Canty



Lauren Ormsbee



Matthew Grier

The plaintiffs filed a detailed complaint that included allegations from five former Nvidia employees who described, among other things, that (1) crypto miners purchased massive quantities of GeForce GPUs; (2) Nvidia had an internal database, accessed by Huang, which quantified global GeForce sales to crypto miners; (3) Nvidia staff presented crypto-specific sales data to Huang at quarterly meetings; (4) reports detailing miners' demand for GeForce GPUs were sent directly to Huang; and (5) an Nvidia internal study proved that Nvidia was measuring GeForce sales to crypto miners.[12]

The plaintiffs also described a post-class period report by Royal Bank of Canada quantifying Nvidia's massive reliance on crypto-related sales during the class period, and retained Prysm, an economic consulting firm specializing in crypto markets, "to conduct an independent analysis" that corroborated RBC's findings.[13]

Despite these, and other, allegations, the district court dismissed the operative complaint, concluding that it failed to raise a strong inference of scienter.[14]

Ninth Circuit Reverses, Holding Plaintiffs "Easily" Satisfy PSLRA Pleading Standard

In August 2023, a split panel of the U.S. Court of Appeals for the Ninth Circuit **reversed** the district court's decision, finding "the totality of detailed allegations in Plaintiffs' amended complaint easily satisfies the PSLRA pleading standard." [15] Specifically, as to scienter, the Ninth Circuit pointed to the plaintiffs' allegations that "(1) Huang had detailed sale reports prepared for him; (2) Huang had access to detailed data on both crypto demand and usage of Nvidia's products; (3) Huang was a meticulous manager who closely monitored sales data; and (4) sales data at the time would have shown that a large portion of GPU sales were being used for crypto mining." [16]

The Ninth Circuit also addressed falsity, and concluded that the defendants' statements were materially misleading, citing (1) the RBC and Prysm reports, which both concluded that Nvidia's revenues were driven by crypto-related demand; (2) allegations from multiple former employees who confirmed that crypto miners purchased "enormous numbers of GeForce GPUs"; and (3) a post-class period admission by Huang attributing Nvidia's revenue drop to a "Crypto hangover." [17]

Defendants Petition for Certiorari, Claiming A Circuit Split

Nvidia **filed** a petition for a writ of certiorari, asserting that the Ninth Circuit's opinion "deepened one longstanding circuit split and created a second" by (1) holding that the plaintiffs can proceed to discovery on allegations about what internal company reports "might have said" rather than on the "actual contents" of those documents, and (2) allowing the plaintiffs to rely on the opinions of retained experts rather than on particularized facts to circumvent the PSLRA's heightened pleading requirements. [18]

The plaintiffs strongly refuted the defendants' factual characterization of the claims and argued that the defendants relied on "an illusory circuit split" because no circuit has promulgated a categorical requirement that the contents of internal documents must be described with particularity, nor does any circuit prohibit the use of allegations derived from expert analysis. [19]

Supreme Court Grants Certiorari, Parties File Merits Briefs Joined by Amici

In June 2024, the Supreme Court granted certiorari on two questions presented by the defendants. [20]

The first question asks "[w]hether plaintiffs seeking to allege scienter under the PSLRA based on allegations about internal company documents must plead with particularity the contents of those documents." [21] This question is meant to address the Ninth Circuit's finding of scienter based, in part, on the plaintiffs' allegations that Huang received "detailed sale reports," had access to "detailed data on both crypto demand and usage of Nvidia's products," and that this data would have shown that a large portion of GPU sales were used for crypto mining. [22]

The second question asks "[w]hether plaintiffs can satisfy the PSLRA's falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact." [23] This question is meant to address the Ninth Circuit's reliance, in part, on the Prysm report in its falsity analysis, even though

the circuit court also relied on RBC's report and allegations from multiple former Nvidia employees.

The defendants' opening merits brief highlights the heightened PSLRA pleading standard and argues that the relief sought was consistent with the statute — notably no longer mentioning a circuit split on the issue.[24] As to scienter, the defendants argue that allegations supporting Huang's scienter derived from accounts of former Nvidia employees who described how Huang reviewed certain documents and data contradicting his public statements are not sufficiently particularized because the plaintiffs do not allege the specific contents of these documents.[25]

Regarding falsity, the defendants assert that the Prysm expert report that corroborated the publicly reported analysis performed by independent analysts at RBC — and, by extension, the investors' reliance on any expert analysis at the pleading stage — should be excluded as a matter of law on the basis that such analyses may not serve as a substitute for particularized factual allegations.[26]

The defendants are joined in their efforts by four amici: The Digital Chamber, a trade association that promotes the digital asset and blockchain industry; Stanford Law School professor Joseph Grundfest; and the Atlantic Legal Foundation and the Washington Legal Foundation, two nonprofit law firms advocating for, among other things, free enterprise and limited government.[27] These amici largely echo the defendants' arguments concerning the use of expert reports at the pleading stage, and notably do not substantively engage with the defendants' arguments concerning internal company documents.

The Nvidia plaintiffs responded with a full-throated defense of their allegations, backed by eight amicus briefs, including one on behalf of the U.S. Department of Justice and the SEC.

The plaintiffs argue that the defendants' proposed bright-line scienter rule requiring that the plaintiffs plead the exact contents of internal reports is unworkable, serves no legitimate function and contravenes prior Supreme Court precedent that requires a holistic inquiry of all relevant allegations.[28] The plaintiffs further argue that their complaint sufficiently includes a plethora of particularized allegations of scienter — including allegations that are based on internal documents — the contents of which are recounted — and additional allegations not deriving from internal documents.[29]

With respect to the falsity arguments, the plaintiffs argue that (1) the PSLRA does not preclude factual allegations drawn from expert analysis, and (2) the Prysm report does not substitute for other allegations, as the plaintiffs alleged many additional facts, including those derived from, among other things, Nvidia's internal data, former employees and a third-party report by RBC.[30] According to the plaintiffs, their claims are precisely the type of meritorious allegations sufficient to proceed past the motion to dismiss stage, and the defendants' proposed rules "are a solution in search of a problem." [31]

The plaintiffs received support from eight separate amici that all argue that the complaint at issue should be sustained and that the bright-line rules concerning the use of internal documents and expert analysis should be rejected.[32] Notably, the U.S. solicitor general, whose attorneys will argue alongside counsel for the plaintiffs, describes the country's "strong interest" in the outcome of this litigation as deriving from the fact that "[m]eritorious 'private actions' are 'an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively by the [DOJ] and the [SEC].'" [33]

An amicus brief filed by former SEC officials similarly maintains that "lawsuits initiated by private parties are an important complement to the agency's own enforcement actions," and that "ill-advised barriers to private actions," like those urged by the defendants, would reduce "compliance with the federal securities laws." [34]

In a separate amicus brief, a group of institutional investors that represent more than \$5 trillion of assets invested on behalf of retirees, employees and other investors describe how "private enforcement is necessary for well-functioning securities markets," and emphasize that the "standards Defendants propose would substantially damage private enforcement." [35]

These amici are also joined by two briefs filed by legal scholars of federal civil procedure.

Notable is a stand-alone amicus brief filed by Brian T. Fitzpatrick, a professor and former clerk for

Justice Antonin Scalia who, according to his brief, "has dedicated much of his teaching and writing ... to carrying forward the Justice's legacy of bringing textualism and originalism to American Law." [36] Fitzpatrick concludes that the "questions presented are easily answered by textualism" in the plaintiffs' favor, and that "policy considerations counsel in favor of lower pleading burdens, not higher ones," as large amounts of securities fraud go unpunished and private actors such as plaintiffs and their attorneys are much more effective at policing fraud than the government. [37]

Separately, a group of numerous esteemed civil procedure scholars detailed in their brief the history and purpose of the particularity requirement in fraud pleading, which "does not require plaintiffs to tell defendants what they already know, including what their own documents say." [38]

Looking Ahead

Oral argument is scheduled for Nov. 13. If the defendants' position is adopted — depending on the contours of any such opinion — the Supreme Court could strip lower courts of their long-standing ability, and obligation, to holistically weigh all relevant facts supporting plaintiffs' allegations of securities fraud in order to make their case-by-case determination as to whether claims subject to the PSLRA's heightened pleading standards have been adequately pled. This would have a wide-ranging impact on securities fraud class actions in the U.S. and the health of equity markets.

First, a standard that requires plaintiffs to plead the specific contents of any documents — as opposed to detailed but not verbatim descriptions of those documents as described by former employees — would create paradoxes that district courts and plaintiffs attorneys would need to grapple with. Taken literally, for example, the defendants' position would seemingly require plaintiffs to plead evidence prior to discovery, and force plaintiffs to allege in their complaint a level of detail regarding internal documents that is not even required at summary judgment or trial.

Second, foreclosing the use of expert analysis would put plaintiffs — and the investors they represent — at a structural disadvantage, particularly when litigating against technology or life sciences companies, or, for example, when pursuing claims involving accounting fraud. Such complicated and technical fields and claims require expertise that corporations and their executives have — but that attorneys and judges may not possess without the assistance of a field expert. If plaintiffs are restricted in their use of expert analysis, defendant corporations will be able to use the complexity of their industries as both a sword and a shield in defense of claims of fraudulent conduct.

Third, the imposition of bright-line rules restricting plaintiffs from satisfying the already-heightened PSLRA pleading standard — previously foreclosed by the Supreme Court in *Matrixx* — would result in a weakening of private enforcement of the securities laws.

As Fitzpatrick explains, "both the data and the theory show that the incentives, the resources, and the private bar's inability to become captured by wrongdoers makes private enforcement much more effective than putting all of our eggs in the government's basket." [39] As he further notes in his brief,

private enforcement of the law is one of the things that makes the United States different — and better — than the other developed economies around the world. They rely on government to do everything for them. We don't — and our markets are more nimble, innovative, and honest because of it. [40]

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[1] 15 U.S.C. § 78u-4.

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

[3] 15 U.S.C. § 78u-4(b)(1)-(2).

[4] 15 U.S.C. § 78u-4(b)(2).

[5] *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313, 322-23, 326 (2007).

[6] *Matrixx Initiatives v. Siracusano*, 563 U.S. 27, 48-49 (2011).

[7] Brief for Respondents at 1, *Nvidia Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (Sept. 25, 2024) ("Respondents' Merits Brief").

[8] *Id.*

[9] *Id.* at 11.

[10] *Id.* at 17.

[11] *Id.* at 18.

[12] *Id.* at 16, 20, 41.

[13] *Id.* at 21.

[14] *Id.* at 22.

[15] *E. Ohman J:or Fonder AB v. Nvidia Corp.*, 81 F. 4th 918, 942 (9th Cir. 2023).

[16] *Id.* at 940.

[17] *Id.* at 932, 942.

[18] Petition for Writ of Certiorari at 3-5, *Nvidia Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (March 4, 2024).

[19] Respondents' Brief in Opposition to Petition for Writ of Certiorari at 22, *Nvidia Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (May 6, 2024).

[20] Brief for Petitioners at 22-26, *Nvidia Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (Aug. 13, 2024) ("Petitioners' Merits Brief").

[21] *Id.* at (i).

[22] *E. Ohman J:or Fonder AB v. Nvidia Corp.*, 81 F. 4th at 940.

[23] Petitioners' Merits Brief at (i).

[24] *Id.* at 1-2.

[25] *Id.* at 19.

[26] *Id.* at 44.

[27] See Supreme Court Docket for *Nvidia Corp. v. E. Ohman J:or Fonder AB*, No. 23-970, available at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-970.html>.

[28] Respondents' Merits Brief at 23-24.

[29] *Id.* at 32 n.5.

[30] *Id.* at 4, 43-49.

[31] Id. at 4.

[32] See Supreme Court Docket for Nvidia Corp. v. E. Ohman J:or Fonder AB, No. 23-970, available at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-970.html>

[33] Brief for The United States as Amicus Curiae Supporting Respondents at 1, Nvidia Corp. v. E. Ohman J:or Fonder AB., No. 23-970 (Oct. 2, 2024).

[34] Brief for Former SEC Officials as Amicus Curiae Supporting Respondents at 4, 8 n.6, Nvidia Corp. v. E. Ohman J:or Fonder AB., No. 23-970 (Oct. 2, 2024).

[35] Brief for Certain Institutional Investors as Amicus Curiae Supporting Respondents at 4, 15, Nvidia Corp. v. E. Ohman J:or Fonder AB., No. 23-970 (Oct. 2, 2024).

[36] Brief for Brian T. Fitzpatrick as Amicus Curiae Supporting Respondents at 1, Nvidia Corp. v. E. Ohman J:or Fonder AB., No. 23-970 (Oct. 2, 2024) ("Fitzpatrick Amicus Brief").

[37] Id. at 9, 17, 20.

[38] Brief for Scholars of Civil Procedure as Amicus Curiae Supporting Respondents at 5, Nvidia Corp. v. E. Ohman J:or Fonder AB., No. 23-970 (Oct. 2, 2024).

[39] Fitzpatrick Amicus Brief at 20.

[40] Id.

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Publix Denied Early Win Over Opioid Coverage Defense

By **Ganesh Setty**

Law360 (October 30, 2024, 7:53 PM EDT) -- A Florida federal court rejected Publix's bid for defense cost coverage for dozens of public nuisance lawsuits related to the opioid crisis, finding that the damages sought are too far removed from particular bodily injuries caused "because of" opioid addiction, as required in Publix's policies.

In an **order** issued Tuesday, U.S. District Judge Charlene Edwards Honeywell denied Publix Super Markets Inc.'s partial summary judgment bid over certain insurers' duty to defend. Under Florida law, Judge Honeywell said, the phrase "because of" means a "direct causal connection" instead of but-for causation, which is wider in scope and corresponds to "arising out of" policy language.

"Although the underlying lawsuits refer to people injured by opioids, the plaintiffs do not seek reimbursement for the costs of those particular individuals' medical treatment," Judge Honeywell said, pointing to one case that's been designated as a bellwether case in **multidistrict opioid litigation** against Publix and others: Cobb County v. Purdue Pharma LP et al.

In that case, Cobb County alleged that the opioid epidemic's "severe and far-reaching public health, social services, and criminal justice consequences" caused the county to incur costs exceeding the "normal or typical burdens of governmental programs and services."

"The route between the damages the county seeks to recover and injuries to specific individuals is circuitous at best," Judge Honeywell said.

The judge further ordered Publix to show cause within 21 days as to why the court shouldn't grant summary judgment to the opposing insurers.

According to court filings, Publix kicked off the coverage dispute in November 2022, seeking coverage for a raft of pending lawsuits consolidated in Ohio federal court that seek to recover damages for the economic cost of the opioid epidemic. Save for the Cobb County case, all have been stayed pending the resolution of the litigation's bellwether cases.

By **April 2023**, Publix sought partial summary judgment against its various primary and excess insurers for the 2013 policy year, seeking a declaration that they had a duty to defend it in the underlying litigation. The 2013 insurers, along with a separate insurer, St. Paul Fire & Marine Insurance Co., filed oppositions thereafter.

The 2013 insurers are Liberty Mutual Fire Insurance Co., Ace Property and Casualty Insurance Co., Great American Insurance Co., Liberty Insurance Underwriters Inc., XL Insurance America Inc., The Ohio Casualty Insurance Co. and Hartford Fire Insurance Co.

On Tuesday, Judge Honeywell first determined that the court retained subject matter jurisdiction, finding that while it's unclear whether all the excess insurers' policies will be triggered, there is "an actual controversy with respect to at least some of the 2013 insurer defendants" — Ace and Liberty Mutual in particular.

Turning to the merits, she then cited a prior pro-insurer opioid coverage decision assessing the causality question **under Florida law**, **Travelers Property Casualty Co. of America et al. v. Anda Inc. et al.**

In that case, the at-issue policy covered damages "for bodily injury," which Publix argued was materially different from the at-issue causality phrase in its policies, "because of bodily injury."

But Judge Honeywell said she was not convinced the difference mattered.

"After all, one of the policies at issue in *Anda* employed the phrase 'because of' instead of 'for,'" she noted. "And one of the policies at issue here, the ACE policy, uses both 'for' and 'because of.'"

She then pointed to other similar pro-insurer rulings in opioid coverage cases — **rulings from** the Ohio Supreme Court and Delaware Supreme Court **in 2022**, along with a Sixth Circuit ruling **in 2023** and Seventh Circuit ruling **from 2016**.

Dissents in the Delaware and Seventh Circuit decisions, meanwhile, do not "acknowledge the significant differences in the opioid lawsuits' theories of relief from that of an individual, organization, or even government entity seeking to recover the cost of a specific injured person's care," Judge Honeywell said.

Though "replete" with allegations about the injuries caused by the opioid epidemic, the underlying lawsuits do not seek to recover costs for particular medical treatment but instead for downstream economic damages, Judge Honeywell concluded.

"Indeed, many of the suits expressly disclaim damages for physical personal injury or wrongful death," she added.

Tuesday's decision did not address the insurers' other coverage defenses, which have disputed whether the underlying lawsuits actually alleged a covered "occurrence" and whether Publix could show it did not have prior knowledge of the underlying claims.

Representatives of the parties did not immediately respond to a request for comment Wednesday.

Publix is represented by Kenneth H. Frenchman, Alexander M. Sugzda and Jason D. Meyers of Cohen Ziffer Frenchman & McKenna LLP and Robert H. Friedman of Friedman PA.

The 2013 insurers are represented by attorneys from Clyde & Co. LLP, Holwell Shuster & Goldberg LLP, Butler Weihmuller Katz Craig LLP, Ruggeri Parks Weinberg LLP, Hinshaw & Culbertson LLP, Dentons US LLP and BatesCarey LLP.

St. Paul is represented by James N. Hurley, Edward J. Briscoe and Chloe M. Horton of Fowler White Burnett PA and Bryce L. Friedman and Joshua Polster of Simpson Thacher & Bartlett LLP.

The case is *Publix Super Markets Inc. v. ACE Property and Casualty Insurance Co. et al.*, case number 8:22-cv-2569, in the U.S. District Court for the Middle District of Florida.

--Additional reporting by Jeff Overley, Joe Van Acker, Shane Dilworth and Jeff Sistrunk. Editing by Emma Brauer.

Correction: A previous version of this article misstated the day that Judge Honeywell issued the order. The error has been corrected.



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Mortgage Co. Says Pension Fund Can't Jump In To Lead Suit

By **Katryna Perera**

Law360 (October 30, 2024, 10:00 PM EDT) -- Rocket Companies Inc. has told a Michigan federal judge to reject a renewed class certification bid in a shareholder suit accusing the mortgage business of concealing a downturn in loan volume, arguing that the pension fund trying to take over as lead plaintiff is inadequate to represent the proposed class, among other things.

Rocket Cos. filed an opposing **memo** to a request to file a renewed motion for class certification submitted to the court by the Construction Laborers Pension Trust for Southern California in early October.

The pension fund, referred to as SoCal in the brief, **moved for another chance** at class certification after the initial bid was denied in light of a recent U.S. Supreme Court **decision** in **Goldman Sachs Group v. Arkansas Teacher Retirement System** . In September, U.S. District Judge Thomas L. Ludington **denied class status** to shareholders, who allege the company hid a sharp drop-off in its mortgage business for months until it reported an expected \$18.5 billion decrease in closed loan volume in May 2021.

In its most recent bid, SoCal argued the new proposed motion for class certification would include a much smaller class, focus only on insider trading claims and cure issues the court previously found.

However, on Tuesday, Rocket pushed back, saying SoCal has "no authority" to control the litigation since it is only a named plaintiff and the suit's lead plaintiff, Carl Shupe, was found to be an inadequate class representative and is no longer seeking to represent the investors.

"Indeed, there has never been a lead plaintiff appointed to represent an insider-trading class. Shupe was appointed lead plaintiff solely of a misstatement-claim class, and SoCal has merely been appointed as an individual 'named plaintiff' empowering it only to 'aid the lead plaintiff in representing a class,'" the memo states. "As a result, SoCal can do no more than 'proceed with [its] individual claim[.]'"

In its motion earlier in October, SoCal also claimed that any adequacy issues of itself and Shupe would also be remedied with the renewed certification bid since Shupe no longer seeks to serve as class representative, and SoCal's previously articulated errors in distinguishing between claims would no longer be present since only insider trading claims will be pursued.

However, Rocket said Tuesday that SoCal continues to be an inadequate class representative because it "does not know what claim it is asserting or the identity of the class it seeks to represent."

"SoCal's only argument that anything has changed is its suggestion that because Shupe has dropped his misstatement-class claim, this Court's adequacy concerns are 'no longer present.' This makes no sense, and misconstrues the court's holding as faulting SoCal merely for being unable to "articulat[e] [the] difference" between the elements of Shupe's misstatement claim and SoCal's insider-trading claim," the memo states.

Rocket says the court held that a class representative must, at a minimum, have a basic understanding or general knowledge of the relevant facts underlying their claims, and SoCal has failed to meet this standard.

The mortgage company also disagreed with SoCal's claim that the proposed new motion for class certification would cure any previously identified ascertainability issues since the class definition is now much more "concrete."

According to SoCal, the new class definition would include all persons who purchased Rocket Class A common stock between March 29, 2021, and April 1, 2021.

"The new proposed class definition resolves any ascertainability concern, as it provides a fixed period of time (four days), and a person's inclusion in the class can be determined based on their trading records," SoCal said earlier this month.

Rocket said Tuesday that an ascertainable class definition must identify a specific time period for eligible purchases of Rocket stock to qualify as being "contemporaneous," or inside trades.

"But there is no evidentiary basis in the record to define that time period in a way that includes SoCal. That is fatal," the memo states, since a class representative must be part of the class.

According to the memo, the alleged insider trades occurred on March 29, 2021, but SoCal is trying to argue that its purchase of Rocket stock on March 30 was "sufficiently contemporaneous" since it occurred within a few days of the insider sale.

"Because SoCal bought Rocket stock on March 30, 2021, the day after [Rock Holdings Inc.'s] March 29 stock sale, it had to adduce evidence that supports defining the proposed class period beyond the day of RHI's stock sale. SoCal has not done so," the memo states. "And the evidence in the record, coupled with the evidentiary findings this court has already made, establishes that any purchases on or after March 30 were not 'contemporaneous' with RHI's stock sale."

Finally, Rocket said SoCal is wrong in its claims that reliance would no longer be an issue with the new proposed class since insider trading claims don't require a reliance element.

"SoCal does not cite a single case holding that reliance is not an element of a civil claim for insider trading. Instead, SoCal merely cites cases that discuss civil insider-trading claims without mentioning reliance," the memo states.

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

SoCal is represented by Carol C. Villegas, Christine M. Fox, Jake Bissell-Linsk and David Saldamando of Labaton Keller Sucharow LLP, Shannon Hopkins of Levi & Korsinsky LLP and James Allen of Schenk & Bruetsch PLC.

Rocket Companies and the other defendants are represented by Jeffrey B. Morganroth of Morganroth & Morganroth PLLC and Sharon L. Nelles, Jeffrey T. Scott, Julia A. Malkina and Jacob E. Cohen of Sullivan & Cromwell LLP.

The case is Shupe et al. v. Rocket Companies Inc. et al., case number 1:21-cv-11528, in the U.S. District Court for the Eastern District of Michigan.

--Editing by Emily Kokoll.



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LA Times Owner Faces Investor Suit Over Drug Co.'s Woes

By **Emilie Ruscoe**

Law360 (October 30, 2024, 9:14 PM EDT) -- Officers and directors of biotechnology company ImmunityBio Inc., including L.A. Times owner Patrick Soon-Shiong, face a shareholder's derivative complaint alleging the company concealed issues affecting a path to regulatory approval for one of its key product candidates.

In a **complaint filed Wednesday**, plaintiff Gary Van Luven claimed the ImmunityBio brass should face liability after the company failed to tell investors that starting in March 2021, the U.S. Food and Drug Administration began raising concerns about the processes in use by the third-party contract manufacturing organization making active ingredients for ImmunityBio's bladder cancer treatment Anktiva.

Van Luven claimed investors were kept in the dark about the FDA's misgivings for more than two years and only found out about them when the company was forced to acknowledge them as it announced the FDA had rejected a biologics license application for Anktiva.

"The news came as a shock to investors, who had been repeatedly assured that the company's manufacturing processes were compliant with FDA regulations," Van Luven said, adding that right after the announcement, the company's trading prices for its shares fell by more than 55% from more than \$6 to under \$3.

According to Van Luven, the company's brass concealed that the company either failed to properly vet its manufacturer or ignored deficiencies in its manufacturing processes, increasing the likelihood the FDA would refuse to sign off on the Anktiva application.

"Accordingly, the company overstated the regulatory approval prospects for the Anktiva [biologics license application]," Van Luven said.

The investor also claimed the company's leadership left it vulnerable to liability after it was hit with a proposed investor class action over the same alleged misconduct.

Van Luven noted that in June, the company lost a bid to see the putative shareholder class action tossed, adding that that matter will "expose the company to significant class-wide liability moving forward."

Alongside Soon-Shiong, who founded ImmunityBio and chairs its board, the suit also names current ImmunityBio CEO Richard Adcock and eight additional individual defendants, some of whom are also defendants in the proposed class action.

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

Van Luven is represented by Betsy C. Manifold, Rachele R. Byrd and Alex J. Tramontano of Wolf Haldenstein Adler Freeman & Herz LLP, and Justin A. Kuehn of Kuehn Law PLLC.

Counsel information for the defendants wasn't immediately available Wednesday.

The case is Luven v. Soon-Shiong et al., case number 3:24-cv-02014, in the U.S. District Court for the Southern District of California.



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'Vague' Witness Sinks Green Materials Co. Investor Suit

By **Craig Clough**

Law360 (October 30, 2024, 11:01 PM EDT) -- A California federal judge dismissed an investor suit Tuesday filed against a maker of sustainable materials alleging it failed to disclose a change in direction in its manufacturing plans and a delay in building a new plant, saying the suit relies heavily on statements of a confidential witness that are "fatally vague."

The **order** from U.S. District Judge William B. Shubb of the Eastern District of California said plaintiff Antonio F. Soto can amend the complaint against Origin Materials Inc. and two of its executives "if he can do so consistent" with the court's finding that statements of a former Origin employee identified as "Confidential Witness 1" are not specific enough for the claims to survive.

The judge found that statements the witness "learned" in meetings that the company was changing directions and delaying the construction of a new plant months before it was disclosed to investors are "crucial" to the complaint's pleading of both falsity and scienter, but lack the details needed to withstand the pleading standards of the Private Securities Litigation Reform Act, or PSLRA.

"However, the allegations concerning what CW1 'learned' at meetings attended by defendants are fatally vague, as they do not indicate 'when this information was conveyed to [defendants], who conveyed it, or the substance of what was allegedly conveyed,'" the judge wrote, citing the Northern District of California's 2007 **ruling** in *In re Ditech Communications Corp. Securities Litigation*,  which held that what a confidential witness "learned" during meetings was not sufficient to support the inference of scienter.

"The complaint also fails to allege with specificity what defendants' role was during these meetings and whether defendants had access to the same information that was communicated to CW1," the judge continued. "When questioned several times at oral argument, counsel was unable to provide any further detail concerning what CW1 'learned' and how he learned it."

According to the August 2023 lawsuit, Origin specializes in converting "the carbon found in biomass into carbon negative materials that can replace the petroleum-based substances typically used in various end products." The suit alleges violations of Sections 10(b) and 20(a) of the Securities Exchange Act.

The suit alleges that on Aug. 9, 2023, Origin announced after the market closed that it was significantly delaying construction on its Origin 2 commercial plant and changing the focus products to be made at the plant from paraxylene to furandicarboxylic acid. The company also said the construction would be more expensive than planned and "yield less capacity than previously announced," according to the suit.

The announcement caused the company's stock to decline \$2.88 per share, or 66.5%, to close at \$1.45 per share on Aug. 10, 2023, the suit alleges.

Judge Shubb granted a motion to dismiss from the defendants on Tuesday, finding that the complaint relies heavily on the statements of the confidential witness.

"It is possible for example that CW1 believes he 'learned' of the changed plans, merely through his own deductions based on such things as the body language of the meeting attendees," the judge wrote.

Judge Shubb also wrote that the "lack of detail provided concerning the March 2023 meetings is particularly glaring given that the complaint provides greater detail concerning other meetings," and that "[i]n evaluating the statements of a confidential witness, sufficient detail is all the more important, as both the court and the defendants lack a crucial piece of information — the witness's identity — traditionally used in weighing the credibility of the allegations."

Under the PSLRA, it is "not sufficient for plaintiff to merely 'set forth a belief that certain unspecified sources will reveal, after appropriate discovery, facts that will validate h[is] claim,'" the judge added, citing the Ninth Circuit's 2005 ruling *In re Daou Sys., Inc.* 

Counsel for Soto did not immediately respond to a request for comment. Counsel for the defendants declined to comment.

Soto is represented by Jacob Walker of Block & Leviton LLP.

The defendants are represented by Boris Feldman, Doru Gavril, Carl Patrick Hudson and Rebecca Lockert of Freshfields Bruckhaus Deringer LLP.

The case is Antonio F. Soto v. Origin Materials Inc. et al., case number 2:23-cv-01816, in the U.S. District Court for the Eastern District of California.

--Editing by Michael Watanabe.

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Bernstein Litowitz, NYS Fund Rep CrowdStrike Investor Class

By **Emilie Ruscoe**

Law360 (October 30, 2024, 10:03 PM EDT) -- Bernstein Litowitz Berger & Grossmann LLP will represent a putative class of CrowdStrike investors in litigation alleging the cybersecurity company mischaracterized the risk of seeing a major outage like the one it faced in July.

In a Wednesday order in Texas federal court, U.S. District Judge Robert Pitman appointed Bernstein Litowitz's client, the New York State Common Retirement Fund, class representative, noting two other lead plaintiff movants bowed out of the competition once all the bids were filed.

"Having reviewed the parties' submissions, the court finds that NYSCRF has asserted the largest financial interest in the relief sought by the class," Judge Pitman said.

The loss chart submitted with the institutional investor's lead plaintiff bid states the fund's losses in connection with the alleged fraud are over \$16 million when calculated by either commonly used method for characterizing losses in such cases.

The fund also told the court that it is a "paradigmatic lead plaintiff under the [Private Securities Litigation Reform Act] because it is a sophisticated institutional investor with a substantial financial interest in the litigation and the ability to supervise and monitor counsel" in its Sept. 30 lead plaintiff motion.

The other would-be lead plaintiffs were institutional investor LS Value, a client of DiCello Levitt LLP and Nix Patterson LLP, with alleged losses of nearly \$273,000, and the Public Employees' Retirement System of Mississippi, represented by Kahn Swick & Foti LLP and the Kendall Law Group PLLC, with estimated its losses of about \$4.1 million.

The New York pension fund will lead claims launched in July by a Labaton Keller Sucharow LLP client taking aim at CrowdStrike over its statements about how it was working to prevent crashes.

The proposed class includes those who purchased CrowdStrike shares between Nov. 29, 2023, when the company touted its "modern, frictionless data security" on an earnings call, and July 29, 2024, after a flawed update of CrowdStrike's Falcon software platform shut down millions of devices running the Microsoft Windows operating system all over the world, grounding airplanes, and shutting down emergency 911 hotlines, among other consequences.

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

Thomas P. DiNapoli, Comptroller of the State of New York, as Administrative Head of the New York State and Local Retirement System, and as Trustee of the New York State Common Retirement Fund, is represented by Hannah Ross, Avi Josefson and Scott R. Foglietta of Bernstein Litowitz Berger & Grossmann LLP and Gerald T. Drought and Frank B. Burney of Martin & Drought PC.

CrowdStrike is represented by Zachary C. Ewing, Kevin M. Neylan and Sandra C. Goldstein of Kirkland & Ellis LLP.

The case is Plymouth County Retirement Association v. CrowdStrike Holdings Inc. et al., case number 1:24-cv-00857, in the U.S. District Court for the Western District of Texas.



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Del. Justices Probe Implications Of Tripadvisor Nevada Move

By **Jeff Montgomery**

Law360 (October 30, 2024, 10:51 PM EDT) -- Delaware's justices closely questioned on Wednesday an attorney defending shopping and travel giant Tripadvisor Inc.'s bid to reincorporate in Nevada, pressing for frameworks that protect the interests of current stockholders as well as fiduciaries and investors seeking more business-friendly pastures.

The questions arose as the court fielded a mid-case appeal from a Court of Chancery decision in February that kept alive minority stockholder damage claims alleging that Tripadvisor approved the move in an unfair vote tainted by controller clout.

Vice Chancellor J. Travis Laster found enough reasons to deny dismissal of claims on behalf of stockholders of Tripadvisor Inc. and parent Liberty TripAdvisor Holdings Inc. that the actions provided unfair benefits to directors and officers in the form of diminished stockholder litigation rights in Nevada.

While saying the court would not block the re-domestication, the vice chancellor also found that the decision failed to protect minority stockholders — a majority of whom opposed the move — from the voting weight held by CEO, chairman and controlling investor Gregory B. Maffei, who owns all super-voting shares of Liberty TripAdvisor Holdings.

"The big struggle here is to find the right framework, and, as you point out, entire fairness in a way seems ill-fitting because of the speculative and unquantifiable nature of the benefit," Justice Karen L. Valihura told Matthew W. Close of O'Melveny & Myers LLP, counsel to Maffei and the board of Liberty TripAdvisor Holdings.

Close argued that business judgment deference, rather than the far more stringent entire fairness test advocated by stockholder attorneys, was the right answer given a lack of a pending or contemplated lawsuit, or a "clear day" litigation context. He also said other equitable and statutory protections are available, including a section of current law providing that an out-of-state move "shall not be deemed to affect any obligations or liabilities of the corporation incurred prior to such conversion or the personal liability of any person incurred prior" to the move.

"The rule we propose and why we think business judgment deference is the right approach here is, you don't have a situation where the move is having an impact. There's no pending or threatened litigation, none is alleged, nor is there alleged wrongful conduct" being shielded, Close said.

"How do we reconcile or address your 'clear day' argument with the fact of control looking forward?" Justice Gary F. Traynor asked. "What will keep controllers from, in anticipation of an interested transaction, reincorporating in a jurisdiction that they deem more friendly to fiduciaries?"

Andrew E. Blumberg of Bernstein Litowitz Berger & Grossmann LLP, counsel to the stockholders, argued that when a controller causes a reincorporation "specifically to provide more protection" against stockholder claims, "the controller is self-interested, entire fairness thus presumptively applies consistent with longstanding precedent,"

Justice Valihura asked Blumberg whether he would agree that, if there was no controller and "a clear day, would director independence be subject to challenges" simply because of a vote to incorporate in Nevada?

Blumberg observed that the directors sought stockholder support for the conversion into a Nevada company in a proxy that admitted that its primary purpose was to insulate directors from future stockholder litigation.

"They have admitted that they are voting in favor of this business decision for purposes of receiving that benefit," Blumberg said.

Liberty TripAdvisor and Tripadvisor argued in a brief that Vice Chancellor Laster's decision raises concern that Delaware's weighing of potential harm from a corporate redomestication would violate principles of "comity" or the consensus that each state is entitled to its own "assessment of balance between fostering commercial activity within its border and protecting potential victims."

Blumberg noted that Delaware allows companies to shield directors from liability for violating duties of care, such as gross negligence, but not duties of loyalty.

"Loyalty-based exculpation would enable fiduciaries to extract benefits at the expense of stockholders," Blumberg said.

"Why don't we just say this is a difficult case and entire fairness might apply, but the benefit is just too speculative for us to put a value on," Chief Justice Collins J. Seitz Jr. said, "and therefore, even though entire fairness applies, we're not going to put up blockade against companies that are controlled from moving from Delaware."

Blumberg said redomestication in a jurisdiction that permits shielding of duty of loyalty breaches increases the value of control and potentially allows immediate monetization after a move, such as selling control stake or engaging in a self-interested transaction.

Nevada also does not follow the Delaware courts' so-called Revlon duties, Vice Chancellor Laster observed in his decision earlier this year. Revlon duties require companies to get the best reasonably available price in a sale. Instead, Nevada permits other considerations.

The decision has special significance in Delaware, where corporate and alternative entity franchise payments were estimated to account for about 29% of state general fund revenue last year. Among other benefits for holding down other Delaware taxes: The more than 1 million companies holding Delaware charters get the benefit of Chancery Court's rapid attention and deeply grounded decisions and precedents.

"This is a whole different world, at least in my view, trying to value what Texas or Nevada or some other jurisdiction" potentially offers a company in terms of value for controllers or directors, Chief Justice Seitz said. He added that although Vice Chancellor Laster had commented about the possibility of an event study or examining stock prices, "that looks awfully speculative."

The justices said they would take the arguments under advisement.

Remaining breach of fiduciary duty claims in the Court of Chancery case will go forward under Delaware law, regardless of whether conversion of Tripadvisor, the world's largest trip planner, to a Nevada-chartered corporation occurs, Vice Chancellor Laster's decision in February found.

"The plaintiffs can only state a claim on which relief can be granted because the corporation has a stockholder controller, and the board did not implement any protective provisions," the vice chancellor wrote at the time. "The defendants also did not make any effort to compensate the stockholders for the reduction in their litigation rights. Change any of those variables and the outcome could be different."

Liberty TripAdvisor Holdings Inc. and its directors and officers are represented by Kevin R. Shannon, J. Matthew Belger, Jaclyn C. Levy, Christopher D. Renaud and Justin T. Hymes of Potter Anderson & Corroon LLP and Matthew W. Close, Jonathan B. Waxman, Abby F. Rudzin and Asher Rivner of O'Melveny & Myers LLP.

Tripadvisor Inc. and its directors and officers are represented by Bradley R. Aronstam and S. Michael

Sirkin of Ross Aronstam & Moritz LLP and John A. Neuwirth, Evert J. Christensen and Stefania D. Venzia of Weil Gotshal & Manges LLP.

Tripadvisor and Liberty TripAdvisor stockholders Dennis Palkon and Herbert Williamson are represented by Gregory V. Varallo, Andrew E. Blumberg, Mae Oberste, Daniel E. Meyer and Jeroen van Kwawegen of Bernstein Litowitz Berger & Grossman LLP, Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax and Robert Erikson of Block & Leviton LLP and Jeremy Friedman, David Tejtcl, Christopher Windover and Lindsay LaMarca of Friedman Oster & Tejtcl PLLC

The case is Gregory Maffei, Tripadvisor Inc. and Liberty TripAdvisor Holdings Inc. v. Dennis Palkon and Herbert Williamson, case number 125,2024, in the Supreme Court of the State of Delaware.

The case under appeal is 2023-0449, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.

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Class Members Can't Change Opt-Out Rules In Chevy EV Deal

By **Mike Curley**

Law360 (October 30, 2024, 4:43 PM EDT) -- A Michigan federal judge won't grant a bid by individual class members to change the opt-out procedure in a \$150 million settlement to resolve claims that General Motors sold Chevrolet Bolt electric vehicles with defective batteries, calling the motion an improper late objection to the settlement's preliminary approval.

In an **order** filed Monday, U.S. District Judge Terrence G. Berg denied a motion from a group of class members who sought to allow class members to use email and electronic signatures to opt out of the deal instead of the mail-in procedures agreed to in the settlement, saying the motion comes far too late.

According to the order, any objection to the bid for preliminary approval was due by June 6, 2024, or, at the very latest, before or at the court's preliminary approval hearing on July 15, but the motion was instead filed in August.

Even if it were on time, the judge wrote that it would still be denied because it significantly alters the opt-out provision in the carefully negotiated settlement, and a court can't make that kind of modification over objections by the parties.

Judge Berg also rejected the movants' argument that it is unduly burdensome to expect individual plaintiffs to physically sign and mail opt-out notices, saying that requiring a personally signed, mailed opt-out request is a well-established practice.

"The opt-out period runs for 150 days from the date of preliminary approval, which is more than sufficient time to accomplish the required tasks of signing and mailing in a request to opt out," the judge wrote. "As the Defendants point out, the requirement of a physical signature is the best way to guarantee that any opt-out requests reflect individualized and considered decisions before actually doing so and trading a certain right to meaningful recovery for the uncertainty of individual litigation or arbitration.

The judge added that requiring physical, mailed-in exclusion requests helps guard against "mass opt-outs," which the settlement expressly prohibits, and promotes individualized opt-outs.

E. Powell Miller of The Miller Law Firm PC, representing the class, said Wednesday, "We look forward to moving the settlement forward."

Representatives for the other parties could not immediately be reached for comment Wednesday.

The litigation, which began in **December 2020**, includes eight potential class actions consolidated in the Eastern District of Michigan that accused GM and units of South Korea's LG Corp. of failing to disclose that there was a defect in the lithium-ion battery in GM's Bolt EVs and failing to adequately repair the defect after three safety recalls and GM guidance that hamstrung consumers' use of the class vehicles.

In August 2021, GM **recalled all Chevrolet Bolts** due to fire risks tied to two manufacturing defects in batteries manufactured by LG Chem Ltd., expanding two earlier recalls from November 2020 and July 2021.

The deal covers more than 100,000 consumers who purchased or leased 2017 to 2022 Chevrolet Bolt vehicles before GM's voluntary recall in August 2021. The vehicles are eligible for battery replacements or a software upgrade that will monitor the health of the batteries and alert owners if there is an issue, according to court documents.

Class members who need battery replacements will receive \$700, and those who are eligible for the software upgrade will receive \$1,400. The class requested that class representatives receive a \$2,000 service award.

In September, Judge Berg **granted** preliminary approval to the deal, saying after four years of litigation, including numerous proceedings and discovery, counsel for both sides had the opportunity to structure the deal in a way that accounts for the strengths and weaknesses of the case.

The moving plaintiffs are represented by Eric D. Pearson of Heygood Orr & Pearson.

The buyers are represented by The Miller Law Firm PC, Keller Rohrback LLP, McCune Wright Arevalo LLP, Fine Kaplan & Black RPC, Migliaccio & Rathod LLP, the Law Offices of Todd M. Friedman PC and Chimicles Schwartz Kriner & Donaldson-Smith LLP.

GM is represented by Andrew S. Rosenman, John Nadolenco and Archis A. Parasharami of Mayer Brown LLP.

LG Electronics USA is represented by Phoebe A. Wilkinson and Samuel L. Zimmerman of Hogan Lovells and A. Michael Palizzi of Miller Canfield Paddock & Stone PLC.

LG Energy Solution is represented by Mark S. Mester, Robert C. Collins III and Jason R. Burt of Latham & Watkins LLP.

The case is In re: Chevrolet Bolt EV Battery Litigation, case number 2:20-cv-13256, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Linda Chiem and Danielle Ferguson. Editing by Andrew Cohen.



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3M Says Excess Insurers Must Cover PFAS Claims

By **Hope Patti**

Law360 (October 30, 2024, 6:29 PM EDT) -- Manufacturing giant 3M said its excess insurers must cover claims alleging injury and damage because of exposure to so-called forever chemicals in the company's products, telling a Delaware state court that the claims fall squarely within the scope of coverage promised in the policies.

In a **suit filed** Oct. 25, 3M Co. said a group of insurers, including units of AIG, Chubb and Travelers, breached their respective insurance policies by failing to provide defense and indemnity coverage for underlying claims concerning alleged exposure to per- and polyfluoroalkyl substances, or PFAS.

"Pursuant to the terms of the policies, the insurers have a duty to indemnify 3M, up to the applicable limits of their respective policies, for any settlements or judgments that 3M becomes legally obligated to pay in connection with the PFAS claims," the manufacturer said. "Certain insurers also have a duty to defend 3M, or the duty to pay or reimburse the defense costs that 3M has incurred, in connection with the defense of underlying PFAS claims."

According to the complaint, the claims against 3M include lawsuits brought by individuals, water providers, state and municipal government authorities, and others alleging bodily injury or property damage because of the use of 3M products, such as aqueous film-forming foams used for fire suppression and Scotchgard fabric repellants. Some also claim injury or damage stemming from 3M's operations at certain facilities in Alabama, California, Illinois, Minnesota, Missouri, Belgium and Germany, that allegedly have a history of manufacturing, using or spilling PFAS.

Thousands of suits concerning the firefighting foam product have been consolidated in multidistrict litigation in the District of South Carolina, known as In re: Aqueous Film-Forming Foams Products Liability Litigation.

In June 2023, 3M struck a \$12.5 billion settlement in the MDL with public water systems that claimed the foam products caused water contamination. 3M said in its complaint Oct. 25 that it has paid approximately \$2.7 billion to date and plans to pay an additional \$1.75 billion in 2025.

While 3M has announced that it plans to exit all PFAS manufacturing and discontinue the use of PFAS across its product portfolio by the end of 2025, the company noted that it continues to face PFAS claims filed by claimants.

"3M has incurred, and continues to incur, the costs of defending such additional PFAS claims, and has entered, and may continue to enter, into additional settlements to resolve such PFAS claims," the company said.

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

3M is represented by Jennifer C. Wasson and Carla M. Jones of Potter Anderson & Corroon LLP and by James M. Davis, J. Camille Fisher, Vivek Chopra, Jonathan G. Hardin, Michael T. Sharkey and Bradley H. Dlatt of Perkins Coie LLP.

Counsel information for the insurers was not available.

The case is 3M Co. v. Everest Reinsurance Co. et al., case number N24C-10-372, in the Superior Court of the State of Delaware.



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Connecticut Water Users Amend Utility PFAS Class Action

By **Tom Lotshaw**

Law360 (October 30, 2024, 3:10 PM EDT) -- A proposed class of Connecticut consumers filed an amended complaint for a suit alleging a water utility knowingly sold water containing unhealthy levels of "forever chemicals" without installing treatment equipment that could have prevented the contamination from reaching people.

New Milford residents Deborah Vincent, Kate Losey and Courtney Richotte filed the amended complaint against the Aquarion Water Co., a subsidiary of Eversource Energy, on Tuesday.

A prior complaint alleged violations of the **Connecticut Unfair Trade Practices Act** and the Connecticut Product Liability Act, court records show.

The amended complaint **drops** the state law-based product liability claim, adding counts for breach of implied warranty of merchantability, breach of implied warranty of fitness for particular purpose and strict liability.

The residents dropped an original version of their suit in March, about a month after the utility had asked a Connecticut state judge to dismiss it, and refiled comparable claims a week later.

The suit seeks class certification, damages for economic losses, common law and statutory punitive damages, and attorney fees and costs, according to the amended complaint.

During arguments **in July**, a Connecticut state court judge at one point questioned whether the Legislature's statutory and regulatory scheme allowed Vincent and the other plaintiffs to sue the utility in court rather than pursue an administrative remedy with the Connecticut Public Utilities Regulatory Authority.

Representatives for the parties could not immediately be reached for comment on Wednesday.

The customers are represented by David S. Golub, Ian W. Sloss, Johnathan Seredynski, Krystyna Gancoss and Kate Sayed of Silver Golub & Teitell LLP.

Aquarion is represented by Kevin W. Hadfield and Timothy J. Fazio of Manning Gross & Massenburg LLP and Amy Leete Van Dyke of Eversource Energy.

The case is Vincent et al. v. Aquarion Water Co., case number UWY-CV24-6076640-S, in the Waterbury Judicial District of the Connecticut Superior Court.

--Editing by Patrick Reagan.

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Hershey's Candy Wrappers Contain PFAS, Spooky Suit Says

By **Tom Lotshaw**

Law360 (October 30, 2024, 3:30 PM EDT) -- A chocolate lover has sued The Hershey Co. in Pennsylvania federal court just days before Halloween alleging the packaging of its milk chocolate bars and Kisses, Reese's Peanut Butter Cups, Reece's Pieces and KitKat Bars contain dangerous "forever chemicals."

In a proposed class action filed Tuesday, Louisiana resident Jonathan Parish said third-party testing revealed "alarmingly high levels" of per- and polyfluoroalkyl substances and organic fluorine in the packaging the confectionery giant uses for some of its most popular candies.

According to Parish, the company touts the quality and safety of its products, as well as their wrappers, to "convey a message to consumers that the confectionery products are safe, high-quality, merchantable, and free of any unwanted substances and contamination."

Nonetheless, Parish told the court, testing found "heightened levels of dangerous, unsafe" organic fluorine and PFAS that are toxic, carcinogenic and linked to a number of health problems.

"Plaintiff's purchase and consumption of confectionery products has resulted in plaintiff's suffering physical impact in the form of being exposed to a non-bargained for agent with potent mutagenic properties that operates at the cellular and sub-cellular levels, implicating future potential health consequences," Parish said in the complaint.

PFAS, known as forever chemicals for their ability to persist in the environment and the human body, have long been used to imbue various consumer products with non-stick and water- and grease-resistant properties and have triggered a mountain of litigation over contamination and health impacts.

Water- and grease-resistant properties are not required in candy wrappers, according to Parish, who said the presence of PFAS is "due to a lack of care in production processes or supply chains."

"As the third-party testing reported, the significant signal in the data is that many of the products seem highly contaminated, and from a toxicological standpoint, Hershey's products seem much worse than testing performed on competing products," Parish told the court.

"Troublingly, none of the above confectionery products should have contained any PFAS or fluorine in their wrappers, or the products themselves (due to exposure of the wrappers)," he added.

Parish's lawsuit proposes several classes of plaintiffs, including a national class and Louisiana and Pennsylvania Unfair Trade Practices Act subclasses. It asserts claims of breach of warranty, fraud, negligent misrepresentation and omission, negligence, unjust enrichment and violation of state consumer protection laws.

A California man hit The Hershey Co. with a proposed false advertising class action late last week, alleging that **it and its Bubble Yum brand** assert they are committed to meeting the "highest quality, safety and sustainability standards," when lab tests revealed its wrappers and gum contained organic fluorine — an indicator of PFAS — at amounts exceeding limits allowed under California law.

Representatives for Parish declined to comment. Representatives for The Hershey Co. could not

immediately be reached for comment.

Parish is represented by Allan Kanner, Conlee S. Whiteley and David J. Stanoch of Kanner & Whiteley LLC and Andre Bizer of Bizer & DeReus.

Counsel information for Hershey could not immediately be determined.

The case is Jonathan Parish v. The Hershey Company, case number 1:24-cv-01868, in the U.S. District Court for the Middle District of Pennsylvania.

--Editing by Rich Mills.

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Capital One Says It Disclosed Sale Of Consumer Account Data

By **Katryna Perera**

Law360 (October 30, 2024, 10:03 PM EDT) -- Capital One has urged a California federal judge to toss a proposed class action alleging that it surreptitiously disclosed the personal financial information of millions of consumers to Meta, Google, Microsoft and other third parties without consumers' consent, saying it "fully disclosed" to customers the bank's use of routine marketing and analytics software.

Capital One filed a dismissal **motion** Monday after a group of California consumers hit the bank with a 99-page complaint in August **alleging** Capital One's "outrageous, illegal and widespread practice" of knowingly and surreptitiously installing third-party tracking tools on its website that allow other businesses to collect personal and financial information from its banking customers.

The third-party tracking tools like Facebook-owner Meta Platform's "Meta Pixel" tool allegedly collect "vast" amounts of sensitive consumer data, including Capital One customers' account information, employment information, browsing habits, credit card application information and credit-card approval data, among other highly sensitive information, according to the complaint.

The collected data is then allegedly shared with third parties in real time, solely for marketing and sales purposes, while Capital One allegedly receives revenues from targeted ads directing consumers to its website. Consumers say the bank doesn't disclose its practices or ask consumers for consent as required by multiple federal and state laws.

However, on Monday, Capital One noted that the plaintiffs, along with other holders and applicants of Capital One credit cards, admit that they accepted the bank's "Privacy Contracts," which explicitly disclose the circumstances under which the bank collects and shares consumer data, including through its website.

"Plaintiffs themselves contend that the 'Privacy Contracts' are valid and binding contracts," the motion stated. "Those 'Privacy Contracts' on their face disclose explicitly (among other things) that 'third-party providers acting on [Capital One's] behalf use a variety of online tools ... to collect information' and that 'service providers may use pixel tags to determine whether you have interacted with a specific part of [Capital One's] website.'"

The suit's exhibits, which include the privacy contracts, contradict the plaintiffs' claims that they were never provided written notice from Capital One about the data disclosure or what information the bank would share with nonaffiliates, the motion stated.

The plaintiffs' allegation that Capital One failed to provide sufficient opt-out mechanisms for customers also lacks "validity," according to the motion.

"Once again, one need only look to plaintiffs' own exhibits to show this is false," the motion stated. "Capital One's online privacy policy provides an '[o]pt out of targeted advertising' section that explains Capital One's support for 'Global Privacy Control (GPC)', which is a setting that allows you to communicate your privacy preferences to websites."

Capital One further argued for dismissal of the suit, saying the plaintiffs have failed to adequately plead what personal and financial information of consumers was disclosed.

"The closest plaintiffs come to explaining what they actually mean by 'personal and financial information' is a listing of generic categories of information that could be disclosed, such as 'employment,' 'bank accounts,' and credit card eligibility," the motion states. "But without a direct allegation — which plaintiffs do not make — about what data concerning them was actually disclosed, plaintiffs' generic supposition offers nothing more than 'conjectures and hypothetical scenarios.'"

Capital One argues that the plaintiffs have also failed to state a claim for invasion of privacy. According to the motion, the plaintiffs have failed to allege that they had a reasonable expectation of privacy since, by their own admission, they agreed to and had notice of the bank's privacy policies. Additionally, the suit does not allege that Capital One's alleged conduct is "highly offensive," which is a requirement to state an invasion of privacy claim, according to the motion.

"Even if Capital One did share PI and FI with third parties in the manner alleged, the collection and sharing of data is not offensive to any degree — let alone highly — as a matter of law," the motion states.

Capital One also argued that the plaintiffs have failed to plead negligence, lack standing under several California statutes and fail to allege a breach of contract, among other things.

In addition to Facebook's Mega Pixel tracking tool, the lengthy complaint points to similar third-party tracking tools made by other tech giants, including Google LLC and Microsoft Inc., ad company DoubleClick Inc., software companies New Relic, Adobe and Everest Technologies, Israeli marketing company Kenshoo, AI marketing companies Snowplow and Tealium, and fraud-prevention technology company BioCatch Ltd. Those companies, however, are not named as defendants in the lawsuit.

The lawsuit notes that although Capital One's privacy notice discloses that the company may share customer data with affiliates, which "can include" companies like insurers, "co-branded partners, retailers, data processors and advertisers," the complaint said it's not clear that the social media giant Facebook and the other third parties fall into that category.

The lawsuit details the experiences of the named plaintiffs, some who have Capital One accounts, and they generally claim that immediately after applying for a Capital One card, or using the website, they began seeing a "bombardment" of ads on Facebook and other websites for loans and credit cards.

The named plaintiffs seek to certify a nationwide class and a California subclass of consumers whose personal and financial information was allegedly disclosed by Capital One to third parties through its website's tracking technology without authorization.

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

The consumers are represented by Natalie Lyons, Vess A. Miller, Lynn A. Toops and Amina A. Thomas of Cohen & Malad LLP, J. Gerard Stranch IV and Emily E. Schiller of Stranch Jennings & Garvey PLLC and Samuel J. Strauss and Raina C. Borrelli of Strauss Borrelli PLLC.

Capital One is represented by Rebecca Harlow, Aravind Swaminathan and Jassiem Moore of Orrick Herrington & Sutcliffe LLP.

The case is Vishal Shah et al. v. Capital One Financial Corp. et al., case number 3:24-cv-05985, in the U.S. District Court for the Northern District of California.

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



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Jury Told Abbott, Mead Owe 'Astronomical' Sum Over Formula

By **Cara Salvatore**

Law360 (October 30, 2024, 11:07 PM EDT) -- Lawyers for a premature baby who developed a serious gut condition after being given formula made by Abbott and Mead Johnson asked a jury to deliver an "astronomical" punishment in closing arguments Wednesday while the companies said formula's only sin is it can't protect preterm infants like breast milk can.

After a roughly monthlong trial, a lawyer for now-7-year-old Kaine Whitfield began closing arguments Wednesday by saying Abbott and Mead Johnson recklessly sold a product they knew was followed by a worse outcome for its users. Whitfield, born in August 2017 at 27 weeks and 5 days' gestation and weighing 1,140 grams, developed necrotizing enterocolitis in the first weeks of his life and now has extreme and permanent challenges from short bowel syndrome, which prevents him from absorbing nutrients easily.

"They are making billions off these little babies' backs. It's profits over preemies," the plaintiffs' lawyer Timothy Cronin said.

Recommending to jurors that they award punitive damages in the proportion of 15% of the companies' revenues — about \$5 billion for Abbott and about \$1 billion for Mead — Cronin acknowledged, "I'm not denying that they are astronomically high numbers, OK? But they're what I think is appropriate that's actually going to cause somebody to make a change."

And Cronin told jurors that if it wasn't clear exactly why these preterm cow's-milk formulas result in worse incomes, the cause of the mechanism does not need to be known.

"They want to flip the baseline. They want to pretend like NEC is something that naturally happens to anyone at any age at the same rate unless they're actively drinking their mom's own breast milk," Cronin said. "But it's the opposite. The baseline is mom's milk. The formula has an increased risk compared to the milk they're supposed to get."

He said Abbott and Mead are desperate to get hospital patients onto their formulas, so mothers become long-term customers when they leave the hospital and start buying non-preterm formulas in the grocery store.

Cronin asked the jury to award Kaine \$50 million for past pain and suffering, \$66 million for future medical, \$10.6 million for future lost wages and other economic but nonmedical damages, and \$150 million for future pain and suffering, for a total of \$277 million in compensatory damages. He also asked them to find that Abbott was 75% at fault and Mead 25% at fault for Kaine's injuries.

The defense, meanwhile, said Kaine was a severely ill baby, and things like his antibiotics and his anemia were known risk factors for NEC.

Plaintiffs "must prove that without formula and still with everything working against him, he would not have gotten NEC" — and they simply "cannot prove that," said Rebecca Fitzpatrick of Kirkland & Ellis LLP, who represents Abbott.

In 81 feedings in the NICU, Kaine received mother's milk in 78 of them, sometimes alongside formula. Expert witnesses admitted during trial that mother's milk made up 70% to 90% of the total feeding volume, Fitzpatrick said.

Kaine was in the NICU for 16 days before developing NEC, and for 13 of those days, he was on antibiotics. Defense expert Dr. Rachana Singh testified that severe anemia was what pushed him over the edge for NEC, Fitzpatrick said.

"NEC has been studied in hundreds, if not thousands, of studies. It is the holy grail of neonatology," Fitzpatrick said. "There is no ingredient in formula that causes NEC. If there were, we would know it; neonatologists would know it."

She added that the logic of finding that formula "causes" NEC just doesn't compute.

"We all know that drinking water doesn't cause sailors to get scurvy. It's the same for formula. ... Mother's own milk is more protective against NEC than formula, but nobody should ever say that formula causes NEC. It's the same logic," she said.

Phyllis Jones of Covington & Burling LLP, who represents Mead Johnson, said the company's Enfamil Premature 20 was only 2.8% of Kaine's total relevant feeding volume — "an ounce and a bit on a single day seven years ago."

"Babies who overwhelmingly receive their mom's own breast milk can still get necrotizing enterocolitis," Jones said. She stated that in severely premature babies, like Kaine, organs aren't just smaller; they simply don't work the way they're supposed to.

And she tried to get out ahead of some evidence she implied jurors might have found distasteful.

"If you, sitting here today, are skeptical of the company employee testimony, if that describes you; if you are today, thinking, 'I didn't like some of what I saw in some of the company emails' ... if you are someone who says, 'I really wish someone at the company had just put a label on the bottle' ... they still have to prove causation," Jones said.

Abbott and Mead Johnson face thousands of baby formula injury suits and have lost initial trials in state courts; both say there is zero evidence that these special hospital-use formulas for premature babies are to blame.

A Missouri jury awarded \$95 million in compensatory damages and \$400 million in punitive damages in a bellwether trial against Abbott earlier this year. Mead lost its first trial with a \$60 million verdict. The two also face multidistrict litigation in federal court, where bellwether cases are being worked up.

Elizabeth Whitfield is represented by Timothy Cronin and Kevin Carnie of The Simon Law Firm PC.

Abbott is represented by James Hurst, Rebecca Fitzpatrick and Sierra Elizabeth of Kirkland & Ellis LLP.

Mead Johnson is represented by Phyllis Jones of Covington & Burling LLP.

St. Louis Children's Hospital is represented by Teresa Bartosiak of Bartosiak Makepeace.

The case is Whitfield v. Abbott et al., case number 2222-CC06214, in the 22nd Judicial Circuit of Missouri.

--Editing by Kristen Becker.

For more of this case, see Courtroom View Network.



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Short-Seller Implications Of 10th Circ.'s Overstock Decision

By **Greg Laufer, David Friedman and Emily Miller** (October 29, 2024, 3:43 PM EDT)

On Oct. 15, the U.S. Court of Appeals for the Tenth Circuit **issued** an opinion in *In re: Overstock Securities Litigation*, which affirmed the dismissal of class action claims by a short seller under the Exchange Act for failure to allege reliance.

Further, as a matter of first impression in the circuit, the court held that a corporate transaction that artificially increases the company's share price is not "manipulative" under the act, absent evidence that the defendants acted with intent to deceive investors.[1]

In addition to providing clarity on the pleading standard for a market manipulation claim under the Exchange Act, the Tenth Circuit's decision has potential implications for short sellers and others with distinct motives for transacting in securities, who may not be entitled to rely on the fraud-on-the-market presumption of reliance set forth in the U.S. Supreme Court's 1988 ruling in *Basic Inc. v. Levinson*, even at the pleading stage.

Indeed, the decision generally underscores that a complaint's factual allegations may constitute binding concessions that negate necessary elements of a securities fraud claim.

Background

Section 10(b) of the Exchange Act broadly prohibits deception in connection with the purchase or sale of securities. U.S. Securities and Exchange Commission Rule 10b-5(b) forbids "mak[ing] any untrue statement of a material fact." [2]

To state a claim for misstatements under Rule 10b-5(b), a plaintiff must sufficiently allege, among other elements, that the plaintiff relied on the misleading statements and suffered damages because of its reliance. [3] Additionally, Rule 10b-5(a) and (c) prohibit manipulative acts in connection with the purchase or sale of securities. [4]

In this case, a short seller, Mangrove Partners Master Fund Ltd., brought a putative class action against Overstock and certain former Overstock executives, alleging that they made false and misleading statements about Overstock's performance, risk controls and dividend strategy, and that Overstock manipulated the market by inducing an artificial short squeeze. [5] During the relevant period, Overstock had significant short interest, with more than half of the shares outstanding sold short. [6]

According to the complaint, Overstock's CEO devised a plan to squeeze those short sellers in order to artificially inflate Overstock's share price. [7] Specifically, Overstock announced that it would issue a dividend in the form of a blockchain-based digital security token that would not be registered with the SEC. [8] Because the token was unregistered, it could not be transferred for six months after issuance. [9]



Greg Laufer



David Friedman



Emily Miller

That was problematic for short sellers who had borrowed Overstock shares to place their short positions and were contractually obligated to transmit any dividends to the brokers that lent them the shares.[10] The announcement of the unregistered dividend forced the short sellers to buy new Overstock shares and close their short positions before the dividend's record date in order to avoid breaching their lending contracts.[11]

This forced buying increased the share price, enabling the CEO to sell his shares at a significant profit before departing the company.[12] The CEO made various public statements prior to the record date of the dividend explaining that the transaction was "designed ... carefully" to cause a short squeeze.[13]

In 2021, the U.S. District Court for the District of Utah granted the defendants' motion to dismiss, finding that Mangrove had failed to plead reliance on the alleged misstatements or that the defendants acted with scienter.[14] Mangrove subsequently appealed.

The Overstock Decision

Beginning by addressing the plaintiff's Rule 10b-5(b) claim for allegedly false or misleading statements, the Tenth Circuit held that Mangrove failed to plausibly allege the necessary element of reliance.[15] The court explained that an Exchange Act plaintiff may plausibly allege reliance either by showing actual reliance on the defendant's misrepresentation, or by invoking the fraud-on-the-market presumption of reliance under the Supreme Court's Basic decision.[16]

Although Mangrove invoked the Basic presumption to plead reliance, the defendants successfully "rebutted the presumption with statements in Plaintiff's complaint" because "Plaintiff admitted that Overstock's looming crypto dividend — not the [allegedly false] retail statements or the fairness of Overstock's market price — caused it to buy its Overstock stock." [17] The court found that Mangrove's own allegations conceded that it and the other short sellers would have purchased shares to cover their short positions no matter the price.[18]

While Mangrove argued that the fraud-on-the-market presumption could not be rebutted prior to discovery, the Tenth Circuit explained that no authority supported that position, and that Mangrove's own binding "judicial admissions" doomed its claim.[19] The court reasoned that the "Plaintiff cannot have it both ways: if Plaintiff bought its shares to avoid breaching its lending contracts, it cannot also have bought its shares because of Defendant's alleged misstatements." [20]

As for Mangrove's Rule 10b-5(a) and (c) claims for market manipulation, the Tenth Circuit adopted the U.S. Court of Appeals for the Second Circuit's approach in its 2021 decision in *Set Capital LLC v. Credit Suisse Group AG*, and held that "an open-market transaction may qualify as manipulative conduct, but only if accompanied by plausibly alleged deception." [21]

The court reasoned that acting in a manner that results in an artificial price is not enough on its own to constitute manipulative conduct.[22] Rather, Section 10(b) only "prohibits practices that are manipulative in the 'technical sense of artificially affecting market activity in order to mislead investors.'" [23]

The Tenth Circuit explained that because the defendants made truthful disclosures about the planned dividend transaction in advance of the record date, including that the dividend would be of unregistered securities and thus not available for resale for a period after distribution, the necessary element of deception was missing from Mangrove's allegations.[24]

Based on those disclosures, the court concluded that "the market received notice that short sellers might buy Overstock stock to cover their positions before the dividend's record date," and thus investors possessed "sufficient information to form judgments about how Overstock's dividend would impact Overstock's share price[.]" [25] Accordingly, Mangrove failed to allege that Overstock deceived investors as to the value of its securities.[26]

Implications

This decision has potential implications for securities class actions brought by short sellers and other

investors with distinctive motives for transacting in a company's stock.

While securities plaintiffs typically invoke the fraud-on-the-market presumption to plead reliance, the Overstock decision suggests that short sellers may not always be entitled to that presumption. Although the Tenth Circuit made clear that it was not adopting a blanket rule barring short sellers from invoking the presumption,[27] companies defending against securities class actions led by short sellers may succeed in rebutting the presumption at the pleading stage if the complaint itself alleges that short sellers' investment decisions were motivated by reasons other than the challenged public statements.

And even if the complaint lacks such admissions, defendants may wish to use discovery to establish short seller plaintiffs' distinct motivations to argue that they are inadequate representatives at the class certification stage.

Likewise, the decision underscores that courts may carefully assess the entirety of investors' factual allegations to determine whether they constitute binding concessions that negate one of the necessary elements of a securities fraud claim. For example, a plaintiff may plead itself out of court by attributing a share price decline to a particular event that a court determines is not causally related to the alleged fraud, thereby conceding the necessary element of loss causation.

Finally, the Tenth Circuit's decision provides further clarity on the pleading standards for a market manipulation claim under Rule 10b-5(a) and (c). Surveying market manipulation cases from sister circuits, the Tenth Circuit made clear that a claim for market manipulation is dependent on allegations of deceit.

Thus, regardless of whether a transaction is designed to artificially inflate a company's share price, there can be no valid claim of market manipulation if adequate information about a planned transaction is disclosed to the market, such that the market can understand the likely impact of the transaction on the share price.

Greg Laufer is a partner and co-chair of the investment management litigation practice group at Paul Weiss Rifkind Wharton & Garrison LLP.

David Friedman is a partner and deputy chair of the investment management litigation practice group at the firm.

Emily Miller is an associate at the firm.

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[1] *In re Overstock Sec. Litig.* , --- F.4th ----, 2024 WL 4489593 (10th Cir. 2024).

[2] 17 C.F.R. § 240.10b-5(b).

[3] *In re Overstock*, 2024 WL 4489593 at *6.

[4] *Id.* at *8; see also 17 C.F.R. § 240.10b-5(a), (c).

[5] *In re Overstock*, 2024 WL 4489593 at *1-5.

[6] *Id.* at *3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Id.

[11] Id.

[12] Id. at *4-5.

[13] Id. at *4.

[14] See *In re Overstock Sec. Litig.* , 2021 WL 4267920, at *6-14 (D. Utah Sept. 20, 2021).

[15] *In re Overstock*, 2024 WL 4489593 at *6.

[16] Id. at *7.

[17] Id.

[18] Id.

[19] Id.

[20] Id.

[21] Id. at *8.

[22] Id. at *9.

[23] Id. (quoting *Santa Fe Indus. v. Green* , 430 U.S. 462, 476-77 (1977)).

[24] Id. at *9-10.

[25] Id. at *10.

[26] Id.

[27] Id. at *7 n.21.