Backpedaling 2nd Circuit greenlights AmTrust investors' claims against auditor | Secondary Sources | National

(November 05, 2024) - A federal appeals court has reconsidered a 2023 ruling that dismissed securities fraud claims against BDO USA LLP in a proposed class action alleging it knowingly issued a false audit opinion for insurer AmTrust Financial Services Inc. in 2013.

New England Carpenters Guaranteed Annuity & Pension Funds et al. v. DeCarlo et al., No. 20-1643, 2023 WL 11965444 (2d Cir. Oct. 31, 2024).
A panel of the 2nd U.S. Circuit Court of Appeals on Oct. 31 amended its 2023 ruling that BDO's false opinion statements were immaterial to investors and instead vacated a lower court's dismissal of claims against the audit firm.

BDO's certification that the audit was conducted in accordance with accepted accounting standards was a material misstatement because it falsely conveyed that AmTrust's financial results were reliable, the amended opinion said.

Fraudulent audit opinion?

The lawsuit, filed in the U.S. District Court for the Southern District of New York, alleges that AmTrust concealed accounting errors from 2013 to 2017 that forced it to restate certain financial results.

BDO issued an unqualified audit opinion for AmTrust's 2013 financial statements and internal controls over financial reporting even though the auditor failed to perform necessary work to assess the company, according to the suit.

The Wall Street Journal reported April 11, 2017, that a former BDO auditor and whistleblower tipped off regulators about improper adjustments to AmTrust's financial schedules, the suit says.

The whistleblower said BDO auditors loaded incomplete documents into an internal system to conceal their unfinished work, according to the suit.

AmTrust's share price fell nearly 19% after the WSJ report, closing at $15.30 on April 11, 2017, the suit says.

The plaintiffs brought securities fraud claims against AmTrust and two officers, as well as BDO. The suit also asserted strict liability for misrepresentations in the documents for AmTrust's stock offerings in 2015 and 2016.

First appellate ruling

The District Court dismissed the suit in April 2020, saying that it failed to plead a materially false or misleading statement or omission.

The plaintiff shareholders appealed, and the 2nd Circuit vacated the dismissal of strict liability claims against AmTrust, certain officers and directors, and the underwriters of the stock offerings.

However, the appellate panel upheld the dismissal of securities fraud claims against the AmTrust defendants and BDO. The suit plausibly alleged that BDO's 2013 audit opinion contained false statements, but it failed to show they were material to investors, the panel said.

The appellants, represented by Andrew S. Love of Robbins Geller Rudman & Dowd LLP, asserted in a petition for rehearing that BDO's unqualified audit opinion was critical to building investor confidence in AmTrust's financial statements.
The petition drew amicus curiae support from the Securities and Exchange Commission and three former SEC officials.

Claims reinstated

The 2nd Circuit granted the petition as to the securities fraud claims against BDO only.

BDO's false certification that it conducted the audit in accordance with Public Company Accounting Oversight Board standards signaled that AmTrust's financial statements were reliable and subjected investors to undisclosed risks, the panel said.

The appellants did not need to demonstrate a link between the certification and specific errors in AmTrust's financial statements, the amended opinion said.

The panel also said that the suit sufficiently pleaded loss causation and raised a strong inference of deceptive intent against BDO.

The allegations show that BDO recklessly conducted the audit and issued the audit opinion, the panel said. The suit also demonstrates that BDO knowingly concealed its noncompliance with PCAOB standards, the 2nd Circuit said.

Timothy E. Hoeffner of McDermott Will & Emery LLP represented BDO, and Steven M. Farina of Williams & Connolly LLP represented AmTrust.
By Nicole Banas

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Article: 2nd Circuit got it wrong on auditor liability, former regulators say 2023 SECDBRF 0216
Date: September 19, 2023

Three former Securities and Exchange Commission officials are urging a federal appeals court to reconsider its decision upholding the dismissal of claims that BDO USA LLP issued a false audit opinion for insurer AmTrust Financial Services Inc.

BDO must face AmTrust investors' fraud case after US appeals court backtracks

reuters.com/legal/government/column-bdo-must-face-amtrust-investors-fraud-case-after-us-appeals-court-2024-11-04

Alison Frankel

REUTERS/Andrew Kelly Purchase Licensing Rights, opens new tab

Nov 4 (Reuters) - Audit firm BDO must face a securities fraud claim by a class of AmTrust Financial shareholders after a federal appeals court took the rare step last week of revisiting a decision that let BDO off the hook.

A three-judge panel from the 2nd U.S. Circuit Court of Appeals ruled, opens new tab on Thursday that AmTrust (AFSIA.PK), opens new tab shareholders can proceed with a claim that BDO is liable for falsely certifying its 2013 audit of the insurance giant. The new ruling reverses a decision, opens new tab last August by the same judges, who said at the time that shareholders failed to show BDO's allegedly false certification mattered to AmTrust investors.

The 2nd Circuit's change of heart came after shareholder lawyers from Robbins Geller Rudman & Dowd petitioned, opens new tab for reconsideration by the three-judge panel. That petition prompted the appeals court last November to ask the U.S. Securities and Exchange Commission to weigh in.

The SEC, as I reported in February, urged the 2nd Circuit to reinstate shareholders' claim against BDO, arguing that investors place significant faith in auditors' certifications of corporate financials. Even though auditor certifications are standardized, the U.S. regulator said, investors rely on the statements to provide “a clear and consistent signal” on financial statements.

BDO opposed reconsideration in an April 9 brief, opens new tab. The auditor insisted that the SEC’s “sweeping and extreme position” would “drastically expand the federal securities fraud laws.” If the 2nd Circuit were to revive AmTrust shareholders’ claims against the audit firm, BDO argued, it would be sending a signal that investors can sue for fraud whenever accountants acknowledge a technical deficiency in their procedures.

Some key background: BDO has acknowledged that it issued a “misstated audit opinion” on AmTrust in 2013. According to an SEC order, opens new tab in 2018, when BDO’s audit team fell behind schedule in reviewing AmTrust’s financial reports in 2013, BDO partners instructed auditors to sign off on incomplete and unverified work. Although BDO ultimately completed the audit, the SEC in 2018 suspended three BDO accountants for “improper professional conduct.”

The audit firm’s lawyers at McDermott Will & Emery have nevertheless argued throughout the AmTrust shareholder case that the supervisory deficiencies cited in the SEC suspension order had nothing to do with the substance of AmTrust’s financial reports and were therefore immaterial to AmTrust investors. BDO has also argued that the allegedly false 2013 audit certification did not cause AmTrust investors to lose money.

In the 2nd Circuit’s new ruling, Judges Raymond Lohier and William Nardini, as well as U.S. District Judge Rachel Kovner of Brooklyn, sitting by designation, sided with the SEC and AmTrust shareholders. Investors, wrote Lohier, were not required to allege a specific link between BDO’s allegedly false certification and misstatements in AmTrust’s financial statements in order to show that the audit report mattered to shareholders.

“BDO’s certification that the audit was conducted in accordance with [federal accounting] standards succinctly conveyed to investors that AmTrust’s audited financial statements were reliable,” the 2nd Circuit said. “The false certification thus subjected unknowing investors to the risk that AmTrust’s financial statements were unreliable.”

The 2nd Circuit pointed out that AmTrust’s share price dropped when The Wall Street Journal reported in 2017 on problems with BDO’s previous audit certification. That market reaction, the appeals court said, was evidence of “a ‘clean match’ between the misleading audit opinion and the subsequent disclosure.”

BDO counsel Tim Hoeffner of McDermott noted in an email statement that the 2nd Circuit declined to revive a second fraud claim against the audit firm, allowing investors only to proceed with allegations that BDO’s false certification violated the Securities and Exchange

Act. “With respect to the sole claim reinstated,” Hoeffner said, “we continue to believe that the 2nd Circuit’s original decision on that claim was correct and are considering available remedies.”

Shareholder lawyer Sam Rudman of Robbins Geller said it is “almost unheard of” for a 2nd Circuit panel to change its mind in response to a petition for rehearing.

“The decision is significant for the obvious reason that the court is recognizing the common-sense reality that people care about auditor opinions,” Rudman said.

Shareholders originally sued AmTrust in 2017 after the insurer restated five years’ of financial statements. They subsequently amended their complaint to add claims against BDO based on its allegedly false certification of AmTrust’s 2013 audit.

U.S. District Judge Lewis Kaplan of Manhattan dismissed , opens new tab the entire case in 2020. The 2nd Circuit’s ruling last August revived shareholders’ Securities Act claims over AmTrust stock offerings in 2015 and 2016.
AmTrust, which is represented by Williams & Connolly, did not provide a statement in response to my query on last week’s reinstatement of a claim against BDO.

Read more:

'Audits matter.' AmTrust shareholders get US SEC backing in bid for appellate redo on BDO claim

Reporting By Alison Frankel

Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World’s Most Valuable Coin.

Securities Law News
Nov. 5, 2024, 2:00 AM PST

Meta, Nvidia Bring Investor Suits' Starting Gate to High Court

By Martina Barash

Argument Preview
Documents

Facebook Docket

Nvidia Docket

- Securities pleadings cases to be argued a week apart
- Cases focus on requirements to survive a dismissal bid

Bloomberg Law News 2024-11-05T10:17:11329764719-05:00

Meta, Nvidia Bring Investor Suits' Starting Gate to High Court

By Martina Barash 2024-11-05T05:00:00000-05:00

- Securities pleadings cases to be argued a week apart
- Cases focus on requirements to survive a dismissal bid

Meta Platforms Inc. and Nvidia Corp. will aim a spotlight on risk disclosure claims and expert evidence during the early stages of securities fraud class actions in two arguments at the US Supreme Court this month.

The cases have the potential to reduce investor litigation—and the expense it brings to publicly traded companies, defense attorneys say. Investor advocates, for their part, say the suits are healthy for the market, and the US government has weighed in on the importance of private securities actions.

"The cases are of interest to the securities litigation bar because they both reflect allegations that are very common in securities fraud class actions and are made in complaints against companies and executives regardless of the industry," said Susan Hurd of Alston & Bird LLP. In securities class actions, the dismissal stage is a "critical phase" since it's where "some of these cases get disposed of entirely, or in large part," said Hurd, who represents corporate defendants.

Both cases feature massive potential liability for the tech giants and come to the high court from the US Court of Appeals for the Ninth Circuit, which revived the investors' misrepresentation claims despite the companies' requests for dismissal.

Risk Disclosures

In the Meta case, which will be argued at the Supreme Court on Wednesday, investors say the company should face securities fraud claims over disclosures that improperly treated the risk of user data misappropriation as hypothetical. Their multibillion-dollar proposed class action focuses on a data-harvesting scandal involving political consulting firm Cambridge Analytica. The investors allege their stock in the company, then called Facebook, took two significant hits in the wake of that scandal.

A split panel of the Ninth Circuit revived their suit after the US District Court for the Northern District of California dismissed the claims. The appeals court agreed with the investors that Facebook's risk disclosures—that data breaches and improper disclosure of user data "could harm" its reputation and negatively impact the business—were misleading because they presented the risks as hypothetical, even though company leaders allegedly knew Cambridge Analytica had accessed user data.

"The idea that investors don't rely on these risk disclosures—it's not true," said Michael Canty of Labaton Keller Sucharow LLP, who participated in a brief for institutional investors supporting the Facebook plaintiffs. Facebook's stock plummeted when the truth was revealed, he said. "It was material to investors."

In this case, and one from last term, *Macquarie Infrastructure Corp. v. Moab Partners, L.P.* , "the Supreme Court may be seeking to clarify risk disclosure," he said.

But Jack Yoskowitz, a defense litigator who represents investment managers and banks at Seward & Kissel LLP, said the justices are likely "to side with Meta that the Ninth Circuit went too far—and that the disclosure that Meta did was sufficient, and was not misleading."

Role of Expert Report

The Nvidia investors allege the chip maker misled the market about its dependence on sales to cryptocurrency miners. That case, too, was revived by a divided Ninth Circuit panel following a Northern District of California dismissal.

The investors used an expert report to bolster their claims about the sources of Nvidia's revenue—specifically that the volatile crypto mining market accounted for more revenue, relative to gaming customers, than the company let on.

Nvidia said the report "invented" data and asked the justices to clarify the standard for such a suit to survive an early-stage dismissal under the Private Securities Litigation Reform Act, which requires "particularized" allegations. The company will spar with investors at oral argument Nov. 13.

"Foreclosing experts puts investors at a structural disadvantage," said Canty, who represents stockholders in securities class actions. The material is sometimes technically complex, and defendants could use that to defeat pleadings if investors can't present experts to explain the complexities to a district court judge, he said.

Nvidia wants a standard where the plaintiffs "actually have to have copies of the documents that they allege exists" under the PSLRA, Robert Peck of the Center for Constitutional Litigation PC said. In some way, investors "must get access to internal documents that are not available to the public," said Peck, who submitted a brief for the American Association for Justice in the case. "That would essentially turn off all this litigation."

Yoskowitz sees the Supreme Court potentially ruling for Nvidia because the use of an expert affidavit or report "raises analysis and questions that a court shouldn't be doing on a motion to dismiss, like, How good is the expert? Are they sufficient in this area?," he said.

The Court's Direction

"It's always difficult in advance to read these kinds of tea leaves, and know what the court's real concern is," Peck said. "There's certainly a general concern that there's too much litigation."

But the court may simply be making sure the law is uniform across the federal appeals courts, he said.

To Yoskowitz, the court may "want to send a message that these pleading standards should be restrictive."

Hurd said, "Anything that makes it clear there is a heavy burden on the plaintiff to survive the motion to dismiss is obviously something that's important to the defense bar and potentially helpful to companies and their executives."

The cases are Facebook, Inc. v. Amalgamated Bank, 9th Cir., No. 23-980, oral argument 11/6/24 and NVIDIA Corp. v. E. Ohman J:or Fonder AB, U.S., No. 23-970, oral argument 11/13/24

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Securities disclosure over Cambridge Analytica data breach comes before court

scotusblog.com/2024/11/securities-disclosure-over-cambridge-analytica-data-breach-comes-before-court

November 4, 2024

CASE PREVIEW

By Ronald Mann

on Nov 4, 2024 at 3:36 pm

Oral arguments in *Facebook v. Amalgamated Bank* will begin on Wednesday at 10 a.m. (Katie Barlow)

The justices will return to securities law on Wednesday with arguments in a case arising out of the 2015 Cambridge Analytica-Facebook data breach. The tech giant's effort to fend off federal securities fraud lawsuits in *Facebook v. Amalgamated Bank* could narrow the opportunities for private investors to hold companies accountable under federal laws that regulate corporate misconduct.

In 2016, the British political consulting firm Cambridge Analytica exploited the data of over 30 million Facebook users in connection with Donald Trump's 2016 presidential campaign. After Facebook (now Meta) knew of the breach, but before Cambridge's widespread use of the data was made public, Facebook issued a securities filing disclosing to investors the hypothetical risk that a security breach might cause harm to Facebook's business and stock price. That disclosure did not reveal that, as Facebook was aware, a large breach of that sort already had occurred.

Later, when Cambridge's misuse of the data became widely known, Facebook's stock price fell precipitously. The Securities and Exchange Commission and Facebook shareholders sued the company for securities fraud, arguing that the disclosures about the risk of a securities breach were misleading because they did not reveal what Facebook knew about the Cambridge breach. A federal district court dismissed their claims, holding that the risk statements were not false or misleading. But the U.S. Court of Appeals for the 9th Circuit reversed, prompting Facebook to come to the Supreme Court.

This is one of those cases – regrettably common – where the parties spend as much of their time bickering about what question is properly before the justices as they do presenting their arguments on the merits. Paring away the contentions about what was and was not argued below and whose position has changed the most over the course of the proceeding, Facebook's central point is that its disclosure about the hypothetical possibility that a data breach could cause it harm in the future is not misleading, and that the lower court erred in its contrary finding.

Specifically, Facebook argues that this kind of disclosure – a forward-looking statement about future risks – should never be regarded as misleading solely because it fails to disclose that the relevant triggering event (in this case, a securities breach) already has occurred and well might cause harm to the company. Here, because nothing in the disclosure was incorrect – it is in fact true that a security breach could harm Facebook and its stock price, as history now teaches us. In short, the company says, Facebook cannot be held liable for what it did not say.

The investors reject Facebook's argument as seeking a categorical rule that gives companies a pass if they make a clearly misleading statement and put it in a forward-looking risk disclosure as opposed to some other part of their filing. From the investors' perspective, the rule should be the same here as anywhere else; the only relevant question is whether the statement, taken in context, was materially misleading.

The only thing that the lower courts held here is that Facebook can be liable if the statement, in context, was materially misleading. The investors, a bank and a public pension plan, are seeking compensation for the lost value of their stock.

My guess is that the justices will be frustrated by how little the issues on which the parties discuss in their briefs resemble the question they agreed to review. In an effort to offer something predictive about what we might see at the argument, I would point to two things. The first is a deep-seated skepticism of securities fraud litigation held by some of the justices, who tend to view litigation in this area as akin to extortion based on hindsight. The court has also issued a number of decisions in recent years in favor of corporate interests that have weakened federal regulators, including at the Securities and Exchange Commission.

On the other hand, it is a powerful benefit to the investors that the government filed a parallel suit against Facebook, contending that its disclosures about security breaches were insufficient; the government appears in full support of the investors and will share in their oral argument time. It similarly helps the investors that there is a forceful and direct friend-of-the-court brief signed by most of the most famous securities law scholars, arguing that the securities laws bar any kind of categorical exception for misleading statements made in forward-looking risk disclosures.

[Disclosure: Tom Goldstein, the publisher of SCOTUSblog, argued on behalf of the investors in the 9th Circuit but was not involved in the Supreme Court proceedings in the case.]
Posted in Featured, Merits Cases

Cases: Facebook, Inc. v. Amalgamated Bank

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Walgreens agrees to pay $100 mln to resolve lawsuit over generic drug pricing

reuters.com/legal/litigation/walgreens-agrees-pay-100-mln-resolve-lawsuit-over-generic-drug-pricing-2024-11-04

Brendan Pierson

Pigeons are seen resting on signage for Walgreens, owned by the Walgreens Boots Alliance, Inc., in Manhattan, New York City, U.S., November 26, 2021. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights, opens new tab

Nov 4 (Reuters) - Walgreens (WBA.O), opens new tab has agreed to pay $100 million to settle a proposed class action lawsuit accusing it of fraudulently overcharging customers for a decade when they bought generic drugs through private insurance, Medicare or Medicaid. Walgreens was accused of wrongly requiring insured customers to pay more than members of its Prescription Savings Club, who for a low annual fee could buy more than 500 widely prescribed generic drugs for $5, $10 and $15 for 30-day prescriptions, and $10, $20 and $30 for 90-day prescriptions without using insurance.

In a filing on Friday in federal court in Chicago, lawyers for the class of plaintiffs suing the drugstore chain sought approval for the settlement, calling it an "excellent result" for the class.

"We admit no liability and believe these claims never had any merit," a Walgreens spokesperson said in a statement. "This resolution allows us to focus on our turnaround strategy that will benefit our patients, customers, team members and shareholders."

The lawsuit alleged that the prices Walgreens charged to its savings club members were its "usual and customary" prices, and that the prices it reported to insurers for reimbursement were inflated. It said that insured customers reasonably believed that they would not pay more than customers who paid out of pocket, but they did end up paying more in the form of copays and deductibles.

The lawsuit sought damages for insured customers nationwide since 2007, when the Prescription Savings Club began.

One condition of the settlement was that Walgreens end the savings club, which it did in August.

The case is Russo et al v. Walgreen Co., U.S. District Court for the Eastern District of Illinois, No. 1:17-cv-02246.

For plaintiffs: Paul Geller of Robbins Geller Rudman & Dowd, Joseph Guglielmo of Scott + Scott and others

For Walgreens: Selina Coleman and Michael Scott Leib of Reed Smith

Read more:

Walgreen must face lawsuit over U.S. generic drug pricing

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Reporting By Brendan Pierson in New York

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

Bloomberg Law News 2024-11-05T13:21:15313653432-05:00

Ford Leaders Hit With Investor Suit Over Warranty Accounting (1)

By Martina Barash 2024-11-05T07:34:15000-05:00

- **COURT:** ED. Mich.
- **TRACK DOCKET:** No. 2:24-cv-12906 (Bloomberg Law subscription)

Ford Motor Co.'s directors and top executives are responsible for the automaker's failure to disclose quality control problems and higher warranty costs than expected, an investor alleges.

The leaders' actions harmed Ford by causing it to overpay for stock repurchases by about $116 million and by subjecting it to a proposed securities class action, stockholder Richard Rich says on behalf of the company. He filed his derivative suit Nov. 1 in the US District Court for the Eastern District of Michigan.

Ford's warranty and recall costs came to $2.3 billion in the second quarter of 2024, according to news reports, he says—an $800 million increase over the previous quarter.

The automaker"failed to ensure that its warranty reserves reflected the increased demand stemming from the quality assurance issues," Rich says. "The warranty reserves were therefore insufficiently funded" and the company reported inaccurate financial results, he says.

Rich brings claims for securities fraud, contribution in connection with the class action, proxy misstatements, breach of fiduciary duties, unjust enrichment, and waste of corporate assets. He seeks compensatory and punitive damages, along with internal governance reforms.

Ford didn't immediately respond to a request for comment on Tuesday morning on behalf of itself and the individual defendants.

The case is assigned to Judge Brandy R. McMillion.

Wolf Haldenstein Adler Freeman & Herz LLP and Rosen Law Firm represent Rich.

The case is Rich v. Farley , E.D. Mich., No. 2:24-cv-12906, complaint 11/1/24 .

(Updated with more information from complaint starting in third paragraph.)

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Securities Law News
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Plug Power Defends Amazon Relationship, Accounting in Delaware

By Jennifer Kay

Documents

Docket

- Federal court in New York dismissed securities class action
- 2020 financials needed restating due to accounting issues

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Plug Power Defends Amazon Relationship, Accounting in Delaware

By Jennifer Kay 2024-11-04T17:57:50000-05:00

- Federal court in New York dismissed securities class action
- 2020 financials needed restating due to accounting issues

Hydrogen fuel cell maker Plug Power Inc. asked the Delaware Chancery Court on Monday to follow a federal court's lead in dismissing allegations of insider trading against its senior leaders.

Investors claim an agreement with Amazon.com Inc., the company's most important customer, drove directors and executives to dump $122 million worth of shares just before the stock plummeted upon news that Plug Power's 2020 financial statements had to be restated because of accounting issues.

The consolidated complaint before Chancellor Kathaleen St. Jude McCormick followed a federal securities class action in New York prompted by the 2020 restatement. McCormick adjourned Monday's hearing without ruling on Plug Power's motion to dismiss the Delaware litigation.

Investors didn't appeal the dismissal of the New York case, and that judge's "observations are just as pertinent here as they were there," said John Clarke Jr. of DLA Piper, representing Plug Power.

McCormick should reach the same conclusion as the New York judge, Clarke said—that Plug Power and its board weren't aware of any accounting issues until KPMG raised them and delayed the release of the company's full, audited financial statements for 2020.

"This is a complaint in search of a claim," Clarke said.

Investors allege Plug Power, which provides fuel cell products that replace conventional batteries in electric vehicles and other equipment, issued false and misleading financial information about the costs of a transaction with Amazon for warrants under a 2017 purchase agreement.

"It was no longer a profitable contract, and they knew that," said Lee Squitieri of Squitieri & Fearon, the investors' attorney. "There was a rush to the exits, to say the least."

While the exact dollar amount may not have been known, Plug Power directors knew the Amazon relationship had tipped toward a loss, and that knowledge fell under the company's insider trading policy, he said. The price of Plug Power stock had risen substantially, making the price for Amazon's next tranche of warrants far higher than two previous transactions.

Plug Power negotiated with Amazon to waive vesting conditions on its remaining warrants and eliminate long-term costs related to them. When Amazon no longer had any obligation to lease Plug Power's equipment, senior leaders knew a substantial change was coming, "and that's enough for material, nonpublic information that precludes an officer and director from trading," Squitieri said.

By the fourth quarter of 2020, Plug Power's board and management had begun discussing a way to exit its arrangement with Amazon, as the conditions for pricing its next tranche of warrants had been met, Clarke said.

Plug Power was "timely" in making its disclosures regarding the Amazon relationship, he said.

The investor is also represented by Rigrodsky Law PA and Moore Kuehn PLLC. Individual Plug Power directors, executives, and former directors are represented by Richards Layton & Finger.

The case is In re Plug Power Inc. S'holder Derivative Litig., Del. Ch., No. 2022-0569, hearing 11/4/24 .

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Securities Law News

Nov. 4, 2024, 12:49 PM PST

UScellular Must Face Class Suit Over Voluntary Churn Statements

By Bernie Pazanowski

- Allegedly false statements made about success of promotion
- Sufficiently shown that officers knew statements were false

Bloomberg Law News 2024-11-05T10:21:40404446014-05:00

UScellular Must Face Class Suit Over Voluntary Churn Statements

By Bernie Pazanowski 2024-11-04T15:49:25000-05:00

- Allegedly false statements made about success of promotion
- Sufficiently shown that officers knew statements were false

United States Cellular Corp., two of its officers, and its majority owner, Telephone and Data Systems Inc., failed to convince a federal court to dismiss a class action alleging that they made false statements about a promotion to combat voluntary churn of its products.

Howard M. Rensin sufficiently pleaded that the officers said that they were satisfied with the 2022 promotion, even though they knew it wasn’t working, Judge Mary M. Rowland said Nov. 1 for the US District Court for the Northern District of Illinois.

About 90% of UScellular’s individual lines are postpaid—the customer is billed in monthly installments, Rowland said. The company in 2022 faced a large amount of voluntary churn, or customers disconnecting and going to a competitor, the judge said.

UScellular responded by implementing a promotion to give away phones to new subscribers. The company launched the promotion in June 2022 and in August, chief executive officer, Laurent C. Therivel told investors that it would take six to nine months for any results to be seen in its churn and subscribership, Rowland said.

When the company’s 2022 third-quarter results were released, they acknowledged that the promotion wasn’t working and UScellular’s stock prices fell, Rowland said. Rensin sued for fraud, setting the class period from May to November 2022.

Most of Therivel's statements about the promotion timeline, such as the company's claim that it should see positive results from the promotion by the second half of 2022, weren't actionable because they were forward-looking, Rowland said.

But Rensin sufficiently alleged that Therivel knew his comment that investors would see benefits from the promotion in the third and fourth quarters of 2022 was false when he made it, and thus fell outside the Private Securities Litigation Reform Act's safe-harbor provision, she said.

Rensin also sufficiently alleged that several statements by Therivel and chief financial officer, Douglas W. Chambers, falsely portrayed the promotion as balancing financial and subscriber outcomes and that the promotion was executed in line with UScellular's expense discipline. Two confidential witnesses presented evidence that the officers knew their statements were false because they knew how costly the promotion was and the company had a perpetual problem with walk-in traffic in its stores, Rowland said.

Rensin also sufficiently pleaded that Therivel's comments to investors that the company was pleased with its regional approach to promotions, without noting that the promotion at issue was going to have a nationwide rollout, was a material misrepresentation, Rowland said. "The imminent national rollout 'conflict[s] with what a reasonable investor would take from' Therivel's comments," she said.

Under the PSLRA, a plaintiff must state with particularity facts giving rise to a strong inference that the speaker intended to deceive, Rowland said.

Rensin alleged that the timeline statements Therivel made after the stock prices dropped about when the company expected to see postpaid subscriber improvement showed he knew his earlier statements were false.

Rowland agreed, saying that the record supported that conclusion, and that non-public information the officers had suggested that the public statements "were materially inaccurate."

Cohen Milstein Sellers & Toll PLLC and Levi & Korsinsky LLP represent Rensin. Sidley Austin LLP represents the defendants.

The case is Rensin v. US Cellular Corp. , 2024 BL 393428, N.D. Ill., No. 1:23-cv-02764-MMR, 11/1/24 .

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Securities Law News

Nov. 4, 2024, 10:49 AM PST

BofA Treasury Futures Spoofing Suit Tossed by Illinois Judge

By Ben Miller

- Boutique trading firm had alleged BofA manipulated prices
- Complaint didn't sufficiently show actual damages, court says

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BofA Treasury Futures Spoofing Suit Tossed by Illinois Judge

By Ben Miller 2024-11-04T13:49:18000-05:00

- Boutique trading firm had alleged BofA manipulated prices
- Complaint didn't sufficiently show actual damages, court says

A Bank of America Corp. unit won't face allegations that it participated in a spoofing scheme involving US Treasury futures after an Illinois federal district court granted a bid to toss the case for lack of standing.

M&N Trading LLC, the boutique trading firm that brought the suit, hasn't shown it suffered actual damages stemming from the alleged manipulation, Judge Sunil R. Harjani in the US District Court for the Northern District of Illinois said in a Nov. 1 opinion. The judge gave M&N the opportunity to amend its claims and file a new complaint.

The alleged scheme by BofA Securities involved entering small initial orders, then a large "spoof" order on the opposite side of the correspondent Treasury securities to distort actual supply or demand, according to M&N Trading's complaint. That would be followed by the execution of the initial order at an artificial price and the cancellation of the "spoof" securities order before it could be executed.

But M&N Trading failed to show that the purported fraud affected its own returns, and it didn't allege how long prices were artificially impacted because of BofA's trades, Harjani said.

"Plaintiff merely states in conclusory language that 'Defendants' spoofing had a lasting impact on the market for Treasury Futures well beyond the time the manipulative spoof orders were placed,'" he said in the order. "This is not enough."

A BofA spokesman declined to comment.

Bank of America paid a $24 million fine in 2023 to settle allegations by the Financial Industry Regulatory Authority that two former employees made fraudulent trades, and that the company failed to properly supervise the activity.

In that case, the self-regulatory organization alleged the BofA Securities workers had spoofed US Treasury securities 717 times from October 2014 to February 2021, tricking other investors into making trades. BofA didn't admit or deny FINRA's allegations as part of the settlement

M&N Trading has until Nov. 15 to file an amended complaint fixing the deficiencies in its pleading, according to the order. Otherwise, the order will automatically convert to a dismissal with prejudice.

Kirby McInerney LLP and Lowey Dannenberg PC, representing M&N Trading, didn't immediately respond to a request for comment.

Moore & Van Allen PLLC and Winston & Strawn LLP represent BofA Securities.

The case is M&N Trading LLC v. BofA Securities Inc. , N.D. Ill., No. 1:24-cv-01229, 11/1/24 .

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Pfizer And Johnson & Johnson Remain Under FCPA Scrutiny

fcpaprofessor.com/pfizer-and-johnson-johnson-remain-under-fcpa-scrutiny

November 5, 2024

Remember when a high-ranking Department of Justice official declared in 2017 that it was the intent of the DOJ "for our FCPA investigations to be measured in months, not years." (See here for the prior post).

The statement was laughable when made and remains laughable approximately seven years later because since the statement was made FCPA scrutiny tends to average approximately 4-5 years. (See here).

Several current instances of FCPA scrutiny have dragged on for years including that of Pfizer and Johnson & Johnson.

Pfizer's most recent quarterly filing states:

> "U.S. Department of Justice/SEC Inquiry relating to China Operations
>
> In June 2020, we received an informal request from the U.S. Department of Justice's FCPA Unit seeking documents relating to our operations in China. In August 2020, we received a similar request from the SEC's FCPA Unit. We have produced records pursuant to these requests.
>
> U.S. Department of Justice Inquiry relating to Mexico Operations
>
> In March 2023, we received an informal request from the U.S. Department of Justice's FCPA Unit seeking documents relating to our operations in Mexico. We have produced records pursuant to this request."

In 2012, Pfizer resolved a $60 million Foreign Corrupt Practices Act action concerning conduct in Bulgaria, China, Croatia, Czech Republic, Italy, Kazakhstan, Russia, and Serbia. (See here).

Johnson & Johnson's most recent quarterly filing states:

> "In July 2018, the Public Prosecution Service in Rio de Janeiro and representatives from the Brazilian antitrust authority CADE inspected the offices of more than 30 companies including Johnson & Johnson do Brasil Indústria e Comércio de Produtos para Saúde Ltda. The authorities appear to be investigating allegations of possible anti-competitive behavior and possible improper payments in the medical device industry. The Company continues to respond to inquiries regarding the Foreign Corrupt Practices Act from the United States Department of Justice and the United States Securities and Exchange Commission."

In 2011, Johnson & Johnson agreed to pay approximately $70 million to resolve parallel DOJ and SEC FCPA enforcement actions focused on business conduct in Greece, Poland, and Romania. (See here). The enforcement actions also resolved an investigation of Johnson & Johnson subsidiary companies in the United Nations Oil for Food Program in Iraq.

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SEC's Informant Awards System Opens Door to Bad Actors Overseas

By Martin Weinstein 2024-11-05T04:30:04000-05:00

- *Cadwalader partner says whistleblower program has dark side*
- *Rewards foreign nationals, sows mistrust, unfairly competitive*

A $279 million payout is usually associated with a superstar professional athlete. Not this time. In this instance, $279 million is what a single whistleblower earned in 2023 for informing on Ericsson, the global telecommunications company. In just the past decade, the Securities and Exchange Commission has paid out more than $2 billion to corporate informants around the world, including $98 million in August alone.

A product of the Dodd-Frank Act, which was once touted as a path to Wall Street reform, the SEC whistleblower program has used federal dollars to make multimillionaires of a small class of individuals. Since 2012, there have been more than 400 cash awards to whistleblowers, many of whom aren't US citizens, including nationals from countries unfriendly to the US.

How does one join this class of millionaires? An employee—perhaps through a contingent-fee lawyer specializing in whistleblower matters—brings information to the SEC (or to the Commodity Futures Trading Commission, which has its own program) about a suspected violation of US securities laws.

The SEC contacts the named company, which has probably already received a copy of the allegation from the leverage-seeking whistleblower's lawyer. The company, at shareholder expense, then undertakes an internal investigation and reports its findings to the SEC.

If the allegation is credible, the company may reach a settlement with the government that includes disgorgement of ill-gotten gains and possibly penalties. These settlements are often in the tens or hundreds of millions of dollars, but can reach billions.

Here is the kicker. The whistleblower is eligible for up to 30% of the total collected by the SEC. Those 400-some lucky whistleblowers have received an average of $5 million for their information. It doesn't matter if one lives or works in the US, or even pays US taxes.

In fact, the SEC has touted that the program has become “fundamentally international in character,” with information coming from China, India, the UK, and Canada, among other countries. In 2014, the SEC announced a $30 million award to a foreign national; of course, we can’t know the name of the whistleblower or their home country because the program guarantees anonymity.

There’s more: When working with the SEC, crime does pay! The SEC will actually pay out an award to an individual who participated in the wrongdoing (though the whistleblower’s relative culpability can reduce the amount of the award). The SEC rationalizes this by saying that those involved in the malfeasance often have the most valuable information to offer, which should surprise nobody.

It’s not hard to imagine that bad actors could try to game the system. Sadly, this isn’t just a hypothetical concern. I have seen foreign nationals inform to the SEC on their US-listed employer, collect millions of dollars in award money, and go on to perpetrate more malfeasance at their next company. Given the program’s increasing prominence and exponential growth, it is reasonable to assume that such instances will only become more frequent.

To date, the government’s whistleblower programs were reserved for civil enforcement cases. Perhaps concerned that its own voluntary disclosure program isn’t generating enough cases, the Department of Justice announced on Aug. 1 the details of its own whistleblower program, which it describes as “filling the gaps” left open by other programs.

Now, you can inform on your employer, or any corporation, regarding criminal activity that you may have information about—or even “minimally participated” in yourself—with the hope that the DOJ will reach a lucrative settlement that you can share while perhaps even sending your boss or your neighbor to jail as an extra prize.

Having heard criticisms of SEC whistleblower awards in the hundreds of millions of dollars, the DOJ program includes some guardrails that the SEC program doesn’t. The DOJ limits whistleblower awards to 30% of the first $100 million recovered, 5% of amounts between $100 million and $500 million, and nothing from amounts over $500 million, effectively capping whistleblower awards at $50 million. Still not a bad payday, even if you have to share it with your contingent-fee lawyer.

Earlier in my career, I had the privilege of serving for eight years as a DOJ prosecutor. Bringing wrongdoers—individuals and corporations—to justice was among the most fulfilling chapters of my career. Since leaving government many years ago, I have helped corporations design and implement world-class compliance programs.

To stay in line with various regulatory pronouncements through the years, corporate America has literally spent billions of dollars hiring compliance professionals (many of whom are former prosecutors themselves), creating hotlines capable of receiving complaints in almost every imaginable language, implementing data analytics designed to detect and prevent wrongdoing, monitoring business partners worldwide, and a host of other compliance policies and procedures that are subject to regular review by internal auditors.

The growing whistleblower programs have placed corporate America in a precarious position, pitting the government against corporations and employees against their employers, creating an environment that manifests subversive distrust in the system.

The US government has effectively gone into unfair competition with the corporate world. In fiscal 2023, the SEC paid whistleblowers nearly $600 million—a staggering figure against which no company can or should even try to match.

As the programs expand, the traditional bonds of trust within companies are eroded, resulting in a workplace dynamic where suspicion and self-enrichment supersede transparency and collaboration. The shift will not only fracture the integrity of corporate culture but also raise concerns about the long-term sustainability of such disjointed relationships within the American economic landscape.

Almost every current or former federal prosecutor I have ever met has the highest ethical standards; nothing I have written here is intended to disparage them. But when our system starts incentivizing distrust and turning colleagues into multimillionaire informants under a veil of secrecy, we must reevaluate how we are dispensing justice. We must also ask ourselves and our regulators whether this is a proper use of funds that ultimately belong to US taxpayers.

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

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Securities Law News

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US Audit Board Aims to Issue Corporate Crime Risk Plan This Year

By Amanda Iacone

- Proposal is among handful of projects on year-end agenda
- Audit regulator has been active under Chair Erica Williams

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US Audit Board Aims to Issue Corporate Crime Risk Plan This Year

By Amanda Iacone 2024-11-04T16:01:34000-05:00

- Proposal is among handful of projects on year-end agenda
- Audit regulator has been active under Chair Erica Williams

The US audit regulator is racing to wrap up a handful of rule-writing projects by the end of the year, including a plan that would force auditors to dig deeper into possible corporate lawbreaking.

The Public Company Accounting Oversight Board revised priorities and timelines for its standard-setting work on Monday. The board's updated agenda retains its commitment to finalize a project that would overhaul its illegal acts standard this year.

Auditors and US companies told the board to scale back the far-reaching proposal, known as noncompliance with laws and regulations or NOCLAR, and to submit a fresh draft for another round of public comments before issuing any final rule.

Under the proposal, auditors would need to assess a wider range of corporate wrongdoing that could have a significant impact on the financial statements they vet. Investors have long called for rule changes to shed more light on corporate crimes that could sink stock values.

Expanded audit firm disclosures and a new requirement that would crack down on misleading statements about board registration are also slated to be finalized this year, the regulator said.

Under PCAOB Chair Erica Williams, the board has pursued an active standard-setting agenda, completing six projects since 2022 and releasing five other draft projects. The regulator has committed to overhauling a rulebook written by the audit industry that predates the PCAOB's 2002 founding.

“We look forward to building on our progress as we close out 2024 and head into the new year,” Williams said in a statement.

Tuesday’s presidential election, however, could reset the regulator’s priorities as Kamala Harris and Donald Trump face off. Either candidate’s administration could bring in new leadership in what would be a possible third shakeup of the board since 2017.

The board also plans to release by year-end draft rules for how auditors report circumstances when they can’t issue a clean opinion that investors could rely on the client’s financial statements.

Proposed changes for how auditors consider risks that could shutter a business, along with draft changes for auditing inventory, are slated for release next year.

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Matt Levine's Money Stuff: JPMorgan Undercharged for a Trade

By Matt Levine

Opinion

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Matt Levine's Money Stuff: JPMorgan Undercharged for a Trade

By Matt Levine 2024-11-04T14:56:20803-05:00

JPMorgan miscellany: MMLF

I wrote last week that, "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." The next day the US Securities and Exchange Commission sent JPMorgan Chase & Co. an invoice for $151 million for assorted securities misdeeds over the last few years. I'm not sure it's even fair to say that the SEC sent an invoice. These days it's more like a tax return: JPMorgan downloads a form that is like "what securities laws did you violate this year," and it fills out the form and attaches the relevant receipts and sends it all in to the SEC with a check. From the SEC's announcement:

"JP Morgan's conduct across multiple business lines violated various laws designed to protect investors from the risks of self-dealing and conflicts of interest," said Sanjay Wadhwa, Acting Director of the SEC's Division of Enforcement. "With today's settlements, which include multiple self-reports and large voluntary payments to harmed investors, JP Morgan is being held accountable for its regulatory failures."

The violations are very miscellaneous; there's one about putting clients into higher-fee mutual funds rather than lower-fee but otherwise identical exchange-traded funds, and another one about waiting too long after initial public offerings to sell stocks for clients. But here's a good one about a money market fund regulatory arbitrage.

In March 2020, the Federal Reserve created a “Money Market Mutual Fund Liquidity Facility,” or MMLF, to help bail out money market funds. Investors had parked their cash in money market funds, but they were nervous about Covid and withdrew a lot of cash. Meeting those withdrawals would require the money market funds to sell assets, but the markets were nervous enough that there might not be any buyers. This is a pretty clear case for Fed intervention: When depositors want their money back, and banks have good assets that they temporarily can’t sell to meet those withdrawals, the central bank is supposed to step in to lend against those assets and prevent a run on the bank. So it did.

Of course money market funds are not technically banks and the Fed is not technically supposed to be a lender of last resort to them, but those feel like quaint technicalities and the Fed was not too troubled by them. As a concession to these technicalities, though, the Fed did *not* lend money to money market funds: Instead, it “made loans available to eligible financial institutions secured by high-quality assets purchased by the financial institution from money market mutual funds.” The money market funds had to sell their assets to a bank or broker, which would then get the (non-recourse) loan, but the promise of the Fed loan made it easier for the funds to sell without dislocating markets.

Because the Fed was looking to support US money market funds, it made only US funds eligible for the MMLF.

J.P. Morgan Investment Management runs US money market funds and also a foreign money market fund that was not eligible for the MMLF. In March 2020, its US and foreign money market funds faced redemption requests. The US funds raised money from MMLF as intended, but the foreign fund couldn’t. JPMorgan sensibly thought “well these are money market funds, it’s all short-term low-risk stuff, surely there is a trade here.” The trade is extremely simple:

1. The foreign fund sells assets to the US fund.
- 2. The US fund sells assets to a bank or broker eligible for the MMLF.
- 3. The broker brings the assets to the Fed for an MMLF loan.

All of the assets are pretty fungible, so “US money market funds can (indirectly) sell their assets to the Fed” also means “foreign money market funds can sell their assets to US funds who can sell them to the Fed.” JPMorgan’s US funds are in the business of investing in short-term cash-equivalent securities, and being in the middle of this trade is in fact a low-risk short-term cash-equivalent sort of trade. The foreign fund goes to the US fund and says “we’ll pay you a 1.3% annualized yield to hold this stuff for us overnight and then hand it to the Fed in the morning,” and the US fund is like “yeah 1.3% is a good rate for this safe trade” and does it.

Is it cheating? Was JPMorgan tricking the Fed into giving liquidity to foreign funds? I mean, sure, I guess, maybe, but (1) it’s the mild loophole-based sort of cheating that you’d expect from fixed-income traders and (2) JPMorgan did *ask* the Fed and the Fed was like “eh fine I guess”:

On March 23, 2020, in coordination with JP Morgan IM, personnel at J.P. Morgan Securities LLC ("JP Morgan Securities") emailed the Fed seeking guidance on whether a hypothetical transaction would comply with the intent of the MMLF. The hypothetical transaction posed to the Fed was similar to what later became the Repack ABCP trades. In the following days, the Fed and JP Morgan Securities engaged in further communications about the hypothetical transaction. The Fed ultimately responded that it did not plan to issue any guidance that would prevent the hypothetical transaction.

So JPMorgan did this to the tune of $4.3 billion of assets.

But last week the SEC objected to the *prices* of the trades. Everything involved here is a short-term, highly rated cash substitute, so the price of everything is more or less 100 cents on the dollar, but not quite. The foreign funds' assets had appreciated, so they had about $1.5 million of gains on $4.3 billion of assets, or about 3 basis points. There were fees to be paid to the broker that bought the assets from the foreign fund and sold them to the US funds, and to the broker that bought them from the US funds to deliver into the MMLF. And then the US funds needed to be paid for buying the assets — but, again, they were buying safe low-risk assets for one night before handing them over to the Fed, so they didn't need to be paid *much*. Specifically they needed to be paid a 1.3% annual yield on $4.3 billion for one day, or about $150,000.

The SEC objects that (1) the US funds took on some risk (what if the Fed had said no to taking these assets? It didn't) and (2) they didn't get paid enough:

The Domestic Funds earned only one-tenth of the investment gain that the Foreign Fund made from the transactions. Because JP Morgan IM personnel were involved in all aspects of the transactions, JP Morgan IM could have allocated more of the investment proceeds from the transactions to the Domestic Funds by increasing the annualized yield of the Repack ABCP but did not do so.

There was a conflict of interest here in that JPMorgan funds were on both sides of the trade, and the SEC isn't happy with how the conflict was managed. Oh well. It is a good story of the traps of financial engineering. The US government is like "we want to backstop US money market funds," and you are like "how can I use this to backstop my non-US money market fund," and you come up with the sensible answer "have my US funds backstop my foreign fund and then have the Fed backstop the US ones," and you call the Fed and say "does this work," and they sigh and say "we can't stop you," and then you get in trouble with a different bit of the US government because you didn't pay your US fund enough of a commission.

JPMorgan miscellany: Portfolio managers

Two ways you can invest with JPMorgan Securities are:

1. Your JPMorgan financial adviser can park your money with some outside portfolio manager, and you pay (1) that manager's fee plus (2) a "wrap fee" to JPMorgan, or

- 2. Your JPMorgan financial adviser can manage your money herself, and you pay one fee to JPMorgan.

When I describe it like that presumably you immediately understand that:

1. Paying one fee to JPMorgan, instead of two fees to JPMorgan and the outside manager, is cheaper for you.
- 2. But paying one fee to JPMorgan, instead of two fees to JPMorgan and the outside manager, results in a bigger fee *for JPMorgan*. The one fee is bigger than its share of the two fees. So JPMorgan, and in particular the JPMorgan adviser who gets paid based on revenue, would prefer that you let her manage your money rather than sending a lot of revenue away to a third-party manager.

And so your JPMorgan adviser will say "you can let me manage your money, or you can use our third-party manager programs, but letting me do it is cheaper," and then she will probably go on to say how good she is at managing money and how she won't let you down etc. And, for a while, she would not then go on to say "but I should warn you that I have a conflict of interest: I get paid more for managing your money myself than if I find you an outside manager." And this, says the SEC, was deceptive:

In part because clients do not pay a separate third-party fee when invested in PM Program strategies [*where a JPMorgan adviser manages the portfolio*], JP Morgan Securities and its financial advisors are able to charge a higher wrap fee for the PM Program, while maintaining a lower overall fee for the client. The opportunity to charge a higher wrap fee for PM Program strategies creates a financial incentive for JP Morgan Securities and its financial advisors to recommend the PM Program over the TPM Programs [*where a third-party manager runs the money*]. …

The PM Program brochure disclosure used until August 2021 did not disclose the conflicts of interest that PM Program financial advisors have when recommending that clients invest through the PM Program over the TPM Programs, particularly the fact that financial advisors most often negotiate a higher JP Morgan Securities fee when clients participate in the PM Program, which has no separate portfolio manager fee, instead of in TPM Programs where clients also pay a separate portfolio manager fee.

Okay. It would be weird if the JPMorgan adviser got paid the same amount for managing your money herself as she would for outsourcing it to a paid third party? But I guess you have to be really clear.

BlackRock

My crude rule of thumb is that if you are a giant traditional asset manager you can charge fees of roughly 10 basis points, so at 10x earnings you should be valued at roughly 1% of assets under management. And if you are a big alternative asset manager you can charge fees of roughly 100 basis points, so you should be valued at roughly 10% of assets under management. And then for some reason Pershing Square is worth 56% of its assets under management.

This suggests that if you are a giant traditional asset manager with trillions of dollars under management, and you can rebrand yourself as also a little bit of an alternative asset manager, there is a lot of valuation leverage there. If you run $11 trillion and are valued at 1% of AUM, and then people start thinking "well they're kind of an alts manager so should be 10% of AUM," then, uh, that adds $1 trillion to your valuation? It doesn't really work that way, but the thought process is not entirely wrong. Here's this:

BlackRock's clients are pouring money into its core stock and bond offerings. To keep the momentum going, chief Larry Fink wants to push the world's largest asset manager into the more lucrative world of private markets.

Managing more assets such as private equity, private credit, real estate and infrastructure would allow BlackRock to compete with the biggest alternative asset managers. It could also make BlackRock more valuable.

Firms such as Blackstone, Apollo Global Management and KKR manage just a fraction of BlackRock's $11.5 trillion in assets. Yet those rivals command market values that are in the ballpark of BlackRock's, which is around $150 billion.

The reason: Private-market funds can charge more than BlackRock gets for much of its plain-vanilla, index-based funds. And the market rewards that. ...

Alternatives made up just 3% of BlackRock's total assets in the third quarter, but generated 11% of total revenue, highlighting how lucrative the fees are.

[Martin] Small, BlackRock's finance chief, called out that opportunity, noting that insurance companies have $700 billion of assets with BlackRock, and flipping just 10% of that to private-credit strategies would be a huge boost to alternative assets.

The way that I tend to think about private credit is that in the olden days insurance companies bought bonds and held them to maturity, and then there was a long interlude where insurance companies invested in actively managed bond strategies, and then private credit was invented so that insurance companies could make loans and hold them to maturity. You could tell that story with a slightly different emphasis:

1. In the olden days insurance companies bought bonds and held them to maturity.
- 2. Asset managers realized they could charge insurance companies higher fees for actively managing their bond portfolios.
- 3. Over time, competition heated up and those fees compressed.
- 4. Asset managers realized they could charge insurance companies higher fees for private credit.

It does seem like a waste for BlackRock to charge a few basis points for bond beta when it could charge a few percentage points for " the beta of alts."

Who owns farmland?

It is roughly true that Chinese law prohibits foreign investors from owning certain Chinese technology companies. A lot of those companies want to go public offshore (in the US, UK, etc.), raise money from foreign investors and have stocks that trade freely in global markets. (Or, rather, they wanted to: This was a popular thing for Chinese companies to do for a while, but it more or less stopped in 2021.) How can you have stock that trades freely among foreigners, if you can't be owned by foreigners? Well! There is a solution. The solution is:

1. You've got a Chinese company owned by Chinese people.
- 2. You set up another company (in the Cayman Islands or wherever) that can sell stock to anyone, and it goes public in London or New York.
- 3. The Chinese company and the Caymans company sign a series of contracts saying things like "the Chinese company will give the Caymans company its profits" and "the Caymans company can appoint the executives of the Chinese company," but in vaguer ways. ("[Caymans Company] or its designated parties have the exclusive right to provide [Chinese Company] with comprehensive technical support, consulting services and other services, and [Chinese Company] agrees to pay services fees, the amount of which is determined by [Caymans Company] on the basis of the work performed and commercial value of the services" is a good way to say "the Chinese company will pay dividends to the Caymans company," without using those words.)

This is called a "variable interest entity"; we talked about it once when DiDi Global Inc. went public in New York with a VIE. So the Caymans company (which is owned by global shareholders) doesn't *own* the Chinese company, in the standard legal sense of share ownership, but it has something more or less economically equivalent to ownership of the Chinese company. It quasi-owns the Chinese company: It owns the Chinese company *enough* to make shareholders willing to invest, but not so much that the Chinese authorities crack down.

Again, this was the state of the art in 2021, but then both Chinese and US authorities *did* crack down, so, uh, never mind. Still the broad idea is correct. The broad idea is that if you live in Country X and you want to own Asset Y in Country Z, and Country Z prohibits residents of Country X from owning Asset Y, you enter into some sort of agreement with someone in Country Z that gives you ownership-like rights over Asset Y without actually owning it. The concept of "ownership" is broad and fuzzy, and you can probably find something that is enough like ownership for you but not so much like ownership that the Country Z authorities will object.

Though a big chunk of the job of Country Z's regulators is writing the rules in a way that covers all the sorts of quasi-ownership that, if they thought about it, they would object to. Still it's probably easier for you to find loopholes than for them to close them.

Anyway here's a story about US farmland and Chinese investors:

Walton Global has been identified by the U.S. government as a Chinese owner of U.S. farmland for a decade. The private land-banking company has opened four new offices in China since 2018 and last year was named by the U.S. Department of Agriculture as one of the top five Chinese owners of American farmland.

But last month, the company successfully petitioned the agency to reclassify much of its land as owned by investors from other countries, after The Wall Street Journal inquired about its holdings. It said the agency had made a mistake in saying so much of its land was held by Chinese investors. …

Few agree on what even counts as owned by China or which aspect of that ownership is bad for the U.S., even when that land is close to military installations. …

“We do business in China. We’re proud to do business in China,” the company’s chief executive, Bill Doherty, said in an interview. But he said, “The company is owned by me and my family. And I’m most definitely not Chinese.”

The company has touted its proximity to military installations, along with other local attractions, in some of its marketing materials in China. …

Walton said it has investors from around the world who can take brief tours of their land holdings, but don’t otherwise have access to the land, which the company then aims to sell to developers.

I don’t know enough about the ownership structures here to really comment, but “few agree on what even counts as owned by China” does seem like a pretty standard problem in these sorts of regulatory regimes.

Trade secrets

One thing you can do is:

1. Take a job at a quantitative asset manager.
2. Email yourself all of the company’s models and secret sauce.
3. Use it to set up your own quantitative hedge fund.

Compared to painstakingly building the models and discovering useful signals yourself, this is a pretty convenient shortcut. There are disadvantages:

1. Painstakingly doing it yourself might make you *better* at it: Your employer’s signals probably won’t be that good for that long, and if you just downloaded them you probably won’t understand them well enough to keep improving the models and finding new trades.
2. If you copy your employer’s models, you’ll also end up copying their trades, which might get crowded and lose their edge.

- 3. You'll get, like, extremely sued? And arrested? Not legal advice, but this is very much not allowed, and people do get arrested for it.

Here is a potential solution to Problems 2 and 3:

1. Be a citizen of the People's Republic of China.
- 2. Come to the US and take a job at a US quantitative asset manager.
- 3. Go to China and log into your work computer remotely.
- 4. (Use a virtual private network, because your work computer doesn't actually allow logins from China.)
- 5. Download all the models and secret sauce.
- 6. Use them to set up your own quantitative hedge fund in China, trading Chinese stocks.
- 7. Get charged with a crime in the US, but don't get extradited.

I guess? Not legal advice or anything but here's this:

A co-founder of high-flying Chinese quantitative hedge fund Pinestone Asset Management Co. has been indicted in the US for alleged theft of trade secrets, according to people with knowledge of the matter.

Xiao Zhang, a 33-year-old Chinese citizen from Shanghai, was indicted by a federal grand jury in Boston for allegedly stealing secrets from an unidentified global investment management firm while he was working for it in 2021, according to a statement dated Oct. 31 from the US Attorney's Office in Massachusetts.

Here are the Justice Department press release and the indictment:

According to the indictment, in 2021, Zhang allegedly utilized a virtual private network (VPN) to access his employer's network from the PRC, which enabled him to circumvent the company's controls. Zhang then allegedly made copies of his employer's code, projects and research, and sent the copies through a PRC-based file-sharing application, enabling him to again evade his employer's controls. It is alleged that Zhang then utilized the stolen items with the intent of establishing his own investment firm in the PRC.

I will say it seems hard to run a quant fund in China, and the intuitions that you develop from long experience with finding useful equity signals in the US might not be all that valuable when applied to China. But maybe the models still are.

Things happen

People are worried about the basis trade. Wall Street frenzy creates $11bn debt market for AI groups buying Nvidia chips. Nvidia Set to Replace Intel in the Dow Jones Industrial Average. B. Riley Chairman Is 'Personally Sick' as FRG Goes Bankrupt. TGI Fridays Files for Bankruptcy Following Years of Diners' Declining Interest. China piles pressure on rich people and companies to cough up taxes. State Street Asks SEC for Blessing to Fit ETFs into 401(k) Plans. The SALT Deduction Fight Is Coming Back—Whoever Wins the Election. "Doctors are like any other employee, and that's how the new generation is behaving." Even Some High-Income Americans Can't Afford New Cars Anymore. "When he reached the finish line 12 minutes later, 'you could tell the dogs were really happy and excited at the accomplishment.'" Instagram Plans to Use AI to Catch Teens Lying About Age. Meta's plan for nuclear-powered AI data centre thwarted by rare bees.

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- 1. The US Secured Overnight Financing Rate was about 0.01% at the time — crushed by Covid — so 1.3% was a fine rate.
- 2. It's all short-term assets, but short-term rates had collapsed in the couple of weeks leading up to these trades, so these assets were up a bit.
- 3. Because it's more or less illegal for a JPMorgan fund to sell assets directly to another JPMorgan fund, so it's all done through outside brokers.
- 4. This is an approximate quotation from DiDi Global Inc.'s prospectus. There are other agreements; my favorite is that there are agreements with the spouses of the somewhat nominal Chinese shareholders of the underlying Chinese company, in which they "agreed not to assert any rights over the equity interest in Xiaoju Technology held by the respective shareholder." You would not want the nominal shareholders' spouses to take the business away from the US-listed Caymans company.

Securities Law News

Nov. 4, 2024, 8:10 AM PST; Updated: Nov. 4, 2024, 2:22 PM PST

Corporate Expense Reporting Promises Investors More Clarity (1)

By Amanda Iacone

- Disclosures will break down large income statement expenses
- FASB rule responds to investor demand for spending details

Bloomberg Law News 2024-11-05T10:18:37730993563-05:00

Corporate Expense Reporting Promises Investors More Clarity (1)

By Amanda Iacone 2024-11-04T11:10:14000-05:00

- Disclosures will break down large income statement expenses
- FASB rule responds to investor demand for spending details

Investors are slated to get their hands on new details about major costs that affect corporate income from rising payroll totals to higher fuel prices under new expense disclosure requirements that have been years in the making.

The Financial Accounting Standards Board on Monday released final rule changes that require public companies to detail amounts spent on expenses including staff salaries and benefits, inventory purchases, and the cost of depreciation and amortization.

Companies will have to begin surfacing the new information for shareholders and other financial statement users in their 2027 annual reports. Similar details must be reported each quarter beginning in 2028.

Unlocking expenses that feed into a few catch-all line items on the income statement has long dominated investor priorities. Now US companies will have to break down how they spend their money through footnote disclosures meant to help investors trace corporate performance over time and project future cash flows.

“It’s been perhaps the highest priority for investors for probably more than a decade,“ board member Frederick Cannon said. The standard-setter came up with a “practical solution” that will enable analysts and investors to model net income and earnings, he added.

Investors rely on corporate expense information to compare performance across companies and understand corporate spending priorities. Companies often roll expenses into broad buckets on the income statement like costs of goods sold that can range from supplier costs to marketing.

Under the new requirements, companies will also discuss other costs that don't fit into the mandatory disclosure categories but still contribute to corporate expenses.

Companies warned that new requirements would be costly to adopt and that many of their expenses would end up in the "other" category, providing little clarity to investors. The board also faced corporate pushback over concerns about sharing competitive information.

The accounting standard-setter tried to address that feedback to ensure that companies could produce such information for investors. The board, for example, agreed to remove inventory and manufacturing expense requirements and instead added in purchased inventory recognized under Topic ASC 330.

An earlier proposal to expand expense reporting on the income statement failed to garner support in 2019. But the board agreed to try again a few years later to address investor demands.

The long lag time between when FASB issued the rules versus when companies must comply is on purpose. The accounting standard-setter has acknowledged that this will be a big undertaking—and companies will need time and money to follow the rules.

Thermo Fisher Scientific Inc. told FASB in 2023 that the equipment manufacturer used 90 different expense tracking systems because it acquires up to 10 businesses every year. The costs to streamline those systems would be "extreme," the chief accounting officer said at the time.

"This is a very big deal," said Kristin Bauer, partner at Deloitte & Touche LLP. "It's a huge change."

(Updates with additional reporting beginning in paragraph 11.)

— With assistance from Nicola M. White.

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Securities Law News

Nov. 4, 2024, 1:21 PM PST

Franklin Sees $53 Billion in Wamco Investor Exodus Amid Probes

By Michael Mackenzie and Silla Brush

- Wamco key bond fund falls below $10 billion as clients flee
- CEO discloses that CFTC is also investigating trades at Wamco

Bloomberg Law News 2024-11-05T10:19:15696778276-05:00

Franklin Sees $53 Billion in Wamco Investor Exodus Amid Probes

By Michael Mackenzie and Silla Brush2024-11-04T16:21:05335-05:00

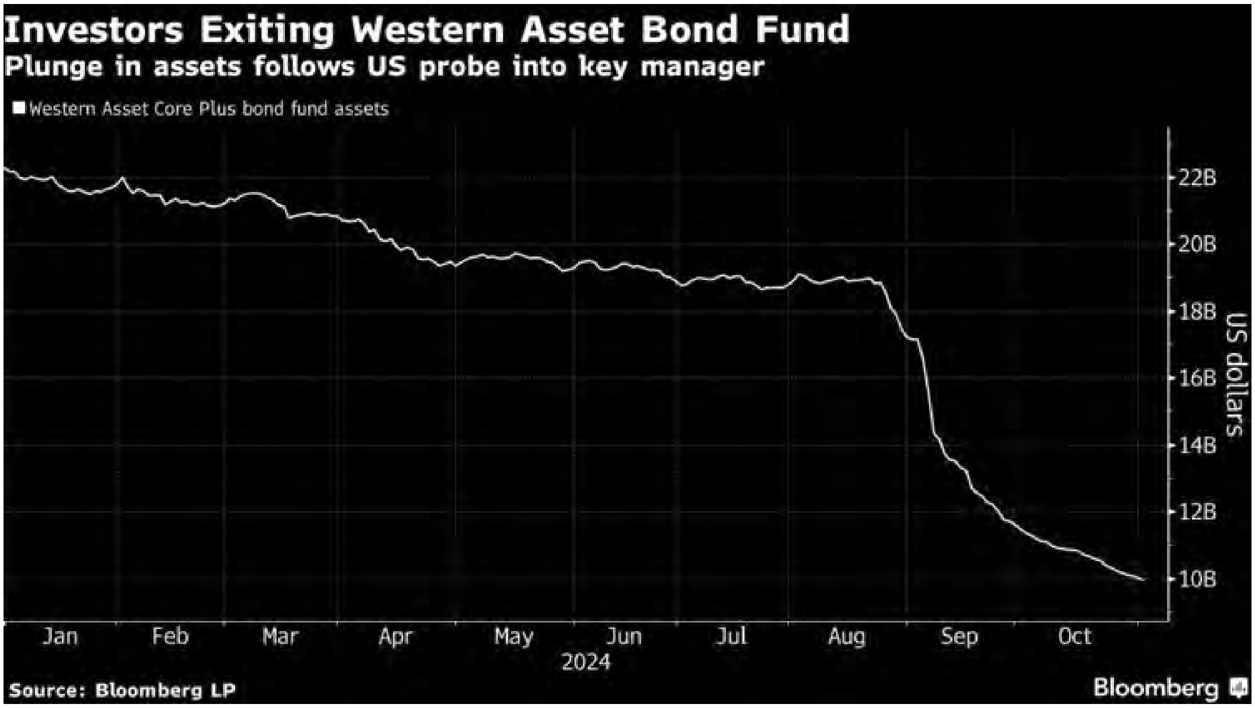
- Wamco key bond fund falls below $10 billion as clients flee
- CEO discloses that CFTC is also investigating trades at Wamco

A surge of investor redemptions has slashed the amount of cash managed by Franklin Resources Inc.'s bond unit, Western Asset Management Co., by more than $53 billion since the disclosure of a federal probe of the firm's veteran trader and Co-Chief Investment Officer Ken Leech.

About $18 billion of those outflows came in October alone, **Matthew Nicholls**, Franklin's chief financial officer, said in a call with analysts after a quarterly earnings release on Monday. That — along with the disclosure that the Commodity Futures Trading Commission has started looking into trades by Wamco — pushed shares in Franklin to close at the lowest in more than a week.

The CFTC investigation comes as the US Securities and Exchange Commission and Department of Justice carry out their own inquiries into potential cherry-picking trading practices under Leech. The Pasadena, California-based company said in August that Leech was going on leave after receiving a notice from the SEC, which could recommend enforcement action.

The outflows leave less than $10 billion in Wamco's flagship core plus bond mutual fund as of Nov. 1, from $22.3 billion to start 2024 — representing a decline of more than half this year, according to data compiled by Bloomberg.



There's "no way to sugar coat or diminish the adverse impact Western is and will continue to have on" Franklin, analysts led by **Glenn Schorr** at Evercore ISI wrote in a note. "But we can point to multiple positive trends that should lead to growth and a more diversified Franklin in the end."

Franklin assumed control of Wamco and agreed to allow it to operate with a great deal of independence for five years as part of its purchase of Legg Mason in 2020. Chief Executive Officer **Jenny Johnson** said that arrangement is now under review.

"Franklin Resources is working with Western's management team to explore ways to assist Western Asset, including adjustments to economic arrangements, operational and revenue synergies," she said. "This may entail changes that are similar to what we have successfully implemented with our other public market specialist investment managers while maintaining investment process independence."

Franklin reported adjusted earnings per share for the fourth quarter that missed the average analyst estimate. Shares in the company have fallen about 30% so far this year. They slid 3.3% on Monday to $20.16.

Among some of the bigger investors that have said they are leaving Wamco are the Ohio Bureau of Workers' Compensation, which decided to pull roughly $750 million. The Chicago Teachers' Pension Fund, which had roughly $550 million with the firm, is also ending its relationship.

An exodus of cash has been especially visible in the Western Asset Core Plus Bond Fund, which recorded a net outflow of $8.18 billion in the third quarter, bringing its year-to-date decline in assets to $11.1 billion, according to Morningstar Direct. Wamco's Core Bond mutual fund, meantime, saw a net outflow in the three months ending in September of $6 billion.

As the pace of the outflows from Core Plus accelerated, the fund has been selling existing holdings. The fund has also severely lagged peers, ranking in the bottom rungs over the last three- and five-year periods as well as so far this year, the data show.

Wamco has been hammered by consistent outflows for its flagship fund over nearly three years after a recent peak around $42.3 billion in August 2021. Under the leadership of Leech, the firm's bond strategies reflected a view that Federal Reserve rate hikes from 2022 would be measured and not drive Treasury bond yields to last year's peaks of 5%.

(Updates throughout.)

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Sydney Maki, Erin Fuchs

Musk now says it's 'pointless' to build a $25,000 Tesla for human drivers

reuters.com/business/autos-transportation/musk-now-says-its-pointless-build-25000-tesla-human-drivers-2024-11-05

Chris Kirkham

Item 1 of 2 Tesla CEO and X owner Elon Musk rides in Tesla's robotaxi at an unveilling event in Los Angeles, California, U.S. October 10, 2024 in this still image taken from video. Tesla/Handout via REUTERS/File Photo

[1/2]Tesla CEO and X owner Elon Musk rides in Tesla's robotaxi at an unveilling event in Los Angeles, California, U.S. October 10, 2024 in this still image taken from video. Tesla/Handout via REUTERS/File Photo Purchase Licensing Rights, opens new tab

Nov 5 (Reuters) - When Reuters reported in April that Tesla had scrapped plans for a long-promised, next-generation $25,000 electric vehicle, the automaker’s stock plunged. Chief Executive Elon Musk rushed to respond on X, his social-media network.
“Reuters is lying,” he posted, opens new tab, without elaborating. Tesla’s stock recovered some of its losses.
Six months later, Musk appears to have backed into an admission that Tesla dropped its plans for a human-driven $25,000 car. He said in an Oct. 23 earnings call that building the affordable EV would be "pointless” unless the car was fully autonomous.

His latest remarks came in response to an investor asking: “When can we expect Tesla to give us the $25,000 non-robotaxi regular car model?”

Musk responded: “We’re not making a non-robo…,” before he was interrupted by another Tesla executive. Musk later added: “Basically, I think having a regular $25K model is pointless. It would be silly.”

The April 5 Reuters article reported that Tesla had abandoned plans for an all-new, affordable mass-market EV but still planned a self-driving robotaxi. Since then, Musk has increasingly touted plans for robotaxis and autonomous vehicles.
Tesla and Musk did not respond to requests for comment for this story.

On the October earnings call, Musk said that Tesla does plan a “$25K car” – its “Cybercab,” a two-door, two-seat, fully autonomous vehicle. Musk unveiled a prototype at a Hollywood-style event on Oct. 10.
Musk says Tesla will start production of the Cybercab in 2026, after it deploys fully autonomous versions of its current Model 3 and Model Y vehicles in Texas and California next year. The automaker faces steep technological, regulatory and legal challenges in delivering on Musk’s latest promises of fully autonomous vehicles, which echo others dating back about a decade.

An all-new affordable Tesla for human drivers had until recently been a linchpin of Tesla's strategy to become the world's biggest automaker. For several years, Tesla had a goal of producing 20 million vehicles a year by 2030, more than tenfold what it sells now and nearly double that of Toyota, the current global sales leader. In May, Tesla dropped the 20-million goal from its latest "impact report" on progress toward sustainability goals.

As recently as January of this year, Musk confirmed the plan for an all-new affordable EV in an earnings call. He said the next-generation vehicle would arrive in 2025 and launch a second major "growth wave," following the first wave with the release of its Model 3 and Model Y vehicles in 2017 and 2020, respectively.
Investors and Tesla fans commonly called the anticipated cheap car a "Model 2," slotting in below the Model 3, currently the least-expensive Tesla, starting at $42,490.

In January, Musk described the all-new model as requiring "new revolutionary manufacturing technology." But in April, after Reuters reported Tesla had scrapped the Model 2, Musk outlined a plan for "more affordable" models that could be produced "on the same manufacturing lines" as current Teslas.
Seth Goldstein, a Morningstar Research Services analyst, said he believes these less-expensive vehicles will be built on current Tesla platforms and priced in the mid-$30,000s.

"It was my understanding that the original plan was to make the more-affordable vehicle on a new platform," he told Reuters. "I think Tesla realized they were late to making an affordable vehicle versus their Chinese-EV peers … So, they changed their strategy rather than make a large investment to produce a new vehicle."

After the April 5 Reuters report that Tesla had killed the Model 2, Musk posted that day on X saying Tesla planned a "robotaxi unveil" in August. The event, delayed until October and held on a movie set near Los Angeles, underwhelmed Wall Street and drove a 9% drop in Tesla shares the following day.
Some investors viewed Musk's comments on the Cybercab – along with displays of an autonomous "Robovan" concept and humanoid robots – as short on concrete details about the products. Tesla hasn't said whether the Cybercab will feature new self-driving technology beyond the company's "Full Self-Driving" feature in its current vehicles. Its existing models can't fully drive themselves and require a human driver paying strict attention.

The target market for the Cybercab isn't clear. The Cybercab's sports-car looks and two-door, two-seat configuration – a nearly extinct layout in the wider U.S. auto market – puzzled some analysts who expected a robotaxi with more room for passengers and luggage.
Musk, in the October earnings call, said the concept vehicle's design was "optimized for autonomy" and would also deliver affordability.

“It will cost … roughly 25K, so it is a 25K car,” Musk said. “It just won't have a steering wheel and pedals.”

Reporting by Chris Kirkham; editing by Brian Thevenot

Chris Kirkham
Thomson Reuters

Chris Kirkham is a business reporter in Los Angeles who has covered topics including tobacco, worker safety, internet privacy and corporate sustainability efforts. Chris previously worked at The Wall Street Journal and the Los Angeles Times.

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Walgreens To Pay $100M In Suit Alleging Inflated Drug Prices

By **Grace Elletson**

Law360 (November 4, 2024, 2:11 PM EST) -- Walgreens has agreed to hand over $100 million to settle claims from consumers and unions that it unlawfully overcharged insured consumers for prescription drugs while allowing members of its cost savings club to pay less, according to an Illinois federal court filing.

The customers behind the suit asked the court Friday to **preliminarily approve** their deal with Walgreen Co., which would shutter the case alleging fraud, unjust enrichment and various state claims for unfair business law.

"The proposed settlement is an excellent result for the settlement class," the plaintiffs said Friday. "In agreeing to settle, plaintiffs and class counsel were aware of the strengths and weaknesses of plaintiffs' claims and made a well-informed evaluation of the risks of continued litigation of this complex case against the benefits of settlement at this time."

On top of the payout, Walgreens has also promised to shutter its Prescription Savings Club targeted in the 2017 suit. Uninsured members of the club, which acted as a discount generic drug program that gave its members access to flat-rate pricing, were charged less for drugs while Walgreens' insured customers were charged more, according to the suit.

The company did this by failing to report its savings club prices when determining the "usual and customary" prices it charged to insured customers, but Walgreens pushed back in its filings, stating that it wasn't obligated to report its savings club prices as its usual and customary charges, according to Friday's filing.

The parties also agreed to certify a class comprising all individuals who paid for any prescription drugs from Walgreens using prescription insurance benefits to fill the medication, dating back to Jan. 1, 2007. Class members will receive settlement awards based on an estimation of the money they spent paying for some or all of Walgreens' eligible prescription drugs, Friday's filing stated, adding that the class consists of millions of individual members and thousands of benefits payers.

Walgreens attempted to toss the suit in 2017, but the company's bid was largely **shot down** in 2018 when U.S. District Judge John Z. Lee found the customers had supported their claims with enough detail. They adequately backed up their claims that Walgreens presented higher "usual and customary" prices to insurance and other benefits groups while it was simultaneously providing the same drugs at a much lower cost to those in its savings club, the judge said.

The customers and unions moved for class certification in November 2022, which **Walgreens opposed**, but settlement discussions began in December 2023 while the request was still pending, according to the Friday filing.

Fraser Engerman, senior director of media relations and issues management for Walgreens, told Law360 the company admits no wrongdoing and believes the claims are meritless. Engerman added that the cost savings program was created 15 years ago to provide equitable access to low-cost medications.

"This resolution allows us to focus on our turnaround strategy that will benefit our patients, customers, team members and shareholders," Engerman said.

Representatives of the consumers and the unions did not immediately respond to requests for comment.

The consumers and the union are represented by Joseph P. Guglielmo, Erin Green Comite and Amanda Rolon of Scott+Scott Attorneys at Law LLP and David W. Mitchell, Arthur L. Shingler III, Paul J. Geller, Mark J. Dearman and Stuart A. Davidson of Robbins Geller Rudman & Dowd LLP.

Walgreen is represented by Michael Scott Leib, Anthony Robert Todd, Selina Coleman and Jessica Christensen of Reed Smith LLP.

The case is Russo et al. v. Walgreen Co. et al., case number 1:17-cv-02246, in U.S. District Court for the Northern District of Illinois.

--Additional reporting by Kat Greene. Editing by Emma Brauer.

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Errors Lower Fee Award For Athira Pharma Investors' Counsel

By **Emily Sawicki**

Law360 (November 4, 2024, 7:40 PM EST) -- A Seattle federal judge has awarded $2 million in attorney fees to four firms that represented a class of Athira Pharma investors following a $10 million settlement over allegations the company's former CEO manipulated Alzheimer's drug studies, trimming the 25% fee award the firms sought due to an "overall lack of success in this litigation."

In his order on Friday, U.S. District Judge Thomas S. Zilly said the law firms' $2.5 million in fee requests, in line with the standard Ninth Circuit benchmark for class counsel from settlement agreements, was excessive due to class counsel's failures on the majority of claims and defendants in the litigation.

Judge Zilly slashed $500,000 from the $2.5 million requested by Glancy Prongay & Murray LLP, Labaton Keller Sucharow LLP, Rossi Vucinovich PC and Block & Leviton LLP, saying that spreadsheets provided by the four firms were inadequate, lacking detailed information about the work undertaken, and that it was therefore up to him whether to depart from the 25% benchmark.

The fee ruling came nearly nine months after **Judge Zilly approved** a $10 million class action settlement between Athira and the class, which at the time was estimated at more than 30,000 individuals.

Judge Zilly rejected an earlier proposed settlement reached in September 2023, finding a conflict between the lead plaintiffs and the rest of the class.

The settlement ends claims first brought in June 2021, accusing Athira of securities violations related to false and misleading information provided by its former CEO, Dr. Leen Kawas, during the company's initial public and secondary public offerings. According to the investors, the company's stock nosedived after independent researchers disclosed that data regarding the effectiveness of an anti-Alzheimer's drug was falsified.

The litigation was rife with problems, the judge said. Athira challenged 11 statements by the class, with only one of the challenged statements surviving, Judge Zilly noted in his Friday order. Of five claims by the investors under two statutes, three were dismissed, leaving two, both under the same statute. Of 10 defendants initially named, Judge Zilly said, all but two were dismissed from the suit.

Much of the work the attorneys did on the litigation was unsuccessful, the judge went on, including presenting a non-viable initial settlement proposal and proposed notices and forms that were not user-friendly for class members to join the settlement.

The 23-page claims notice was "lengthy and potentially confusing," Judge Zilly said in the Friday order, likely drawing more potential claimants than qualified, and therefore the issues with the process did not pose an "unreasonable or unconstitutional obstacle for class members."

"The court remains persuaded that sufficient discovery and motion practice was conducted in this case and that class counsel has enough experience in similar matters to propose this settlement," Judge Zilly later stated, adding that the $10 million settlement was not "obviously deficient," but rather "extremely favorable" in light of missteps by class counsel.

Though the judge trimmed the fees to be paid to each firm — ending at $24,000 for Block & Leviton, which represented plaintiff Hang Gao; $888,000 each for Glancy Prongay and Labaton Keller; which represented the class; and $200,000 for Rossi Vucinovich, class liaison counsel — he left intact each firm's bid for costs.

This left costs of $87,381.23 for Glancy Prongay, $61,890.10 for Labaton Keller and $1,428 for Rossi Vucinovich, with Block & Leviton not requesting litigation costs.

An additional $62,000 in fees and costs requested by two other firms, Keller Rohrback LLP and Longman Law PC, which together represented individuals who were not selected as class representatives, was denied, with the judge noting the firms provided no summaries, billing statements or spreadsheets detailing their work.

Representatives for the four plaintiffs' firms and counsel for Athira Pharma and Kawas did not immediately respond to requests for comment Monday.

The investor class is represented by Thomas G. Hoffman and Michael P. Canty of Labaton Keller Sucharow LLP, Kara M. Wolke, Casey E. Sadler and Natalie S. Pang of Glancy Prongay & Murray LLP, and Benjamin T.G. Nivison of Rossi Vucinovich PC.

Hang Gao is represented by Jacob Walker and Michael D. Gaines of Block & Leviton LLP.

Athira Pharma is represented by Gregory L. Watts, John C. Roberts Jr. and Tyre L. Tindall of Wilson Sonsini Goodrich & Rosati PC.

Kawas is represented by Sean C. Knowles, Zachary E. Davison and Joseph E. Bringman of Perkins Coie LLP.

The case is Antonio Bachaalani Nacif et al. v. Athira Pharma Inc. et al., case number 2:21-cv-00861, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Gina Kim. Editing by Peter Rozovsky.

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Security Tech Co. Evolv Misled Shareholders, Suit Claims

By **Sydney Price**

Law360 (November 4, 2024, 10:07 PM EST) -- Security technology company Evolv Technologies Holdings Inc. has been hit with a proposed class action in Massachusetts federal court by a shareholder alleging the company reported inaccurate revenue for over two years because of weaknesses in its internal controls.

According to the complaint filed by shareholder Douglas Buchan on Friday, Massachusetts-based Evolv creates security technology offerings using artificial intelligence for clients in sectors including education, healthcare, sports and live entertainment. The suit alleges that Evolv's investors were damaged when the company revealed last month that its financial statements had been inaccurate for over two years, and that it expects to report additional weaknesses in its internal controls.

Following the announcement, Evolv reported that it had **terminated its CEO**, Peter George, leading to another share decline, the complaint says. Evolv's chief financial officer, Mark Donohue, is also a defendant.

The suit's class period begins Aug. 19, 2022, the day after Evolv issued its financial results for the first half of the year in a filing with the U.S. Securities and Exchange Commission. The filing contained a section titled "revenue recognition" that explained the company's revenue recognition methodology and affirmed that Evolv complied with Financial Accounting Standards Board guidelines, according to the complaint.

For the next several quarters, Evolv continued to proclaim the accuracy of its revenue calculations and touted growth. In May 2024, it told investors that revenue in the first quarter of the year was $21.7 million, up 17% year-over-year, which reflected "continued traction with our channel partners."

On Oct. 25, 2024, information regarding Evolv's weak internal controls was revealed to the market, the suit alleges, when the company announced that "shareholders and others should not rely upon certain of the company's previously issued financial statements" dating back to the second quarter of 2022.

The same day, Evolv said that it would delay filing its third-quarter financial report because it "expects to report one or more additional material weaknesses in internal control over financial reporting" and that it had "self-reported these issues" to the SEC.

Evolv was already facing investigations by the Federal Trade Commission and the SEC, as well as another **proposed class action** by shareholders filed in March, all dealing with whether the company was exaggerating the capabilities of its products.

On this news, shares of Evolv declined $1.63, about 40%, to close at $2.47 per share on Oct. 25.

On Oct. 31, Evolv reported before the market opened that it had terminated George, effective immediately.

On this news, shares of Evolv declined 19 cents, about 8%, to close at $2.15 on Oct. 31.

The suit claims Evolv and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act. It argues that the defendants' statements are not covered by the safe harbor provisions of securities laws and seeks damages with prejudgment and post-judgment interest.

Counsel for Buchan and a representative of Evolv did not immediately respond to requests for comment on Monday.

Buchan is represented by Theodore M. Hess-Mahan of Hutchings Barsamian Mandelcorn LLP and Javier Bleichmar, Ross Shikowitz and Adam C. McCall of Bleichmar Fonti & Auld LLP.

Counsel information for Evolv was not immediately available on Monday.

The case is Buchan v. Evolv Technologies Holdings Inc. et al., case number 1:24-cv-12768, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Julie Manganis. Editing by Peter Rozovsky.

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New Fortress Energy Faces Investor Suit Over Outlook

By **Katryna Perera**

Law360 (November 5, 2024, 2:25 PM EST) -- New Fortress Energy was hit with a proposed investor class action in New York federal court alleging the natural gas company and its top brass misled investors about the company's growth and revenue outlook, which led to a stock drop once the truth came to light.

Plaintiff Taylor Anderson filed a **complaint** on Friday against New Fortress, its founder and CEO Wesley Robert Edens, Chief Financial Officer Christopher Guinta and executive officer Andrew Dete. The suit is on behalf of a proposed class of investors who purchased or acquired New Fortress securities between Dec. 12, 2022, and Aug. 8, 2024.

Anderson says that the defendants gave information to investors about New Fortress' full-year 2023 fiscal results and its 2024 outlook, which was based on the company's goal to double metrics in 2024, complete the construction of terminals and power plants in Brazil and Puerto Rico and execute a project known as "Fast LNG" in Mexico.

However, these positive statements were given to investors while at the same time the defendants concealed facts about how quickly the Fast LNG project would be operational and how much delays were costing the company, according to the complaint.

"Defendants created the false impression that they possessed reliable information pertaining to the company's projected revenue outlook and anticipated growth based on its Fast LNG units being fully operational, while also downplaying the potential for delays in building the FLNG units and increasing costs associated with the project," the complaint states.

Anderson claims that contrary to the disseminated positive statements, New Fortress knew that it would not meet the publicly stated progress goal of having the Fast LNG project operational and in service by March 2024. Additionally, the company hid that the delays were costing it nearly $150 million per quarter, the complaint states.

The truth began to emerge in February when New Fortress issued press releases that contained statements in direct contrast to previous public statements made by the defendants during a December 2022 investor call.

"On that call, defendants praised the investments made with its FLNG projects in order to meet the company's goal that long-term customers buy gas and/or power from New Fortress. There was no indication that there would be delays in building the units and that the main priority was 'getting our FLNG units up and running,'" the complaint states.

When the truth came to light in February that the project was experiencing delays, Anderson says the price of New Fortress' common stock fell from $35.15 per share on Feb. 29 to $34.43 per share on March 1, and then to $32.02 per share on March 4.

Despite the stock drop, the defendants continued to mislead investors, according to Anderson, by misrepresenting the speed at which New Fortress was constructing and commissioning its LNG projects and by claiming to have the first LNG unit fully operational by March.

"By doing this, defendants deceptively claimed confidence to increase its profitability and deploy its solutions globally," the complaint states.

However, the full truth came to light in August when New Fortress announced "disappointing" adjusted EBITDA second-quarter 2024 highlights and lowered its guidance for the second half of 2024.

"New Fortress revealed that its adjusted EBITDA in the second quarter of $120 million was well below the company's expectation of $275 million," the complaint states. "Importantly, the company attributed disappointing results and lowered guidance to delays in placing the company's FLNG 1 project into service, which cost New Fortress $150 million per quarter in lost operating margin."

On this news, the complaint states that New Fortress' share price dropped from $17.02 per share on Aug. 8 to $13 per share on Aug. 9. On Tuesday, New Fortress' common stock was trading around $8.66 per share.

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

Anderson is represented by Jeremy A. Lieberman, J. Alexander Hood II and Thomas H. Przybylowski of Pomerantz LLP and Peretz Bronstein of Bronstein Gewirtz & Grossman LLC.

The case is Anderson v. New Fortress Energy Inc. et al., case number 1:24-cv-08356, in the U.S. District Court for the Southern District of New York.

--Editing by Patrick Reagan.

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Vista Equity Sued In Del. Over Ad Tracking Co. Insider Trades

By **Jeff Montgomery**

Law360 (November 4, 2024, 5:37 PM EST) -- A stockholder of digital ad evaluator Integral Ad Science Holding Corp. has sued the company's private equity controller and five IAS directors in Delaware's Court of Chancery, seeking recovery of derivative damages for alleged insider trading moves that purportedly saved Vista nearly $270 million.

IAS stockholder Richard Scarantino's suit accused Vista Equity Partners Management LLC and five Vista-related figures who sit on IAS' board of lining up $477 million in sales of the private equity's IAS stock ahead of two rounds of steep stock drops triggered by pressure from competitors and undisclosed, revenue-eroding price cuts enacted in response. The complaint was filed under seal on Oct. 29 and released in redacted form on Friday.

Vista's representatives learned of IAS' slowed growth and its growing challenges with key customer retention — which have weakened the company's ability to avoid price cuts and revenue declines — "prior to these struggles being public," the suit said.

Alleged in the complaint was insider information-fueled "front-running" stock sales by Vista, aided by IAS' Vista-dominated board, in order to stay ahead of market losses.

"Vista breached its fiduciary duties by disloyally prioritizing its own personal financial interests above the interests of IAS and its stockholders," the complaint said. In particular, Vista sold approximately $477 million worth of company stock to the public while in possession of negative, material, nonpublic information regarding competition-related pressure on IAS' prices and declining revenues.

The insider sales allowed Vista to avoid an estimated $269.4 million in losses that would have occurred if the shares were held until public markets caught up with the bad news, the complaint said, adding that IAS is entitled to recover from Vista "an amount to be determined at trial."

The four-count suit alleged unjust enrichment against Vista and derivative breaches of fiduciary duty against the private equity as IAS' controlling stockholder, along with breaches of fiduciary duty against five Vista employees on IAS' board.

The private equity owned more than 50% of IAS' stock until June 2023, when it sold what was described as a "significant" block of shares based on nonpublic information.

"Vista knowingly participated in those breaches of fiduciary duty by senior Vista executives by selling Vista-owned company stock," the complaint said. "As dual fiduciaries and Vista employees, the director defendants' knowledge is imputed to Vista."

IAS executives were separately "incentivized" to ensure that Vista received returns on its investments in the company, the complaint said. Some Vista options held by executives, including by CEO Lisa Utzschneider, vest upon a triple return on Vista investments, or in connection with change-of-control events.

Vista lined up sales of IAS stock on four separate occasions that beat public knowledge of material negative information that triggered later stock drops, including sales in May and June of 2023 totaling $267 million and sales totaling $177 million in December 2023 and January 2024.

In all cases, according to the complaint, the sales occurred just ahead of negative reports by IAS in 2023 and February 2024 that resulted in sudden share price plummets, including revelations that hauled IAS' price down some 41%, from $17.10 per share to $10.01 per share, on Feb. 28.

Earlier rounds of sales saved Vista from a $3.66 per-share loss, while the later rounds avoided losses of $7.09 per share, the complaint said, for a combined, alleged insider information-fed savings of $269.44 million.

As competition eroded IAS' revenues, the complaint said, the company's "spin" and selective disclosures led to expressions of disappointment among Wall Street analysts, but a continued, "cautiously optimistic" round of reports until the full picture emerged.

A pre-suit demand for the IAS board to sue directly to recover the losses was deemed futile, the complaint said, because conflict concerns implicate all three members of IAS' compensation and nominating committee — a Vista managing member, a vice president on a Vista private equity team and a member of Vista's executive committee.

Counsel for IAS and Vista did not immediately respond to a request for comment Monday.

Scarantino is represented by Andrew E. Blumberg, Daniel E. Meyer, Jeroen van Kwawegen, Christopher J. Orrico and Caitlin Bozman of Bernstein Litowitz Berger & Grossmann LLP, Joel Fleming and Amanda Crawford of Equity Litigation Group LLP, Robert E. Bishop and Frank Partnow of Bishop Partnoy LLP, and Richard A. Maniskas of RM Law PC.

Counsel information for IAS and Vista was not immediately available Monday.

The case is Richard Scarantino v. Vista Equity Partners Management LLC et al., case number 2024-1103, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.

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Late New Evidence Can't Revive Investor Suit, Judge Says

By **Katryna Perera**

Law360 (November 4, 2024, 8:13 PM EST) -- A Massachusetts federal judge has declined to vacate the dismissal of an investor class action alleging that a hearing loss treatment company and some of its executives concealed disappointing clinical trial results, saying the plaintiff "is playing fast and loose with the Rules of Civil Procedure," and trying to blame the court and the clerk for his own procedural missteps.

U.S. District Judge William G. Young issued an **order** on Friday denying a motion filed by lead plaintiff Julian Quinones asking the court to vacate the dismissal of his suit against Frequency Therapeutics. Judge Young dismissed the suit in March 2023, and his ruling was **upheld by the First Circuit** this past July.

However, following the appeals court's decision, Quinones moved for relief under Rules 60(b)(2) and 60(b)(6) of the Federal Rules of Civil Procedure, arguing that newly discovered evidence cured the deficiencies that originally warranted dismissal.

According to Friday's order, Federal Rule of Civil Procedure 60(b) provides six reasons upon which a "court may relieve a party or its legal representative from a final judgment, order, or proceeding." Quinones moved for vacatur under the second rule or reason, which states that a party may obtain relief from a judgment or order based upon the discovery of new evidence brought "within a reasonable time," not "more than a year after the entry of the judgment."

But Judge Young said Friday that Quinones fails to meet this requirement since the action was dismissed in March 2023 and Quinones did not file his motion for relief until July 2024.

Additionally, Quinones' bid for relief under rule 60(b)(2) fails on the merits because he did not exercise reasonable diligence to obtain the newly discovered evidence, the judge said.

According to the order, the purported newly discovered evidence is based on the testimony of two new confidential witnesses previously employed by Frequency.

"In his motion, Quinones claims that the two new witnesses only 'emerged' after the deadline to file an appeal had expired," the order states. "According to Quinones, contact was made with CW2 in June 2023, and CW2 was able to introduce CW3 to the investigator that same month."

However, Judge Young said this argument, even if true, "reflects a time period of eleven months where Quinones did nothing further, apparently waiting to see if the motion to dismiss would be allowed [by the First Circuit.]"

And even if Quinones could establish that he acted with reasonable diligence in acquiring the new evidence, the confidential witnesses' statements do not adequately support the suit's claims of scienter, or knowledge of wrongdoing, the judge said.

Quinones "cannot amalgamate a series of sketchy brushstrokes and call it a van Gogh," the order states.

Quinones also moved for relief under rule 60(b)(6), which is known as the "catch-all provision" of the statute, if the previous five rules are inapplicable.

However, Judge Young noted that the First Circuit has held that "[i]t is a 'bedrock principle that clause (6) may not be used as a vehicle for circumventing clauses (1) through (5),'" and there are no extraordinary circumstances present in the current motion that warrant applying rule 60(b)(6).

The investors claim that Frequency hid poor trial results of a proposed hearing loss treatment known as FX-322 from October 2020 to March 2021. One of the company's executives, David Lucchino, sold a large amount of the biotechnology company's shares just before their price plummeted by 78% following the public announcement of the trial's results, according to the suit.

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

Quinone and the investors are represented by Amanda Lawrence, Jacob Lieberman, Thomas Laughlin and Anna Hunanyan of Scott & Scott LLP.

Frequency and its executives are represented by Roman Martinez, BJ Trach, Jeff Hammel, Kevin McDonough, Megan Behrman, Ryan Scanchne, Christine Smith and Cameron Sinsheimer of Latham & Watkins LLP.

The case is Quinones et al. v. Frequency Therapeutics Inc. et al., case number 1:21-cv-10933, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Elliot Weld. Editing by Vaqas Asghar.

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Nextdoor Inc. Investors Sue After De-SPAC Stock Drop

By **Jeff Montgomery**

Law360 (November 4, 2024, 6:38 PM EST) -- Investors in a special purpose acquisition company that took neighborhood network app Nextdoor Inc. public at a $4.3 billion valuation in July 2021 have sued the SPAC's sponsors and founding directors for damages in Delaware's Court of Chancery, accusing architects of the deal of overvaluing the business.

The suit, made public Friday, alleges that incomplete pre-deal disclosures by Khosla Ventures Acquisition Co. II, or KVAC II, pegged the company's value at $3.5 billion before closing, without providing other reports pointing to lower values. At close, the company's value briefly spiked and then fell steadily to its current $920 million market capitalization.

Investors who paid $10 per share for stakes in the SPAC before its directors and founders settled on a target held shares wound up holding shares trading at $2.42 per share on Monday. The suit leveled breach of fiduciary claims against KVAC II and a long list of companies and parties, including controllers Vinod Khosla and Samir Kaul, who formed Khosla Ventures SPAC Sponsor II LLC and affiliates.

"No directors, officers, or controlling stockholders faithfully fulfilling their fiduciary duties to stockholders would have entered into the merger with Legacy Nextdoor, let alone recommended that the merger was in the best interest of KVAC II's public stockholders. Defendants did," the complaint said.

Alleged in the complaint are four separate, direct claims for breaches of fiduciary duty against the SPAC's officers, directors and controllers and pre-deal Nextdoor parties and a direct claim for unjust enrichment against the KVAC parties and legacy Nextdoor former CEO Sarah Friar.

Some 41.6 million shares were sold in the SPAC's initial public offering, with only 1,222,040 holders of KVAC II Class A common stock exercising their right to redeem their shares for $10 plus interest and exit the deal.

Favorable terms for insiders who bought in ahead of public investors at lower prices, however, mean those holding Class B "founder" shares can expect a 67,494% return on their stake — millions of shares acquired at 25 cents per share.

A summary proxy statement issued at the time the deal was being negotiated failed to disclose that an independent third party advisor "valued Legacy Nextdoor at a fraction of the valuation assigned to the private company in the proxy," the suit said.

Nextdoor launched in the U.S. in 2011, and operates as what the complaint described as a "hyperlocal" networking app for neighborhood residents. While its stock price has fallen far short of public investor buy-ins, it claims 95 million verified neighbors in 335,000 neighborhoods in 11 countries, including 1 in 3 households.

The case is one in a string of stockholder actions to find their way into Delaware's Court of Chancery, with tens of billions invested and hundreds of "de-SPAC" mergers completed during a surge in 2020 and 2021 alone. The flood diminished in 2022 as unhappy investors steered their claims into federal courts and the Court of Chancery. The U.S. Securities and Exchange Commission adopted new disclosure rules and protections for investors in January.

In the latest suit, attorneys for Lamborn argued that KVAC II's conflicts oblige review under the Court of Chancery's more plaintiff-friendly "entire fairness" standard – one that the complaint said cannot be met by the merger.

"KVAC II's negotiations with Legacy Nextdoor were infected by these substantial financial conflicts and dominated by the controller defendants, who evaluated potential target businesses without any board oversight," the complaint said. Directors allegedly "rubber stamped" the deal after two meetings, without adequate assessment or third-party valuation of the target.

Among other issues cited in the complaint: conflicts of interest built into the SPAC enterprise that set a two-year deadline for completing a take-public merger, with failure wiping out founder investments.

As the merger approached, KVAC II's share price prior to redemption had fallen to $8.50 per share, despite a "deemed" value of $10 per share that obliged Nextdoor to inflate its own pre-deal value, the complaint said. But the process went forward with an untested, $3.5 billion post-merger valuation never compared with a standalone valuation.

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

Amy Lamborn and the proposed class are represented by Michael J. Barry, Kelly L. Tucker and Jonathan C. Millis of Grant & Eisenhofer PA and Michael Klausner.

Counsel information for those named in the suit was not immediately available.

The case is Amy Lamborn v. Khosla Ventures SPAC Sponsor II LLC et al., case number 2024-1100, in the Court of Chancery of the State of Delaware.

--Editing by Linda Voorhis.

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BofA Unit Escapes Trading Firm's Spoofing Suit For Now

By **Sydney Price**

Law360 (November 4, 2024, 9:58 PM EST) -- An Illinois federal judge has tossed a trading firm's proposed class action claiming that a Bank of America unit manipulated markets for U.S. Treasury futures and options, ruling that the firm fails to allege actual damages, but giving it an opportunity to amend the suit.

Trading firm M&N Trading LLC alleged in its **February suit** that for over six years between 2014 and 2021, BofA Securities Inc. and its investment banking predecessor, Merrill Lynch Pierce Fenner & Smith Inc., engaged in the "unlawful and intentional manipulation" of the markets for Treasury securities by means of spoofing, or the fraudulent placement, then cancellation, of trade orders to obscure true supply and demand for the orders in the interest of getting more favorable pricing.

To support its claims, M&N Trading noted a $24 million **settlement** BofA Securities entered last November with the Financial Industry Regulatory Authority over the alleged spoofing activity of two former traders in U.S. Treasury securities.

U.S. District Judge Sunil R. Harjani determined Friday that even though the firm has standing to bring the case, it failed to allege how long prices were artificially affected or when it traded in relation to the defendants' alleged spoofing.

"Courts do not require hyper-specific allegations — such as pleading that the trading happened within milliseconds or even minutes — but there must be some allegation of timing that allows a common-sense inference to be made," his **order** states.

According to the suit, BofA Securities and Merrill, which prior to a 2019 reorganization handled U.S. Treasury business, placed "hundreds of manipulative spoof orders" in service of the scheme, and these were the result of failures to supervise traders properly.

M&N Trading cited FINRA's finding that during the time of the alleged market manipulation, BofA Securities' compliance systems were "not reasonably designed to achieve compliance with securities laws and regulations and FINRA rules prohibiting spoofing."

Even though BofA Securities and Merrill Lynch argued that M&N Trading had failed to establish that they intended to spoof the market even if its traders knew certain orders would appear in the order book, Judge Harjani said intent can be inferred from circumstances.

"While defendants are correct in noting that mere knowledge is insufficient, if a complaint alleges an artificial price caused by the defendants' conduct along with a fraudulent scheme, that is sufficient for the court to find intent on a motion to dismiss taking the allegations as true and viewing the inferences in plaintiff's favor," the order states.

Despite the defendants' claims that M&N Trading should have reasonably known about its injury no later than Sept. 2021 — over two years before FINRA's settlement with BofA Securities was announced — M&N Trading's claims may not be time-barred under the Commodity Exchange Act, Judge Harjani also noted in the order.

"Plaintiff alleges the BofA Securities failed to reasonably supervise and monitor for spoofing, so there was no way for it, let alone anyone on the outside to know it occurred," the order states. "These allegations establish a set of facts that could defeat the statute of limitations defense."

M&N Trading has until Nov. 15 to amend and refile its suit, according to the order.

Bank of America declined to comment Monday. Counsel for M&N Trading did not immediately respond to requests for comment.

M&N Trading LLC is represented by Anthony F. Fata and Anthony E. Maneiro of Kirby McInerney LLP and Vincent Briganti, Raymond P. Girnys and Peter Demato of Lowey Dannenberg PC.

BofA Securities Inc. and Merrill Lynch Pierce Fenner & Smith Inc. are represented by John Anderson Fagg Jr. and Nader Saeed Raja of Moore & Van Allen PLLC and Elise Marie LeCrone and Joseph Laurence Motto of Winston & Strawn LLP.

The case is M&N Trading LLC v. BofA Securities Inc. et al., case number 1:24-cv-01229, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Emilie Ruscoe and Sarah Jarvis. Editing by Linda Voorhis.

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Glazer Sues In Del. For Appraisal In $7.2B Squarespace Deal

By **Jeff Montgomery**

Law360 (November 5, 2024, 12:11 PM EST) -- Five funds of Glazer Capital LLC sued late Monday for Delaware Court of Chancery appraisal of the investment management firm's more than 2.8 million shares of website builder Squarespace Inc., seeking to better the company's $46.50 per share price for a recently closed take-private acquisition by interests of Permira Advisers LLC.

Glazer declared its opposition to the deal in a letter to Squarespace directors in mid-August, before the price was boosted from an earlier $44 per share. In its objections, Glazer cited a broad sample of precedent transactions by Goldman Sachs over a 16-year period that supports a price range of $49.30 to $50.87 per share. Two of the transactions, the investor said, support $46.97 to $59.19 per share.

The investor described the deal as a controller squeeze-out, with about $3 billion of the shares involved owned "by stockholders that will have no stake in the post-merger entity."

Delaware's corporation law allows investors to reject merger offers and to sue for a Chancery Court appraisal and a potentially better deal based on a sale target's unaffected price, plus interest from the date of the transaction.

The case is Glazer Enhanced Fund LP et al. v. Squarespace Inc., case number 2024-1137, in the Court of Chancery of the State of Delaware.

--Editing by Daniel King.

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Kroger, State AGs Finalize Sprawling $1.37B Opioid Deal

By **Hailey Konnath**

Law360 (November 4, 2024, 10:48 PM EST) -- Kroger will pay $1.37 billion to dozens of states and thousands of counties, municipalities and Native American tribes to resolve allegations the grocery store chain contributed to the opioid crisis, with Ohio, California and Texas seeing the largest distributions, according to a finalized settlement unveiled Monday.

Specifically, Kroger has agreed to shell out $1,372,800,000 to 33 states and the District of Columbia, funds that will also go to a long list of subdivisions and tribal nations. Ohio will come away with the biggest allotment, roughly 11.2% of the funds, per the deal. Meanwhile, California will be allocated 10.1% and Texas will see about 6.4%.

The settlement resolves allegations that Kroger ignored red flags for suspicious prescriptions for narcotics, fueling the opioid epidemic.

In a statement Monday, California Attorney General Rob Bonta said the Golden State will receive up to $122 million for opioid abatement, with payments beginning early next year. Kroger has also agreed to require its pharmacies to monitor, report and share data about suspicious activity related to opioid prescriptions as part of the settlement, according to Bonta's office.

"The funds secured in this settlement will allow the state and eligible cities and counties to continue addressing the harms inflicted by this epidemic through comprehensive prevention, treatment and recovery programs, and other resources," Bonta said in the statement.

North Carolina Attorney General Josh Stein said his state would see about $40 million for opioid abatement. Stein led the settlement negotiations along with Bonta and the attorneys general of Colorado, Illinois, Oregon, Tennessee and Virginia, according to a statement.

Stein said in the statement, "Working to hold accountable the companies that created and fueled the opioid crisis in North Carolina has been a top priority. And we are winning."

He said the funds will "help people stay alive, get treatment and begin recovery."

"We are also forcing these companies to change their behavior so more people don't get addicted to these deadly drugs," Stein added.

Kroger, which is based in Ohio, **initially announced** that it had agreed to pay up to $1.4 billion to resolve opioid litigation in September 2023. At the time, the company said it would pay $1.2 billion to states and local governments and $36 million to Native American tribes.

Kroger didn't immediately respond to a request for comment late Monday.

The states are represented by their respective attorneys general.

Kroger is represented by Chantale Fiebig and Dan Nadratowski of Weil Gotshal & Manges LLP.

–Additional reporting by Emily Field and Jonathan Capriel. Editing by Emily Kokoll.

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Robinhood Users Denied Class Cert. In Order Flow Suit

By **Emilie Ruscoe**

Law360 (November 4, 2024, 10:03 PM EST) -- A proposed class of Robinhood customers must run their expert's damages model before asking a California federal judge to weigh their class certification bid in litigation alleging that the investing platform failed to disclose financial interests affecting order flow on the platform.

In a ruling Thursday, U.S. District Judge Yvonne Gonzalez Rogers of the Northern District of California denied the Robinhood users' class certification bid "largely on the grounds that a ruling on class certification would be premature without plaintiffs running their expert's damages model."

"At argument, plaintiffs intimated they are currently in possession of sufficient data to run at least a representative sample in order to assist the court with its analysis on the motion," the judge said, telling the parties that she would deny the motion for now and allow the Robinhood users to make their request again "once the appropriate calculations have been performed."

The Robinhood users moved for class certification in March, proposing a class of those who used the platform between September 2016 and September 2018 and who executed at least one trade with pricing that was "inferior, at a statistically significant level" to the average prices offered for those same trades by the market or market makers Robinhood routed its trades to.

In payment for order flow, a brokerage firm directs orders and executes trades to a particular market maker or exchange. It allows brokers to offer commission-free trading by passing their customers' trades through a third party, from which the brokers collect a fee.

But critics of the practice have said retail investors might not receive the most competitive prices when firms rout orders to certain brokers.

In its class certification bid, the platform's users claimed that the company's clandestine payment for order flow practice "meant that Robinhood customers received worse per-share prices on their trades than if they had placed the same orders with Robinhood's competitors."

They also noted that the practice most harmed users who executed larger trade orders because for large orders, "any offset from the lack of a traditional commission was substantially certain to be more than the offset from inferior price improvement."

Pointing to the company's practice of advertising that it didn't collect traditional up-front commissions, Robinhood users argued that the payments it did accept amounted to "kickbacks" and that "the inferior execution price received by Robinhood's customers amounted to a form of backdoor commission: a cost-imposed trade by trade that resulted in immediate, substantial profits for Robinhood."

Robinhood said class certification must be denied because in cases involving allegations hinging on so-called best execution requirements for trades, economic loss "cannot be established with common proof on a classwide basis."

"Unlike a typical securities class action, showing injury (i.e., economic loss) in a best execution case does not depend on a price decline in a single stock but instead requires a fact-intensive inquiry into each of the tens of millions of trades during the proposed class period to determine whether a better price reasonably could have been obtained for that exact trade at the precise moment when it was executed," Robinhood said.

In a reply, the platform's users shot back that the company relied on its "expert's spoon-fed conclusions," resulting in "attacks [on] straw-man versions" of the users' arguments about their damages.

"Plaintiff's model is designed to show whether and to what extent class members were harmed, addressing both the element of economic loss and the computation of damages. Robinhood and its expert have attempted to imbue the concept of economic loss with considerations that relate entirely to the separate (and premature) issue of loss causation," the users argued.

Representatives for the proposed class did not immediately respond to requests for comment Monday.

The proposed class is represented by Matthew Z. Robb of Liddle Sheets PC, by Tina Wolfson, Robert Ahdoot and Bradley King of Ahdoot & Wolfson PC, and by Scott A. Bursor and Sarah N. Westcot of Bursor & Fisher PA.

Robinhood is represented by Karen P. Kimmey of Farella Braun & Martel LLP and by Maeve L. O'Connor, Elliot Greenfield and Brandon Fetzer of Debevoise & Plimpton LLP.

The case is In re: Robinhood Order Flow Litigation, case number 4:20-cv-09328, in the U.S. District Court for the Northern District of California.

--Editing by Karin Roberts.