

Metal Miner TMC Hit With Suit Over Stock Drop From SEC Filings

By Mike Vilensky 2024-11-11T10:26:51000-05:00

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [No. 2:24-cv-09684](#) (Bloomberg Law subscription)

Deep-sea miner [TMC the Metals Co.](#) is facing a proposed class action for allegedly misleading investors over its debt levels in filings with the SEC that the company later revised.

The [complaint](#), filed Nov. 8 in the US District Court for the Central District of California, seeks to represent a class of people who acquired TMC securities between May 12, 2023, and March 25, 2024. It was filed against the company and its top executives.

According to the complaint, TMC disclosed in a March 25 filing with the Securities and Exchange Commission that the company's financial statements for the first three quarters of 2023 "should be restated and, accordingly, should no longer be relied upon."

TMC's March 25 filing cited the "reevaluation" of whether the proceeds from its 2023 partnership with Low Carbon Royalties Inc. should be classified as debt or deferred income, according to the complaint.

On the news of the company's revised SEC filing, TMC's stock price fell 13.23% March 26, according to the complaint.

"Defendants had both the motive and opportunity to commit fraud," lead plaintiff Thomas Lin said in the lawsuit. "They also had actual knowledge of the misleading nature of the statements they made, or acted in reckless disregard of the true information known to them at the time."

The complaint brings two claims of Exchange Act violations, seeking class certification and damages.

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

Metal Miner TMC Hit With Suit Over Stock Drop From SEC Filings

Pomerantz LLP represents Lin and the proposed class.

The case is [Lin v. TMC the Metals Co. Inc.](#) , C.D. Cal., No. 2:24-cv-09684, complaint filed 11/8/24 .

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Bloomberg Law News 2024-11-11T11:15:22539375174-05:00

Paragon Technologies Board Sued Over 'Coup' by Ousted Chairman

By Mike Leonard 2024-11-08T15:46:52000-05:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1134](#)

Two [Paragon Technologies Inc.](#) directors staged a board “coup,” forced out its chairman, and adopted illegal bylaws insulating them from the ordinary levers of corporate governance, according to a lawsuit unsealed Friday.

Hesham Gad is suing Samuel Weiser and Jack Jacobs over his ouster and the bylaws, which place a series of restrictions on the ability of investors to remove them from the board through ordinary channels. The “obvious invalidity” of the bylaws “is breathtaking,” the suit says.

The allegations represent a reversal of roles for the investment holding company, which earlier in the year [led litigation](#) challenging [Ocean Power Technologies Inc.](#) bylaws that allegedly targeted Paragon’s shareholder activism campaign.

Paragon didn’t immediately respond to a request for comment Friday.

Gad’s lawsuit in Delaware’s Chancery Court says Weiser and Jacobs sought to marginalize him by replacing him as chair, even though they lacked the shareholder support to remove him from the board altogether. Gad—who joined Paragon in 2010 after a proxy fight—reacted by rallying other investors to replace Weiser and Jacobs, an effort that yielded stockholder consents reflecting more than 50% of the company’s ownership, according to the complaint.

But they allegedly responded by rejecting the written consents on the “technicality” that some of them had been signed by beneficial stockholders rather than record holders. They then hastily convened a 12-minute board meeting, on a Sunday, at which they adopted the new bylaws, the suit says.

Among other things, the bylaws impose a 75% supermajority requirement for shareholders to call a special meeting or act by written consent, according to Gad’s complaint. They also allegedly prohibit

investors from removing board members without cause and bar the company from reimbursing stockholders for expenses related to proxy fights.

All of those provisions violate Delaware corporate law and Paragon's charter, the lawsuit says. It was originally filed under seal Nov. 1.

Gad is represented by Meluney Alleman & Spence LLC.

The case is [Gad v. Weiser](#) , Del. Ch., No. 2024-1134, complaint unsealed 11/8/24 .

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Shaquille O'Neal Settles Class Action Over Astrals, Galaxy NFTs

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Class Action

Shaquille O'Neal attends the State Farm All-Star Saturday Night at Lucas Oil Stadium on Feb. 17, 2024, in Indianapolis.

Photo by Stacy Revere/Getty Images

Shaquille O'Neal and digital asset holders who sued the basketball legend have fully settled a proposed class action over his Astrals and Galaxy nonfungible tokens' diminished value, subject to a court's approval, according to a mediator.

The amount of the settlement hasn't been disclosed yet. In class actions, that's usually laid out in a request for a court's preliminary approval, which the parties here will ask for within seven days, mediator Howard Tescher told the the US District Court for the Southern District of Florida on Thursday.

- Judge Federico A. Moreno ruled in August that the token holders adequately alleged O'Neal was a "seller" of the NFTs and that the products meet the definition of securities, a decision seen as the first major ruling on celebrity promotions
- Miami Heat star Jimmy Butler and a YouTube influencer agreed to pay a combined \$340,000 following that ruling to resolve claims that they helped dupe Binance Holdings Ltd. customers into buying unregistered securities
- In October, Dapper Labs Inc. received final approval from the Southern District of New York to settle with holders of its Top Shot NFTs for \$4 million

Moskowitz Law Firm and Mark Migdal & Hayden represent the plaintiffs. Fowler White Burnett PA and Brown Rudnick LLP represent O'Neal and three Astrals companies that are also named as defendants.

The case is Harper v. O'Neal , S.D. Fla., No. 1:23-cv-21912, filing 11/7/24 .

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Celsius Crypto Founder Loses Bid to Toss Some Fraud Charges

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Securities Law

Signage of various cryptocurrencies at the Hong Kong Digital Asset Exchange Ltd. digital currency trading store in Hong Kong, on June 24, 2021.

Photographer: Paul Yeung/Bloomberg

Nov. 11, 2024, 7:07 AM PST

Jacqueline Thomsen

Reporter

- Judge said arguments were ‘without merit’
- Alex Mashinsky sought dismissal of two charges

Former Celsius Network Ltd. Chief Executive Officer Alex Mashinsky lost his bid to strike two counts of his indictment alleging he artificially inflated the price of his company’s cryptocurrency.

US District Judge John G. Koeltl said in a ruling Nov. 8 that Mashinsky’s attorneys’ arguments against the charges are “either moot or without merit.”

Mashinsky’s attorneys with Mukasey Young LLP had pushed to dismiss a charge that he had violated the Commodity Exchange Act, arguing it couldn’t stand because he was also charged with violating the Securities Exchange Act of 1934 for effectively the same conduct. Koeltl, who sits on the US District Court for the Southern District of New York, rejected the motion, saying that a conviction on the securities charge wouldn’t force an acquittal on the commodities charge.

Koeltl also rejected an argument that the commodities charge is “legally insufficient” because prosecutors didn’t adequately allege that Celsius investors’ depositing Bitcoin into a program that promised weekly “rewards” payments were “contract[s] of sale of any commodity.” The judge said that is a factual question “that cannot be resolved at this stage.”

Mashinsky also lost a bid to toss another charge alleging market manipulation of Celsius’ proprietary token, arguing that he lacked “fair warning” that the alleged conduct was criminal.

Koeltl said that argument “is meritless.” He wrote that the US Court of Appeals for the Second Circuit has previously said that “[o]pen-market transactions that are not inherently manipulative may constitute manipulative activity when accompanied by manipulative intent.”

The district judge also said it wasn’t a proper time to determine whether references to Celsius’ bankruptcy should be struck from the indictment, saying it should be decided through pre-trial motions on evidence or trial.

Mashinsky was charged last year with wire fraud and other charges, after Celsius became one of several crypto exchanges to collapse in 2022. He has pleaded not guilty.

The case is United States v Mashinsky, S.D.N.Y., No. 23-cr-347, 11/8/24

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Addictive social media suits against Meta can't include Zuckerberg

DJ [dailyjournal.com/articles/381890-addictive-social-media-suits-against-meta-can-t-include-zuckerberg](https://www.dailyjournal.com/articles/381890-addictive-social-media-suits-against-meta-can-t-include-zuckerberg)

Civil Litigation

Nov. 11, 2024

The ruling does not clear the Menlo Park company of wrongdoing. Meta Platforms and several other social media companies face ongoing litigation by states and individual plaintiffs in multidistrict litigation accusing the platforms of promoting compulsive online use by young people and concealing its harm.

CEO Mark Zuckerberg will not have to face claims that, as a corporate officer of Meta Platforms Inc., he fraudulently and negligently concealed the harmful impact the company has on young users in two dozen lawsuits, an Oakland federal judge has ruled.

"Plaintiffs' allegations are not sufficient to plausibly allege that Zuckerberg directed the suppression of material information.," U.S. District Judge Yvonne Gonzalez Rogers wrote in dismissing the claims Thursday.

"Control of corporate activity alone is insufficient," she added. "While possible that discovery may reveal a more active participation and direction by Zuckerberg in Meta's alleged fraudulent concealment, the allegations before the Court are insufficient to meet the standard for corporate-officer liability" in 13 states. *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 22-MD-03047 (N.D. Cal., filed Oct. 6, 2022).

The ruling does not clear the Menlo Park company of wrongdoing. Meta Platforms and several other social media companies face ongoing litigation by states and individual plaintiffs in multidistrict litigation accusing the platforms of promoting compulsive online use by young people and concealing its harm.

But Zuckerberg, personally, is off the hook. In April, Gonzalez Rogers dismissed claims of fraudulent and negligent misrepresentation in the CEO's personal capacity while leaving open the possibility that he could be held liable as a corporate officer.

Previn Warren, an attorney with Motley Rice LLC, argued in a brief that Zuckerberg's "involvement in developing and promoting Meta's social media products to teens supports the reasonable inference that he 'was directly involved with, and therefore knowledgeable about,' the products' negative impact on user well-being and Meta's concealment of that information."

As its controlling shareholder, Zuckerberg "himself directed, participated in, knew of, and in fact served as the guiding spirit behind Meta's tortious concealment and omissions," he wrote after Gonzalez Rogers' first ruling.

Zuckerberg made "misleading statements on social media addiction and teen well-being issues that omitted the truth about their products' addictive designs and risks of harm," Warren added.

Covington & Burling LLP partner Timothy C. Hester, who represents Zuckerberg, countered that plaintiffs failed to allege that the CEO actively participated "in Meta's alleged misrepresentations or omissions, or specifically directed Meta to engage in such alleged misrepresentations or omissions."

"Plaintiffs seemingly attempt to insinuate that Mr. Zuckerberg could be held liable on a corporate officer liability theory because he is purportedly the 'guiding spirit' of Meta or significantly involved in a wide range of business decisions, including the investment of resources and the development of its services and features," he wrote. "But that is not the test for corporate-officer liability."

Gonzalez Rogers agreed that plaintiffs didn't have enough on Zuckerberg.

"In terms of context, plaintiffs are not proceeding on a theory that Zuckerberg made affirmative misrepresentations, but argue that because his affirmative statements are misleading, or at least not forthcoming, these statements support the inference that he participated in Meta's alleged fraudulent concealment," she wrote.

"On their own, they do not plausibly support the inference that Zuckerberg participated in a scheme or directed any employee to conceal information," the judge added. "There is no allegation that Zuckerberg directed an employee to suppress an internal report that otherwise was going to be disclosed."

#381890

High Court Asked to Review DOJ's 'Illusory Promise,' Religious Charter School, Meta Class Action

 [law.com/nationallawjournal/2024/11/08/high-court-asked-to-review-doj-illusory-promise-religious-charter-school-meta-class-action](https://www.law.com/nationallawjournal/2024/11/08/high-court-asked-to-review-doj-illusory-promise-religious-charter-school-meta-class-action)

Jimmy Hoover

National Association of Realtors offices in Washington, D.C. Photo: Diego M. Radzinski/ALM

"Every day, federal agencies resolve civil and criminal enforcement actions through agreements with private parties," the National Association of Realtors told the high court. "It is critical that the government honor its word in those contracts, no matter who occupies the White House or leads DOJ."

November 08, 2024 at 03:42 PM

🕒 7 minute read

United States Supreme Court

By Jimmy Hoover



As the Supreme Court term kicked off in October, the justices received a new batch of petitions in a range of business cases, controversial policy fights and criminal matters.

Several dealt with the ongoing legal saga over a recent horse-racing safety law passed with bipartisan support in Congress, which the Supreme Court reinstated in late October. Another centers around Oklahoma's bid to preserve nearly \$5 million in federal funds for family planning services withdrawn over the state's refusal to give patients the number of an abortion hotline.

Below, the National Law Journal shines a brighter spotlight on three cases that reached the justices last month.

Realtors Fight Reopening of DOJ Probe After Settlement

The National Association of Realtors, the largest U.S. trade association, has asked the justices to intervene to block the Department of Justice from reopening an investigation into its policies for possible antitrust violations.

The embattled organization, which agreed to pay \$418 million to settle a nationwide class action from home sellers this year, is now fighting two recent civil investigative demands from the DOJ's antitrust division. According to NAR, the government's demands represent a violation of an earlier consent judgment that it had entered into with the DOJ during the first Trump administration.

Under terms of the agreement, the DOJ promised to close the investigation. But shortly after President Joe Biden took office, the antitrust division moved to reopen the probe and sent the CIDs in question.

Below, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit refused NAR's request to quash the CIDs. D.C. Circuit Judge Justin Walker dissented.

"The question presented by that conflict is exceptionally important," NAR wrote in its petition filed by Christopher Michel and other lawyers from Quinn Emanuel Urquhart & Sullivan.

"Every day, federal agencies resolve civil and criminal enforcement actions through agreements with private parties," NAR added. "It is critical that the government honor its word in those contracts, no matter who occupies the White House or leads DOJ."

The first policy, dating back to the 1970s, requires listing brokers to offer a flat commission rate on listings posted to a "multiple-listing services," or MLS, site. The DOJ says the policy reduces competition among buyer's agents.

The other policy that has caught the government's attention, known as the "clear cooperation policy," requires brokers to list a property on an MLS site within one day of marketing the listing.

"We discern no commitment by DOJ—express or implied—to refrain from either opening a new investigation or reopening its closed investigation, which might entail issuing new CIDs related to NAR's policies," D.C. Circuit Judge Florence Pan wrote in a majority opinion. "Put simply, the fact that DOJ 'closed its investigation' does not guarantee that the investigation would stay closed forever."

But that reading, NAR argued, allowed "DOJ to make an illusory promise in exchange for meaningful consideration, a paradigmatic contract-law violation."

The case is *National Association of Realtors v. United States*, No. 24-417.

Can Religious Schools Be Charter Schools?

In June, the Oklahoma Supreme Court ruled that a state board's approval of a Catholic school as a publicly funded charter school was unlawful. That school, along with the board itself, each filed appeals with the Supreme Court seeking to reverse that decision.

Oklahoma is the latest battleground in the ongoing legal efforts of religious entities to obtain access to taxpayer-funded programs. The Supreme Court's conservative majority has held in recent years that states cannot, under the First Amendment, exclude "sectarian" organizations from generally available government benefits simply because they are religious in character.

The question now facing the justices is whether religious schools must be eligible to participate in a state's publicly funded charter school system.

Here, the Oklahoma Virtual Charter School Board approved a Catholic charter school with a self-proclaimed "evangelizing mission." The approval was subsequently challenged in court by the state's Republican attorney general as a violation of state constitutional law, which ultimately ordered the state to rescind its contract.

"Time and again, [the U.S. Supreme Court] has held that the Free Exercise Clause prohibits a state from excluding a school from generally available funding programs solely because the school is religious," argued lawyers for St. Isidore of Seville Catholic Virtual School, a K-12 online school established by the Archdiocese of Oklahoma City and the Diocese of Tulsa.

"That is precisely what occurred here," the school's lawyers wrote in their petition. "Oklahoma has applied its law to bar St. Isidore from participating in the charter school program simply because it is Catholic."

The school is represented by a legal team that includes law firms Dechert and Peri Dunn, and Notre Dame Law School's Lindsay and Matt Moroun Religious Liberty Clinic. The virtual school board is represented by the legal advocacy group Alliance Defending Freedom.

Oklahoma Attorney General Gentner Drummond has been given until Dec. 9 to file a response.

The cases are *St. Isidore of Seville Catholic Virtual School v. Drummond*, No. 24-396, and *Oklahoma Statewide Charter School Board v. Drummond*, No. 24-394.

Meta Fights Class Action From Advertisers

Facebook parent company Meta has filed a Supreme Court appeal seeking to stop a class action from online advertisers claiming that they were misled about the reach of their ads.

Back in March, a divided panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the certification of the class action under Federal Rule of Civil Procedure 23. Meta says the ruling greenlit a potentially mammoth class of "many millions of businesses, from multinational corporations to corner stores, that advertised through Meta over the course of nearly a decade."

The suit was filed by e-commerce firm DZ Reserve, which claims to have spent more than \$1 million on hundreds of advertising campaigns, and another smaller business that spent less than \$500 on 11 Meta ads. The plaintiffs allege that Meta misled them with their "Potential Reach" estimates by including all potentially reachable accounts, rather than the number of living people the ads would reach.

Section (b)(3) of Rule 23 states that a class action can only be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members."

Below, the Ninth Circuit affirmed the certification of the class on the ground that Meta had engaged in a "common course of conduct" that affected all digital advertisers. But Meta says the Ninth's Circuit's defendant-focused test ignores key differences about whether the potential reach estimates were material, or whether the advertiser relied on them.

"If a class with this many differences can be certified, it is hard to imagine any fraud class that would not be certified under the Ninth Circuit's test," Meta said. "The sweeping implications of the decision below—and the disparity between the circuits—confirm the need for this Court's review."

The Ninth Circuit's approach to Rule 23 "makes class certification the norm rather than the exception," Meta argued in its petition filed by Roman Martinez and other lawyers from Latham & Watkins.

The plaintiffs waived their right to file a response, but the Supreme Court requested that they file one anyway by Dec. 9. The plaintiffs are represented by Geoffrey Graber of Cohen Milstein Sellers & Toll.

The case is *Meta Platforms v. DZ Reserve*, No. 24-384.

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Latest

Trending

Opinion **Inside Business**

J&J's latest Texas two-step strategy on brink of victory

Multinational has struck a deal with most claimants over toxic talc powder claims through a Chapter 11 filing by a subsidiary

SUJEET INDAP



J&J will tell anyone that the purpose of the so-called Texas two-step was never about evading accountability © Reuters

Sujeet Indap YESTERDAY



Can the Texas two-step work the third time around? A pair of clever attempts by Johnson & Johnson, starting in 2021, to use the US bankruptcy code to take care of billions of dollars in alleged liability over carcinogenic talc powder were found to be too cute by a half. A third attempt currently under way, however, might be about to thread the needle.

A J&J subsidiary known as Red River Talc (named after a body of water near Dallas) filed for bankruptcy in a federal court in Houston in September. The strategy relies on a Texas state law to create a vehicle that houses only talc liability claims.

In the pair of previous attempts, it went to bankruptcy court with that hammer to push thousands of claimants into a deal. This time around, J&J tried an arguably softer approach.

For technical reasons, those earlier Chapter 11s attempts were thrown out of court. This time, the bankruptcy filing was struck after a deal with victims at the beforehand, an approach that effectively dares a bankruptcy judge to take agreed-upon billions out of the pockets of victims.

J&J has always maintained that its talc was safe and the stream of lawsuits are meritless. But it was willing to write a cheque if it could get permanent closure and most importantly, keep its main parent company — worth nearly \$400bn — as far away and as untainted by the product liability litigation. They are within striking distance of that goal.

J&J will tell anyone that the purpose of the so-called Texas two-step was never about evading accountability. Rather, bankruptcy was the cleanest and fairest way to resolve the litigation and that J&J should have the ability to use Chapter 11 without having to put the remaining healthy company in bankruptcy.

To demonstrate their good faith, J&J struck a so-called “funding agreement” where the broader company agreed to infuse tens of billions of dollars into a bankrupt entity when a settlement was reached. In exchange for the guaranteed money, J&J and its executives expected full liability releases.

The idea that entities not in bankruptcy can get the benefits of Chapter 11 — including litigation stays and releases — is extremely controversial and the key issue in a [recent Supreme Court fight](#) over the Purdue Pharma’s bankruptcy plan that would shield members of the company’s founding Sackler family from future civil liability in exchange for a \$6bn contribution.

The J&J funding agreement gambit was ultimately rejected by federal courts in New Jersey (J&J had also first tried to pursue those original cases in North Carolina before being forced back to their home state). The court ruled that the talc vehicle had not shown a “financial distress” motivation to file for bankruptcy because of the billions the J&J parent company was backstopping.

In the current Texas bankruptcy, J&J has garnered the support of what it says are 83 per cent of claimants, enough for a court to approve the settlement and bind holdouts to the terms — the pot is now set at around \$8bn and the standards of bankruptcy in the Texas federal court are confusingly different than those in the Northeast.

Efforts by the Department of Justice to shift the case back to New Jersey — it calls J&J's repeated efforts to access bankruptcy courts as “textbook example of bad faith” — have so far not borne fruit.

Among the last barriers to the deal getting done is a fight put up by holdouts and their law firm about just how valid the 83 per cent of claimholder support is — there have been accusations against J&J of “vote buying” which it rejects. Conversely J&J has accused plaintiff's lawyers and litigation funders of ulterior motives. By February, we should know if these objections are accepted by the court.

Plenty of claimants are now happy to settle with J&J and expeditiously get their money. The government and the holdouts, however, believe the company is running roughshod to get off easy from courtroom trials where they could be forced to pay more.

This third attempt at the two-step is undoubtedly creative. Many big companies like J&J are resigned that old, legacy products may come back to haunt them with big liabilities. They are willing to write big checks to get finality, but believe they can do so on terms they dictate.

Congress could clarify the laws to make Texas two-step shenanigans unnecessary, both allowing victims their day in court and companies the chance to fairly defend themselves as well as neatly negotiate deals that they want to make. For now, our faith rests with the courts to disentangle all the manoeuvrings.

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Stellantis Sued Over Defective Jeep Models That Can Catch Fire

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Class Action

- **COURT:** E.D. Mich.
- **TRACK DOCKET:** No. 2:24-cv-12968 (Bloomberg Law subscription)

Stellantis was hit with a new proposed class action from a group of consumers who say that certain 2021-2023 Jeep Wrangler and Gladiator vehicles contain a defect in the power steering pump electrical connector that can cause vehicle fires both while they're being driven or when parked.

The lawsuit, filed Thursday in the US District Court for the Eastern District of Michigan, said at least nine vehicle fires have been reported, and an ongoing National Highway Traffic Safety Administration investigation covers over 781,000 Jeep Wrangler and Gladiator vehicles.

Some of the vehicles at issue in the current case already have been recalled for other issues that could result in a fire, although there hasn't yet been a recall for the specific spontaneous fire risk cited in the complaint, it said.

The case asserts claims for breach of implied warranty under the Magnuson-Moss Warranty Act and state laws, as well as claims for unjust enrichment. It also alleges that Stellantis—formerly known as FCA US LLC—breached implied warranties by selling vehicles prone to spontaneous combustion and failing to remedy the defect.

The plaintiffs seek certification of nationwide and statewide classes as well as damages, restitution, attorneys' fees and costs, and an order requiring the automaker to repair the alleged defect.

A representative for Stellantis didn't immediately respond to a request for comment.

The Miller Law Firm and Hagens Berman Sobol Shapiro LLP represent the proposed class.

The case is *Graves v. FCA US LLC*, E.D. Mich., No. 2:24-cv-12968, complaint filed 11/7/24.

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Certification denied in lawsuit over Apple's water resistance claims

DJ [dailyjournal.com/articles/381894-certification-denied-in-lawsuit-over-apple-s-water-resistance-claims](https://www.dailyjournal.com/articles/381894-certification-denied-in-lawsuit-over-apple-s-water-resistance-claims)

A Los Angeles judge denied class certification for plaintiffs claiming Apple Inc. made false and misleading representations about the water resistance of its iPhones. Judge Carolyn B. Kuhl ruled that evidence presented by the plaintiffs did not demonstrate that all class members were exposed to the same or similar representations made by Apple.

Thiago M. Coelho of Wilshire Law Firm in Los Angeles, who represents the plaintiffs, vowed to appeal the decision in a phone call on Friday.

"The case is far from over, I can tell you that much," Coelho said.

Coelho is joined on the plaintiffs' side by Wilshire attorneys Shahin Rezvani, Lauren M. Lendzion, Chumahan B. Bowen, Jennifer M. Leinbach, Jesenia A. Martinez, Reuben A. Aguirre, Patrick W. O'Connor and Jesse S. Chen. The team also includes Scott L. Tillett of Pine Tillett LLP in Sherman Oaks and sole practitioner Nathan N. Shamtoub of Los Angeles.

Apple is represented by Morrison & Foerster LLP attorneys Arturo J. Gonzalez, Alexis A. Amezcua, Purvi G. Patel, Whitney R. O'Byrne and Zachary A. Maldonado in Los Angeles, as well as Adam J. Hunt and Tiffani B. Figueroa in New York City.

Counsel for Apple did not respond to emailed and phoned requests for comment by press time on Friday.

The lawsuit claimed that Apple profits from false advertising that overstates the water resistance of its iPhone products, according to an amended complaint filed in June of 2021. *Miguel et al. v. Apple Inc.*, 21STCV08348 (L.A. Super. Ct., filed March 3, 2021).

A subsequent second amended complaint filed by plaintiffs Gabriela Miguel and Robert Herrera brought 12 causes of action against Apple, including violations of the Consumer Legal Remedies Act, the Unfair Competition Law, Business & Professions Code Section 17200, fraudulent concealment and breach of express warranty, Kuhl noted in her Nov. 4 ruling.

Miguel has since voluntarily dismissed her claims against Apple, leaving Herrera as the sole remaining claimant, the order said.

In a hearing on Oct. 4, Coelho argued that the case was a matter of omissions made in Apple's representation to the customer - particularly that the phones' water resistance is limited and impermanent.

The Consumer Legal Remedies Act "bars omissions of any material fact related to goods," he said. "A manufacturer has a duty to disclose a defect when it has exclusive knowledge of material facts not known to the plaintiff."

In response, Patel argued that the case is actually a partial misrepresentation case rather than pertaining purely to omissions.

"Accordingly, whether any given purported class member was exposed to and relied on an alleged partial misrepresentation and related omissions requires resolution of individual questions. No class can be certified on these claims," she said.

Kuhl agreed in her Nov. 4 ruling.

"The reason why Herrera has recently sought to characterize his claims as based on omissions that are untethered to Apple actual statements is clear," Kuhl wrote. "Herrera is unable to show that all the putative class members were actually exposed to Apple's statements; thus, in an attempt to prevail on his class certification motion, Herrera seeks to characterize his claims as based on omissions."

A trial setting conference is scheduled for Dec. 17.

#381894

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Riverside case joins claims that Pfizer's contraceptive causes brain tumor

DJ [dailyjournal.com/articles/381896-riverside-case-joins-claims-that-pfizer-s-contraceptive-causes-brain-tumor](https://www.dailyjournal.com/articles/381896-riverside-case-joins-claims-that-pfizer-s-contraceptive-causes-brain-tumor)

Health Care & Hospital Law

Nov. 11, 2024

Pfizer Inc says the contraceptive Depo-Provera has been approved by the FDA as safe for 30 years but is updating its labels with warnings about long-term use.

The latest of a series of federal lawsuits that claim Pfizer Inc. negligently manufactures a contraceptive drug and fails to warn consumers that one of its ingredients could potentially increase the risk of developing a certain brain tumor was filed in federal court in Riverside on Friday.

The first known lawsuit of its kind was filed against the pharmaceutical company and its labs in a federal court in San Francisco last month. Two more were filed weeks later in the Southern District of Indiana and a Los Angeles federal court.

With claims nearly identical to the others, Friday's lawsuit was filed by Anapol Weiss partner Paige N. Boldt. The lawyer represents Latosha White, who said a 2023 intracranial meningioma diagnosis - a type of brain tumor that surrounds the brain and spinal cord - was caused by her years of regularly prescribed injections of Depo-Provera that began in 2018 at a Planned Parenthood in Moreno Valley. *White v. Pfizer Inc. et al.*, 5:24-cv-02379 (C.D. Cal., filed Nov. 8, 2024).

"Several scientific studies have established that progesterone, its synthetic analogue progestin, and Depo-Provera in particular, cause or substantially contribute to the development of intracranial meningioma. Nevertheless, defendants failed to warn, instruct, advise, educate, or otherwise inform Depo-Provera users and prescribers about the risk of intracranial meningioma or the need for monitoring for resultant symptoms," Boldt wrote in the complaint.

In response to the litigation, which has not reached class status or consolidation at this time, Pfizer said in a statement Friday: "Depo-Provera has been an FDA-approved medication for more than 30 years and has been a safe and effective treatment option for millions of patients during that time. The company will vigorously defend these lawsuits."

According to White's lawsuit, the connection between the brain tumor and Pfizer was first linked in March following the publication of a case control study from the British Medical Journal. According to the study, researchers found that women who were given medroxyprogesterone acetate - an ingredient in Depo-Provera - had up to a five times greater risk of developing meningioma.

In April, Pfizer - headquartered in New York - released a statement in response to the study: "We are aware of this potential risk associated with long-term use of progestogens and, in collaboration with regulatory agencies, are in the process of updating product labels and patient information leaflets with appropriate wording."

However, White's lawsuit claims the U.S. Depo-Provera label still makes no mention of these potential dangers even though Pfizer has purportedly provided such warnings in Europe.

"To date, the U.S. label for Depo-Provera still makes no mention of the increased risk to patients of developing intracranial meningiomas despite the fact that the European Union and the United Kingdom labels now list meningioma under the 'special warnings and precautions for use' section and advise European Union patients to speak with their doctors before using Depo-Provera if they have any history of meningioma," Boldt wrote in the complaint.

White claims she was unaware of the purported brain tumor linkage until after the March study was released. Prior to her surgeries to treat the diagnosis, White said she asked her physician about the safety of continued Depo-Provera usage and was advised it was safe to do so. However, she opted to stop using it and claims she is still suffering from serious injuries that make certain sides of her body physically weak because of the tumor and surgeries to treat it.

The complaint lists nine counts against the pharmaceutical defendants including: failure to warn, design defect, negligence, fraudulent misrepresentations, and breach of contract violations.

#381896

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Judge Dismisses Microplastics Suit Against Evian's 'Natural Spring Water'



law.com/therecorder/2024/11/07/judge-dismisses-microplastics-suit-against-evians-natural-spring-water

Riley Brennan

A federal judge in Chicago sided with the makers of popular water brand Evian, shooting down claims that the company mislabeled its spring water as "natural" because of the alleged presence of microplastics.

U.S. District Judge Thomas M. Durkin in the Northern District of Illinois granted Danone Waters of America's motion to dismiss plaintiffs Michael Daly and Michael Dotson's claims that the company violated Illinois and California state consumer fraud statutes by falsely claiming its Evian spring water is "natural." In *Daly v. Danone Waters of America*, the court determined that the plaintiffs' claims were preempted by federal regulation, according to a Tuesday decision.

Durkin concluded that the claims were preempted as the U.S. Food and Drug Administration's regulations for spring water don't mention microplastics, or impose a requirement regarding microplastics. The plaintiffs' consumer fraud claims under state law would have to be "identical to the requirements imposed by federal regulation," Durkin said.

"Any claim that imposes a requirement for the word 'natural' beyond proper identification of the water's source goes beyond the regulatory requirements and is thus preempted," Durkin wrote.

The plaintiffs argued that they were free to bring their claims, maintaining there wasn't any preemptive concern as the federal regulation doesn't define the word "natural" when defining "spring water," or otherwise impose a requirement regarding the use of the term "natural" in a label.

The court disagreed. Durkin found that the plaintiffs had ulterior motives for focusing their claims on the term "natural" and looking to distance their claims from revolving around the definition of "spring water." Durkin agreed with Danone that the plaintiffs' motivation stemmed from the fact that the regulation doesn't mention microplastics, meaning the "regulation does not impose a requirement regarding microplastics, thereby preempting any claim which, like Plaintiffs', attempts to impose a microplastic requirement on labels for 'spring water.'"

However, the court held that the two terms cannot be separated, noting that each time the regulation uses the word "natural," the word is used to describe the source of the "spring water."

"In other words, the plain language of the regulation defines 'spring water' as, in part, the water that is harvested from a 'natural spring' (i.e., a 'natural flow' through a 'natural orifice'). As long as water comes from a 'natural spring' it can be labeled 'spring water,' and by extension 'natural.' The regulation imposes no further requirement for use of the word 'natural' in a label," Durkin said. "And any claim that imposes a requirement for use of the word 'natural' beyond proper identification of the water's source goes beyond the regulatory requirements and is thus preempted."

The court further noted that it agreed with other courts who had addressed consumer fraud claims based on the alleged presence of microplastics in federally regulated bottled water, citing the court's August holding in *Slowinski v. BlueTriton Brands*; the U.S. District Court for the Central District of California's May decision in *Bruno v. BlueTriton Brands*; and the Central District of California's 2019 holding in *Baker v. Nestle*.

"Although two of those three courts were focused on different label terms—i.e., '100%' and 'purified'—all three courts found that the requirements for proper use of the label terms could not be separated from the regulations for the particular type of 'bottled water.' In other words, a claim based on falsely using the descriptive term in a label (in this case, 'natural') could not impose any requirements beyond those imposed by the regulation for the type of bottled water in question (in this case, 'spring water')," Durkin said.

"While this court agrees with the ultimate findings of preemption made by those other courts, this court respectfully disagrees with their reasoning. The other courts based their findings on the general proposition that the federal 'bottled water' regulations (including the definition of 'spring water') do not mention microplastics," Durkin said. "The other courts found that, absent mention of microplastics in the regulations, the regulations cannot impose any labeling requirements concerning the presence of microplastics in the water."

The other courts reasoned that "if the regulation has nothing to say about the presence of microplastics in 'spring water,' and 'spring water' is 'natural,' then the regulation has nothing to say about the presence of microplastics in 'natural spring water,' and any claim that 'spring water' containing microplastics is falsely labeled as 'natural' is preempted," Durkin said.

Durkin concluded that it was unnecessary to address whether the regulation imposed requirements regarding microplastics when determining the "preemptory scope" of the word "natural." He noted that the present court, as well as numerous other courts already determined "the preemptory scope of the terms 'natural' and 'spring water' are inextricably intertwined because 'spring water' is harvested from 'natural springs.'"

Danone's attorney, Yan Grinblat, of DLA Piper in Chicago, and the plaintiffs' attorney, David B. Levin, of Law Offices of Todd M. Friedman in Northbrook, Illinois, did not immediately respond to requests for comment.

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<https://www.wsj.com/articles/telefonica-pays-85-million-to-resolve-u-s-probe-into-bribery-in-venezuela-e0898241>

RISK & COMPLIANCE JOURNAL

Telefónica Pays \$85 Million to Resolve U.S. Probe Into Bribery in Venezuela

The Justice Department cites a scheme to bribe government officials

By *Dylan Tokar* [Follow](#)

Nov. 8, 2024 6:09 pm ET



The settlement marks the second time a Telefónica subsidiary has been fined for violating the Foreign Corrupt Practices Act. PHOTO: EDUARDO PARRA/ZUMA PRESS

Spanish telecom company Telefónica has agreed to pay more than \$85.2 million to resolve an investigation into an alleged scheme to bribe Venezuelan officials to obtain preferential access to U.S. dollars, the Justice Department said.

A Telefónica subsidiary entered into a settlement with federal prosecutors filed in U.S. court in Manhattan on Friday. The agreement charges the subsidiary with conspiring to violate the Foreign Corrupt Practices Act, a law prohibiting companies from bribing foreign officials to secure a business advantage.

The settlement marks the second time a Telefónica subsidiary has been fined for violating the 1977 antibribery statute.

The company, which is listed on the New York Stock Exchange, didn't respond to a request for comment.

The allegations

At the center of the latest probe are state-run auctions through which Venezuela's government regulates foreign currency exchange and injects U.S. dollars into the country's economy.

In 2014, Telefónica Venezolana participated in a government-sponsored currency auction to exchange Venezuelan bolivars for U.S. dollars. Behind the scenes, the company bribed government officials to ensure it would secure U.S. dollars needed to maintain its position in the Venezuelan telecommunications market, according to prosecutors.

To do that, it recruited two suppliers to pay around \$28.9 million to an intermediary, knowing some of the funds would reach government officials in the form of a "commission," prosecutors said.

To conceal the payments, Telefónica Venezolana covered the cost of the bribes by purchasing equipment from the suppliers at inflated prices. The company ultimately secured more than \$110 million at the auction, or more than 65% of the awarded funds, prosecutors said.

The settlement

Prosecutors have agreed to dismiss the bribery charges against Telefónica Venezolana if it continues cooperating and takes steps to improve its compliance programs, in what is known as a deferred prosecution agreement.

The Justice Department in a statement credited the company for making employees based outside the U.S. available for interviews, and disciplining employees involved in the misconduct. The company also built out an independent compliance function and appointed a chief compliance officer with direct access to the audit committee of its board, prosecutors said.

But the department said Telefónica Venezolana failed early on in the investigation to turn over certain records and important information prosecutors needed.

Prosecutors also pointed to the company's past record of misconduct.

Telefónica's Brazilian subsidiary in 2019 agreed to pay a \$4.1 million fine to the U.S. Securities and Exchange Commission over civil violations of the FCPA.

Write to Dylan Tokar at dylan.tokar@wsj.com

Telefónica Venezolana Resolves \$85 Million Enforcement Action

 fcpprofessor.com/telefonica-venezolana-resolves-85-million-enforcement-action

November 11, 2024

Approximately ten years ago, a Venezuelan telecommunications company (a wholly-owned subsidiary of a Spanish telecommunications) allegedly bribed Venezuelan officials.

The end result is a \$85 million U.S. Foreign Corrupt Practices Act enforcement action against the Venezuelan telecommunications company.

The DOJ recently announced that “Telefónica Venezolana C.A. (Telefónica Venezolana), a Venezuela-based subsidiary of Telefónica S.A. (Telefónica), a publicly traded global telecommunications operator based in Spain, will pay over \$85.2 million to resolve an investigation by the Justice Department into a scheme to bribe government officials in Venezuela to receive preferential access to U.S. dollars in a currency auction.

The root cause of many FCPA enforcement is a real-world business condition and in this regard the following is relevant to the Telefónica Venezolana enforcement action.

Telefónica Venezolana wanted to buy equipment from two Venezuelan subsidiaries of multinational telecommunications equipment and systems companies. However, those companies did not accept payment from Telefónica Venezolana in bolivars and instead required payment in stable currencies such as the U.S. dollar.

Problem was, Telefónica Venezolana “overwhelmingly collected payments from its customers in bolivars and developed significant bolivar reserves” but “due to strict currency controls ... Telefónica Venezolana was unable to exchange its bolivar reserves for stable currencies.”

The Venezuelan government began to sponsor currency exchanges (or auctions) that allowed domestic companies in critical industries to apply to exchange Venezuelan bolivars for U.S. dollars at favorable rates and in significant quantities to enable domestic companies to import the necessary goods and equipment from suppliers that would not accept payment in Venezuelan bolivars.

In 2014, the Venezuelan government held a national currency exchange auction specifically for the telecommunications industry administered through the Central Bank of Venezuela called Sistema Complementario de Administracion de Divisas (SICAD). As alleged by the DOJ, “although called an “auction” SICAD was in fact a selective government program

through which the Venezuelan government chose: (i) which companies would receive access to foreign currency at favorable exchange rates; (ii) for which purposes or goods; and (iii) if awarded, how much currency a company would be permitted to exchange.

The stage is now set for the rest of the story.

Under the heading “Overview of the Bribery Scheme,” the DOJ alleges:

“During the Relevant Period [2014-2015], Telefónica Venezolana, through certain of its officers, employees, and agents, and while acting as an agent of Telefónica, together with its co-conspirators, knowingly and willfully conspired and agreed with others to corruptly provide payments to, and for the benefit of, foreign officials in Venezuela, including Foreign Official 1 and Foreign Official 2, to secure an improper advantage and to influence those foreign officials in order to obtain and retain business by receiving preferential access to U.S. dollars in a government-sponsored currency auction that allowed Telefónica Venezolana to purchase equipment for its telecommunications network.”

Foreign Official’s 1 and 2 are both described as Venezuelan nationals “who served as a high-ranking Venezuelan government official.”

“Specifically, in or around 2014, Telefónica Venezolana participated in a currency auction in Venezuela that allowed Telefónica Venezolana to exchange Venezuelan bolivars for U.S. dollars. To ensure its success in the action, Telefónica Venezolana recruited two suppliers, Company A [a wholly-owned Venezuelan subsidiary of a multinational telecommunications equipment and systems company] and Company B [a wholly-owned Venezuelan subsidiary of another multinational telecommunications equipment and systems company], to make approximately \$28,870,099 in corrupt payments to Intermediary 1 [a Venezuelan national] and Shell Company 1 [a company incorporated in Panama owned and controlled by Intermediary 1] that were intended, at least in part, to benefit Venezuelan government officials, including Foreign Official 1 and Foreign Official 2. To conceal the bribe payments, Telefónica Venezolana covered the cost of the bribes by agreeing to purchase equipment from Company A and Company B at inflated prices, using the U.S. currency obtained in the auction.

Telefónica Venezolana knew that a significant portion of the approximately \$28,870,099 would be paid as a ‘commission’ that was intended, at least in part, for the benefit of Venezuelan government officials to influence the results of the currency auction. As a result of its corrupt payments, Telefónica Venezolana was permitted to exchange and subsequently received over \$110 million through the currency auction, which it used to purchase equipment from Company A and Company B.

In furtherance of the scheme, Telefónica Venezolana, together with others, utilized and caused the use of means and instrumentalities of interstate commerce to communicate with each other and other individuals regarding the scheme. The conspirators also routed corrupt payments totaling more than \$22 million into and out of correspondent bank accounts at financial institutions in New York, New York.

In total, in or around August 2014, the Venezuelan government awarded approximately \$172,046,000 to 16 telecommunication companies as part of the currency auction. Between the two bids it corruptly orchestrated, Telefónica Venezolana received approximately 65% of the total currency awarded in the auction. Telefónica Venezolana was able to deploy those funds (less the \$28,870,099 paid to Intermediary 1 through Shell Company 1) to buy network equipment from Company A and Company B and thereby continue providing telecommunications services to customers in Venezuela.”

According to the DOJ, shortly before the SICAD auction was publicly announced Executive 1 (a senior executive of Telefonica Venezolana) “was summoned to an impromptu meeting” with, among others Foreign Official 1 and Foreign Official 2 who informed Executive 1 that if Telefónica Venezolana would only be awarded U.S. dollars through the auction if it paid a commission on any funds awarded, implying that the commission would personally benefit Foreign Official 1 and Foreign Official 2.

Based on the above allegations, the DOJ charged Telefónica Venezolana with conspiracy to violate the FCPA's anti-bribery provisions.

The criminal charge was resolved through a three year deferred prosecution agreement which sets forth the following relevant considerations.

- “a. the nature and seriousness of the offense conduct ... including the Company’s participation in a corrupt bribery scheme to obtain U.S. dollars through a government-run currency exchange program in Venezuela;
- b. the Company did not receive voluntary disclosure credit ... because it did not voluntarily and timely disclose;
- c. the Company received credit for its cooperation because it cooperated with the investigation and demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct; the Company also received credit for its cooperation and remediation [for among other things]: (i) making regular factual presentations to the [DOJ] based on the information learned in the course of the Company’s internal investigation; (ii) voluntarily making employees based outside the United States available for interviews in the U.S.; (iii) producing a significant number of documents ... while navigating foreign data privacy and related laws; (iv) collecting, analyzing, and organizing voluminous evidence and information for [the DOJ] accompanied by translations of documents; however, in the initial phase of the government’s investigation, the Company failed to timely identify, collect, produce, and disclose certain records and important information, which affected investigative efforts by the DOJ and reduced the impact of the Company’s cooperation.
- d. the Company provided to the DOJ all relevant facts known to it ... including information about the individuals involved in the conduct ...
- e. the Company also received credit ... because the Company and Telefónica engaged in timely remedial measures, including (i) disciplining certain employees involved in the relevant misconduct or that were otherwise made aware of the misconduct, including terminating employees; (ii) strengthening its anti-corruption compliance program by building and empowering an independent compliance function, appointing a Chief Compliance Officer with direct access to the Audit Committee of the Board of Directors, and investing in additional compliance resources throughout its global operations; (iii) overhauling its review and approval process for transaction with non-standard pricing, including by ensuring that the compliance function reviews all such transactions globally; (iv) reviewing, enhancing, and testing its broader internal controls for pricing and other transactions with the assistance of a foreign accounting firm; (v) strengthening processes for vetting, engaging, and monitoring third parties, including implementing additional controls concerning payments to third parties through a propriety software tool; and (vi) establishing risk assessment and audit processes to regularly review and upgrade the compliance program and otherwise mitigate business risks; and

- f. Telefónica has committed to continuing to enhance its compliance program and internal controls, including ensuring that its compliance program satisfies the minimum elements set forth in Attachment C to this agreement.
- g. Based on the Company's and Telefónica's remediation and the state of Telefónica's compliance program, and the Company's and Telefónica's agreements to report to the DOJ as set forth in Attachment D ... the DOJ has determined that an independent monitor was unnecessary;
- h. the Company and Telefónica have no prior criminal history;
- i. the Company and Telefonica have limited civil or regulatory enforcement matters, namely, a subsidiary of Telefonica, Telefonica Brasil S.A. resolved, without admitting or denying the charges, an action brought by the SEC in 2019 for alleged violations of the accounting provisions of the FCPA, in connection with hospitality provided to government officials for sporting events in Brazil in 2013 and 2014;
- j. the Company and Telefonica have agreed to continue to cooperate with the DOJ:
- k. accordingly ... the DOJ has determined that the appropriate resolution of this case is a deferred prosecution agreement and a criminal penalty of \$85,260,000, which reflects a discount of 20 percent off the 5th percentile of the otherwise-applicable Sentencing Guidelines fine range."

The DPA sets forth a fine range of \$101.5 million to \$203 million.

In the DOJ release, Principal Deputy Assistant Attorney General Nicole Argentieri stated:

"Telefónica Venezolana bribed Venezuelan government officials to participate in a government auction through which it exchanged Venezuelan bolivars for U.S. dollars. The company concealed the illicit payments by purchasing equipment at inflated prices from two suppliers who paid the bribes on the company's behalf. Telefónica Venezolana chose to support a corrupt regime to circumvent the difficulties of conducting legal business in Venezuela. This resolution is yet another example of the Justice Department's commitment to fight corruption and hold companies accountable for their criminal conduct."

U.S. Attorney Damian Williams for the Southern District of New York stated:

“Telefónica Venezolana, a subsidiary and agent of a U.S. issuer, agreed to line the pockets of corrupt Venezuelan officials to gain access to U.S. currency and maintain its position in the Venezuelan telecommunications market. Intermediaries then funneled the bribe payments through U.S. correspondent bank accounts. This office will not tolerate the use and abuse of the U.S. financial system to enrich corrupt foreign officials and those who maintain their market position by appeasing them.”

Executive Special Agent in Charge Kareem Carter of the IRS-Criminal Investigation Washington Field Office stated:

“This case is an example of the IRS Criminal Investigation (IRS-CI)’s and our law enforcement partners’ relentless effort to fight corruption and protect United States interests. We are committed to pursuing investigations into corporate fraud in an effort to protect consumers from bearing the costs associated with criminal activity.”

Executive Associate Director Katrina Berger of Homeland Security Investigations (HSI) stated:

“Telefónica Venezolana engaged in a complex and criminal financial fraud scheme, in which they bribed Venezuelan government officials to obtain access to U.S. dollars. Thanks to the cooperative efforts of HSI, IRS-CI, and the Justice Department, the perpetrators of this conspiracy will be forced to pay for their illicit actions. HSI will continue to collaborate with our law enforcement partners, at home and overseas, to investigate and bring to justice any corporations engaging in such financial crimes.”

DLA Piper attorneys Berge Setrakian and Eric Christofferson represented Telefonica.



Elevate Your FCPA Research

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Elevate Your Research

Imprisoned ex-Ohio House Speaker Larry Householder to ask Donald Trump for clemency, campaign attorney says

cleveland.com/news/2024/11/larry-householder-imprisoned-ex-ohio-house-speaker-to-ask-donald-trump-for-clemency-campaign-attorney-says.html

November 11, 2024

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- |Published: Nov. 11, 2024, 10:34 a.m.



Former Ohio House Speaker Larry Householder, center, walks into Potter Stewart U.S. Courthouse with his attorneys, Mark Marein, left, and Steven Bradley, right, before jury selection in his federal trial, Friday, Jan. 20, 2023, in Cincinnati. (AP Photo/Joshua A. Bickel)AP

By

Jeremy Pelzer, cleveland.com

COLUMBUS, Ohio—Ex-Ohio House Speaker Larry Householder, who's serving a 20-year prison sentence for overseeing the largest bribery scandal in Ohio history, is preparing to ask President-elect Donald Trump for clemency, according to his campaign's attorney.

Householder, a Perry County Republican, is planning to submit an official pardon application to the U.S. Justice Department at some point closer to Trump's inauguration on Jan. 20, 2025, according to the attorney, Scott Pullins.

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"We will also be working to build support and communicate with the President and his team," Pullins stated in a message. Pullins is not a member of Householder's criminal defense team; rather, he's advised Householder about legal and political matters over the years and represented him in some state elections cases.

Mark Marein, one of Trump's criminal defense attorneys, declined comment.



Stories by Jeremy Pelzer

U.S. presidents have the power to offer two kinds of executive clemency for federal crimes: a presidential pardon, and commuting a prison sentence. Either would result in Householder being immediately released from prison.

A pardon would fully restore Householder's civil rights, including his ability to vote and run for public office again.

Pardons are generally issued after convicts are released from prison, though they don't have to be -- Trump, for example, pardoned Joe Arpaio, the former sheriff of Maricopa County, Arizona, two months after his conviction for defying a judicial order to stop traffic patrols targeting undocumented immigrants.

When someone applies for a presidential pardon, the U.S. Justice Department conducts an investigation and decides whether to recommend that it be granted.

Justice Department advisory rules normally require people serving a federal prison sentence to wait until at least five years after their release to apply for a pardon. However, Pullins stated that Householder will ask for a waiver of the Justice Department's waiting period -- which applicants can do, though it is "is rarely granted and then only in the most exceptional circumstances," according to the Justice Department's presidential pardon application.

Householder could also apply for Trump to commute his sentence -- which would reduce his time behind bars but keep his felony racketeering conviction on the books.

Asked whether Householder will ask Trump for a pardon or to commute his sentence, Pullins replied, "We will take whatever we can get."

“We are pursuing all legal avenues to bring Speaker Householder home,” Pullins stated.

Last year, Householder was convicted by a federal jury of leading a scheme to use \$60 million in bribes from FirstEnergy to help pass and maintain House Bill 6, a 2019 energy law that offered the Akron-based utility a windfall of financial perks – headlined by a \$1 billion-plus bailout of two Ohio nuclear power plants owned at the time by a company subsidiary.

Householder, who has maintained his innocence, has appealed the conviction, claiming – among many other things -- that the judge was biased and the jury was given faulty instructions.

Householder, 65, is currently serving his sentence at a low-security federal prison in Elkton, Ohio.

While Householder was prosecuted at trial by the office of U.S. Attorney Kenneth Parker, an appointee of Democratic President Joe Biden, the House Bill 6 corruption investigation was launched under Parker’s predecessor, Trump appointee David DeVillers.

DeVillers declined comment Monday on Householder’s presidential clemency request. The Plain Dealer/Cleveland.com reached out to Parker’s office.

Householder was one of the first and most prominent Ohio supporters of Trump’s first presidential campaign in 2016, when most Republicans backed then-Gov. John Kasich’s GOP presidential run.

As president, Trump took action to release several convicted politicians from both parties, including pardoning former U.S. Rep. Duncan Hunter , a California Republican convicted of violating campaign-finance law.

Trump also commuted the prison sentences of, among others, ex-Illinois Gov. Rod Blagojevich and former Detroit Mayor Kwame Kilpatrick (both Democrats), as well as Republican ex-U.S. Reps. Duke Cunningham of California, Rick Renzi of Arizona, and Robin Hayes of North Carolina.

Jeremy Pelzer covers state politics and policy for Cleveland.com and The Plain Dealer.

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Trump Will Bury ESG, But It Was Already Dead

Published: Mon Nov 11 00:06:13 EST 2024

By John Authers

(Bloomberg Opinion) --

ESG will end with a whimper, not a bang.

Photographer: Kamil Krzaczynski/AFP/Getty Images

To get John Authers' newsletter delivered directly to your inbox, sign up here.

Today's Points:

- In one of the ultimate Trump Trades, Bitcoin topped \$80,000 for the first time — more analysis on that as the week goes on.
- ESG is about to be buried; in the US, at least, it's fair to say it was already dead.
- China still hasn't nailed how it digs out from its real estate debt crisis, or responds to Trump 2.0 tariffs.
- AND: Rest in Peace, Quincy Jones, a songwriter and producer who was not at all bad.

Ever So Gone

As was obvious even before voters went to the polls, ESG was already a decisive loser in the US. The concept of Environmental, Social and Governance investing became hopelessly entangled with the culture war agenda, failed to deliver on its promises, and went into retreat. Rather than attempt a technocratic, clean, green way of changing capitalism, America has opted for something more nationalist, even mercantilist.

ESG as a term has been demonized by politicians on the right, to the point that BlackRock's Larry Fink said that it had been "weaponized" and should no longer be used. Because of Fink's stand on ESG issues, BlackRock has become a lightning rod for conservative attacks lumped in with identity politics. Startlingly, the company shows up in a list of "decadent and rootless" institutions that should be burned to the ground in a new book by Kevin Roberts, the head of the Heritage Foundation, a distinction it bizarrely shares with the Boy Scouts of America and the Chinese Communist Party.

Supporters of the concept were already disillusioned that ESG had become little more than a

marketing wheeze, and several big fund managers, including WisdomTree and Invesco, have faced fines in the US for “greenwashing” (claiming their products were greener than they really were). In France, BlackRock is under fire over allegations that 18 of its funds sold as sustainable are in fact investing in fossil fuels.

Regulator attitudes differ starkly across the Atlantic. In Europe, regulators have raised the ante by telling fund managers that they must reach minimum thresholds for environmental impact before they can use the ESG label — a move that makes it hard for them to keep investing in the US, where the best returns are, and requires them to become more active than is currently the case for many.

In the US, the Securities and Exchange Commission has watered down its requirements on companies to disclose ESG statistics — and the whole concept is close to unworkable unless everyone has to disclose standardized statistics. In September, it quietly disbanded its task force on ESG enforcement. Now, the Trump administration is likely to make dismantling such rules one of its first acts in office.

That will complete a retreat that has largely already taken place. A look at the total market cap of BlackRock’s flagship ETFs covering the global energy and clean energy sectors shows that after a boom in 2021, the clean energy fund has steadily dwindled, and is now worth slightly less than the main energy fund:

Much of this is driven by the declining share prices of clean energy stocks. However, if we look at the number of shares in the ETF, it’s clear that there were huge inflows during the pandemic, and much of that money has now been withdrawn. Investors are losing interest in the concept (and claims that ESG would reduce global warming, or starve fossil fuel groups of capital, look overblown):

Interest among the public has waned in the US — although not elsewhere. Google Trends shows that US searches for ESG and its synonyms tanked over the last two years, while continuing at much the same level elsewhere. The rest of the world still seems happy to give it a try, but America is no longer going along for the ride:

The pattern recurs in the news media. Counting stories published on the Bloomberg terminal from all sources shows interest peaking in 2016, when Donald Trump was first elected, and long before the flow of money went into reverse. By the time that Fink said ESG had been “weaponized,” interest was barely a third its 2016 level and has continued to dwindle:

Critically from the point of view of how capitalism is operating, the same pattern shows up in earnings call transcripts. Bloomberg’s Document Search function shows that executives — not just Larry Fink — no longer want to talk about it. This is our quarter-by-quarter measure of mentions of ESG and its various synonyms since 2010. Mentions exploded after the pandemic, and have tumbled since 2022.

With this earning season roughly 90% over, interest from executives in ESG looks to be right back to pre-pandemic levels:

This is at least in part because fund managers are no longer forcing the issue. BlackRock is admirably transparent about the way it votes its shares, and produces regular reports; here is the latest. As this chart from the report (which is worth a read) demonstrates, the amount of support from shareholders for environmental and social proposals has declined markedly over the last three years:

BlackRock itself upped its support for corporate governance proposals, but only backed 4% of social and environmental proposals (down from 20% two years earlier). It also declined to support any of the various anti-ESG proposals that were put forward, and complained that many of them were duplicative or poorly drafted. But the notion that ESG was going to change the way companies operate seems to be in retreat.

Once Trump is back in the White House in January, we'll learn much more about how his economic nationalism will work. Fine-tuning capitalism to make it more long-termist and take into account more than the narrowly defined interests of shareholders — the big ESG idea — has been comprehensively defeated. Now we wait to see what version of mercantilism comes in its stead.

Waiting for China's Next Move

For another sphere where the US election ratified a change that had already happened, look to China. Its exports to the US surged for many years, briefly interrupted by recessions. The Trump tariffs brought the biggest overall decline in imports from China since Beijing joined the World Trade Organization. Less recognized is that after a recovery, they have suffered just as big a decline in the last two years under Joe Biden. That's true whether we look at total imports from China, or in their share of all the goods entering the US. The end of Covid-Zero lockdowns two years ago had no impact on the decline.

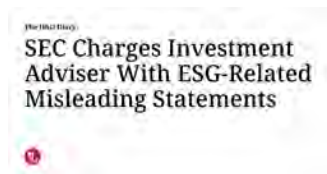
So while Trump's return is plainly bad news for China's policymakers, they already knew they faced the most difficult environment in a generation. That being so, it's surprising that their response remains unclear. China's National People's Congress held a five-day marathon meeting last week, and became the latest government body to attempt to bring clarity to economic recovery efforts. Like previous efforts, it hasn't really succeeded.

The messaging around China's "whatever it takes" moment in late September sounded at first like a bold return to capitalism, but what's followed has been the usual bureaucratic and multiple-layered decision-making process, testing investor resolve. The NPC is addressing local governments' humongous "hidden debt" — exacerbated by the housing sector's collapse. But the International Monetary Fund estimates it to be over 60 trillion yuan, far in excess of the 10 trillion yuan, or \$1.4

SEC Charges Investment Adviser With ESG-Related Misleading Statements

K [dandodiary.com/2024/11/articles/esg/sec-charges-investment-adviser-with-esg-related-misleading-statements](https://www.dandodiary.com/2024/11/articles/esg/sec-charges-investment-adviser-with-esg-related-misleading-statements)

November 11, 2024



By Kevin LaCroix on November 11, 2024

Posted in ESG



When it became public a few weeks ago that the SEC had disbanded its Climate and ESG Task Force, the SEC emphasized that it was not taking its eye off of ESG-related issues. In the latest example of the SEC's continuing ESG-related monitoring, late last week the ESG announced that it had settled charges against investment

adviser Invesco Advisers. The agency alleged that the company had made misleading statements about the percentage of company-wide assets under management that integrated ESG factors in investment decisions. In settling the charges, the company agreed to pay a \$17.5 million civil penalty. The SEC's November 8, 2024, press release about the charges and the settlement can be found [here](#). The SEC's November 8, 2024, cease-and-desist order in the matter can be found [here](#).

Background

Invesco is an Atlanta, Georgia-based registered investment adviser. It is an NYSE-listed company and has about \$746 billion assets under management (AUM). According to the SEC, in fall 2019, Invesco came to believe that incorporating environmental, social, and governance (ESG) considerations into its portfolio management was of "commercial importance." An internal study by senior ESG team members concluded that at least \$370 billion in AUM was at risk of moving to another firm, prompting Invesco to accelerate its "ESG integration" efforts.

Consistent with its effort to market its ESG capabilities, during the period April 2020 through July 2022, Invesco made representations to certain clients and prospective clients about the percentage of firmwide AUM at Invesco that was "ESG integrated." ESG also included the percentage of company-wide ESG-integrated AUM in its ESG Investment Stewardship

Reports, which described its “ESG integration” as including “ESG considerations as an influence in investment decision making.” The claimed percentage of AUM that the company claimed was ESG integrated varied from 70% to 94% during the period in question.

The SEC’s Charges

The SEC charged that these percentages were misleading because they counted Invesco’s passive ETF’s, which contained a substantial portion of Invesco’s AUM, as ESG integrated. Many of the ETFs, the SEC alleged, could not consider ESG factors in making investment decisions because they were guided by passive strategies that did not follow an ESG-related index.

The SEC also charged that Invesco had no comprehensive set of written policies and procedures concerning how Invesco would determine the percentage of firmwide AUM that was ESG integrated. The SEC alleged that Invesco lacked any written policy defining ESG integration.

In the agreed order, Invesco agreed that it would cease and desist from violating the pertinent provisions of the Investment Advisers Act of 1940 and the relevant rules thereunder. Invesco also agree to pay a \$17.5 million civil money penalty. Significantly, as least from my perspective, the SEC’s order also provided that “Invesco is censured.”

Discussion

Neither the SEC’s press release nor its cease-and-desist order uses the word, but this action would appear to be a clear case of so-called “greenwashing” – which according to one definition is “a deceptive marketing tactic where a company or organization misleads the public about its environmental impact.” In its press release, the SEC quoted an agency spokesperson as saying that Invesco saw “commercial value” in “claiming a high percentage of company-wide assets were ESG integrated. But saying it doesn’t make it so.” The spokesperson went on to say that “Companies should be straightforward with their clients and investors rather than seeking to capitalize on investing trends and buzzwords.”

At least during the time frame involved in the SEC’s action, Invesco had concluded that there was marketplace value in a certain kind of virtue-signaling. In order to try to establish and burnish its ESG credentials, and obviously as a way to preserve and even grow its assets under management, Invesco allegedly overstated its case. Overstating ESG credentials for perceived commercial advantage would look to be a prime example of “greenwashing.”

This action underscores the fact that just because the agency has disbanded its Climate and ESG Task Force, the agency is not out of the business of policing ESG-related issues, including with respect to companies’ overstatement of their ESG credentials. Indeed, this action against Invesco comes closely on the heels of the action late last month (discussed

here) in which the agency filed settled charges against investment advisor WisdomTree Asset Management. The agency had alleged that WisdomTree had based on alleged misstatements and compliance failures relating to the firm's execution of its ESG investment strategy.

The size of the penalty Invesco agreed to pay — \$17.5 million— is noteworthy. This is a not insubstantial amount (by way of comparison, WisdomTree agreed to pay a \$5 million penalty). In addition, as I noted above, the agency censured Invesco, which in my mind is a strong step to take against a publicly traded company. The penalty and the censure together, to me at least, appear intended to send a message that it is both focused on ESG-related representations and taking alleged misrepresentations about ESG seriously.

This action, together with the prior WisdomTree action, clearly show that even though the agency has disbanded the ESG Task Force, it has not taken its eye off ESG-related issues.

All of these observations take on an interesting light in consideration of the outcome of last week's Presidential election. On the one hand, the alleged misconduct at the heart of these recent actions do involve alleged misrepresentations to consumers, which is of course the kind of thing that is at the heart of the SEC's mission. Even under a second Trump administration, these fundamental aspects of the agency's mission are not going to go away. However, you do have to wonder whether in the new administration certain kinds of issues — say, for example, ESG-related issues — might be deemphasized or even passed over in favor of other concerns. One of the many things we can look forward to watching with the advent of the new administration.

Bitcoin surge triggers billions in losses for crypto short traders after Trump win

 [reuters.com/technology/bitcoin-surge-triggers-billions-losses-crypto-short-traders-after-trump-win-2024-11-11](https://www.reuters.com/technology/bitcoin-surge-triggers-billions-losses-crypto-short-traders-after-trump-win-2024-11-11)

Shashwat Chauhan

By Shashwat Chauhan

November 11, 2024 6:29 AM PST Updated 4 hours ago

[1/2] Representations of bitcoin are seen in this illustration picture taken in Paris, France, March 9, 2024. REUTERS/Benoit Tessier/Illustration/File Photo Purchase Licensing Rights [↗](#), opens new tab

Nov 11 (Reuters) - Short sellers of cryptocurrency and blockchain-related stocks have suffered heavy losses since Nov. 6, after bitcoin surged to record highs, on optimism U.S. President-elect Donald Trump would implement a more favorable regulatory framework.

Crypto short trades looked set for a further hammering on Monday as most cryptocurrency-related stocks jumped in U.S. premarket trading. Among them, Coinbase was last up close to 16%, tracking the surge in bitcoin prices.

Traders who bet against MicroStrategy (MSTR.O) [↗](#), opens new tab, one of bitcoin's biggest corporate backers, lost more than \$1.2 billion between Nov. 6 and Nov. 8, according to data analytics firm Ortex, and are down more than \$6 billion so far this year.

Combined short-selling losses on crypto-exchange operator Coinbase Global (COIN.O) [↗](#), opens new tab, crypto miners Riot Platforms (RIOT.O) [↗](#), opens new tab and MARA Holdings (MARA.O) [↗](#), opens new tab, and blockchain-farm operator Bitfarms were about \$1.2 billion, as of the Nov. 8 close.

Bitcoin, the world's largest cryptocurrency, soared to a record high above \$82,000 on Monday, with a nearly 19% jump since Nov. 6, when Republican candidate Trump reclaimed the presidency after defeating Vice President Kamala Harris.

"Bitcoin speculators are betting on a more clement regulatory environment and have expectations that the authorities may build up a reserve crypto fund, helping lift ongoing demand," said Susannah Streeter, head of money and markets at Hargreaves Lansdown.

Investors betting against iShares Bitcoin Trust exchange-traded funds (IBIT.O) [↗](#), opens new tab, the world's largest ETF in terms of assets under management, lost close to \$37 million since Nov. 6.

Trump embraced digital assets during his campaign, promising to accumulate a national stockpile of bitcoin and make the United States the "crypto capital of the planet".

Reporting by Shashwat Chauhan in Bengaluru; Editing by Pooja Desai



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Meet The Attys Arguing Nvidia Securities Case At High Court

By **Jessica Corso**

Law360 (November 8, 2024, 8:49 PM EST) -- Two former BigLaw colleagues and a onetime Consumer Financial Protection Bureau litigator are set to appear before the U.S. Supreme Court on Wednesday to argue a closely watched case that could change the pleading standards shareholders have to meet to sue companies like Nvidia Corp.

The case, which centers on investors' claims about the degree to which Nvidia's bottom line was tied to the volatile cryptocurrency industry, gives the high court a chance to review pleading standards under the Private Securities Litigation Reform Act.

In particular, Nvidia petitioned the Supreme Court to take up the case to clarify if the statute requires investors to point to internal documents that CEO Jensen Huang allegedly reviewed that would demonstrate he knew the company was selling much of its key product to crypto miners.

The proposed class of investors, led by Swedish asset management company Öhman Fonder, say the company's stock price fell in 2018 when it announced that Nvidia was slashing its revenue projections due to the struggling crypto markets.

The company argues that investors cannot simply rely on the testimony of former employees or a report submitted by an outside expert to make their case that Huang should have known about the sales.

Nvidia appealed to the Supreme Court after the Ninth Circuit revived the lawsuit **in a split decision**, with the majority ruling that a pair of outside expert reports coupled with information provided by several former employees demonstrated that Huang may have known about the company's reliance on the crypto industry while publicly downplaying the same.

Suing shareholders have won the support of the U.S. government, which was **given the green light** to participate in oral arguments. The government said the evidence of fraud presented by the suing investors was strong and that the PSLRA's high pleading standards "are not intended to weed out every suit that might ultimately fail on the merits."

Wednesday's arguments will be heard **just one week** after Meta Platforms Inc. brought another securities suit — originating, again, out of the Ninth Circuit — before the justices. That case, which grew out of the Cambridge Analytica data harvesting scandal, deals with the types of disclosures companies must make when discussing business risks with investors.

All three parties arguing next week's case — Nvidia, its investors and the government — have chosen Supreme Court regulars to argue on their behalf.

For Nvidia: Neal Katyal of Hogan Lovells

Former acting U.S. Solicitor General Neal Katyal is no stranger to the Supreme Court, having argued 51 cases before the justices. According to his Hogan Lovells' biography, that's more than any minority attorney ever, including the late Justice Thurgood Marshall.

Katyal's most recent appearance before the justices was on behalf of former New York Financial Services Superintendent Maria T. Vullo, who is being sued by the National Rifle Association over

allegations she coerced financial services institutions to cut ties with the gun rights group. The Supreme Court allowed the NRA **to move forward** with its First Amendment Claims in a unanimous ruling in May.

During the court's 2022-2023 term, Katyal **argued five cases** before the Supreme Court and won three. One of those wins was on behalf of crypto trading platform Coinbase Inc., with the justices **ruling** the company did not have to move forward with discovery in a California district court as it fought to move a customer dispute into arbitration.

In 2018, Katyal **appeared before the justices** to argue another securities class action case on behalf of telecommunications company Cyan Inc. The Supreme Court ruled against Cyan, finding investors could **continue to file class actions** in state court under the federal Securities Act of 1933.

While the number of federal securities class actions filed in state court increased following the Cyan decision, they began falling in 2020 after the Delaware Supreme Court upheld the use of federal forum-selection clauses by corporations, according to consulting firm Cornerstone Research.

For investors: Deepak Gupta of Gupta Wessler LLP

The law firms of Kessler Topaz Meltzer & Check LLP and Bernstein Litowitz Berger & Grossmann LLP, which are leading the case against Nvidia in the district court, brought frequent Supreme Court litigator Deepak Gupta onboard to argue their case before the justices.

Gupta founded Gupta Wessler LLP in 2012 after leaving the CFPB, where he was senior counsel for enforcement strategy and launched the agency's amicus program in its early days.

According to the Gupta Wessler website, Gupta and his firm's attorneys have argued 16 cases before the Supreme Court.

The firm was founded to serve as a "counterweight to the corporate dominance of the Supreme Court and appellate bar," according to its website.

In 2021, Gupta **argued and won** a case on behalf of consumers fighting to keep their product liability case against Ford Motor Co. in Montana and Minnesota, where Ford claimed there was no jurisdiction over it.

Gupta's first argument before the Supreme Court came in 2010 when he worked for the left-leaning advocacy group Public Citizen.

In that matter, he argued a case on behalf of consumers seeking to file a class action lawsuit against AT&T for allegedly deceiving them by offering free phones that were not free. However, **the justices ruled** in **AT&T Mobility LLC v. Concepcion**  that an arbitration agreement signed by the customers invalidated their class claims.

For the government: Colleen Roh Sinzdak, U.S. Solicitor General's Office

Colleen Roh Sinzdak **was Katyal's colleague** at Hogan Lovells before joining the solicitor general's office in 2019, according to her LinkedIn profile.

While at the firm, she argued a high court case that **led to a ruling** allowing a Fort Bend County, Texas, worker to proceed with a discrimination suit without first going through a regulator like the U.S. Equal Employment Opportunity Commission. Sinzdak argued on behalf of Fort Bend, and Katyal also worked on the lawsuit.

Sinzdak has already **argued one case**, **Bouarfa v. Mayorkas** , before the court this term, seeking to win the justices over to the view that the U.S. Department of Homeland Security has the right to revoke visa petitions without judicial review.

During the court's last term, she argued and lost an appeal over a federal bribery law frequently used in corruption cases, with the conservative majority **ruling** in **Snyder v. U.S.**  that officials accepting

gifts for actions they already took were not committing a crime.

--Editing by Jay Jackson Jr. and Drashti Mehta.

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Insurer Ignored Sex Harassment And Rampant Fraud, Suit Says

By **Sydney Price**

Law360 (November 8, 2024, 9:23 PM EST) -- Executives and directors of life insurance company Globe Life Inc. have been hit with a shareholder derivative suit in Texas federal court alleging they had been ignoring a culture of sexual harassment among its employees and participating in fraudulent underwriting practices.

According to shareholder Jui Cheng Hsiao's suit filed Thursday, Globe Life reported inflated profitability metrics for at least four years as its largest subsidiary — American Income Life Insurance Co. — engaged in insurance and recruiting fraud. At the same time, the subsidiary was permitting a culture of unchecked sexual harassment, the suit alleges.

A short-seller report published in April revealed that Globe Life subsidiaries maintained a hostile workplace where sexual harassment, drug use and sexual assault went unaddressed, the suit states. The report also revealed that Globe Life's subsidiaries were adding policies to existing users' accounts without their consent by, in some cases, forging signatures, according to the suit.

In addition to nominal defendant Globe Life, the suit's individual defendants include current co-CEOs Frank M. Svoboda and James Matthew Darden, former CEOs Gary L. Coleman and Larry M. Hutchison, Chief Accounting Officer M. Shane Henrie, Chief Financial Officer Thomas P. Kalmbach, and several directors.

The suit alleges that between May 2019 and April 2024, Globe Life substantially modified how compensation was paid to its agents. Among other things, it began paying out commission bonuses in agents' paychecks immediately after an insurance policy was sold, according to the suit.

"Additionally, Globe Life implemented a clawback policy, pursuant to which agents were required to reimburse the company for any bonuses received in connection with policies canceled within a certain number of months," the suit said.

During that five-year period, the individual defendants caused Globe Life to make false and misleading filings with the U.S. Securities and Exchange Commission that claimed AIL was driving revenue increases, the suit alleges.

On a Feb. 8, 2024, investor call, Darden addressed articles related to litigation pending AIL, which described a "tawdry, drug-fueled, violent world." He told investors that the company employed a third party to conduct "an impartial and thorough investigation." These comments, however, did not fully reveal the extent of the issues within the company, the suit alleges.

A couple of months later, on April 11, short-seller Fuzzy Panda published its report with allegations about the hostile work environments at Globe Life and its subsidiaries and the company's fraudulent underwriting activities.

The report also alleged Globe Life could qualify "in the eyes of many state regulators and the Federal Trade Commission" as an illegal multilevel marketing scheme.

Following the report's publication, shares of Globe Life declined by \$55.76, or 53%, to close at \$49.17 on April 11, according to the complaint.

The complaint also notes Globe Life is facing a securities class action in Texas federal court and says the company has already been damaged financially due to the defendants' actions.

Counsel for Hsiao and a representative of Globe Life did not immediately respond to requests for comment Friday.

Hsiao is represented by Stuart L. Cochran of Condon Tobin Sladek Thornton Nerenberg PLLC, Phillip Kim and Erica Stone of The Rosen Law Firm PA and Benjamin I. Sachs-Michaels, Robert V. Prongay and Pavithra Rajesh of Glancy Prongay & Murray LLP.

Counsel information for Globe Life and the individual defendants was not immediately available Friday.

The case is Hsiao v. Globe Life Inc. f/k/a Torchmark Corporation et al., case number 4:24-cv-00993, in the U.S. District Court for the Eastern District of Texas.

--Editing by Janice Carter Brown.

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Chancery Rejects \$2.4M Fee Request In 'Poison Pill' Case

By **Jeff Montgomery**

Law360 (November 8, 2024, 3:37 PM EST) -- Cautioning that class attorneys in virtual lookalike settlements shouldn't expect to match big, early fee awards, a Delaware vice chancellor on Friday approved a \$300,000 attorney fee — downsized from a \$2.4 million request — for those who secured a company agreement to scuttle an overreaching shareholder rights "poison pill."

Vice Chancellor Paul A. Fioravanti Jr. made the point in ruling on a settlement and "mootness" fee-only resolution in a suit filed to block nuclear-fuel supplier Centrus Energy Corp. from maintaining a hair-trigger pill — which had been represented as designed to protect tax-advantaged net-operating loss claims.

Attorneys representing Centrus stockholders argued the pill in reality was designed to entrench incumbent managers and directors faced with shareholder activism, a class assertion that has gotten traction with the court in previous cases.

Vice Chancellor Fioravanti observed that Bernstein Litowitz Berger & Grossmann LLP, Fields Krupka & Shukorov LLP and RM Law PC booked only 87 hours on the quickly settled case, listing a string of similar cases that secured far smaller fees. Centrus attorneys, who suggested a roughly \$130,000 fee, pointed to the same record.

"The plaintiff read the proverbial writing on the wall and reduced their ask to \$600,000," the vice chancellor said, noting he had awarded that amount in another recent case. Centrus had argued even that amount was "too rich" and called for a lower fee, roughly twice their reasonable-hour and reasonable-rate "lodestar."

The NOL-related mootness fee litigation appeared to have been adopted as a business model, the vice chancellor said, cautioning "the fact that counsel has related the same theory" in multiple cases must be considered in mootness fee decisions.

"For the benefit of others who might seek a mootness fee" under similar circumstances, the vice chancellor said, "they should not have any illusion that \$300,000 will be the award."

Neither side argued the issue during the hearing, and counsel for the class said there was no comment afterward.

Poison-pill defenses surged during the COVID-19 pandemic, when market disruptions eroded stock prices and some companies, including The Williams Cos., moved to protect NOLs by doling out large numbers of fractional shares with full-share voting power — diluting existing voting clout. The provisions included a "hair trigger" allowing deployment if an entity or individual acquired more than 4.99% of the company's stock and posed a risk to the tax assets.

Critics noted that sprawling definitions of "beneficial" share ownership gave the NOL protections broad reach, based in part on terms that allowed companies to lump together or "daisy chain" percentages held by multiple stockholders if found to be subject to an "agreement, arrangement or understanding" regarding votes.

The aggregation presumption also included a "daisy chain" feature that allowed the company to assume links among stockholders who might be unaware of others in the alleged group, the suit said.

Although pills triggered by accumulations of 15% or more of a company's shares had become common, Williams went lower — with a 5% trigger and other restrictive features — in early 2020 amid concerns about a drop in its own share price and takeover risks.

Then-Vice Chancellor Kathaleen St. J. McCormick struck down the Williams pill in February 2021, months before her appointment as chancellor, in a ruling that found the company deployed "the nuclear weapon" of corporate governance in a disproportionate response to an unclear threat.

Stockholder George P. Assad and the proposed class are represented by Daniel E. Meyer, Jeroen van Kwawegen, Edward Timlin, Christopher J. Orrico, Thomas G. James and Shiva Mohan of Bernstein Litowitz Berger & Grossmann LLP, William J. Fields, Christopher J. Ku9pka and Samir Shukurov of Fields Kupka & Shukuirov LLP, and Richard A. Maniskas of RM Law PC.

Centrus Energy Corp., its directors and Computershare Trust Company NA are represented by Kevin R. Shannon, Jaclyn C. Levy and Christopher D. Renaud of Potter Anderson & Corroon LLP and Matthew W. Close and Abby F. Rudzin of O'Melveny & Myers LLP.

The case is George P. Assad Jr. et al. v. Mikel H. Williams et al., case number 2024-0426, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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NFT Buyers Drop OpenSea Suit In Face Of Arbitration Demand

By **Aislinn Keely**

Law360 (November 8, 2024, 7:07 PM EST) -- Users of nonfungible token platform OpenSea have dropped their proposed securities class action after the NFT marketplace held firm on its demand that the claims be arbitrated.

Anthony Shnayderman and Itai Bronshtein on Thursday voluntarily dismissed their securities claims against Ozone Networks, which does business as OpenSea. The decision came after OpenSea repeatedly asserted that it intended to compel the users to arbitrate their claims that the platform sold them unregistered securities.

The users previously asserted that recent court decisions and moves from the U.S. Securities and Exchange Commission indicated that the tokens they bought on OpenSea's platform implicate securities laws despite OpenSea's representations to the contrary.

After the users **brought the suit** in September, OpenSea said in an October motion to bifurcate briefing that its terms of use had clear clauses that entitled it to send all claims to an arbitrator — including whether the issues themselves belonged in arbitration. That filing said the firm intended to "promptly" move to compel arbitration and would appeal any denial, which would pause the case.

Counsel for the users, Adam Moskowitz of the Moskowitz Law Firm PLLC, said in an emailed statement to Law360 that "we had no choice but to dismiss the pending case."

According to Moskowitz, plaintiffs' "main goal" in filing the suit was to work with the NFT platform on creating a framework for a global marketplace to sell NFTs compliantly amid the changing political and regulatory landscape. Moskowitz said at the time of the filing that the users looked forward "to working with OpenSea to structure the best avenue and future process" for selling NFTs "in a well-regulated environment."

"They respectfully heard us but demanded we refile in arbitration and litigate only those federal issues for many months, and after millions of dollars in legal fees," Moskowitz said Friday.

While the merits of the case weren't necessarily in doubt, the hope of reaching a productive resolution that heightened protections for users no longer seemed feasible, Moskowitz said.

"We still think OpenSea could help, especially in supervising and monitoring NFTs traded on their own exchange, for which they directly profit," he said.

In a statement to Law360, OpenSea said it was pleased with the dismissal, reiterating that it believes the claims were "without merit."

"We're confident that OpenSea operates legally and that our users aren't trading securities when they buy or sell NFTs using our platform," said a spokesperson for OpenSea.

Shnayderman and Bronshtein initially told a Florida federal court that the NFTs they bought on OpenSea were effectively worthless, given their alleged status as unregistered securities. The users said the platform led them to believe it didn't list securities, but a subsequent **notice of potential enforcement** from the U.S. Securities and Exchange Commission against OpenSea, along with other court decisions allowing securities claims against NFT projects, said otherwise.

The so-called Wells notice "suggests that OpenSea is in the hot seat and may be found liable for facilitating the exchange of unregistered securities," the two users said in their initial suit. They argued this effectively breached the platform's end of an agreement to moderate the assets on its exchange to filter out securities.

For its part, OpenSea has repeatedly asserted that its platform doesn't host securities, but "creative goods" that are more like collectibles than stocks. It vowed to "stand up and fight" any forthcoming suit from the SEC when it disclosed that it had received a Wells notice.

It likewise condemned Shnayderman and Bronshtein's allegations, saying the users had conjured "from thin air a purported class action lawsuit based on our disclosure of an SEC Wells notice."

Moskowitz said his firm plans to continue its investigations into specific NFTs and other crypto projects that may have harmed customers.

"We will certainly continue to investigate how we can best help those victims of failed NFTs and other crypto products," he said.

The users are represented by Adam M. Moskowitz, Joseph M. Kaye and Howard M. Bushman of The Moskowitz Law Firm PLLC.

OpenSea is represented by Daniel Tramel Stabile, Athanasia Charmani and Gabriela Ana Plasencia of Winston & Strawn LLP.

The case is Shnayderman et al. v. Ozone Networks Inc., case number 1:24-cv-23616, in the U.S. District Court for the Southern District of Florida.

--Editing by Rich Mills.

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Shaq Reaches Settlement With Astrals NFT Buyers

By **Aislinn Keely**

Law360 (November 8, 2024, 7:49 PM EST) -- The mediator overseeing the dispute between buyers of the Astrals LLC nonfungible token project and basketball Hall of Famer and promoter Shaquille O'Neal told a Florida federal judge that the parties reached a settlement in their most recent session.

A mediator's report filed Thursday noted that all matters between O'Neal and the buyers were settled after an Oct. 22 Zoom mediation. The terms of the settlement were not yet public Friday, and the deal is still subject to court approval.

Plaintiff's counsel Adam Moskowitz of The Moskowitz Law Firm PLLC said in a statement to Law360 that the details will be filed next week.

"We are thankful to Shaq for agreeing to resolve this case and to Judge Moreno for moving the case along," said Moskowitz.

Counsel for O'Neal did not immediately respond to a request for comment.

The NFT buyers had previously accused the basketball star of violating securities laws by promoting Astral NFTs, assets connected to an online role-playing game O'Neal allegedly co-founded.

U.S. District Judge Federico Moreno had **trimmed** the buyers' complaint against O'Neal in August, finding that they hadn't shown the basketball star had controlled the project and that claims around certain NFT purchases before May 2022 were time-barred. However, it permitted claims that O'Neal was a "seller" of the tokens sold after the May 2022 date to move forward and found the buyers had adequately shown the NFTs met the characteristics of securities.

A proposed class led by Daniel Harper **filed the suit** in May 2023, serving O'Neal with the suit while he worked as a commentator a Miami Heat play-off game, Moskowitz said at the time of filing. The suit accused O'Neal specifically of targeting Florida residents in his promotion of the Astrals Project, and levied his work as a promoter of collapsed crypto exchange FTX to hype both projects. O'Neal should have known that the NFTs and his promotional efforts implicated securities laws, the buyers argued.

O'Neal **urged** the court to toss the suit in July, telling the Florida district court that the tokens "were intended for and marketed to gamers, not investors," and didn't otherwise meet the definition of investment contracts. He also argued the complaint "exaggerated" his relationship to the project and its promotion.

The parties first met for mediation in February and agreed to continue talks before mediator Howard Tescher again in October, which yielded the not-yet-public settlement agreement.

The plaintiffs are represented by Adam M. Moskowitz and Joseph M. Kaye of The Moskowitz Law Firm PLLC, and Jose M. Ferrer and Desiree Fernandez of Mark Migdal Hayden LLP.

O'Neal is represented by Christopher E. Knight, Brian D. Elias, Esther E. Galicia and Alexandra L. Tifford of Fowler White Burnett PA, and Stephen A. Best, Rachel O. Wolkinson, Daniel L. Sachs and Jonathan D. White of Brown Rudnick LLP.

The case is Daniel Harper et al. v. Shaquille O'Neal et al., case number 1:23-cv-21912, in the U.S. District Court for the Southern District of Florida.



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Mark Zuckerberg Beats Liability In Social Media MDL

By **Emily Field**

Law360 (November 8, 2024, 4:58 PM EST) -- A California federal judge dismissed claims against Mark Zuckerberg in multidistrict litigation alleging Meta concealed social media's risks to young users, finding that plaintiffs failed to show Zuckerberg directly participated in or authorized the alleged concealment despite his control over the company.

U.S. District Judge Yvonne Gonzalez Rogers on Thursday said that the plaintiffs had failed to show any instances where Zuckerberg directed or participated in the concealment of the addictive designs of Meta platforms, which is needed to hold him liable as a corporate officer. Generalized allegations may be "compelling," the judge said, but are insufficient to hold Zuckerberg liable, according to the **order**.

"Control of corporate activity alone is insufficient," the judge said. "While possible that discovery may reveal a more active participation and direction by Zuckerberg in Meta's alleged fraudulent concealment, the allegations before the court are insufficient to meet the standard for corporate-officer liability in the thirteen at-issue jurisdictions."

There's no allegation that Zuckerberg told an employee to suppress an internal report that was going to be disclosed, the judge said.

The MDL consists of hundreds of actions brought by personal injury plaintiffs, school districts and local government entities and state attorneys general over the allegedly addictive designs of social media. The litigants generally allege that Meta's Facebook and Instagram, Google's YouTube, ByteDance's TikTok and Snapchat designed their platforms to foster compulsive use by minors, resulting in a variety of harms to children, local governments and the public health.

The claims against Zuckerberg were brought under the laws of 13 states: Arizona, Colorado, Connecticut, Georgia, Maryland, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia and Wisconsin.

"Whether Mark Zuckerberg is held accountable in his personal capacity or not, our lawsuit against Meta, the company he has led for 20 years, is moving forward. We will not stop until the hundreds of families and school districts we represent have their day in court," Previn Warren of Motley Rice LLC, one of the lead plaintiffs attorneys in the MDL, told Law360 Friday. "We are moving forward with discovery to uncover the truth about how Big Tech has knowingly prioritized profits over the safety of our children."

A spokesperson for Meta declined to comment on Friday.

In July, Judge Gonzalez Rogers **heard oral arguments** over the motion to dismiss the claims against Zuckerberg.

Zuckerberg's counsel, Timothy C. Hester of Covington & Burling LLP, argued that the plaintiffs' recently amended allegations aren't "specific and concrete" enough to hold the Silicon Valley CEO liable for the company's alleged misconduct. Finding otherwise, Hester said, would have broad and sweeping implications for corporate officers.

"Simply saying, 'Mr. Zuckerberg was broadly aware of what was going on in the company,' doesn't suffice," Hester argued.

Plaintiffs' counsel, Mathew P. Jasinski of Motley Rice LLC, fired back, arguing that the allegations are detailed and more than enough to establish viable claims against Zuckerberg. Jasinski noted that the complaint specifically accused Zuckerberg of knowing about the risks of social media use from internal staff reports but "playing the Big Tobacco playbook" by dodging lawmakers' questions during hearings before Congress.

On Oct. 15, Judge Gonzalez Rogers **also ruled** that Meta and others can't ditch the MDL, finding that they must face most of the claims brought by school districts and local government entities alleging the companies designed their platforms to addict children. The judge largely denied the motion to dismiss lobbed by Meta's Facebook and Instagram and other social media companies, mostly disagreeing with the companies that the alleged injuries of the plaintiffs — referred to in the opinion as simply "school districts" — are too remote or attenuated to seek redress.

The plaintiffs are represented by Lexi Hazam of Lieff Cabraser Heimann & Bernstein LLP and Previn Warren of Motley Rice LLC.

Meta is represented by Gregory L. Halperin, Gavin Jackson, Christopher Yeung, Ansel Carpenter and Ashley M. Simonsen of Covington & Burling LLP.

The case is In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, case number 4:22-md-03047, in the U.S. District Court for the Northern District of California.

--Editing by Dave Trumbore.

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MVP: Latham's Michele D. Johnson

 [law360.com/articles/1887725/print](https://www.law360.com/articles/1887725/print)



Michele D. Johnson

Latham

Her biggest accomplishment this year:

Johnson told Law360 that the sheer number of wins her team has racked up representing such big-name companies ranks as a major accomplishment. She credited it to the way her teams approach storytelling in court.

Those victories included scoring a dismissal with prejudice in March of a proposed stock-drop class action against X relating to cybersecurity and data privacy concerns, and another dismissal in June of a case alleging the company violated the Illinois Biometric Information Privacy Act.

She said it's important to keep in mind that, aside from the rules of the court and the way precedents play into a case, attorneys are essentially telling the judge a story about the case, and the way her team is able to use the narrative to attack a plaintiff's pleadings has led to her success in the last year.

"That is a number of strong teams to lead to successes all in the past year," she said. "It's quite an accomplishment that we're proud of."

Her biggest challenge:

The Peloton case, dismissed **in October**, proved a particularly exciting challenge, Johnson said, as she and her team had to convince the court of the good-faith nature of what Peloton was doing during the pandemic.

In that investor suit, the proposed class alleged the company had deliberately misled investors into believing that its COVID-19 spike in demand was sustainable and would continue, but the judge dismissed the claims, finding that the company's statements were nonactionable puffery, or not false when made.

Again, Johnson said, the team's storytelling ability was what clinched the case, as they were able to convey to the judge what was happening from Peloton's perspective in regard to what was happening in the market, weaving the story together to show that the case ought to be dismissed.

"It was leaning into the story part of the Peloton experience, while also meeting the standards for dismissal," she said.

Her proudest moment:

Johnson said her proudest moment in court this year was winning the X cybersecurity case, particularly as her team won first a federal court dismissal, then a dismissal in state court after the claims were amended and refiled, with the state court judge describing the new complaint as "judge shopping."

"That's a particularly proud moment because you can see it happening, but convincing the judge that it's really forum shopping was gratifying," she said. "It happens so often in these big cases, so to convince the judge and to see that in the order was nice."

Why she's a class action attorney:

Johnson said she got her start on products liability cases, usually defending cases brought by municipalities, which she considered a preparation for the class actions that make up much of the product liability space. From there, she moved to include securities, data and tech cases.

She added that she got a lot of early trial experience, particularly in securities class action, and it was good training for the "team sport" that is class action law. She said she enjoys attacking the law's biggest challenges with a collective mindset that she can really lean into.

"With stakes this high, the thrills of winning are magnified, and the burdens are lighter because they're shared," she said. "We don't experience losses, we have developments."

Her other notable cases:

Johnson said she's proud of the work she's done for the U.S. Soccer Federation in the long-running wages suit brought by members of the U.S. Women's National Team over their pay, saying her work led to a collective bargaining agreement.

She told Law360 that summary judgment wins in U.S. Soccer's favor paved the way for a **settlement**, which in turn led to the collective bargaining agreement. She added that her team came in late in the process and was able to adjust the federation's approach on the eve of trial.

Her advice for junior attorneys:

In a firm of more than 1,100 attorneys, Johnson said she is often asked for advice, and the best she can give is for young attorneys to invest in themselves, even if the impact of that investment is not immediately apparent.

Many junior attorneys, she said, see the difficult path ahead but struggle to find meaning in all of the hard work they have to do in advance to see success.

"Doing the hard work for your clients, for the firm, for your colleagues, is also doing the hard work for yourself," she said. "Because you'll either stay at the place where you are or you'll move, and either way you're going to take yourself with you. And if you've made those investments, they will not be lost."



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Ford Buyers Win Cert. Of Some Classes In 'Death Wobble' Suit

By **Craig Clough**

Law360 (November 8, 2024, 9:12 PM EST) -- A California federal judge certified some subclasses in a product liability class action against Ford over an alleged steering defect known as the "death wobble," but denied certification of a nationwide class and trimmed or partially trimmed 13 of the 30 claims.

The Thursday order from U.S. District Judge Anthony J. Battaglia found that eight subclasses in the case can be certified, but not a nationwide class based on violations of the Magnuson-Moss Warranty Act because the plaintiffs fail to address in their motion and reply brief how variations in the 50 states' express warranty claims are not material.

The judge cited the 9th Circuit's 1998 ruling in [Hanlon v. Chrysler Corp.](#) as holding that "variations in state law do not necessarily preclude a 23(b)(3) action, but class counsel should be prepared to demonstrate the commonality of substantive law applicable to all class members."

The judge added that the court finds "[b]ecause plaintiffs have failed to address any predominance issues arising from this claim, the court denies plaintiffs' motion to certify a nationwide class."

The cases were consolidated in 2019 in the Southern District of California, bringing together various lawsuits filed around the country accusing Ford Motor Co. of hiding the "death wobble," which is also known as "the shimmy."

An amended complaint filed in 2021 claims that the defect existed in the 2005 to 2019 models of the Ford F-250, F-350, F-450 and F-550 vehicles, and sought certification of a nationwide class and subclasses in South Carolina, Texas, Ohio, New Mexico, Maine, Indiana, Illinois, Colorado, Arizona and California.

One **2019 lawsuit** from California resident William Lessin asserts Ford F-250s and F-350s "suffer from one or more defects in their suspension and steering linkage systems. Those bugs include abnormal wearing or loosening of the track bar bushing, damper bracket, ball joints, control arms, shock absorbers and struts."

"The Death Wobble is typically triggered when the class vehicles are traveling at speeds above 50 miles per hour and one of the tires hits a groove or bump in the road," Lessin says in his complaint. "This causes a violent shaking of the vehicle, which can only be controlled by a sudden reduction of speed."

Lessin, who lives in San Diego, owns a 2011 Ford F-250, according to his suit. When he purchased his truck in 2010, he was led to believe it was free of defects, he notes.

But after experiencing the "death wobble," he had to bring his truck into a San Diego Ford dealership twice over the course of three months for repairs. And during both trips to the dealership, Ford failed to fix the problem, denied the existence of a defect and refused to repair the vehicle under warranty, he says.

Consequently, Lessin spent more than \$1,600 on repairs and replacement parts, he states, and the value of his vehicle has gone down.

The consolidated complaint's 30 claims include alleged violations of various state's express or implied warranty laws, violations of lemon laws, fraudulent concealment and unfair trade practices.

The judge trimmed or partially trimmed some claims Thursday. For example, the court tossed express warranty claims in Maine and Illinois by finding that they "lack evidence of multiple failed repair attempts within the warranty period," and rejected the plaintiffs' arguments that Ford knew the repairs it made to the cars would eventually fail again and were essentially a stopgap measure.

"However, plaintiffs fail to cite any case law for either Illinois or Maine, and the court finds none, for the proposition that a vehicle repair is insufficient merely because the defendant does not perform the specific repair demanded by the plaintiff," the judge stated. "Indeed, it can be inferred from the record that [plaintiffs Susanne] Hamilton's and [David] Appel's repairs were completed satisfactorily since there is no indication that their vehicles were ever serviced multiple times for the same issue while under warranty."

Prior to Thursday's order, the judge dismissed two of three claims related to the putative Ohio class, and in Thursday's order, granted summary judgment on the third, agreeing with Ford's argument that the plaintiff's tortious breach of implied warranty claim for his 2019 F-350 fails because he cannot show his truck is "not fit for safe driving and reliable transportation" and finding he failed to show any economic loss.

Of the remaining nine putative subclasses, the judge certified classes for eight, but rejected certain claims within those subclasses. The court rejected certification of an Indiana subclass brought under the Indiana Deceptive Consumer Sales Act, finding that under that law, "a consumer is required to show that she relied to her detriment on a deceptive act by the defendant."

"Plaintiffs fail to cite, and the court does not find, any case law of Indiana in which reliance may be presumed. Because this creates individualized issues for the class, the court denies plaintiffs' motion for class certification as to its Indiana subclass under the IDCSA," the judge added.

He also approved McCune Law Group APC and Cafferty Clobes Meriwether & Sprengel LLP as class counsel.

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

The plaintiffs are represented by Richard D. McCune, David C. Wright and Steven A. Haskins of McCune Law Group APC, and Bryan Clobes of Cafferty Clobes Meriwether & Sprengel LLP.

Ford is represented by Jodi M. Schebel of Bowman and Brooke LLP, and Randall Edwards, Kelsey M. Larson and Victoria C. Hargis of O'Melveny & Myers LLP.

The case is William Lessin et al. v. Ford Motor Co. et al., case number 3:19-cv-01082, in the U.S. District Court for the Southern District of California.

--Additional reporting by Hailey Konnath. Editing by Kristen Becker.



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3rd Circ. Unsure Progressive Can Undo Car Value Suit Cert.

By **Matthew Santoni**

Law360 (November 8, 2024, 3:11 PM EST) -- A Third Circuit panel on Friday grappled with whether an adjustment that Progressive Specialty Insurance Co. did every time it calculated the value of a totaled vehicle was enough to warrant class certification for a lawsuit claiming the adjustment was unfair, or if classwide treatment was inappropriate when each class member could have a different outcome of that assessment.

In arguments Friday, counsel for Progressive told the panel that the "intermediate step" in its calculations, a "projected sold adjustment" that tended to subtract money from the sales prices listed for comparable vehicles, did not support class certification because the "actual cash value" the insurer paid at the end of the process could still be more or less than what the customers believed was fair, and would have to be examined on a case-by-case basis to determine if the PSA ultimately caused the customer harm.

"You don't resolve a breach of contract claim by looking at an intermediate step," said Jeffrey S. Cashdan of King & Spalding, representing Progressive. "... You have to look at the end of the process to determine whether there was a financial injury."

But members of the panel questioned why, if the PSA was applied to the calculation for every totaled vehicle, it wasn't still a "common question" that would support class certification.

"Why can't a question on the way to the ultimate question be a 'common question?'" asked Judge Stephanos Bibas.

The three lead plaintiffs had sued Progressive for breach of contract in 2021, claiming the use of the PSA in the calculation of actual cash value goes against their insurance policies' assertion that such values are based upon their vehicles' age, market value, and condition prior to the incident that totaled them.

The adjustments, they claimed, were based on outdated, skewed and cherry-picked data, which assumed that more vehicles were being sold for less than their listing prices due to haggling and discounts, when in the age of online listings and sales, most sellers have adjusted their sticker prices to be what customers ultimately pay. The federal court for the Eastern District of Pennsylvania granted them class certification in August 2023.

Cashdan said the PSA deductions didn't matter to establishing whether all the class members had been harmed, because other factors ultimately went into settling on a valuation for a vehicle, and what mattered was whether the insured got what their vehicles were worth. Determining that would require a jury to look at each settlement, along with competing assessments of the vehicles, to decide whether it was fair or if the PSA had knocked too much off the value, he said.

"We're going to have thousands of mini-trials," Cashdan told the panel. "That's not appropriate for class certification."

Jacob L. Phillips of Jacobson Phillips, representing the plaintiffs, said the universal downward adjustment of the PSA was a common issue for all the class members, as was their allegation that the PSA was built on "rigged" data. If Progressive wanted to try and prove that other calculation methods produced higher or lower valuations, that could be part of their defense, he said, but it

should not defeat class certification.

"If it's necessary to go through each method... to determine if the actual cash value with the PSA was lower, how do we have a common question?" said Judge Cheryl Ann Krause. "How is there anything but individualized proof in this case?"

Phillips responded that the application of the PSAs was a "uniform misconduct subject to uniform remedy," and that inclusion of it in the calculations was going beyond the factors outlined in customers' insurance policies.

On rebuttal, Cashdan reiterated that the ultimate payout for customers' vehicles could depend on their negotiations with the insurer, which could result in the actual cash value being raised if they presented evidence their vehicle was in better condition than most. He said Pennsylvania regulations outline different methods that insurers can use to determine a vehicle's value, and Progressive's methods, including the PSA, fit within those regulations.

The Third Circuit took Friday's arguments under consideration.

Judges Cheryl Ann Krause, Stephanos Bibas and Anthony Scirica sat on the panel for the Third Circuit.

Progressive is represented by Jeffrey S. Cashdan, Zachary A. McEntyre, James Matthew Brigman, Allison Hill White, Erin Munger, Paul Alessio Mezzina, Amy R. Upshaw, Julia C. Barrett and Nicole Bronnimann of King & Spalding LLP.

The plaintiffs are represented by Jacob L. Phillips of Jacobson Phillips PLLC and Hank Bates and Lee Lowther of Carney Bates & Pulliam PLLC.

The case is Leon Drummond, et al. v. Progressive Specialty Insurance Co, et al., case number 24-1267, in the United States Court of Appeals for the Third Circuit.

--Editing by Patrick Reagan.



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J&J Talc Unit Must Revise Ch. 11 Plan, Insurers Say

By **Jennifer Mandato**

Law360 (November 8, 2024, 8:57 PM EST) -- A group of Johnson & Johnson insurance carriers urged a Texas judge to reject the Chapter 11 plan disclosure statement for the company's Red River Talc unit as unconfirmable, saying J&J "made it clear that it intends to saddle its insurers with responsibility to pay" for the bankruptcy-related claims.

In an **objection** filed Thursday, a group of insurers including Travelers, Chubb and Ace units told the court that the disclosure statement was fundamentally incomplete and affirmatively confusing and misleading.

The insurers urged the court to reject the disclosure statement, order it to be revised and direct Red River to re-solicit votes on the plan under the revised disclosure statement.

Each of the insurers was alleged to have issued primary general liability and products liability policies, as well as excess indemnity and/or excess overlayer indemnity policies, to J&J between September 1957 and January 1986, according to court records.

Red River **filed** for bankruptcy on Sept. 20 with a prepackaged Chapter 11 plan, intending to create a nearly \$9 billion fund to settle current and future claims that J&J's talc-based baby powder contained asbestos and caused ovarian and other gynecological cancers.

The filing marked J&J's third attempt to use bankruptcy to resolve talc claims. Its first Chapter 11 case — originally filed in North Carolina before its transfer to New Jersey — was **dismissed** in 2023 by the Third Circuit, which found that talc unit LTL Management LLC wasn't sufficiently distressed. Then, later that year, a New Jersey bankruptcy judge **rejected** LTL's second bankruptcy case, echoing the Third Circuit's reasoning.

Despite the Third Circuit twice holding that Red River didn't have the requisite financial distress to file for bankruptcy, the insurers maintained that J&J is "trying to rush its prepackaged plan through, pointing to ginned-up support from illegitimate claimants and a questionable solicitation process."

J&J excluded the insurers from all aspects of plan negotiations, instead "stuffing the ballot box" with an unknown number of meritless claims in an effort to drum up sufficient votes for the plan, the carriers said.

"Insurers were never meaningfully informed of, or involved in, the discussions or negotiations leading to the announcement and solicitation of the plan, nor were they involved in any negotiations or provided any information about the billions of dollars in settlements with mesothelioma claimants that were publicly disclosed in connection with solicitation of the plan," the insurers said.

The carriers added that the "linchpin" of Red River's bankruptcy strategy is certain gynecological claims despite there being now proven causal link between J&J baby powder or talc and gynecological cancer as defined in the plan.

"The fact is that the creation of this class is nothing more than a vote-buying scheme whereby J&J is agreeing to pay meritless claims in order to stuff the ballot box," the insurers argued.

While it remains to be seen how many such claimants voted on the plan, paying any otherwise-invalid claims to garner a release is inconsistent with the Bankruptcy Code, the carriers told the court.

The carriers also likened the present case to the mass opioid-related tort claims in *Harrington v. Purdue Pharma*, in which the Supreme Court ruled that the Sackler family couldn't use the bankruptcy filing of their subsidiary to "engineer a non-consensual third-party release of all claims facing them."

Here, J&J can't seek to use its subsidiary Red River's bankruptcy to "achieve a global resolution of independent talc liability that it faces as the Sacklers tried to do," the carriers said. This move would extend the plan beyond what the Bankruptcy Code outlines, they argued.

Counsel for Travelers Casualty and Surety Co., The Travelers Indemnity Co. and the official committee of talc claimants declined to comment. Representatives of Red River, The Coalition of Counsel for Justice for Talc Claimants and the remaining insurers did not immediately respond to requests for comment Friday.

The insurers are represented by attorneys from Gray Reed, Simpson Thacher & Bartlett LLP, Plevin & Turner LLP, Duane Morris LLP, Kennedys CMK LLP and Ifrah PLLC.

Red River is represented by John F. Higgins, M. Shane Johnson, Megan Young-John and James A. Keefe of Porter Hedges LLP and Gregory M. Gordon, Dan B. Prieto, Brad B. Erens and Amanda Rush of Jones Day.

The official committee of talc claimants is represented by Sander L. Esserman and Peter C. D'Apice of Stutzman Bromberg Esserman & Plifka PC.

The Coalition of Counsel for Justice for Talc Claimants is represented by Melanie L. Cyganowski, Adam C. Silverstein, Sunni P. Beville and Jennifer S. Feeney of Otterbourg PC and David J. Molton, Jeffrey L. Jonas, Eric R. Goodman, Gerard T. Cicero and Susan Sieger-Grimm of Brown Rudnick LLP.

The case is *In re: Red River Talc LLC*, case number 4:24-bk-90505, in the U.S. Bankruptcy Court for the Southern District of Texas.

--Additional reporting by Vince Sullivan. Editing by Nick Petruncio.

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Judge Lets Plaintiffs Drop Kroger Pain Patch Suit

By Celeste Bott

Law360 (November 8, 2024, 6:13 PM EST) -- An Illinois federal judge on Friday allowed two customers who sued supermarket chain Kroger over the effectiveness of lidocaine patches to ditch their class claims after he denied certification last month, and ultimately dismiss the individual claims with prejudice.

U.S. District Judge Matthew F. Kennelly **denied certification** in Shannon Hunt and Lanette Johnson's putative class action in October, saying neither of two proposed class representatives purchased the allegedly misleading patches, which they claimed could not stay on long enough to provide up to eight hours of relief as advertised.

In a status report shortly after, the parties told the court the consumers had proposed a stipulation of dismissal to The Kroger Co., and that they intended to withdraw their class allegations if Kroger didn't agree to it. Days later, the plaintiffs filed their motion to amend.

During a brief telephonic hearing Friday morning, counsel for Kroger said the grocery giant didn't oppose the motion, but was frustrated with the way the case played out.

"It should have been clear to [plaintiffs' attorney Spencer Sheehan] that he did not have the requisite evidence to support the claims in the first amended complaint," said Kirsten Gough of Gordon Rees Scully Mansukhani LLP.

"What you want to do is file a motion for attorneys' fees," Judge Kennelly said. "You don't need me to retain jurisdiction to do that."

Representatives for the plaintiffs did not immediately respond to a request for comment.

The suit was originally filed in September 2022 by Chicago resident Tiffany Agee, with Hunt and Johnson then substituted as named plaintiffs in April.

Hunt and Johnson's amended complaint, much like the original, pointed to Kroger pain relief patches they said misleadingly claimed to provide up to eight hours of relief because the patches regularly peeled off users' bodies "within a few hours, and often minutes, after being applied."

They alleged that because the patches could not stay on, the products also failed to deliver an advertised "maximum strength" amount of lidocaine in patch form.

Judge Kennelly **trimmed some claims** from the suit in April 2023, but kept claims regarding the eight hours of pain relief allegedly advertised.

But in denying the class certification bid, the judge said it was undisputed that Kroger had two suppliers for its lidocaine patches in the state — one that supplied patches touting the maximum eight hours of relief and was sold only in Kroger stores, and another that supplied patches that made no mention of hours of relief on the front and was available at Kroger and Mariano's stores.

Judge Kennelly said that while the amended complaint was based on Kroger's alleged false promise of providing "up to eight hours of relief" with "maximum strength," both of the named plaintiffs bought lidocaine patches at Mariano's stores.

"The packaging for the patches sold at Mariano's stores made no mention of hours of relief on the

front and included a materially different directive, 'Use one patch for up to 12 hours,' on the back," Judge Kennelly wrote. "The packaging on the product sold at Mariano's did not — at least did not expressly — promise a particular number of hours of relief."

The consumers are represented by Spencer Sheehan of Sheehan & Associates PC.

Kroger is represented by Diane Webster, Avanti Bakane, and Kirsten Gough of Gordon Rees Scully Mansukhani LLP.

The case is Tiffany Agee v. The Kroger Co., case number 1:22-cv-04744, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Lauraann Wood, Emily Field and Rae Ann Varona. Editing by Linda Voorhis.

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Water Utility Hits PVC Pipe Makers With Price-Fixing Suit

By **Thy Vo**

Law360 (November 8, 2024, 7:59 PM EST) -- A public water utility on Friday hit some of the nation's largest PVC pipe manufacturers with a class action accusing them of using a commodity pricing service to exchange information and illegally fix prices, claiming the companies reaped "historic profits" at the expense of public utilities.

In a proposed class action filed Friday in Illinois federal court, the Erie County Water Authority accused JM Eagle Inc. and six other makers of polyvinyl chloride pipe of illegally colluding to keep the price of PVC pipes high even after supply chain issues from the coronavirus pandemic had subsided.

The lawsuit claims the companies — which also include Atkore Inc., Diamond Plastics Corp, IPEX USA LLC, National Pipe & Plastics Inc., Otter Tail Corp. and West Lake Corp — used the subscription price reporting service OPIS to pass competitively sensitive notes and signal their pricing intentions to competitors.

"OPIS is the proverbial smoke-filled backroom that enables defendants to implement their conspiracy," Erie stated in the complaint.

OPIS publishes daily prices and market trends for different industries and brags about having "two-way relationships with players at the heart of the action," according to the suit, citing a brochure in which the company said it gets daily information about prices and transactions from active traders.

In a January 2021 edition of the "PVC & Pipe Weekly," OPIS reported that "while some market participants believed the market needed to be reset with a new price letter closer to the current price level, other[s] said that there is no reason converters can't push prices higher."

"The only requirement would be discipline," the OPIS report continued.

That line was an "invitation to restrain competition by coordinating on future pricing actions," Erie alleged, noting that the report coincides with the start of a "dramatic increase" in prices for PVC pipes that began in January 2021.

Erie, a Buffalo, New York-based public benefit corporation, filed the suit on behalf of public water and sewer utilities across the country that purchased PVC pipes for municipal water from Jan. 1, 2021, to present.

A Tennessee man filed **a similar suit** in September that sampled the same OPIS newsletters as evidence of a price-fixing conspiracy.

California's attorney general also cited OPIS' price reports in a lawsuit accusing two energy companies of artificially inflating gas prices in that state, Erie said. California reached a **\$50 million settlement** with the companies to end the litigation.

In Friday's lawsuit, Erie said the subscription-only newsletter allowed the PVC pipe makers to raise their prices and keep them there because purchasers of PVC pipes couldn't access OPIS reports to negotiate lower prices.

The newsletters also served as a "conduit" for the companies' antitrust conspiracy, the suit alleged,

citing various reports from OPIS that included competitively sensitive information.

A January 2023 newsletter stated that two companies, Northern Pipe and IPEX, "indicated that they would follow whatever the market does." A few months later, in May, OPIS reported that some PVC makers believe "Atkore needs to take a hard stand next week on new business at the higher price levels."

"There is no pro-competitive reason to call on market leader Atkore to hold the line on higher price levels, while acknowledging that there is no economic reason for a price increase," the lawsuit stated.

The OPIS newsletters also contain evidence that the companies communicated directly, according to the complaint.

A November 2022 report shared that some companies had buyers "fishing for a lower price by claiming that a competitor had sold to them at a lower number."

"But a phone call or two proved that this was not the case. So far, nobody has blinked," the report stated.

The alleged conspiracy has clearly worked, Erie said.

The utility cited documents the manufacturer's filed with the Securities and Exchange Commission showing prices stayed high despite a lack of strong demand for PVC pipes.

"For example, defendant Otter Tail reported that its prices for PVC pipes manufactured to municipal standards increased by 198% but volume for those pipes decreased by 23% from 2019-2023 cumulatively. This is not consistent with the laws of supply and demand," according to the complaint, which said prices should fall when demand declines.

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

Erie is represented by Elizabeth A. Fegan and Kyle Jacobson of Fegan Scott LLC and Michael London and Tate J. Kunkle of Douglas and London PC.

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

The case is Erie County Water Authority v. Atkore Inc. et al., case number 1:24-cv-11531, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Jared Foretek and Rae Ann Varona. Editing by Kelly Duncan.



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Special Master Recommends \$7.8M For Flint Plaintiffs' Attys

By **Mike Curley**

Law360 (November 8, 2024, 5:11 PM EST) -- A Special Master has recommended that attorneys representing plaintiffs in the Flint Water Crisis litigation receive \$7.8 million in fees for their role in securing a \$25 million settlement with Veolia North America finalized last month.

In a **report** filed Wednesday, Deborah Greenspan of Blank Rome LLP noted that the fees — which represent work done between December 2023 and June 2024 — represents a small portion of the total work done since the litigation began nearly eight years ago.

According to the report, the class had petitioned for an award of common benefit fees of 6.33% of the gross settlement amount, plus 25% of the gross settlement amount, coming to 31.33% of the \$25 million.

Greenspan wrote that on reviewing the time and hours submitted by class counsel, she was able to confirm that it was within proper rates and that the work hours submitted were largely in keeping with the work done on the case, and were reasonable when compared to the lodestar reached by multiplying the applicable rates by the submitted hours.

She added that the entries included some block billing, but those entries include time descriptions consistent with the total amount of time charged, and though some entries included work done for cases pending in a different court against the U.S. Environmental Protection Agency, those entries were removed from the special master's compilation.

U.S. District Judge Judith E. Levy granted **final approval** to the \$25 million settlement in early October, which resolves the claims of about 45,000 plaintiffs and water firm Veolia North America, while saying she wished members of the public were better able to track case developments, because then they might have more understanding as to why the process took as long as it did.

The plaintiffs say Veolia knew that the Flint water was corrosive and that lead was a problem throughout the water system, but did not properly alert city officials, prolonging residents' exposure to the water. The plaintiffs allege that Veolia knew that switching back to Detroit's water service was the quickest fix, but did not share that information and publicly stated that Flint's water was safe.

A trial was scheduled to begin last week in a case from minor Flint plaintiffs — dubbed Bellwether III — who allege that Veolia prolonged their exposure to lead and caused them lasting mental and physical harm, but it was adjourned in a text order, the **second time** the trial has been delayed on the eve of its start date.

Representatives for the parties could not immediately be reached for comment Friday.

The class is represented by Cohen Milstein Sellers & Toll PLLC, Pitt McGehee Palmer Bonanni & Rivers PC, Weitz & Luxenberg PC, Susman Godfrey LLP, Motley Rice LLC, the Law Offices of Teresa A. Bingman PLLC, Bronstein Gewirtz & Grossman LLC, the Law Offices of Deborah A. LaBelle, the NAACP, Goodman Hurwitz & James PC, Trachelle C. Young & Associates PLLC, Dedendum Group LLC, McKeen & Associates PC, the Law Office of Cirilo Martinez PLLC, Shea Aiello PLLC, Cynthia M. Lindsey & Associates PLLC, McAlpine PC and the Abood Law Firm.

VNA is represented by Michael A. Olsen of Mayer Brown LLP and James M. Campbell and Alaina

Devine of Campbell Conroy & O'Neil PC.

The case is In Re Flint Water Cases, case number 5:16-cv-10444, in the U.S. District Court for the Eastern District of Michigan.

–Additional reporting by Danielle Ferguson. Editing by Emily Kokoll.

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Telefónica Venezuela Unit To Pay \$85.3M To End FCPA Probe

By **Dorothy Atkins**

Law360 (November 8, 2024, 9:24 PM EST) -- A Telefónica SA's Venezuela subsidiary has agreed to pay \$85.26 million to resolve a Foreign Corrupt Practices Act criminal investigation alleging the Spanish telecommunications giant bribed Venezuelan officials with cash, a Caribbean vacation and expensive jewelry to fix an auction swapping local currency for stronger U.S. dollars, prosecutors announced.

Telefónica Venezolana CA waived a criminal indictment and entered into a deferred prosecution agreement on Friday, the same day prosecutors filed a criminal information sheet in the Southern District of New York charging the company with conspiracy to violate the anti-bribery provisions of the FCPA.

The settlement, which has not yet been filed in court but was announced by the U.S. Department of Justice, comes after another Telefónica subsidiary, Telefónica Brasil SA, agreed to pay \$4.125 million in 2019 to settle the U.S. Securities and Exchange Commission's allegations it violated accounting provisions of the FCPA by giving tickets to 34 Brazilian government officials for the 2014 World Cup and 2013 Confederations Cup.

Telefónica representatives didn't immediately respond to a request for comment Friday.

Amid political unrest that affected its once-thriving domestic economy, the Venezuelan government began to sponsor local currency exchanges in 2013. The exchanges allowed domestic companies in critical industries to apply to exchange local currency — the inflation-ravished Venezuelan bolivars — into U.S. dollars at favorable rates and in large quantities so that those companies could import equipment and pay suppliers who refused to accept bolivars as payment, according to the information sheet.

But prosecutors allege in 2014, Telefónica Venezolana participated in a corrupt currency auction that allowed the telecom giant to exchange its local currency for more than \$110 million in U.S. dollars. During the auction, Telefónica Venezolana allegedly won more than 65% of the \$172 million that the local government awarded to 16 telecom companies, according to court documents.

In order to ensure it won the auctions, Telefónica Venezolana allegedly recruited two suppliers not identified by name in court documents. Those suppliers allegedly made tens of millions of dollars in illegal bribe payments to an intermediary, while knowing that some of those funds would be used to pay Venezuelan government officials as a purported "commission," or bribe, prosecutors allege.

Prosecutors claim that Telefónica Venezolana tried to hide its illegal conduct by purchasing equipment from the suppliers at inflated prices, and it allegedly transferred funds through U.S. bank accounts in New York.

The bribes were allegedly used to help fund the intermediary and one government official's luxury holiday vacation with their families in St. Barts worth roughly \$500,000, and the ill-gotten funds paid for more than \$605,000 in luxury watches and jewelry in St. Barts, the information sheet alleges.

Under its settlement with the DOJ, Telefónica Venezolana and its corporate parent have agreed to cooperate with prosecutors in any ongoing or future criminal investigations related to the alleged bribery scheme, and they've agreed to enhance their global compliance program and to update the

U.S. government regularly on the program's remediation and implementation efforts, according to the DOJ.

The Justice Department noted that during the initial phases of the government's investigation, Telefónica Venezolana didn't timely "identify, collect, produce and disclose" certain records and relevant information, which impeded the investigation.

However, later in the investigation, the company cooperated by voluntarily making its foreign-based employees available for interviews in the U.S. and by producing a significant number of internal documents with translations, while navigating complex foreign data privacy laws, among other efforts, the DOJ said.

Telefónica Venezolana additionally took steps to remediate the alleged misconduct by disciplining or firing certain employees involved in the alleged scheme and strengthening its anti-corruption compliance program, according to the DOJ. Those efforts include creating an independent compliance team, appointing a chief compliance officer with direct access to the board's audit committee and overhauling its review and approval process for transactions with nonstandard pricing, the DOJ said.

The company also created ways to test and improve internal controls for pricing and other transactions with the help of a forensic accounting firm, and it beefed up its processes for vetting and monitoring third parties using proprietary software, among other compliance efforts, the DOJ said.

Nicole M. Argentieri, head of the DOJ's criminal division, said in a statement Friday that Telefónica Venezolana chose to support a corrupt regime to circumvent the difficulties of conducting legal business in Venezuela.

"This resolution is yet another example of the Justice Department's commitment to fight corruption and hold companies accountable for their criminal conduct," Argentieri said.

Damian Williams, U.S. attorney for the Southern District of New York, added that Telefónica Venezolana agreed to line the pockets of corrupt Venezuelan officials in order to gain access to U.S. currency and maintain its position in the Venezuelan telecommunications market while funneling bribe payments through U.S. bank accounts.

"This office will not tolerate the use and abuse of the U.S. financial system to enrich corrupt foreign officials and those who maintain their market position by appeasing them," Williams said.

The government is represented by Nicola Mrazek and Abdus Samad Pardesi of the U.S. Department of Justice Criminal Division's Fraud Section and Jilan Kamal for the U.S. Attorney's Office for the Southern District of New York.

Counsel information for Telefónica Venezolana was not immediately available Friday.

The case is USA v. Telefónica Venezolana CA, case number 1:24-cr-00633, in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.