Court considers dispute over disclosure of NVIDIA sales to crypto miners

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CASE PREVIEW

By Ronald Mann

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The NVIDIA headquarters in Santa Clara, Calif. (JHVEPhoto via Shutterstock)

NVIDIA, the world's most valuable company, sells computer graphics processing chips designed primarily for use in video games, which it sells to manufacturers of game devices. As it happens, NVIDIA's chips also are useful for mining cryptocurrency, and in 2017 many crypto miners started to buy NVIDIA chips for that purpose. As that use increased, NVIDIA's chip sales increased. But in 2018, when the price of bitcoin went through a period of sharp decline, reducing the incentive for crypto mining, NVIDIA's sales declined.

Shareholders responded by filing the proposed class action here, alleging that NVIDIA executives (including CEO Jensen Huang) made false and misleading statements about the extent to which use in crypto mining was propping up NVIDIA's chip sales. The U.S. Court of Appeals for the 9th Circuit allowed the action to proceed, and the Supreme Court agreed to review the matter.

At issue in the case is the Private Securities Litigation Reform Act, a statute adopted in 1995 to stem securities class actions. Among other things, it establishes a high bar for crafting a successful complaint in such a case. If the case alleges a false or misleading statement, it must not only specify the reasons why each statement is believed to be misleading but also "state with particularity all facts on which that belief is formed." Moreover, the complaint also must "state with particularity facts" that "giv[e] rise to a strong inference that the defendant acted with the required state of mind." That "strong inference" standard is notably higher than the normal standard for a complaint.

Under that statute, the shareholders have a hard time showing that Huang spoke falsely when he made statements downplaying the share of NVIDIA chip sales attributable to crypto mining. The shareholders do not have any documents or statements that directly show any reason to think Huang knew what share of sales were made to crypto miners. Rather, they rely on an expert report that estimated the number of crypto-mining processors built during the relevant time, the number of chips that would have been required, and the share of those chips likely to have been sold by NVIDIA. Because the numbers produced by those estimates were inconsistent with Huang's public statements, the shareholders allege that his statements were false – indeed that he must have known they were false.

NVIDIA ridicules this as a potential theory of the case. The company argues that when the theory of "scienter" (the securities law standard of intent – a Latin term that means something like "with knowledge") is that internal company documents contradict public statements, the PSLRA's requirements of particularity mean that the plaintiff has to allege the contents of those internal documents. So in this case, because the shareholders have not made any such allegations – they allege nothing at all about any documents Huang might have seen – they have failed to satisfy their burden.

For similar reasons, NVIDIA contends that the shareholders have not done enough to allege that any of Huang's statements are false. The complaint offers no direct allegations at all about NVIDIA chip sales or the share made to crypto miners; rather, it offers only the generalized estimations of its expert witness based on the size of the crypto market and NVIDIA's likely share of it. That kind of "generic market research," NVIDIA argues, cannot make out a case of falsity "with particularity."

In the Supreme Court, the shareholders back away from exclusive reliance on the expert report. Instead, they point to a variety of evidence suggesting that various employees at NVIDIA tracked the rise of crypto mining and that NVIDIA executives were paying attention to that information. Because existing Supreme Court cases about the PSLRA call for a "holistic inquiry" that assesses the information in context, they argue that the justices should reject the "bright line" rule the shareholders see in NVIDIA's argument, which would require plaintiffs to produce the "smoking gun" internal document when they file their complaint.

For its part, NVIDIA responds forcefully that – contrary to what the shareholders allege in the Supreme Court – the lower court decision validates the fraud allegations as resting entirely on the failure of Huang to make statements about crypto mining sales that match the findings of the plaintiff's expert.

As with last week's argument in *Facebook v. Amalgamated Bank*, the shareholders here surely will face some skeptical questioning from justices who will think that the complaint in this case is precisely the kind of thing that the PSLRA was designed to squelch. When they say that the rule NVIDIA proposes makes this kind of case basically impossible – because of the difficulty in obtaining confidential and compromising corporate documents to support a complaint – those justices are as likely as not to agree, and respond that the PSLRA was designed for exactly that result.

Posted in Featured, Merits Cases

Cases: NVIDIA Corp. v. E. Ohman J:or Fonder AB

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US Supreme Court weighs Nvidia bid to avoid securities fraud suit

reuters.com/legal/us-supreme-court-hear-nvidia-bid-avoid-securities-fraud-suit-2024-11-13

John Kruzel, Andrew Chung

Item 1 of 2 People walk across the plaza of the U.S. Supreme Court building on the first day of the court's new term in Washington, U.S. October 3, 2022. REUTERS/Jonathan Ernst/File Photo

[1/2]People walk across the plaza of the U.S. Supreme Court building on the first day of the court's new term in Washington, U.S. October 3, 2022. REUTERS/Jonathan Ernst/File Photo Purchase Licensing Rights, opens new tab

- Sweden-based investment management firm led class action
- U.S. Supreme Court heard similar Facebook case on Nov. 6
- Rulings in both cases expected by the end of June

WASHINGTON, Nov 13 (Reuters) - The U.S. Supreme Court scrutinized on Wednesday Nvidia's (NVDA.O), opens new tab bid to torpedo a securities fraud lawsuit accusing the artificial intelligence chipmaker of misleading investors about how much of its sales depended on the volatile cryptocurrency market.
The justices heard arguments in Nvidia's appeal of a lower court's decision allowing a 2018 class action - litigation led by the Stockholm, Sweden-based investment management firm E. Ohman J:or Fonder AB - to proceed.

It is one of two cases to come before the Supreme Court this month that could lead to rulings making it harder for private litigants to hold companies to account for alleged securities fraud. The other one, involving Meta's (META.O), opens new tab Facebook, was argued on Nov. 6.
At issue in the Nvidia case is whether the plaintiffs cleared the heightened legal bar for bringing private securities fraud suits as set by Congress in a 1995 federal law called the Private Securities Litigation Reform Act that aimed to screen out frivolous lawsuits.

Some of the justices expressed reservations about intervening in the case, wondering about whether there is a clear legal issue for them to decide, as opposed to just a dispute over facts - and given the technical complexities involved they may not be ideally placed to resolve.

"It just seems to me that you're asking us to engage in a kind of analysis that we are not very good at and weren't expecting when we took this case," liberal Justice Elena Kagan told Neal Katyal, the lawyer arguing for Nvidia.

Liberal Justice Ketanji Brown Jackson expressed concern that the standard Nvidia has asked the court to adopt would place too heavy a burden on plaintiffs.

"I guess my concern is that you appear to be requiring for plaintiffs to actually have the evidence in order to plead their case," Jackson said, noting that critical evidence often is not obtained by plaintiffs until a later stage of litigation.

The plaintiffs accused Nvidia and its CEO Jensen Huang of violating a 1934 federal law called the Securities Exchange Act by making statements in 2017 and 2018 that falsely downplayed how much of Nvidia's revenue growth came from crypto-related purchases.

Conservative Chief Justice John Roberts appeared to search for a middle ground.

"If I think that the positions on both sides are a little too absolute, how do you find sort of the sweet spot in terms of when the (Private Securities Litigation Reform Act) is satisfied?" Roberts asked Katyal.

The higher legal standards under the law mean that plaintiffs need more than "just a little bit of direct evidence," Roberts said. "On the other hand, it seems to me you can't insist on only the direct evidence before a complaint goes forward. So if I don't think it's black and white, how ... do I decide where the balance is?"

Beginning in 2017, as the price of certain cryptocurrencies rose, Nvidia's chips became increasingly popular for cryptomining, a process that involves performing complex math equations in order to secure cryptocurrencies such as bitcoin and ether.

By late 2018, amid a decline in crypto profitability, Nvidia's revenue fell short of its projections, leading its stock price to fall in early November of that year.

The plaintiffs accused Nvidia and its top officials of concealing the impact of cryptomining on its business. The suit seeks unspecified monetary damages in part to recoup the lost value of the Nvidia stock held by the investors.

Nvidia in 2022 agreed to pay $5.5 million to U.S. authorities to settle charges that it did not properly disclose the impact of cryptomining on its gaming business, but without admitting or denying the findings of federal regulators.

'INACCURATE CHARACTERIZATION'

Conservative Justice Neil Gorsuch asked Deepak Gupta, the lawyer representing the plaintiffs, to respond to Nvidia's argument that their allegations about how much of the company's sales went to crypto miners relied heavily on an expert opinion by the economic consulting firm, Prysm Group, that contained too few details to clear the initial phase of litigation.

Gupta called Nvidia's claim "an inaccurate characterization of the report."

"Basically what Prysm was doing was math," Gupta said. "It was taking publicly available figures and doing some multiplication."

A federal judge dismissed the lawsuit but the San Francisco-based 9th U.S. Circuit Court of Appeals subsequently revived it.

Conservative Justice Brett Kavanaugh raised a concern expressed to the Supreme Court by outside interest groups that the 9th Circuit decision created "a blueprint" for getting around heightened legal bar set by Congress in the Private Securities Litigation Reform Act.

President Joe Biden's administration supported the shareholders in the case.
The Supreme Court's rulings in the Facebook and Nvidia cases are expected by the end of June.

Reporting by John Kruzel and Andrew Chung; Editing by Will Dunham

Out of Thin Scienter: Protecting Confidential Information in Light of 'NVIDIA v. Ohman'

law.com/newyorklawjournal/2024/11/12/out-of-thin-scienter-protecting-confidential-information-in-light-of-nvidia-v-ohman

Stefan Atkinson and Jenny Lee

For nearly 30 years, the Private Securities Litigation Reform Act (PSLRA) has required private plaintiffs in securities litigation to plead both falsity and scienter with particularity. The Supreme Court will likely clarify the contours of this heightened pleading standard when it decides *NVIDIA Corp. v. E. Ohman J:or Fonder AB* this term.

One of the questions presented in *NVIDIA* is whether plaintiffs seeking to allege scienter under the PSLRA based on allegations about internal company documents must plead with particularity the content of those documents.

For companies and their counsel, some practical questions underlie the one before the Supreme Court: how did the *NVIDIA* plaintiffs get information about (and in one instance, direct access to) purported internal company documents—before discovery, no less?And what can be done about it? The use of internal documents in securities litigation (and beyond) poses myriad issues for companies and their counsel to weigh when considering how to protect proactively their confidential information.

The NVIDIA Case

In *NVIDIA*, the plaintiffs (respondents in the Supreme Court) brought a class action under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, alleging that NVIDIA intentionally misrepresented the extent to which its chip sales to cryptocurrency miners, as opposed to gamers, were driving the company's gaming-segment revenues.This was allegedly done because executives wanted to create the false impression that NVIDIA was insulated from crypto volatility.

To support these claims, the plaintiffs alleged that company leadership was aware of internal documents that showed that the volume of sales to crypto miners outstripped what had been acknowledged publicly. It appears that several former NVIDIA employees described such documents to the plaintiffs' counsel and, in one instance, provided a document itself. The purported internal company documents included:

> · A database that tracked global sales;· Technical data from software installed on devices sold;· A privately commissioned internal study on crypto-mining's effect on sales in China and an accompanying PowerPoint deck (several slides of which were then included in the complaint as screenshots);· Quarterly meeting materials;· Weekly reports; and· Emails.

The District Court dismissed the plaintiffs' complaint, finding that the plaintiffs' reference to internal records without particularized pleading as to their contents failed to plead scienter. A divided panel of the Ninth Circuit reversed, holding that the plaintiffs' allegations sufficiently pleaded scienter.
The defendants (petitioners in the Supreme Court) argued that alleging only the general character of company documents prevents courts from reliably assessing the pleadings under the governing PSLRA standard. The defendants also argued that because every major company has internal reporting structures, any shareholder under the plaintiffs' proposed approach could create generalized allegations sufficient templyoyeeo survive the pleading stage, allowing for the very vexatious litigation the PSLRA was meant to prevent.

The plaintiffs countered that precedent requires courts to consider all alleged facts holistically, rather than apply the heightened PSLRA standards to each fact (or document) individually. According to the plaintiffs, the defendants' proposed rule would hamstring securities plaintiffs by requiring them to allege the specific contents of documents that they may not be able to access or control, particularly in light of the PSLRA's automatic stay of discovery through the resolution of motions to dismiss.

Key Takeaways for Companies

Regardless of how the Court decides *NVIDIA*, the case serves as an important reminder of the risk of disclosure of confidential company information and how that information may be used even at the outset of litigation.Companies and their counsel may want to consider the following steps to protect their confidential information.It is important to note that the suggestions here are not intended to interfere with a company's policies or obligations regarding whistleblower claims or other protections.

Draw Clear Parameters. It may be wise to educate employees about their company's confidentiality policies and any applicable agreements governing the use of confidential information. Current or former employees may disclose confidential information without even realizing what they are doing.Educating employees early and often about the relevant scope of confidentiality and their individual roles in safeguarding that confidential information can help protect against such inadvertent disclosures.

One good way to educate employees is to define confidentiality in clear, concrete terms. Ensure employees understand that the underlying *information* is protected, regardless of whether the document in which that information resides is disclosed.In *NVIDIA*, the plaintiffs relied not just on information that most employees would recognize as confidential, such as a purported internal sales database and a privately commissioned study, but also less obviously protectable information, such as data embedded in quarterly and weekly updates and emails that may have gone out to many company recipients.It may be helpful to use specific examples of what constitutes confidential information when speaking with employees on these issues.

Confidentiality should also be defined in terms of duration.For example, confidential information could be disclosed by former employees who are unaware that confidentiality obligations to former employers can survive the employment relationship.The allegations in *NVIDIA* were founded on statements made by purported former employees, including from outside of the U.S.It appears that one former NVIDIA employee even supplied the plaintiffs' counsel with a copy of an internal PowerPoint on crypto-mining's effect on chip sales in China; it is unclear whether the former employee shared the document before leaving the company or after, but it would not be surprising if both are violations of NVIDIA's confidentiality policy. It is therefore essential to make plain the longevity of any confidentiality restrictions.

In sum, companies and their counsel should determine what confidential information means to their respective businesses and communicate those specific parameters to their employees, as well as the employees' role in safeguarding that information, even beyond their employments. While this will not eliminate the risk of disclosure, it could go a long way toward avoiding at least inadvertent disclosures of confidential information.

Counsel Careful Conversations. Companies and their counsel should also educate employees on what constitutes a disclosure. In the securities litigation context, confidential information is sometimes verbally disclosed by current or former employees to lawyers (or private investigators employed by lawyers) reaching out on behalf of a putative class.For example, the plaintiffs in *NVIDIA* relied upon statements of five former employees who appear to have spoken directly with plaintiffs' counsel or investigators. Employees may not be clear on who is a company "outsider" for purposes of confidentiality, including counsel or investigators for someone other than the company. Teach employees to ask questions of anyone seeking information about the company.

In particular, consider training employees to ask whom the individual contacting them represents and how the information will be used. Employees may sometimes be willing to speak under the mistaken belief that they will not be implicated in the litigation or that they might benefit from the lawsuit.As always, encourage employees to talk to the company's counsel if they are asked for confidential information by someone outside the company.

Don't Be All Bark*.* In some instances, a current or former employee may seek to share confidential information with outsiders, despite knowing the company's policies.Consider whether to attach consequences (and if so, what consequences to attach) to a breach of the company's confidentiality, including after an employee has left the company. For a departed employee, for example, a confidentiality breach could lead to the return of an employee's severance, equitable relief, or even attorney fees. You may wish to tie the consequences for breach to factors like relevant industry regulations and employee level.

If an employee has an employment agreement that contains confidentiality provisions, it is helpful if employees are aware of and understand those provisions at the time of signing their agreement, as well as during and after their employment. Including consequences for breach will help reinforce the notion that the company takes the protection of its confidential information very seriously.

Of course, companies need to be mindful of their obligations under Section 21F of the Securities Exchange Act of 1934 to not impede an individual's ability to act as a whistleblower to the SEC.

There is no one-size-fits-all solution to corporate confidentiality concerns.Confidentiality agreements will naturally vary across industries, companies, and even employee levels.But whether or not the Supreme Court rules that securities plaintiffs must plead the contents of internal documents with particularity, the *NVIDIA* case highlights the crucial role confidential information can play in a securities class action—even long before discovery has begun.Companies can help to protect themselves by being proactive and diligent about instituting confidentiality protections, ensuring employee comprehension, and enforcing compliance.

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This Week in Chancery Court: Truth Social, Paramount (Correct)

bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/XEOJGNL4000000

The Delaware Chancery Court will focus on social media networks this week, with bot allegations at the failed startup IRL and additional claims surrounding the special purpose acquisition company created to take the Truth Social platform public.

Here's a look at more from the court's calendar:

Tuesday: Discovery Glob. Opportunity Master Fund LTD v. Hertz Glob. Holdings Inc., Del. Ch., No. 2024-0655, phone hearing 11/12/24.

At issue: A group of Hertz Global Holdings Inc. warrant holders sued the car rental company in June seeking at least $187.5 million under so-called change-of-control provisions triggered by debt issuance and share buybacks. Hertz seeks the lawsuit's dismissal, arguing in a brief that the allegations are "premised on a misreading of the Warrant Agreement and contradict the purpose of the contractual provisions on which they are based." The warrant holders, in an answering brief, say it's Hertz's interpretation of the agreement that disregards its "plain and unambiguous" language.

Court action: Delaware Superior Court Judge Eric M. Davis will hear oral arguments on the motion to dismiss via teleconference. Superior Court judges are assigned some breach of contract litigation to help alleviate the Chancery Court's busy caseload.

Hertz Warrant Holders Take Legal Action for $188 Million Payment

Tuesday: ACRA Assets SA v. ARC Global Inv. II LLC, Del. Ch., No. 2024-1141, phone hearing 11/12/24.

At issue: The former CEO of the blank-check company that combined with Donald Trump's social media platform faces allegations that he stole millions of shares by funneling them to offshore shell entities. Three dozen of the early backers of the Truth Social platform seek to expedite their litigation against the SPAC's former head, Patrick Orlando. Trump isn't accused of any wrongdoing in connection with the claims against Orlando, who's been involved in multiple court fights this year over Truth Social and the SPAC created to take it public.

Court action: Oral arguments on the motion to expedite will be heard via teleconference.

Truth Social SPAC Ex-CEO Sued by Investors on Stock Theft Claims

Tuesday: Fortis Adv. LLC v. Medtronic Minimed Inc., Del. Ch., No. 2023-1055, oral argument 11/12/24.

At issue: The court previously ruled that a Medtronic Plc unit had to face litigation challenging its acquisition of Companion Medical Inc., which developed reusable insulin pens and a companion mobile app. The medical device giant may have breached the sale agreement by belatedly asserting indemnity claims blocking the release of $17.5 million from an escrow account to former Companion shareholders, the court said in a July opinion. The ex-shareholders who brought the lawsuit now have a motion for judgment on the pleadings. Medtronic argues in a brief that the court is obligated to allow the parties to develop a factual record in the matter.

Court action: Delaware Superior Court Judge Meghan A. Adams will hear oral arguments in Wilmington, Del. Superior Court judges are assigned some breach of contract litigation to help alleviate the Chancery Court's busy caseload.

Medtronic Must Defend Withholding Escrow After Insulin Pen Deal

Thursday: State of Rhode Island Off. of the Treasurer v. Paramount Glob., Del Ch., No. 2024-0457, oral arguments 11/14/24.

At issue: In a hearing rescheduled from last week, Vice Chancellor J. Travis Laster will hear objections to a preliminary ruling finding that a pension fund didn't show a legitimate purpose for inspecting Paramount Global's internal records about its $2.4 billion acquisition by Skydance Media. In the merger, producer David Ellison, the son of Oracle Corp. Chairman Larry Ellison, and RedBird Capital Partners will buy out the Redstone family's majority stake in Paramount. The Employees' Retirement System of Rhode Island said in a brief that Magistrate in Chancery Selena E. Molina erred in excluding from her consideration almost four dozen news articles about Shari Redstone. Paramount said in a brief that Laster should finalize Molina's ruling.

Court action: Oral arguments will be held in Wilmington, Del.

Paramount Gains Edge in Fight Over Skydance Buyout Files (2)

Friday: Weird Sci. LLC v. Enochian Biosciences Inc., Del. Ch., No. 2023-0599, oral arguments 11/15/24.

At issue: Enochian Biosciences Inc.—now known as Renovaro Biosciences—faces litigation over claims that the company breached an agreement allowing its former majority owner, Weird Science LLC, to participate in certain sales of registered securities to the public. Enochian seeks to dismiss the litigation, arguing in a brief that Weird Science had "ample opportunity" to sell their shares "and they certainly are not the victims of fraud." Other defendants in the case also have filed separate motions to dismiss. Weird Science, arguing for the case to proceed, has also alleged Renovaro's longtime legal counsel, K&L Gates LLP and firm attorney Clayton E. Parker, participated in the scheme.

Court action: Oral arguments on the motions to dismiss will be heard in Wilmington, Del.

Enochian Accused of Trampling on Ex-Owner's Stock Resale Rights

Friday: Shafi v. Chien, Del. Ch., No. 2023-1157, oral arguments 11/15/24.

At issue: The directors and investing units of the shuttered social-media startup IRL, or In Real Life, seek to dismiss a lawsuit claiming they wrongfully rushed to shut down to protect their reputations. IRL co-founder and former CEO Abraham Shafi filed the lawsuit a year ago, alleging the board that removed him lied about its reasons for closing the site. The board argues in a brief that Shafi and his subordinates deployed computer bots to "deceive investors into believing that IRL was the next promising social media platform." Shafi said in an answering brief that the board is trying to scapegoat him for the startup's collapse.

Court action: Oral arguments on the motion to dismiss will be held in Wilmington, Del.

Busted Social-Media Darling IRL's Founder Sues Softbank Unit (2)

(Corrects to reflect relationship between RedBird Capital Partners and businesses owned by Larry Ellison.)

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Baltimore wins $266 million in opioid case against distributors

Brendan Pierson

By Brendan Pierson

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Bottles of several opioid based medication at a pharmacy in Portsmouth, Ohio, June 21, 2017. REUTERS/Bryan Woolston/File Photo Purchase Licensing Rights, opens new tab

Nov 13 (Reuters) - The city of Baltimore won $266 million in its lawsuit accusing top drug distributors McKesson (MCK.N), opens new tab and Cencora (COR.N), opens new tab of fueling an epidemic of opioid addiction in the U.S., and is expected to seek billions more in the next phase of the case.

A six-person jury in the Circuit Court for Baltimore found McKesson responsible for $192 million and Cencora for $74 million on Tuesday following a nearly two-month trial. The amount represents damages compensating the city for harms the companies were found to have caused.

Baltimore, which has been hit hard by the opioid crisis, opted out of large national opioid settlements in recent years in the hope of winning more money on its own. In 2022, Baltimore recorded 904 opioid overdose deaths, out of a total population of about 569,000, while the national opioid overdose death rate was about 25 per 100,000.

Next month, the city is expected to ask Judge Lawrence Fletcher-Hill for about $9 billion from the companies to pay for the cost of addressing the opioid crisis going forward. That is a legal remedy known as abatement, and is distinct from civil damages.

Baltimore accuses Cencora, formerly called AmerisourceBergen, and McKesson of ignoring red flags that opioids they supplied were being diverted into illegal channels. The companies deny the claim.

"Justice was done," said Bill Carmody, a lawyer for Baltimore. "The jury's verdict is an important step toward helping Baltimore recover so that it can continue to be one of the best cities in America and a place where all of its citizens can be healthy and succeed."

Both companies said they would seek to have the verdict overturned. McKesson in a statement said that the verdict "fundamentally misunderstands McKesson's limited role as a pharmaceutical distributor."

Cencora said it "frays the legal and ethical tightrope the company is being asked to walk between providing access to necessary medications and acting to prevent diversion of controlled substances."

Baltimore is one of more than 3,000 local, Native American tribal and state governments across the country that have filed similar lawsuits against drugmakers, distributors and pharmacies over the opioid crisis. The vast majority of those cases have been settled through nationwide agreements, which now total about $46 billion.

With Tuesday's verdict, which comes after a series of settlements with other companies including Walgreens (WBA.O), opens new tab and Johnson & Johnson (JNJ.N), opens new tab, Baltimore has now obtained more than $668 million in verdicts and settlements.
McKesson supplied about half of Baltimore's opioids between 2006 and 2019, according to U.S. government data. In 2017, it reached a $150 million settlement with the U.S. Department of Justice, under which it admitted that it had failed in its duty to prevent illegal drug sales nationwide.
Cencora is also currently facing a civil lawsuit by the Justice Department over its alleged role in the opioid crisis.
More than 800,000 people in the United States died of opioid overdoses from 1999 through 2023, according to data from the U.S. Centers for Disease Control and Prevention.
Reporting By Brendan Pierson in New York, Editing by Alexia Garamfalvi and Bill Berkrot

Jury rules for Baltimore in opioid case, awards $274 million in damages

baltimoresun.com/2024/11/12/jury-rules-for-baltimore-in-opioid-case-awards-274-million-in-damages

Alex Mann November 12, 2024

BackyardProduction / iStock via Getty Images
Maryland and most of its localities recently received nearly $24 million as the 2023 installments of payments for settlements aimed at abating the opioid crisis, the office of state Attorney General Anthony G. Brown announced Wednesday.

By Alex Mann | amann@baltsun.com
UPDATED: November 12, 2024 at 5:41 PM EST

A jury on Tuesday ruled in favor of the City of Baltimore, finding that two drug distribution companies fueled the opioid epidemic in the city by sending hundreds of millions of painkillers here, and awarded $274 million in damages.

By ruling for the city, the jury determined that the city's opioid problem was depriving residents of their right to public health and safety. Jurors found that the companies, McKesson and AmerisourceBergen, unreasonably shipped huge sums of painkillers to the Baltimore area, substantially contributing to the public nuisance.

Together, the two drug distributors accounted for 60% of the prescription opioid market in Baltimore for about a decade, city lawyers said. Between 2006 and 2019, McKesson and AmerisourceBergen sent 320 million oxycodone pills here.

By pumping pills into the area, the city contends, the companies helped to hook a new generation on opioids, people who went on to die at staggering rates when their prescriptions ran out and they turned to more potent heroin and fentanyl.

Baltimore's win at trial represents a gamble paying off. Years ago, the city opted out of a global settlement between a group of opioid manufacturers and distributors and a host of states and municipalities around the country, opting to pursue its own cases against those companies with hopes of securing larger payouts. Before the trial against McKesson and AmerisourceBergen, the city settled with a range of manufacturers, distributors and pharmacies for more than $402.5 million.

A spokesman for the city said it could still not disclose the details of its settlement with opioid manufacturer Johnson & Johnson.

Baltimore could still earn more money from its case against McKesson and AmerisourceBergen. Circuit Judge Lawrence P. Fletcher-Hill scheduled an “abatement” trial in December. That proceeding determines how much the companies must pay to help Baltimore mitigate the ongoing crisis a jury has now ruled that they fueled.

The city will ask for up to $11 billion in abatement.

“Abatement is a special remedy which applies when plaintiff proves a cause of action for nuisance,” Carl W. Tobias, Williams Chair in Law at the University of Richmond School of Law, said in an email. “The amount awarded to abate the nuisance could make the ultimate award substantially larger.”

After deliberating less than two days, the jury ruled McKesson and AmerisourceBergen accounted for 70% and 27% of the public nuisance in Baltimore, respectively, attributing just 3% to other actors. That means the damages the companies are on the hook for are closer to $266 million combined.

In a statement, Mayor Brandon Scott noted that the verdict brings the city’s winnings from opioid litigation to at least $668.5 million, “a game-changing figure that will reshape our ability to confront this crisis in every part of our city.”

“The opioid overdose epidemic has taken a toll on every community in this country, but in Baltimore, it has touched every resident in some way and devastated whole families and whole neighborhoods,” said Scott, a Democrat. “Today, a jury agreed that the outsized impact on our city was a direct result of the actions of big pharma. I am grateful to the jury for their careful deliberation, which has validated our claim against these bad actors, and sent a message that indifference for the lives of our residents will not be tolerated.”

At trial, lawyers from McKesson and AmerisourceBergen persistently downplayed the role of prescription painkillers in the opioid epidemic, saying instead that heroin and fentanyl were responsible for the addiction scourge. They blamed cartels, gangs and street crews for flooding city streets with illicit drugs.

The defense attorneys also said that doctors were responsible for increases in opioid shipments to Baltimore because the companies only shipped drugs to meet demand driven by prescriptions. They said the companies only sold to pharmacies licensed by the Drug

Enforcement Administration and the state of Maryland.

But city attorneys countered that the companies neglected their responsibilities under the federal Controlled Substances Act to catch and report suspicious orders of opioids. They said McKesson and AmerisourceBergen intentionally overlooked warning signs that the drugs they sold were ending up on the streets.

A spokesperson for McKesson said the company “continues to maintain and enhance strong programs” designed to detect when its opioids end up on the streets and to report such circumstances when they arise.

“We respect but disagree with the jury’s verdict, which fundamentally misunderstands McKesson’s limited role as a pharmaceutical distributor,” the spokesperson said. “We believe this decision does not adequately take into account the compelling facts and evidence presented at trial. We are prepared to file motions challenging the verdict and, if those are denied, we will file an appeal.”

Mike Iorfino, a spokesman for AmerisourceBergen, which is now called Cencora, said in a statement the company was “disappointed with the jury’s verdict, which we believe does not reflect the facts of the case.”

“Cencora distributes FDA-approved medications to licensed and registered health care providers and today’s verdict further frays the legal and ethical tightrope the company is being asked to walk between providing access to necessary medications and acting to prevent diversion of controlled substances, Iorfino said. “Our teams are analyzing the ruling and evaluating all options moving forward, including appealing today’s verdict.”

The trial, which spanned more than six weeks, featuring dozens of witnesses, hours of videotaped depositions and hundreds of documents, put a magnifying glass to the distributors’ business with several pharmacies throughout the Baltimore area. In some cases, the companies continued to send huge amounts of painkillers despite what a former DEA agent described as glaring “red flags,” such as large quantities of prescriptions called in from pain clinics and opioids making up unusually high proportions of pharmacies’ business.

McKesson sent more oxycodone to Drug City Pharmacy in Dundalk than any other independent pharmacy nationwide. The owner told McKesson at one point that he was employing off-duty police officers to catch people selling pills in the parking lot. McKesson nonetheless increased its supply of oxycodone. At the peak, McKesson was sending 273,000 oxycodone pills to the pharmacy each month, or more than 3 million annually.

“This is just so much oxycodone,” former DEA agent Ruth Carter testified. “There’s no explanation I can think of.”

City lawyers called a range of Baltimore employees to testify to the everyday toll of the epidemic.

A fire official said the department responds to up to 6,000 opioid overdoses a year. A leader in the Department of Public Works Solid Waste Bureau testified to waste-laden blocks in areas where people were known to use opioids. A health department employee described the agency’s efforts to combat the crisis, such as distributing clean needles to users.

The city’s legal team hired an economist who estimated Baltimore spent at least $197 million over the last 13 years — an average of more than $15 million a year — combating the opioid crisis via its police, fire and health departments and the Mayor’s Office for Homeless Services. He projected the city would spend $73 million more from 2024 to 2029.

During the trial, Fletcher-Hill ruled the jury could not award punitive damages against McKesson and AmerisourceBergen, dramatically reducing the pull of money available. Punitive damages, or fines designed to punish defendants, can number up to 10 times more than compensatory damages, or costs defendants seek reimbursement for through litigation.

Have a news tip? Contact Alex Mann at amann@baltsun.com and @alex_mann10 on X.

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Critical Mass With Law.com's Amanda Bronstad: Third Circuit Hears Post-Purdue Arguments in Boy Scouts Case, Lead Prosecutor in Tom Girardi Trial Joins Edelson

law.com/2024/11/13/critical-mass-with-lawcoms-amanda-bronstad-third-circuit-hears-post-purdue-arguments-in-boy-scouts-case-lead-prosecutor-in-tom-girardi-trial-joins-edelson

Amanda Bronstad

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

This week: The **U.S. Court of Appeals for the Third Circuit** heard Nov. 6 arguments on whether to change the third-party releases in the **Boy Scouts** bankruptcy. **Assistant U.S. Attorney Ali Moghaddas**, a lead prosecutor in the **Tom Girardi** trial, has joined **Edelson PC**. Find out who represents **Pfizer** in a growing number of lawsuits over **Depo-Provera**.

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

Judge Marjorie Rendell.

'The Panel Was Pressing Both Sides Pretty Hard'

In a Nov. 6 hearing that lasted three hours, the **U.S. Court of Appeals for the Third Circuit** heard arguments on whether to dismantle the third-party releases in the **Boy Scouts of America**'s Chapter 11 reorganization plan.

Here's the coverage from **ALM**'s **Ellen Bardash** on the hearing, which involved 10 attorneys who represented the Boy Scouts, insurance companies and sexual abuse claimants who supported the plan. But some insurance firms and abuse claimants want changes, citing the

U.S. Supreme Court's June 27 decision in *Harrington v. Purdue Pharma*, which found non-consensual third-party releases in opioid manufacturer Purdue Pharma's $6 billion bankruptcy plan to be unlawful under the U.S. Bankruptcy Code.

Purdue isn't only impacting the Boy Scouts case. At least three other bankruptcy judges have evaluated the decision in Chapter 11 plans involving **Robertshaw U.S. Holding Corp.**, **Tonawanda Coke Corp.** and **Smallhold Inc.**

I asked Ellen what made the Boy Scouts' bankruptcy stand apart from the other cases. She told me:

"What sets this case apart most is the scope of it. The plan includes the largest sexual abuse settlement at least in the U.S. (maybe anywhere) and is set to pay out over 60,000 survivors. And there's the time element: the large majority of abuse claimants are elderly, and the longer this process is drawn out in the courts, the more are dying before getting compensation."

So, did the Third Circuit panel give any indication of how it might rule? Ellen told me:

"The panel was pressing both sides pretty hard so I can't say they were leaning one way or the other, but Judge [Margorie] Rendell, who used to be a bankruptcy attorney, seemed reluctant to shake up the third-party release practice without strong proof of problems in it."

Ali Moghaddas of
Edelson. Courtesy photo

Girardi Prosecutor Joins Edelson: 'I Loved Their Mission'

A lead federal prosecutor who got the Aug. 27 conviction of **Tom Girardi**has joined **Edelson PC**. **Assistant U.S. Attorney Ali Moghaddas**, of the **Central District of California**, joined the Los Angeles office of Edelson on Tuesday.

Jay Edelson (**Edelson**) said the hire comes as the firm is focused on a rise in class action trials. Edelson was a key player in breaking open the Girardi scandal when it alerted a federal judge in the lawsuits against **Boeing** over the **Lion Air crash** about a missing $2 million in client settlements. **U.S. District Judge Thomas Durkin**, of the **Northern District of Illinois**, issued a 2020 contempt order against Girardi and his firm, **Girardi Keese**, and referred them to federal authorities.

Moghaddas and **Assistant U.S. Attorney Scott Paetty** spearheaded the Girardi trial. Moghaddas did the closing argument and cross examination of Girardi on the stand. He told me he reached out to Edelson, whose lawyers were "instrumental to the Girardi investigation for several years," to ask about other plaintiffs' firms in Los Angeles he was considering joining.

"They said those places are outstanding, but if you're looking to go plaintiffs' side, we're thinking about opening an LA office, so what about here?"

So, why did he pick Edelson? He told me: "I loved their mission. Knowing what I know about them and the Girardi case, they did something no other plaintiff lawyers would do."

Still, Moghaddas said, the irony is not lost on him that "a prosecutor who put this big bad plaintiffs lawyer away is now a plaintiffs lawyer himself." But he said:

"I cannot tell you how many times I met with Tom's former clients who were witnesses in our case, and others that ultimately weren't called for whatever reason, but it was, to me, how could this guy be such this salt-of-the-earth, folks who went to Tom in their darkest hour, really heartbreaking stories. There's got to be a better way of doing this, got to be lawyers who put their clients first, and not these greedy plaintiffs lawyers who just want to buy personal jets and mansions. I've met many of them in LA. That's not what I want to do, I want to put folks first."

DEPO-PROVERA box of medication with MEDROXYPROGESTERONE active substance by PFIZER,used for contraception,birth control. Credit: Depo-Provera/Adobe Stock

Who Got the Work?

DLA Piper partners George Gigounas stepped in to represent **Pfizer** in a growing number of lawsuits alleging injectable birth control medication **Depo-Provera** increases the risk of developing brain tumors. The defense lawyers appeared on Monday in the first Depo-Provera case filed, but **Law.com Radar** has identified at least four lawsuits so far.

Here’s what else is happening:

Marriott 2.0: **Marriott** was back before a federal appeals court to reverse – again – a district judge’s order that certified a class of hotel guests impacted by its 2018 data breach. The Nov. 1 oral arguments before the **U.S. Court of Appeals for the Fourth Circuit** focused on a 2023 order that found Marriott could not use the defense of a class action waiver to defeat certification because it argued for the cases to be coordinated into multidistrict litigation. That order followed the Fourth Circuit’s remand of an earlier class certification order, which had failed to consider a class action waiver.

Zantac Verdict? A jury in **Alameda County Superior Court** is deliberating in the first Zantac trial in California. The trial, against **Boehringer Ingelheim**, began Oct. 3. Jurors began deliberating on Nov. 6. The Oakland trial comes after two previous Zantac trials in Illinois ended in mistrials. Juries in two other trials in Illinois handed defense verdicts to Boehringer Ingelheim and **GlaxoSmithKline**, which agreed last month to settle 80,000 Zantac lawsuits for $2.2 billion.

Orrick Breach: A federal judge in California approved **Orrick**’s $8 million settlement of a lawsuit over its 2023 data breach. **U.S. District Judge Susan Illston** oversaw four separate lawsuits over the Orrick breach, which impacted the personal data of about 640,000 people. Meanwhile, **Gunster** agreed to pay $8.5 million to resolve a class action over a 2022 breach impacting 9,550 people. In 2024, three other law firms — **Taft**, **Robinson & Cole** and **Burr & Forman** — reported breaches.

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

Florida AG Unable to Shift Meta Child Privacy Case to Home Turf

B **bloomberglaw.com**/product/blaw/bloomberglawnews/litigation/X4S0I5R8000000

Litigation
Ashley Moody, attorney general for Florida, speaks during the Conservative Political Action Conference in National Harbor, Maryland, on March 2, 2023.

Al Drago/Bloomberg via Getty Images

- California judge overseeing social media multidistrict litigation
- Law says AG generally must sue where defendant is located

Florida Attorney General Ashley Moody (R) failed to shift most of her lawsuit alleging Meta Platforms Inc. violated child privacy law back to a Florida federal district court.

Judge Yvonne Gonzalez Rogers of Oakland, Calif., who is overseeing a consolidated multidistrict litigation against social media giants, ruled Tuesday that the US District Court for the Middle District of Florida doesn't have jurisdiction to hear the bulk of the Florida AG's case.

Florida's lawsuit was filed in that court last fall, the same day that a multi-state coalition of over 30 AGs filed a nearly identical joint suit against Meta before Rogers, who sits on the US District Court for the Northern District of California. Both lawsuits claim Meta's Facebook and Instagram platforms cause addiction and mental health harms to children and violate the federal Children's Online Privacy Protection Act.

Rogers is overseeing a multidistrict litigation consolidating all cases filed nationwide that relate to social media addiction. That includes hundreds of private civil suits from parents of children injured by social media, school districts claiming social media disrupts learning, and the state AG lawsuits.

Moody's lawsuit was consolidated into the MDL before Rogers, and she ruled last month that the multi-state AGs and Florida lawsuits can largely proceed on the merits. Florida's AG sought to have it's case returned to her home state for trial.

Rogers' Tuesday ruling said the Middle District of Florida doesn't have jurisdiction over the Florida case because COPPA's jurisdiction requirements generally require lawsuits to be filed where the defendant is located.

She rejected the AG's argument that the Florida court had jurisdiction because Meta Payments Inc., a subsidiary that oversees payment processing and data analytics, is incorporated in Florida.

Rogers said the Florida AG will have to refile in an appropriate jurisdiction, which would at least include the Northern District of California where Meta is located.

The judge did find that the Middle District of Florida did have jurisdiction to hear the state's claim that Meta violated the Florida Deceptive and Unfair Trade Practices Act, potentially resulting in that claim being filed separately from the remainder of Moody's suit.

Covington & Burling LLP represents Meta.

The case is In Re: Social Media Adolescent Addiction/Pers. Inj. Products Liab. Litigation , N.D. Cal., No. 4:22-md-03047, 11/12/24 .

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Judge advances claim against Meta by Florida AG over kid safety

courthousenews.com/judge-advances-claim-against-meta-by-florida-ag-over-kid-safety

Matt Simons

FILE - A Meta Portal Go is displayed during a preview of the Meta Store in Burlingame, Calif., on May 4, 2022. (AP Photo/Eric Risberg, File)

OAKLAND, Calif. (CN) — A federal judge dismissed multiple claims against Meta brought by the state of Florida claiming the company violated the state's Children's Online Privacy Protection Rule ("COPPA"), which imposes certain requirements on operators of websites or online services directed to children under 13 years of age.

Although U.S. District Court Judge Yvonne Gonzales Rogers dismissed two of Florida's claims on the grounds of improper venue and failure to claim sufficient facts, she allowed one claim based on the Florida Deceptive and Unfair Trade Practices Act to survive.

It's a partial win in a recent string of legal victories for Meta CEO Mark Zuckerberg, who is battling a massive suit against his company that includes 34 states, including California.

In June, Meta moved to dismiss Florida’s amended complaint for improper venue and lack of personal jurisdiction. The court heard arguments on the matter in September.

In its motion to dismiss, Meta argued the U.S. District Court for the Middle District of Florida is an improper venue for the state’s children’s act claim, warranting its dismissal. Florida countered, arguing that a substantial part of the events that created the claim occurred in its state.

Particularly, it pointed to Florida users who were required to agree to Meta’s terms of service and the collection of their data by Meta, which was sold to Florida-based companies for use in targeted ads.

In a 20-page ruling Tuesday afternoon, Gonzales Rogers found for Meta on the matter of venue, finding none of the state’s arguments supported a claim that the children’s act was violated, including data collection.

“The mere collection of data is insufficient,” Gonzales Rogers wrote. She dismissed the claim without prejudice, allowing the claim to be refiled in a more appropriate venue.

The judge similarly dismissed a claim against Meta Pay, the purchasing client of Zuckerberg’s tech empire. The service allows users to make payments on Facebook, Messenger, Instagram and select online stores.

Florida argues that because Meta Pay and its parent company are sufficiently intertwined — sharing email systems, corporate headquarters, industry data and core leadership — Meta Pay should be fair game for their lawsuit as well. This idea, known as a “common enterprise theory of liability,” is a common legal doctrine.

Gonzales Rogers rejected the claim with prejudice, finding that state failed to sufficiently explain how Meta Pay acted with other Meta defendants toward violating the statutes in their claim.

“Florida does not indicate how Meta Payments was involved in the design of any allegedly harmful platform features, the alleged concealment of those harms, or the unlawful collection of under-13 users’ data,” she wrote

Florida did achieve a minor victory when the judge ruled that the Middle District of Florida had jurisdiction for its trade practices claim, citing a conscious effort by Meta to embed itself in the state via in-person meetings with local business owners since 2021.

“Because Meta has purposefully directed its activities at Florida, and because Florida’s claim arises out of or relates to Meta’s contacts in Florida, the FLMD court can exercise specific personal jurisdiction over Florida’s FDUTPA claim consistent with due process,” Gonzales Rogers wrote.

The ruling in the Northern District of California is part of the multidistrict litigation involving hundreds of personal injury lawsuits on behalf of children and adolescents, by school districts and local governments, and by state attorneys general. The plaintiffs claim that Facebook and Instagram, as well as Google's YouTube, ByteDance’s TikTok and Snapchat are to designed to foster compulsive use by minors.

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

Categories / Business, Courts, Health, Technology

Ban on social media firms contacting kids without consent faces challenge

DJ dailyjournal.com/articles/381916-ban-on-social-media-firms-contacting-kids-without-consent-faces-challenge

Nov. 13, 2024

"The restrictions imposed by California Senate Bill 976 violate bedrock principles of constitutional law and precedent from across the nation," Bradley A. Benbrook of Benbrook Law Group PC wrote in the lawsuit filed by NetChoice LLC.

A technology trade group filed a lawsuit Tuesday against California, arguing that a law that would prohibit social media companies from sending unsolicited notifications to minors without a parent or guardian's consent violates the First Amendment.

"The restrictions imposed by California Senate Bill 976 violate bedrock principles of constitutional law and precedent from across the nation," wrote Bradley A. Benbrook of Benbrook Law Group PC in Sacramento on behalf of NetChoice LLC.

Also representing the plaintiff is national boutique firm Lehotsky Keller Cohn LLP.

In the complaint filed in San Jose, the trade group also asked for a preliminary injunction to prevent the bill from going into effect Jan. 1, 2025, with its key provisions becoming effective two years later. *NetChoice LLC v. Bonta et al.*, 24-CV-07885 (N.D. Cal., filed Nov. 12, 2024).

In September, Gov. Gavin Newsom signed the bill, which is similar to a New York law. The governor's office declined to comment on the lawsuit, but Newsom praised SB 976 when he signed it.

"Every parent knows the harm social media addiction can inflict on their children - isolation from human contact, stress and anxiety, and endless hours wasted late into the night," according to a statement he issued at the time. "With this bill, California is helping protect children and teenagers from purposely designed features that feed these destructive habits."

The bill - written by state Sen. Nancy Skinner, D-Berkeley - is one of several to impose new requirements on social media companies because of fears that children are suffering mental harm due to excessive online use late at night and during school hours.

Critics say the bill is flawed and ineffectual legislation that violates the First Amendment.

"Not only does SB 976 restrict access to information conditioned on the willingness to hand over sensitive information, but it requires companies to continually track minors -- and send reports to the government annually," wrote Paul Taske, NetChoice's associate director of litigation.

Attorney General Rob Bonta's office denied that the law regulates speech. "The same companies that have committed tremendous resources to design, deploy, and market social media platforms custom-made to keep our kids' eyes glued to the screen are now attempting to halt California's efforts to make social media safer for children," the office said in a statement.

The battles between social media companies and legislators who want to regulate them have been raging in California and nationwide, often with bipartisan coalitions of legislators conflicting with social media companies.

In August, a 9th U.S. Circuit Court of Appeals panel affirmed part of a San Jose district judge's injunction of a state law - the California Age-Appropriate Design Code Act -- requiring technology companies to assess their websites' risks to children.

9th Circuit Judge Milan D. Smith Jr. wrote that the law's requirement that companies complete a Data Protection Impact Assessment for each service they provide and how it is detrimental to children "falls well short of satisfying strict First Amendment scrutiny."

The panel vacated the remainder of U.S. District Judge Beth Labson Freeman's injunction and remanded the case to her. *NetChoice LLC v. Bonta*, 2024 DJDAR 7847 (9th Circ., filed Oct. 23, 2023).

Eric Goldman, an associate dean at Santa Clara University School of Law who is not involved in the new lawsuit, noted oral arguments are scheduled in January before the U.S. Supreme Court in a case involving a Texas law requiring pornographic websites to verify the age of visitors. He said a decision could be critical to the SB 976 case.

"We'll find out where the [justices'] heads are at," he said in a phone interview, noting that a defeat for Texas could make it difficult for California to enforce its law, which also has the practical burden of coming up with a way to confirm an online user's parent or guardian. *Free Speech Coalition et al. v. Paxton*, 23-1122 (S. Ct., filed April 12, 2024).

"There's no clear way to authenticate parental status," Goldman added. "It's not as simple as the parent identifying themselves, and what if parents disagree?"

#381916

Judge gives final OK to $8M settlement in Orrick data breach

abajournal.com/news/article/judge-gives-final-ok-to-8m-settlement-in-orrick-data-breach

Cybersecurity

By Debra Cassens Weiss

November 12, 2024, 1:51 pm CST

A federal judge in California approved an $8 million settlement Friday in consolidated cases brought against Orrick, Herrington & Sutcliffe over a 2023 data breach that may have compromised the personal information of more than 638,000 people. (Image from Shutterstock)

A federal judge in California approved an $8 million settlement Friday in consolidated cases brought against Orrick, Herrington & Sutcliffe over a 2023 data breach that may have compromised the personal information of more than 638,000 people.

U.S. District Judge Susan Illston of the Northern District of California said after a hearing Friday she would give final approval to the settlement but was holding off on a $2 million request for attorney fees to be paid out of the settlement money.

Law360, Bloomberg Law and Law.com have coverage.

Orrick initially reported that the data breach affected nearly 153,000 people but later said the number of people affected was higher. More than 638,000 people received notices that personally identifiable information may have been obtained, according to an Oct. 4 motion for final settlement approval.

The hack exposed names, home addresses, birth dates and Social Security numbers, plaintiffs said.

The settlement allows class members to receive an “alternative cash payment” of $75 without supplying documentation, according to the Oct. 4 motion.

Those who submit documentation can seek up to $2,500 for out-of-pocket expenses, up to $7,500 for extraordinary losses, up to $125 for time spent (amounting to $25 per hour), and, for Californians, an extra $150 for privacy act claims, the motion says.

Orrick agreed to the settlement but denied liability and did not concede the factual basis for claims.

Illston's approval of the Orrick settlement follows an agreement by Florida midsize law firm Gunster to pay $8.5 million to plaintiffs suing over a 2022 data breach, according to Law.com.

Related topics:

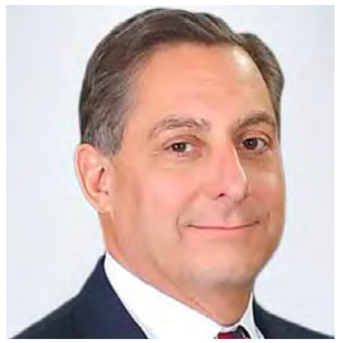
States | Trials & Litigation | Law Firms | Practice Management | Technology | California | Verdicts & Settlements | Career & Practice | Midsize Firm | Large Firm | Cybersecurity

'Direct defiance' leads to big penalty for big asbestos firm

legalnewsline.com/stories/665750101-direct-defiance-leads-to-big-penalty-for-big-asbestos-firm

November 12, 2024

Attorneys & Judges



Napoli | https://nsprlaw.com/

RICHMOND, Va. (Legal Newsline) - A federal appeals court ordered the Napoli law firm to pay more than $1 million in sanctions, saying the prominent asbestos lawyers tried to interfere with a contract dispute by filing competing lawsuits in New York.

“It is hard to imagine a more flagrant challenge to the district court’s authority or a more obvious spur to litigation hither and yon,” said the federal appeals court in a brief decision upholding the sanctions order.

Napoli became embroiled in the suit after the Keyes Law Firm in Maryland accused it of reneging on an agreement to split fees on more than 2,000 asbestos cases Keyes referred to Napoli. While the contract suit was proceeding in federal court in Maryland, Napoli filed two identical suits in state court in New York seeking an injunction to block the federal case.

At the same time, that court ordered Napoli to pay $317,000 in sanctions for failing to comply with discovery. A jury later ordered Napoli to pay Keyes $861,000 in damages, which the Fourth Circuit affirmed in 2022.

The federal court imposed another $1 million in sanctions against Napoli for trying to obstruct proceedings, saying a “first-year constitutional law student” would know it was improper to try and get a state court to halt a federal case.

“The full list of Napoli’s sanctioned misconduct is long and troubling,” the Fourth Circuit said. “It included repeated defiance of court orders, frivolous motions, and last minute document dumps, to name just a few examples.”

Article III of the Constitution grants federal courts with the authority to “fashion an appropriate sanction for conduct which abuses the judicial process,” the appeals court said. “Without it the `judicial Power’ would be no `Power’ at all.”

Attorney Paul Napoli protested to Law360 that his firm and Napoli Bern are separate entities. Napoli split with his longtime partner Marc Bern in 2015 amid allegations of financial impropriety and a “power struggle” as Napoli fought leukemia.

This isn’t the only fee dispute stemming from Napoli’s practice of recruiting clients through referral arrangements in which it agreed to pay a portion of its fees to the originating firms.

In 2018, California lawyer Marc Willick sued Napoli with similar allegations and sought discovery from the Keyes firm to identify cases where he said he was owed fees. An ex-employee also sued for allegedly shortchanged fees.

Napoli argued a U.S. Supreme Court decision limited the sanctions power to cases in which someone violates a court order but that is incorrect, the Fourth Circuit said in its Oct. 24 decision. Not only does that decision say sanctions can be ordered for behavior “such as” violating a court order, meaning it was just one example, but other Supreme Court rulings upheld sanctions for filing competing lawsuits in state court or trying to halt proceedings in another federal court.

“Napoli asks that we embrace the proposition that a single lawsuit may routinely spawn two others,” the appeals court said. “But no. Napoli’s New York lawsuits were in direct defiance of the district court’s authority.”

The court ended with a hopeful footnote, however: “In hopes that the trial court’s sanctions award will have a reformative effect on appellants’ future conduct, we shall exercise our own discretion and decline to impose sanctions with regard to this appeal.”

ORGANIZATIONS IN THIS STORY

U.S Court Of Appeals For The Fourth Circuit

Sending your kid to public school isn’t consenting to arbitration, Calif judge says

reuters.com/legal/litigation/column-sending-your-kid-public-school-isnt-consenting-arbitration-calif-judge-2024-11-12

Alison Frankel

A child uses a laptop in school. REUTERS/Jorge Silva/File Photo Purchase Licensing Rights , opens new tab

Nov 12 (Reuters) - As corporate defendants continue to test the limits of their power to force plaintiffs into arbitration, a California federal judge has drawn a bright red line: Parents of grade school children can't be compelled to arbitrate privacy claims against an educational technology company merely because they sent their kids to public school.
The ruling , opens new tab earlier this month by U.S. District Judge Rita Lin of San Francisco came in a prospective class action by parents who accuse California-based IXL Learning of harvesting and monetizing data from millions of grade school children, in violation of federal wiretap and state privacy laws.
IXL and its lawyers at Orrick, Herrington & Sutcliffe, as I told you in August, moved to compel the parents to arbitrate their claims. Their argument: The parents were bound to the mandatory arbitration provisions in the contracts signed by their Kansas school districts.
The school districts agreed to IXL’s terms of service, including mandatory arbitration, when they contracted with the online learning platform. IXL asserted that school district officials were empowered under the Children’s Online Privacy Protection Act to act as agents for the parents of children in their districts. So when the districts agreed to arbitrate, IXL argued, their contracts roped in the students’ parents as well.

IXL’s theory of agency under the children's privacy law rested on a handful of statements by the U.S. Federal Trade Commission in the late 1990s, when the FTC was working on rules to implement the statute. (Broadly speaking, the law gives parents control over the information that website operators can collect from children under the age of 13.)

The FTC acknowledged during the rulemaking process that it would be extremely challenging for school districts to obtain consent from every family in order to allow their students to, for instance, access the internet in school. To solve that problem, the agency opined that the law allowed schools to act as parents’ intermediaries in certain limited circumstances.

But after IXL argued in the case before Lin that FTC rules empowered school districts to accede to arbitration on parents’ behalf, the agency weighed in with an amicus brief , opens new tab refuting the premise of the company's theory. Its guidance from the 1990s, the FTC said, merely clarified that the children’s privacy law did not preclude schools from acting as parents’ agents for the purpose of notification and consent to use online learning platforms and software.

The FTC told Lin that its statements about the statute should not be construed as creating an all-purpose agency relationship between parents and school districts.

One FTC commissioner went considerably farther than that in a statement, opens new tab accompanying the FTC’s press release, opens new tab about its amicus brief. Commissioner Andrew Ferguson, a Republican appointee to the FTC, called IXL’s theory a “brutal misreading” of the children’s privacy law.
“IXL’s argument does not pass the smell test,” Ferguson wrote.

Lin agreed in her decision denying the company’s motion to compel arbitration. “In essence, IXL argues that, simply by virtue of sending their children to public school, plaintiffs have assented to arbitrate any claims they have with IXL,” the judge wrote. “Neither the Children’s Online Privacy Protection Act nor common-law agency principles support IXL’s contention.”

The company’s theory, Lin said, would undermine the whole purpose of the statute, which is to empower parents to protect schoolchildren’s privacy. IXL's argument, she said, would allow school districts to act as parents' agents to sign away kids' privacy rights — a "perverse scheme," the judge said, in light of the law's intent.

IXL alternatively argued, opens new tab, perhaps even more audaciously, that the plaintiffs had consented to arbitration by continuing to send their children to public schools that use its online platform after learning of their school districts’ arbitration agreements with the company.
Lin rejected that premise as well. California law, she said, recognizes that voluntary consent binds parties to all provisions of a contract. But Kansas law, she noted, requires children to be enrolled in school. So, the judge said, it’s hardly fair to describe the kids’ continued exposure to IXL’s platform as voluntary.

“In short,” she wrote, “a parent’s decision to not pull their child out of public school or tell them to stop using a platform that is part of the curriculum does not constitute voluntary acceptance of the benefits—and burdens—of using IXL products.”

Neither IXL nor its lawyers at Orrick responded to my query on the ruling. In addition to attempting to force parents into arbitration, the company has moved to dismiss, opens new tab the case on the merits, arguing that its data collection does not violate any state or federal law. Lin deferred a ruling on that motion to allow IXL to appeal her decision denying the company’s bid to send the case to arbitration.
An FTC spokesperson declined to comment. Plaintiffs lawyers from Morgan & Morgan and the EdTech Law Center said in an email statement that they look forward to “putting a stop to IXL's allegedly predatory business model that traffics in young people’s most sensitive

personal information."

Read more:

Friend bought you a ticket to the big game? You still have to arbitrate, says US appeals court
US government trashes IXL's arbitration bid in parents' data harvesting class action
Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting By Alison Frankel

Alison Frankel
Thomson Reuters

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

Two Judges. 60-Plus Years on the Bench. Plenty of Advice.

law.com/litigationdaily/2024/11/13/two-judges-60-plus-years-on-the-bench-plenty-of-advice

Ross Todd

Listen to the judge.

It’s a straightforward rule that applies equally to litigators and journalists covering courts.

When two judges with more than six decades of experience on the bench between them sat down at the San Francisco federal courthouse last month to dole out advice for practicing litigators, Litigation Daily was all ears. U.S. District Senior Judges **Maxine Chesney** and **William Alsup** passed along dozens of practice tips during a program sponsored by the Northern District of California Chapter of the Federal Bar Association. Here are the highlights.

More Isn’t Always Better

Chesney, who has been on the federal bench for more than 28 years and served on the state court bench for a dozen years prior to that, said that lawyers often have a way of over-complicating their cases. “I think people just go to Wikipedia and they go, ‘Oh, okay, I’ve got all these causes of action. I'll put them all in.’ And the defendant's going: ‘Here are all the affirmative defenses. Put all those in.’”

But Chesney said you don’t have to have 10 causes of action or defenses to put on a good case. Keeping things as simple as possible can help focus a fact-finder on your strongest arguments. “Don't cram a bunch of things into your pleading that you're trying to shoehorn your facts into,” she said. "It never works.”

Chesney also said that when it comes to motions, she thinks there's an inverse relationship between how much a party has to say and how right they are. “If you have to spend 25 pages explaining why there's no issue in a case, there's probably an issue in the case,” she said.

Appeal to Fairness—or Get an Airtight Set of Instructions

Alsup, who was a civil litigation partner at **Morrison & Foerster** prior to taking the bench 25 years ago, says that every trial is conducted on two levels: one according to the law and the other according to the equities. “You, as the trial lawyer, need to have a case on both fronts and try to win it on the instructions, but also try to win it on the equities,” he said.

Alsup said that winning on the equities means appealing to jurors’ sense of what’s fair. “Imagine if we, as the judge, were to say, ‘Ladies and gentlemen of the jury, you've heard all the evidence, go and decide this case according to what you think is fair,’” Alsup said. Although that’s not what the judge tells jurors, Alsup said it's “part of the dynamic in the courtroom” and what’s perceived as the fair outcome will play an important part in how jurors make their decisions.

What if you have a case that’s strong on the law, but not great on the equities? Alsup said that when that’s the case, as it sometimes can be on the defense side of civil cases, you want to make sure you have an airtight set of jury instructions. He said that model jury instructions often will have some wiggle room. Lawyers who have a case where the legally correct outcome may not be the most fair one will often have to ask for a special jury instruction. “This is where your credibility as a lawyer will be important,” Alsup said. “If you have squandered your credibility, you might not get that instruction. But if you have tried to earn some trust from the judge, this is where it makes a great deal of difference.”

Some Words and Phrases to Avoid

The judges gave a handful of words and phrases that can create problems during arguments or be the sources of disputes in and of themselves. Chesney said the word “include”—appearing either in a contract or a statute—has been problematic in multiple cases where she’s presided.

“It's ambiguous,” Chesney said. “If you use it and you make it very clear that you mean ‘but not limited to,’ it's fine. But if you use it as a substitute for ‘consisting of,’ you’ve got a problem.”

Chesney also encouraged the more senior lawyers in the audience to avoid bringing up how long they’ve been practicing during oral arguments. “Every now and then you get a lawyer who says, ‘In my 35 years of practicing law …’ and then they're going to tell you you're doing something they've never seen before,” she said. “It's not a good idea to use that on someone of my vintage, because my years are going to trump yours in almost every instance.” Chesney added that if you use that phrasing with a younger judge, “It’s just plain insulting.”

Both Chesney and Alsup echoed a message that Federal Circuit judges who heard arguments at the University of California, Berkeley School of Law imparted to students last month: don't duck hard questions. “If you get a hard question, I think it's just important to take it on,” Chesney said. She said if you feel like the answer to a question is one that’s not in your client’s favor, it’s best to concede it and move to your stronger points. But she said that if you don’t answer the question, or if you answer it by pulling the politician’s debate trick of going on a tangent, it could potentially hurt your overall argument. “If I get an answer like that, then I'm going to be very suspicious,” she said.

Alsup said in those moments the word “so” is a “dead giveaway” that whatever follows will not be responsive. He said he’ll often ask a difficult question and see the lawyer pause, look at the ceiling and say “so.”

“They launch into … their talking point that is meant to address that general subject, but it is not an answer,” he said. “Don't start your answer with the word ‘so.’ That's my advice. And at least try to answer.”

Don’t Write Out Your Opening or Closing

Chesney urged lawyers to avoid writing down their opening and closing statements. “If you write them out, you will read them,” she said. “Even though you say to yourself, ‘I'm not going to read them,’ you will read them.” She said those statements should be more of a conversation with jurors rather than a speech. “You want to tell them why they should vote in favor of the position that you're espousing,” she said. “If you're just reading and trying to get everything in—every little bit of evidence—that's not what's going to be important to them.”

Alsup said the same thing applies to examining witnesses on the stand. “It's okay to have to jot down short phrases to help you remember what point you wanted to make,” he said. But he said he sees litigators—especially those at large law firms—go into trial with notebooks “prepared three levels down by an associate” who just read the questions as written. “It's not just that you're reading it. It's [that] you're locked into the script,” Alsup said. The answers the witness is giving, the judge said, might mean you need to take a completely different direction in your examination. “I think you need to, with witnesses, be prepared to go off in a different direction and not be locked into a script,” he said.

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Matt Levine's Money Stuff: Merger Trading Will Get Easier (Correct)

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Merger Trading Will Get Easier (Correct)

By Matt Levine 2024-11-12T20:41:47469-05:00

Arbaggedon

I guess there are two ways of thinking about merger arbitrage as a hedge fund strategy. One is: "Merger arbitrage is a bet on which mergers will close." If you are a merger arbitrageur, your job is to look at merger deals that are announced, figure out how likely they are to actually close, and then bet money on the ones that the market underprices. Company X is trading at $35 per share, and then it announces that it has signed a merger agreement to be bought by Company Y for $50 per share. The stock trades up to $46. You look at the deal and think "this deal is ironclad, there are no regulatory problems, it will definitely close in six months, and I can make 8.7% in six months by buying today at $46 and selling at closing at $50." You are playing a game of skill against other traders, trying to buy the deals that will close and avoid (or short) the deals that won't. In reality nothing is certain, so you will try to pick the deals where you think the probability is good and the reward (the spread between the deal price and the current stock price) is worth the risk.

The other way to think about it is: "Merger arbitrage is a low-margin form of liquidity provision." Company X is trading at $35 per share, and then it announces that it has signed a merger agreement to be bought by Company Y for $50 per share. Investors in Company X would like to turn their attention to something new: Their job is providing capital to interesting business ideas, not figuring out whether and when mergers will close. Merger arbitrageurs come in to provide a service: They go to all the Company X investors and say "hey instead of waiting an indefinite amount of time for this merger to close and pay you $50, just sell us your shares today for $46, and we'll deal with all the hassles on the back end." And this is a useful service for which the merger arbs charge, you know, $4. They are making markets somewhat more convenient and efficient for everyone else. They are offering a simplifying abstraction — "when a merger is announced, that merger will happen" — over the messy legal complexities of the market.

These descriptions are not mutually exclusive; they are both true, and the difference is a matter of emphasis. In the first, merger arbitrage is about *being smart* and *taking on risk* to *earn gains*; in the second, merger arbitrage is about *being careful* and *limiting risk* to *earn a modest spread*. The first description is about *finding alpha*; the second is about *charging for a service*.

I once argued that the current US antitrust enforcement regime, under Lina Khan's Federal Trade Commission, is in a sense *good* for merger arbitrage. Sure sure sure Khan tries to block a lot of deals, and sometimes succeeds, but often she fails; there is just more *variability* than there once was. I wrote:

The returns to skill — to reading FTC complaints and using your expertise to know which mergers will close and which will be blocked — go way up. You buy the deals that will close (and double down when the FTC sues and the stock drops) and avoid the deals that won't; you use skill to generate alpha, rather than just being a passive index investor in every deal. … If you are good at merger arb you want some dispersion in outcomes.

That was in the context of the FTC's failed attempt to block a drug company deal, in which merger arbs were able to buy low (on the FTC's lawsuit) and sell high (when it lost). "Because of the FTC's lawsuit, we have had the ability to take something that would have made tens of millions of dollars and instead make many, many times that amount," said the head of Pentwater Capital Management, a fund that made a killing on the trade.

But that is all very much the first way of looking at merger arb, and the second way — "we collect a modest fee for moving the market along" — would argue otherwise. In that view, merger arb is basically a pennies-in-front-of-the-steamroller strategy, and in that sort of trade the main thing that you want is no steamrollers. Earning modest profits on five deals and getting blown up on one is, in this view, very bad; you do *not* want a dispersion in outcomes. You want to earn your steady fees.

Anyway good news for merger arb:

In recent months, numerous high-profile acquisitions have either struggled to close or failed, including a plan to unite Tapestry and Capri Holdings, the companies behind Coach and Michael Kors. The pileup has ripped through the hedge-fund world, leading to unexpected losses and several top traders losing their jobs.

Now however, the new president's pro-business, lighter-regulation agenda "means a pro-merger environment that will embolden companies to get bigger through acquisitions; it is as simple as that," said Orkun Kilic, a London-based arbitrager. "I am very excited for the next four years."

A hostile deal environment has largely kept Kilic on the sidelines since December, he said, and he now expects to become more active with Trump's election.

So now there will be tons of mergers, and they will all go through, and the spreads might be more modest but they'll be a lot safer.

FTX

A big problem, or perhaps opportunity, in crypto is:

1. There are a lot of crypto tokens with very large, somewhat fake "market capitalizations." Anyone can launch a new crypto token, say "there are 10 billion of these tokens," give herself 5 billion of them in two different wallets, and then sell one token from one wallet to the other for $1. Voilà, the token has a market cap of $10 billion, and her stake is worth $5 billion. If she tried to sell all of it at once she would probably be able to get, in round numbers, $0. But mechanically multiplying her stash of tokens by the last sale price will tell you that her stash is worth $5 billion.

- 2. There are, or were anyway, a lot of places — leveraged crypto exchanges, crypto lending platforms, decentralized finance protocols — where you could *borrow*, non-recourse, against a fairly arbitrary list of crypto tokens. You show up with $100 worth of Bitcoin and the platform will lend you $50, or $100, or $200 even. You show up with $100 of A Shiba Inu Token, But Not The Ones You've Heard Of, and the platform will lend you $10, or $20, or maybe $50 or $99: The haircuts might vary based on the token's popularity or liquidity or volatility, but a lot of places would lend you *something* against all sorts of nonsense.
- 3. Those two facts combine straightforwardly into "find (or create) some nonsense, push up its price, plop it into a lending platform, borrow as much real cash as you can against it, and then walk away whistling as it collapses."

The most elegant description of this problem/opportunity probably comes from Sam Bankman-Fried, the co-founder of crypto exchange FTX, who explained it to me on Bloomberg's Odd Lots podcast in 2022:

You start with a company that builds a box and in practice this box, they probably dress it up to look like a life-changing, you know, world-altering protocol that's gonna replace all the big banks in 38 days or whatever. Maybe for now actually ignore what it does or pretend it does literally nothing. It's just a box. …

This box is worth zero obviously. … But on the other hand, if everyone kind of now thinks that this box token is worth about a billion dollar market cap, that's what people are pricing it at and sort of has that market cap. Everyone's gonna mark to market. In fact, you can even finance this, right? You put X token in a borrow lending protocol and borrow dollars with it. If you think it's worth like less than two thirds of that, you could even just like put some in there, take the dollars out. Never, you know, give the dollars back. You just get liquidated eventually. And it is sort of like real monetizable stuff in some senses. And you know, at some point if the world never decides that we are wrong about this in like a coordinated way, right? Like you're kind of the guy calling and saying, no, this thing's actually worthless, but in what sense are you right?

In many senses! Let me quickly mention two famous examples of this phenomenon — "you put X token in a borrow lending protocol and borrow dollars with it," "never, you know, give the dollars back" and "just get liquidated eventually." One is the Mango Markets exploit: A guy named Avi Eisenberg pushed up the price of MNGO tokens, borrowed against his MNGO futures position on the Mango Markets platform, and walked away whistling with $110 million, though now he is in prison.

The other is, of course, *FTX:* FTX collapsed a few months after that podcast, and Bankman-Fried is also in prison. A stylized description of part of what went on in FTX's collapse — not all of it, but an important part — is:

1. Alameda Research, a crypto trading firm also started and owned by Bankman-Fried, had billions of dollars' worth of tokens, many of which were "Samcoins," tokens with names like FTT and Serum and MAPS, which were affiliated with FTX in some way and largely owned by FTX/Alameda. Their market capitalizations were large and, it seems fair to say in hindsight, not entirely real.

- 2. FTX is a leveraged crypto exchange, and Alameda was able to borrow against those positions on FTX, in part to buy other crypto stuff and in part to pay for stadium sponsorships, political donations, real estate, etc.
- 3. Then those tokens went poof, Alameda owed FTX billions of dollars, and the money wasn't there.
- 4. So ultimately FTX's *other* customers took Alameda's losses: FTX was loosely speaking a platform that made loans against dodgy crypto tokens; it loaned its customers' money to Alameda secured by its weird tokens, and when those tokens went poof so did the customers' money.

I will say: I sort of assumed that this was unique to Alameda. That is, FTX generally advertised that it had *good* risk management that would *prevent* this sort of thing from happening, that it *wouldn't* just lend a ton of its customers' money to someone who showed up with a random inflated token. Alameda, though, was subject to many exceptions, and could sort of borrow from FTX whatever it wanted.

But last week FTX's new management went on a tear of suing people who took money from FTX under its old management. Bloomberg's Bill Allison and stacy-marie ishmael report:

FTX filed a lawsuit against Anthony Scaramucci and his hedge fund SkyBridge Capital as part of a broader effort to claw back money for creditors of the bankrupt company.

The lawsuit against the former White House communications director is one of 23 filed in the bankruptcy court of Delaware on Friday. Defendants also include digital-asset exchange Crypto.com and political groups such as the Mark Zuckerberg-founded FWD.US, according to court documents.

FTX alleges that during the crypto winter of 2022, founder Sam Bankman-Fried engaged "in a campaign of influence-buying throughout the year and making lavish and showy 'investments'."

There's also a lawsuit against Binance, arguing that, when FTX paid Binance $1.76 billion to cash it out of its stake in FTX in 2021, that $1.76 billion was largely stolen and Binance should give it back.

But also, Coindesk reports:

Among the lawsuits filed last week by the FTX estate is a 32-page document listing eight counts against Humpy the Whale, the crypto trader who earlier this year attracted attention for a governance attack on Compound DAO.

Naming him as Nawaaz Mohammad Meerun, a Mauritian citizen, the suit filed in the U.S. Bankruptcy Court for the District of Delaware alleges that between January 2021 and September 2022, Meerun "orchestrated a series of massive market manipulation schemes and defrauded hundreds of millions of dollars from FTX." It also claims Meerun had connections to organized crime groups. Meerun dismissed the allegations.

Here is the complaint, which describes the standard approach, e.g.:

In January 2021, Meerun began laying the groundwork for to perpetrate a fraud on FTX by accumulating a massive position in an illiquid token ("BTMX"). He eventually cornered more than half of the total BTMX supply, driving BTMX's price up by 10,000% over three months. Meerun knew that the notional value of his BTMX holdings had been massively (and artificially) inflated by his manipulative trading, and used that inflated value to exploit a flaw in FTX's margin trading rules, "borrowing" tens of millions of dollars from FTX using his BTMX holdings as "collateral." Meerun knew that as soon as his manipulation stopped, BTMX's price would crash and he would be required to return all of his "borrowed" assets.

"I have always operated within the parameters set forth by FTX exchange," Meerun told Coindesk, and I suppose "operate within the parameters set forth by FTX exchange" and "exploit a flaw in FTX's margin trading rules" could be different ways of saying the same thing. Anyway the complaint also has some good FTX internal exchanges:

Bankman-Fried, [Ryan] Salame, [Gary] Wang, and Nishad Singh, Director of Engineering at FTX, were left scrambling to catch up with Meerun's actions. On March 27, 2021, Salame asked "do we want to restrict his trading until he replies?," adding that "it almost feels like a competitor exchange trying to screw us? idk that sounds dumb lol." …

As of the morning of March 28, 2021, Meerun's manipulated BTMX position had a paper value of nearly $1 billion, and Meerun had withdrawn a total of $450 million from FTX, which included more than $150 million withdrawn on March 27 alone. That same day, Bankman-Fried pointed out that he had "realized we forgot to block withdrawals [face with tongue emoji]" on Meerun's account. Salame responded: "ooof i didnt realize how insane the account had gotten."

Concerned that Meerun would attempt to circumvent the limits they had placed on his account, Bankman-Fried directed Wang and Singh to "treat the account as flagged so we'll catch if it tries to feed another account." Singh replied that Meerun had "already done some stuff with a new account kingofthepudding@protonmail.com . . . which now has blocked withdrawals." Bankman-Fried reported that he had "messaged him threatening to freeze/liquidate." Salame bizarrely responded that it "would be cool to keep him as a friend though since he's like 50% of our margin platform lol."

Ultimately they liquidated him, Alameda took on his positions, and Alameda (and, thus, eventually FTX) lost somewhere between $400 million and $1 billion on the trade. "Realized we forgot to block withdrawals [face with tongue emoji]" is not the most embarrassing internal FTX communication about an oopsie — that would be "hidden, poorly internally labeled 'fiat@' account" — but it's not the *best* emoji to have in a court filing. Anyway you can read all of this as a dress rehearsal for FTX's collapse a year later.

Greenwashing

There will probably be a few more of these in the next three months, but then what?

The Securities and Exchange Commission [Friday] charged Invesco Advisers, Inc. for making misleading statements about the percentage of company-wide assets under management that integrated environmental, social, and governance (ESG) factors in investment decisions. The Atlanta-based registered investment adviser agreed to pay a $17.5 million civil penalty to settle the SEC's charges.

According to the SEC's order, from 2020 to 2022, Invesco told clients and stated in marketing materials that between 70 and 94 percent of its parent company's assets under management were "ESG integrated." However, in reality, these percentages included a substantial amount of assets that were held in passive ETFs that did not consider ESG factors in investment decisions. Furthermore, the SEC's order found that Invesco lacked any written policy defining ESG integration.

"As stated in the order, Invesco saw commercial value in claiming that a high percentage of company-wide assets were ESG integrated. But saying it doesn't make it so," said Sanjay Wadhwa, Acting Director of the SEC's Division of Enforcement. "Companies should be straightforward with their clients and investors rather than seeking to capitalize on investing trends and buzzwords."

We have talked about this sort of thing before. For a while, it was obviously good marketing for investment managers to say “our ESG Fund always considers ESG factors in making investment decisions,” because (some) customers wanted ESG. Sometimes the managers did not in fact *always* consider ESG factors in making investment decisions for the ESG Fund, and the SEC would occasionally audit the funds, find some decisions that were made without writing a memo about the ESG factors, and impose a fine. Once it did this for biblical investing too.

The Invesco case is a bit different because the SEC’s objection here is not about Invesco’s marketing of its ESG funds. Rather, it’s about Invesco’s marketing of its whole business. The alleged greenwashing here is not “Invesco said that its ESG funds always considered ESG, and sometimes they didn’t.” Rather it is “Invesco said that up to 94% of its assets were in ESG funds, but actually that was an exaggeration because it counted purely mechanical non-ESG index funds.” It wasn’t *that* much of an exaggeration — Invesco said things like “investment teams responsible for managing approximately 85% of Invesco’s AUM have attained the ESG integration level defined as minimal but systematic integration” — but it was an exaggeration, so Invesco had to pay up.

Here, though, there is no suggestion that Invesco tricked investors into investing in its ESG funds by exaggerating their ESG approach. Rather, the point here is that, way back in “between approximately April 2020 and July 2022,” Invesco thought it was a good idea to tell potential customers that every part of its investment process was infused with ESG. ESG, Invesco was saying, was not just a part of how it ran designated ESG funds; it was part of Invesco’s DNA and its culture.

Imagine saying that now! We talked last week about “greenhushing,” the idea that, *now*, if you want to integrate any ESG factors into your investment decisionmaking, you have to do it quietly, because otherwise Republican lawmakers will come after you. (There’s some chance that, in the next four years, considering ESG will be a *crime.*)

Gary Gensler’s SEC has a few months to bring its last greenwashing cases, but after that, I assume the next SEC will be bringing greenhushing cases? “Invesco said in its marketing materials that it does not boycott fossil fuels, but in fact it runs some ESG funds that own no fossil-fuel stocks, so it has to pay up.” Get them coming and going.

Who controls the Fed?

Early in Donald Trump's first term as president, there was a funny fight over who was the acting director of the US Consumer Financial Protection Bureau. One theory was that it was Leandra English, who was a holdover from the Obama administration; the other theory was that it was Mick Mulvaney, who was named to the job by President Trump. It kind of feels like, in the long run, the person running a federal executive agency is going to be the one picked by the president, but in the short term, with the acting director, weird stuff does happen. But Mulvaney won the fight early on, by showing up at the CFPB on his first day and bringing doughnuts. For some reason the court battle stretched on for a year and a half before English gave up (and President Trump nominated a permanent director), but as far as I can tell, Mulvaney was running the CFPB for most of that time. "To me," I wrote, "the person who is acting as director of the CFPB is the acting director of the CFPB. If Mulvaney tells CFPB people to do things and they do it, then he is the acting director; if English does, then she is." The doughnuts, I argued, were essential, as a matter of legal realism, to persuading the relevant stakeholders that he was actually in charge.

But the CFPB is an odd agency; it was created during the Obama administration and has no real Republican support. Mulvaney called it a "sick, sad joke." He could have accomplished a lot of his goals, as acting director of the CFPB, by padlocking the front door and going away. He did not bring the doughnuts as the first step toward rallying the troops to conquer new heights in the battle against consumer financial fraud. "The CFPB can't do any regulating for a year while we fight this out in court" would have been, for the Trump administration, fine.

I bet Jerome Powell has been scouting good doughnut shops:

When a frustrated Donald Trump flirted with removing Federal Reserve Chair Jerome Powell in a dispute over interest rates back in 2018, Fed leaders privately readied a break-glass-in-case-of-emergency response: a legal challenge against the president to protect the integrity of America's central bank. …

Six years later, Trump is heading back to the White House and the dormant drama of his fraught relationship with Powell is back on display. When asked last week whether he would resign if asked to do so, Powell offered a one-word reply: "No." He gave the same answer when asked if the president had the authority to dismiss him. …

"If the president were to succeed at this, that would mean every future chair is subject to removal at the whim of the president," said Scott Alvarez, who served as the Fed's general counsel from 2004 to 2017. "I don't think that's a precedent Jay would want to set, and that's why I think he would fight it. This is a humongous precedent."

He has been thinking about this for a while:

"I will never, ever, ever leave this job voluntarily until my term ends under any circumstances. None whatsoever," he told a visitor [in 2019]. "It doesn't occur to me in the slightest that there would be any situation in which I would not complete my term, other than dying."

At the time, Fed leaders decided that if Powell's status as chair of the Fed's board was called into question, the central bank's separate interest-rate setting body, the Federal Open Market Committee, would close ranks by meeting to immediately re-elect Powell as its chair. ...

The upshot is that attempting to remove Powell would provide little practical benefit because Powell would likely continue to lead the institution until any litigation is resolved, which could extend beyond Powell's term.

Yes if the rest of the Fed thinks you're the Fed chair then that does kind of make you the Fed chair? What if there are two Fed chairs, though? Powell, with the support of the FOMC, saying "the Fed Funds rate is 4.75%," and a Trump appointee saying "actually it's 2%"? *What would the short-term interest rate be?* I feel like the plausible answers are "20%" and "0%." It has to be something! It's not like the CFPB; doing nothing, even for the Trump Fed, is not an option.

Or is it?

Hours after Powell implied last week he would fight any dismissal, Sen. Mike Lee (R., Utah) posted a news article with a comment suggesting the Fed should answer to the White House. "Yet another reason why we should #EndTheFed," he wrote on X.

There is definitely a view in government that padlocking the front door of the Fed and going away would produce better monetary policy than the Fed does. That does not seem to be the dominant view in Trump's circles, but you can't quite rule it out. On the other hand, elsewhere in Trump's circles, there is a school of thought that actually having two Fed chairs would be fun:

Scott Bessent, an investment manager who is currently an adviser to Trump [and potential Treasury secretary], last month suggested Trump should announce whom he plans to select as Powell's successor so that this "shadow" chair could try to undercut Powell, making him a lame duck. In an interview last week, Bessent said based on recent criticism of the idea, he no longer thought it was worth pursuing.

It would be funnier to name, like, three shadow Fed chairs and have them going around making wildly different pronouncements about monetary policy, and then at the end pick the one who got the most attention. Or have a bunch of different Fed chairs for different points on the interest-rate curve; "when I am Fed chair in two years and nine months, let me tell you what *I* am going to do to rates." Anyway at Credit Slips Adam Levitin argues that "realistically, if President Trump were to fire Powell for any reason, no matter how ridiculous (e.g., 'I don't like his tie'), the effect would be to render Powell's position untenable," but Powell has made it clear that "untenable" is not a problem for him, and it doesn't seem to be a problem for Trump either.

Things happen

Bonuses Set to Grow Across Wall Street for First Time Since 2021. Key Advisers to Trump Back Bessent for Treasury Secretary. The Outsider Trying to Restore Citi to Investment-Banking Glory. Elliott Amasses $5 Billion-Plus Stake in Honeywell. BlackRock Targets Money-Market Fund Business in New ETF Push. Levered Bond ETF That's ' Broken Many Hearts' Sees Record Inflow. Shell Overturns Dutch Court Order to Slash Emissions Faster. How oil and gas companies disguise their methane emissions. SoftBank Rainmaker Exits Vision Fund After Tumultuous Tenure. Mattel Apologizes for Porn Site Misprint on 'Wicked' Toy Packaging.

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(Corrects spelling of Invesco in the sixth paragraph of the third section.)

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- 1. Non-recourse is sort of an essential feature of a lot of decentralized lending platforms, since they are lending only against crypto wallets, not legal entities. It is less of a formal feature of the centralized lending platforms, though it seems to be a practical one: When crypto borrowers blow up, they *really* blow up, so there's not that much recourse anyway.
- 2. That is, if you read a story that is like "the central bank of Ruritania is mired in a dispute about who its governor is, with the new president's appointee pushing for lower rates while the previous incumbent insists that he is still in charge," you would sort of assume that Ruritania is an inflationary basket case and its short-term market interest rate was like 20%. But the US is not Ruritania, and if you read any story of the form "weird stuff is happening," that tends to push US interest rates lower — even when the weird stuff is, like, "the US might default on its debt."
- 3. Doing nothing on bank regulation and financial stability, also jobs of the Fed, probably is an option.

Accounting Plan Tackles Confusion Over Quarterly Disclosures (1)

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Securities Law
Photo Illustration: Jonathan Hurtarte/Bloomberg Tax; Photos: Getty Images

- Proposal marks standards board's second attempt at clarity
- Project stems from 2018 SEC disclosure rule clean-up

Companies would get clarity on which information they must reveal in financial statement footnotes quarterly versus annually under a revised plan from US accounting standard-setters.

The Financial Accounting Standards Board on Wednesday issued a proposal for public comment that attempts to streamline US interim disclosures accounting guidance, outlined in ASC 270.

The proposal aims to compile in one place a list of existing disclosures that companies must provide every quarter under US accounting standards. It would also clarify that all entities that issue quarterly financial statements must follow the guidance, including any privately-held businesses that issue interim reports.

In addition, the draft changes would add to US accounting rules a prior SEC disclosure principle that entities must update investors on material events or changes since the end of the most recent fiscal year.

The board borrowed the wording from Securities and Exchange Commission guidance that predated a 2018 project that eliminated dozens of agency financial disclosure mandates , the Wall Street regulator said were either outdated or overlapped with other SEC requirements and US accounting standards.

Some of the requirements the SEC deleted weren't actually in FASB's rulebook, so the board had to get to work. It was intended to be a quick fix, but it was a bigger undertaking than FASB expected.

The board in November 2021 set out to refresh its interim reporting guidance, but audit firms and trade groups gave the plan mixed feedback, with many saying they needed specific guidance.

This latest version attempts to address some of that feedback, but FASB members themselves have acknowledged it won't be a perfect solution. In April, FASB member Christine Botosan said she had envisioned the proposal as a one-stop shop for businesses to find all quarterly disclosure requirements, but "that is just a pipe dream," she said at the time.

Comments are due on March 31, 2025**.**

(Updates with link to proposal.)

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ADM Delays Financial Statement as It Reviews Previous Reports

By Gerson Freitas Jr.2024-11-12T17:31:32943-05:00

Archer-Daniels-Midland Co. has delayed the release of its financial statement for the third quarter as the company works to restate previous reports. The shares fell in after-hours trading.

The agriculture company won't be able to file its so-called Form 10-Q for the period ended in September "within the prescribed time period without unreasonable effort and expense," it said in a filing. The company also needs more time to complete amendments to the financial statements for full-year 2023 and the first two quarters of 2024, it said.

Read More: ADM Has Yet to Get a Handle on Accounting Months After Scandal

ADM shares slid as much as 1.9% in New York after regular-trading hours.

ADM said last week it found additional errors in how it reported transactions between some of its businesses, adding to a January scandal that has drawn investigations by US authorities and wiped out billions in market value. The company has been testing new internal controls as part of efforts to fix "material weakness" over financial reporting.

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Chipotle's Portions Are Eating Away Profits, Investor Suit Says

By **Sydney Price**

Law360 (November 12, 2024, 6:34 PM EST) -- Fast-casual restaurant chain Chipotle has been hit with a proposed shareholder class action alleging the company downplayed concerns about meager portion sizes, an issue the company later acknowledged it would correct, sacrificing profitability.

Posts of Chipotle customers describing the Mexican food chain's portion sizes as "inconsistent or lacking" began trending on social media this past spring and summer, according to shareholder Michael Stradford's suit filed in California federal court on Monday. Despite previously denying quality issues, Chipotle announced its initiative to ensure generous portions in July, reducing profitability and leading to share declines, the suit alleges.

In addition to Chipotle, its ex-CEO Brian Niccol and Chief Financial Officer John R. Hartung are individual defendants in the suit.

The suit's class period begins Feb. 8, 2024, the day Chipotle filed its annual report for the previous year with the U.S. Securities and Exchange Commission. In the report, Chipotle provided a risk disclosure statement that said, "[if] we do not continue to persuade guests of the benefits of paying higher prices for our higher-quality food, our sales and results of operations could be hurt."

Stratford alleges this risk disclosure and others were false and misleading.

"The statement [was] materially false and misleading because the Company understated how difficult it would be to convince customers of the 'overall value proposition of its menu' given that the Company provided customers with highly inconsistent (and in the view of some customers, lacking) portion sizes," the suit states.

During the class period, Chipotle responded to the social media critiques and media reports regarding portions by making misleading statements, the suit alleges. For example, Chipotle's chief corporate affairs officer told Fox Business in July that "there have been no changes in our portion sizes, and we aim to provide a great guest experience every time," according to the suit.

The truth began to emerge, the suit alleges, on July 24. On that day, Chipotle executives told investors in its second-quarter earnings call that the continued criticism had caused the company to "relook" at its execution strategy and reemphasize training and coaching around assembling bowls and burritos, the suit states. As a result, the company would have higher cost of sales in the upcoming quarter, the executives told investors, according to the complaint.

On this news, the price of Chipotle shares declined 96 cents, or about 2%, to close at $50.82 on July 25, according to the suit.

Last month, Chipotle announced during its third-quarter earnings call that cost of sales in the quarter were 30.6%, an increase of about 90 basis points year-over-year, the suit states. Ensuring "consistent and generous portions," as well as inflation of ingredient prices, contributed to the increase, the company said, the complaint states.

The suit alleges Chipotle's shares fell again when Business Insider published an article describing how the chain's efforts to improve customer satisfaction would impact its profitability on Oct. 30.

On this news, the price of Chipotle shares declined $4.76, or about 8%, to close at $55.73 on Oct. 30.

The suit claims Chipotle and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act.

Counsel for Stradford and a representative of Chipotle did not immediately respond to requests for comment on Tuesday.

Stratford is represented by Laurence M. Rosen of The Rosen Law Firm PA.

Counsel information for Chipotle was not immediately available on Tuesday.

The case is Stradford v. Chipotle Mexican Grill Inc. et al., case number 8:24-cv-02459, in the U.S. District Court for the Central District of California.

--Editing by Vaqas Asghar.

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Deloitte Must Face Certified Class Over Nuclear Audit Reports

By **Lauren Berg**

Law360 (November 12, 2024, 9:29 PM EST) -- A South Carolina federal judge on Tuesday certified a class of SCANA Corp. investors accusing Deloitte of issuing audit reports that misled them about the progress the utility company was making on a $9 billion nuclear energy expansion project that failed.

U.S. District Judge Jacquelyn D. Austin, in a 32-page **order**, granted the class certification motion brought by the lead plaintiff, the International Brotherhood of Electrical Workers Local 98 Pension Fund, finding that it meets the requirements of a typical and adequate class representative. Even though IBEW bought SCANA shares after alleged partial corrective disclosures were made, the judge determined that does not make it atypical.

"Multiple courts have held that 'a stock purchase after a partial corrective disclosure is not per se evidence that a class representative is atypical and did not rely on the alleged fraudulent representations,'" Judge Austin said, pointing to the 2022 case In re Under Armour Securities Litigation, in which a Maryland federal judge found that the plaintiffs' allegations suggested the price they paid still "reflected their reliance on the defendants' alleged misrepresentations and omissions."

"Similarly, here, IBEW alleges that it relied on Deloitte's material misrepresentations and omissions when purchasing SCANA's common stock in an efficient market" after a partially corrective disclosure was made, she added. "Further, as IBEW points out, there is no suggestion that it is the only class member who bought stock after the partial disclosures."

Judge Austin determined that IBEW has shown that its interests and those of the putative class members align, according to the order. The judge certified a class of investors who purchased SCANA stock between Feb. 26, 2016, and Dec. 20, 2017, the order states.

The litigation, first filed in November 2019, accuses Deloitte of failing to warn SCANA investors about financial problems plaguing a $9 billion project to build a pair of nuclear reactors in South Carolina that ultimately went nowhere.

The suit alleges that even after Bechtel Corp. was hired to assess the project and found problems, those issues were swept under the rug. When the issues were belatedly revealed over time, SCANA's stock price correspondingly slid, plummeting from $76.12 to $37.39 during the class period, the complaint states.

And the investors allege that, as SCANA's longtime auditor, Deloitte knew about the Bechtel findings and had other information showing the project wouldn't be done in time to take advantage of the tax credits.

The accounting firm made multiple attempts to escape the lawsuit, including an early move in **July 2020**, arguing that it "fairly represented SCANA's financial position" in the audits and denied that it acted knowingly or recklessly to conceal the utility company's alleged fraud.

"Deloitte never made any statement, of any kind, about the nuclear project, the progress of construction, or their completion," the company asserted.

But U.S. District Judge Donald Coggins — who handled the case before it was reassigned to Judge

Austin in February — in August 2023 shot down Deloitte's latest dismissal bid, rejecting its argument that IBEW's board of trustees didn't sign off on the suit. The judge said it wasn't clear from the fund's controlling document that such approval was needed.

IBEW in January moved for class certification and to appoint Cohen Milstein Sellers & Toll PLLC as class counsel and Tinkler Law Firm LLC as liaison counsel.

In her order Tuesday, Judge Austin also determined that IBEW has shown that questions common to class members predominate over any questions affecting just individual members. The judge found that Deloitte hasn't proven that "the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock," the order states.

"Deloitte has not established that the alleged misstatements in its audit reports … are not related or relevant to the alleged corrective disclosures, which revealed that the nuclear project would not be completed on time or at all; that the costs of the nuclear project were significantly higher than projected; that SCANA knew of and actively misrepresented clear risks to regulators; and that the [Base Load Review Act] rate recovery was at risk," the judge said.

Judge Austin also approved IBEW's choice of Cohen Milstein as class counsel and Tinkler as liaison counsel, according to the order.

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

SCANA has faced multiple suits over the nuclear power work. It was part of a **$520 million settlement** with utility customers that was granted preliminary approval in March 2020. Its investors in **January 2020 asked** a federal judge to sign off on a $192 million settlement resolving allegations the company and its executives misled the public about project delays.

IBEW Local 98 is represented by Laura H. Posner, Steven J. Toll and Jan Messerschmidt of Cohen Milstein Sellers & Toll PLLC and William Tinkler of Tinkler Law Firm LLC.

Deloitte is represented by Daniel R. Fuerst, Christopher A. Ogiba, Lesley A. Firestone, Tiffany Payne, Lauren N. Vriesinga, Mark A. Nebrig, John A. Fagg Jr., Nader Raja and Kristen Kenley of Moore & Van Allen PLLC and Scott A. Edelman, Jed M. Schwartz and Andrew B. Lichtenberg of Milbank LLP.

The case is International Brotherhood of Electrical Workers Local 98 Pension Fund v. Deloitte & Touche LLP et al., case number 3:19-cv-03304, in the U.S. District Court for the District of South Carolina.

--Additional reporting by Jessica Corso. Editing by Vaqas Asghar.

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Hertz Investors Urge Chancery Not To Toss Stock Warrant Suit

By **Jeff Montgomery**

Law360 (November 12, 2024, 7:32 PM EST) -- An attorney for two Hertz Inc. institutional investors told a Delaware judge Monday that the vehicle rental giant relied on an impermissible reinterpretation of a warrant agreement to reject a redemption demand purportedly triggered by the company's post-Chapter 11 recapitalization.

Daniel A. Fliman of Paul Hastings LLP, counsel to investment affiliates of Discovery Capital Management LP, told Superior Court Judge Eric M. Davis that the investors only have to show a viable — if not winning on its face — argument to beat a Hertz motion to dismiss the case, which seeks a $187.5 million payout plus interest.

At issue are claims that the Discovery funds purchased roughly 9.1 million out of 89 million warrants originally entitling holders to purchase stock at $13.80 per share — now $20.47 — including as a change of control payment triggered by a reorganization or recapitalization of Hertz.

Afterward, between November 2021 and December 2023, Hertz undertook $3.4 billion in post-bankruptcy share repurchases and $2.2 billion in debt issuance that boosted the ratio of the rental car company's debt to outstanding stock book value from -8% to more than 70%, the warrant holders said.

"We believe the right reading of this provision is that, so long as you have any recapitalization, you have a reorganization event," Fliman said.

While Hertz argued otherwise, Fliman said, the court is obliged to deny a motion to dismiss "unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible to proof."

"What we know is, by the end of June 2022, Hertz had acquired over $2 billion in shares and incurred $1.5 billion of debt," Fliman said. "We contend at that point in time, we absolutely have a recapitalization and reshuffling of the capital structure" that triggers an obligation to repurchase warrants.

Hertz sought Chapter 11 protection in May 2020 with about $20 billion of debt, citing a major downturn in business as the COVID-19 pandemic ravaged the travel industry. The company gained approval for its Chapter 11 plan and emerged from insolvency in June 2021.

Following the bankruptcy, Hertz issued warrants that entitled holders to purchase more than 89 million shares of its common stock at a set price, the company's brief noted. The warrants have a 30-year term that expires June 30, 2051.

Andrew Ditchfield of Davis Polk & Wardwell LLP, counsel to Hertz, argued that Discovery's complaint ignored provisions in the warrant agreement that refers to Hertz stock as a whole, rather than a single share or the 89 million shares associated with the warrant.

"If a recapitalization is a reorganization event, regardless of whether there's a conversion or exchange" while another section refers to a reorganization event "meaning a recapitalization, why would the company have to exercise an amendment to make it clear the warrants are exercisable for something else?" Ditchfield asked.

Under the agreement, Ditchfield said, "warrant agreement is a defined term" that captures the more than 89 million shares of Hertz common stock tied to the warrant. But warrant shares and common stock are used differently.

"Nowhere in the warrant agreement is the phrase 'the common stock' used to mean anything less than the class of Hertz common stock as a whole," Ditchfield said.

Fliman said the warrant agreement creates protection for a warrant holder related to what happens to common shares.

"Here, where interpretation of a contract is in dispute, dismissal is proper only if the defendant's construction is the only reasonable construction as a matter of law," Fliman said, arguing that Hertz had made that case.

Hertz, Fliman said, asked the court to "deviate from the plain language" of the contract and arguing as a fallback that "our reading would lead to a commercially unreasonable result."

Judge Eric M. Davis, a Superior Court Complex Commercial Litigation Division panel member sitting by designation for the case, said he would take the arguments under advisement.

The Discovery funds are represented by Samuel T. Hirzel II and Brendan Patrick McDonnell of Heyman Enerio Gattuso & Hirzel LLP and Daniel A. Fliman, Ryan Montefusco, Isaac S. Sasson and John F. Iaffaldono of Paul Hastings LLP.

Hertz Global Holdings Inc. is represented by Blake Rohrbacher and Kevin M. Kidwell of Richards Layton & Finger P.A. and Andrew Ditchfield, Alison B. Miller and Kyra M. Kaufman of Davis Polk & Wardwell.

The case is Discovery Global Opportunity Master Fund Ltd. et al. v. Hertz Global Holdings Inc., case number 2024-0655, in the Court of Chancery of the State of Delaware.

--Editing by Kelly Duncan.

Update: This story has been updated to include additional information.

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Weedmaps Execs Named In Derivative Action Over SEC Fine

By **Emilie Ruscoe**

Law360 (November 12, 2024, 8:02 PM EST) -- Current and former executives and directors of Weedmaps' parent company face shareholder derivative claims following an investor class action and a regulator's fine over the digital cannabis marketplace's alleged use of "willfully inflated" user metrics.

In a **complaint** filed Friday in California federal court, investor Ryan DeGennaro claimed that the company's brass had breached their fiduciary duties after an internal probe showed the company had significantly overcounted its monthly active users by including in that total the number of individuals who were served its pop-under advertisements on third-party websites.

DeGennaro cited the internal investigation's finding that the company's monthly active user metric, which is a key performance indicator for the company, was at times overstated by more than 50%.

The investor argued that the probe showed the numbers had been intentionally inflated, noting that most of the users who were directed to the Weedmaps website as a result of its use of pop-under ads would close the company's website without clicking anything else on the website.

DeGennaro's suit comes after the U.S. Securities and Exchange Commission **fined** the company $1.5 million in September, referring to "untrue and misleading reporting" of monthly active users by the company.

According to the SEC, the company's public filings described its monthly active users count as the number of users who opened its website or app in a month.

But the pop-under ad viewers who were actually included in the numbers it reported "did not volitionally seek out the WM Technology site," and "despite the reported growth in [monthly active users], WM Technology's user engagement metrics were stagnant or declining."

WM Technology, which also offers e-commerce and compliance software to cannabis companies, also got hit with a **proposed investor class action** in October over the company's "large and increasing" percentage of users who were automatically shown the company's website and didn't engage.

On Friday, DeGennaro said as a result of the misstated metrics, the company would ultimately expend millions of dollars on internal probes, on handling the securities class action and on changing its financial reporting controls. It also saw losses in the form of wasted corporate assets and losses because the company had "improperly overcompensated" the defendants, the investor claimed.

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

DeGennaro is represented by Alex J. Tramontano, Betsy C. Manifold and Rachele R. Byrd of Wolf Haldenstein Adler Freeman & Herz LLP, Herbert W. Mondros of Rigrodsky Law PA and Joshua H. Grabar of the Grabar Law Office.

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

The case is DeGennaro v. Francis et al., case number 8:24-cv-02454, in the U.S. District Court for the Central District of California.

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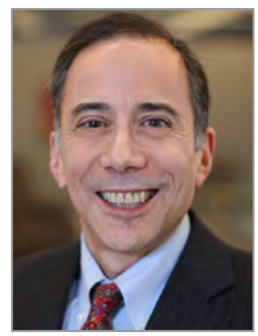
Why K-Cup Claims Landed Keurig In Hot Water With SEC

By **Andrew Rodman and Randy Wang** (November 12, 2024, 4:02 PM EST)


Andrew Rodman


Randy Wang

On Sept. 10, the U.S. Securities and Exchange Commission **announced** that it had charged Keurig Dr. Pepper for making incomplete — and therefore, by the SEC's reasoning, inaccurate — statements regarding the recyclability of its popular K-cup pods.

Specifically, Keurig made statements in two Form 10-Ks that indicated that its pods could be "effectively recycled," without revealing that two of the largest commercial recyclers had told Keurig that the recycling of the pods at such time was not commercially feasible, and as a result, the companies did not intend to accept pods at their respective facilities.

To settle the SEC's charges, Keurig, without admitting or denying the findings, agreed to pay a $1.5 million civil penalty and consented to the entry of a cease-and-desist order.

The SEC action against Keurig is significant because it did not include a finding of a material misstatement or omission in violation of Exchange Act Rule 10b-5. Instead, it alleged a violation of Exchange Act Section 13(a) and Rule 13a-1, which require that companies file complete and accurate annual reports.

While the SEC's action may have been driven, at least in part, by its recent focus on greenwashing, the settlement does not make this clear.

Deeper Dive

The SEC order[1] discussed the background of the charges, including the establishment of a company goal to achieve the recyclability of pods, and testing by the company to demonstrate recyclability, including the radio frequency identification tagging of pods during the recycling process.

Potential Significance of Recyclability

According to the SEC's order, consumer research conducted by Keurig in 2016 indicated that environmental concerns, among others, were a significant factor for certain customers when deciding whether to purchase a Keurig brewing system.

Keurig's Form 10-Ks also suggested the importance of environmental concerns. In its fiscal year 2018 10-K, Keurig disclosed its goal that all of its pods be recyclable by 2020. Additionally, in each of its fiscal year 2019 and 2020 10-Ks, Keurig included a consumer preference risk factor, which stated in part:

> Consumers are also increasingly focused on sustainability, with particular attention to the recyclability of product packaging, reducing consumption of single-use plastics and non-recyclable materials, and the environmental impact of manufacturing operations. If we do not meet consumer demands by continuing to provide recyclable packaging options and focusing on sustainability throughout our manufacturing operations, our sales could suffer.[2]

The SEC's order further stated that sales of pods comprised a significant percentage of net sales of

Keurig's coffee system business segment in 2019. This disclosure might also be interpreted to indicate the potential importance of the pods' recyclability to the company's business.

Testing and Disclosure

According to the SEC's order, in connection with its 2016 consumer research, Keurig reviewed options to change its pods to make them recyclable. The company determined that pods made of polypropylene No. 5 plastic, sold in packaging with appropriate instructions, would achieve this goal. However, Keurig was aware of recycling industry concerns that small items like the pods could not be processed and recycled at recycling facilities.

To find out for itself, Keurig performed tests at various recycling facilities in the U.S. and Canada beginning in 2016, utilizing radio frequency identification readers at various points in the recycling process to follow the movement of pods tagged with a tracking chip. These tests enabled Keurig to track the flow of the pods through the facility, including the ultimate destination of pods, and assess whether pods were processed and sorted correctly. Keurig's tests reflected that pods typically could be successfully sorted from other materials during the recycling process.

According to the SEC, after Keurig's testing, two recycling companies that were involved in the testing provided negative feedback regarding the commercial feasibility of curbside recycling of pods. They indicated that they did not intend to accept pods at their own recycling facilities at such time. The two companies are among the largest in the industry, operating more than one-third of U.S. recycling facilities.

SEC Order

Based upon Keurig's 2019 and 2020 fiscal year Form 10-Ks, the SEC's order indicated that Keurig violated Section 13(a) and Rule 13a-1 under the Exchange Act, which require accurate and complete 10-K filings. The SEC believed that disclosing that pods could be recycled was misleading without also disclosing that two of the largest recycling companies would not recycle the pods.

Keurig, without admitting or denying the findings in the order, agreed to pay a $1.5 million civil penalty and consented to a cease-and-desist order from committing or causing any violations and future violations.

Commissioner Peirce's Dissent

Commissioner Hester Peirce released a statement dissenting from the order,[3] in which she indicated that Keurig's statements regarding the pods' ability to be "effectively recycled" remain accurate even if a third-party recycler elects not to do so. She asserted that the SEC misread Keurig's statement that the pods could be recycled as an assertion that the pods would be recycled.

Peirce believed the statement remains accurate, irrespective of whether decisions by a third party meant that the pods would likely not be recycled. For example, she asked whether Keurig's statements would be any less accurate if recycling companies accepted the pods but most consumers simply threw them in the trash because it was easier.

Peirce also emphasized that the SEC's order does not indicate that the statements at issue were material. In her view, the closest the SEC came in this regard is the statement that the sales "comprised a significant percentage of net sales of Keurig's coffee systems business segment" in 2019.

She also believed that the fact that certain consumers identified environmental concerns as a factor, among others, when deciding whether to purchase a Keurig brewing system in 2016 does not mean that the recyclability of pods was material to investors in 2016 or 2019. In her view, the SEC action "will expose companies to endless second-guessing by the Commission unless they pad any [immaterial] statements they do make with a mountain of caveats."

Peirce also said the absence of any charges against Keurig on the basis of the antifraud rules — Section 10(b) and Rule 10b-5 of the Exchange Act, Securities Act Section 17(a), or Exchange Act Rule 12b-20 — is telling of the weakness of the SEC's case.

Takeaways

The SEC's charges against Keurig serve as another reminder that companies should scrutinize their filings to ensure that all disclosures — particularly with respect to environmental, social and governance matters — present the full picture. In this regard, companies should consider taking the following actions.

Companies should notify persons responsible for relevant functional areas of the need to not only review and substantiate statements in SEC filings, marketing materials and other public statements for accuracy, but also to ensure that there is no information missing that would be needed to provide a complete understanding, even where not necessarily material. Companies should exercise judgment to avoid distracting management with clearly immaterial items while addressing questionable statements that could attract the SEC's attention, as well as considering whether any limitations or uncertainties need to be addressed.

They should also take particular care with respect to ESG matters in their marketing and other public statements involving product capability and characteristics in light of the SEC's focus on greenwashing, as well as scrutiny from other regulators and private plaintiffs. If there is any doubt regarding potentially immaterial assertions of product capabilities or characteristics, companies should consider whether those statements are appropriate or needed.

Last, companies should review risk factors and forward-looking statement disclaimers to ensure that they sufficiently cover ESG and related matters.

Andrew Rodman is counsel and Randy Wang is senior counsel at Bryan Cave Leighton Paisner LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://www.sec.gov/files/litigation/admin/2024/34-100983.pdf.

[2] https://www.sec.gov/Archives/edgar/data/1418135/000141813523000003/kdp-20221231.htm.

[3] https://www.sec.gov/newsroom/speeches-statements/peirce-statement-keurig-091024.

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Elanco Pays $15M SEC Fine To Settle Sales Incentive Claims

By **Rachel Scharf**

Law360 (November 12, 2024, 8:18 PM EST) -- Elanco Animal Health Inc. has agreed to pay a $15 million fine to resolve U.S. Securities and Exchange Commission allegations that it deceptively juiced revenues with distributor sales incentives between 2019 and 2020, the regulator announced Tuesday.

The **in-house SEC settlement** includes a civil monetary penalty and a cease-and-desist order barring Elanco from committing securities law violations going forward. The animal feed and pharmaceutical company neither admitted nor denied the commission's allegations regarding its sales practices after **spinning off** from Eli Lilly & Co. in 2018.

The SEC alleged that after Elanco's initial public offering, the company set high revenue targets to show investors its viability as an independent entity. To meet these goals, the commission said, Elanco began offering third-party distributors sales incentives such as rebates and extended payment terms beginning in the first quarter of 2019.

According to the commission, Elanco failed to tell investors that incentives were a major factor in meeting its revenue targets — or that these practices led to a buildup of over $100 million worth of channel inventory that Elanco's distributors might have trouble selling to end users, such as animal owners, veterinarians and feed lots.

"Elanco publicly attributed its revenue growth to strong consumer demand," the SEC's order said. "Moreover, Elanco also failed to warn investors of the impact incentivized sales to distributors in excess of consumer demand could have on its future revenue and core revenue growth, and that its future performance may suffer if its distributors refused the enticements."

The SEC said Elanco stopped offering sales incentives in the first quarter of 2020, leading to a $160 million decline in revenue and a 13% drop in share value. The company misleadingly attributed these losses to the COVID-19 pandemic, the agency alleged.

In a statement Tuesday, Elanco spokesperson Colleen Dekker noted that the company "has increased its controls concerning channel inventory levels [and] improved disclosure processes" as part of the $15 million settlement.

"Our full cooperation with the SEC on this matter reflects our efforts of transparency and determination to execute against our innovation, portfolio and productivity business strategy," Dekker said. "The company is focused on delivering a consistent flow of high impact innovation to drive revenue growth while improving cash flow to decrease leverage."

A spokesperson for the SEC declined to comment Tuesday.

The SEC first subpoenaed Elanco over its channel inventory and sales practices in 2021, according to the pharmaceutical company's regulatory disclosures. Elanco said in these disclosures that it provided documents and information to the SEC and reached a settlement in principle this past July.

Elanco, based in Greenfield, Indiana, faced similar allegations of so-called channel-stuffing in a **proposed shareholder class action** filed in 2020. An Indiana federal judge **tossed the suit** for failure to state a claim in 2022. It is now on appeal at the Seventh Circuit.

The SEC is represented in-house by Christina McGill, Drew Grossman, George Bagnall, Kevin Guerrero, Peter Rosario, Stacy Bogert, Ken Donnelly and David Nasse.

Elanco is represented by Sarah Coyne and Stacy Nettleton of Weil Gotshal & Manges LLP.

The case is In the Matter of Elanco Animal Health Inc., case number 3-22309, before the U.S. Securities and Exchange Commission.

--Editing by Drashti Mehta.

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Truth Social Sponsor's Shares Mostly Gone, Del. Court Told

By **Jeff Montgomery**

Law360 (November 12, 2024, 7:13 PM EST) -- An attorney for the former CEO of a company central to the public stock listing of Donald Trump's social media platform told a Delaware vice chancellor Monday only 45,000 shares remain available from an 8.1 million share founders' stake now at the center of multiple suits in multiple courts.

The detail — branded as "offensive" by counsel for aggrieved investors pursuing millions of shares — surfaced during a hearing before Vice Chancellor Lori W. Will on expediting a 10-count Court of Chancery suit accusing former CEO Patrick Orlando of funneling equity without authority from ARC Global Investments II LLC to two Florida companies and a Cayman Islands entity.

ARC sponsored "blank check" company Digital World Acquisition Corp., which carried Trump Media & Technology Group Corp. via a reverse public merger into public listing under the symbol DJT.

"What I find offensive here is, now, on Nov. 12, 2024, we learn for the first time that ARC only has 45,000 TMTG shares of the 8.1 million it received" at closing," said Bradley J. Bondi of Paul Hastings LLP, counsel to investors who sued on Nov. 5 in an effort to recoup their stake.

"It's also offensive that we learned for the first time over the weekend that ARC sold, liquidated, five million of those shares," worth somewhere around $450 million in cash," Bondi said.

Bondi said ARC has been contractually obligated to transfer millions of shares to his clients since March, when special purpose company Digital World Acquisition Corp. closed on its take-public merger deal with TMTG.

Instead, the company was accused of transferring millions of shares out of the business without disclosure or explanation.

Vice Chancellor Will agreed to expedite a trial for the claims, but rejected a proposed February trial date and declined to order a summary judgment argument on one count, breach of contract, for December.

Instead, trial will be set in the spring, with the vice chancellor acknowledging the possibility that an injunction motion or one to preserve the status quo could follow Monday's hearing.

During the hearing, Matthew Perri of Richards Layton & Finger PA, counsel to Orlando and ARC, accused attorneys for the investors of knowingly failing to disclose an earlier filed suit in Florida focused on similar claims that should be given deference.

"ARC does not have any substantial number of TMTG shares to deliver to plaintiffs," Perri said, adding that ARC sold shares "to pay liabilities and create a reserve."

Perri added: "We're in some sort of Catch-22 where Mr. Bondi apparently can find ways to sue us on behalf of somebody no matter what we do."

A brief filed on behalf of Orlando and ARC said, "There is nothing to expedite. Plaintiffs have filed a meritless action that relies on vague allegations contradicting unambiguous contracts."

Perri also argued that the claims in Delaware are "quintessential derivative claims" belonging to the company and not the stockholders.

Bondi accused those named in the suit of a "pattern of undisclosed sales and transfers" of stock that caused irreparable harm and warrants fast-tracking the case. He said Orlando caused ARC to transfer about 40% of the company's membership interests to himself via a company that he created, Franlu, and another 20% to a Cayman Islands entity, Belsize.

A brief filed ahead of the argument said the transfer produced "no valid consideration" for ARC and accused Orlando of engaging in "malicious and intentional self-dealing of monumental proportions to the tune of potentially hundreds of millions of dollars" through transfers to himself through Franlu and offshore via Belsize.

Perri argued that the ARC complaint is multiply flawed, including by failures to provide well-pled facts tying Orland to Belsize, and said the Chancery case needed to be stayed in order to allow the first-filed Florida action to go forward.

Bondi argued that the Florida case involves different plaintiffs who are not party to the Delaware case, and said that recent appointment of new, purportedly independent directors to ARC had no bearing on past conduct.

The complaint asserts claims of conspiracy, unjust enrichment, conversion, tortious interference, breach of the implied covenant of good faith and fair dealing, aiding and abetting breach of fiduciary duty, breach of fiduciary duty and breach of contract.

The suit seeks declaratory judgment nullifying any subscription agreements or founder share transfers by ARC to Franlu and Belsize, and an order requiring that all shares issued by ARC to Franlu and Belsize must be distributed to the remaining members of ARC on a pro rata basis.

ACRA Assets SA and the other investors are represented by Kevin M. Coen and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP and Bradley J. Biondi, D. Scott Carlgon, Ronald Anguas and Nicholas J. Griepsma of Paul Hastings LLP

ARC Global Investments II LLC and Patrick Orlando are represented by Matthew D. Perri, Daniel E. Kaprow, Elizabeth J. Freud and Kevin M. Kidwell of Richards Layton & Finger P.A.

The case is ACRA Assets SA et al. v. ARC Global Investments II LLC et al., case number 2024-1141, in the Court of Chancery of the State of Delaware.

--Additional reporting by Dorothy Atkins. Editing by Linda Voorhis.