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Justices Signal Narrow Outcome in Nvidia's Pleading Test Request

By Martina Barash

Deep Dive

Documents

Docket

- Internal documents, expert reports at issue in crypto sales row
- Rare securities case at top court may not yield more clarity

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Justices Signal Narrow Outcome in Nvidia's Pleading Test Request

By Martina Barash 2024-11-15T12:04:17000-05:00

- Internal documents, expert reports at issue in crypto sales row
- Rare securities case at top court may not yield more clarity

Nvidia Corp.'s quest for a new rule from the US Supreme Court about how investors must plead securities suits didn't strike the chord it intended at oral argument this week.

Some justices viewed the company's appeal as crumbling into a request for a ruling on the facts, according to lawyers who listened to the Nov. 13 argument. "There was a fair amount of hand-wringing about whether they should have even accepted this appeal," said Stephen Warren of Holland & Knight LLP.

The chip maker sought to defeat a revived stock-drop suit over its alleged reliance on the volatile cryptocurrency mining market, rather than gaming, for sales of its graphic cards. Nvidia challenged two aspects of the investors' complaint under the requirement to plead "with particularity" under the Private Securities Litigation Reform Act: references to internal company documents without descriptions of their contents, and the use of an expert report.

It remains to be seen whether the Supreme Court gives the litigants a bright-line rule, clarifications, a ruling on the facts that reaffirms previous opinions, or even a rejection of the appeal as "improvidently granted." The last of these options is unlikely, according to Warren. "But I don't expect them to make new law," he said. "I think it'll rather be an affirmance of their previous positions."

"The Supreme Court doesn't take a lot of securities cases," said Adam Goldberg of Pillsbury Winthrop Shaw Pittman LLP. It's helpful for practitioners to get guidance on the laws in this area, he said. And lawyers who represent companies are "always looking for clarity on what a heightened pleading standard might look like," he said.

'Problematic Ask'

After judges in the lower courts came to different conclusions on dismissal, it seemed that Nvidia and its CEO, Jensen Huang, "were asking the Supreme Court to weigh in on who had gotten the facts right, who had correctly given credence to the facts that were alleged," Goldberg said. "And that seemed like a problematic ask that was unlikely to lead to a new rule."

"There seemed to be agreement—across a number of justices who don't always agree—that this perhaps wasn't the right vehicle to make clarifications to the PSLRA, if clarifications were needed," Goldberg said.

The pleading standard calls for lower courts to weigh the allegations holistically, said Lauren Ormsbee of Labaton Keller Sucharow LLP. "And by definition, that type of review is not hospitable to a bright line rule," she said.

Several justices expressed concern that Nvidia's legal position had shifted from its petition for review and briefs, attorneys Jack Yoskowitz and Molly Rao of Seward & Kissel LLP said in an email.

The company's counsel, Neal Katyal of Hogan Lovells US LLP, was "repeatedly grilled on whether Nvidia was retreating" from its request for new legal rules on the use of internal company documents and expert reports in pleadings, they said.

The justices primarily discussed whether the investors' reference to internal Nvidia sales documents, which they didn't have in their possession, could support their allegations that Huang knew about the proportion of crypto-mining revenue.

"The Justices expressed their usual reluctance to delve into the specific facts of the case and tell the lower court that they simply got it wrong," Susan Hurd of Alston & Bird LLP said in an email. Katyal "explained that this was not a case where the Ninth Circuit articulated the right standard and just misapplied it to the facts," she said. Instead, the company's "position is that the Ninth Circuit articulated a looser standard than other circuits on when internal report allegations are sufficient at the motion to dismiss stage and that it would be highly problematic to let that standard stand."

Opinion as Fact

“I was surprised how light the discussion was on the expert opinion issue,” Hurd said. No one expressed “righteous indignation,” she said. “I don’t see how an expert’s opinion is ever a ‘fact’ that can be considered on a motion to dismiss for purposes of assessing compliance with the heightened pleading standards,” she said. “I just expected more fist banging on table than we got on that subject.”

Holland & Knight’s Warren said Katyal conceded he wasn’t asking for a bright-line rule that plaintiffs can never have an expert report as part of their complaint, allowing that it can be used to supplement personal knowledge allegations.

“Once the justices had that clarification, it didn’t seem that anyone was really concerned about it,” Warren said.

If the high court allows the expert analysis, the role of such a report at the pleading stage in securities fraud suits might become less rare, according to one attorney.

“It is very unusual—I have never seen a complaint in a securities class action that relied on an expert report,” said Goldberg. “Part of the reason for that is that experts are expensive.”

“Is this going to start a trend, or is this a unique situation?” he said. “I do suspect you’ll see more.”

Goldberg addressed an outcome where the court disagrees with Nvidia but still wants to rule on the merits. “I think the court is likely to say that the existing, heightened standard under the PSLRA is clear, and it’s up to the trial court to determine whether a plaintiff has pled with sufficient specificity what was false and what the defendant knew about it,” he said. “My guess is that’s the likely direction they will go here.”

The case is NVIDIA Corp. v. E. Ohman J:or Fonder AB, U.S., No. 23-970, oral argument 11/13/24 .

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Supreme Court Seems Inclined To Let Shareholders Conduct Proctology Exam On Nvidia

D dealbreaker.com/2024/11/supreme-court-seems-inclined-to-let-shareholders-conduct-proctology-exam-on-nvidia

Jon Shazar

Back when the world's most valuable company was much less valuable (or important), it may have hidden its reliance on cryptocurrency mining. It's not reliant on that anymore, but it may not matter.

- Jon Shazar
- Nov 14, 2024

NVIDIA Taiwan, CC BY 2.0 <https://creativecommons.org/licenses/by/2.0>, via Wikimedia Commons

Today, Nvidia is the world's most valuable publicly-traded company. That now $3.6 trillion market cap is based on the chipmaker's almost priceless role in the artificial intelligence revolution.

Seven years ago, however, the company was much more reliant on fake money than fake brains. And it may just have elided that fact in public statements, disclosures and communications with shareholders, at least according to the shareholders who are suing it. This alleged elision left said shareholders gobsmacked when Nvidia CEO Jensen Huang announced in November 2018 that the company had missed its revenue projections due to the crypto collapse of that period, and left Nvidia open to the aforementioned lawsuit.

Let's set aside that said crypto-collapse seems positively quaint at the moment, given that it involved bitcoin dropping from just under $20,000 to just under $4,000 (the world's leading fake currency hit an all-time high of $93,469.08 yesterday). And also the fact that robot-powered Nvidia shares have—to put it mildly—more than made up for it since: NVDA lost roughly half its value in the third quarter of 2018, bottoming out at $3 and change; yesterday, it closed at $146 and change. None of that is legally relevant. Nor, quite frankly, is anything about the shareholder suit, at least according to the Supreme Court.

> The Supreme Court on Wednesday seemed likely to keep alive a class-action lawsuit accusing Nvidia of misleading investors about its dependence on selling computer chips for the mining of volatile cryptocurrency…. "It's less and less clear why we took this case and why you should win it," Justice Elena Kagan [told Nvidia lawyer Neal Katyal].

> Hearing arguments in Washington on Wednesday, several justices questioned whether the court was right to take up Nvidia's appeal, saying the case didn't present the kind of broad legal issue that normally prompts Supreme Court review. Chief Justice John Roberts said both sides had made the issues too "black and white…." Justice Amy Coney Barrett said the Supreme Court could order reconsideration by the federal appeals court that said the lawsuit could proceed.

Swedish institutional investor E Ohman J:or AB argued that Huang's focus on Nvidia's sales data were the equivalent of "proctology exams," and it looks like it just may get to order the company to spread'em in court.

Supreme Court seems likely to allow class action to proceed against tech company Nvidia [AP]
Supreme Court Wary of Big Ruling in Nvidia Shareholder Case [Bloomberg Law]
Bitcoin briefly tops $93,000 for the first time as investors digest postelection gains, inflation data [CNBC]

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Toy Company Hit with Pandemic-Related Securities Suit

dandodiary.com/2024/11/articles/securities-litigation/toy-company-hit-with-pandemic-related-securities-suit

November 18, 2024

By Kevin LaCroix on November 18, 2024
Posted in Securities Litigation

One of the more interesting developments in the securities litigation arena over the past several years has been the continuing influx of pandemic-related securities class action lawsuit filings. Here we are now approaching what will be the sixth year since the initial outbreak of COVID-19 in the U.S. and yet the pandemic-related suits are continuing to come in. In the latest example, last week a shareholder plaintiff filed a securities class action lawsuit against the toy company Hasbro, alleging that the company misled investors by claiming that the level of inventory it built up in response to pandemic lockdown-related consumer demand was appropriate, only to later announce it would have to incur substantial inventory reduction costs. A copy of the November 13, 2024, complaint against Hasbro can be found here.

Background

Hasbro manufactures and sells toys and games. At the outset of the pandemic, Hasbro, according to the complaint, "faced an increased demand as familied locked down in their homes, and global supply chain disruptions impacted numerous industries." In response, the complaint alleges, Hasbro "overpurchased inventory to ensure that it could meet demand."

In subsequent reporting periods, the complaint alleges, the company and its executives assured investors that its "inventory was of a high quality" and that the company was "appropriately building up its inventory to mitigate supply chain risk and meet consumer demand." The complaint further alleges that the company reported in its SEC filings that the rising inventory levels "reflected outstanding and anticipated demand, rather than excess supply that outpaced waning demand."

In January 2023, when the company previewed its 4Q02 financial results, the company disclosed that its revenue would decline 17% and that the company would be laying off 15% of its global work force. According to the complaint, the company's share price declined about 8% on this news. Even as the company was reporting these disappointing results, the company, the complaint alleges, was continuing to make "false, reassuring statements to investors concerning the extent of the inventory buildup."

On October 26, 2023, in announcing the company's 3Q03 financial results, the company announced an 18% decline in consumer product revenues, and it also lowered its guidance for the remainder of the year. The company also announced that it was forecasting a "$50-ish million of onetime cost" to be incurred on "moving through inventory at the retailer level, extra marketing to move through the industry, and extra obsolescence cost" in its consumer product segment. According to the complaint, the company's share price decline nearly 12% on this news.

The Lawsuit

On November 13, 2024, a plaintiff shareholder filed a securities class action lawsuit in the Southern District of New York against Hasbro and certain of its executives. The complaint purports to be filed on behalf of a class of investors who purchased the company's common stock between February 7, 2022, and October 25, 2023.

The complaint alleges that during the class period, the defendants' statements "represented the quality of inventory and the appropriateness of the levels of inventories carried by Hasbro and its retailers compared to consumer demand. In truth, however, the Company had a significant buildup of inventory that it was struggling to manage and which far exceeded customer demand." As a result, the complaint alleges, "Defendants' statements about Hasbro's inventory, and what inventory levels reflected regarding demand, were materially false and misleading and/or lacked a reasonable basis."

The complaint alleges that the defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The complaint seeks to recover damages on behalf of the class.

Discussion

At the top of this post, I noted the fact that pandemic-related securities suits continue to be filed even though the beginning of pandemic is now years in the past. However, it should also be noted that though this complaint has only just now been filed, it relates to events that allegedly took place some time ago. Indeed, the end of the class period is more than a year ago. So while this complaint is consistent with the observation that pandemic-related cases continue to be filed, it is also true that this case could be characterized as something of a vestige or remnant rather than as a reflection of current or continuing conditions and events.

That said, it is interesting to note, at least according to the plaintiff's allegations in the complaint, the extent to which long-term effects of the pandemic lockdown disrupted corporate operations and financial results. The pandemic had a huge, long-term impact, economy-wide and at the individual company level. The pandemic's disruptive effect not only has continuing reverberations, but it is also contributing to continuing securities class action lawsuit filing activity.

According to the Stanford Law School Securities Class Action Clearinghouse website, this new lawsuit is the 15th pandemic related securities class action lawsuit to be filed so far this year, and the 80th to be filed since the initial COVID-19 outbreak in the U.S. in March 2020. As I noted at the outset, it really is an interesting phenomenon that COVID-related filings continue to be such a significant factor in the overall number of securities suit filings. The 15 pandemic-related securities suits YTD represent roughly 8% of all securities class action lawsuit this year, making an important contributing factor to the total number of suits this year.

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This Week in Chancery Court: Musk, Court Square, Fox News

By Jennifer Kay and Patrick L. Gregory

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This Week in Chancery Court: Musk, Court Square, Fox News

By Jennifer Kay and Patrick L. Gregory 2024-11-18T05:00:01000-05:00

Three lawsuits that seek to hold Elon Musk accountable in Delaware for alleged mismanagement at Tesla Inc. may be consolidated by the Chancery Court this week. The lawsuits were filed just before the billionaire moved the electric vehicle maker to Texas in June, after the Delaware court's chief judge voided Musk's $56 billion compensation package as Tesla's CEO.

Here's a look at more from the calendars for the Chancery Court and Delaware Supreme Court:

Monday: Perry v. Musk, Del. Ch., No. 2024-0560; Emp. Ret. Sys. of R.I. v. Musk, Del. Ch., No. 2024-0631; and Cleveland Bakers & Teamsters Pension Fund v. Musk, Del. Ch., No. 2024-0646, hearing 11/18/24.

At issue: Two pension funds have asked the court to combine the lawsuits that claim Musk harmed Tesla with insider trading, buying the social media platform Twitter Inc., and redirecting resources to side projects involving artificial intelligence. Tesla and Musk oppose the consolidation effort, as does Tesla investor Michael Perry, who argues in a brief that there are "profound differences" among the three lawsuits.

Court action: Chancellor Kathaleen St. Jude McCormick will hear oral arguments in Wilmington, Del.

Musk, Tesla Oppose Bid to Merge Twitter, AI, Insider Trade Suits

Monday: In re Rocket Companies Inc. S'holder Derivative Litig., Del. Ch., No. 2021-1021, post-trial arguments 11/18/24.

At issue: Online lender Rocket Cos. Inc. during oral argument in May sought to downplay revenue projections cited in shareholder litigation as evidence of insider trading in a $500 million stock sale in 2021. A shareholder suit claimed the company's decision to approve the stock sale was based on non-public information relating to declining revenue.

Court action: McCormick will hear post-trial arguments in Wilmington, Del.

Rocket Says 2021 Stock Sale Was Meant to Cover IPO's Shortfall

Wednesday: Siegel v. Morse, Del. Ch., No. 2024-0628, oral arguments 11/20/24.

At issue: A lawsuit alleges the board of energy company AES Corp. wants to chill shareholder activism by demanding that investors backing director candidates disclosure sensitive information about private equity carried interest and secret limited partners. Carried interest—the performance-based fee that fund managers earn on successful investments—is often a trade secret, and nondisclosure agreements may shield the identity of limited partners, the lawsuit said. AES and its board said in a brief the litigation should be dismissed because it's "just another in the flood of abstract, hypothetical challenges to bylaws." The shareholder leading the litigation argues that the board "intended to entrench itself, not advance a legitimate corporate objective" by adopting bylaw provisions giving it a pretext for rejecting nominees.

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

AES Board Sued Over Bylaw Requiring Confidential Investment Info

Wednesday: Court Sq. Cap. Mgmt. LP v. Brown, Del., No. 205,2024, oral arguments 11/20/24.

At issue: Court Square Capital Management LP seeks the reversal of a Chancery Court decision finding it wrongly withheld carried interest payments from ex-partner Kevin Brown. After a two-day trial in 2023, McCormick found that Court Square had developed a strategy that involved cutting off payments to a half-dozen executives who left for the family investment office of billionaire Michael Dell. Court Square said in a brief that McCormick's "conclusions are plainly inconsistent with the language of the LLC Agreements and basic legal principles governing the interpretation and application of forfeiture clauses in LLC agreements." Brown argues that Court Square is "vindictively withholding millions of dollars of his hard-earned compensation," according to a brief.

Court action: The Delaware Supreme Court will hear oral arguments in Dover, Del.

Court Square Ex-Partner Beats Firm in Court on Carried Interest

Friday: Govette v. Elec. Referral Mgr., Inc., Del. Ch., No. 2019-0139, evidentiary hearing 11/22/24.

At issue: Jonathan Govette, the former CEO of medical software maker ReferralMD, sued the company to challenge his ouster from its board and the rescission of certain stock. The company, which had alleged that Govette gambled hundreds of thousands of dollars in company cash at casinos, dropped fiduciary breach claims against him in 2021. Govette now seeks a declaration that he holds five million shares of common stock in the company and that he is the sole member of its board. ReferralMD argued in a brief that Govette engaged in "serial perjury" and that his "attempts to manipulate the Court" should result in dismissal with prejudice.

Court action: Vice Chancellor Nathan A. Cook will hold an evidentiary hearing in Wilmington, Del.

ReferralMD Accuses Ex-CEO of Gambling Company Cash at Casinos

Friday: In re Fox Corp. Deriv. Litig., Del. Ch., No. 2023-0418, oral arguments 11/22/24.

At issue: Rupert Murdoch and other Fox Corp. senior leaders face allegations that they're personally to blame for the potentially multibillion-dollar fallout of false conspiracy theories that Fox News aired concerning voting technology companies and the 2020 election. Fox agreed to pay Dominion Voting Systems Inc. $788 million without admitting wrongdoing last year. Smartmatic Corp. is seeking as much as $2.7 billion in damages in a separate suit against Fox, which is expected to go to trial in New York next year. The derivative complaint failed to plead with particularity "that the directors utterly failed to implement any reporting system or controls regarding defamation risk," Murdoch and his co-defendants argued in a brief.

Court action: Vice Chancellor J. Travis Laster will hear oral arguments in Wilmington, Del.

Murdochs Deny Blame for Fox's Record Election Defamation Payout

Friday: Salama v. Simon, Del. Ch., No. 2024-1124, oral arguments 11/22/24.

At issue: Canadian cannabis company Tilray Brands Inc. was sued for allegedly trying to trick investors into increasing its share limit. The company argues in a brief that the class action complaint relies on a mistaken interpretation of state corporation law concerning the default tabulation standard for stockholder votes.

Court action: Laster will hear oral arguments via Zoom.

Cannabis Company Tilray Sued Over Vote to Increase Share Limit

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SmartFi Investor Suit Over Buyback Should Proceed, Judge Says

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Martina Barash

Investors who put about $1.9 million into SmartFi adequately alleged claims against its CEO for misrepresenting the cryptocurrency company's ability to refund their money, a federal judge said in a recommendation to allow the suit to proceed.

Claims against Power Block Coin LLC, which does business as SmartFi, are paused while it's in bankruptcy proceedings, according to Magistrate Judge Christopher B. Brown. Founder-CEO Aaron Tilton's request for dismissal should be denied, Brown said Nov. 15 for the US District Court for the Western District of Pennsylvania.

The four individual plaintiffs say they invested in SmartFi to fund its lending business after Tilton repeatedly promised that in a year they would be able to get a refund of the value of the SMTF tokens they received in return. Tilton allegedly reassured them about the safety of the investment and their ability to get a buyback after a year.

The investors—including crypto software developers Jason Brown and Daniel Stadelmann—brought federal and state securities law claims, as well as common law claims, after SmartFi allegedly ignored or refused their request to redeem $1,858,261 in SMTF tokens when they sought the buybacks after a year.

The plaintiffs adequately alleged fraud-based claims under a heightened pleading standard with specific allegations that Tilton made statements about the investment offer on certain dates, the magistrate judge said.

The investors cleared the heightened pleading standard for federal securities claims as well, adequately alleging falsity and creating an inference of the necessary level of intent, he said.

They offered "circumstantial evidence which demonstrate a strong inference that Tilton's statements—both about the buyback guarantee and how SmartFi was designed to maintain liquidity to meet those buyback requests—were at least reckless," the judge said. Allegations of self-dealing also supported the inference, he said.

Pennsylvania and Utah state claims for the sale of unregistered securities can proceed because the plaintiffs adequately pleaded the SMTF tokens met the definition of an investment contract and therefore were securities, he said. "Tilton represented that as SmartFi's loan portfolio grew, SMTF token buyers like Plaintiffs would benefit because the value of the SMTF tokens would increase as more interest was charged on the loans," rising through SmartFi's efforts, he said.

The recommendation will go to Judge W. Scott Hardy for a decision.

In April, SmartFi failed to force the suit into arbitration.

Eckert Seamans Cherin & Mellott LLC represents the plaintiffs. Buchanan Ingersoll & Rooney PC and Parsons Behle & Latimer PC represent SmartFi.

The case is Brown v. Tilton , 2024 BL 412429, W.D. Pa., No. 2:23-CV-00554, 11/15/24 .

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Target Knocks Out Investors' False-Statements Securities Suit

By Mallory Culhane 2024-11-18T12:26:14000-05:00

- Investors failed to show company knew statements were false
- Some alleged statements protected by PSLRA safe-harbor provision

A proposed class action alleging Target Corp. and its top executives misled shareholders in violation of federal securities law was dismissed by a federal judge who found those statements protected by law.

The allegedly misleading statements the plaintiff-investors say caused Target's stock to trade at an artificially high price are protected by the Private Securities Litigation Reform Act's safe-harbor provision, Judge Jeffrey M. Bryan of the US District Court for the District of Minnesota wrote in a Friday opinion..

The retailer and some of its executives—including CEO Brian Cornell, then-CFO Michael Fiddelke, and former COO John J. Mulligan—made false or misleading statements from late 2021 to early 2022 about Target's inventory and overstock issues, the investors had said. Their suit claimed Target started pre-ordering large quantities of home goods in mid-2021 despite consumers' buying habits shifting as Covid-19 restrictions eased, "which resulted in Target's warehouses distribution centers, and stores becoming overstocked" with those items by September 2021.

When Target revealed its net profits were down 52% for the first quarter of 2022, its stock price dropped nearly 25%, according to Bryan's opinion. The company said its "operating margin was 'well below expectations, driven primarily by gross margin pressure reflecting actions to reduce excess inventory,' and that gross margin had dropped to 25.7% compared to 30.0% in the same quarter 2021, which 'reflected higher markdown rate.'"

The allegations were based on statements from three former Target employees who allegedly saw the overstocked inventory, the investors said. But they failed to adequately support their claim that the company and its executives "had actual knowledge that the statements were false at the time they were made," Bryan wrote.

And, some of the statements "are nonactionable statements of corporate optimism, opinion statements, or uncontested statements of past performance," he said.

Target and its officers' statements expressing a healthy flow of inventory and providing positive insight are vague statements of corporate optimism and wouldn't sway a reasonable investor, Bryan said. The investors also failed to present evidence that statements warning of changes in demand and potential lost sales were made with actual knowledge of being false or misleading.

The investors also didn't present evidence of the former Target employees' "basis for knowing facts that support the heart of the alleged omission: that Target had 'abandoned its customer-focused purchasing strategy' in favor of 'indiscriminately buying large quantities of inventory' that consumers did not want," Bryan wrote. The investors didn't support the notion that the former workers had "personal knowledge of Target's inventory procurement processes" or knew the defendants had abandoned Target's inventory policies, the judge said.

Reinhardt Wendorf & Blanchfield, Wolf Haldenstein Adler Freeman & Herz LLC, and Levi & Korsinsky LLP represent the investors. Kirkland & Ellis LLP and Faegre Drinker Biddle & Reath LLP represent Target and the individual defendants.

The case is Perez v. Target Corp. et al , D. Minn., No. 0:23-cv-00769, 11/15/24 .

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Consumer attorney raises alarm on non-consolidation clauses

DJ dailyjournal.com/articles/381959-consumer-attorney-raises-alarm-on-non-consolidation-clauses

Legislatures will need to turn their attention to restricting non-consolidation clauses in clickwrap agreements that have the potential to put a "padlock" on the courts' authority, according to a leading plaintiffs' attorney. The statement comes as consumer attorneys warn that similar federal efforts to whittle away at arbitration clauses will likely face roadblocks under the incoming Trump administration.

Speaking at the Consumer Attorneys of California convention in San Francisco on Thursday, Elizabeth J. Cabraser told the audience that they "really have to watch out for" non-consolidation clauses. Cabraser is a partner at Lieff Cabraser Heimann & Bernstein LLP.

She warned that these clauses weren't just aimed at waiving a plaintiffs' right to participate in a class action but also participation in any coordinated proceeding, such as multi-district litigation or Judicial Council Coordination Proceedings. She cited Uber Technologies Inc.'s use of such a clause as an attempt by major companies to stifle the potential for multi-district litigation in federal courts and joint actions in state courts.

"That would make anything that we do for plaintiffs, even if it involves just two, extinct if it is honored or enforced by a court," she said.

Cabraser said that such a clause isn't an attack on litigants, but on the "authority of the courts," describing it as "basically a padlock on the court's authority."

The California Legislature should attempt to address this in a future session, she said, though she cautioned that any move may be preempted.

On the topic of legislative interventions, panelist Mike Arias said that recent efforts to "chip away" at forced arbitration clauses were likely to be "delayed for some time" given Republican domination of the executive and legislative branches come January. Arias is managing partner with Arias Sanguinetti Wang & Team LLP.

The panel, moderated by Panish Shea Ravipudi partner Erika Contreras and also consisting of Gerald Singleton, managing partner at Singleton Schreiber, and Michelle West, a partner at Robinson Calcagnie, agreed that defense attorneys and their clients were beginning to awaken to the fact that arbitration was an expensive endeavor for which they bear responsibility.

The filing fees alone were "phenomenally expensive," Singleton said.

Public nuisance claims against Meta over child addiction advance

courthousenews.com/nuisance-claims-against-meta-over-child-addiction-advance

Edvard Pettersson

(CN) — A federal judge on Friday mostly allowed school districts and local governments to proceed with their public nuisance claims against Meta — the owner of Facebook and Instagram — and other social media companies they say have designed their sites so that young users become addicted to them.

U.S. District Judge Yvonne Gonzalez Rogers in Oakland denied Meta's and the other companies' motion to dismiss the nuisance claims except if they were brought under the laws of four states — Illinois, New Jersey, Rhode Island and South Carolina — where supreme courts have been reluctant to extent public nuisance doctrine beyond traditional land-use contexts.

It's the fourth ruling on the social media juggernauts' bid to trim the massive, consolidated litigation by personal injury plaintiffs, state attorney generals, school districts and local governments who claim that the social media platforms are designed to hook children, because that's what drives the companies' profits, and are the cause of a youth mental health crisis.

In previous rulings, Gonzalez Rogers allowed school districts to proceed with their negligence claims, insofar as they weren't barred by Section 230 of the Communications Decency Act. She also advanced the claims by 34 states under the Children's Online Privacy Protection Act, also with the same provision for Section 230, which shields online businesses, including social media platforms, from liability for content posted by users.

Alphabet Inc., the owner of Google and YouTube, Snap Inc., the owner of Snapchat, and ByteDance Ltd., the owner of TikTok, are also defendants in the multidistrict proceedings before Gonzalez Rogers.

The public nuisance claims against the social media platforms mirror those brought by school districts and local governments against makers and distributors of opioids where they sought damages for having to address the addiction crisis caused by these companies' part in the profit-driven over-prescription of those drugs.

Gonzalez Rogers rejected the media companies' argument that their purported conduct doesn't interfere with the school districts' own exercise of public rights, which is a necessary element of a public nuisance claim, but only with that of the students.

"Every court that has held that school districts can bring public nuisance claims goes against defendants' proposition," the judge said. "It is enough that the defendants' conduct interferes with a public right and that the plaintiffs' injuries flows as a direct consequence of that interference."

School districts and local governments from across the country argue in their master complaint filed last year that they are on the front lines of redressing the damage caused by what they say is the social media companies' deliberate choice to design, develop and market their platforms to attract and addict youth.

"As a result of defendants' conduct, public school districts have been forced into a constant struggle for students' attention, as well as a constant struggle to provide the social, emotional, mental health, and learning support they need," they claim.

"From addressing the use of defendants' platforms during class, in violation of school policy, to increased need for anxiety and depression counseling, the plaintiff school districts have devoted substantial resources to combatting students' addiction to social media and the many resulting harms," they claim. "School districts have even needed to revise lesson plans and teaching methods to account for the unique way that this social-media generation thinks, including reduced attention spans and reduced capacity for critical thinking."

The school districts say that they are the primary providers of mental health services to youth and that responding to the mental health crisis they claim is caused by the social media companies is stealing resources from their primary objective of educating youth in a safe and healthy environment.

“We respectfully disagree with the court's decision, which runs contrary to the ruling in the California state proceedings (JCCP) that the school districts cannot expand the law to create legal claims where none exist," a Meta spokesperson said in response to the judge's ruling. "We will continue to defend ourselves vigorously against these claims and believe the evidence will demonstrate our commitment to supporting young people.”

In their joint lawsuit filed last year, 33 states including California claim that 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 say it refused to address existing harms to users to conceal and downplay its platforms' adverse effects.

The social media giants are also fighting a similar consolidated case in Los Angeles County Superior Court, where last month they asked to trim more than a thousand lawsuits claiming the apps have fomented an epidemic of teen addiction and depression.

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Social Media Companies Unable to Shake Schools' Nuisance Claims

By Bernie Pazanowski 2024-11-18T10:46:38000-05:00

- School systems from 19 states filed public nuisance claims
- Law from 15 states doesn't block claims against platforms

School systems from 15 states may proceed with their claims that social media platforms offered by Meta Platforms Inc., Google LLC, and Beijing ByteDance Technology Co. create a public nuisance, a federal court said.

This is the latest ruling by US District Judge Yvonne Gonzalez Rogers, of the US District Court for the Northern District of California, who is overseeing hundreds of lawsuits alleging that Meta's Facebook and Instagram, Google's YouTube, and ByteDance's TikTok and Snap have profited from the addiction of young people to their products.

The school systems said that the companies purposefully addict young children to their platforms through their marketing and features, and that they often must address the students' addiction in the first instance.

Here, Rogers rejected the media platforms' argument that the public nuisance claims overstep the laws of the 19 states pursuing it. Public nuisance, "like negligence, provides a flexible mechanism to redress evolving means for causing harm," she said.

The defendants said that the claims should be dismissed because there is no nexus between their conduct, land use, or actions that overlap products liability law; that their actions don't interfere with a public right; and that the districts didn't incur any special injuries.

The school systems alleged that the defendants interfered with the public right to health and safety, Rogers said. "The alleged nuisance-causing conduct does not solely target individual children and schools, but is directed to the public, writ large," she said.

Though the students' injuries are individualized, the schools' costs were caused by the defendants' alleged interference with the public health, Rogers said.

The plaintiffs also alleged a special injury, one not imposed on the public at large. The school districts' injury was resource diversion—"costs uniquely imposed on them and not similarly borne by any other members of the community," she said.

Rogers said that though some jurisdictions have imposed land- or product-related limitations on public nuisance claims, none of the at-issue states have formally adopted such limitations. She refused to adopt the per se prohibition proposed by the defendants.

The public nuisance claims from school districts in Alaska, Arizona, California, Colorado, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Nevada, North Carolina, Pennsylvania, Utah, and Virginia may therefore proceed, Rogers said.

However, Rogers did dismiss the claims from school systems in Illinois, New Jersey, Rhode Island, and South Carolina. The supreme courts in those states have expressed a reluctance to expand public nuisance law past its traditional boundaries, she said.

The case is In re Soc. Media Adolescent Addiction/Personal Injury Prod. Liability Litig. , N.D. Cal., No. 4:22-md-03047-YGR, 11/15/24 .

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Randi Ellis appointed as future claims representative in J&J $8.2 billion talc settlement

legalnewsline.com/stories/665877238-randi-ellis-appointed-as-future-claims-representative-in-j-j-8-2-billion-talc-settlement

November 18, 2024

Federal Court

Randi Ellis | Facebook / JAMS

HOUSTON (Legal Newsline) - A Texas bankruptcy judge appointed Randi Ellis as the future claims representative for Red River Talc, Johnson & Johnson's talc unit, in its Chapter 11 bankruptcy case.

Ellis is a veteran dispute resolution and settlement consulting attorney who has previously been appointed by federal and state courts as a neutral mediator, special master and settlement master in complex civil disputes.

The matter was decided during a nearly seven-hour hearing held Nov. 12 in the U.S. Bankruptcy Court for the Southern District of Texas in Houston.

The high-stakes legal battle continues to unfold as lawyers representing thousands of women face off against Johnson & Johnson (J&J) over an $8.2 billion settlement intended to resolve ovarian cancer lawsuits allegedly related to the company's talc powder. The proposed settlement has plaintiff lawyers who took money from funders who demand a payoff at each other's throats.

The legal battle has already seen several failed bankruptcy attempts.

Red River Talc's bankruptcy filing is J&J's third attempt to resolve talc claims. Two previous cases were rejected for lack of financial distress.

Ellis, who had served in the same role in the two previous J&J bankruptcy attempts, will oversee future claims from women alleging talc exposure caused cancer, as part of Red River's settlement plan.

Despite objections from the U.S. Trustee's office and insurance companies, who raised concerns over potential conflicts due to Ellis' long association with J&J, Judge Christopher Lopez ruled that Ellis could operate independently.

The objections also included the claim that Ellis's previous retention under a non-disclosure agreement could influence her impartiality.

Red River's legal team argued that the coalition opposing the plan sought to delay proceedings.

"From our perspective, what they care about is delay. They want this case to go down," Red River counsel Gregory Gordon said, according to Law 360.

The proposed settlement, which would resolve lawsuits filed by women claiming J&J's talc products caused their cancer, was previously opposed by both plaintiffs' attorneys and the U.S. Trustee.

J&J has defended the settlement, claiming it is fair and legal, with the majority of affected women supporting the plan.

The hearing also addressed a dispute over the authority to cast votes for certain claimants, with Red River seeking documents to verify whether Beasley Allen had proper consent to vote on their behalf.

"Every time we have tried to check, it had only raised suspicion that they didn't get the informed consent they said they had," Red River counsel Allison Brown said of Beasley Allen, according to Law 360.

Lopez also instructed a plaintiffs' law firm, Beasley Allen, to provide documents concerning 11,500 disputed votes related to the plan.

"They cannot select a ballot option that requires documentation then refuse to produce that documentation," Brown said, according to Law 360.

Lopez ruled that some evidence of voting authority would be required to resolve the dispute, but also allowed for privileged information to be redacted.

The Nov. 12 hearing centered on whether the bankruptcy process, including the creation of a new subsidiary, Red River Talc, LLC, is being used improperly to discharge J&J's own liabilities.

The case follows years of litigation against J&J, with jury verdicts awarding billions to plaintiffs, but also mixed outcomes.

John Higgins, a partner at Porter Hedges in Houston, and Gregory Gordon, a partner at Jones Day in Dallas, said in a brief prior to the hearing that the challenges to the settlement are part of a broader legal strategy.

“Put bluntly, the [opponent’s] motion is the predictable outcome of the coalition’s delay-and-obfuscate strategy,” the pair wrote.

In January, the federal bankruptcy court will decide whether the J&J settlement can proceed.

The bankruptcy plan, which would create a fund for current and future claimants, is part of J&J's strategy to resolve around 40,000 claims.

ORGANIZATIONS IN THIS STORY

Johnson & Johnson

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Mass Tort Lawyers Trapped in Cycle of Debt as Cases Drag On

By Emily R. Siegel 2024-11-18T05:00:03000-05:00

- Mass tort firms refinance loans as they await settlements
- Funders see “fallow period” in big-ticket lawsuit pipeline

Mass tort lawyers and their investors have a problem: Some huge cases are taking longer than expected to pay out as they hunt for the next big one.

Two of the largest multi-district personal injury cases show little sign of resolving soon after running for years. Johnson & Johnson’s multiple attempts at bankruptcy have delayed an $8 billion settlement for claims alleging its talc products cause cancer. A split among courts handling litigation against Bayer over the pesticide Roundup means the US Supreme Court may step in.

High-interest loans that law firms behind those cases use to fund their work are coming due, forcing firms to refinance. An influx of lawyers seeking a piece of the action and a dearth of big budget mass torts on the horizon has sparked concerns that the space is overleveraged.

“All these loans have maturity dates in them,” said Michael Kelley, a partner at Parker Poe who advises on funding deals. “So those are coming and going and the question always becomes what happens?”

Mass tort lawyers typically work on contingency, getting paid with a percentage of any settlement for the people they represent. They turn to outside funders to help shoulder the costs. The $15.2 billion litigation finance industry turned its attention to these cases in recent years after initially focusing on commercial disputes. They offer loans—rather than investments in exchange for returns on successful cases—with firms using their case dockets as collateral.

The deals allow funders to deploy large amounts of capital to firms with built-in diversified portfolios of hundreds or thousands of cases. Many of the large payouts they anticipated have yet to come.

Now, funders and law firms are scrambling to identify the next big tort.

There's a "degree of stress and distress in the space," Brandon Baer, founder of Contingency Capital, said at a litigation finance conference in September. Some funders are getting pressured for returns from limited partners, while borrowers are saying they don't have enough liquidity, according to Baer.

"We are going to be entering into a fallow period," Baer said. "You have a lot of built up inventory over significant periods of times. There might be seven major mass torts at the moment. Once those are played out, there will be potentially three to five years of quiet time while the firms are idling and reloading."

'Refinancing Wave'

Loans to law firms often come with double-digit interest rates that can exceed 20%. The deals typically mature after three to four years. If cases aren't resolved by that time, borrowers are forced to restructure the loans—with pricey concessions to lenders—or refinance with a new lender.

The talc and Roundup cases are nearing the decade mark with no end in sight.

"Nobody makes a bad loan. Bad loans happen over time," said Andrew Sagliocca, the CEO and president of Esquire Bank, which specializes in lending to plaintiffs' firms. "Duration is creating kind of a refinance wave."

Esquire often lends to law firms for up to $30 million, but also does deals with funders and others. Its focus has shifted in the past eight years away from mass torts because of the duration issues. The bank instead has turned toward law firms handling single-event cases, like automobile accidents, which are shorter and lower risk.

WATCH: Billion Dollar Lawsuits: When Litigation Finance Met Mass Torts

Kelley of Parker Poe says around 85% of his practice involves funding deals and the portion of refinancing arrangements has grown fairly significantly. He helps law firms facing looming maturity dates design those arrangements.

Lenders typically require law firm borrowers seeking more capital to increase guarantees, cut costs in the operations or even slash firm owners' pay.

"That's pretty scary for a lot of the attorneys," he said. Lenders "want to see the principals putting some more skin in the game."

Brian Roth, CEO of mass tort funder Rocade Capital, says the market is in a digestion phase after capital surged in quickly. "A lot of investors in the space are waiting to see when the cash will come back from the cases rather than other investors," he said.

'Dangerous Proposition'

Some seasoned mass tort lawyers blame an influx of new players, who they say are borrowing a lot of capital and fueling the heavily leveraged environment.

The market has "blown up exponentially" with new firms said Jim Onder, founder of plaintiffs' firm OnderLaw. He expects consolidation to eventually follow.

"There are a lot of people entering the space trying to figure it out," said Onder. "I don't think it's a good idea for them to be engaging in funding because it's a dangerous proposition. They need to understand the risk."

OnderLaw previously had a loan with Fortress Investment Group, a major player in litigation funding. The firm has a lien with Texas-based Armadillo Litigation Funding, according to public filings.

Inexperienced lawyers are taking on more cases than they can handle, according to Mike Papantonio, senior partner at Florida-based personal injury firm Levin Papantonio. Some newcomers aren't properly evaluating the transactional costs and duration, he said, and he's concerned they're more beholden to investors than their clients.

"Refinancing is gonna cost somebody and the pitiful thing is it costs the client," said Papantonio. "The client is now a victim three times: victim from the injury, victim for the first financing, victim from the third financing."

Papantonio and Onder are already eyeing their next big target: lawsuits over contraceptive injection Depo-Provera. Those suits allege pharma giant Pfizer Inc. failed to warn patients about brain tumor risks. The cost that lawyers pay for Depo-Provera case referrals has already jumped from $350 to $1, 500 apiece, according to Onder.

Many lawyers that don't know how to identify good litigation opportunities are too eager to deploy money, Onder said.

"If the next thing that someone says is good is a really horrible litigation, they're gonna throw their money at it stupidly and blindly," he said. "And unfortunately, some of the lenders do the same thing."

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Seventh Circuit skeptical of claims of honey fraud at Walmart

courthousenews.com/seventh-circuit-skeptical-of-claims-of-honey-fraud-at-walmart

Dave Byrnes

CHICAGO (CN) — Walmart is defrauding customers who buy its honey, an Illinois consumer claims. He took that claim before the Seventh Circuit on Friday, where the three-judge appellate panel was almost immediately skeptical.

The judges repeatedly opined that the consumer's attorney was unclear about some of the factual premises underlying his case, frustrating U.S. Circuit Judge Frank Easterbrook in particular.

"This is a serious problem," Easterbrook said at one point. "I expect representations by counsel to be absolutely truthful."

The Ronald Reagan appointee was, at the time, questioning the validity of the "National Honey Board" as a reliable source to back up the consumer's claims that Walmart fraudulently sells processed honey as "raw" honey, which lacks a strict definition under U.S. law. The National Honey Board is a trade association of honey producers that says raw honey "generally means honey that has not been heated or filtered," and is cited in the consumer's appellate brief.

The board claims to be an "instrumentality" of the U.S. Department of Agriculture, but the consumers' attorney, Matthew Norgard of the law firm Krislov & Associates, said he wasn't sure what that meant.

"I don't know what legal authority they have," he told Easterbrook.

"So far as I can tell, absolutely none," the judge shot back.

The broader claim goes back to June 2022. That's when a man named John Wertymer bought bottles of "raw honey" and "organic raw honey" from a Walmart location in the Chicago suburbs. Upon testing, Wertymer reportedly found that these honey products were less "raw" than advertised. There was too much of the organic compound 5-hydroxymethylfurfural, or HMF, in both honey bottles, and too much of the sugar mannose in the organic raw honey. He argued both factors indicated industrial processing — by heating the raw honey and adding "foreign" sugars to the organic raw honey — when he filed a federal fraud class action against Walmart in October 2023.

But the district court in Chicago tossed Wertymer's claims this past February, and again in May after he filed an amended complaint. In both cases, U.S. District Judge Lindsay Jenkins wrote that Wertymer had offered a sufficient factual basis to back up his claim. She noted that under the Codex Alimentarius, an internationally-recognized food safety code, Walmart's raw honey didn't exceed the typical HMF safety threshold of 40 milligrams per kilogram. Further, in his initial complaint he did not provide a source for claiming raw honey's HMF levels ought to be below 10 mg/kg, and his amended complaint cited the word of "Airborne," A New Zealand commercial apiary.

Airborne notes on its own website that while fresh honey can have less than 1 mg/kg of HMF, time and ambient temperatures slowly cause the level to rise. Wertymer, as Walmart's defense counsel noted Friday, had the Walmart honey bottles sampled ten months after he purchased them, and they still tested as having an HMF levels between 22 and 23 mg/kg.

"Every single source that plaintiff cites in their complaint to talk about HMF value, explains that HMF value is not merely a matter heating, it's a matter of freshness," Walmart's attorney William Northrip, of the law firm Shook, Hardy & Bacon said.

A Canadian testing company which analyzed the Wertymer's Walmart organic raw honey did indicate it had mannose levels of six milligrams per kilogram, which the company concluded "could indicate the presence of foreign sugars or industrial processing practices which are not suitable for honey," but Jenkins found this wasn't enough evidence to hold Walmart liable for fraud.

Wertymer appealed regardless, but the appellate court echoed Jenkins' concerns. The court had fewer questions for Northrip, who argued it was infeasible to compare 10-month-old Walmart honey with the chemical composition of honey sampled right at the time and place of its extraction.

"When you buy raw honey at Walmart, you aren't taken into a back room where there's a beehive and have a segment cut out. You're buying a product that is sitting on a shelf, in a bottle," the Walmart attorney said.

The appellate panel took Northrip and Norgard's arguments under advisement, but did not say when it would issue a ruling. U.S. Circuit Judges Ilana Rovner and Thomas Kirsch, George H. W. Bush and Donald Trump appointees respectively, joined Easterbrook on the panel.

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Categories / Appeals, Consumers, Courts

US buyers sue potato processors over alleged price-fixing scheme

reuters.com/legal/litigation/us-buyers-sue-potato-processors-over-alleged-price-fixing-scheme-2024-11-18

Mike Scarcella

By Mike Scarcella
November 18, 20248:52 AM PSTUpdated 2 hours ago
French fries are shown in Hollywood, California October 3, 2007. REUTERS/Lucy Nicholson (UNITED STATES) Purchase Licensing

Nov 18 (Reuters) - Four of the largest potato processors in the United States were accused in a pair of new lawsuits of conspiring to overcharge grocery stores, other commercial buyers and consumers for years.

Lamb Weston (LW.N), opens new tab, McCain Foods, J.R. Simplot and Cavendish Farms illegally fixed prices for frozen French fries, hash browns, tater tots and other products, Pennsylvania grocery chain Redner's Markets alleged in a lawsuit, opens new tab filed on Friday in Chicago federal court.

The same companies, as well as marketing group Potatoes USA, were separately sued on Sunday in a proposed consumer class action, opens new tab over similar claims in the same court.
The defendants did not immediately respond to requests for comment on the lawsuits, which allege violations of U.S. antitrust law.

The four companies dominate the $68 billion annual frozen potato products market, the plaintiffs said.

The lawsuits said the companies shared competitively sensitive commercial data with a third-party industry group that provides market snapshots. They contend such data-sharing disincentivized the companies from competing.

According to Redner's, the price of frozen potato products rose 47% from July 2022 to July 2024. It said input costs "significantly declined" during that period.

The frozen potato manufacturers' cartel relied on trade industry conferences to unlawfully coordinate on pricing, according to the lawsuits.

The cases seek unspecified monetary damages and a court order ending the alleged price-fixing.

The cases are Redner's Markets Inc v. Lamb Weston Holdings et al, U.S. District Court, Northern District of Illinois, No. 1:24-cv-11801.

5th Circuit Judge Jones Slams Proposal for Greater Amicus Brief Funding Disclosure

law.com/nationallawjournal/2024/11/15/5th-circuit-judge-jones-slams-proposal-for-greater-amicus-brief-funding-disclosure

Avalon Zoppo

Judge Edith Jones, of the U.S. Court of Appeals for the Fifth Circuit. Photo: Diego M. Radzinschi/ALM

News
“I urge any of you who are defenders of the First Amendment," said Edith Jones. "It's a case called NAACP v. Alabama, which says that that violates the First Amendment—that kind of compelled disclosure.”

November 15, 2024 at 04:55 PM

Judges
By Avalon Zoppo

Federal appeals court Judge Edith Jones on Thursday slammed a proposed rule for greater amicus brief funding disclosure.

The rule would require amicus filers to more broadly disclose financial ties to parties and non-parties. Its goal is to address concerns that parties or non-parties can secretly fund multiple amicus filings to manufacture the appearance of wide support for a certain position.

But Jones, of the U.S. Court of Appeals for the Fifth Circuit, said the proposal threatens the First Amendment rights of friend-of-the-court filers and is an example of the judiciary “compromis[ing] and conced[ing]” to arguments that the Third Branch is illegitimate.

“There is currently a measure lining its way through the rules process to require the filers of amicus briefs to disclose the parties who supported filing those amicus briefs, [or] in other words, who paid the money,” Jones said during a discussion on the judiciary’s independence at the Federalist Society’s annual National Lawyers Convention.

“Why is that? That is so various groups who are opposed to certain members of the judiciary [and] the judicial system can expose the Koch brothers," Jones continued. "They can expose whoever supports the Alliance Defending Freedom. They can expose the National Civil Liberties Alliance and its members. They can dox them. They can harass and they can say, ‘Oh, that judge was at such and such a meeting with those people. Therefore, there's an air of impropriety.’”

Under the proposed amendment, an amicus brief would need to disclose any party or its counsel that has "a majority ownership interest in or majority control of" the entity submitting the brief, as well as if they have contributed "an amount equal to 25% or more of the total revenue of the amicus curiae for its prior fiscal year."

Any party or non-party who contributed more than $100 to pay for "preparing, drafting, or submitting the brief" would also need to be disclosed, unless the person has been a member of the amicus for the past year, according to the proposal.

Jones echoed First Amendment criticism of the rule that Republican U.S. Sens. Mitch McConnell of Kentucky, John Thune of South Dakota and John Cornyn of Texas wrote about in a letter to the Committee on Rules of Practice and Procedure in September.

“I'm so sorry to say that the federal judiciary is allowing this to go through the rulesmaking process,” Jones said. “I urge any of you who are defenders of the First Amendment. It's a case called *NAACP v. Alabama*, which says that that violates the First Amendment—that kind of compelled disclosure.”

‘It’s a War’

Fifth Circuit Judge James Ho moderated the panel discussion on “The Continued Independence of the Judiciary” and had heated words for those who support U.S. Supreme Court reforms such as term limits.

Ho said those calling for Congress to institute court reform are merely dissatisfied with the justices’ rulings and are threatening the judiciary’s independence from politics.

“If you rule the way the critics dictate, you won't be criticized. You'll be celebrated," Ho said.

But if you don't, you'll be ostracized, you'll be defamed and destroyed with every tool that they have. And they have many tools: the academy, the media, even the Judicial Conference of the United States,” Ho added. “The double standards don't trouble the critics, because to the critics, this isn't a debate, it's a war. And that's the choice I think we all have to make as we approach these conversations. We can either treat this as a debate, or we could treat this as a war on the judiciary.”

The Supreme Court, with a 6-3 conservative majority, has overturned longstanding precedents over the past few years from federal abortion rights to 'Chevron' deference. Over the summer, President Joe Biden called for term limits for justices, a binding ethics code and a constitutional amendment to overturn the court's ruling on presidential immunity.

Georgetown Law professor Stephen Vladeck, a panel member, said calls for court reforms aren't necessarily a threat to judicial independence and don't delegitimize the institution. He said Congress has historically been involved in overseeing the judiciary in some ways.

"[I]ndeed, many court reforms might even bolster that independence insofar as they're aimed at increasing judicial accountability and thereby enhancing public faith in a judiciary," Vladeck said.

"Congress taking more control over the Supreme Court's docket, which was completely controlled from the founding until 1891 is not a threat to judicial independence," he added. "And Congress asserting more control over where lawsuits are filed, including, for example, [by] limiting the ability of litigants—Democrats, Republicans or Kardashians—to handpick individual district judges, is not a threat to judicial independence."

In the latter half of the event, Jones attacked Vladeck over his criticism of litigants' practice of judge-shopping using single-judge divisions.

Some district courts across the country contain divisions where only one judge sits, enabling litigants to guarantee cases filed in those divisions will be assigned to a particular judge. For example, the U.S. District Court for the Northern District of Texas has a division in Amarillo where only Trump-appointed Judge Matthew Kacsmaryk sits, and red state attorneys general have brought many challenges to Biden policies there.

Jones argued that judge-shopping is not new and said the government lawyers defending Biden's policies in Texas never moved to have a judge recused or a case transferred to a different venue. She added that Congress gave each district court the power to divide its docket.

"Ever since there were two judges, somebody would want to be in front of one judge rather than another," Jones said, adding that judges of the circuit have faced "relentless attacks."

At one point, Jones read from Vladeck's tweets related to Kacsmaryk and the ability of litigants to judge shop in Texas. She accused Vladeck of attacking Kacsmaryk's character, a characterization Vladeck rejected.

"[I]t's worth stressing that what I have done and what I've written… is describe a pattern that is happening," he said, adding that he has never claimed Kacsmaryk is unqualified to be a judge or that lawyers filing suits in his court are behaving unethically.

"The notion that describing behavior is attacking a judge, I think, is a very dangerous road," Vladeck said. "I think it's rather unfortunate what's happened this afternoon, and I wish that it weren't so. But I also think that it says a lot about where we are that instead of having a conversation about whether this is a good thing or not, we decide to turn it into a 'Can I put words into your mouth that make you look bad?' And it seems like that's not the kind of debates that I thought the Federalist Society was interested in sponsoring. I'm disappointed it's the conversation we've had today."

You Might Like

November 12, 2024

Bloomberg Law News 2024-11-18T13:52:17094122335-05:00

Quinn Emanuel, Insurers Spar Over Interest on $92 Million Fee

By Roy Strom 2024-11-18T11:47:30000-05:00

- Health insurers seek interest on award Quinn Emanuel held for years
- Dispute follows court slashing legal fee in half to $92 million

Health insurers want Quinn Emanuel to disgorge the interest that would have been earned on a massive $185 million award that was slashed in half by a court last month.

The health insurers on Friday asked a judge in the U.S. Court of Federal Claims to force the firm to pay more than $21 million, which they say is how much interest the difference in the fee award, about $92 million, could have accrued since it was originally awarded in 2021. The fee was for recouping government payouts owed the insurers.

The fee award appears to have been distributed to Quinn Emanuel Urquhart & Sullivan's partners, according to court documents. The firm then purchased an insurance policy protecting it against a later decision reducing the fee.

"The question is what would have happened if the class received the $92.4 million back in 2021 at the time of the original judgment, instead of Quinn Emanuel," a lawyer for the insurers, Sheppard Mullin partner Moe Keshavarzi, wrote in a court filing. "Under no circumstances would $92.4 million (or $185 million) have sat in a zero-interest account for several years."

The insurers are also asking the court to force Quinn Emanuel to hand over the excess fees while the dispute over any interest payment plays out.

The drawn-out fee fight stems from an overwhelming victory Quinn Emanuel lawyers secured in a case decided by the US Supreme Court in 2020. Their clients, a group of health insurers stiffed on government payments promised by the Affordable Care Act, won $3.7 billion in damages.

The good will the law firm earned from that victory has since dwindled. A group of the insurers originally objected to the firm's request for 5% of the billions in damages, asking a judge to award the firm between $12 million and $23 million.

The insurers then successfully appealed a decision that approved the full $185 million award, leading a judge to reduce Quinn Emanuel's recovery to 2.5% of the award.

The insurers now say Quinn Emanuel is backtracking on its view expressed in court arguments that any reduced fee would come with an interest payment to the insurers.

Partner Adam Wolfson last week told the insurers' attorneys that Quinn Emanuel believed the fee would not have accrued interest had it been held in the common fund account, according to an email thread attached to the insurers' Friday court filing.

The firm proposed a settlement applying 1.775% interest to the fee, according to the emails.

Wolfson and Keshavarzi did not immediately respond to requests for comment.

The health insurers counter that the $92 million would not have been held in a common fund, but instead distributed to the insurers to use as they please. They are now seeking interest to compensate them for not having the money.

The insurers applied a "prime rate" to calculate the $21 million proposal. That rate varied over the nearly four-year period as the US Federal Reserve embarked on an interest rate hiking cycle to combat inflation. The prime rate the insurers propose rose from 3.25% in 2021 to 8.5% in 2024, according to the court filing.

The filing also shed some light on Quinn Emanuel's judgment preservation insurance policy, which it purchased to protect its $185 million fee award from being reduced on appeal.

The filing said the insurance policy covered $166.85 million in potential losses after Quinn Emanuel paid the first $9.1 million in reduced fees. That would put insurers who wrote the policy on the hook for about $83.5 million in losses. That nascent market has suffered a series of losses.

The case is Health Republic Ins. Co. v. United States , Fed. Cl., 1: 16-cv-00259, 11/15/24 .

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Managers of this government-run Canadian pension fund were shocked to learn during their

170-person

storytelling

offsite

at a nice hotel

that the governing Conservatives were concerned about their costs being out of control.

@DepartmentOGE
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Public Ambush Sends Alert to $120 Billion Alberta Pension

- Conservative lawmakers dismissed CEO and are vowing changes
- Staff costs have ballooned in recent years, government says

By Layan Odeh, Paula Sambo and Dawn Lim

Public Ambush Sends Alert to $120 Billion Alberta Pension

- Conservative lawmakers dismissed CEO and are vowing changes
- Staff costs have ballooned in recent years, government says

By Layan Odeh, Paula Sambo and Dawn Lim

(Bloomberg) -- It was supposed to be a bonding experience.

Evan Siddall, then-chief executive officer of Alberta Investment Management Corp., gathered about 170 senior staff at The Westin Edmonton for a meeting and an exercise on "how to lead from a place of joy" taught by The Moth, a nonprofit dedicated to the art of storytelling.

Things quickly turned joyless.

Nate Horner, Alberta's finance minister, showed up to tell Siddall and three other executives they no longer had jobs. The four left the building after their phones and laptops were confiscated. Horner then broke the news to the remaining Aimco employees. He also dismissed the entire board.

Evan Siddall was ousted as CEO of Alberta's public pension manager on Nov. 7.

The public purge sent a clear message: The government of Alberta is the boss, and it's taking back control.

Horner has temporarily become the fund manager's chairman and sole director, and the conservative regime that rules the Canadian province plans to overhaul the firm and cut costs.

"To restore confidence in the agency, Alberta's government has decided to

5:46 AM · Nov 15, 2024 · **1,343** Views

3 10 1

Stomping_llama @stomping_llama · 9h

Meanwhile, in Nevada...

What Does Nevada's $35 Billion Fund Manager Do All Day? Nothing

Nevada goes passive to beat peers; BLT or tuna

By Timothy W. Martin Follow

Updated Oct. 19, 2016 11:13 am ET

Steve Edmundson has no co-workers, rarely takes meetings and often eats leftovers at his desk. With that dynamic workday, the investment chief for the Nevada Public Employees' Retirement System is out-earning pension funds that have hundreds on staff.

His daily trading strategy: Do as little as possible, usually nothing.

The Nevada system's stocks and bonds are all in low-cost funds that mimic indexes. Mr. Edmundson may make one change to the portfolio a year.

2 105

Attorney: ex-Ohio Speaker Larry Householder using Trump ‘connections’ to try to get out of prison

ohiocapitaljournal.com/2024/11/18/attorney-ex-ohio-speaker-larry-householder-using-trump-connections-to-try-to-get-out-of-prison

By Morgan Trau

November 18, 2024

Former Ohio House Speaker Larry Householder gives the thumbs up as he enters a federal courthouse in Cincinnati. (Photo from WEWS.)

The attorney for former Ohio House Speaker Larry Householder said that his team is using the convicted felon’s power — and his connections to President-elect Donald Trump — to get out of prison.

The jury foreman from the speaker’s case is furious, arguing that this is the exact kind of corruption for which Householder was convicted.

Back in 2019, Householder took a $61 million bribe in exchange for legislation to give FirstEnergy a $1 billion bailout, named H.B. 6, all at the expense of the taxpayers.

In March 2023, a jury found that Householder and former GOP leader Matt Borges participated in the racketeering scheme that left four men guilty and another dead by suicide.

In late June of that year, federal Judge Timothy Black sentenced Householder to 20 years in prison. Borges got five years. The two surviving defendants — Jeff Longstreth and Juan Cespedes — are awaiting sentencing after taking plea agreements early on and helping the FBI. The feds are asking for zero to six months for them.

At the end of 2023, former chairman of the Public Utilities Commission of Ohio, Sam Randazzo, pleaded not guilty after being charged with a dozen crimes related to bribery and embezzlement. He allegedly received more than $4.3 million from FirstEnergy. The utility company has already admitted it bribed everyone.

Then 2024 hit.

Former FirstEnergy CEO Chuck Jones, former FirstEnergy Senior Vice President Michael Dowling and Randazzo were all hit with state bribery charges. Each pleaded not guilty during their joint arraignment in Akron in mid-February. They are accused of masterminding the corruption scheme.

Randazzo committed suicide in April. He is the second man, out of eight, to take his own life after being connected to the scandal. Neil Clark, a lobbyist accused of bribery, died after pleading not guilty in 2021.

In the summer, OCJ/WEWS uncovered text messages showing that Gov. Mike DeWine and Lt. Gov. Jon Husted have close ties to the FirstEnergy executives, and Husted helped lead the charge to get H.B. 6 to pass.

Householder is still working his way through the appeals process. He and his attorneys have defended his innocence the entire time.

New beginnings

A new administration means new beginnings, but not just for Trump.

Larry Householder is looking for an escape — literally.

“It’s a humiliating experience,” Householder’s campaign attorney Scott Pullins said.

In 2023, the former speaker was sentenced to 20 years in federal prison for racketeering.

“It’s not [an] experience I recommend for anyone,” he added. “At the same time, he’s gotten some exercise. He’s lost a lot of weight.”

Pullins told me that after sitting, or rather working out, in a cell for a year and a half, Householder is about to call in a favor.

“Larry has a long history with Donald Trump,” Pullins said. “I think he’ll be particularly receptive to this clemency request.”

Pullins is working with Householder to start the request for clemency, first with a reduction in his sentence and then a full pardon — which means no more criminal record.

“The justice system can be turned as a weapon against people for political purposes,” the lawyer said.

Householder's team believes that the FBI was politically motivated in arresting the former speaker.

This argument could appeal to the president, Case Western Reserve University criminal law professor Mike Benza explained.

"One of the things that we know that President-elect Trump is interested in is what he sees as political forces working in the Department of Justice, especially targeting Republicans," Benza said.

Householder knows Trump well and spoke at the 2016 Republican National Convention. They kept in touch throughout the years, Pullins said.

FirstEnergy, who has already admitted to bribing Householder, also admitted in subpoenaed records that they paid millions to try to influence Trump when he was president in 2017, according to the Energy and Policy Institute.

Republican Attorney General Dave Yost is not impressed with this pardon attempt. He said that this isn't a get-out-of-jail-free card for Householder.
"He is also indicted on state charges, state criminal charges," Yost said. "A federal pardon will not reach those charges if he's convicted of them."

The ex-speaker has pleaded not guilty to 10 felony charges in Cuyahoga County.

Pullins believes that Yost is also politically motivated and is jealous of Householder for getting to speak at the RNC. The AG has continued to deny any personal baggage in cases he prosecutes and has asserted that Householder just committed crimes.

"We think that if his federal conviction is overturned or is pardoned, it will send a strong message to Dave Yost that these charges are bogus," Pullins said.

Pullins said he doesn't plan on reaching out to other Statehouse executives, like DeWine or Husted because they helped "scapegoat" Householder into being the only one to face consequences from this situation.

DeWine's team had no comment about the start of the clemency request process.

Same stuff, different day?

The foreman for the jury in the Householder federal trial did an exclusive, in-depth interview in 2023, and had more to say following the new developments.

“My instant thought was, he didn’t learn his lesson,” Jarrod Haines, the foreman, said on Friday. “Householder used his position and his power to better himself, along the way he ruined many individuals’ lives. Don’t remember seeing an apology from him to the people of Ohio, instead he’d rather undermine ole Bob and Betty Buckeye to cut his sentence short.”

He added that Householder was, once again, using power to get what he wanted.

“I definitely feel like he is using his connections to skip his sentence,” he said. “I would feel that the justice system failed if he would be pardoned. I would feel that my time as a juror was wasted. Even though I think it was a very valuable experience for me, my life was interrupted for seven weeks.”

Benza understood this reaction.

“That would be an interpretation for many people that this is just another example of the entire system being bankrupt and corrupt because if you have the political power, you face no repercussions for violating the law,” the professor said.

Pullins was asked about the appearance that Householder could be using his connections in order to get out of prison.

“Well, yeah. He is,” he responded. “Hopefully he has some friends left that can help.”

FCA says ex-Barclays CEO Staley misled it over Epstein contacts during probe

reuters.com/business/finance/fca-says-ex-barclays-ceo-staley-misled-it-over-epstein-contacts-during-probe-2024-11-18

Reuters

Item 1 of 2 Barclays' CEO Jes Staley arrives at 10 Downing Street in London, Britain, January 11, 2018. REUTERS/Peter Nicholls/ File Photo

[1/2]Barclays' CEO Jes Staley arrives at 10 Downing Street in London, Britain, January 11, 2018. REUTERS/Peter Nicholls/ File Photo Purchase Licensing Rights, opens new tab

LONDON, Nov 18 (Reuters) - Ex-Barclays CEO Jes Staley gave misleading answers to Britain's Financial Conduct Authority about his dealings with Jeffrey Epstein when it was investigating his relationship with the disgraced financier, the FCA's lawyers alleged on Monday.

The FCA said in October 2023 that it intended to ban Staley from senior roles and fine him 1.8 million pounds ($2.27 million) in relation to a letter sent by Barclays to the financial watchdog in 2019.

Staley said then that he was "very disappointed" with the FCA decision, which he is now challenging. His appeal is due to be heard by London's Upper Tribunal in March next year.

The watchdog found Staley, a former JP Morgan (JPM.N), opens new tab executive, had "recklessly approved" the letter, which the FCA said contained two misleading statements, about his relationship with Epstein and their last contact.
In documents for a preliminary hearing on Monday, the FCA said that Bank of England Governor Andrew Bailey, who was FCA chief executive between 2016 and 2020, and Barclays chairman Nigel Higgins had both given witness statements for the case.

The FCA also argued in court on Monday that material from a lawsuit brought by the U.S. Virgin Islands against JP Morgan suggested Staley had misled the FCA in interviews and in his response to the tribunal case.

Staley's lawyers said that the FCA is attempting to present an entirely new case and allowing the British regulator to amend its case would be unfair.

Last year, JP Morgan agreed to pay $75 million to settle the U.S. Virgin Islands' claim that the bank aided in Epstein's sex trafficking. It also reached a confidential settlement with Staley, who JP Morgan blamed for keeping him as a client.

Epstein killed himself in a New York jail in 2019, while awaiting trial on sex-trafficking charges.
The FCA's lawyer Leigh-Ann Mulcahy said in court documents that, based on evidence given in the U.S. lawsuit, Staley had "dishonestly or recklessly" misled the watchdog in three interviews between 2019 and 2021.

Staley told the FCA that "I'd had zero contact, any relationship at all, with Jeffrey" while he was at Barclays, where he was chief executive from December 2015 until 2021.

Judge Tim Herrington will give his ruling on whether the FCA can amend its case at a later date.

Reporting by Sam Tobin; Editing by Alexander Smith

Securities Law News

Nov. 15, 2024, 9:58 AM PST

Auditors Say Companies Underrate Economic, Climate Change Risks

By Michael Kapoor

Bloomberg Law News 2024-11-18T10:12:12406845835-05:00

Auditors Say Companies Underrate Economic, Climate Change Risks

By Michael Kapoor 2024-11-15T12:58:42000-05:00

Companies under-estimate risks like climate change and fail to act on areas perceived as high threats such as economic volatility, according to a new report from the maker of an audit and risk management platform.

The findings are based on an AuditBoard survey of 376 internal auditors at companies in the US, UK, and Ireland. The survey showed a lack of alignment between top risks businesses face for 2025 and the level of resources internal auditors put toward them, AuditBoard said in a report Thursday.

Internal auditors assess their company's risk management, internal controls, and corporate governance procedures.

"The internal audit profession is facing an inflection point. We must better equip ourselves to understand and face tomorrow's risks while deriving more benefits from limited resources," Richard Chambers, AuditBoard's senior adviser for risk and audit, said in a statement.

As well as a lack of investment in internal audit, the survey suggested companies were not reacting to new threats based on how they perceived risk areas.

Cybersecurity topped both the risk ranking and the audit effort rating. Changing economic conditions ranked as the second-biggest risk facing audit professionals but No. 11 in terms of internal audit effort. The survey also showed fraud as the third-highest issue for internal audit attention, even though it ranked as the 10th biggest risk.

Environmental, social, and governance risks came in at No. 13 in the ranking by internal audit professionals. Chambers said by email that they are perceived as long-term issues.

"ESG risks are often deprioritized, ranking low on internal audit's risk lists despite their capacity to drive significant organizational change," he said.

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Securities Law News

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US Audit Board Shelves Rule Rewrite on Flagging Illegal Acts (1)

By Amanda Iacone

Exclusive

- White House transition stymies long-debated rule overhaul
- Proposal raises bar to vet toll of corporate crimes, misdeeds

Bloomberg Law News 2024-11-18T09:59:48373803683-05:00

US Audit Board Shelves Rule Rewrite on Flagging Illegal Acts (1)

By Amanda Iacone 2024-11-15T16:42:52000-05:00

- White House transition stymies long-debated rule overhaul
- Proposal raises bar to vet toll of corporate crimes, misdeeds

A hotly contested proposal that would require auditors to dig far deeper into their clients' potential lawbreaking activities won't be finalized this year, the US audit regulator said on Friday.

The Public Company Accounting Oversight Board had planned to adopt a major overhaul of its rules spelling out how auditors consider the financial risks of any legal or regulatory violations as they vet corporate revenues and balance sheets.

But now the board must grapple with the prospect of new leadership and a fresh set of priorities for financial regulators following President-elect Donald Trump's win in the Nov. 5 US election.

And instead, the PCAOB has paused the project and won't take further action until the regulator has consulted with the Securities and Exchange Commission under the incoming presidential administration, a source familiar with the audit regulator's process said.

Investors supported the plan, but it faced pushback from auditors and corporate leaders.

"We will continue engaging with stakeholders, including the SEC, as we determine potential next steps," a PCAOB statement said. "The PCAOB is committed to listening to all stakeholders and getting it right."

Board leaders face a quickly closing window to push through regulatory reforms before the second Trump administration takes control of the SEC, which must approve any changes in US audit standards. However, the commission is unlikely to take action on major rule changes in the coming months until a new chair is sworn in.

The delay will ensure that the full commission has sufficient time to review the complex standard-setting project, the source said.

Under PCAOB Chair Erica Williams, the board has pursued an ambitious agenda, setting a higher bar for auditors by overhauling an outdated rulebook and aggressively enforcing its requirements. But a Republican-led SEC could overhaul the PCAOB's leadership for the third time since 2017 and reset its agenda.

This week PCAOB member Christina Ho, a frequent critic of the board's approach, advised the regulator against rushing through a "series of midnight regulations" and urged it to respect the "democratic process."

Project Pushback

Investors have long demanded that auditors shed more light on corporate crimes that could sink stock values. They argue that the current rules, which date to 1988, don't capture serious internal failures like high-pressure sales tactics at Wells Fargo & Co. or emissions cheating by Volkswagen AG.

"This was really the shining light out of rules that they were proposing and one that would have had the biggest bite to increase auditors' vigilance," said Mekedas Belayneh, a policy advocate with consumer advocacy group Public Citizen. "It's a disappointment that the agency is leaving a rule that would have emboldened their duties to serve not only investors" but also guard against corporate fraud and misconduct.

Auditors and corporate leaders, however, have panned the 2023 proposal, known as noncompliance with laws and regulation or NOCLAR, and demanded that the project be dropped or re-issued for another round of public comment.

"Our expectation is that any NOCLAR amendments that the Board seeks to adopt would have to be substantially revised, and, as such, the public should have the opportunity to comment on any such revised proposal," the Center for Audit Quality wrote to the board in a Nov. 11 letter.

In the meantime, the board continues to evaluate feedback including input from auditors about how they comply with current rules, the source familiar with the PCAOB's process said. Staff guidance issued this week reminds auditors of their responsibilities under the illegal acts standards.

Despite the pending political transition, the board continues to advance other aspects of its rule-writing agenda. Next week, the PCAOB plans to adopt another set of rule changes that would expand disclosures that auditors provide to their regulator and the public. The board adopted this week a narrow change to its registration process.

Wolfspeed ousts CEO Gregg Lowe as slowing EV sales hit growth

reuters.com/sustainability/boards-policy-regulation/wolfspeed-board-terminates-ceo-lowe-2024-11-18

Reuters

Wolfspeed CEO Gregg Lowe speaks during an event in Ensdorf, Germany, February 1, 2023. REUTERS/Thilo Schmuelgen/File Photo

Nov 18 (Reuters) - Chipmaker Wolfspeed (WOLF.N), opens new tab said on Monday that its board ousted Gregg Lowe as its CEO without cause, amid growing challenges from slowing demand for electric vehicles, sending its shares up about 6%.
The Durham, North Carolina-based company faced manufacturing issues at its factory, which it has announced will be shut down. It has also been struggling with slowing orders from the industrial and energy end markets.

Between a weak demand environment, Wolfspeed's existing restructuring plan and reduced capital expenditure for fiscal 2025, the new management cannot do much to ignite a rally in the shares other than a full-on sale, analysts at Charter Equity Research said.

Wolfspeed's shares are down about 85% so far this year, widely underperforming the S&P 500 (.SPX), opens new tab and the Philadelphia semiconductor index (.SOX), opens new tab.

The company, which makes chips using silicon carbide (SiC), a more energy-efficient material than standard silicon, counts General Motors (GM.N), opens new tab and Mercedes-Benz (MBGn.DE), opens new tab among its customers.
Lowe, who has served as the company's CEO since 2017, will receive a severance payment as part of the settlement, the company said in a filing.

Lowe did not immediately respond to a Reuters request for comment.

The company also named Chairman Thomas Werner as executive chairman and said its board was conducting a search for a permanent CEO.

Wolfspeed had forecast quarterly revenue below Wall Street estimates earlier this month and said it would book $174 million in restructuring charges for the planned closure of a facility.
The company also announced to lay off 20% of its workforce on its latest post-earnings call.
Last month, it had also dropped plans to build a factory in Ensdorf, Germany, citing the slower adoption of EVs in Europe.

Reporting by Jaspreet Singh in Bengaluru; Editing by Anil D'Silva and Alan Barona

US opens two new probes into Ford recalls after settlement

reuters.com/business/autos-transportation/us-opens-probe-into-over-110000-ford-suvs-seat-belt-concern-2024-11-18

David Shepardson

A Ford logo is seen at the New York International Auto Show Press Preview, in Manhattan, New York City, U.S., March 27, 2024. REUTERS/David Dee Delgado/File photo Purchase Licensing Rights, opens new tab

WASHINGTON, Nov 18 (Reuters) - The National Highway Traffic Safety Administration said on Monday it has opened two new investigations into Ford recalls, the latest scrutiny by U.S. regulators of the No. 2 U.S. automaker.

Last week, Ford agreed to a $165 million civil penalty after an NHTSA investigation found the automaker failed to recall vehicles with defective rearview cameras in a timely manner.
On Monday, the auto safety regulator opened an investigation into whether Ford should recall 112,000 Ford (F.N), opens new tab Expedition SUVs over seat belt issues and another into whether Ford's recall of 456,000 SUVs over a loss of power and an electrical system failure is adequate.

The agency has received three complaints, alleging an inadvertent deployment of the seat belt retractor pretensioner. The complaints referenced a loud sound followed by the seat belt rapidly tightening and remaining in the locked position. The investigation follows the February recall by Ford of 77,000 Ford Expedition and Lincoln Navigator SUVs over the issue.

NHTSA is investigating if Ford's April recall of about 456,000 Bronco Sport and Ford Maverick vehicles over a loss of power stemming from sudden degradation of the 12-volt battery is adequate to address the issue.

The recall fix is a series of software updates designed to provide improved detection of the 12-volt battery state of charge but NHTSA has received 15 reports describing loss of power incidents for Ford Bronco Sport vehicles that received the software update.

The company said it was working with the NHTSA to support both investigations.

Under terms of NHTSA's settlement with Ford last week, Ford must thoroughly review all recalls it has filed in the last three years and if needed, file new recalls.

NHTSA said Ford provided inaccurate or incomplete information, did not submit timely quarterly reports for other recalls and did not fully comply with public availability of vehicle recall information. Ford said it disagreed with NHTSA's assessment.

Reporting by David Shepardson in Washington and Nathan Gomes in Bengaluru; Editing by Shinjini Ganguli and Rod Nickel

Trump Makes Second Attempt to Install Wall Street's Lawyer, Jay Clayton, to Oversee Prosecutions of Wall Street

wallstreetonparade.com/2024/11/trump-makes-second-attempt-to-install-wall-streets-lawyer-jay-clayton-to-oversee-prosecutions-of-wall-street

By Pam Martens and Russ Martens: November 18, 2024 ~

Last week President-elect Donald Trump announced the nomination of Jay Clayton to become U.S. Attorney for the Southern District of New York – the regional office of the U.S. Department of Justice that brings (or passes on bringing) criminal prosecutions against the Wall Street megabanks for their serial looting of the American people.

In Trump's first term as President, Clayton was tapped by Trump to serve as Chairman of the Securities and Exchange Commission – notwithstanding that Clayton had represented 8 of the 10 largest Wall Street banks in the prior three years as a law partner at Sullivan & Cromwell, one of the oldest Wall Street go-to law firms. Clayton returned to Sullivan & Cromwell after his stint at the SEC and currently serves there as Senior Policy Advisor and Of Counsel.

When Clayton's name was first announced by Trump to be SEC Chair in early January 2017, Senator Sherrod Brown, then the Democrat's ranking member of the Senate Banking Committee, issued the following statement:

"It's hard to see how an attorney who's spent his career helping Wall Street beat the rap will keep President-elect Trump's promise to stop big banks and hedge funds from 'getting away with murder.' I look forward to hearing how Mr. Clayton will protect retirees and savers from being exploited, demand real accountability from the financial institutions the SEC oversees, and work to prevent another financial crisis."

Our Revolution, the organization created by supporters of Senator Bernie Sanders after his failed bid for the Presidency, ramped up the heat against Clayton serving as SEC Chair with an email blast asking Sanders' supporters to sign a petition against Clayton. The email message read in part:

"Clayton's ties to Wall Street are deep. His law firm specializes in protecting Wall Street banks, and during the financial crisis he worked as a bailout attorney for Goldman Sachs, where his wife works today…The SEC chair is supposed to referee Wall Street banks, but Clayton has spent his entire career protecting their interests – and more than half of his family income currently comes from one of them. How can he be trusted to suddenly switch sides and put working Americans first?"

The link to the petition called this a "hostile takeover" of America. That hostile takeover now looks like a warm, cuddly blanket compared to what Trump is unleashing today. *Saturday Night Live's* James Austin Johnson, playing Trump, described his cabinet picks as follows: "…I am very fastly picking the most epic cabinet of all time. They're some of the most dynamic, free-thinking, animal killing, sexually criminal, medically crazy people in the country." *Saturday Night Live* forgot to reference Fox News host Pete Hegseth, the man Trump has nominated to be Secretary of Defense and head the U.S. military and Pentagon, despite his tattoos espousing white supremacy rhetoric.

Most notable about the current Trump nomination of Clayton is that this is not the first time that Trump has attempted to put this deeply conflicted man – *who has zero experience as a criminal prosecutor* – in charge of the federal prosecutor's office that handles criminal prosecutions of Wall Street. The first time was more of an attempted coup d'état rather than an appointment. Here are the hubristic details of what went down with Clayton in Trump's last year in office as President – six months before Trump fueled the insurrection on the U.S. Capitol building on January 6, 2021.

Shortly after 9 p.m. on June 19, 2020, the then U.S. Attorney General, William Barr, blindsided prosecutors in the Southern District of New York with the announcement that their boss, Geoffrey Berman, was stepping down as U.S. Attorney and would be replaced with the sitting SEC Chairman, Jay Clayton.

What Barr had not foreseen was that Berman had no intention of being ousted quietly. In fact, he would later write a tell-all book on the experience. Berman writes the following in *Holding the Line: Inside the Nation's Preeminent US Attorney's Office and Its Battle with the Trump Justice Department:*

"Throughout my tenure as U.S. attorney, Trump's Justice Department kept demanding that I use my office to aid them politically, and I kept declining — in ways just tactful enough to keep me from being fired."

Two hours after Barr's announcement, Geoffrey Berman released his own statement indicating that the U.S. Attorney General had just told a brazen lie to the American people. Berman's statement was this: "I learned in a press release from the Attorney General tonight that I was 'stepping down' as United States Attorney. I have not resigned, and have no intention of resigning my position, to which I was appointed by the Judges of the United States District Court for the Southern District of New York."

The next day, Barr issued another statement indicating that President Trump was removing Berman from his post but would leave Berman's Deputy in charge of the office on an interim basis. Barr had stated the prior Friday evening that he would be putting in Craig Carpenito, the sitting U.S. Attorney for the District of New Jersey, as acting head of the office until Clayton's confirmation hearing. The acknowledgement by Barr that Berman's Deputy would fill the post until a confirmation occurred appeased Berman and he agreed to step down.

The same day, then Senate Judiciary Committee Chairman Lindsey Graham, Republican of South Carolina, released a statement indicating that he would not move forward on Clayton's nomination without the standard policy of getting a go-ahead from the two Senators of the state where the new U.S. Attorney will serve, i.e., New York. That meant that Senators Chuck Schumer and Kirsten Gillibrand would have to give the greenlight to Clayton. Instead, Schumer released the following statement:

"Forty seven years ago, Elliott Richardson had the courage to say no to a gross abuse of presidential power. Jay Clayton has a similar choice today: He can allow himself to be used in the brazen Trump-Barr scheme to interfere in investigations by the U.S. Attorney for the Southern District of New York, or he can stand up to this corruption, withdraw his name from consideration, and save his own reputation from overnight ruin."

According to the New York Times, Senator Gillibrand had also stated that Clayton should withdraw his name from consideration.

That was the end of the Trump-Barr-Clayton attempted coup d'état on June 19, 2020. It was followed by the violent and deadly attempted coup d'état on January 6, 2021 at the Capitol building.

Now Trump's plan to install Clayton in the U.S. Attorney's Office for the Southern District of New York is back and, incredibly, Clayton looks like one of the more reasonable Trump cabinet picks – on the mere basis that he hasn't been accused of sexually assaulting anyone or having his body decorated with white supremacy images.

What Trump is attempting to do for Wall Street's serial miscreants today is precisely what he is planning to do for himself at Main Justice – the U.S. Department of Justice in Washington, D.C. Trump has nominated his sycophant, Matt Gaetz, to be U.S. Attorney General and his defense counsel, Todd Blanche, to be Deputy Attorney General, a position that oversees the criminal division of the U.S. Department of Justice.

Blanche represented Trump in the federal cases brought by Special Counsel Jack Smith and in the New York case where Trump was accused of attempting to illegally influence the 2016 election by paying hush money to porn star Stormy Daniels, who testified in court that the two had sex in a hotel room. According to Daniels' statements to the media, Trump's wife, Melania, was caring for their four-month old son, Barron, at the time. The hush money trial ended with Trump being convicted on all 34 criminal felony counts – making him the first convicted felon in U.S. history to be elected President of the United States.

In the 2020 effort by Trump to install Clayton, mainstream media focused on the fact that the U.S. Attorney's office for the Southern District was actively investigating Trump ally, Rudy Giuliani, and Deutsche Bank, a major financial lender to Trump's companies. That might have been relevant. But also noteworthy was the ongoing criminal investigations of two Wall Street megabanks.

Goldman Sachs was under investigation in one of the biggest financial frauds in history – a case involving a Malaysian sovereign wealth fund known as 1MDB. Goldman raised over $6 billion in bond offerings for 1MDB but, according to the Justice Department, $4.5 billion of that was "misappropriated" and used "to fund the co-conspirators' lavish lifestyles, including purchases of artwork and jewelry, the acquisition of luxury real estate and luxury yachts, the payment of gambling expenses, and the hiring of musicians and celebrities to attend parties." Goldman made more than $600 million in fees from the bond offerings, according to the Justice Department.

On June 6, 2020 Reuters reported that Malaysia would not accept $3 billion from Goldman to settle the case. On June 11 – just eight days before Berman was abruptly dismissed from his post — the New York Times reported the following:

"Goldman Sachs is trying to get federal prosecutors to ease up on the bank for its role in a brazen scheme to loot billions of dollars from a Malaysian sovereign wealth fund.

"Lawyers for the bank have asked Deputy Attorney General Jeffrey Rosen to review demands by some federal prosecutors that Goldman pay more than $2 billion in fines and plead guilty to a felony charge, according to three people briefed on the matter.

"The bank has sought to pay a lower fine and avoid a guilty plea, according to the people, who spoke on condition of anonymity because the talks are continuing."

What most Americans have never heard about in this famous case is that Clayton's law firm, Sullivan & Cromwell, was involved in making some of those luxury purchases on behalf of the gang of alleged criminals who looted 1MDB, according to the U.S. Department of Justice.

Sullivan & Cromwell's name makes seven appearances in the criminal complaint filed in court by the Justice Department.

While Sullivan & Cromwell is named 7 times in the complaint, the giant law firm Shearman & Sterling is mentioned 94 times. Shearman & Sterling has represented Goldman Sachs and other Wall Street banks on numerous occasions.

Something else that the public does not know is that a unit of JPMorgan Chase, a bank that has pleaded guilty to five criminal felony counts, is named 61 times in the 1MDB complaint for its role in wiring the looted funds. While the Justice Department did not bring charges against J.P. Morgan in the matter, the Swiss regulator, FINMA, found in 2017 that the bank had committed serious anti-money laundering breaches in its handling of monies belonging to 1MDB.

Just three months after the attempted Clayton coup, the U.S. Department of Justice gave JPMorgan Chase a deferred prosecution agreement for two criminal felony counts involving sprawling crimes in the trading of precious metals and U.S. Treasuries. But instead of the case being brought by the U.S. Attorney's Office for the Southern District of New York – where JPMorgan's trading desks are located – the case was inexplicably handled by the District of Connecticut.

Securities Law News

Nov. 15, 2024, 6:29 AM PST; Updated: Nov. 15, 2024, 8:11 AM PST

Red States Challenge SEC Authority to Police Digital Assets (1)

By Bernie Pazanowski and Ben Miller

Documents

- Complaint
- Docket
- Judge Gregory F. Van Tatenhove
- Press Release

- **COURT:** E.D. Ky.
- **TRACK DOCKET:** No. 3:24-cv-00069 (Bloomberg Law subscription)

Bloomberg Law News 2024-11-18T09:58:23948421-05:00

Red States Challenge SEC Authority to Police Digital Assets (1)

By Bernie Pazanowski and Ben Miller 2024-11-15T09:29:34000-05:00

- **COURT:** E.D. Ky.
- **TRACK DOCKET:** No. 3:24-cv-00069 (Bloomberg Law subscription)

Kentucky and 17 other states are challenging the Securities and Exchange Commission’s authority to regulate digital assets such as cryptocurrency.

The SEC unilaterally asserted regulatory control over digital assets by classifying them as investment contracts and treating them like stocks and bonds, according to the complaint filed Thursday in the US District Court for the Eastern District of Kentucky.

The SEC maintains that the agency therefore has the power "to regulate secondary-market sales of digital assets as securities transactions, and to require digital asset platforms both to register with the SEC as securities exchanges, dealers, brokers, and clearing agencies and to comply with all manner of requirements under the federal securities laws," the complaint says.

But the SEC's regulation of digital assets "preempts some state laws, pressures States to change others, and subjects the entire digital asset industry to a single ill-fitting regime that Congress enacted for an entirely different kind of financial instrument," the lawsuit says.

Digital assets "are just that—assets, not investment contracts covered by federal securities laws," the complaint says. They should therefore be regulated by the states, it says. To hold otherwise will allow the SEC "to regulate (and displace State regulation of) not only all transactions in digital assets but also a boundless array of other assets as well, from collectibles to luxury goods and beyond," it says.

The states seek a declaration that digital assets aren't investment contracts and an injunction preventing the SEC from taking enforcement action against digital platforms that don't register as securities dealers.

They also seek a declaration that the SEC violated the Administrative Procedure Act by not subjecting its regulation of digital asset platforms to notice and comment rulemaking, damages, costs, and fees.

"While we don't comment on litigation, state securities regulators have been strong partners in efforts to uncover and prosecute misconduct in the crypto markets," an SEC spokesperson told Bloomberg Law Friday.

Several cases challenging alleged SEC overreach into the realm of crypto regulation have been brought in Texas district court, including suits filed by industry players Crypto.com, Lejilex, and Beba. In September, a Texas federal judge dismissed a case filed by crypto company Consensys Software Inc., finding it had been brought prematurely.

The latest challenge in Kentucky district court has the potential to reach the Sixth Circuit on appeal, which could coincide with any appeals in the Texas crypto-related SEC challenges and create a possible split with the Fifth Circuit. In that scenario, the issue of SEC crypto regulation could then land in the Supreme Court, where the justices would decide whether to curtail the agency's enforcement.

Meanwhile, President-elect Donald Trump has pledged to fire SEC Chair Gary Gensler and roll back the agency's efforts to police crypto trading.

The Kentucky Attorney General's Office filed the complaint.

The case is Commonwealth of Ky. v. SEC , E.D. Ky., No. 3:24-cv-00069, complaint filed 11/14/24 .

(Updates with other suits challenging the SEC over crypto regulation starting in paragraph nine.)

To contact the reporters on this story: Bernie Pazanowski in Washington at bpazanowski@bloombergindustry.com; Ben Miller in New York City at bmiller2@bloombergindustry.com

Securities Law News
Nov. 18, 2024, 3:00 AM PST

Crypto's Coming Back. Here's How to Avert Disaster: Editorial

By The Editors

Opinion

Bloomberg Law News 2024-11-18T10:10:24072485738-05:00

Crypto's Coming Back. Here's How to Avert Disaster: Editorial

By The Editors 2024-11-18T06:00:18452-05:00

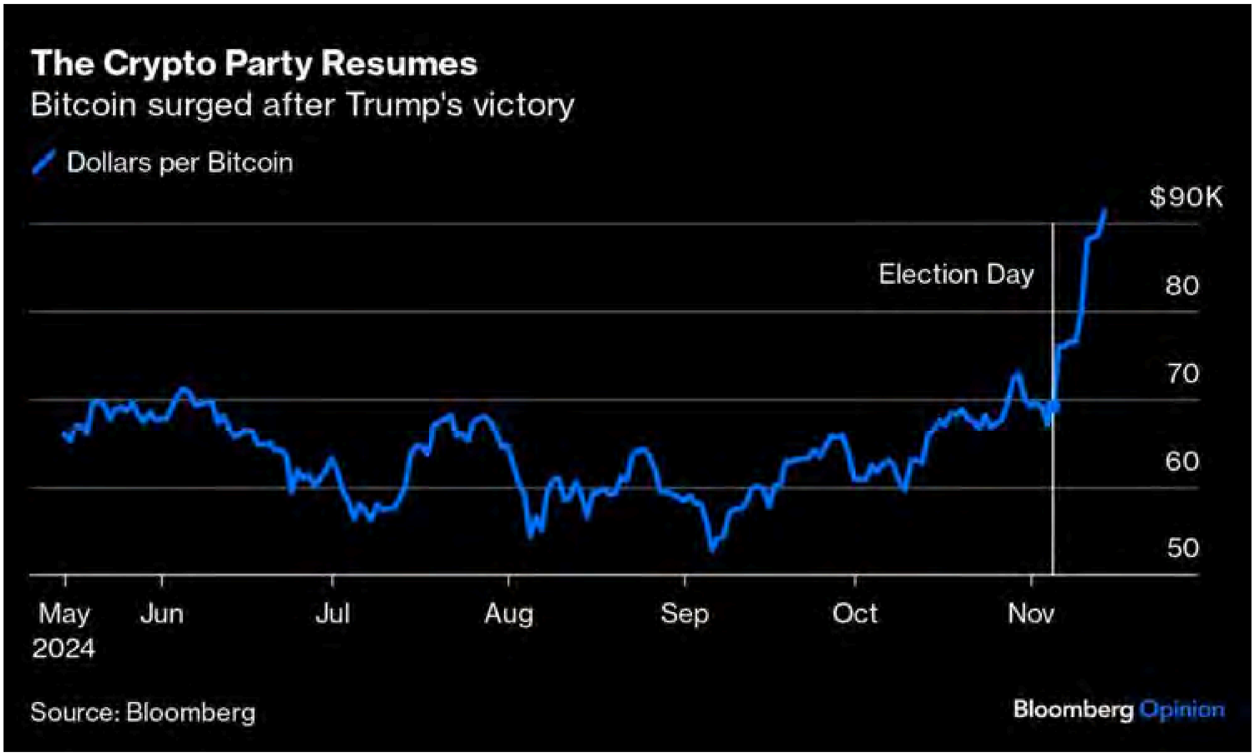
The crypto party seems to be getting restarted. Bitcoin is surging and big players are celebrating amid expectations that President-elect Donald Trump will make the US, as he put it, "the crypto capital of the world."

Lest this experiment go awry, regulators need to keep some guardrails in place.

In its current incarnation, crypto has at best an indirect potential to benefit society. Most of its enterprises — such as the Trump-promoted World Liberty Financial — have little or nothing to do with the technology's capacity to, say, improve cross-border payments or securities settlement. The most popular digital tokens tend to be purely speculative instruments, with no connection to the real-world cash flows from which financial assets derive their value. They're traded on platforms rife with scammers, manipulation and conflicts of interest, enriching primarily the kind of intermediaries that crypto was supposed to eliminate.

Under President Joe Biden, the Securities and Exchange Commission has sought to shut crypto down rather than introduce rules to accommodate and civilize it (as Europe, for example, is attempting). SEC Chair Gary Gensler sued two of the world's largest trading platforms, Binance Holdings Ltd. and Coinbase Global Inc., for various violations of securities laws — an effort that, if successful, could've forced them out of the country or even out of business.

Things have changed. Trump has pledged to fire Gensler and even establish a “strategic national Bitcoin stockpile,” to the delight of crypto advocates who pumped more than $200 million into his campaign and those of dozens of successful congressional candidates. Industry-sponsored legislation would largely neutralize the SEC, facilitating a proliferation of issuance and trading with minimal oversight — particularly given the president-elect’s likely appointments to the relevant regulators. In the 10 days following Trump’s election, Bitcoin jumped more than 30%. Dogecoin, created as a joke, nearly doubled.



Without being alarmist or unduly meddlesome, it’s worth pondering some of the ways in which things could go wrong.

What becomes of Trump’s Bitcoin reserve idea remains to be seen: It might be limited to tokens the government has already confiscated in criminal cases and hence not much to worry about. Likewise, if crypto remains a realm of rip-offs, self-dealing and zero-sum speculation, the victims will mainly be people who have been amply warned and should’ve known better, as happened with the implosion of FTX in 2022.

Unfortunately, that’s not all. If traditional financial institutions are allowed to lend against the collateral of tokens conjured out of thin air, trouble in crypto could well spread. If issuers of so-called stablecoins — tokens purporting to represent dollars and other currencies — amass enough traditional assets, a crypto panic could destabilize financial markets. And if stablecoins keep acting as uncontrolled conduits for moving money, the US’s ability to fight terrorism and impose sanctions could be significantly weakened. Hundreds of billions of dollars a month move in and out of Tether, the most popular stablecoin.

Authorities need to stay alert. Financial regulators have so far done a good job of limiting lending against crypto, particularly by banks. They should keep it up. The Treasury Department has ample power to influence stablecoin issuers, which can't function properly without access to dollars. It should demand that they assiduously police transactions, report suspicious activity and freeze holdings when necessary. And their investments should be limited to the safest, most liquid securities.

Crypto is poised for a comeback. Basic firewalls can at least prevent it from posing a threat to the millions of people who reasonably want nothing to do with it. Beyond that, buyer beware.

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Securities Law News

Nov. 15, 2024, 11:53 AM PST

Super Micro’s Looming Nasdaq Deadline Stokes Delisting Fears (2)

By Carmen Reinicke

- Super Micro’s delayed filing puts it out of Nasdaq compliance
- Company must submit plan to restore compliance by Nov. 18

Bloomberg Law News 2024-11-18T09:58:55552983342-05:00

Super Micro’s Looming Nasdaq Deadline Stokes Delisting Fears (2)

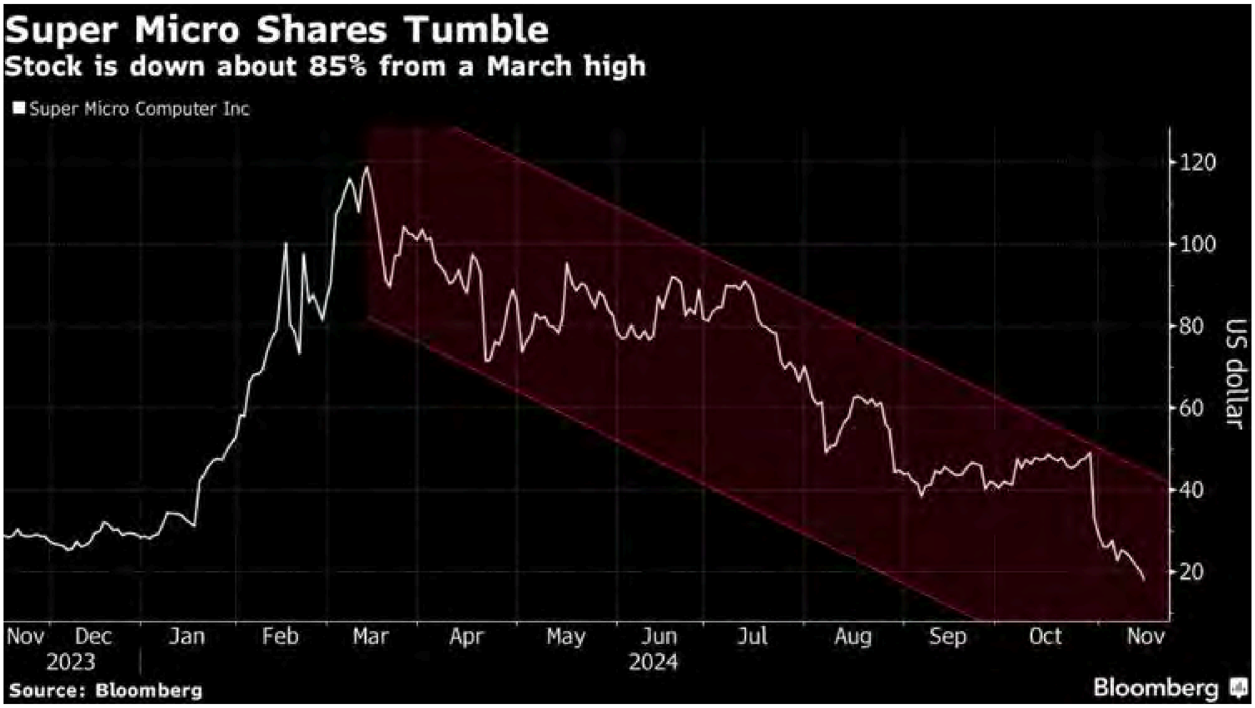
By Carmen Reinicke2024-11-15T14:53:20555-05:00

- Super Micro’s delayed filing puts it out of Nasdaq compliance
- Company must submit plan to restore compliance by Nov. 18

Super Micro Computer Inc. investors have spent two months waiting for the company to file a plan that would allow it to remain listed on the Nasdaq exchange. With the deadline now just days away, that plan is yet to materialize.

The server maker has until Monday, Nov. 18, to either file a delayed 10-K annual report or submit a plan to file the form to Nasdaq to be in compliance with the exchange’s rules. Super Micro’s original deadline for filing the plan was Saturday, Nov. 16 but in accordance with the Nasdaq’s rules: If the last day of the period is a Saturday, Sunday, federal or Nasdaq holiday, the period then runs until the end of the next day that is not one of those days.

“As we previously disclosed, Super Micro intends to take all necessary steps to achieve compliance with the Nasdaq continued listing requirements as soon as possible,” a Super Micro spokesman said. Shares of Super Micro fell as much as 4.2% in intraday trading on Friday.



Super Micro delayed its annual filing in August following a damaging report from short seller Hindenburg Research. The company is also facing a US Department of Justice probe, and its auditor, Ernst & Young LLP, resigned in October, citing concerns about Super Micro's governance and transparency.

This week, Super Micro postponed filing its quarterly 10-Q form for the period ending Sept. 30. The company also said that the committee its board formed to review internal controls had finished its investigation stemming from concerns raised by Ernst & Young, and that while it "has other work that is ongoing" it expects the review to be completed soon.

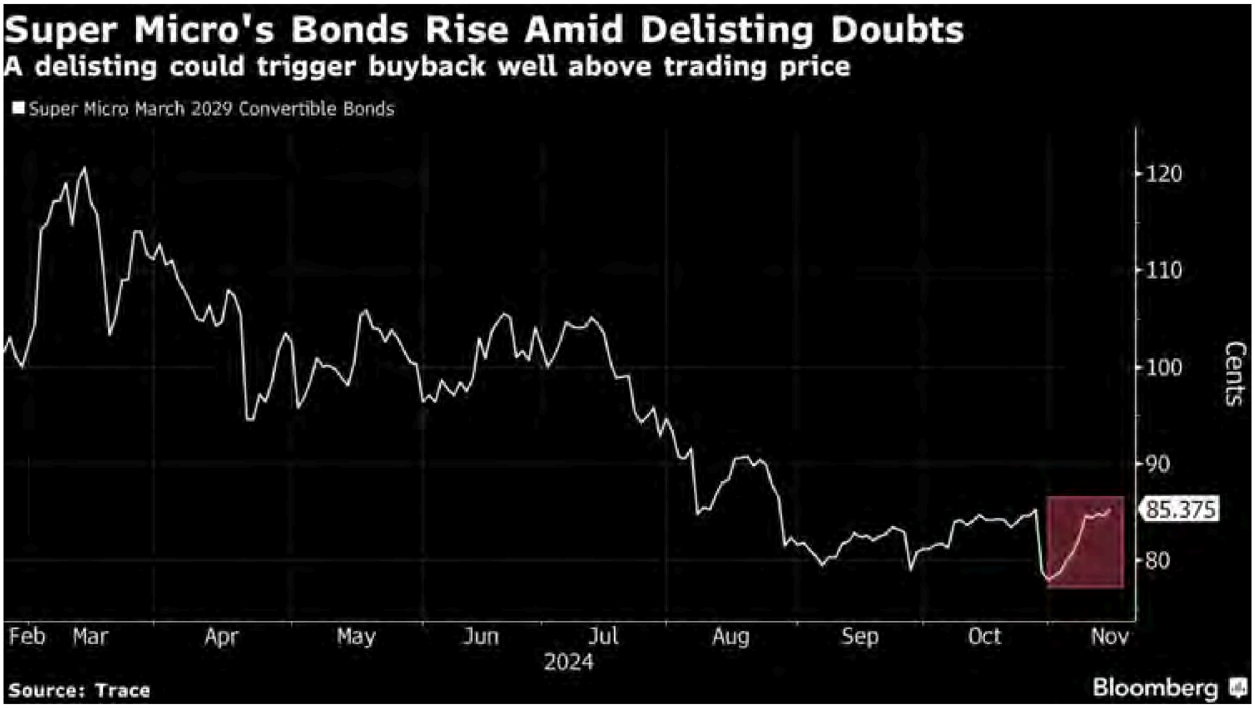
"Whatever the results are would probably play into whatever their plan is" to hire a new auditor and file their financial reports, **Matt Bryson**, an analyst at Wedbush, said by phone. "I wouldn't be shocked if something comes out over the next couple of days."

Super Micro shares have tumbled nearly 70% since announcing it would be delaying its annual filing in August. The losses are even steeper when measured from the stock's record high in March. More than $55 billion in value has been erased over that span as Super Micro shares plunged 85%.

If the company submits a plan that Nasdaq approves, its deadline to file will likely get extended into February. If a plan is not approved, the company can appeal the decision. Nasdaq declined to comment.

The consequences of missing the deadline with Nasdaq could be dire. If the company is delisted, it would likely mean removal from the S&P 500 Index, which Super Micro joined this year. It also potentially faces an early repayment on $1.725 billion of its bonds if it's kicked off the Nasdaq stock exchange.

That said, it attracted the attention of a swath of Wall Street's event-driven community, who spotted a chance for big gains by buying their convertible bonds now. Their bet is that the bonds will be bought back at par upon delisting, due to an embedded clause in the instrument. Those notes, due March 2029, climbed from mid-70-cent range to the mid-80-cents over the past few weeks.



It's not the first time that Super Micro has been delisted. In 2019, shares were taken off the Nasdaq exchange after the company failed to meet deadlines to file a 10-K and several quarterly reports.

"I've never seen a company go through this problem twice," said Bryson. "I don't know how that influences things."

Super Micro got approval to rejoin the Nasdaq exchange in 2020. That same year, the company resolved an investigation by the US Securities and Exchange Commission into its accounting by paying a $17.5 million penalty. Super Micro didn't admit to or deny the regulator's allegations as part of its settlement.

This year's woes have marked a reversal for the company's shares, which surged in the first few months of 2024 amid the artificial intelligence frenzy and being added to the S&P 500 Index.

In an early November business update, the company gave a weaker than anticipated outlook, saying it expected revenue to be $5.5 billion to $6.1 billion, well below the nearly $6.8 billion that Wall Street projected.

(Updates stock move. Adds detail in paragraph nine.)

--With assistance from Yiqin Shen and **Brandon Harden**.

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Kroger, Texas Ink $83M Deal Over Opioid Crisis

By **Spencer Brewer**

Law360 (November 15, 2024, 9:16 PM EST) -- Texas announced it has agreed to an $83 million settlement with Kroger to resolve the state's claims alleging the groceries and pharmacy chain maintained practices that contributed to the opioid crisis in Texas, apparently as part of a larger $1.37 billion agreement the retailer recently reached with several states.

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

To date, Texas has obtained over $3 billion in legal settlements with drug manufacturers and other entities for their roles in the national opioid epidemic. Funds from statewide opioid settlements are dedicated to opioid abatement and overseen by the Texas Opioid Council, according to a Thursday statement.

"We've worked relentlessly to hold major pharmaceutical manufacturers, distributors, and pharmacies accountable for their role in the national opioid epidemic that has created so much suffering in our state," Texas Attorney General Ken Paxton said in the statement. "This settlement is an important step in our ongoing efforts to securing justice for Texas."

--Additional reporting by Hailey Konnath. Editing by Covey Son.

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Social Media Cos. Must Face Schools' Public Nuisance Claims

By **Lauren Berg**

Law360 (November 15, 2024, 9:38 PM EST) -- Meta Platforms and other social media giants must face most of the public nuisance claims brought by school districts and local government entities in multidistrict litigation alleging the companies designed their platforms to addict children, a California federal judge ruled Friday.

A California federal judge on Friday declined to dismiss most of the public nuisance claims in school districts' multidistrict litigation against the parent companies of Facebook, Instagram, YouTube, TikTok and Snapchat. (Alicia Windzio/picture-alliance/dpa/AP Images)

In a 28-page **order**, U.S. District Judge Yvonne Gonzalez Rogers largely denied the motion to dismiss from Meta's Facebook and Instagram, Google's YouTube, ByteDance's TikTok, and Snap Inc., mostly disagreeing with the companies that state precedent and public policy bar public nuisance claims that lack a causal link between the alleged conduct at issue and the use of land, or that overlap with products liability law.

"Public nuisance, like negligence, provides a flexible mechanism to redress evolving means for causing harm," Judge Gonzalez Rogers said. "While some other jurisdictions have imposed land- or product-related limitations on public nuisance claims, others have expressly permitted actions outside of that context, and none of the at-issue states have formally adopted such limitations."

"While public nuisance law remains in flux, the court declines to import these limitations and hold that the supreme courts of the at-issue states would per se prohibit the kind of action brought by the school districts under the alleged facts of this case," she continued.

However, because the state high courts of Illinois, New Jersey, Rhode Island and South Carolina have "expressed reluctance to expand public nuisance," the judge tossed the public nuisance claims with respect to those states.

The ruling comes in **multidistrict litigation** comprising hundreds of actions brought by personal injury plaintiffs, school districts, local government entities and state attorneys general over the allegedly addictive designs of social media.

The litigants generally allege that Facebook, Instagram, YouTube, TikTok and Snapchat designed their platforms to foster compulsive use by minors, resulting in a variety of harms to children, local governments and the public health. The school districts and other plaintiffs defended their claims during **oral argument** this summer, with Judge Gonzalez Rogers appearing skeptical of some of the social media companies' arguments.

Because the case is so sprawling, the judge has broken up her motion to dismiss orders into multiple opinions, including last month when she **refused to toss** most of the school districts' negligence claims. In that order, Judge Gonzalez Rogers found that the companies' conduct "is plausibly alleged to have contributed to negative mental health outcomes for students, causing foreseeable resource expenditures by the school districts to combat that alleged public health crisis."

The school districts have alleged injuries of increased financial resources to address the disruptive forces of social media in school, hire mental health personnel, develop mental health resources and implement resources to limit access to social media platforms, among other alleged injuries.

"In this court's view, the school districts' alleged injuries are 'distinct' from harms allegedly suffered by students in their respective school districts (including any personal injury plaintiff residing in a suing district)," the previous order states.

"Defendants notably do not argue that minor students bear the cost of increased expenditures for healthcare resources at their schools," it added. "That the school districts suffer a corollary impact does not render their injuries 'derivative.'"

In her order on Friday, Judge Gonzalez Rogers also rejected the social media companies' argument that the plaintiffs failed to allege the defendants' conduct interferes with the public right to health and safety and the public right to education, finding that the alleged nuisance-causing conduct is directed to the public and doesn't only target individual children and schools.

"While the students' injuries are individualized byproducts of that interference, and while the school districts' resource diversion and expenditure are individualized corollary impacts of those individual students' harms, those harms and costs all flow from defendants' alleged interference with the public health," the judge said.

She also rejected the social media companies' argument that the school districts' alleged injuries don't constitute a "special injury" for the purposes of public nuisance, which is a harm "different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference," according to the order.

She found that the plaintiffs have provided details that the alleged harm in this case is unique to the schools and local governments, and that it is different from that suffered by the general public in their communities, the order states.

"The public at large incurs harm in the form of medical malady; school districts, by contrast, seek recovery of resource diversion," Judge Gonzalez Rogers said. "The school district plaintiffs' injuries seek recovery of costs uniquely imposed on them and not similarly borne by any other members of the community."

She held that the plaintiffs have the authority to seek abatement of the alleged nuisance, according to the order.

The first **bellwether trials** in the MDL are set for October 2025.

"We are pleased that, with this ruling, the majority of public nuisance claims will proceed, along with the court's previous ruling on negligence," plaintiffs' counsel Michael M. Weinkowitz of Levin Sedran & Berman LLP told Law360 on Friday.

Lexi Hazam of Lieff Cabraser Heimann & Bernstein LLP and Previn Warren of Motley Rice LLC, who also represents the plaintiffs, on Friday added, "Addictive social media platforms have significantly disrupted the learning environment for our children, forcing schools, teachers and administrators to address the fallout on youth mental health."

"We will press ahead with our claims on behalf of school districts across the country and will not relent until Meta, TikTok, Snapchat and Google are held accountable for knowingly designing their platforms to exploit young users for profit," they said.

José Castañeda, a spokesperson for Google, told Law360 on Friday that "providing young people with a safer, healthier experience has always been core to our work."

"In collaboration with youth, mental health and parenting experts, we built services and policies to provide young people with age-appropriate experiences, and parents with robust controls," he said. "The allegations in these complaints are simply not true."

A Meta spokesperson told Law360 on Friday that the decision runs contrary to a ruling in similar California state proceedings, saying, "The school districts cannot expand the law to create legal claims where none exist."

"We will continue to defend ourselves vigorously against these claims and believe the evidence will demonstrate our commitment to supporting young people," the spokesperson added.

Representatives for Snap and ByteDance did not immediately respond to requests for comment.

The plaintiffs are represented by Lexi J. Hazam of Lieff Cabraser Heimann & Bernstein LLP, Previn Warren of Motley Rice LLC, Michael Weinkowitz of Levin Sedran & Berman LLP and Melissa L. Yeates of Kessler Topaz Meltzer & Check LLP.

The Meta defendants are represented by Ashley M. Simonsen, Phyllis A. Jones and Paul W. Schmidt of Covington & Burling LLP.

ByteDance and TikTok are represented by Andrea Pierson and Amy R. Fiterman of Faegre Drinker Biddle & Reath LLP and Geoffrey Drake and David Mattern of King & Spalding LLP.

Snap is represented by Jonathan H. Blavin, Rose L. Ehler, Victoria A. Degtyareva, Laura M. Lopez, Ariel T. Teshuva and Lauren A. Bell of Munger Tolles & Olson LLP and John H. Beisner, Nina R. Rose, Jessica Davidson, Jason David Russell, Laura Bernescu and Catherine Mullaley of Skadden Arps Slate Meagher & Flom LLP.

Google and YouTube are represented by Brian M. Willen, Lauren Gallo White, Samantha A. Machock, Christopher Chiou and Matthew K. Donohue of Wilson Sonsini Goodrich & Rosati PC, Joseph G. Petrosinelli, Ashley W. Hardin, J. Andrew Keyes, Annie Showalter and Chaloea Williams of Williams & Connolly LLP and Yardena R. Zwang-Weissman, Brian Ercole and Stephanie Schuster of Morgan Lewis & Bockius LLP.

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

--Additional reporting by Hailey Konnath, Dorothy Atkins and Jonathan Capriel. Editing by Alanna Weissman.

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Healthcare Co. PACS Made False Claims Before IPO, Suit Says

By **Sydney Price**

Law360 (November 15, 2024, 8:01 PM EST) -- Healthcare holding company PACS Group Inc. has been hit with a proposed shareholder class action on the heels of a short seller's report that alleged the company engaged in deceptive practices to boost its value ahead of its initial public offering, including Medicare claims fraud.

According to a complaint filed by shareholder Christopher Manchin on Wednesday, PACS took a number of steps to give the illusion of profitability ahead of its April IPO, including concealing from investors that it had submitted false Medicare claims to drive up its net income and adding nonexistent staff to meet minimum requirements for the healthcare facilities it operates.

Shares of the company, which operates assisted living and other facilities through its subsidiaries, fell earlier this month when short seller Hindenburg Research published a report it said was based on a five-month investigation into PACS's alleged wrongdoing, according to the suit.

In addition to PACS, its CEO Jason Murray and Chief Financial Officer Derick Apt are individual defendants in the suit. Several of its IPO underwriters, including J.P. Morgan Securities LLC and Goldman Sachs & Co. LLC, as well as directors who signed the registration statement, are also named.

The class period begins April 11, 2024, the day PACS' common stock began publicly trading. In the IPO, PACs sold over 21 million common stock shares for $21 each.

"The proceeds from the IPO were purportedly to be used to repay amounts outstanding under the Company's credit facility and general corporate purposes to support the growth of the business," according to the complaint.

Throughout the class period, PACS reported it was making all efforts to "comply with various requirements of federal and private healthcare programs," which the suit alleges was false.

On Nov. 4, Hindenburg Research published a report that it said included interviews with 18 former PACS employees, competitors and an analysis of over 900 PACS facility cost reports, the complaint states. The report alleged PACS had "abused a COVID-era waiver" by submitting false Medicare claims which "drove more than 100% of PACS' operating and net income between 2020 and 2023," according to the suit.

The report also alleged PACS engaged in staffing fraud and employed unlicensed administrators. PACS secretly listed uncertified nurse aides as certified in the system in an apparent scheme to cheat staffing ratios and "retroactively add fake RN hours" in order "to meet minimum staffing requirements, boost star ratings, and avoid costly penalties," according to the suit.

On this news, the price of PACS shares fell $11.93, or about 28%, to close at $31.01 on Nov. 4, according to the suit.

"By the commencement of this action, PACS Group stock has traded as low as $18.09 per share, a more than 13.9% decline from the $21 per share IPO price," the suit states.

The suit accuses the defendants of violating the Exchange Act and alleges their statements are not covered by the safe harbor provisions of securities laws.

Counsel for Manchin and a representative of PACS did not immediately respond to requests for comment on Friday.

Manchin is represented by Gregory B. Linkh, Rebecca Dawson, Robert V. Prongay and Charles H. Linehan of Glancy Prongay & Murray LLP.

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

The case is Manchin v. PACS Group Inc. et al., case number 1:24-cv-08636, in the U.S. District Court for the Southern District of New York.

--Editing by Vaqas Asghar.

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Semiconductor Co. ASML Faces Suit Over Trade Downturn

By **Emilie Ruscoe**

Law360 (November 15, 2024, 7:20 PM EST) -- Semiconductor industry supplier ASML Holding NV has been hit with a shareholder class action alleging that it stunned investors as it significantly lowered its 2025 revenue forecast after earlier brushing off the potential impact of economic headwinds affecting its industry.

In **a complaint filed Thursday** in Manhattan federal court, institutional investor the City of Hollywood Firefighters Pension Fund claimed the Dutch corporation failed to properly appraise the impact it would see from a downturn affecting the semiconductor makers it sells its products to.

The company eventually had to acknowledge that "the issues being faced by suppliers, like ASML, in the semiconductor industry were much more severe than defendants had indicated to investors," the investor claimed. As ASML acknowledged it wasn't immune from the effects of the downturn after all, the investor claimed, the company saw trading prices for its shares fall, hurting investors.

At issue in the case are claims that the company's now-former CEO Peter Wennink made this past January, when he touted significant growth the company expected to see in 2025.

At the time, the company also reaffirmed sales guidance that the company made two years prior, when it said it expected that in 2025, it would see $31.6 billion to more than $42 billion with a gross margin of about 55%.

When ASML doubled down on its rosy 2025 outlook, the pension fund said, it failed to meaningfully account for the challenges facing its business, which included the industrywide downturn as well as constraints caused by tighter export controls on Dutch trade with China, where the company had a critical growth market.

The truth emerged in October, the investor said, when the company surprised the markets by announcing financial results for its third quarter that were down by more than 50% from the prior quarter.

At the same time, the company lowered its 2025 revenue expectations, conceding that recovery of the industry it supplied was "more gradual than previously expected."

In response to this negative news, ASML's price fell more than 16% from more than $872 a share to about $730 a share, the pension fund said.

The investor added that the next day, when the company's executives discussed the report on an earnings call, ASML saw trading prices drop more than 6%, from about $730 a share to less than $684 a share.

Alongside the company, the complaint names the company's current CEO Christophe Fouquet, Wennink and its Chief Financial Officer Roger Dassen.

The proposed class would include those who purchased shares ASML shares between Jan. 24, 2024, when the company's then-CEO said it expected 2024 would be an "important year to prepare for significant growth," and Oct. 15, 2024, when the company announced its disappointing quarterly earnings and lowered its financial guidance for its upcoming fiscal year.

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

The City of Hollywood Firefighters Pension Fund is represented by Hannah Ross, Avi Josefson and Scott R. Foglietta of Bernstein Litowitz Berger & Grossmann LLP and Robert D. Klausner of Klausner Kaufman Jensen & Levinson PA.

Counsel information for ASML wasn't immediately available Thursday.

The case is the City of Hollywood Firefighters Pension Fund v. ASML Holding NV et al, case number 1:24-cv-08664, in the U.S. District Court for the Southern District of New York.

--Editing by Stephen Berg.

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EV Carmaker Lucid Sued In Del. For Inflated Biz Claims

By **Jeff Montgomery**

Law360 (November 15, 2024, 6:48 PM EST) -- A stockholder who bought electric-car maker Lucid Group shares sued in Delaware's Chancery Court on Friday to recover derivative damages for the company tied to claims that the business raised billions on knowingly inflated production outlooks only to later drastically downsize its forecast.

The derivative action was docketed as proceedings continued ahead of an amended dismissal motion in a federal securities suit in the U.S. District Court for the Northern District of California, focused on direct claims for Lucid stockholder damages.

Behind both complaints is the fallout from alleged federal securities violations and claims that Lucid's directors were complicit in a scheme to mislead stockholders as the company cleared an $11 billion take-public merger with a special purpose acquisition company in late 2021.

Upbeat claims that production would scale up from 20,000 vehicles in 2022 to 34,000 per year "drove up Lucid's stock price to over $55 per share, setting the stage for the company to seek billions in additional financing and for Rawlinson to personally benefit from his extraordinary compensation package pursuant to which he became the highest paid executive in the automotive industry," the new Chancery complaint said

The suit alleged that the company concealed details and reasons for production shortfalls and blamed them on external, industrywide supply chain issues without acknowledging Lucid-specific design and logistical troubles. Positive output forecasts withered in 2022 to 6,000 to 7,000 vehicles, with actual production booked at 1,405 cars, with 679 actually delivered

The results put Rawlinson and Lucid's board at the center of litigation on both casts, after company shares skidded from $55 to $2 currently.

Cited by attorneys in the derivative case was an opinion issued in the California securities action by U.S. District Judge Araceli Martinez-Olguin, keeping alive some but not all claims, with leave to amend the complaint including some alleging knowingly false disclosures.

"Taking lead plaintiff's allegations holistically, as to Rawlinson, the inference of intent to defraud here is at least as compelling as an inference of innocent conduct," the judge observed.

The new Delaware derivative suit pointed to Judge Martinez-Olguin's decision at points, quoting a section that said the California court "sustained allegations that, as early as November 15, 2021, Rawlinson made false and misleading statements to investors about Lucid's vehicle production targets, and that Rawlinson acted with scienter, or intent to defraud, in that he knew his statements about Lucid were false and misleading when he made them."

Lucid's board refused a demand to take up the derivative claims Oct. 28, "having conducted no investigation whatsoever," the new complaint said, and also rejected an extension of deadlines for the new action.

"The board has summarily disregarded the merits of the claims and allegations. Accordingly, the board wrongfully refused the litigation demand," the complaint said.

Lucid only began producing electric vehicles at the end of September 2021 and it made its first deliveries to customers at the end of October, the lawyer said, adding that this was disclosed to investors in Lucid's 2021 filing with the U.S. Securities and Exchange Commission.

The company's third quarter 2024 report, filed Nov. 7, noted that: "From inception through September 30, 2024, the Company has incurred operating losses and negative cash flows from operating activities. For the nine months ended September 30, 2024 and 2023, the Company has incurred net losses of $2,316.7 million and $2,174.7 million, respectively. The Company had an accumulated deficit of $12.5 billion as of September 30, 2024."

On Oct. 30 and Oct. 31, Lucid reported that Ayar Third Investment Co., a wholly owned subsidiary of Public Investment Fund of Saudi Arabia, purchased about 396 million shares of Class A common stock at an aggregate purchase price of just over $1 billion in a private placement concurrent with a public offering. The company ended the quarter with just over $5.16 billion in total liquidity.

On Nov. 7, the company reported that it had produced 1,805 vehicles in the third quarter of 2024 and was on track for annual production of about 9,000 vehicles, with 2,781 vehicles delivered in the third quarter and revenues of $200 million for the same period. Losses amounted to 41 cents per share for the business, which prices its "flagship" car at just under $70,000.

Counsel for Lomont did not immediately respond to a request for comment. Lucid also did not immediately respond to a request for comment.

Stockholder Ed Lomont is represented by P. Bradford deLeeuw of deLeeuw Law LLC and Robert C. Schubert and Willem F. Jonckheer of Schubert Jonckheer & Kolbe LLP.

Counsel information for Peter Rawlinson, the other directors and officers and Lucid in the newly filed case was not immediately available.

The case is Ed Lomont v. Peter Rawlinson, et al, case number 2024-1149, in the Court of Chancery of the State of Delaware.

The federal securities case is In re Lucid Group Inc. Securities Litigation, case number 3:22-cv-02094, in the U.S. District Court for the Northern District of California (San Francisco).

--Additional reporting by Bonnie Eslinger and Hailey Konnath. Editing by Kelly Duncan.

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Secure Software Co. Investor Sues In Del. For Deal Docs

By **Jeff Montgomery**

Law360 (November 15, 2024, 4:19 PM EST) -- An investor in a "public benefit" company that provides sensitive software to government agencies and allies sued the business Friday in Delaware Chancery Court, seeking documents on a stock purchase agreement and other moves purportedly made without required consents.

Christine McGarry, who holds more than 100,000 shares of the Delaware-chartered company, says in her complaint that Second Front Systems LLC wrongfully refused a demand on Oct. 29 that invoked her rights as a stockholder.

According to the complaint, McGarry wants to investigate wrongdoing, mismanagement, material nondisclosures or false representations in connection with a $70 million Series C stock purchase agreement extended to new investors Salesforce Ventures and Battery Ventures, and others.

The agreement called for a $34.64362 per-share transaction.

Among other concerns, McGarry says, Second Front "knowingly made material false representations in the stock purchase agreement regarding the non-existence of claims made against the corporation and its senior management" as well as the company's compliance with legal requirements, government contracts and state and federal employment laws.

In connection with the $70 million fund raise, Second Front said the money would allow the business to continue a rapid expansion of its product suite, aimed in part at "deploying commercial applications into classified environments."

"This funding allows us to continue rapidly expanding our product suite, supporting additional regulated networks, and collaborating with allied governments around the world to power better software," the company said in a news release.

McGarry says in the complaint that a 2023 stock purchase agreement grants major investors and "key holders" of shares contractual rights to protect their interests, including notice of and an opportunity to consider and vote on actions affecting their rights.

Second Front allegedly failed to provide notice of the 2024 sale or an opportunity to bid on it, and afterward produced unsigned rights of first refusal, McGarry says.

The company, which provides services to the U.S. Department of Defense as well as the U.K.'s Ministry of Defence and NATO, describes its business as fast-tracking government access to "disruptive, commercially proven software as a service (SaaS) applications for national security missions."

Roots of the business, the company said, go back to the experiences of three former U.S. Marines who "saw firsthand the damages done by an outdated acquisition system to those on the frontlines of defending our country." They founded Second Front "with the mission of accelerating the transition of technology to U.S. and Allied warfighters."

Among other differences with regular corporations, public benefit companies must report on their efforts to comply with their mandate.

Second Front and counsel for McGarry did not immediately respond to requests for comment.

Stockholder Christine McGarry is represented by Andrew L. Cole, Gregory L. Arbogast, Nathaniel J. Klepser and Austin R. Niggebrugge of Cole Schotz PC.

Counsel information for Second Front was not immediately available.

The case is Christine McGarry v. Second Front Systems Inc., case number 2024-1169, in the Court of Chancery of the State of Delaware.

--Editing by Orlando Lorenzo.

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Investor Drops Stock Pumping Suit Against UPS

By **Chart Riggall**

Law360 (November 15, 2024, 4:29 PM EST) -- One of several investors suing shipping and logistics giant UPS in recent months over a share price tumble caused by disappointing earnings numbers this summer said Thursday that he plans to drop his claims against the company.

Lesley Savage, a shareholder who last month accused the company of securities fraud by over-promising its expected 2024 profits before the late July share price dip, filed a brief notice of his intent to dismiss his lawsuit without prejudice.

The suit, like multiple others filed against the company, alleges UPS executives failed to anticipate consumers' increased demand for lower cost — and less profitable — shipping options while putting out inflated projections for UPS' bottom line. When the company released its earnings for the second quarter of 2024, the investors said quarterly profits were down some 30% compared to the year prior, and the company's share price dropped by 12% in a single day.

At least two similar lawsuits, both filed this week by Gerald Joseph Lovoi and Lan Huong Tran, respectively, remain active and seek damages on behalf of shareholders.

The case is Savage v. United Parcel Service Inc. et al., case number 1:24-cv-04591, in the U.S. District Court for the Northern District of Georgia.

--Editing by Drashti Mehta.

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Dogecoin Buyers Drop Bid To Revive Suit Against Musk

By **Rae Ann Varona**

Law360 (November 15, 2024, 6:27 PM EST) -- Dogecoin cryptocurrency investors have agreed to drop their appellate bid to revive a two-year-old proposed securities class action accusing Elon Musk and Tesla Inc. of using the CEO's celebrity to target unsophisticated investors and gain a profit on the memecoin, according to a stipulation filed in New York federal court.

The stipulation filed on Thursday states that the investors agreed to withdraw a notice of appeal to the Second Circuit of a late August dismissal of their case.

"Plaintiffs will not challenge, in this Court, the United States Court of Appeals for the Second Circuit, or any other court, this Court's order dismissing the Fourth Amended Complaint with Prejudice or the Final Judgment closing this case," the stipulation says.

Meanwhile, Musk and his electric vehicle company agreed to withdraw a motion to impose sanctions on the investors and their counsel for allegedly lodging the suit for an improper purpose and without factual and legal support.

The investors' attorney, Evan Spencer, told Law360 by email on Friday that it was "clear that Elon Musk is above the law and can manipulate Dogecoin without penalty or limitation by United States courts."

Spencer cited the case's dismissal by a "90-year-old judge who didn't 'understand' the case," and President-elect Donald Trump's "alliance with Musk" in proposing to create a **department** with an acronym sharing the cryptocurrency's name, the Department of Government Efficiency. He also cited the coin's subsequent spike since the presidential election.

"As a sole practitioner I've done all I can to hold Musk accountable for market manipulation over the past 2 1/2 years but now my clients and I agree it's time to withdraw our appeal," Spencer said.

Counsel for Musk and Tesla did not immediately respond to a request for comment.

The **suit** was initially filed in June 2022 and was amended four times — including to accuse Musk of **insider trading** — before U.S. District Judge Alvin K. Hellerstein ultimately dismissed the fourth amended complaint with prejudice in late August.

Investors accused Musk of targeting investors who are generally unsophisticated when it comes to trading crypto and using his reputation in finance and technology to "influence a mass audience."

The investors cited Musk's ability to "move securities markets" by simply posting on social media or giving public remarks.

Musk, for instance, tweeted a meme in July 2020 of a dust storm overtaking an urban area with the face of "Dogecoin Shiba Inu" superimposed on the dust cloud. The cloud was labeled "dogecoin standard," while the urban area was labeled "global financial system." Musk said in his tweet, "It's inevitable."

The investors alleged in their latest complaint that Dogecoin's price rose roughly 14% in less than two hours after Musk's tweet.

They said that Musk knew about this power when he started endorsing Dogecoin, intending to draw in new investors and "pump" the cryptocurrency's price so that he and Tesla could "dump" it at a profit.

In **dismissing** the case with prejudice, Judge Hellerstein wrote in a two-page order that statements Musk made on Twitter — including that Dogecoin is the "future currency of Earth" and that Tesla vehicles might be bought with Dogecoin — were "aspirational and puffery" and "not factual and susceptible to being falsified."

As for Musk and Tesla's alleged "pump and dump" scheme, Judge Hellerstein wrote that it was "not possible to understand" the allegations on which the investors asserted market manipulation, the pump and dump scheme, breach of a fiduciary duty amounting to insider trading, or state law claims.

The investors filed a notice that they were appealing Judge Hellerstein's dismissal to the Second Circuit in September.

In Thursday's stipulation, the investors agreed to withdraw a cross-motion filed last month to **disqualify** Musk and Tesla's Quinn Emanuel Urquhart & Sullivan LLP attorneys for publicly disclosing a confidential settlement offer in the case.

They also agreed to not seek or file any further motions for any further postjudgment relief either in the district court or in the Second Circuit.

The investors are represented by Evan Spencer of Evan Spencer Law PLLC.

Musk and Tesla are represented by Alex Spiro, Sarah Heaton Concannon and Brenna Nelinson of Quinn Emanuel Urquhart & Sullivan LLP and Allison Huebert of Tesla.

The case is Colby Gorog et al. v. Elon Musk et al., case number 1:22-cv-05037, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Hailey Konnath, Aislinn Keely, Lauren Berg and Madison Arnold. Editing by Nicole Bleier.
