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Walgreens Gets Nod for \$100 Million Generic Drug Pricing Deal

By Jacklyn Wille 2024-11-19T07:28:23000-05:00

- Lawsuit centers on alleged dual pricing scheme for drugs
- Settlement would cover millions of customers since 2007

Walgreen Co. received initial court approval for a \$100 million class settlement resolving a seven-year-old lawsuit by customers who say the pharmacy chain overcharges for generic drugs when they're purchased using insurance.

The deal, which also requires Walgreens to terminate its generic drug discount program, is expected to cover million of people and entities that paid for prescription drugs from Walgreens using insurance coverage since January 2007, according to the customers' [settlement motion](#).

Judge Edmond E. Chang of the US District Court for the Northern District of Illinois signed the preliminary approval [order](#) Monday. Chang also scheduled a Sept. 10, 2025, hearing to consider whether the deal merits final approval.

The [lawsuit](#) accuses Walgreens of operating an undisclosed dual pricing scheme in which people who pay for generic drugs in cash through the pharmacy's generic drug discount program are charged a lower price than the price reported to health insurers, Medicare, and Medicaid. Customers criticized this program as a mechanism for Walgreens to knowingly and intentionally overcharge insured consumers and third-party payors for thousands of generic drugs.

In 2018, the court [allowed](#) the customers to move forward with claims of fraud and violations of multiple state consumer protection laws, and in 2021 it [rejected](#) their attempt to expand the lawsuit to include a subset of drugs called non-Value Priced Generics.

Reed Smith LLP represents Walgreens. Scott & Scott Attorneys at Law LLP and Robbins Geller Rudman & Dowd LLP represent the customers.

The case is [Russo v. Walgreen Co.](#) , N.D. Ill., No. 1:17-cv-02246, 11/18/24 .

Alta Mesa Investors Reach Partial Settlements as Trial Starts

By Martina Barash

- Proposed deals over SPAC merger total more than \$11 million
- Oil and gas company's accounting allegedly caused collapse

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Alta Mesa Investors Reach Partial Settlements as Trial Starts

By Martina Barash 2024-11-18T16:02:34000-05:00

- Proposed deals over SPAC merger total more than \$11 million
- Oil and gas company's accounting allegedly caused collapse

Alta Mesa Resources Inc. investors have reached class settlements worth more than \$11 million with several defendants as a trial begins over the blank-check merger that brought the now-defunct energy company public.

Investors asked for preliminary court approval of a \$2 million accord with private equity firm Bayou City Energy Management LLC on Nov. 15, in the latest of several settlement-related filings in the US District Court for the Southern District of Texas case.

The other major defendants remaining in the suit, HPS Investment Partners LLC and ARM Energy Holdings LLC, asked for approval of settlements worth \$6.3 million and \$3 million, respectively, before trial began Nov. 6. The HPS and Bayou City settlements each cover claims against an individual defendant as well as those against the entity.

The class action stems from the \$3.8 billion oil and gas company's financial collapse. The investors allege Alta Mesa secretly used unconventional drilling methods to inflate financial estimates before and after its merger with a special purpose acquisition company, according to a previous court opinion in the case.

Alta Mesa wrote down \$3.1 billion in response to an audit that showed accounting weaknesses, according to the investors. Its stock eventually crashed from \$8.38 a share to \$0.34, and its assets allegedly sold during bankruptcy for \$320 million.

Alta Mesa was created by a 2018 transaction combining two energy companies—Alta Mesa Holdings LP and Kingfisher Midstream LLC—with a SPAC called Silver Run Acquisition Corp. II that had been formed by private equity firm Riverstone Holdings LLC, according to the complaint.

The suit is among many faced by companies formed through such de-SPAC, or blank-check, mergers. Numerous companies that went public through that method have faltered following the deals' peak in 2020 and 2021, sending investors to the courts.

Judge George C. Hanks Jr. said in August that the investors lacked claims against several former Alta Mesa leaders but had enough evidence to go to trial against investment firm HPS, Bayou City, and producer services company ARM, which had ownership interests in one or both of Alta Mesa's predecessors and became minority shareholders in the merged company.

Hanks cut claims against them over post-merger statements, but said the investors "worked extensively" with Harlan Chappelle, then CEO of Alta Mesa Holdings, "to craft public statements regarding AMH and Kingfisher before the SPAC transaction."

Individual investment funds suing over the SPAC deal have reached a settlement with HPS and settlements-in-principle with the other defendants, according to a pretrial filing.

Entwistle & Cappucci LLP and Robbins Geller Rudman & Dowd LLP are class counsel. Counsel for the plaintiffs in the individual actions includes Rolnick Kramer Sadighi LLP. Firms representing the defendants include Eversheds Sutherland (US) LLP, Latham & Watkins LLP, and Kirkland & Ellis LLP.

The case is *In re Alta Mesa Res., Inc. Sec. Litig.*, S.D. Tex., No. 4:19-cv-00957, approval motion 11/15/24.

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Lululemon Sued Over Diversity Program, Launch of Leggings Line

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Lululemon Athletica Inc. and its officers are facing a shareholder suit in federal court alleging that the company's failure to adopt a workable diversity program and to timely launch a new line of leggings caused its stock price to plummet.

Shareholder James Wong alleges in a complaint filed Monday in the US District Court for the Southern District of New York that Lululemon announced in 2020 that it adopted a program called "Inclusion, Diversity, Equity, and Action" that would reflect the diversity of the communities it served. The program wasn't structured to be successful and company employees continued to face discrimination, the suit says.

An article was published in the Business of Fashion in 2023 titled "At Lululemon, Being Black is 'Off-Brand,'" accusing IDEA of protecting the company's image, the complaint says. After the article was published, the company's stock price lost \$4.90, it says.

The individual defendants also created issues with the company's inventory allocation methods, the complaint says. The truth about the inventory issues emerged in March 2024 when the company announced that its growth in its Americas region was stagnant, it says.

When the inventory issues were made public, Lululemon's stock price dropped from \$478.84 to \$403.19, the complaint says. In July 2024, when the company announced that inventory allocation problems would require delaying the launch of its Breezethrough leggings, the company's stock dropped from \$281.37 to \$272.06 per share, it says. The next day, the stock price dropped to \$247.32 per share, it says.

The shareholders' derivative suit accuses the defendants of making false statements about the company's diversity program and its inventory allocation issues in the press and in its annual reports to the Securities and Exchange Commission. It says the defendants committed various forms of securities fraud, breached their fiduciary duty, were unjustly enriched, and wasted corporate assets.

The complaint seeks an award of compensatory and punitive damages against the individual defendants, jointly and severally, an accounting from them, and interest. It also asks the court to order Lululemon to take the steps necessary to prevent similar behavior in the future.

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

Rosen Law Firm PA represents Wong.

The case is Wong v. McDonald , S.D.N.Y., No. 1:24-cv-08752, complaint filed 11/18/24 .

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McCormick Consolidates Two Tesla Chancery Cases

[law.com/delbizcourt/2024/11/18/mccormick-consolidates-two-tesla-chancery-cases](https://www.law.com/delbizcourt/2024/11/18/mccormick-consolidates-two-tesla-chancery-cases/)

Ellen Bardash



Chancellor Kathaleen St. J. McCormick consolidated two Tesla shareholder cases and coordinated a third on Nov. 18, a middle ground between the consolidation of all requested by two plaintiffs and the complete separation advocated for by other plaintiffs and Tesla.

Moving forward, the cases in which a Rhode Island retirement fund and a Cleveland pension plan separately challenged Elon Musk's investments in AI projects will be proceeding as one, while a third case brought by shareholder Michael Perry will move toward a separate trial while allowing counsel to coordinate discovery with the consolidated action.

In August, the two institutional shareholder plaintiffs moved to consolidate their cases, which were filed within three days of one another in June, along with a third derivative case brought by Perry in May. Perry, who did not join the motion, opposed consolidation, stating in a filing that the three cases are "dramatically different actions."

Prickett, Jones & Elliott director Marcus Montejo, arguing in favor of the Rhode Island and Cleveland funds' motion, said all three cases overlap in their claims, the issues involved and the relief they're seeking, and Perry had not met the Delaware court's standard for showing why his case should be exempt from consolidation.

"It's best both for Tesla and for this court if the cases were to proceed together," Montejo said.

Tesla and the directors named as defendants opposed the motion, calling it "little more than a device to displace other plaintiffs and their counsel and wrest control of these claims."

Sullivan & Cromwell partner Brian Frawley stated Tesla would prefer that none of the cases be linked, but alternatively would have wanted the commonalities among the cases to be grouped.

Frawley said the issue of demand futility is one reason not to consolidate: though there's overlap, each case pending against Tesla refers to a different timeframe, which means board composition differs from case to case and requires separate analysis, he said.

McCormick said she failed to see why it would be better for witnesses to sit for multiple separate depositions as opposed to one potentially multi-day deposition. Tesla claimed consolidation would lead to more discovery disputes and would make depositions more difficult to arrange.

“The total discovery does not change, it just means that three or four different firms are pursuing it,” McCormick said, later adding in response to Frawley, “It just strikes me that having four different lawsuits proceed separately is more likely to create inefficiencies than the scenario you described.”

One of the four lawsuits addressed during the hearing is that of another shareholder, David Wagner, who filed a Chancery complaint in 2022. Wagner’s case has been stayed since December of that year as the SEC conducts an investigation into Tesla’s handling of Musk’s social media activity, and he claims because his case is left out of the motion to consolidate, granting it would effectively “disappear” his claims despite their being initiated more than a year and a half in advance of the others.

Montejo said bringing the Wagner case up in opposition to a motion that didn’t mention it was “very odd” procedurally and that there’s no dispute that case involves separate issues and seeks different relief than the other three. McCormick ruled that the Wagner case will remain separate.

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New Suit - Copyright

Flavor God LLC and Shredz Supplements were hit with a copyright infringement lawsuit on Nov. 19 in New Jersey District Court. The court action, filed by Sanders Law Group on behalf of Watson Music Group, accuses the defendants of posting an

Musk's Threat to Exact Delaware Revenge Runs Risk of Backfiring

By Mike Leonard

Deep Dive

- Bearing \$56 billion grudge, Musk floats federal corporate law
- With Republicans in control, he could get it, then regret it

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Musk's Threat to Exact Delaware Revenge Runs Risk of Backfiring

By Mike Leonard 2024-11-19T05:00:01000-05:00

- Bearing \$56 billion grudge, Musk floats federal corporate law
- With Republicans in control, he could get it, then regret it

Elon Musk is coming for Delaware again.

The world's richest man, now slated to serve as a government efficiency czar for Donald Trump, has set his sights back on the only state where he's faced a reckoning for flouting the rule of law. After a year-long online campaign against America's corporate capital, he said after the election that he'll wield his clout with the president-elect in favor of "corrective action" against "egregiously wrong legal judgments in a single state."

The tech titan is nursing a \$56 billion grudge against the chief judge of Delaware's elite business court, who voided his record compensation deal. As the judge weighs Musk's unprecedented request to restore the pay package based on a Tesla Inc. shareholder vote, his not-so-veiled threat to federalize corporate law—Delaware's top cultural export—looks like it's about extorting her, according to Tulane University law professor Ann Lipton.

With Trump's Republican party in control of the White House and both chambers of Congress, Musk could get his revenge. But taking corporate law away from Delaware's specialized judiciary and throwing it into the crucible of national politics—with the potential to whipsaw after every election—could backfire.

"This is kind of like a wish on a monkey's paw," Lipton said, alluding to the old horror fiction trope about an ironic curse. "I doubt very much he's thinking that far ahead."

Whether Trump and his allies in Congress follow through, lose interest, or focus on other priorities will be "an interesting test of how much influence Elon Musk has," according to Oklahoma University law professor Megan Shaner. The initiative is easily constitutional under the commerce clause, and the federal securities laws already regulate corporate activity at the margins.

The business mogul is floating an idea that's usually tied to progressive reform efforts aimed at making businesses more accountable. That's almost certainly not what Musk wants, according to Lipton.

"I don't think Elon Musk is particularly concerned with good governance," she said. "He wants his \$56 billion back."

A Counterintuitive Push

Musk's latest volley against Delaware comes after a lengthy crusade that raised alarms across the state's tight-knit legal community, which revolves around the seven-judge Chancery Court.

His diatribes, blasted out to hundreds of millions of followers via his social media site, X, are turbocharging the perennial hand-wringing over a "race to the bottom" led by states leveraging looser liability rules to compete for corporate charters. The decision to move some of his companies to Nevada and others to Texas amplified those jitters.

Even against that backdrop, though—and even given his history of defying intellectual categories—Musk's flirtation with federalizing corporate law is counterintuitive, according to Shaner. He doesn't seem to realize he's better served by the current system, which lets major employers gain sway with legislators by playing different jurisdictions off one another.

"He has a home state advantage," she said. "He just couldn't move the levers of federal law in the same way."

The traditional case for federalization, advocated by Ralph Nader and Elizabeth Warren, involves imposing social and economic regulations: letting non-shareholders elect the board, giving employees a vote, and devising fiduciary duties toward outside stakeholders who could sue to enforce them.

Musk's vision would probably turn those ideas on their head, according to University of Maryland law professor William Moon, who speculated about a "ruthless shareholder-centric version."

The proposal is a solution in search of a problem, said Southern Methodist University law professor Carliss Chatman. She suggested the result would end up looking "just like the Delaware code."

Delaware Dominance

The Delaware model is so dominant that lawmakers in Nevada—which markets itself as the anti-Delaware—had to effectively ban judges from looking to Delaware legal precedents for guidance. “These are experienced jurists who specialize in crafting the best corporate law for everyone,” Shaner said. “A federal judge doesn’t always have that experience. What other resource would they look to?”

The hundreds of federal judges—not to mention a dysfunctional Congress—would also make “a mess” in an area that benefits from the stability provided by seven expert judges accessible to every corporate constituency, said Lipton. That could drive companies offshore.

“Capital is mobile,” Moon said.

Kathaleen St. J. McCormick, the judge who struck down Musk’s pay package, acknowledged him indirectly at George Washington University last month. Angry billionaires are worth taking seriously because they’re an important part of the corporate ecosystem, the judge said Oct. 25.

This year, “perhaps the megaphones are louder,” but McCormick is too busy with her day job to get “overly stressed” about it, she said.

It’s hard to imagine Musk still believes he can influence McCormick after a year’s worth of antics that included thousands of letters to her from Tesla retail investors, according to Chatman, who said he’s more likely driven by simple spite. She also pointed to “classic agency capture” ideas.

“He probably thinks that he got Trump elected and whoever’s in charge of these new federal corporations is going to be one of his friends,” Chatman said.

He may be right about that, but turning corporations over to the federal government would put them at the mercy of the political winds, establishing the legal architecture for another administration to dramatically change course, according to Tulane’s Lipton.

Once corporate law is tossed in the “congressional meat-grinder,” his ability to dictate its direction would vanish, she said.

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Webtoon Leaders Sued Over Revenue for Span Ending Just After IPO

By Martina Barash

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [No. 2:24-cv-09915](#)

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Webtoon Leaders Sued Over Revenue for Span Ending Just After IPO

By Martina Barash 2024-11-18T18:01:45000-05:00

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [No. 2:24-cv-09915](#)

Webtoon Entertainment Inc. directors and officers breached their fiduciary duties to the online comics company by failing to disclose slowing revenue in a period that ended just days after the company's initial public offering closed, an investor alleges.

The members of leadership fell short in maintaining adequate internal controls and caused the company to make false statements, Ho Kan Cheung says in a complaint filed Nov. 15 in the US District Court for the Central District of California.

CEO Junkoo Kim and the other defendants harmed the company by subjecting it to a proposed securities class action over a 38% stock-price drop when the information about second-quarter 2024 revenue was released in August; creating the need to undertake internal investigations and implement controls; and being overcompensated, Cheung says.

The August 8 revenue report cited declining advertising revenue and IP adaptations revenue, along with exposure to weaker foreign currencies, offsetting revenue growth, according to the complaint. The individual defendants should have made the company disclose those factors in advance of the IPO, which took place June 27, Cheung says.

Cheung brings claims for misleading proxy statements, breach of fiduciary duties, unjust enrichment, abuse of control, gross mismanagement, waste of corporate assets, and contribution. The suit seeks damages, restitution, and internal governance reforms.

Webtoon didn't immediately respond to an emailed request for comment on behalf of itself or the individual defendants.

The Brown Law Firm PC represents Cheung.

The case is Cheung v. Kim , C.D. Cal., No. 2:24-cv-09915, complaint 11/15/24 .

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AutoZone CEO's Explanation Rejected in Short-Swing Profit Suit

By Bernie Pazanowski

- CEO said AutoZone stock sales from trust was annuity payment
- Sales weren't protected from disgorgement by Rule 16a-13

Bloomberg Law News 2024-11-19T10:06:52690572567-05:00**AutoZone CEO's Explanation Rejected in Short-Swing Profit Suit****By Bernie Pazanowski 2024-11-18T13:50:39000-05:00**

- CEO said AutoZone stock sales from trust was annuity payment
- Sales weren't protected from disgorgement by Rule 16a-13

The chief executive officer of AutoZone Inc. failed to convince a federal judge that the profit he made from selling company stock out of a trust weren't short-swing profits that he was required to disgorge.

William C. Rhodes III said that his 2022 stock sales were in-kind payments that were exempt from disgorgement under Securities and Exchange Commission Rule 16a-13. But Judge Jon P. McCalla, of the US District Court for the Western District of Tennessee, said Nov. 15, that Nosirrah Management LLC sufficiently pleaded that Rhodes obtained the stock and profited from it in violation of Rule 16(b) of the 1934 Securities Exchange Act.

"Given the stage of litigation and the fact that Defendant relied on statements outside the Complaint in his arguments, the Court finds Plaintiff's argument persuasive," McCalla wrote, in denying Rhodes' motion to dismiss.

Nosirrah is an AutoZone shareholder. It alleged that Rhodes purchased AutoZone stock in March and April 2022, and sold it between Dec. 2021 and July 2022, making a profit of over \$1million. Nosirrah sought disgorgement of the profit under Section 16(b).

Rhodes said that the stock came from a grantor retained annuity trust, which represented an annuity obligation to him. He said that the transactions weren't purchases of AutoZone stock, but rather in-kind annuity payments under the terms of the GRATs.

Section 16(b) says that an officer or director of a company is liable to the company for any profits realized from the purchase or sale of the company's stock within a six-month period. But Rule 16a-13 exempts from Section 16(b) transactions that effect only the form of the beneficial ownership without changing the person's pecuniary interest in the security.

Rhodes said that he was the grantor, trustee, and sole lifetime beneficiary of the GRATs. But McCalla said that he couldn't prove that at this stage of the proceedings, because he didn't support it with any evidence. At most, Rhodes' pleadings show that he created the GRATs, the judge said.

Rhodes didn't show he was the beneficial owner of the stock, McCalla said. But Nosirrah sufficiently pleaded that Rhodes sold the AutoZone stock and made a profit, he was an AutoZone insider, and the stock was sold within six months of their acquisition, he said.

Allowing the case to proceed will best serve "the congressional purpose in Section 16(b) of curbing short-swing speculation by corporate insiders," McCalla wrote.

Sterlington PLLC represents Nosirrah. Bass Berry & Sims PLC represents AutoZone. Baker Donelson Bearman Caldwell & Berkowitz PC represents Rhodes.

The case is *Nosirrah Mgmt., LLC v. AutoZone Inc.*, 2024 BL 412839, W.D. Tenn., No. 2:24-cv-2167, 11/15/24.

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Target Knocks Out Investors' False-Statements Securities Suit

By Mallory Culhane

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

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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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Long-Running Kentucky Retirement Systems Case Surmounts Yet Another Procedural Spanner, Moves Closer to Discovery After Seven Years

 [nakedcapitalism.com/2024/11/long-running-kentucky-retirement-systems-case-surmounts-yet-another-procedural-spanner-moves-closer-to-discovery-after-seven-years.html](https://www.nakedcapitalism.com/2024/11/long-running-kentucky-retirement-systems-case-surmounts-yet-another-procedural-spanner-moves-closer-to-discovery-after-seven-years.html)

By Yves Smith

November 19, 2024

Yes, seven years. That is how long beneficiaries of the Kentucky Retirement Systems, represented by Michelle Lerach with the assistance of her formidable and controversial husband, Bill Lerach, have been trying to get damages from the sellers of customized hedge funds of funds, KKR, Blackstone, and PAAMCO, as well as as their principals, such as Henry Kravis and Steve Schwarzman.

The bone of contention in the original suit, *Mayberry v. KKR*, was that these various defendants were subject to Kentucky's strict statutory fiduciary duty laws, yet violated them by (among many other things) fundamentally misrepresenting the products, depicting them as the impossible combination of low risk and high return and collecting rich fees as the hedge funds delivered barely any investor return. (For a more detailed recap of the history than the summary below, visit [this post](#))

This litigation has still not gotten to discovery despite the considerable lapse of time. A big reason is the defendants engaging in very aggressive "motions practice." The plaintiffs also suffered bad luck in the form of unexpected and adverse Federal appeals and Supreme Court cases that resulted in the original defined benefit plaintiffs lacking standing. Two separate pension-related precedents resulted in defined-benefit plan members needing to suffer a particularized loss, which meant the plan came up short in making its promised payments to them, before they had standing to sue. Merely being massively underfunded, and being a party that made the underfunding worse, did not cut it.

But the case was reconstituted around the so-called "Tier 3" plaintiffs, who are in a hybrid plan and do not have guaranteed payments. Because their benefits depend on investment performance, the standing principles for defined contribution plans apply. Numerous cases have found that members in a defined contribution plan (and Tier 3 has elements of a defined contribution plan) can sue if their plan balances have fallen or even not produced the returns they should have delivered if the manager had executed his promised strategy.

In the meantime, the Attorney General, after an earlier Attorney General had filed a motion supporting the original litigation, filed suit saying he could "fully occupy the field" as in represent all potential claimants. That seemed impossible due to differences of interest among the claimants plus the Attorney General having a clear conflict of interest. Even

Kentucky Retirement Systems objected; it is one of the Kentucky state agencies that is allowed to hire its own counsel and it had not authorized the Attorney General to represent them.

It appears that that Attorney General, Daniel Cameron, who was a protege of Mitch McConnell, hoped to negotiate a lowball settlement with the powerful Republican financiers. But after repeated filings with the court making excuses as to why Cameron needed more time, it became clear that the defendants weren't even willing to entertain a cheap resolution.

Another unexpected development was that the original trial court judge, Philip Shepherd, considered to be one of the most progressive judges in Kentucky, was forced to recuse himself from the case. The defendants had caught out Shepherd making the bone-headed move of touting his tough stance on the litigation in his re-election campaign and sued for his removal.

But aside from creating a bit of delay due to a new judge, Thomas Wingate, having to master a very extensive record, Wingate is not working out to the defendants' advantage. It turns out that a competent judge, regardless of his ideological bent, did not blindly defer to white shoe East Coast lawyers and their big money clients.

After wading through a very large number of motions to dismiss, at the start of May, Wingate issued a comparatively compact and well-reasoned omnibus ruling. He rejected the claim that the Attorney General could properly represent the Tier 3 plaintiffs, and denied the motions to dismiss of the hugely powerful defendants, KKR, Blackstone, PAAMCO, and private equity kingpins Henry Kravis, George Roberts, Steve Schwarzman, and Tomlinson Hill personally.

This development would have seemed to mean the case could finally proceed to discovery. Mind you, that is what all this legal maneuvering has been about. It is not just that the plaintiffs have the potential to claw back the excessive fees as well as actual and punitive damages. It's also that this case will expose the internal working of these operators, particularly their sharp practices. In addition to deservedly tarnishing their images, some of the findings may help similarly-situated investors launch their own suits.

But noes! The defendants went immediately to the appeals court even though there had been no trial court decision. They had also done that with original Mayberry v. KKR filing.

Normally, what is called an interlocutory appeal, which is an appeal made before the underlying court has heard the case and issued its decision, is as far as I can tell, generally looked upon dimly in most US courts. However, Kentucky procedure provides what appears to be an unrestricted right to try that gambit. You can find it under Rules of Appellate Procedure and is referred to as "RAP 60" in the filings below.

The plaintiffs (who are now defendants in this appeal, but we will continue to call them plaintiffs, or Real Parties in Interest) pick their way through the RAP 60 filing in the first embedded document below. You can see what a confection of motions practice this case continues to be. One of the tactics in the filing by the KKR and its fellow travelers is to repeatedly misrepresent prior rulings and facts of the case.

I must confess that the “writ of the first class” versus “writ of the second class” analysis in the ruling embedded below is over my pay grade, and a gander through search engine results suggest that this is Kentucky-only nomenclature. Anyone who has the expertise and patience to unpack it for the rest of us, please pipe up in comments.

But as you can see, the judge picked calmly through the various howler claims by the defendants, like merely going to trial would result in irreparable harm (this after saying in their own public filings that all of their outstanding litigation, in toto, did not represent a material risk). The judge similarly did not accept the flat out fabrication that the state guaranteed the payments of the Tier 3 plaintiffs’ accounts. The judge can’t resist from making occasional tart remark like, “This is not reflective of reality.”

Now one can expect the defendants (well confusingly the plaintiffs in this latest action) to appeal to the Kentucky Supreme Court. I can’t readily find how what percentage of cases this Supreme Court agrees to hear, but parties to a case in Kentucky are entitled to only one appeal, so acceptance of any further appeal is not a given. But even waiting for a rejection will take time.

Normally, delay in getting to a trial works to the advantage of defendants, since memories fade and witnesses in depositions or on the stand can go into “Mumble, mumble, I don’t remember” mode. But both in government matters and in investment deals, the written records are extensive. There’s no way to wriggle out of the bad facts there. The original (very extensive) filings already presented a ton, and the itty bitty bit of discovery undertaken so far unearthed more. So the normally weakening of cases due to the passage of time won’t be all that operative here.

So we will have to wait a bit more for popcorn time, but it is coming.

Commonwealth of Kentucky

Court of Appeals

NO. 2024-CA-0781-OA

KKR & CO., L.P.; BLACKSTONE
ALTERNATIVE ASSET
MANAGEMENT; BLACKSTONE
GROUP INC.; BLACKSTONE GROUP
L.P.; GEORGE R. ROBERTS; GIRISH
REDDY; HENRY R. KRAVIS; J.
TOMILSON HILL; JANE BUCHAN;
PACIFIC ALTERNATIVE ASSET
MANAGEMENT CO.; PRISMA
CAPITAL PARTNERS SM, L.P.; AND
STEPHEN A. SCHWARZMAN

PETITIONERS

AN ORIGINAL ACTION
v. ARISING FROM FRANKLIN CIRCUIT COURT
ACTION NO. 21-CI-00645

HON. THOMAS D. WINGATE
JUDGE, FRANKLIN CIRCUIT
COURT

RESPONDENT

AND

ASHLEY HALL-NAGY; BOBBY
ESTES; JACOB WALSON;
KENTUCKY RETIREMENT
SYSTEMS, ITS PENSION AND
INSURANCE TRUSTS FOR THE

BENEFIT OF THOSE TRUSTS; AND
TIA TAYLOR

REAL PARTIES IN INTEREST

ORDER
DENYING PETITION FOR A WRIT OF PROHIBITION

* * * * *

BEFORE: COMBS, LAMBERT, AND MCNEILL, JUDGES.

Petitioners filed a Kentucky Rule of Appellate Procedure (RAP) 60 petition for a writ prohibiting Respondent from enforcing an order entered on July 3, 2024, in which the Franklin Circuit Court denied Petitioners' motion to dismiss. The Real Parties in Interest, Tia Taylor, Ashley Hall Nagy, Bobby Estes, and Jacob Watson, filed a response after this Court granted them an extension of time to do so. Having reviewed the petition, the response, and being otherwise sufficiently advised, the petition shall be, and hereby is, DENIED.

BACKGROUND

The Real Parties in Interest are participants in the Kentucky Retirement System (KRS) plan. Because they began participation in KRS after January 1, 2014, they are "Tier 3" participants in the plan. Unlike participants who began the plan before that date, they do not have a defined benefit plan under which retirees receive a fixed payment each month. The parties describe Tier 3 as a "hybrid plan," which generally has elements of both a defined benefit plan and what is known as a "defined contribution" plan. The Real Parties in Interest filed

suit against numerous individuals and entities, including Petitioners, in the trial court, alleging KRS had imprudently invested in hedge fund products over a period of years, both as a result of negligent and intentional conduct. Defendants below included hedge funds, hedge fund managers and employees, middlemen, and officers and trustees of KRS itself.

Petitioners in this original action are three principal hedge fund entities and related individuals and entities. Petitioners moved the trial court to dismiss claims against them, arguing, *inter alia*, that the Real Parties in Interest lacked constitutional standing as they had not alleged a concrete injury. Further, Petitioners argued the Real Parties in Interest lacked standing to recover damages on behalf of the Tier 3 pool of funds. Finally, Petitioners argued that the Real Parties in Interest sought relief which was duplicative of the relief sought by the Kentucky Attorney General's office in a separate case against them.¹

On May 1, 2024, the trial court entered an omnibus order which addressed numerous motions to dismiss filed by various defendants. The trial court rejected Petitioners' arguments that the Real Parties in Interest lacked standing and that the Petitioners' claims were duplicative of the Attorney General's.

¹ Petitioners raised other arguments as well, but only seek relief based on these three issues in this original action.

This original action followed. Additional facts regarding the historical underpinnings of Petitioners' argument shall be discussed below as necessary to facilitate this Court's analysis.

ANALYSIS

A writ is an extraordinary remedy. It is now well settled:

A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

Petitioners argue they are entitled to a writ of the first class because the Real Parties in Interest lack standing in the case below. The Kentucky Supreme Court has never recognized a lack of standing as giving rise to a writ of the first class. Petitioners, however, cite this Court's Order in *Prisma Capital Partners, LP v. Shepherd*, No. 2019-CA-0043-OA (Ky. Ct. App. April 25, 2019), as support for this proposition. *Prisma Capital Partners, LP* was also an original action in this Court arising from a case in Franklin Circuit Court in which "Tier 1" and "Tier 2" plaintiffs made similar allegations against Petitioners and others (the "Overstreet litigation"). Full consideration of the issues raised by Petitioners in

this case is not possible without the context of the issues decided by appellate courts in the Overstreet litigation.

The Kentucky Supreme Court described the procedural posture of the Overstreet litigation in *Overstreet v. Mayberry*, 603 S.W.3d 244, (Ky. 2020):

In February of 2018, Defendants moved to dismiss Plaintiffs' claims for lack of constitutional standing and, for some defendants, on immunity grounds. The circuit court denied the motion, finding, among other things, that Plaintiffs had standing to bring their claims.

From the circuit court's order, the KRS trustee and officer defendants each filed notices of interlocutory appeal in which they challenge the circuit court's rulings on sovereign immunity and constitutional standing. This court accepted transfer of those appeals and consolidated them. Those consolidated appeals make up the present case before this Court.

Meanwhile, in January of 2019, a subset of Defendants also filed an original action in the Court of Appeals seeking a writ of prohibition claiming the circuit court was acting outside of its subject-matter jurisdiction. In April 2019, the Court of Appeals granted the writ of prohibition, finding that Plaintiffs lacked standing, and the Plaintiffs appealed that decision to this Court. We heard oral argument in all three cases on the same day, and now render this opinion and orders adjudicating those cases simultaneously.

Id. at 251. The *Overstreet* Court's reference to the writ of prohibition granted by this Court is a reference to the order entered in *Prisma Capital Partners, LP*, the case upon which Petitioners now rely. It is important to note the distinction between the direct appeals of trial court's orders and the appeal of this Court's

order in *Prisma Capital Partners, LP* which were before the Kentucky Supreme Court at that time. The “KRS trustee and officer defendants” brought direct appeals of the trial court’s order as to the rulings on sovereign immunity and standing. The Kentucky Supreme Court’s ability to review standing on a direct appeal was a result of the principles then recently annunciated in *Commonwealth Cabinet for Health & Family Servs., Dep’t for Medicaid Servs. v. Sexton by & through Appalachian Reg’l Healthcare, Inc.*, 566 S.W.3d 185 (Ky. 2018), rehg denied (Feb. 14, 2019). Quoting *Sexton*, the Kentucky Supreme Court noted:

While a trial court’s ruling on the issue of constitutional standing, in and of itself, does not give rise to an immediate right to an appeal, i.e. an interlocutory appeal, this Court has the authority to address constitutional standing whenever a facially valid and procedurally proper interlocutory appeal is before it. In this case, the facially valid and procedurally proper interlocutory-appeal issue before us is whether the doctrine of qualified official immunity bars Plaintiffs’ claims.

Overstreet v. Mayberry, 603 S.W.3d at 251 (quotations omitted). Ultimately, the Kentucky Supreme Court determined that the plaintiffs in *Overstreet* lacked constitutional standing, and by way of the two direct appeals reversed the trial court and remanded the case with directions to dismiss the action in its entirety. *Id.* at 266. The Court neither affirmed nor reversed this Court’s ruling in the *Prisma Capital Partners, LP* writ action. It instead dismissed that matter as moot as it had already determined that the entire trial court action should be dismissed. *Id.* at n. 4,

6.

This Court's determination that a lack of constitutional standing was appropriate for a writ of the first class was based on the teachings of the then-recent *Sexton* case. However, in the intervening time period, the Kentucky Supreme Court has yet to speak directly to this issue, and the conclusion we reached in *Prisma Capital Partners, LP* admittedly represented a departure in the law concerning writs of the first class. Additional analysis is warranted.

Jurisdiction and standing are without question distinct concepts. "The key difference is that subject-matter jurisdiction involves a court's ability to hear a type of case while standing involves a party's ability to bring a specific case." *Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010). "The court has subject matter jurisdiction when the 'kind of case' identified in the pleadings is one which the court has been empowered, by statute or constitutional provision, to adjudicate." *Daugherty v. Telek*, 366 S.W.3d 463, 467 (Ky. 2012) (citation omitted). Traditionally, a writ of the first class has not been available to challenge "particular case jurisdiction." Petitioners do not argue the trial court lacks the authority to hear this kind of case.

This is an important distinction in this action. Because Petitioners plainly do not meet the prerequisites for issuance of a writ of the second class,²

² This is true for reasons discussed below.

whether this Court may consider standing at this juncture hinges entirely on whether a writ of the first class is available.

Since *Sexton* and *Prisma Partners, LP* were decided, the Kentucky Supreme Court spoke to standing in terms of a writ of the first class in *Goff v. Edwards*, 653 S.W.3d 847 (Ky. 2022). There, the Supreme Court affirmed this Court's decision to deny a petition for a writ of prohibition in which the petitioner argued both that the trial court lacked subject matter jurisdiction and, separately, that the plaintiffs in the underlying case lacked standing. *Id.* The Court analyzed the subject matter jurisdiction argument under the first-class writ standard, and the standing argument under the second-class writ standard. *Id.* at 855-56. The Court further quoted *Harrison* for the proposition that "[a]lthough the concepts bear some resemblance to each other, standing is distinct from subject-matter jurisdiction." *Id.* at 844 (quoting *Harrison*, 323 S.W.3d at 706.)

However, a close reading of *Goff* reveals that the Court's decision was based on its assessment that the standing issue raised by appellants implicated statutory, not constitutional, standing:

While *Goff* argues that constitutional standing is implicated, we must disagree. . . .

As *Goff* has framed her argument, she essentially asserts that her Sisters do not have what courts have referred to as "statutory standing." Standing in this sense has to do with "whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that

right of action.” *Small v. Federal National Mortgage Association*, 286 Va. 119, 747 S.E.2d 817 (2013) (quoting *CGM, LLC v. BellSouth Telecomm., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011)). The question is whether the plaintiff is among the class of persons authorized by the statute to bring suit, and as such “statutory standing” is not a jurisdictional question, but is essentially a matter of statutory construction

With it being established that the circuit court has subject-matter jurisdiction of this case, the Court of Appeals did not err by addressing whether a second-class writ may issue on Goff’s behalf.

Goff, 653 S.W.3d at 854. Thus, the Court suggested, without reaching the issue, that had Goff made a true constitutional standing argument, it would have applied the first-class writ standard; *i.e.*, granting a writ if the plaintiff below indeed lacked constitutional standing.

This reading is consistent with *Sexton*, which places the question of constitutional standing on separate footing than other standing doctrines. “[A]ll Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only *justiciable causes* proceed in court, because the issue of constitutional standing is not waivable.” *Sexton*, 566 S.W.3d at 192 (emphasis original). Despite this conclusion, however, the Court still cautioned that standing itself was not a proper subject of an interlocutory appeal. *Id.* at 191.

Finally, we note that the Kentucky Supreme Court has previously

ruled, despite the typical “particular case” versus “this kind of case” dichotomy, that a lack of justiciability implicates subject matter jurisdiction. “Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it.” *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007) (quoting *Doe v. Golden and Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005)). While the holdings in *Nordike* and *Doe* both concern claims which were not yet ripe, the cases nonetheless stand for the proposition that justiciability and subject matter jurisdiction are inextricable concepts.

Accordingly, as we did in *Prisma Capital Partners, LP*, we analyze Petitioners’ claim that the Real Parties in Interest lacked constitutional standing under the first-class writ standard. As standing is a legal issue, we review the trial court’s decision *de novo*. *Cameron v. EMW Women’s Surgical Center, P.S.C.*, 664 S.W.3d 633, 647 (Ky. 2023).

As an initial matter, we note that Tier 3 KRS participants are not similarly situated to those in Tiers 1 and 2. The Court recognized this distinction in *Overstreet*:

We note first that any loss to KRS plan assets does not directly confer an injury to the Plaintiffs because they are members of a defined-benefit plan rather than a defined-contribution plan. In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries’ good or bad investment decisions. In a defined-contribution plan, by contrast, the retirees’

benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions. So, any alleged mismanagement of the KRS plan has no direct bearing on whether the KRS-member Plaintiffs in this case will receive their vested monthly retirement payments.

Id. at 253. The Court specifically noted at this point in its analysis that none of the plaintiffs below were Tier 3 participants. *Id.* at n. 21.

The Court next dispensed with the plaintiffs' contention that they suffered an increased risk of their benefits not being paid due to mismanagement. "But, relying on any increased risk of not receiving pension benefits in the future poses a problem in this case: as KRS beneficiaries, Plaintiffs' retirement benefits are part of a statutorily declared 'inviolable contract' between KRS members and the Commonwealth." *Id.* at 253. Yet, the "inviolable contract" referred to by the Court in *Overstreet* specifically excludes the Tier 3 plaintiffs who have brought the action in the case *sub judice*.

KRS 61.692(1), provides the following:

(1) For members who begin participating in the Kentucky Employees Retirement System prior to January 1, 2014, it is hereby declared that in consideration of the contributions by the members and in further consideration of benefits received by the state from the member's employment, KRS 61.510 to 61.705 shall constitute an inviolable contract of the Commonwealth, and the benefits provided therein shall not be subject to reduction or impairment by alteration, amendment, or repeal, except:

- (a) As provided in KRS 6.696; and
- (b) The General Assembly reserves the right to amend, reduce, or suspend any legislative changes to the provisions of KRS 61.510 to 61.705 that become effective on or after July 1, 2018.

(Emphasis added). Thus, the codification of the “inviolable contract” specifically excludes Tier 3 participants. As such, the facts underlying the principles the Kentucky Supreme Court relied upon to determine the plaintiffs lacked constitutional standing in *Overstreet* are not present in this case. Petitioners argue the distinctions are not material and that the Real Parties in Interest still lack constitutional standing. We disagree.

The *Sexton* Court adopted the test for constitutional standing set forth by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992), “as a predicate for bringing suit in Kentucky’s courts.” *Sexton*, 566 S.W.3d at 196. In particular: “To invoke the court’s jurisdiction, the plaintiff must allege [1] an *injury* [2] *caused* by the defendant [3] of a sort the court is able to *redress*.” *Id.* (citing *Lujan*, 504 U.S. at 560-61 (emphasis original)). An “injury” under the *Lujan* test must be:

- (a) concrete and particularized, and
- (b) actual or imminent, not conjectural or hypothetical

Lujan, 504 U.S. at 560 (internal citations omitted). *See Sexton*, 566 S.W.3d at 196 (citations omitted).

Petitioners argue that the alleged damages of the Real Parties in Interest are still too speculative to survive constitutional standing analysis. The parties agree that Tier 3 participants are entitled to a statutory floor of 4% interest each year with the possibility of “upside sharing” increasing this percentage if their invested funds perform well. Petitioners argue that because the latter is not guaranteed from year to year, that Tier 3 is still a defined-benefit plan for the purposes of constitutional standing analysis. This is not reflective of reality. While the value of a Tier 1 or 2 participant’s retirement benefits bears no relationship to the performance of investments, the value of a Tier 3 participant’s plan plainly does.³

At this time, the Court is only concerned with whether the Real Parties in Interest have plausibly pled that they have suffered a “concrete and particularized” injury which is “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. We conclude they have. Whether they ultimately prove these damages or if Petitioners can show that no actionable conduct led to actual damages is a question for a different time.

The fact that damages are uncertain or difficult to calculate does not render them “too speculative.” The Court’s discussion of speculative injury in

³ The performance of the investments will necessarily impact Tier 3 benefits unless the criteria for “upside sharing” on an annual basis are literally never met. Petitioners do not argue that is the case.

Overstreet centered on plaintiffs' claims that "the imprudent investment decisions in question resulted in hundreds of millions of dollars in losses to the plan assets thereby placing at significant risk the solvency of the KRS fund." 603 S.W.3d at 253. Analogizing to caselaw concerning defined-benefit ERISA plans, the Court held that the potential insolvency of the KRS fund was purely speculative and hypothetical, and therefore not an "injury" under constitutional standing analysis. *Id.* at 254-55. Petitioners' argument that Tier 3 participants were never guaranteed "upside sharing" and therefore their damages are speculative is not remotely analogous.

Accordingly, we hold that the Real Parties in Interest have pled allegations sufficient to support constitutional standing and decline to issue a writ of the first class.

Consistent with *Goff*, we analyze Petitioners' arguments outside of constitutional standing under the second-class writ standard. This merits little discussion as Petitioners plainly do not meet the prerequisites for the issuance of a writ of the second class.

Writs "are truly extraordinary in nature and are reserved exclusively for those situations where litigants will be subjected to substantial injustice if they are required to proceed." *Indep. Order of Foresters v. Chauvin*, 175 S.W.3d 610, 615 (Ky. 2005). A writ of the second class requires a showing that "the lower

court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise.” *Hoskins*, 150 S.W.3d at 10. This second class also usually requires a showing that “great injustice and irreparable injury will result if the petition is not granted.” *Id.*

While there are exceptions to the “great injustice and irreparable injury” requirement in “certain special cases,”⁴ Petitioners do not argue that the certain special cases exception applies. Rather, they appear to argue that the burden of complex litigation in the event the case is not dismissed would result in irreparable harm. The Kentucky Supreme Court has consistently held that the mere burden of litigation does not support a showing of irreparable injury. Arguments concerning the time-consuming nature of litigation are routinely rejected in writ cases. *See, e.g., Fritch v. Caudill*, 146 S.W.3d 926, 930 (Ky. 2004) (“Inconvenience, expense, annoyance, and other undesirable aspects of litigation may be present, but great and irreparable injury is not.”). A great and irreparable injury under our precedent is not merely the high cost of time and money attendant with litigation but, instead, is ‘something of a ruinous nature[.]’” *Romines v. Coleman*, 671 S.W.3d 269, 276 (Ky. 2023) (quoting *Bender*, 343 S.W.2d at 801). If this argument were valid, the prerequisites for issuing a writ of the second class would be illusory, and an original action would merely serve as an interlocutory

⁴ *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961).

appeal as opposed to a means to obtain extraordinary relief.

The showing that the petitioner lacks an “adequate remedy by appeal is an absolute prerequisite to the issuance of a writ under this second category.” *Indep. Order of Foresters*, 175 S.W.3d at 615. Petitioners present no legitimate argument that they lack an adequate remedy by appeal. *Goff* is directly on point in this regard. There, the Kentucky Supreme Court affirmed this Court’s ruling that a party challenging statutory standing has an adequate remedy by appeal upon entry of a final and appealable order. 653 S.W.3d at 855.

Petitioners cite inapplicable writ jurisprudence concerning erroneous discovery rulings to suggest that they lack an adequate remedy by appeal merely because they now must participate in discovery. This original action does not arise from a discovery dispute. A writ is not available to prevent purely speculative future harm. “[R]aw speculation is woefully insufficient to show ruinous injury” in the context of a writ petition. *Gilbert v. McDonald-Burkman*, 320 S.W.3d 79, 86 (Ky. 2010).

Similarly, Petitioners’ argument that a recovery by the Real Parties in Interest may be duplicative of a potential recovery by the Kentucky Attorney General in a separate pending case is not sufficient to support a writ of the second class. If that occurs, Petitioners will have an adequate remedy by appeal.⁵ In

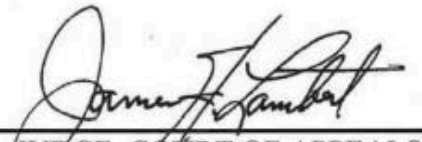
⁵ This concern should be ameliorated as Respondent acknowledged this issue in the May 1, 2024,

short, Petitioners seek an interpretation of the second-class writ standard that would render every denial of a motion to dismiss immediately reviewable. That is not the function of a writ petition.

CONCLUSION

WHEREFORE, the petition for a writ of prohibition shall be, and hereby is, DENIED.

ENTERED: November 12, 2024



JUDGE, COURT OF APPEALS

order and is presiding over both cases.

Securities Law Prof Blog

 lawprofessors.typepad.com/securities/2024/11/new-securities-law-articles-in-print-1.html

Monday, November 18, 2024

New Securities Law Articles in Print

The following law review articles relating to securities regulation are now available in paper format:

Cameron Bills, Note, *Standardizing Corporate Disclosure of Climate Risks*, 32 N.Y.U. Env't L.J. 259 (2024).

Madeleine G. Clahane, Note, *North Carolina's Anti-ESG Statute and the State Treasurer's Fiduciary Duty*, 28 N.C. Bank. Inst. 503 (2024).

Nikita Patel, Student Article, *Auditor Independence: Moving toward Harmonization or Simplification?*, 97 S. Cal. L. Rev. 495 (2024).

Jacob G. Stanley, Note, *A Disruptive Ripple in the SEC's Regulation of Crypto Assets*, 28 N.C. Bank. Inst. 467 (2024).

Matthew Whang, Note, *Drowning Unicorns: The Case against More Disclosure in Private Markets*, 18 Brook. J. Corp. Fin. & Com. L. 319 (2023).

Shaq Signs \$11 Million Settlement to Resolve Astrals Investor Claims

 [law.com/nationallawjournal/2024/11/18/shaq-signs-11-million-settlement-to-resolve-astrals-investor-claims](https://www.law.com/nationallawjournal/2024/11/18/shaq-signs-11-million-settlement-to-resolve-astrals-investor-claims)

Michael A. Mora

What You Need to Know

- Shaquille O'Neal agreed to an \$11 million settlement for his role in the Astrals Project.
- The Astrals settlement will resolve all of the claims in the class action litigation before the Southern District of Florida.
- In addition, the basketball legend settled with the FTX estate to resolve all claims against him.

A filing on Monday evening revealed that ex-NBA star player Shaquille O'Neal has agreed to create an eight-figure class action settlement fund for injured investors in the Astrals Project non-fungible tokens and GLXY tokens, which aimed to promote investment in a virtual world. He has also resolved all claims against him in the FTX multidistrict litigation. Both settlements are pending judicial approval.

Adam Moskowitz, the managing partner at the Moskowitz Law Firm in Coconut Grove, Florida, is the lead attorney for the proposed class of investors in their lawsuit against the defendants, Shaquille O'Neal, Astrals LLC and the company's various subsidiaries. Moskowitz is joined by his partner Joseph M. Kaye and Jose M. Ferrer and Desiree Fernandez of Mark Migdal Hayden in Miami.

Former NBA player Shaquille O'Neal watches warmups before a WNBA basketball game between the Indiana Fever and the Chicago Sky, Friday, Aug. 30, 2024, in Chicago. Photo: Erin Hooley/AP

"So much credit goes to Shaq personally for wanting to help all of the other victims, and to our federal judges," Moskowitz said. "Mr. O'Neal was asked to promote both Astrals and the failed FTX platform."

Stephen A. Best, who is among the partners at Brown Rudnick who represent O'Neal and is joined by Christopher E. Knight, Brian D. Elias, Esther E. Galicia and Alexandra L. Tifford of Fowler White Burnett, declined to comment.

Now, in the Astrals case that was pending before U.S. District Senior Judge Federico Moreno of the Southern District of Florida, O'Neal has agreed to create an \$11 million settlement fund in exchange for having the action dismissed. Meanwhile, U.S. District Judge K. Michael Moore of the Southern District of Florida could rule within the next few days on the FTX multidistrict litigation settlement that would resolve all claims against O'Neal.

'I'm Not F*ing Leaving'**

The Astrals Project is a collection of 10,000 metaverse-ready 3D avatars by artist Damien Guimoneau. These NFTs aim to promote investment in a virtual world in which users could socialize, play and interact with other users, including O'Neal himself. The plaintiff class alleged that the value of Astrals' financial products was linked "almost entirely to O'Neal's celebrity status and many Astrals investors" were induced to purchase them because of his promotion.

The amended complaint alleged that as O'Neal, a basketball Hall of Famer and prominent sports commentator, was attempting to distance himself from his FTX promotions, he was doing the same with the Astrals entities.

"Ironically, right before O'Neal decided to run for the hills and abandon his Astrals Project, he posted a meme on the Astrals Discord, a .gif of a scene from the movie 'The Wolf of Wall Street,' assuring all of the Astral Investors that 'I'm not f***ing leaving,' implying that he would always be there for his Astrals Investors," it said. "But O'Neal has not been seen at Astrals since."

Soon after, the value of the NFTs plummeted. Plaintiffs, representing themselves and a putative global class of investors who purchased Astrals NFTs and/or Galaxy tokens from the Astrals Project, suffered financial losses and filed a lawsuit in September 2023 under an array of securities laws. Unsurprisingly, the defendants disagreed.

The defendants argued that the Astrals Project did not involve a capital investment drive or an appeal to passive investors; rather, the case involved the sale of collectible video game avatars that were "metaverse-ready" upon sale to gamers, court records show.

'Investment Intent'

However, in August, Moreno approved in part and denied in part the defendant's motion to dismiss and additional remedies. In the 24-page ruling, Moreno became the first federal judge to directly address whether celebrity promoters can be liable for promoting these unregistered securities.

Moreno ruled that just because O'Neal was the Astrals founder, it did not mean he had control over its day-to-day operations. However, the judge disagreed with O'Neal that the plaintiffs failed to allege that the NFTs are "securities" subject to federal securities laws. He wrote that the NFTs sold cannot be used and are currently just digital pictures that investors can view.

"Plaintiffs learned about the plans to create a metaverse game and saw high growth potential and even looked to hold the Astrals financial products as long-term investments," Moreno held. "These facts tip in favor of investment intent, rather than consumptive intent."

As a result of the question as to whether the NFTs are unregistered securities, the Astrals investments became almost worthless.

The Astrals settlement will resolve the claims in the class action before Moreno and will be allocated to injured class members, pending judicial approval. It applies to those who, "from May 24, 2022, to the date of preliminary approval, purchased Astrals NFTs and/or who, before the date of preliminary approval, purchased GLXY Token," according to the Monday evening filing. The motion also shows that class counsel cannot seek fees and costs that exceed \$2.91 million.

In addition, O'Neal has resolved all the claims in the FTX multidistrict litigation against him, the details of which were announced Thursday before Moore, and is also pending judicial approval. That leaves remaining defendants, such as Tom Brady, Larry David and others who promoted FTX before its swift collapse.

"The FTX estate has done an amazing job getting plan confirmation and providing billions to FTX investors, and there are certain claims that the customers have, such as against the promoters, that we explained are extremely viable," Moskowitz said. "These named defendants can make up the \$4 billion in additional out-of-pocket damages to our proposed class."

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December 31st Deadline Approaching in \$201 million Boeing SEC Fair Fund

insights.issgovernance.com/posts/december-31st-deadline-approaching-in-201-million-boeing-sec-fair-fund

November 19, 2024



The SEC has created a \$201 million Fair Fund (the “Fund”) for purchasers of The Boeing Company (“Boeing” or the “Company”) common stock during the period between November 28, 2018, and October 17, 2019, inclusive (the “Relevant Period”). Boeing paid \$200 million, and its former CEO (together with Boeing the “Respondents”) paid \$1 million to create the Fund, resolving cease-and-desist proceedings (the “Proceedings”)^[1] against the Respondents by the SEC. The current deadline for investors to file a claim is December 31, 2024 (which was extended from an earlier deadline). Investors should assess whether they may have valid claims from the Fund, and if so, should expeditiously file their claims to best ensure recovery.

The Proceedings revolved around Boeing’s new line of aircraft, the 737 MAX. Two of these planes notoriously crashed—Lion Air flight 610 on October 29, 2018, and Ethiopian Airlines flight 302 on March 10, 2019—killing all aboard each flight. Importantly, the SEC determined that Respondents made materially misleading statements to investors in Boeing’s November 27, 2018, press release about the Lion Air crash and in public statements in April 2019 following the Ethiopian Airlines crash and ordered the cumulative payment of \$201 million as a penalty.

The crashes also spawned multiple shareholder lawsuits, including a putative securities fraud class action in the U.S. District Court for the Northern District of Illinois (the “Securities Case”),^[2] and a shareholder derivative case in Delaware Chancery Court (the “Derivative Case”), which settled in 2022 for \$237.5 million in cash payment and corporate governance reforms, ranking it one of the ten largest such settlements ever.^[3] Furthermore, the U.S. Department of Justice fined Boeing the massive sum of \$2.5 billion related to 737 MAX safety issues.

The underlying alleged facts of the 737 MAX 8 situation, are out set out in great depth in the Securities Case, although the Proceedings provides detailed facts as found by the SEC. Both are informed by discovery of numerous internal documents from Boeing, although documentary evidence in the Securities Case is heavily redacted to the public.

As alleged by plaintiffs in the Securities Case, Boeing—concerned about losing market share to Airbus SE (“Airbus”)—decided to rush to market the 737 MAX, its updated version of the workhorse 737, putting pressure on employees to cut corners and ignore safety warnings. The plaintiffs alleged that instead of making structural changes to the aircraft, a new software system called MCAS, that could take control of the plane and push its nose down if it sensed that the plane was stalling, was added to compensate for the MAX 737’s larger but more fuel-efficient engines, which risked causing the plane to pitch up and stall. Boeing is alleged to have opted against making structural changes to avoid significantly increasing the time to certify the aircraft and requiring former 737 pilots to undertake costly simulator training, a major selling point for Boeing. Crucially, the plaintiffs alleged that the MCAS system malfunctioned and erroneously determined stalls in both crashes, pushing both Lion Air flight 610 and Ethiopian Airlines flight 302 into involuntary steep dives that the pilots were unable to disengage from.

The gravamen of the allegations in the Securities Case is that Boeing falsely represented to investors that the 737 MAX was safe in the wake of the crashes when the truth was in fact the exact opposite, because admitting the truth would result in additional pilot training and updates to the MCAS system and thereby slow down production and sale of the 737 MAX. The plaintiffs in the Securities Case claim that investors were harmed when the truth about the woeful 737 MAX safety problems was revealed over a series of disclosures across 2019 and that Boeing’s stock price declined 27% from its class period high to after the final alleged corrective disclosure. On September 30, 2024, the court in the Securities Case allowed the plaintiffs to proceed on a number of alleged false statements but not others. The case had already been in discovery previously, and with the decision on the latest complaint, discovery has resumed. It is likely that a settlement will be forthcoming for shareholders in this case, but it is unclear whether years more of protracted litigation will first ensue or not.

Boeing’s share price closed below \$140 in November 2024, while it had closed as high as \$440 days before the Ethiopian Airlines crash.

The SEC Proceedings thus are about similar alleged conduct by the Respondents regarding the safety issues regarding the 737 MAX. As noted, the SEC determined that Respondents' statements on November 27, 2018, and in April 2019 were false and misleading and therefore constituted violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933.^[4] The SEC also cites documents, without redaction, that it claims support its factual determinations. For example, the SEC states that Boeing's internal Safety Review Board had concluded that the unintended activation of the MCAS was an "airplane safety issue" that required remediation and had communicated this to Boeing's senior management on or about November 15, 2018. Moreover, the SEC stated that on November 21st 2018, Boeing's communications team suggested removing any discussion of the planned MCAS software redesign from the draft press release. The SEC noted that the final press release did not mention that Boeing had identified an ongoing safety issue or was planning to redesign the MCAS software. Significantly, this was more than three months before the Ethiopian Airlines crash. Claims for the Fund must, if sent by mail, be posted by, and if sent electronically, be received by December 31, 2024. Please be aware that the documentation required by the SEC in Fair Fund claims is more significant than is required in the claims process for private securities class action settlements, such as requiring proof of trade confirmations. Thus, the process can be quite onerous for institutions that do not commonly file such claims, as some of these documents may be difficult to source. So, be sure to allow enough time to properly file all claims in advance of the deadline.

Investor Class Action Details		ISS SCAS▶
Type of fund/Venue	SEC FAIR FUND United States	

[1] In the Matter of The Boeing Company, No. 3-21140, and In the Matter of Dennis A. Muilenberg, No. 3-21141.

[2] In re The Boeing Company Aircraft Securities Litigation, No. 1:19-c-v02394 (N.D. Ill.). See id., at ECF No. 278 for the most recent filed complaint, which asserts a class period of, November 7, 2018, to December 16, 2019, inclusive, that is slightly longer than the Relevant Period. Another putative securities class action is pending against the Company involving alleged continued safety issues at Boeing, exemplified by a January 2024 incident where a door blew off a plane in flight, but this is not as closely related to the Proceedings.

[3] In re The Boeing Company Derivative Litigation, No. 2019-0907-MTZ (Del. Ch.). The allegations in Derivative Case are that Boeing's board of directors and officers breached their fiduciary duties by failing to monitor the safety of Boeing's aircraft despite numerous red flags about safety issues. The cash in the settlement here, less attorneys' fees and expenses, was paid directly to the Company; shareholders are not entitled to recoveries in derivative actions.

[4] Although notably, the Securities Case asserts claims under the Securities Exchange Act of 1934.

"No portion of this insight constitutes legal advice, and no attorney-client relationship is intended or is established."

By: Donald F. Grunewald, Director of Litigation Analysis, ISS SCAS

Schools Win Again: Social Media Fails to Strike Public Nuisance Claims

LAW [law.com/therecorder/2024/11/18/schools-win-again-social-media-fails-to-strike-public-nuisance-claims](https://www.law.com/therecorder/2024/11/18/schools-win-again-social-media-fails-to-strike-public-nuisance-claims)

Amanda Bronstad



Social media icons displayed on an iPhone. Photo: Diego M. Radzinski/ALM

News

On Nov. 15, U.S. District Judge Yvonne Gonzalez Rogers allowed school districts' public nuisance claims to go forward against social media sites including Instagram and TikTok.

November 18, 2024 at 06:44 PM

🕒 5 minute read

Social Media



By Amanda Bronstad
staff reporter



Social media took another hit Nov. 15 after a federal judge allowed most of the public nuisance claims brought by school districts in the addiction cases to move forward.

U.S. District Judge Yvonne Gonzalez Rogers of the Northern District of California found on Nov. 15 that school districts in 15 of the 19 states at issue could pursue public nuisance claims that social media sites, such as Instagram and TikTok, created a mental health crisis among the nation's youth. The ruling is the fourth dismissal order from Gonzalez Rogers in the social media addiction multidistrict litigation and is contrary to a June 7 public nuisance decision by a Los Angeles judge in parallel litigation in California state courts.

"Here, defendants make their platforms available to the entire public," Gonzalez Rogers wrote, concluding that the social media platforms failed to argue that their conduct doesn't interfere with the public's health. "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," she continued, "those harms and costs all flow from defendants' alleged interference with the public health."

Judge Yvonne Gonzalez Rogers at a
sexual harassment panel at the
Northern District of California. Photo:
Jason Doiy/ALM

However, she granted dismissal of public nuisance claims as to four states: Illinois, New Jersey, Rhode Island and South Carolina.

"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," Lexi Hazam of San Francisco's Lieff Cabraser Heimann & Bernstein and Previn Warren of Motley Rice in Washington, D.C., who are co-lead plaintiffs' counsel in the litigation, said in a statement. "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."

'A Flexible Mechanism'

The social media companies argued that the claims overstepped the bounds of public nuisance laws in all 19 states.

But Gonzalez Rogers disagreed.

"Public nuisance, like negligence, provides a flexible mechanism to redress evolving means for causing harm," she wrote. "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. However, because a handful of at-issue state supreme courts have expressed reluctance to expand public nuisance, the court declines to permit the public nuisance actions to proceed with respect to those at-issue states.”

She allowed the public nuisance claims to go forward in 15 states, including California, Florida, Georgia and Pennsylvania.

“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 spokesperson for Meta Platforms Inc., which owns Facebook and Instagram, said. “We will continue to defend ourselves vigorously against these claims and believe the evidence will demonstrate our commitment to supporting young people.”

Los Angeles Superior Court Judge Carolyn Kuhl, who is overseeing the California Judicial Council Coordination Proceeding (JCCP) involving social media addiction cases, had dismissed four complaints brought by school districts in California, Florida, Rhode Island and Washington, concluding, “It is hard to imagine how any business or institution could function—or reasonably insure itself against potential losses—if its liability extends to all those who could reasonably be expected to interact with the individuals that are caused emotional harm by that business or institution.”

A spokesperson for Google, which owns YouTube, said, “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. The allegations in these complaints are simply not true.”

Representatives of TikTok, owned by Byte Dance, and Snap Inc., parent of Snapchat, did not respond to requests for comment.

Los Angeles Superior Court Judge
Carolyn Kuhl. Courtesy photo.

The lawsuits, brought by individuals, school districts, local governments and state attorneys general, allege novel claims that social media usage caused adolescents to become addicted, leading to mental health disorders and, for some, suicide.

Gonzalez Rogers, in her first dismissal order about a year ago, found that the social media platforms could not wipe out all the products liability-related claims based on Section 230 of the Communications Decency Act, which grants immunity to tech companies from the actions of third companies, or the First Amendment.

Last month, Gonzalez Rogers upheld consumer claims brought by more than 30 state attorneys general over alleged misrepresentations made by social media companies, and, in a separate order, refused to dismiss negligence claims brought by school districts and local governments.

This month's order relied on previous court decisions allowing public nuisance claims in cases involving opioids and electronic cigarettes made by Juul Labs.

In a footnote, Gonzalez Rogers also acknowledged an Oct. 17 decision against Meta in a similar case brought by the state of Massachusetts. Suffolk County Superior Court Judge Peter Krupp sided against Meta, concluding that the "mental and physical harms suffered by Massachusetts youth and the associated burdens to the Massachusetts school and health care systems was foreseeable."

Gonzalez Rogers wrote, "That court rejected the same argument before this court on substantially similar allegations."

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Corporate Deal

The SpringHill Co., founded by LeBron James and Maverick Carter, and Fulwell 73 have announced a merger agreement. Los Angeles-based SpringHill was counseled by a Gibson, Dunn & Crutcher team led by partners Kevin Masuda and Sarah Graham. Counsel information for Fulwell 73, which is based in London, was not immediately available.

[Read More](#)

Applying Pressure: Collaborating Firms Advance BioLab Class Action

 [law.com/2024/11/18/applying-pressure-collaborating-firms-advance-biolab-class-action](https://www.law.com/2024/11/18/applying-pressure-collaborating-firms-advance-biolab-class-action)

Cedra Mayfield



What You Need to Know

- Law firms from Alabama, California, Georgia, Tennessee and New York partner in class action litigation against BioLab following Georgia plant fire.
- Collaboration includes Lieff Cabraser Heimann & Bernstein, Simmons Hanly Conroy, Grant & Eisenhofer, Beasley Allen, Reeves Law Firm and Bert Brock.
- Following consolidation of 18 class action lawsuits, collaborating litigators seek appointment as interim class counsel.

Six weeks after a fire at a BioLab plant in Conyers, Georgia, resulted in the release of hazardous chemicals and the evacuation of more than 17,000 residents, a group of law firms from across the country is working to advance class action litigation, now consolidated by a federal judge.

Litigators with Lieff Cabraser Heimann & Bernstein in Tennessee, Simmons Hanly Conroy in New York, Grant & Eisenhofer in California, Beasley Allen in Alabama, and Reeves Law Firm and Bert Brock Law in Georgia are now outlining the state of play in the class action litigation and the steps they're taking to become appointed interim class counsel.

"Living in this community, we have seen and heard directly from our neighbors how this fire and chemical release is impacting their lives," said Jeff Reeves of the Reeves Law Firm in Atlanta.

Five-Firm Plaintiff Team

Lieff Cabraser managing partner Mark Chalos has teamed with Grant & Eisenhofer partners Beth Graham and Adam Gomez, Beasley Allen partner Rhon Jones, Simmons Hanly partner Jayne Conroy, and Atlanta litigators Reeves and Bert Brock of Bert Brock Law to bring the

class action complaint in the U.S. District Court for the Northern District of Georgia. The Oct. 2 filing is brought on behalf of plaintiff David Tzikas and all others similarly situated against defendants Bio-Lab Inc. and KIK Custom Products Inc.

Through the action, Tzikas sought redress for himself and other residents located around the lab at the time of the fire.

"As a result of Defendants' negligent, careless, reckless, and/or intentional conduct in connection with the September 29, 2024 chemical fire and resulting toxic chemical plume, Plaintiff David Tzikas has suffered damages, including, but not limited to, an increased risk of disease from exposure to and inhalation of toxic chemicals, contamination of his property by egregiously high and plainly dangerous levels of toxic chemicals dispersed by Defendants into the air and water, and the loss of use and enjoyment of his property and resulting inconvenience, disruption and emotional distress," the class action alleged.

READ: CLASS ACTION COMPLAINT



Mark Chalos is the managing partner of Lieff Cabraser Heimann & Bernstein's Nashville office. Courtesy photo

Plaintiff counsel noted in the filing that the federal court held subject-matter jurisdiction over the claims asserted in the action under 28 U.S.C. § 1332(d)(2) since complete diversity existed between the defendants and at least one member of the class.

The filing also highlighted the existence of more than 100 class members and that the amount in controversy exceeded \$5 million, exclusive of interests and costs.

"The causes of action for our complaint are negligence, private nuisance, public nuisance, trespass to land and chattel, ultrahazardous/strict liability, and willful and wanton conduct," Chalos claimed. "The damages sought include, but are not limited to loss of use and enjoyment of property, loss of right to enjoy possession of their property, discomfort, disrupted peace of mind, emotional distress, costs of repair, restoration, and remediation, lost trees and growth, lost business income, the depreciation or reduction in their property's market, usable, or rental value, the loss or depreciation of property or business value, evacuation and relocation expenses, out of pocket expenses, and other economic damages as recoverable by law. We are also seeking punitive damages to punish, penalize, or deter Defendants from repeating similar conduct."

According to Reeves, the plaintiff team is also seeking "remediation and continued, periodic testing of the surrounding water, soil, crops and air to ensure they are safe in the future."

18 Lawsuits Consolidated



Sarah Geraghty testifies
before the Senate
Judiciary Committee
during her confirmation
hearing to be U.S. District
Judge for the Northern
District of Georgia, on
Dec. 1, 2021. Photo:
Diego M. Radzinski/ALM

Less than two weeks after filing the federal class action, Chalos said the litigation team is already seeing progress.

"On Nov. 5, the court overseeing the litigation consolidated the 18 pending lawsuits into one coordinated litigation," Chalos said.

In an order issued by U.S. District Judge Sarah E. Geraghty, the court detailed her intent to "enter deadlines for the filing of a Consolidated Amended Complaint and Defendants' answer following the appointment of interim class counsel."

READ: CONSOLIDATION ORDER

Following Geraghty's issuance of the judicial order, Reeves said plaintiff counsel filed a motion to appoint interim class counsel the same day. In the motion, plaintiff counsel requested the court appoint the five-firm team to lead the class-action litigation. Reeves deemed the collaborative unit "well-qualified, diverse, and inclusive."



Jeff Reeves, founder of
Georgia-based Reeves
Law Firm PC. Courtesy
photo

"By working with the best class action attorneys in the country, we are continuing in our commitment to holding BioLab accountable and ensuring our community is taken care of going forward," Reeves said.

Chalos agreed.

"Our team includes the lead class counsel that litigated and resolved the East Palestine, Ohio, Train Derailment and Fire litigation that resulted in a \$600 million settlement—the largest settlement for any rail disaster case in history. We bring the experience from that litigation and many decades of other environmental cases to this case," Chalos said. "We are proud to be combining the national and local expertise of our firms to best represent this community, and we look forward to getting justice for this community."

Geraghty is expected to consider a variety of similar motions to appoint interim class counsel before entering a deadline for a consolidated amended complaint to advance the litigation.

If appointed as counsel, Chalos indicated the five-firm team would be prepared.

"We are conducting our own independent investigation with leading national experts to get a full picture of the events leading up to and following the fire, and the impacts the fire has had on the community in the near-term and may have over the long-term," Chalos said.

Reeves added that the experts are investigating potential long- and short-term impacts of the fire and chemical exposure.

"We encourage everyone in the community to keep as much evidence as possible, including a diary of experienced symptoms," Reeves said. "As we continue investigating and reviewing the data, we will have clearer answers about the extent of the damages and the areas covered by the lawsuit."

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Who Got the Work: 16 Lawyers Appointed to BioLab Class Action Litigation

 [law.com/2024/11/19/who-got-the-work-16-lawyers-appointed-to-biolab-class-action-litigation](https://www.law.com/2024/11/19/who-got-the-work-16-lawyers-appointed-to-biolab-class-action-litigation)

Cedra Mayfield

What You Need to Know

- Federal judge appoints counsel following consolidation of BioLab class actions linked to Sept. 29 chemical fire at Conyers, Georgia plant.
- U.S. District Judge Sarah E. Geraghty of the Northern District of Georgia appointed 16 attorneys from separate firms.
- Appointees will serve as interim co-lead class counsel, liaison counsel, community liaison counsel, plaintiffs' executive committee members and business class committee members.

Class action litigation against Bio-Lab Inc. and KIK Custom Products Inc. is advancing following a Sept. 29 fire at a plant in Conyers, Georgia, that resulted in the release of hazardous chemicals and the evacuation of more than 17,000 residents.

After consolidating 18 class action complaints, a federal judge has greenlit the litigation's advancement by appointing interim class counsel and committee members. The 16 appointed attorneys hail from separate firms in Georgia, Florida, Illinois, Indiana, New York, Tennessee and Puerto Rico.

Meet the Counsel

Sarah Geraghty testifies
before the Senate
Judiciary Committee
during her confirmation
hearing to be U.S. District
Judge for the Northern
District of Georgia, on
Wednesday, December 1,
2021. Photo: Diego M.
Radzinski/ALM

On Friday, U.S. District Judge Sarah E. Geraghty of the Northern District of Georgia appointed attorneys from more than a dozen firms to three interim counsel cohorts and two committees after reviewing submitted motions for appointment.

In an order issued Nov. 15, Geraghty noted that she'd "carefully reviewed Plaintiffs' counsel's applications for appointment as interim class counsel," but that "[g]iven the sheer abundance of skilled attorneys who [sought] appointment," she opted to appoint "attorneys and law firms [that] presented the strongest applications to represent the interests of the putative class on an interim basis."

Geraghty selected Atlanta litigators Jason J. Carter of Bondurant Mixson & Elmore and L. Chris Stewart of Stewart Miller Simmons Trial Attorneys to join forces with Chicago-based attorney Daniel Rock Flynn of DiCello Levitt and Tampa-based litigator Jean S. Martin of Morgan & Morgan as interim co-lead class counsel.

The federal judge also appointed J. Cameron Tribble of the Barnes Law Group in Atlanta to serve as interim liaison counsel and Decatur litigator M.J. Blakely of The Blakely Firm to serve as interim community liaison counsel.

In addition to appointing counsel, Geraghty appointed the following lawyers to serve as members on a pair of committees:

Interim Plaintiffs' Executive Committee

James Bilsborrow, Weitz & Luxenberg in New York, New York
Mark P. Chalos, Lieff Cabraser Heimann & Bernstein in Nashville, Tennessee
Gary Klinger, Milberg Coleman Bryson Phillips Grossman in Chicago, Illinois
Robert S. Libman, Miner, Barnhill & Galland in Chicago, Illinois
Edward Manzke, The Collins Law Firm in Naperville, Illinois
Roger Orlando, The Orlando Firm in Decatur, Georgia
Gerard Stranch, Stranch, Jennings & Garvey in Nashville, Tennessee
Lynn Toops, Cohen & Malad in Indianapolis, Indiana

Interim Business Class Committee

Christopher L. Coffin, Coffin Law in San Juan, Puerto Rico
MaryBeth V. Gibson, Gibson Consumer Law Group in Atlanta, Georgia

With counsel now appointed, preparations are underway for upcoming status conferences set for every six weeks, according to Geraghty's order.

"In advance of each status conference, Interim Co-Lead Class Counsel and Defendants' counsel shall meet and confer," the federal judge ordered. "Unless otherwise ordered, Interim Co-Lead Class Counsel and Defendants' counsel shall file a joint notice setting out

the proposed agenda and the parties' joint and/or respective positions on agenda items no later than three business days prior to each status conference."

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Trending

New Suit - Copyright

Flavor God LLC and Shredz Supplements were hit with a copyright infringement lawsuit on Nov. 19 in New Jersey District Court. The court action, filed by Sanders Law Group on behalf of Watson Music Group, accuses the defendants of posting an excerpt of the plaintiff's copyrighted song to social media without authorization. Counsel have not yet appeared for the defendants. The case is 2:24-cv-10582, Watson Music Group, LLC. v. Flavor God LLC.

[Read More](#)

New Suit - Copyright

Spyscape was hit with a copyright infringement lawsuit on Nov. 19 in New York Southern District Court. The court action, brought by CopyCat Legal on behalf of August Image, accuses the defendant of publishing the plaintiff's copyrighted photograph to Spyscape's website and social media accounts without authorization. Counsel have not yet appeared for the defendant. The case is 1:24-cv-08796, August Image, LLC v. Spyscape Ltd.

[Read More](#)

Ohio nears plea deal with companies of ex-PUCO chair accused of taking a \$4.3 million bribe

[cleveland.com/open/2024/11/ohio-nears-plea-deal-with-companies-of-ex-puco-chair-accused-of-taking-a-43-million-bribe.html](https://www.cleveland.com/open/2024/11/ohio-nears-plea-deal-with-companies-of-ex-puco-chair-accused-of-taking-a-43-million-bribe.html)

November 19, 2024

1. Ohio Politics

Published: Nov. 19, 2024, 3:36 p.m.



Former Public Utilities Commission of Ohio Chairman Sam Randazzo is seen leaving his arraignment at the Summit County Court of Common Pleas on Feb. 13, 2024. (David Petkiewicz/Cleveland.com)David Petkiewicz, cleveland.com

By

Jake Zuckerman, jzuckerman@cleveland.com

COLUMBUS, Ohio – A prosecutor told a Summit County judge Friday that the state has reached a plea agreement “in principle” with businesses owned by Sam Randazzo, the state’s former top utility regulator who died shortly after he was charged with accepting a \$4.3 million bribe from FirstEnergy Corp.

Assistant Attorney General Matt Meyer told Summit County Common Pleas Judge Susan Baker Ross that two companies owned by Randazzo are set to enter guilty pleas.

Prosecutors say Randazzo used the two companies to accept and conceal millions in bribes from FirstEnergy shortly before Gov. Mike DeWine appointed him as chairman of the Public Utilities Commission of Ohio, which regulates power companies like FirstEnergy.

Meyer said the agreement, which Ross would need to approve, would be ready for her review as soon as Friday.

Randazzo died by suicide in April 2024 at the age of 74, while under both state and federal indictments. It's unclear who has rights to make decisions on the companies' behalf.

Randazzo is survived by his wife and several adult children.

Attorneys for Randazzo told Ross on Friday that they're motivated to get the charges resolved, although they were less certain that a final decision this week would be possible. Attorney Roger Sugarman told Ross that a hearing by Friday this week might be a bit "ambitious" and there are still "significant discussions" to be had with state prosecutors, but he didn't rule it out.

Neither the state nor Randazzo's attorney responded to questions about the terms of the deal. But Randazzo made millions from FirstEnergy, and a charge against his business could lead the way to the state reclaiming what it argues are ill gotten gains

As of Tuesday afternoon, the court's docket lists no hearing scheduled for this week.

Prosecutors indicted Randazzo on an array of financial crimes, saying he, in concert with top FirstEnergy officials, stole from his legal clients, secretly colluded with FirstEnergy despite his clients' adverse interests, accepted a \$4.3 million bribe from FirstEnergy's executives just before he started as PUCO chairman, and then did the company's bidding from inside state government at a senior level.

After his death, state prosecutors dropped the charges against Randazzo personally but maintained those against his companies. One, the Sustainability Funding Alliance of Ohio, was solely owned by Randazzo, had no other employees, and its income flowed to him and his wife. The other was IEU-Ohio Administration Company. Both companies, prosecutors say, were paper-only instruments used to execute and conceal the scheme. They allowed him to play "all sides" of a case – representing interests of his clients, FirstEnergy, and himself.

They accused Randazzo as a private lawyer of skimming money from his client, Industrial Energy Users of Ohio, a coalition of large-scale electric buyers. FirstEnergy, via Randazzo's companies, discreetly paid him millions of dollars in exchange for the coalition's agreement to not oppose FirstEnergy's request to the PUCO to collect more money from customers.

Of the \$13.2 million FirstEnergy paid between 2016 and 2019 for the coalition's silence, prosecutors have said, Randazzo pocketed \$5.4 million. They say he deployed similar tactics to steal \$1.2 million from his clients' settlement with another electric utility.

By 2019, FirstEnergy – via CEO Chuck Jones and senior vice president of external affairs Mike Dowling – saw an opportunity to persuade a new governor to appoint Randazzo to head the PUCO. They succeeded in convincing DeWine, and paid Randazzo \$4.3 million in January 2019 before DeWine appointed him one month later.

The three men denied wrongdoing and pleaded not guilty, holding that the \$4.3 million wasn't a bribe but the buyout fee on Randazzo's consulting contract.

Randazzo never publicly disclosed his relationship with the company. His financial disclosures list no consulting income from FirstEnergy or ownership of the two companies at issue. As PUCO chairman, he led several regulatory rulings in FirstEnergy's favor, and he lobbied in support of bailout legislation the company aggressively pushed. Ex-Ohio House Speaker Larry Householder is currently serving a 20-year sentence for his championing of the bailout.

In July 2020, the FBI arrested Householder and four conspirators, setting into motion a series of events that would include two convictions, three guilty pleas, three more indictments and two alleged conspirators' suicides.

Before Randazzo was arrested, he appeared before state lawmakers as PUCO chairman and was directly asked if he was paid by FirstEnergy. At the time, he said he had never worked for FirstEnergy as a lawyer or registered lobbyist, a statement that while technically true was highly misleading.

He resigned as PUCO chairman after FBI agents were seen raiding his condominium in Columbus in October 2020. By the next summer, FirstEnergy struck a deal with federal prosecutors, agreeing to pay a \$230 million penalty and admit to bribing both Randazzo and Householder.

State prosecutors meanwhile fought all the way up to the Ohio Supreme Court to freeze millions in Randazzo's brokerage account out of fear he'd spend down the proceedings before the state could win any criminal or civil judgements. The justices sided with the state, a ruling that mounted new financial pressure against Randazzo as prosecutors moved toward criminal charges.

Jones and Dowling still await trial, and Ross has yet to set a date. At their hearing Friday, Ross indicated she was likely to side with FirstEnergy on a pre-trial motion to compel the limited release of grand jury testimony. State prosecutors indicated they plan to appeal,

meaning further delays are likely. Both men have pleaded not guilty, insisting the money they paid to Randazzo amounted to lawful consulting work and not a bribe.



Stories by Jake Zuckerman

- State prosecutors nix ex-FirstEnergy executive's deposition, leaving criminal charges on the table
- As leadership vote looms, House Speaker Jason Stephens is giving up the gavel: Capitol Letter
- After narrow vote, Ohio accepts \$17 million increase from feds for refugee aid

Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.

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State prosecutors nix ex-FirstEnergy executive's deposition, leaving criminal charges on the table

[cleveland.com/open/2024/11/state-prosecutors-nix-ex-firstenergy-executives-deposition-leaving-criminal-charges-on-the-table.html](https://www.cleveland.com/open/2024/11/state-prosecutors-nix-ex-firstenergy-executives-deposition-leaving-criminal-charges-on-the-table.html)

November 19, 2024

1. Ohio Politics

Published: Nov. 19, 2024, 10:45 a.m.



FirstEnergy headquarters in Akron, Ohio

By

Jake Zuckerman, jzuckerman@cleveland.com

COLUMBUS, Ohio – State prosecutors moved to squash a looming deposition of a former top official of FirstEnergy Corp., signaling they're considering new charges in a long simmering bribery investigation.

Eileen Mikkelsen, formerly the company's vice president of rates and regulatory affairs, is scheduled to testify under oath in a regulatory investigation early next month, one of seven since-ousted company officials subpoenaed in the case before the Public Utilities Commission of Ohio. But Ohio Deputy Attorney General Carol O'Brien asked the regulators to back off, warning that the deposition could grant her immunity, preventing prosecutors from charging her with any crimes.

"We have reservations concerning any grant of automatic immunity concerning Ms. Mikkelsen [sic]," O'Brien wrote. "We ask that she not be compelled to testify to avoid triggering the statutory immunity."

Under state law, witnesses subpoenaed by the PUCO must testify, even if their answers are self-incriminating. But conversely, prosecutors can't charge them for "any transaction or matter concerning which he has testified."

A spokeswoman for Attorney General Dave Yost declined to comment on the filing. Cleveland.com and The Plain Dealer reached out to an attorney for Mikkelsen.

If the prosecutors were to seek charges, Mikkelsen would be the ninth person (and third former FirstEnergy employee) criminally accused in what prosecutors have called the biggest bribery case in state history.

FirstEnergy in 2021 "separated" Mikkelsen for what it described to the U.S. Securities and Exchange Commission as "her inaction regarding the amendment in 2015 of a previously disclosed purported consulting agreement" with Sam Randazzo, who in 2019 was appointed by Gov. Mike DeWine as chairman of the Public Utilities Commission of Ohio.

A company solely owned by Randazzo received more than \$22 million from FirstEnergy between 2010 and his February 2019 appointment to become head of the regulatory body responsible for regulating power companies like FirstEnergy.

FirstEnergy has admitted that its former executives – CEO Chuck Jones and senior vice president of external affairs Mike Dowling – paid Randazzo a \$4.3 million bribe in January 2019 in exchange for preferable rulings in regulatory cases and lobbying help supporting a bailout for the company's nuclear plants. State prosecutors charged all three men with dozens of bribery offenses. Jones and Dowling await trial, while Randazzo died by suicide in April while under both state and federal indictment.

Jones and Dowling, who have pleaded not guilty, say the money wasn't a bribe but a termination fee on their 2015 consulting contract with Randazzo. In exchange for the money from the consulting contract, Randazzo, who represented a group of large and influential industrial companies buying energy in bulk, agreed not to oppose FirstEnergy's rate case at the PUCO.

The company is now cooperating with state and federal prosecutors. Its current lawyers say the company was under no legal obligation to pay Randazzo the \$4.3 million, but Jones and Dowling did anyway.

A jury in March 2023 convicted ex-Ohio House Speaker Larry Householder of accepting tens of millions in bribes, enriching him both personally and politically, in exchange for his work as the driving inside force behind a \$1.3 billion bailout that would solely benefit FirstEnergy. Prosecutors say Jones and Dowling engineered a scheme to discreetly pay both Householder and Randazzo to do the company's bidding from the inside.

Mikkelsen's precise role involving Randazzo's 2015 contract is unclear. In a 2016 filing to the PUCO, FirstEnergy – with Mikkelsen listed as a witness – wrote that it entered “no contracts and/or agreements” involving its PUCO rate case (technically known as an “electric security plan”) at the time.

Texts and emails released via the ongoing criminal, civil and regulatory investigations into the matter show Mikkelsen helped broker the 2015 contract. For instance, in March 2015, another company executive sent her an email from Randazzo with the subject line “CONFIDENTIAL SETTLEMENT DISCUSSIONS” outlining issues around FirstEnergy's Electric Security Plan. By November of that year, Dowling texted her to say that “Sam is on board with the agreement” and telling her some of the terms.

“Great,” she replied, later getting word that Randazzo had filed the agreed-upon non-opposition letter in exchange.

In February 2020, company lobbyist Justin Biltz sent a text to Mikkelsen to tell her that “Mike talked to Sam Randazzo today” about FirstEnergy's previously scheduled 2024 rate review, which company officials believed would force them to lower costs for customers. Biltz told Mikkelsen that “Sam threw out some ideas” that they should learn more about.

“Thanks. I am in the office and look forward to the discussion,” Mikkelsen wrote back.

A ruling from Randazzo ultimately nixed the rate review, prompting celebration inside the company and a jump in its share price. Prosecutors have framed this as one of the key elements of the Randazzo bribe.

FirstEnergy didn't report Mikkelsen's annual salary in annual financial reports, but SEC filings show she directly owned more than \$740,000 in shares as of March 2019.

Sources have said to Cleveland.com and The Plain Dealer that they believe the office of U.S. Attorney for the Southern District of Ohio Ken Parker has finished its probe, although Parker has denied this and said an investigation is ongoing. But the state prosecutors' interest underscores that the prosecution continues even six years after FirstEnergy paid Randazzo the alleged bribe.

At Parker's behest, the PUCO for 18 months froze its investigation into FirstEnergy's political operations. The Ohio Consumers' Counsel, a state agency that represents ratepayer interests, recently began a stretch of seven long-sought interviews of former FirstEnergy lawyers and lobbyists.

However, the first two lobbyists – Joel Bailey and Biltz – refused to testify. State law says anyone subpoenaed by the PUCO must testify, even if the answers may be incriminating. In exchange, those who testify can't have their words held against them in a state case. But attorneys for both men said this wouldn't shield them from federal prosecution. A PUCO judge is set to rule on whether the Fifth Amendment claims are legitimate. A lawyer for Ty Pine, another former lobbyist, indicated he too would refuse to answer questions.

Maureen Willis, who runs the consumers counsel, said Mikkelsen's deposition will be canceled. While the prosecution blocked the nuclear bailout, she emphasized that Ohioans are still paying for a separate coal bailout that was tacked onto HB6 as a political concession.

"Justice continues to unfold in the ongoing House Bill 6 scandal. While we seek answers for FirstEnergy's utility consumers, we will not interfere with the state's criminal investigation," she said. "We continue to push for justice for all Ohioans through repeal of the \$500,000 per day coal subsidies consumers still pay under tainted House Bill 6."

The recent depositions, which in an unusual twist are open to the public, are also looming for FirstEnergy's former vice president Dennis Chack, CEO Steven Strah, and senior vice president and chief legal officer Robert Reffner.

Householder is currently serving a 20-year sentence. He was convicted alongside Matt Borges, a lobbyist (and former Ohio Republican Party chairman) hired by the company, who was sentenced to five years. Two conspirators – political operative Jeff Longstreth and lobbyist Juan Cespedes – pleaded guilty and testified against Borges and Householder. Neither man has been sentenced in the nearly two years since they testified, raising questions of whether they're being held in reserve for another case.

Lobbyist Neil Clark was also accused of participating in the scheme. He died by suicide before trial in 2021.

Summit County Common Pleas Judge Susan Baker Ross hasn't yet set a trial date for Jones and Dowling.



Stories by Jake Zuckerman

- Ohio nears plea deal with companies of ex-PUCO chair accused of taking a \$4.3 million bribe
- As leadership vote looms, House Speaker Jason Stephens is giving up the gavel: Capitol Letter
- After narrow vote, Ohio accepts \$17 million increase from feds for refugee aid

Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.

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Matt Levine's Money Stuff: Insider Trading at the Fed

By Matt Levine 2024-11-19T13:31:17794-05:00

Fed insider trading

The basic theory of bank regulation is that, left to their own devices, bankers would make banks too risky, so regulators and supervisors are there to make banks more boring. A bank is, roughly, a big pot of assets bought with depositors' money; the bank owns essentially an *option* on those assets. If the assets go up, the bank gets a highly leveraged return; if the assets go down, the losses are largely the depositors' (or the taxpayers') problem. "Heads I win, tails you lose," etc., you know all this stuff.

And so banks have incentives to buy high-risk, high-return assets with as much leverage as possible, and risk-based capital regulation and prudential bank supervision counteract those incentives. The bankers — who own stock in their banks and get paid bonuses for making money — push for more risk and more volatility, and the bank supervisors push back.

What are the supervisors' incentives? Well, they get paid government salaries, with no bonuses for bank profitability. They probably find bank blow-ups stressful and try to avoid them. I suppose they think a bit about their future employability in the private sector, which probably motivates them to be stricter. They seem to have roughly the proper incentives to be boring.

And so if a bank comes to its examiner at the Federal Reserve and says "hey we lost all our money," the examiner will be sad. If the bank comes to its examiner and says "hey we actually made a gigantic profit this quarter," the examiner will (1) not be nearly as happy as the bankers are (*she* doesn't get a bonus!) and (2) in fact be a little sad, suspecting that the bank might have made that gigantic profit by engaging in unsafe and unsound banking practices. She will dig deeper into what the bank is up to. Any volatility, positive or negative, is a warning sign for her.

You could imagine a bank examiner counteracting those incentives. After all, she is frequently getting material nonpublic information about the banks she examines. If that information is spicy, she could *trade* on it: If a bank has a disaster, or a windfall profit, she could buy put or call options to profit from the news. That way, the more volatile the banks are, the more money their regulators could make.

This is obviously illegal insider trading, but it is *also* bad bank supervision. What you do not want, in a bank supervisor, is for a bank to come in and say “oops we lost all our money” and for the supervisor to be like “ahh sweet this is gonna buy me a boat.”

Here's this guy:

A former examiner and senior banking supervisor at the Federal Reserve Bank of Richmond illegally traded using nonpublic information about Capital One Financial Corp. and New York Community Bancorp Inc., the Securities and Exchange Commission said.

Robert Brian Thompson's personal brokerage trading activity allegedly violated prohibitions on trading in bank securities, given the conflicts of interest his supervisory and regulatory responsibilities presented, according to the SEC's complaint filed Nov. 8 in the US District Court for the Eastern District of Virginia. Thompson also attempted to evade scrutiny by submitting false conflict-of-interest certifications to the Fed, the SEC said.

Here are the [SEC complaint](#) and the parallel [criminal case](#). It's just very bold:

Between January 18 and January 26, 2024, Thompson learned, via work-related communications with other Federal Reserve staff, that NYCB would soon be announcing substantial, unexpected losses related to loans it acquired as part of its March 2023 acquisition of a distressed bank, Signature Bank N.A. (“Signature Bank”). ...

On the morning of Monday, January 29, 2024, at approximately 9:56 a.m., Thompson messaged a different colleague asking for a “sneak peek at whatever the issue is [with] NYCB so I can get a head start on [another bank's] exposure that we know is coming.” The other bank Thompson referred to was another bank in the Large Banking Organizations portfolio that acquired a different distressed institution in March 2023 under circumstances similar to NYCB's acquisition of Signature Bank that same month.

Less than two hours after emailing his colleague, on January 29, 2024, between approximately 11:13 a.m. and 11:38 a.m., Thompson purchased a total of 1,600 out-of-the-money put option contracts with an expiration date of February 16, 2024 – contracts that would allow Thompson to make money if NYCB's stock price fell by the February 16 expiration date – in the Thompson Accounts at a total cost of approximately \$14,495.

Thompson's January 29 NYCB put option purchases accounted for more than 99% of the total trading volume in those put options on his purchase date.

A senior supervisor at the Fed learned that one of the banks he supervised would be “announcing substantial, unexpected losses,” so he allegedly *bought put options*. Incredible stuff! The news came out, the stock dropped, and Thompson sold the puts and “and obtained ill-gotten profits of approximately \$505,527 – representing a return of approximately 3,745.2% in less than a week.” He allegedly manufactured a half-million-dollar bonus for himself from bad banking news.

Obviously you are not supposed to do this, because insider trading is illegal, but I am just hung up on the incentives here. If you are an insider trading bank supervisor, you want drama. You don't even care if it's good or bad, as long as it is dramatic and unexpected. Your incentives are much *worse* than the bankers'! Bankers are perhaps more willing to take risks with depositor money than is socially optimal, but they still prefer to make money. *You* don't care! If a banker comes to you and says “I want to light all the money in the vault on fire, is that consistent with safe and sound banking practices?” you'll be like “sure go nuts that sounds perfect” and buy some put options.

Empty voting

Shareholder democracy is weird because you can just buy votes. In fact, that's kind of the point: Each share of a public company usually has one vote, so if you want to take control of the company, all you have to do is buy enough shares to win a shareholder vote. (Conservatively 50% plus one, but probably less, if you can get other shareholders to join you and/or they don't vote.) The voting power is generally proportional to the economic ownership of the company; the more you own, the more say you have.

But it is reasonably easy to hedge stock. If you own a lot of stock of a company, and you want to (1) continue owning that stock but (2) not be fully economically exposed to the risk of the stock price, you can probably find a way to do that. Most simply, you could (1) buy 10 million shares of stock and (2) also borrow 10 million *other* shares of stock and sell them short. You're long 10 million shares and short 10 million shares, so you have net zero exposure: If the stock goes up (or down), you will make (lose) money on the 10 million shares you own, and lose (make) an exactly offsetting amount of money on the 10 million shares that you are short. But you get to vote the 10 million shares that you're long, while you don't get *negative* votes for shares you are short. So you have zero economic ownership but 10 million votes.

Or you can do a derivatives trade — a swap or collar, say — that gets you to more or less the same place, long 10 million shares “physically” (you own them and can vote them) and short 5 or 8 or 10 million shares “synthetically” (you have a derivative with a bank to reduce your economic exposure).

The fun question, which people email me about from time to time, is: What if you go long 10 million shares and short 20 million shares? Then (1) you get to vote 10 million shares and, as a big economic owner, you have a say in the running of the company, but (2) you actually profit if the company does *badly*, so your voting incentives will be bad.

If you are the chief executive officer of a public company, and you are facing a proxy fight from an activist hedge fund, a sensible thing to do might be to call up your buddy who runs an investment firm and say “hey it would help me out a lot if you’d buy 9.9% of my company’s stock and vote for me.” (That number, 9.9%, is a magic one; going over 10% would make your buddy an insider subject to various [disclosure and trading rules under Section 16 of the Securities Exchange Act](#), but 9.9% is mostly okay. If you need more help, call *two* buddies and ask them to buy 9.9% each.)

And your buddy might say “sure happy to help but my investment firm has concentration limits and I can’t really own 9.9% of your company.” (Or he might say “I’d love to help, but your stock is not that great an investment, that’s why you’re in a proxy fight, because you are doing a bad job running your company.”) And so then you might say “okay, but why not buy 9.9% of my company and also short 9% of it, so that you don’t have much economic exposure, but you do have a lot of votes and can do me a solid.” And then your buddy might say “oh fine I guess, that’s not a big deal, I’ll do it.”

This will cost your buddy *something* — buying and shorting big chunks of the company will incur transaction costs from doing the trades, and stock-borrow costs for the short — but you could probably keep those costs pretty manageable. Buy and sell simultaneously, so you’re not pushing the price around too much, and save on borrow costs by not doing the trade for very long: Buy and short a ton of stock right before the record date for the shareholder vote, vote your stock, and then get out of the position.

Over the last couple of years, an activist hedge fund, Politan Capital, waged a long proxy fight against the management of a medical technology company called Masimo Corp. It took a long time, because Masimo’s board of directors serve staggered three-year terms, so Masimo had to win two proxy fights, a year apart, to get control of the board. But it did. In September, Masimo’s founder, Joe Kiani, resigned, and Masimo’s appointee took over as chief executive officer.

We talked about this in September, when Politan won its fight. We also talked about it in July, when Politan [accused Kiani](#) of this sort of “empty voting”:

We have observed that a brokerage firm associated with an investor who is a friend of Kiani voted a major position – approximately 9.9 percent of the company’s outstanding stock – in favor of the company’s nominees. The number of shares voted at this brokerage firm exceeded the shares publicly reported to be owned by this investor by several multiples. That excess amount was accumulated at the brokerage in the period running up to the record date and then disposed of out of the same brokerage right after the record date. These share movements corresponded almost exactly with movements in and out of brokerages associated with firms that lend shares in the market. Further, in the same period of these share movements, the short interest in Masimo stock increased by similar amounts.

Upon reviewing this data, which was first made available to us on Monday, July 1, we believe it is likely that this investor has engaged in a pattern of trading that is known as “record date capture” and “empty voting” that provides the investor the ability to vote shares of which they do not have economic exposure.

Well, Politan won anyway, which means that it now controls Masimo. Which means among other things that now *Masimo* can sue Kiani and his buddy — actually buddies, Roderick Wong and Naveen Yalamanchi of RTW Investments — for empty voting. And last month it did; [here is the complaint](#). (I learned of the lawsuit from [Michael Levin at The Activist Investor](#).)

Actually you can’t really sue anyone for empty voting. Or maybe you can, this is not legal advice, but as far as I can tell empty voting is perfectly legal; it rubs people the wrong way and has the obvious potential for mischief, but “you can vote the shares you own” and “you can hedge the shares you own” are both fairly uncontroversial statements, and you can combine them straightforwardly. Masimo’s lawsuit is more technical: The theory is that, because Kiani and RTW were working together to win the shareholder vote, they formed a “group” under Section 16, putting them over that 10% limit. So, while RTW kept its stake to 9.9%, if you add that 9.9% to Kiani’s own 9.1% stake, you get 19%.

Still not enough to win the vote, it turns out, but enough to cause trouble. Specifically, if a group owns more than 10% of a company’s stock, it can’t do “short-swing insider trading”: If you buy stock and then sell it within six months, you have to give up your profits to the company. RTW bought a lot of stock before the record date and sold it after; to the extent the sale prices exceeded the purchase

prices, Masimo wants that money.

Also, the rules say that 10% shareholders — including groups — aren't allowed to sell stock short, which is pretty important to the empty voting trade. "Accordingly," says the complaint, "the short selling RTW engaged in to effectuate the empty vote scheme violated Section 16(c)," though it's not clear what Masimo can do about it. Getting the money back from the short-swing profits would be something, though.

I don't know; it is a weird gray area. People mostly seem to think that empty voting is bad, because it separates voting incentives from economic ownership: You want the people making decisions about the company to be the ones who benefit from good decisions, not ones who are neutral or even short. But it does seem to be *allowed*. This lawsuit is a creative attempt to say "actually it's not allowed," but I don't know if it will succeed, and if it does succeed the damages might be fairly small. This case might just call attention to it, which might make it more common: If activists and managers know that empty voting is a viable option, they might end up doing it more often.

Merger arb

I wrote last week about two ways to think about merger arbitrage. One is "merger arbs bet on which mergers will close"; they are in the business of being smarter about mergers than anyone else, and are rewarded for betting correctly. The other is "merger arbs provide liquidity to shareholders of merger targets"; merger arb is a sort of market-making function, a convenience for other investors that is, in expectation, rewarded.

In both models it's important to know which mergers will close: Like any other liquidity provider, you don't want to be run over by adverse selection, and buying up all the shares of the target of a merger that doesn't close is ruinous. But there is a difference of emphasis. For one thing, if your job is being really good at predicting which mergers will close, you might *short* the stocks of targets of deals that you think *won't* close: An edge is an edge, and you can use your predictions either way. Whereas it is harder — not impossible, but a bit harder — to tell a liquidity provision story about betting *against* mergers.

Anyway reader Ilan Katz emailed with a third model, or perhaps a variant on the first: "There's a third group who, in my estimation and professional experience, make a ton of money, and that's groups who short potential mergers not by predicting which will get held up but by being the actual force that

held them up.” He compared this approach to Kyle Bass’s approach of shorting biotech and pharmaceutical stocks and then litigating over patents. “Trust me when I tell you there are people doing that with merger arb, and for them Lina Khan was much, not a little, better.”

A world in which a lot of mergers get blocked is a world in which you can make a lot of money betting on *or against* mergers, and if you are betting against mergers you can do things to stop them. You try to get the Federal Trade Commission worried about anticompetitive effects, for instance. A world — one assumes, the world of the Trump administration’s antitrust policy, though who knows — in which there are tons of mergers and they are all waved through is a world where you can make a fair spread by doing merger arbitrage, but there is less opportunity for big fun.

That said, you can imagine *other* ways to block mergers, beyond calling in the antitrust authorities. This section is after the empty voting section for a reason. Public-company mergers generally require a vote of the target’s shareholders. Here’s a trade:

- 1. Company X is trading at \$35, and announces a merger in which Company Y will buy it for \$50.
- 2. Company X’s stock trades up to \$46, as merger arbitrageurs provide liquidity, confident that the FTC won’t stop the deal.
- 3. *You* buy 9% of Company X’s stock, and also *short* 18% of Company X’s stock.
- 4. You vote against the deal.
- 5. A few other people independently — not as part of a group! — get the same idea and do the same thing.
- 6. Boom, the deal collapses, Company X trades back to \$35, you lose a ton of money on your 9% stake but make twice as much money on your short.

For a lot of reasons, this does not strike me as very practical, and I don’t think I’ve ever seen it happen. But maybe it will one day.

AI IR

Okay but [what if your quarter is bad](#):

Executives at many companies are using AI to refine word choice in their prepared remarks, for

instance, in deciding whether to say the quarter was “strong” or “solid,” said Dan Sandberg, head of quantitative research and solutions at S&P Global Market Intelligence. The firm’s tool recently preferred “strong,” based on the earnings metrics of other companies that used the word on their earnings calls, he said.

That paragraph is from a delightful Wall Street Journal story about how corporate investor relations departments are using generative artificial intelligence to write earnings releases and prepared remarks and to anticipate analysts’ questions on earnings calls. One problem here is that the people *consuming* earnings information are largely filtering it through AI models at this point, so the companies *producing* that information are also filtering it through AI models. Eventually all human communication will be filtered through two layers of large language models — one for the writer and one for the reader — and everyone will see through a pleasant haze of LLM optimism. I wrote last month:

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

If an LLM is writing earnings remarks for other LLMs, why would it say the quarter was “disappointing”? Every quarter is always strong. From the Journal:

In recent quarters, Skechers has used an AI tool to see whether recent earnings commentary aligns with the brand’s intended messaging, Chief Financial Officer John Vandemore said.

The move is aimed at gauging whether investors’ AI tools—which they may use to digest earnings reports instead of actually listening to calls or reading company materials—would spit back the same key messages Skechers expects, he said.

“The reality is a lot of investors are going to gravitate to using tools like that,” Vandemore said. “So we want to make sure as we prepare and deliver messages that if they go through that analysis ... what comes back is consistent with the objectives of the messaging we’re attempting to deliver.”

“We use an AI to tell us if the AI that our investors use will tell them what we want it to tell them.” Just seems very indirect. And:

Generative AI can also read the harmonics in executives' prepared statements on earnings, assessing them as upbeat, gloomy or something more measured, said Steve Soter, vice president at business-reporting software provider Workiva.

"Is the CFO worried or optimistic, and could that give some indication as to how future performance is going to look for the company?" Soter said, describing the sort of possibly unintended information that AI can catch before it goes out.

It would be fun if the CFO had a dial she could turn from "worried" to "optimistic," and the AI would fine-tune the language to make sure that the remarks convey the proper level of worried/optimistic to the AIs that are reading it. In practice though you're probably always going to set the nonspecific tonal dial to "optimistic," because that is what the AIs reading it will want.

Things happen

' I Smuggled Code': An Executive's Admission in Heated Brokerage Feud. DOJ Will Push Google to Sell Chrome to Break Search Monopoly. Building-Products Distributor [QXO](#) Makes Bid for Beacon Roofing. Super Micro Soars After Hiring New Auditor in Bid to Stay Listed. The rehabilitation of [KPMG](#). Blackstone Strikes Deal for [Jersey Mike's](#) Subs. Citadel's Ken Griffin Says Multistrategy Hedge Fund Boom Is Over. [Car-Loan Delinquencies](#) Aren't Scaring Off Wall Street. How [Spirit Airlines](#) Went From Industry Maverick to Chapter 11 Bankruptcy. Chinese tech groups build [AI teams](#) in Silicon Valley. Founder of [Crypto 'Mixer' Helix](#) Sentenced to Three Years. Oakland [accidentally published](#) a report saying the city could face bankruptcy. [Forklift racing](#). [Dull men](#).

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- 1. Not always, and we often talk about the dual-class exceptions around here, but usually it's one share one vote.

- 2. Rather, generally, the people who loaned you the stock don't get to vote their shares; the people who bought the shares from you when you shorted them do. The possibility of confusion exists.
- 3. Not legal advice and we'll talk more about "groups."

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Matt Levine's Money Stuff: Palantir Delivers the Tendies

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Palantir Delivers the Tendies

By Matt Levine 2024-11-18T14:25:36267-05:00

Palantir

One theme of this column is that public companies should do stupid stuff to make their stocks go up. Not exclusively! They should also do a good job of running a profitable business. It's just, if the opportunity presents itself to non-fraudulently make your stock go up for stupid reasons, why not take it?

I often write about this in the context of meme stocks. The paradigmatic example is that Adam Aron, the chief executive officer of AMC Entertainment Holdings Inc., did a YouTube interview in which he was apparently not wearing pants. Retail investors — well, some retail investors anyway — love this! “It is good for your stock if you do interviews with no pants” is, sometimes, approximately true. But AMC also bought a gold mine and gave shareholders popcorn. Its shareholders enjoy some good comedy, and AMC *provides* them with that comedy, with what I can only assume is a well-thought-out strategy of giving the shareholders what they want. Sometimes what they want is dumb.

There are three main arguments for maximizing your stock price using stupid means:

1. As a matter of corporate finance, if your stock price is high, you can get cheap financing: You can sell stock at high prices, or use your stock as currency to do acquisitions or pay employees. Having a high stock price is good for your business.
- 2. As a matter of your fiduciary responsibility to maximize returns for your shareholders, if your stock price is high, they are happy, because they are making money.
- 3. As a matter of your fiduciary responsibility to make your shareholders happy more generally, the high stock price *indicates* that they are happy. One thing that shareholders stereotypically want is high and growing

profits, but that is not always the only thing they want. If you are not particularly profitable, but the stock is trading at 1,000 times earnings because the shareholders are delighted with your antics, then, I mean, you are doing your job aren't you? The antics are your job.

I don't know how seriously I mean any of this. At least a little bit. But there is a counterargument. The counterargument is something like: "The important thing for a company is to do a good long-term job of running a profitable business. Doing stupid stuff to juice the stock price does not *necessarily, in theory*, prevent a company from also doing a good job on its business. But in practice executive attention is limited, company culture is important, and a CEO who wakes up thinking 'what interviews can I do with no pants today' is not one who is laser-focused on building a great business for the long term."

On the Money Stuff podcast last month, I tried to ask John Collison, the co-founder of Stripe, about initial public offering structure, and he shut me down:

I find all the debates about IPO mechanics really uninteresting because it just doesn't matter. If you have a great business that's valuable for customers that millions of people use and makes money as a result, you can do whatever you want. ... You can have the world's best IPO plan. And if the business isn't good, it doesn't matter. ... Build a great business and you could write your prospectus on a cocktail napkin and it'd be fine.

You could take that view generally about all sorts of stock-price-management antics. The thing that matters is building a great business; any time spent thinking about the mechanics of managing the stock price — whether through traditional means like stock buybacks, or comedic means like AMC's — is misspent.

One possible synthesis of these views is something like: "If you can conveniently do dumb stuff to boost your stock price, go ahead, but don't spend all your time thinking about it, and certainly don't *talk* about it. Don't go around saying 'we're doing stuff to boost our stock price'; go around *talking* about the great business that you are building for the long term. But, sure, occasionally do some stock-price stuff if it's not too much trouble."

I don't know if that is the right synthesis, but I get the sense it is a popular one. Nobody's going to turn down a quick stock-price boost, but talking about it is viewed as unseemly.

For instance, here is Luke Kawa at Sherwood on Friday:

The decision by Palantir Technologies to move its share listing from the NYSE to the Nasdaq could spur another wave of buying from exchange-traded funds that track the Nasdaq 100.

The X account of Alex Moore, a board member at the company, tweeted the quiet part out loud. Quite colorfully.

Per screengrabs of the message:

"We are moving @PalantirTech to Nasdaq because it will force billions in ETF buying and deliver 'tendies' to our retail investors. Player haters be aware that we've been hated for decades (plural). Everything we do is to reward and support our retail diamondhands following."

The tweet, and the account itself, no longer exist on X.

Right? Like someone came in and said to Palantir's board "hey if you move from NYSE to Nasdaq you will be in the Nasdaq 100 index, and Nasdaq 100 ETFs will buy your stock, and your stock will go up without any changes in your business." And Palantir's board was like "well right sure why not, that seems easy enough, it's good if the stock goes up and this won't distract us much from our actual business." And so Palantir decided to move, and put out a simple sober press release saying that, "upon transferring, Palantir anticipates meeting the eligibility requirements of the Nasdaq-100 Index," but not *gloating* about it or anything. Certainly not saying "this will juice the stock price to make our retail shareholders happy." *Certainly* not saying that in Reddit-speak, with "tendies" and "diamond hands." Sure sure sure sure sure that's what Palantir is *doing*, but it is embarrassing to *say* it.

But then Moore said it! And then deleted it, because it's embarrassing. "Everything we do is to reward and support our retail diamondhands following." That is a plausible philosophy of public company management! I have kind of endorsed it! It is not the *standard* philosophy. The standard philosophy would be more like "everything we do is to provide value to our customers, so that we can build an enduring and profitable business and create value for all of our stakeholders in the long run." The stock price is, traditionally, a simple *indicator* of success in that more complex and fundamental undertaking. But sometimes you do stuff for the stock price.

MicroStrategy

Sometimes, though, you find a stock-price-management strategy that is so good that the only reasonable reaction is to chuck out your operating business and spend all your time issuing stock. MicroStrategy is having a great time:

MicroStrategy Inc. bought a record \$4.6 billion in Bitcoin, making good on plans announced last month to tap capital markets to accelerate purchases of the cryptocurrency. ...

MicroStrategy tapped its so-called at-the-market program to sell 13.6 million shares into the market over the week ending Nov. 17, the filing showed. ...

Investors are on board with the strategy. The company's stock price is up over 400% year-to-date, making it the second-best performer among major stocks followed by Bloomberg after Applovin Corp.

Here is MicroStrategy's Form 8-K filing. We talked last month about MicroStrategy's plan here, which is pretty straightforward. MicroStrategy is essentially a pot of Bitcoins: Currently it owns 331,200 Bitcoins, and Bitcoin is trading at around \$91,000, making MicroStrategy's pot worth about \$30 billion. It also runs an enterprise software business but that hardly seems relevant. MicroStrategy's market capitalization is about \$84 billion, meaning that it trades at well over a 150% premium to the value of its Bitcoins. So it can sell \$1 worth of stock, buy \$1 worth of Bitcoin, and add \$2.50 of market capitalization. It can create value out of nowhere.

The natural response to discovering this magical phenomenon is to ask "well, okay, but how *much* of this can we do?" That was MicroStrategy's response — it would absolutely be mine! — and it hasn't found the limit yet. It did \$4.6 billion of stock sales, and \$4.6 billion of Bitcoin buying, *last week*. Its stock was up, Bitcoin was up, and its premium to Bitcoin also went up modestly.

My usual assumption with stuff like this is "arbitrages close." Like, if MicroStrategy is a pot of Bitcoin trading at a premium to the value of its Bitcoin, then the natural arbitrage is to (1) sell MicroStrategy stock and (2) buy Bitcoin. This is a bet that eventually the gap will close, and also it should help *cause* the gap to close, because selling MicroStrategy tends to push down its price and buying Bitcoin tends to push up *its* price. I am not recommending that *you* do that — that's super risky! nothing here is investment advice! — I am just saying that *MicroStrategy* can do that, and should, and does. Except that it doesn't reduce the premium! What if, the more stock MicroStrategy sells to buy Bitcoin, the more the premium goes up? A real perpetual motion machine.

Anyway, if *I* found a way to magically create billions of dollars of value out of nowhere, I would absolutely (1) do that, (2) see how much of it I could do, and (3) possibly spend somewhat less time thinking about my enterprise software business? "We work hard to provide value to our customers and build a long-lasting business," *why*, this is so much easier and better!

AI financing

I think a lot about how OpenAI, when it raises money from investors, tells them that "It would be wise to view any investment in OpenAI Global, LLC in the spirit of a donation, with the understanding that it may be difficult to know what role money will play in a post-AGI world." OpenAI, these days, has real and growing revenue (from selling subscriptions to its consumer chatbot, etc.), much bigger expenses (from spending tons of money training models), and an enormous market valuation driven by the assumption that eventually that will flip. But *OpenAI* doesn't encourage that assumption, at least, not officially. OpenAI's marketing is like "sure eventually our expenses might come down, but if all goes well our revenue won't go up in ways that you can understand; instead we will *transcend money*." It's honestly a great pitch, I love it.

It is probably best to interpret this as mostly OpenAI doing very clever marketing. ("Business negging," I have called it.) But there is plausibly *something* true about it. What if the move toward artificial general intelligence *does* reshape the economy in hard-to-predict ways that will unsettle the value of money? Like in some ways the possible paths for artificial intelligence are:

Extreme bull case: Transcend money, new abundance society, etc.

- Moderate bull case: Very valuable chatbots, more efficient professional services firms, easy to code up a new product for your startup, huge new economic possibilities unleashed by widely available outsourced brainpower, etc.
- Moderate bear case: Mostly hype, AI progress stalls at current levels, hundreds of billions of dollars of investment are wasted, etc.
- Extreme bear case: Skynet, *The Matrix*, extinction of humanity, etc.

I don't know, it's just an interesting story to try to *finance*. Normally you're like "we plan to build a widget factory that will make a million widgets a month, which we think we can sell for \$20 each," and you sort of figure out the cash flows and go out to raise debt and equity capital against them. Banks will lend you some of the money to build the factory, figuring that (1) *some* of those cash flows are reasonably certain and/or (2) even if you go bust as a widget manufacturer, the building and machines will be worth something to someone else. And equity investors will give you the rest of the money, hoping that you'll be good at making widgets and you'll make money.

But for the AI buildout the pitch is pretty much "we need several trillion dollars to build stuff that nobody can entirely conceive of right now, and we don't really have an economic model of how it will make money, but it is so cool that the money will probably take care of itself, unless we transcend money, which would be cool too." And you can do it!

Bloomberg's Neil Callanan, Gillian Tan, Tasos Vossos, Carmen Arroyo and Immanuel John Milton report:

While much of the speculative hype around AI has played out in the stock market so far, as seen in chipmaker Nvidia Corp.'s share price, the giddiness is spreading to the sober suits of debt finance and private equity.

Analysis by Bloomberg News estimates at least \$1 trillion of spending is needed for the data centers, electricity supplies and communications networks that will power the attempt to deliver on AI's promise to transform everything from medicine to customer service. Others reckon the total cost could be double that.

Even Wall Street skeptics on AI's ultimate money-making potential, such as Goldman Sachs Group Inc.'s head of equity research Jim Covello, have said it's worth staying invested in those who provide the plumbing. The wealth of Silicon Valley's and Seattle's tech giants, who want some of this capacity anyway for cloud storage and the like, offers a degree of comfort.

I suppose the explanation is some combination of (1) AI is pretty cool so everyone wants to be involved, and if you're a lender that means lending to AI stuff, (2) "lending to AI stuff" tends to mean financing power plants and data centers that have pretty general uses, so you're not reliant on any particular AI company or thesis succeeding, and (3) the economic model is, in the short term, something like "large highly rated companies like Microsoft and Alphabet and Meta will pay billions of dollars for chips and power, so the cash flows are actually pretty certain":

Financiers are eager to back these grand projects because future occupants have usually pre-signed long leases, making them safer bets. Some banks are offering to lend as much as 70% or 80% of the cost and occasionally more when a lease is already signed, according to a person with knowledge of the matter. ...

Lenders are more twitchy, however, about data centers explicitly earmarked for AI rather than more general purposes, according to a banker who works in the sector. Such deals can carry costlier debt and less leverage, he says, because the technology still has to prove its worth.

Separately, a senior partner at a leading private equity firm says he's troubled by the emergence of speculative development, meaning construction takes place before a tenant has been found, as it's hard to be sure of final demand. Some lawyers talk of "zombie projects" that may never be finished.

Every so often I get emailed press releases to the effect of "99% of nonfungible tokens are now worthless," or initial coin offerings, or other crypto things. And I am like "sure yes that sounds right." I guess I am used to booms that are essentially *abstract* and *online*. The experience of recent startup and crypto booms has been "a handful of people in a room can code up an app that will be worth billions of dollars, so you might as well put some money into their startup because the downside is low and the upside is high." And much of the world has developed to make this all *easier*, with cloud hosting and software tools and outsourced supply chains making it more feasible for a few people with not much capital to start useful companies. And then the AI boom is like "let's build dozens of nuclear power plants." It's nice to have a boom that the infrastructure lenders can get in on.

SRTs

Another theme of this column is that banks don't have any money. Oh, not literally; I'm partly kidding about this one too. But I have argued that, between stricter bank capital regulation and the rise of giant alternative asset managers with huge pots of money to put to work, banks are just less likely to make and hold loans than they used to be. In the olden days, a fairly standard model was "you go to a bank for a loan, and the bank gives you the loan, and if you don't pay it back then the bank loses money."

In modern banking, it is becoming more common for the model to be "you go to a bank for a loan, and the bank goes to an investor to get the money, and the bank lends you the money, and if you don't pay it back then the investor loses the money." The bank, in this model, is increasingly a *sales network*; it is in the business of having a lot of bankers who cover a lot of companies and can originate loans, but its balance sheet is precious, and it will try to find someone else to actually put up the money.

In some ways this model is obviously *safer* than the traditional model: Banks are largely funded with short-term leverage from depositors, so they are at risk of bank runs. Private credit firms and other new alternative lenders are largely funded with long-term locked-up equity capital from big investors (insurance companies, endowments) with long time horizons, so they can more safely bear the credit risk of the banks' loans. It is a move toward narrower banking.

On the other hand, there is an obvious problem with this model, one that you might remember from 2008. It is moral hazard. If a bank (1) makes loans and then (2) loses money if they don't get paid back, it will try very hard to make loans that will get paid back. If a bank (1) makes loans and then (2) sells them to someone else, who will lose money if they don't get paid back, it will try less hard. It will still try! It is good for the bank's long-term business to make good loans, so it can keep selling them to willing buyers. It's just less important for the loans to all be good, if the buyers take the losses.

Here are Bloomberg's Carmen Arroyo, Laura Noonan and Sridhar Natarajan on SRTs :

A campaign by US watchdogs to strengthen banks' balance sheets is spurring lenders to explore creative ways to reduce risks on their books. Increasingly, they're turning to significant risk transfers — a bit of Wall Street alchemy that shifts the first losses on loans for things like cars, commercial properties and corporate operations — to investors such as [EJF Capital co-founder Neal] Wilson. If the loans perform well, he can reap a tidy profit.

SRTs in the US are relatively new and very hot:

That's creating a combination of eager investors, too few deals to satiate their demand and participants on both sides who are new to SRTs — stoking concerns about the possibility that the budding market may soon be polluted with deals in which buyers accepted loose terms. Veterans say it's important, for example, to scrutinize the fine print, such as replenishment clauses that could allow a bank to jam in lower-quality loans. ...

Ideally, buyers and sellers engage in a back-and-forth over which loans to include in pools, especially in corporate debt and commercial real estate portfolios. That can help set up deals that may be renewed again and again, even if the economy shifts, until the debts are repaid.

But the influx of new investors has also meant more are willing to take a "quantitative approach" to SRTs and focus their efforts on blind pools, said Diameter co-founder Scott Goodwin. That's not something Diameter wants to do. It's still sweating over the quality of the underlying collateral before getting the transaction over the finish line, he said.

If your model is roughly "banks have the sales force to make loans, and investors have the money to take the risk," who is in charge of *underwriting* the loans? Who gets to decide which loans are a good credit risk? One obvious answer is "the banks, since they are the ones dealing with the borrowers"; the other obvious answer is "the investors, since they are the ones on the hook for bad credit decisions." A reasonable answer — Diameter's answer — is "both of them," but a plausible, "quantitative" answer is "neither of them."

Things happen

Spirit Air Files Bankruptcy, Bondholders Set to Take Control. SpaceX Share Sale Values Company Around \$255 Billion. HSBC Managers Are Competing to Keep Their Jobs in CEO's Revamp. ECB split over report showing big EU banks' capital requirements lower than US rivals. Wall Street Banks Team With BlackRock to Provide Bond Price Data. Vanguard says shareholders can vote for profits over ESG issues. Goldman Readies Plans to Spin Out Its Digital Assets Platform. Trump Treasury Cabinet Pick in Flux as Jockeying Slows Selection. Bain Capital Raises \$5.7 Billion for Global Special Situations. Singapore oil trader sentenced to 17 years for 'cheating' HSBC over \$112mn. Stealth sackings: why do employers fire staff for minor misdemeanours? \$500,000 Pay, Easy Hours: How Dermatology Became the 'It' Job in Medicine. Ken Griffin and the Big Miami Real-Estate Mystery. Hacker's Wife 'Razzlekhan' Gets 18 Months for Money Laundering. Human in Bear Suit Was Used to Defraud Insurance Companies, Officials Say.

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- 1. Depends how you count, but I'm using the closing price of the stock on Nov. 8, the week before this buying started (\$270.42 per share), times about 202.6 million shares outstanding at the time, compared to a stash of 279,420 Bitcoins and a Bitcoin price on Nov. 8 of about \$77,000. That gives you about a 155% premium (market cap over Bitcoin stash value). And then as of about noon today, the stock was at about \$372, there are an extra 13.6 million shares outstanding, MicroStrategy owns 51,780 more Bitcoins, and Bitcoin is around \$91,500, for about a 165% premium. Everything here is volatile enough that you shouldn't take these numbers too seriously, but at least it doesn't seem like the premium compressed significantly.
- 2. If you do it, you have to short MicroStrategy stock, and you could get blown up. If MicroStrategy does it, it can just create new stock, and has no real risk of getting squeezed.
- 3. I am being loose here, and there is a distinction between the bank finding someone else to fund the loan and the bank finding someone else to take on the credit risk. Often the bank goes to someone else for both things, but SRTs are mostly credit-risk transactions, not funding ones.
- 4. SRT means either "synthetic risk transfer" or "significant risk transfer," depending whom you ask.

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Palantir Director Deletes X Account After 'ETF Buying' Post (1)

By Carmen Reinicke

- Alex Moore's X post said Nasdaq move to reward retail traders
- Shares of Palantir are down Monday after record rally

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Palantir Director Deletes X Account After 'ETF Buying' Post (1)

By Carmen Reinicke2024-11-18T16:33:06558-05:00

- Alex Moore's X post said Nasdaq move to reward retail traders
- Shares of Palantir are down Monday after record rally

A Palantir Technologies Inc board member deleted his X account after posting last week that the company's plan to move its listing to the Nasdaq Global Select Market from the New York Stock Exchange was intended to cater to retail investors.

Alex Moore, a partner at Eight Partners LLC, who has been on Palantir's board since 2020, posted that the company was moving its listing "because it will force billions in ETF buying," potentially driving up the share price to the benefit of existing investors.

The software company said on Nov. 14 that it will transfer the listing of its Class A Common Stock to Nasdaq, and expects to begin trading as a Nasdaq-listed company on Nov. 26. The filing from Palantir did not provide any specific rationale for the change.

The company said in a filing that it expects to be eligible for inclusion in the tech-heavy Nasdaq 100 index. That would force ETFs that track the index, such as the roughly \$300 billion Invesco QQQ Trust Series 1, to buy shares. Palantir shares soared more than 14% on the first trading day after it was announced in September they would be joining the S&P 500 Index.

Moore, who was one of the founding employees of Palantir and worked at the company from 2005 to 2010, said the move would deliver "tendies" — a meme-stock term for gains — to retail investors.

A spokesperson from Palantir declined to comment. Moore did not respond to Bloomberg's request for comment on the post.

"Board members should not be making posts like this regarding the companies they serve," said Amy Lynch, a former regulator with the the Securities and Exchange Commission and Financial Industry Regulatory Authority and founder of FrontLine Compliance.

The SEC will look at all trading activity and Reddit posts to see what was happening at the time of the tweet and who benefited from the tweet via transactions, Lynch said. While nothing may come of their investigation, it's possible the company could look to remove him from the board, she added.

Palantir has long been a favorite among retail investors, garnering frequent mention on sites like Reddit Inc.'s WallStreetBets forum. Alex Karp, co-founder and chief executive officer of Palantir previously said he prefers the company's retail investors and thinks analysts don't understand the company.

Read More: Palantir's CEO Spars With Wall Street as Shares Keep Rising

After debuting in September 2020, the stock more than quadrupled during the meme-stock frenzy of early 2021. It crashed back within a year and languished until taking off again last year.

Wall Street analysts, meanwhile, have remained cautious on the stock after it tripled in 10 months. Only three of the 20 who cover it rate the stock as a buy, according to data compiled by Bloomberg. The shares trade at 136 times forward earnings, more than five times the average price-to-share ratio in the Nasdaq 100.

Shares of Palantir closed 6.9% lower on Monday, its worst one-day drop since July 24. The stock has more than tripled this year.

(Adds comments in paragraph eight, updates stock moves at market close.)

--With assistance from **Lizette Chapman** and **Sunil Kesur**.

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Trafigura Paid Bribes Via 'Mr. Non-Compliant,' Swiss Say (3)

By Hugo Miller, Jack Farchy and Archie Hunter

- Company accused of failing to prevent millions in bribes
- Trial set to begin Dec. 2 at Switzerland's top criminal court

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Trafigura Paid Bribes Via 'Mr. Non-Compliant,' Swiss Say (3)

By Hugo Miller, Jack Farchy and Archie Hunter2024-11-19T08:20:07692-05:00

- Company accused of failing to prevent millions in bribes
- Trial set to begin Dec. 2 at Switzerland's top criminal court

Trafigura was accused by Swiss prosecutors of channeling bribes to an Angolan official through a network of former employees, including one nicknamed "Mr. Non-Compliant" by the company's late founder.

The trading house heads to court Dec. 2 facing charges that its former parent company Trafigura Beheer BV failed to prevent unlawful payments over the 2009 to 2011 period, alongside former senior executive **Mike Wainwright**, a Swiss middleman who can only be named as P., and a senior Angolan public official **Paulo Gouveia Junior**.

A 150-page indictment released on Monday detailed how the bribes were allegedly paid and for the first time claimed that Trafigura's late founder and Chief Executive Officer **Claude Dauphin** was a central participant in the scheme.

The indictment lays bare how Trafigura's most senior executives — up to and including Dauphin — were allegedly involved in corruption. While there have been numerous corruption cases in the past four years against commodity trading companies, only a few individual mid-level traders have been convicted.

If convicted, Trafigura faces a maximum fine of just 5 million Swiss francs (\$5.6 million), roughly what the company made every six hours last year from trading oil, metals and other commodities, plus repayment of the illicit profit of over \$140 million.

Switzerland's Federal Criminal Court has scheduled three weeks for the trial and listed two reserve dates in late January if necessary. Trafigura said it rejects the charges.

The trial comes after a year in which the company admitted paying bribes in Brazil, settled a US case over alleged manipulation of fuel oil markets, and most recently announced it's facing a \$1.1 billion loss after being the victim of a fraud by its own employees in the tiny oil market of Mongolia.

A guilty verdict would be the first time in Swiss history a company has been convicted at trial for allowing the payment of bribes. Switzerland is already under pressure to prove it can be tough on a commodities industry that's long operated under a light regulatory touch.

Latest Case

It's the latest in a series of cases around the world that have cast the commodity trading industry in an unfavorable light, with Trafigura as well as rivals Vitol Group, Glencore Plc and Gunvor Group all admitting to multi-year bribery schemes.

The indictment describes an opaque system of payments.

On March 26, 2009, a letter on Trafigura-headed paper arrived at Credit Agricole SA's Geneva branch, recommending a banking relationship be set up in favor of Gouveia, CEO of the fuel retail arm of Angola's state energy company. Less than two weeks later, Gouveia arrived in the Swiss city for a short, but busy visit.

Four Seasons Hotel des Bergues in Geneva.

Photographer: Godong/Universal Images Group Editorial

Trafigura put him up at the Four Seasons' Hotel des Bergues, overlooking Geneva's famous lake. Gouveia was also invited to dine at the home of Dauphin, the trading house's legendary founder. A lawyer for the late-CEO's family said Dauphin had nothing to do with the bribery scheme.

Payment Flows

But the stay was also to cement other relationships, Swiss prosecutors allege. Gouveia opened a Credit Agricole account under the name of a company called Wyland Group Ltd., through which he would receive funds totaling the equivalent of \$5.79 million between July 10, 2009 and Oct. 20, 2011.

The funds would come initially from Enelmer International Ltd., set up in the preceding months by Trafigura's **Mariano Ferraz**. Later payments were made by Consultco Trading Ltd. – a British Virgin Islands-registered company with an address in Dubai – run by a former Trafigura executive known as P. Swiss prosecutors say there were 16 transfers from Consultco's Emirates NBD Bank account to Wyland's Credit Agricole account.

Another former Trafigura employee was installed as a “controller” of the money flowing through Consultco, according to the indictment. He had worked at Trafigura from 1997 to 2007, before setting up a consulting business in Geneva whose only clients were the trading house and its agents and intermediaries. Dauphin nicknamed him “Mr Non-Compliant.” That’s because he “did the things that could not be done internally within the Trafigura Group,” according to the indictment.

Gouveia, for his part, would sign multi-year chartering contracts for eight vessels and a shipping fuel supply deal that would net Trafigura a total of \$143.7 million in profits, according to the prosecutors.

Gouveia’s stay in Geneva was not the only time that Trafigura paid for the travel of its Angolan business contacts, according to the indictment. One of the trading house’s subsidiaries paid for the daughter of an Angolan official to attend a summer camp in Gstaad, Switzerland. Another subsidiary paid a \$70,050 bill for a five-day hotel stay in Rio de Janeiro during Carnival in 2011.

Read more: Dubai Becomes New Switzerland for Traders of Russian Commodities

Trafigura has argued in the past that the Swiss case against it hinges largely on testimony that should be disregarded, because it comes from Ferraz, a former executive at the company who was found guilty on corruption charges in Brazil in 2018 and testified to prosecutors as part of a plea agreement.

Strengthening Controls

The Swiss charges against Trafigura Beheer allege the company failed to take the necessary measures to prevent bribes being paid, Trafigura Group said on Monday. Trafigura said that its anti-bribery and corruption controls were “externally reviewed and assessed to have met legal requirements and international good practice standards applicable at that time.”

Since then, Trafigura said it’s invested significant resources in staff training, strengthened compliance teams and controls, and from 2019, prohibited the use of third parties for business origination.

Jean-Louis Scenini, a lawyer for Gouveia who was CEO of Sonangol Distribuidora, wasn’t immediately available for comment. Daniel Tunik, a lawyer for the middleman P., declined to comment.

CA Indosuez (Switzerland), which was then Credit Agricole Switzerland, declined to comment. Emirates NBD didn’t respond to a request for comment outside of normal business hours.

Wainwright, who was chief operating officer and a Trafigura board member, “entirely rejects the allegations made against him,” said his lawyer Daniel Kinzer. “He has full confidence the court will find the allegations to be unfounded and will dismiss the case made against him.”

Founder’s Protege

If he’s found guilty, Wainwright would be one of the most senior commodity traders ever to be convicted of corruption.

A protégé of founder Dauphin, Wainwright was one of Trafigura's first employees, joining the company in 1996. He was COO from 2008 until last year, when he announced his retirement. For many years, the quietly spoken English accountant was one of the company's most powerful figures: he personally approved its outgoings and had meticulous knowledge of its sprawling business dealings around the world.

Read more: Man Who Held Trafigura Secrets and Purse Strings Now Faces Trial

In 2009-2011, according to the indictment, he was responsible for monitoring market and strategic risks, human resources, compliance and was the main point of contact for Trafigura's auditors.

The Swiss prosecutors' case focuses on his role approving payments which, they say, were used to bribe Gouveia. It was Wainwright whose signature was on the letter recommending Credit Agricole set up an account for Gouveia, according to prosecutors.

Three payments made from Trafigura through Enelmer to Gouveia's company were initialed "MW" in Trafigura's internal documents, the indictment says.

Key Contact

And Wainwright was a key point of contact between Trafigura and "Mr. Non-Compliant," who worked for the company from 1997 until 2007, the indictment alleges.

It was Wainwright who ordered "Mr. Non-Compliant" to make the first two payments totaling \$1 million from P.'s firm Consultco to Gouveia's company in August 2009, according to the indictment, which cites an online messaging chat between Wainwright and "Mr. Non-Compliant."

Wainwright also agreed to give the former Trafigura employee access to the company's internal trading system, called Pluto, and was regularly in touch with him via SMS, email and online messenger, according to the indictment.

Dauphin, who died in 2015, "must have been involved" in the decision to bribe Gouveia, according to the indictment.

Roman Pinosch, a lawyer for the late-founder's family, said that to his knowledge, Dauphin had "absolutely nothing to do with the bribery scheme." Two letters he wrote to the Swiss court earlier this year, "denouncing a coordinated strategy aimed at making Dauphin a scapegoat and avoiding the collective responsibility of Trafigura's board," and asking for access to the file were dismissed, Pinosch added.

It's the second time this year that claims of wrongdoing have been leveled at Dauphin, a totemic figure within the company and the wider trading industry. Earlier this year, when Trafigura pleaded guilty to US corruption charges in March, it admitted as "true and correct" a statement of facts that included the claim that Dauphin approved bribe payments for oil deals in Brazil.

Dauphin's family responded angrily, with his son telling Bloomberg that Trafigura was using him as a "scapegoat."

(Updates with comments from Dauphin family's lawyer in 12th and third-last paragraphs)

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ADM Reviews Earnings in Latest Step to Fix Accounting Issues (1)

By Gerson Freitas Jr. and Tarso Veloso

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ADM Reviews Earnings in Latest Step to Fix Accounting Issues (1)

By Gerson Freitas Jr. and Tarso Veloso2024-11-18T18:30:15090-05:00

Archer-Daniels-Midland Co. restated previous earnings, after earlier this month identifying new accounting errors, in a key step to regain investor confidence.

Consolidated results for 2023 and the first two quarters of this year haven't been impacted by the review, the Chicago-based trader said in a statement. The restatements, which ADM said would be necessary when the accounting errors were announced, corrected figures for transactions within and between ADM's businesses.

The move by ADM follows an accounting scandal that has since January wiped out billions of dollars in market value and drawn investigations by the Department of Justice and Securities & Exchange Commission. ADM has replaced its chief financial officer, appointed AT&T Inc.'s top lawyer to its board and implemented new controls as part of efforts to restore credibility.

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

ADM has identified and corrected sales between units that either were previously recorded at prices that didn't approximate the market, or included transactions that were improperly classified. So-called intersegment sales for 2023 had been previously overestimated by \$1.28 billion, according to Monday's statement. Still, operating profits for each of ADM's three units remained the same as previously reported.

Shares of ADM were little changed in after-market trading Monday. The stock has lost 27% this year, which compares with a 9.6% decline for main rival Bunge Global SA.

The company also released third-quarter earnings that were consistent with a preliminary report released earlier this month. Adjusted earnings missed the average analyst estimate.

(Updates with more details in fourth paragraph)

Super Micro Soars After Hiring New Auditor in Bid to Stay Listed

By Carmen Reinicke

- The company filed a plan to stay listed on the Nasdaq
- Super Micro said it appointed a new auditor in press release

Bloomberg Law News 2024-11-19T10:12:01005095206-05:00

Super Micro Soars After Hiring New Auditor in Bid to Stay Listed

By Carmen Reinicke2024-11-19T09:35:33839-05:00

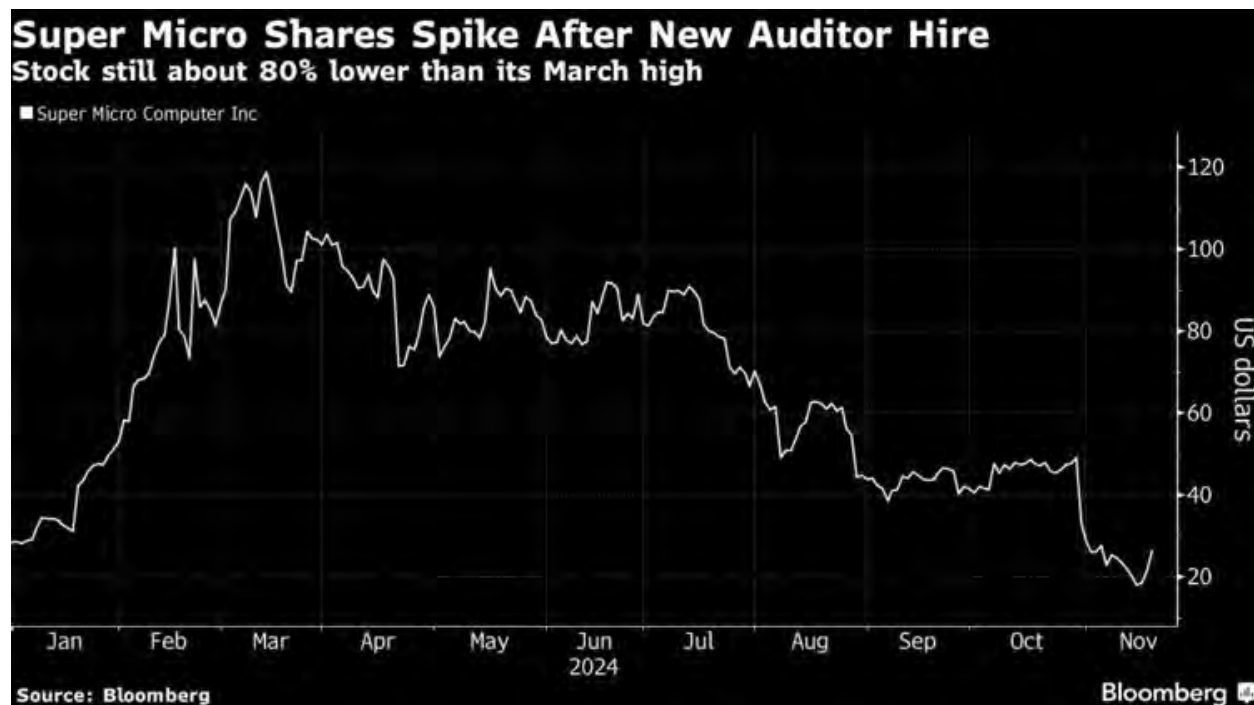
- The company filed a plan to stay listed on the Nasdaq
- Super Micro said it appointed a new auditor in press release

Super Micro Computer Inc. shares jumped as much as 27% after the company hired a new auditor and filed a plan to come into compliance with Nasdaq listing requirements.

The server maker said it submitted a plan to the Nasdaq exchange for filing its 10-K financial disclosure report delayed in August. The company also announced that it appointed BDO USA as its independent auditor, effective immediately.

"In its compliance plan to Nasdaq, the company indicated that it believes that it will be able to complete its annual report on Form 10-K for the year ended June 30, 2024, and its quarterly report on 10-Q for the fiscal quarter ended Sept. 30, 2024, and become current with its periodic reports within the discretionary period available to the Nasdaq staff to grant," Super Micro said Monday in a statement.

If Super Micro's plan is accepted by the exchange, its new deadline for the document will likely be pushed to February. It will be able to stay listed on the Nasdaq until a final decision about its compliance is made. If a plan isn't approved, the company can appeal the decision.



Super Micro's previous auditor, Ernst & Young LLP, resigned in October, citing concerns over the company's transparency and governance. Ernst & Young is one of the Big Four accounting firms, the auditors that vet the books of the world's largest companies. BDO USA is the sixth-largest auditor by revenue, according to Inside Public Accounting. The firm has only one other S&P 500 company as a client, according to data compiled by Bloomberg.

Finding an auditor is a "big step for them," even if it isn't one of the Big Four firms, **Matt Bryson**, an analyst at Wedbush, said in an interview. "This is a positive step in terms of putting a plan forth in front of Nasdaq, and, at least from their perspective, hopefully being able to file their financials and put these problems to bed."

Having a new auditor and a plan to regain compliance with Nasdaq's listing rules is the latest update in a tumultuous few months for Super Micro, which had gained favor with investors earlier this year as a potential beneficiary of the demand for artificial intelligence services. The San Jose, California-based company delayed filing its annual 10-K following a damaging report from short seller Hindenburg Research, and last week said it would be late with quarterly reports.

Super Micro is also facing a US Department of Justice probe. The shares had tumbled more than 80% from a peak in March through Monday's close.

The company has gone through a delisting and relisting process before. In 2019, the shares were taken off the Nasdaq exchange after Super Micro failed to meet deadlines to file a 10-K and several quarterly reports. The company received approval to rejoin the exchange in 2020, and in the same year paid a \$17.5 million penalty to resolve an investigation by the US Securities and Exchange Commission. Super Micro didn't admit to or deny the regulator's allegations as part of its settlement.

Some stock bulls are reiterating their investment case for the one-time Wall Street AI darling.

“We take the view that regardless of its regulatory woes (now receding in the rear-view mirror), SMCI maintains its leadership in the massive, scalable AI data center market for liquid-cooled server racks,” Lynx Equity Strategy analyst **KC Rajkumar** said.

“SMCI has a leadership position in the rapidly expanding liquid-cooled GPU server data center market, a position it is unlikely to give up any time soon,” Rajkumar said.

(Updates with stock move in the first paragraph, adds analyst comments, chart)

--With assistance from **Nicola M. White**, **Subrat Patnaik** and **Sujata Rao**.

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Trump's SEC Likely to Halt 'Off-Channel' Texting Probe That's Led to Billions in Fines

 [law.com/nationallawjournal/2024/11/19/trumps-sec-likely-to-halt-off-channel-texting-probe-thats-led-to-billions-in-fines](https://www.law.com/nationallawjournal/2024/11/19/trumps-sec-likely-to-halt-off-channel-texting-probe-thats-led-to-billions-in-fines)

James Palmer

Federal regulators' crackdown on the off-channel use of WhatsApp and other ephemeral messaging tools, which has yielded more than \$3 billion in fines and spurred endless consternation in the financial services industry, is likely headed for the trash heap, regulatory attorneys say.

The U.S. Securities and Exchange Commission and the Commodities Futures Trading Commission have fined more than 100 investment advisers and broker-dealers over the past three years, with the largest players, including Goldman Sachs, JPMorgan Chase & Co. and Wells Fargo, anteing up \$200 million apiece.

The regulators zinged the companies for failing to preserve text messages between employees and customers via phone apps outside the communication channels investment firms normally monitor. Despite the headline-grabbing size of the penalties, and the deluge of training programs firms have launched to bolster compliance, use of the apps remains pervasive.

But the enforcement spree, like many of SEC Chair Gary Gensler's highest-profile priorities, is premised on novel legal theories. Regulatory attorneys predict that whoever incoming President Donald Trump appoints to succeed Gensler as chair will abandon the boundary-pushing and focus on issues affecting everyday investors.

"All indications are that the SEC's 'sweep' regarding off-channel communications will come to an abrupt end once Trump's appointees take the reins at the SEC," said David Oliwenstein, a securities enforcement and white-collar defense partner at Pillsbury Winthrop Shaw Pittman. "I suspect there are some legacy cases that are in the pipeline that the SEC staff will try to finalize before new leadership is appointed, but that should mark the end of the sweep."

Buttressing that view is the fact that the two Republicans on the five-person commission—Hester Peirce and Mark Uyeda, both of whom are considered potential successors to Gensler—have criticized the off-channel probe, including the size of the fines and the lack of "an achievable path to compliance."

In a statement released in September, Peirce and Uyeda noted that the document-retention rules that the SEC is wielding in its off-channel communications crackdown were adopted in 1997 and "are a product of simpler times" and need to be modernized. "Even well-

intentioned firms could find themselves in the Commission's enforcement queue time and again," they said.

A litany of Republican-leaning advocacy groups have made similar arguments for months, to no avail. In a January 2023 letter to Gensler, the U.S. Chamber of Commerce, the National Venture Capital Association and the Investment Company Institute, among others, wrote that "the SEC is attempting to exceed its authority ... and engaging in rulemaking by enforcement."

The writers also said the SEC's means of verifying violations—copying the entire contents of an employee's phone—is unduly intrusive for a record-keeping inquiry. "The SEC has many less blunt tools to address what it has described as industry-wide conduct," the letter said.

Ropes & Gray told clients in a recent note that Republicans generally regulate financial services less aggressively than Democrats. The note said that during Trump's first term, federal agencies finalized more than 70 regulatory initiatives, most of them perceived as favorable to the financial services industry.

Trump's rhetoric on the campaign trail suggests he may be even more pro-business during his second term. Speaking Sept. 15 at the New York Economic Club, he said, "One of the keys to unlocking growth is scaling back years of disastrous regulations unilaterally imposed by our out-of-control bureaucracy. Regulations have grown into a massive, job-killing industry, and the regulation industry is one business I will put an end to."

Oliwenstein said that despite such pronouncements, the financial services industry won't devolve into a lawless landscape—rules will still be enforced.

"I still expect the Division of Examinations to focus on off-channel communications in connection with examinations," Oliwenstein said. "As for the Enforcement Division, they will likely continue to bring cases as appropriate, but probably only in the event of more serious and pervasive violations."

And even then penalties likely will shrink, he said.

"I would expect to see smaller monetary fines and perhaps less of an emphasis on forcing regulated entities to retain compliance consultants," he said.

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Trump's Media Company in Talks to Buy Bakkt Crypto Platform

By Gillian Tan, Olga Kharif and David Pan

- Bakkt has been exploring a potential sale for months
- Crypto trading venue was launched by Intercontinental Exchange

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Trump's Media Company in Talks to Buy Bakkt Crypto Platform

By Gillian Tan, Olga Kharif and David Pan2024-11-18T17:19:46009-05:00

- Bakkt has been exploring a potential sale for months
- Crypto trading venue was launched by Intercontinental Exchange

President-elect Donald Trump's Trump Media & Technology Group Corp. is in talks to buy the digital-asset marketplace Bakkt, according to people familiar with the discussions who asked not to be named sharing private information.

Shares of Bakkt Holdings Inc. more than doubled after the Financial Times initially reported on the talks, which it described as at an "advanced" stage. The newspaper said Trump Media is closing in on an all-share purchase. Bakkt's market capitalization was \$155 million as of Friday's close.

Bakkt was spun out of and is still majority-owned by Intercontinental Exchange Inc., the parent of the New York Stock Exchange. Neither Bakkt nor TMTG returned requests for comment. ICE declined to comment.

Bakkt has been exploring a potential sale for months. Intercontinental Exchange, which owns some of the biggest futures markets as well as the NYSE, launched Bakkt with much fanfare in 2018.

Bakkt shares rose as much as 162% to \$29.70. The stock had traded at more than \$1,000 in October 2021 as cryptocurrency prices approached all-time highs. Less than three years later, the exchange disclosed that it might not be able to continue as a going concern, raising the possibility of being delisted from the NYSE.

Kelly Loeffler, Bakkt's founding CEO, is married to Jeffrey Sprecher, who is the founder and CEO of Intercontinental Exchange and chair of the New York Stock Exchange.

Loeffler, who spent one year as the US Senator from Georgia, is serving as co-chair of Trump's inaugural committee alongside Steve Witkoff.

Trump owns more than 50% of TMTG, which operates Truth Social, a social media site. Shares of Trump Media's shares rose about 17%.

(Adds details on the possible acquisition in the first paragraph.)

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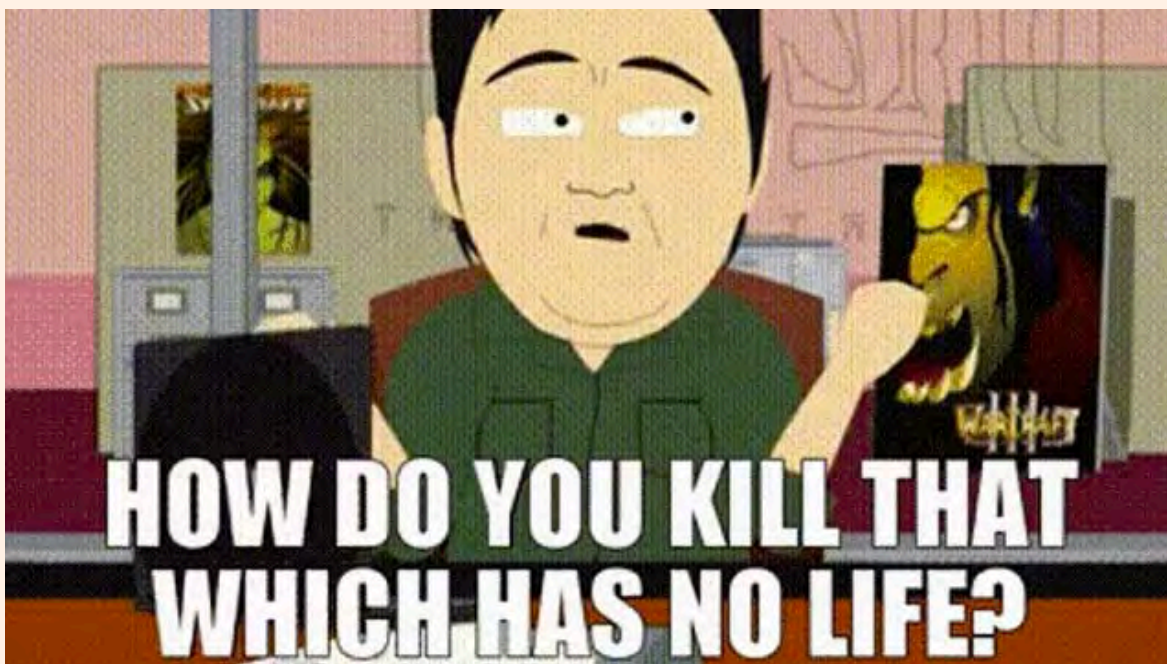
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FT Alphaville IPOs

The second coming (and going) of EF Hutton

An interview with one half of the duo who underwrote Donald Trump's media Spac



George Steer 7 HOURS AGO



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Everyone knows that the best way to stop a zombie is to destroy its brain.

But EF Hutton, [an undead US underwriter we wrote about two years ago](#), had two heads: chief executive Joseph Rallo and president David Boral.

Rallo left the bank earlier this year, taking ZombiEF Hutton's once venerable name and trademark with him. He had been placed on voluntary administrative leave, having in May been served by the Attorney's Office for the Eastern District of New York with a [search and seizure warrant](#) linked to an ongoing investigation into alleged securities and wire fraud. Rallo has not been indicted or charged. In November, EF Hutton 2.0 rebranded as D. Boral Capital.

We reached out to Rallo's legal counsel for comment but have yet to hear back.

Rallo and Boral appear to have enjoyed many happy years together. Both did stints at New York underwriters Maxim Group and Aegis Capital ([check out the underwriters' ... patchy track-records here](#), and their disclosure-heavy Brokercheck reports [here](#) and [here](#)) before teaming up in 2020 at what was then Benchmark Investments.

There, Rallo co-led the company's new investment banking division, Kingswood Capital Markets. KCM grabbed the EF Hutton name in 2021, a blockbuster year for global capital markets during which the firm's IB and underwriting revenues rose to almost \$150mn from \$11mn in 2020.

In 2022, the bank landed its most illustrious client to date: Donald Trump's Truth Social, which it eventually helped list via a Spac.

But the good times didn't last. In mid-September, EF Hutton filed a lawsuit against Rallo, accusing its own CEO of regularly skipping work to "gamble and carouse" and charging the firm for personal expenses including trips on private jets, "extravagant" meals and intravenous drips "which upon information and belief, were used to treat hangovers from excessive alcohol and drug usage".



Happier times: David Boral, left, and Joseph Rallo, right

Rallo contested the allegations and [filed a countersuit](#) soon after, alleging that Boral frequently embarked on stimulant-aided “benders” of his own and that he had “physically assaulted” Rallo over a disagreement about which of the two was the real “alpha” at the bank. The suit alleged that Boral had orchestrated a “coup d’état” by weaponising the federal warrant served against him to wrest control of EF Hutto. Boral contested the allegations.

By mid-October, Boral and Rallo seemed to have buried the hatchet. Their lawsuits were withdrawn. EF Hutton [issued a statement](#) saying the duo were “pleased to put their dispute behind them” and had “decided to take their businesses in different directions”.

In his first interview since the pair’s conscious uncoupling, Boral told FT Alphaville how they settled on the EF Hutton name and gave his take on what Trump’s election win means for US capital markets. The conversation has been edited for brevity.

FTAV: You and Joseph [Rallo] seemed to have a good relationship for a long time. What happened?

David Boral: Joe and I withdrew our lawsuits and publicly stated that we’re pleased to put our dispute behind us and move forward with confidence that our new and separate business ventures will be successful.

The full team is otherwise fully intact. We’ve done a name change and a rebranding. We’re having one of our best years yet*, we’re on pace for \$100mn in revenue, and unadjusted, unaudited positive net income of \$25mn plus or so. We’re very excited to proceed forward.

Snippet of Rallo's now withdrawn lawsuit against Boral and others © THE COURT OF CHANCERY OF THE STATE OF DELAWARE

[\[High-resolution version\]](#)

FTAV: Tell me about the Truth Social deal EF Hutton worked on in 2023 — did Trump's team approach you, or vice versa? How did it go down?

DB: With regard to DJT [Trump Media & Technology Group], everything has already been publicly stated. There's not much for me to add. They're a regular public company now.

FTAV: Why did you choose the EF Hutton name? There was that whole business with the cheque-kiting scandal . . .

DB: We were looking for a name, and at the time, with my previous partner, we thought of looking at previous banks that were no longer in business. So there were a few out there that were available — Dillon Read, some of these prominent names, obviously EF Hutton, that we heard were available, potentially.

We weren't sure if we could get Bear Stearns or Lehman Brothers, but those were too recent and near-term. We polled a few people and most of the people that had ever heard of EF Hutton actually had a positive review or remembered the commercials.

After a cheque kiting scandal rocked the bank in the late 1980s, a Merrill Lynch executive took over as EF Hutton's CEO. "He attempted to boost morale by sending each of us a colouring book and crayons about rebuilding the EF Hutton house," one former employee told FTAV.

But a lot of the employees that used to work there — an older generation, probably at this point mostly in their sixties, because I think it went out in maybe '86 or '87 . . . they were pretty fond of their time and experience there. The response from the marketplace was pretty positive from most people.

FTAV: You set up EF Hutton 2.0 in 2020 and capital markets exploded the next year, when you guys became particularly active in the Spac space. Tell me about the market back then.

DB: 2021 was one of the best years in the history of the financial capital markets in the US. And we capitalised on that. It was an interesting dynamic, from 2020 being an election year, Covid, starting the organisation from home, and not meeting team members in person for a whole year. So we didn't go into our office space until about June 2021, at 590 Madison in the IBM building, overlooking Central Park in New York City.

But for the year prior to that it was working mornings, to late nights, on Zoom calls all day. There wasn't much to do other than work 24/7. That propelled me to a lot of success, because I was singularly focused on growing my bank.

FTAV: Your website says you're ranked "number one worldwide in regular way and Spac IPOs since 2022 for number of new issues". You've certainly listed [an eclectic mix](#) of companies. How do you find these businesses and how do you find investors to invest in them?

DB: I've worked in the industry for about 20 years, so I've met a lot of different constituents, from attorneys, IR firms, PR firms, consultants, auditors, accountants, C-suite management teams, board members in a multitude of industries and sectors. And I think there was a need for a new bank at the time. And I was keenly focused on the opportunity that the Spac market presented, so I hit that market pretty hard, got completely engrossed in it, which provided a lot of value.

Some of D Boral/EF Hutton's latest transactions © <https://dboralcapital.com/>

We don't make any material product, as an investment bank, so a lot of it is the information you have and how to best guide clients, issuers, so you can make the most cost-effective capital raise which inherently provides more jobs, a better company and a more efficient capital markets system. That was an area we focused on and we had tremendous success.

FTAV: Was the Spac boom back then an aberration?

DB: Every few years there's a new hot industry sector product. It was cannabis at one point, then it was crypto, then it was Spacs. It's cyclical in the fact that there's always something new, now it's AI, that is gathering everyone's attention and capital. It just so happened that 2021 was the Spac year.

I think it was a one-off and I actually think that's good. Because there was an oversaturation of the market. In 2022, I think, regular IPOs were down something like 50 per cent after six months. Spac IPOs were down 49 per cent, they were performing slightly better.

The slowdown in the Spac market was good, because [now] you're getting higher quality sponsors, you're getting more repeat sponsors, you're getting more fairly valued de-SPACs. So the numbers have come down but it's healthy long-term. I don't think the product is going anywhere.

FTAV: What does Trump's win mean for your firm and the IPO market more broadly? Is Wall Street rejoicing?

DB: With Trump and how the markets are going to respond, it's pretty evident already from what you've seen. You can see how the market responded to him winning the election. From a macro perspective, issuers listed on NYSE, Nasdaq etc have . . . responded extremely well. That's case in point. There's no speculation needed.

A snippet of EF Hutton's now withdrawn lawsuit against Rallo © SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY – COMMERCIAL DIVISION

[\[High-resolution version\]](#)

FTAV: A lot of the IPOs you've worked on in the past few years, particularly those for Chinese micro-caps, haven't done so well. Shares pop on IPO day but tend to collapse further down the line. Does that bother you?

DB: This year, our IPOs have been up, 4.1 per cent on average the following day and approximately 22.6 per cent after 30 days**. That's very positive, we're very happy about that.

Obviously we want investors to always make money, for companies to get capital and make that dollar they received worth two dollars, and hit on all of the ideas that they had. It doesn't happen all the time, but obviously we try our best to have a win-win, and my 2024 statistics are pretty positive.

** EF Hutton's now withdrawn lawsuit against Rallo states that "by mid-May 2024, the firm was operating at a loss despite significant revenues".*

***The ten regular-way IPOs (excluding follow-on offerings and Spac IPOs) that EFH/D Boral Cap has worked on so far this year, according to its website, have fallen an average of 24.5 per cent since listing.*

Two, Haoxi Health Technology and U-BX Technology, have dropped more than 90 per cent since their respective listings in January and March. Armlogi, the best performer, has added 18.7 per cent since it went public in May.

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Trump's Nominees Are Being Hand-Picked to Enact a Dangerous Platform the Koch Brothers Made Public 44 Years Ago

 wallstreetonparade.com/2024/11/trumps-nominees-are-being-hand-picked-to-enact-a-dangerous-platform-the-koch-brothers-made-public-44-years-ago

By Pam Martens and Russ Martens: November 19, 2024 ~

Tens of millions of Americans rise each morning and pray they are awakening from a bad dream about the President-elect's plans to put a plethora of outrageously unfit people in charge of critical federal agencies that protect the air we breathe, the water we drink, the food we feed our children, our ability to obtain healthcare, social security for the elderly, response to disasters and so forth.

President-Elect
Donald Trump/
Charles Koch

What few Americans understand is that this plan is very real, dead serious, and was hatched 44 years ago by two fossil fuel billionaire brothers – Charles and David Koch. The plan was publicly released as the Libertarian Platform when David Koch ran for Vice President of the United States in 1980. David Koch died in 2019, leaving his brother, Charles, who turned 89 this month, to relentlessly push to install the platform, notwithstanding that his past fossil fuel policies have played a key role in heating the earth to the point of no return, causing unprecedented wild fires and drought in New York City at this very moment – as well as hundreds of deaths from unprecedented flash flooding here in the U.S. and around the globe this year.

To understand the dangerous agenda behind Trump's nominees, consider what was written in that 1980 Platform:

"We support the abolition of the Environmental Protection Agency."

"We support abolition of the Department of Energy."

"We call for the dissolution of all government agencies concerned with transportation, including the Department of Transportation."

"We advocate the abolition of the Federal Aviation Administration."

"We advocate the abolition of the Food and Drug Administration."

"We support an end to all subsidies for child-bearing built into our present laws, including all welfare plans and the provision of tax-supported services for children."

"We oppose all government welfare, relief projects, and 'aid to the poor' programs. All these government programs are privacy-invading, paternalistic, demeaning, and inefficient. The proper source of help for such persons is the voluntary efforts of private groups and individuals."

"We call for the privatization of the inland waterways, and of the distribution system that brings water to industry, agriculture and households."

"We call for the repeal of the Occupational Safety and Health Act."

"We call for the abolition of the Consumer Product Safety Commission."

"We support the repeal of all state usury laws."

"We urge the repeal of federal campaign finance laws, and the immediate abolition of the despotic Federal Election Commission."

"We favor the abolition of Medicare and Medicaid programs."

"We oppose any compulsory insurance or tax-supported plan to provide health services, including those which finance abortion services."

"We favor the repeal of the fraudulent, virtually bankrupt, and increasingly oppressive Social Security system. Pending that repeal, participation in Social Security should be made voluntary."

"We oppose all personal and corporate income taxation, including capital gains taxes."

"We support the eventual repeal of all taxation."

"As an interim measure, all criminal and civil sanctions against tax evasion should be terminated immediately."

"We support repeal of all law which impede the ability of any person to find employment, such as minimum wage laws."

To quote Senator Bernie Sanders, "The agenda of the Koch brothers is to repeal every major piece of legislation that has been signed into law over the past 80 years that has protected the middle class, the elderly, the children, the sick, and the most vulnerable in this country."

After decades of floundering on implementing their agenda, the Kochs finally realized that the key to moving the agenda forward was to first accomplish the stated goal of "the repeal of federal campaign finance laws" so that billionaire money could control who gets elected to

public office. That was accomplished under the Supreme Court's *Citizens United* in 2010, and its progeny, ushering in unlimited corporate and billionaire spending in elections. Americans have been losing ground to the dark Koch agenda ever since.

According to research at the Washington Post, megadonors plowed *\$2.5 billion* into the current election cycle – *twice the amount* they contributed in the 2020 election cycle.

Americans got a peek at Charles Koch's plans for the dystopian future of the U.S. during Trump's first term in office. The campaign funding mechanism Koch used back then was known as Freedom Partners. In a document titled "Roadmap to Repeal: Removing Regulatory Barriers to Opportunity," the Koch front group listed the laws and regulations it expected to be repealed in the first 100 days of his administration. And like a dutiful courtier, the Trump administration responded quickly. Repeal the Paris Climate Accord – done. Tax cuts for corporations and the wealthy – done. Gutting federal regulations at the Environmental Protection Agency – done. Appointing industry shills to run federal agencies – done.

In addition, Freedom Partners funneled its own staff into key jobs in the Trump administration to hasten the enactment of its agenda.

Charles Koch has spent the better part of his adult life planning his assault on the federal government and gradually implementing the components he needs to succeed. As we have previously written, those include the following:

Meeting secretly with big political donors twice a year to plot a coordinated strategy to put their chosen people in public office;

Meeting at his private club with a sitting Supreme Court justice who will then rule on key legislation that benefits his interests;

Funding an organization that then sluices money to the wife of the Supreme Court Justice;

Running a highly sophisticated voter registration database, data mining and get-out-the-vote operation called i360, in order to pack Congress with people who will pursue an antiregulatory agenda;

Installing dozens of its lawyers and operatives into the highest offices of the federal government;

Running a sprawling, opaque trading operation that could potentially be raising the prices of the fossil fuel products it sells via the futures market;

Funding a sprawling network of taxpayer-subsidized front groups to deny climate change and foment hate;

Providing funding to groups involved in sending a mob to attack the seat of the federal government on January 6, 2021;

Funding groups that use dark money and propaganda to put lifetime justices on the highest court and to promote legislation friendly to the fossil fuels conglomerate.

History will not be kind to those who downplay this threat or enable it through their silence.

Column: Election betting is public boon, trading platform Kalshi tells US appeals court

 [reuters.com/legal/government/column-election-betting-is-public-boon-trading-platform-kalshi-tells-us-appeals-2024-11-18](https://www.reuters.com/legal/government/column-election-betting-is-public-boon-trading-platform-kalshi-tells-us-appeals-2024-11-18)

Alison Frankel

Signage is seen outside of the US Commodity Futures Trading Commission (CFTC) in Washington, D.C., U.S., August 30, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

Nov 18 (Reuters) - The 2024 U.S. election proved that regulatory fears of trading-related election manipulation are overblown, a lawyer for derivatives trading platform Kalshi told me in an interview on Monday.

There is, of course, salient context for his hot take.

Kalshi just filed a brief , opens new tab at the U.S. Circuit Court of Appeals for the District of Columbia, where it is trying to cement its right to offer trading in derivative contracts based on the outcome of U.S. elections. As I'll explain, Kalshi contends that the U.S. Commodity Futures Trading Commission, which earlier this year failed , opens new tab to block Kalshi from offering derivatives based on U.S. election results, is asserting arguments that defy the text of the federal statute governing futures contracts predicting the occurrence of particular events.

But more broadly, said Kalshi counsel Josh Sterling of Milbank, the CFTC is just plain wrong when it insists that election-based trading will damage the integrity of U.S. elections, or, at least, the perception of election integrity.

Kalshi saw about \$1 billion in trades predicting the outcome of U.S. elections after a Washington, D.C., trial judge and a motions panel from the D.C. Circuit allowed , opens new tab the platform to offer futures contracts predicting election results, Sterling said. No one, he said, has seriously argued after the election that Kalshi's election trading market affected the outcome of any race.

Instead, Sterling said, "The markets have proved to be quite valuable to the public," citing news reports that prediction markets offered a more accurate reflection of the true state of the presidential race than public polls.

"Markets," Sterling said, "are powerful engines for divining the truth."

The CFTC believes otherwise , opens new tab, of course — at least when it comes to betting on the outcome of elections. (That's the language used by the agency. Kalshi does not use the words betting or gambling to describe derivatives based on election results.)

The agency did not respond to my query on Kalshi's brief at the D.C. Circuit, but it has argued since its 2023 rejection of Kalshi's proposal to offer futures contracts predicting which U.S. political party would control Congress that election-based trading deepens the risk of election manipulation. The agency's opening brief to the D.C. Circuit suggested a couple of troubling prospects: Partisans might invest in prediction markets to manipulate public perception of the state of the race; or investors hoping to lock in profits from their trades might spread misinformation to impact election outcomes.

The CFTC is not alone in its fears. Its appellate brief noted that when it invited public comment on Kalshi's bid to offer derivatives tied to election results, seven U.S. Senators and more than 600 other commenters "expressed grave concerns about the impact on the integrity of elections."

The agency and commenters backing its position also noted that allowing election betting would force the CFTC to police the market for attempts to interfere with the election — an area that, the CFTC concedes, "falls well outside" its expertise and statutory mandate.

Interestingly, the public's interest — or lack thereof — in election-outcome trading is addressed only glancingly in the briefs to the D.C. Circuit, which instead focus intensely on the language of the statute empowering the CFTC to withhold approval of a narrow category of derivatives contracts.

The law says that the agency has the power to bar derivatives based on the occurrence of certain illegal events. The statute specifically cites derivatives predicting terrorism, assassination, war or "gaming." It also includes a catch-all provision for derivatives based on the occurrence of an "activity that is unlawful under any federal or state law."

If a proposed derivative contract falls into any of those buckets, the statute says, the CFTC can evaluate whether trading would serve the public interest.

The CFTC argues that Kalshi's election market trades run afoul of both the gaming and unlawful activity prongs of the statute and must be prohibited because they serve no redeeming public interest.

Betting on election outcomes, the CFTC says, is "gaming," as dictionaries define that word, and its synonym, gambling. And because it's illegal in several states to bet based on the outcome of elections, the CFTC contends, Kalshi's derivatives are alternatively barred because they're based on illegal conduct. (I'm streamlining extremely nuanced statutory arguments but that's the gist.)

Kalshi has so far beaten the CFTC with a veritable buffet of counter arguments. The CFTC, it contends, is misreading the statute's use of the word "involve" to argue that trades predicting the outcome of an election involve gaming. In fact, Kalshi says, its derivatives "involve"

federal elections, not sporting contests, illegal terrorist activities or wars.

Moreover, Kalshi contends, gaming means a sports contest, like the Kentucky Derby or the World Series, not an election. And federal laws regulating derivatives, it said, pre-empt any state laws regulating gambling.

Kalshi asserts that the courts need not address the public interest in the election prediction market because the CFTC has no statutory power to regulate election-outcome trades. It nevertheless argued that the derivatives serve a public interest by allowing traders such as green energy companies and cannabis companies to hedge against an election outcome that undermines their prospects, just as the owner of a beachfront property in Florida might hedge against hurricane losses by betting on the occurrence of a catastrophic storm.

Ultimately, said Kalshi counsel Sterling, the CFTC simply has no statutory right to bar the platform from offering trades predicting the outcome of U.S. elections.

“It’s not the government’s business to try to get inside traders’ heads,” he said. “The law doesn’t prohibit these trades and in this country, we are allowed to do what the law does not prohibit.”

There’s an outside chance that the D.C. Circuit might not get to decide if Sterling and Kalshi are right. Oral arguments in the case have not yet been scheduled, which means that there will be a change in presidential administrations before the appeal is heard.

I asked Sterling whether the incoming Trump administration might have a different view of the CFTC’s right to regulate Kalshi’s offerings. He declined to comment on whether his side has been in touch with officials on President-elect Donald Trump’s transition team.

Read more:

US appeals court clears Kalshi to restart elections betting

US judge allows election betting, dealing blow to markets regulator

Predictions market Kalshi sues CFTC for blocking election contracts

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\$100M Deal In Suit Over Walgreens Rx Prices Gets First OK

By Celeste Bott

Law360 (November 18, 2024, 6:50 PM EST) -- An Illinois federal judge gave an initial blessing Monday to a \$100 million deal resolving claims from consumers and unions that Walgreens unlawfully overcharged insured consumers for prescription drugs while allowing members of its cost savings club to pay less.

During a brief hearing in Chicago federal court Monday afternoon, U.S. District Judge Edmond Chang said the settlement was fair, reasonable and adequate, particularly given the risks of continued litigation. While the plaintiffs had largely beat back the pharmacy giant's bid to dismiss the case, they said they couldn't guarantee they'd prevail at class certification — which was fully briefed ahead of settlement — or at summary judgment or trial, "in the face of more rigorous burdens of proof."

Judge Chang also recognized the agreement was reached after "several years of intense litigation," which he said included dozens of discovery requests on both sides, numerous subpoenas to third parties for additional evidence and three dozen or so depositions.

He set a final approval hearing for Sept. 10.

Prescription drug customers and an International Brotherhood of Electrical Workers benefits fund sued Walgreens in 2017, accusing the company of illegally charging insured customers for generic drugs more than it charged uninsured customers who paid for prescriptions through the company's Prescription Savings Club program.

In 2018, U.S. District Judge John Lee **rejected Walgreens' bid** to escape the suit, holding that the customers plausibly alleged that it failed to report its low PSC program prices as the "usual and customary" prices paid by insurers.

Judge Chang later took over the case when Judge Lee was confirmed to the Seventh Circuit.

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

Walgreens had argued that the proposed class failed to clearly outline who was eligible for a share of the settlement, saying that language carving out beneficiaries of some government entities, such as Medicare, was unclear. A failure to adequately delineate between government entities and "state political subdivisions," a category of benefits plans that is not excluded from the plan, rendered the proposed class too confusing to be certified, the company said.

On top of the payout, Walgreens has also promised to shutter its Prescription Savings Club. And the parties **have agreed** to certify a class comprising all individuals who paid for any prescription drugs from Walgreens using prescription insurance benefits to fill the medication, dating back to Jan. 1, 2007.

Class members will receive settlement awards based on an estimation of the money they spent paying for some or all of Walgreens' eligible prescription drugs.

The consumers and the union are represented by Joseph P. Guglielmo, Erin Green Comite and Amanda Rolon of Scott+Scott Attorneys at Law LLP and David W. Mitchell, Arthur L. Shingler III, Paul

J. Geller, Mark J. Dearman and Stuart A. Davidson of Robbins Geller Rudman & Dowd LLP.

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

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

--Additional reporting by Grace Elletson. Editing by Kelly Duncan.

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Live Nation Says Ticket Buyers Must Arbitrate Antitrust Suit

By **Gina Kim**

Law360 (November 18, 2024, 8:53 PM EST) -- Live Nation moved to arbitrate a proposed consumer antitrust class action alleging it monopolizes concert promotions and secondary ticketing services for major venues, arguing in New York federal court Friday the customers agreed to arbitrate any dispute each time they logged in to their accounts or accepted secondary ticket transfers.

In a 24-page memorandum filed Nov. 15, Live Nation and Ticketmaster argued that plaintiffs Abraham Liefer and Tamara Stevens must arbitrate their consolidated antitrust case, noting that they had agreed to be subjected to the defendants' terms of service on multiple occasions whenever they took any actions on their websites or platforms.

Those actions include any time they signed in to their Ticketmaster accounts, accepted transfer of tickets issued by Ticketmaster, and each time they bought tickets on the defendants' websites, the motion said. A mandatory arbitration provision broadly applying to any claim or dispute related to services by and through the defendants was always included in the terms of service, the arbitration bid added.

"Defendants' records confirm that plaintiffs agreed to the terms on many occasions, including when they accepted transfers of the tickets issued by Ticketmaster that they allege to have purchased on secondary ticket exchanges," the motion said.

Furthermore, whenever the customers clicked the button that read "ACCEPT TICKETS" and agreed to the defendants' terms, they were automatically directed to Ticketmaster's sign-in page, which opened a new window. To finish transferring and accessing the tickets, customers then had to sign in to their account and assent to the terms, Live Nation argued.

To complete the purchase of a ticket using the defendants' services, customers must also assent to the terms again, and this time, check a box to confirm that agreement, the motion said, which meant the customers formed a "clickwrap" agreement.

Live Nation and Ticketmaster further noted that they anticipated the plaintiffs to **reference the recent Ninth Circuit decision** in *Skot Heckman v. Live Nation Entertainment Inc.* to challenge arbitration. The defendants argued Friday the Heckman decision is "deeply flawed," and that they have already submitted a petition for a rehearing en banc.

On Oct. 28, the panel refused to enforce Live Nation's arbitration agreement after the company switched from JAMS to New Era ADR as the designated arbitration provider. The panel had backed a decision by U.S. District Judge George H. Wu, who found the arbitration clause in the terms of service on Ticketmaster's website — which said consumer disputes would be resolved through the upstart of New Era ADR — to be unconscionable.

The New Era rules say three "bellwether cases" chosen from the batched cases become precedent on all common issues in the batched cases, even though the hearing and award in those cases proceed individually and are confidential, known only to the particular plaintiffs, to the defendant company, and to the arbitrator, according to the decision.

In the decision, the panel criticized the New Era mass arbitration rules for permitting the validity of the delegation clause to be decided in these confidential bellwether cases. The Ninth Circuit also took

issue with the New Era's rules that did not include a right to discovery and set limits on complaints and briefing documents.

On Friday, Live Nation and Ticketmaster called the Heckman opinion by the Ninth Circuit "deeply flawed," but also said the opinion is not relevant to the instant case in New York either way.

"After the district court issued its ruling denying defendants' motion to compel arbitration in Heckman, New Era amended its rules to directly and fully address the issues animating the decision," Friday's motion said. New Era has since issued an amended version of its rules on May 1, weeks before Liefer and Stevens filed their case.

The Ninth Circuit's Heckman opinion involved the March 2, 2022, version of New Era's Rules, the defendants pointed out.

Friday's motion to compel arbitration is the latest development in the case filed by Stevens and Liefer, **who alleged that**, since their merger, Live Nation and Ticketmaster dominated three major U.S. markets: concert promotion, primary ticketing services and secondary ticketing services for all major venues, which stifled competition.

As a promoter, Live Nation's market share in major venues exceeded 60% and to protect that dominance, it often requires venues to sign anticompetitive exclusive agreements blocking them from using other event promoters, the plaintiffs claimed.

Ticketmaster, on the other hand, controls the sale of more than 70 to 80% of all primary tickets for major concert venues in the nation, and its monopoly stronghold is reinforced by Live Nation, which forces the venues under its control to use Ticketmaster as their main ticketing agent, the plaintiffs alleged.

The consumers' lawsuit came **the same day the DOJ sued Live Nation** over the 2010 agreement clearing its purchase of Ticketmaster, an oft-maligned deal that enforcers now want to unwind and that is blamed for chaos like the meltdown of ticket sales for Taylor Swift's Eras Tour.

The DOJ Antitrust Division has moved against the deal's fallout once before, forcing Live Nation in early 2020 to extend and tweak the original merger clearance settlement over claims it retaliated against venues trying to use ticketing companies other than Ticketmaster.

Representatives for the parties did not immediately respond to inquiries seeking comment Monday.

The plaintiffs are represented by Israel David, Adam M. Harris and Mark A. Cianci of Israel David LLC and David W. Mitchell, Alexandra S. Bernay, Arthur L. Shingler III, Stuart A. Davidson and Mark J. Dearman of Robbins Geller Rudman & Dowd LLP.

Live Nation and Ticketmaster are represented by Timothy L. O'Mara and Anna M. Rathbun of Latham & Watkins LLP.

The case is In Re Live Nation Entertainment Inc. and Ticketmaster LLC Antitrust Litigation, case number 1:24-cv-03994, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Lauren Berg. Editing by Vaqas Asghar.



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Target Downs Investor Suit Over Inventory Glut For Good

By **Katryna Perera**

Law360 (November 18, 2024, 10:17 PM EST) -- A Minnesota federal judge has tossed for good a proposed class action alleging Target Corp. and its top executives misled shareholders by hiding that the big-box retailer had "abandoned its customer-focused purchasing strategy" in favor of "indiscriminately buying large quantities of inventory" that consumers did not want.

U.S. District Judge Jeffrey M. Bryan issued an **order** Friday saying lead plaintiff Terry and Diane Van Der Tuuk Living Trust's amended complaint fails to meet the heightened pleading standards of the Private Securities Litigation Reform Act and that the alleged misleading statements identified in the suit are nonactionable.

Judge Bryan said the suit's allegations do not meet the PSLRA's heightened pleading requirement because they "fail to adequately set forth any of the three [confidential witnesses'] basis for knowing facts" that support the suit's main claim — that Target had "abandoned its customer-focused purchasing strategy" in favor of "indiscriminately buying large quantities of inventory" that consumers did not want, specifically hardlines and home goods.

He added that the complaint also does not establish that any of the relied upon confidential witnesses had personal knowledge of Target's inventory procurement process, nor does it adequately plead how any of the confidential witnesses knew that the retailer had abandoned the process.

"For instance, there are no allegations that any of the [confidential witnesses] were involved at the merchandise-procurement stage or spoke with anybody involved at that stage who shared knowledge of an intentional shift in the inventory-procurement policy," the order stated.

"Additionally, there are no allegations to suggest any of the [confidential witnesses] analyzed Target's companywide sales or demand, knew customer-purchasing patterns across Target's business, let alone what merchandise Target was purchasing and when," the order further states.

The judge also tossed all six categories of alleged misrepresentations included in the complaint — demand warnings, insight statements, investment statements, flow statements, historic statements and markdown projections.

The insight, investment and flow statements were all found to be nonactionable corporate puffery, and the historic statements were tossed for being inactionable because they are reports of past performance or events, and the complaint does not plausibly plead that they were false or inaccurate, according to the order.

The demand warnings included statements Target made in its U.S. Securities and Exchange Commission filings that disclosed risks that would occur if Target did not obtain "accurate and relevant data on and anticipate and respond quickly to changing consumer preferences."

The plaintiffs claimed these statements were false and misleading because Target had already stopped procuring inventory based on consumer data and insights. However, Judge Bryan said Friday that he disagreed because the plaintiffs failed to plausibly allege that the statements were made "with actual knowledge" and that they were false or misleading. Additionally, the plaintiffs failed to plead falsity for these statements, the order stated.

The final category of alleged misstatements is made up of two remarks made during an earnings call related to Target's projections for a "small increase in markdown rates," according to the order.

The plaintiffs called these statements were false and misleading because Target knew that hardlines and home goods inventory would need "significant markdowns and write-offs the immediately following quarter," but understated their extent, the order stated.

Judge Bryan again disagreed with the plaintiffs' arguments, saying the markdown statements are nonactionable because the plaintiffs failed to plausibly plead that the statements were made with scienter.

"Specifically, plaintiffs have failed to allege facts showing that defendants knew — at the time these statements were made — that demand would rapidly change later that month, necessitating additional markdowns beyond those contemplated at that time," the judge asserted.

The suit, filed in March 2023, was on behalf of all individuals who purchased or acquired Target common stock between Nov. 17, 2021, and May 17, 2022.

The suit claimed that during the COVID-19 pandemic, Target's sales in its hardlines and home goods categories grew significantly, but due to supply chain issues, the retailer could not keep its shelves fully stocked, which negatively impacted its revenue.

As pandemic restrictions were lifted, consumer habits shifted away from hardlines and home goods, but according to the plaintiffs, Target began preordering large quantities of hardlines and home goods to make sure its shelves were stocked going into the 2021 holiday season.

"Plaintiffs allege that Target procured this inventory without regard for consumer preferences, which resulted in Target's warehouses, distribution centers, and stores becoming overstocked with HHGs by September of 2021," the order said.

The plaintiffs contended that Target and its executives concealed this over-purchasing of hardlines and home goods. The truth finally came to light in May 2022 when Target announced its net profits were down 52%; its operating margin was "well below expectations, driven primarily by gross margin pressure reflecting actions to reduce excess inventory;" and gross margin had dropped to 25.7% compared to 30%, which "reflected higher markdown rates."

According to the order, Brian Cornell, Target's former CEO, stated that most of the excess inventory was products within the retailer's hardlines and home goods category.

On this news, the order stated, Target's stock price declined \$53.67 per share, or nearly 25%, from a closing price of \$215.28 per share on May 17, 2022, to \$161.61 on May 18, 2022.

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

The plaintiffs are represented by Carl V. Malmstrom of Wolf Haldenstein Adler Freeman & Hertz LLP, Shannon L. Hopkins and Gregory M. Potrepka of Levi & Korsinsky LLP, Jeremy A. Lieberman and Jonathan D. Park of Pomerantz LLP, and Lesley F. Portnoy of Portnoy Law Firm.

Target and the individual defendants are represented by Jeffrey P. Justman and Sandra Grannum of Faegre Drinker Biddle & Reath LLP, and Sandra C. Goldstein and Alexander J. Rodney of Kirkland & Ellis LLP.

The case is Perez et al. v. Target Corp. et al., case number 0:23-cv-00769, in the U.S. District Court for the District of Minnesota.

--Editing by Kristen Becker.



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Webtoon Brass Hit With Derivative Suit Over Post-IPO Plunge

By **Emilie Ruscoe**

Law360 (November 18, 2024, 8:01 PM EST) -- Executives and directors of online comics platform Webtoon Entertainment Inc. face a shareholder derivative claim alleging the company went public while concealing that it was seeing minimal growth.

In a Friday complaint filed in Los Angeles federal court, Webtoon investor Ho Kan Cheung claims Webtoon CEO Junkoo Kim, Chief Financial Officer David J. Lee and five of its directors should face liability for breaching their fiduciary duties after the company saw trading prices slide when it announced quarterly revenue growth of only 0.1% mere days after its initial public offering closed.

Because it failed to prepare investors for its first earnings report as a publicly traded company, the investor claims, Webtoon's earlier "rosy representations about the company's business, operations, and prospects [were] materially false and misleading."

Cheung cites market records showing that the company saw its trading prices decline by over 38% from nearly \$21 to less than \$13 after it announced the minimal quarterly growth in its first quarterly earnings report as a public company, bringing its prices down significantly from the company's IPO asking price of \$21 per share.

Cheung claims that in its IPO filings, the company had hidden that during the second quarter of its 2024 fiscal year, it was seeing a slowdown in advertising revenue growth and a slowdown of revenue from its intellectual property adaptations business, plus growth offset from its exposure to weaker foreign currencies including the Korean won and Japanese yen, which saw historic lows against the U.S. dollar during the quarter.

The investor also notes that the company and its brass face a proposed shareholder class action over the alleged fraud, asserting that the suit means the company will need to undertake internal investigations and make changes to its internal controls, among other actions, estimating that the exposure to that litigation would cost the company "many millions of dollars."

"The company has been substantially damaged as a result of the individual defendants' knowing or highly reckless breaches of fiduciary duty and other misconduct," Cheung asserts.

Webtoon's **June IPO**, guided by Kirkland & Ellis LLP, saw the company price its shares at the top of its stated range and sell over 16 million shares for \$21 per share, raising net proceeds of \$308.5 million, according to Cheung. The company debuted on the Nasdaq Stock Market, where on Monday, it was trading under \$10.70, down from the lowest price cited in Cheung's suit.

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

Cheung is represented by Robert C. Moest of The Brown Law Firm PC.

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

The case is Cheung v. Kim et al., case number 2:24-cv-09915, in the U.S. District Court for the Central District of California.

--Editing by Kristen Becker.



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Chancery Consolidates 2 Musk, Derivative Damage Suits

By **Jeff Montgomery**

Law360 (November 18, 2024, 7:49 PM EST) -- Delaware's chancellor on Monday combined two class suits that separately targeted Elon Musk's massive sales of Tesla Inc. stock and alleged diversions of Tesla talent to Musk's spun-off artificial intelligence venture, while ordering coordination with a suit seeking damages arising from alleged insider trading in late 2022.

The decision, affecting three of what had been four separate Tesla-focused actions dating to 2022, followed arguments that saw Chancellor Kathaleen St. J. McCormick press an attorney during a hearing Monday for Tesla to explain the company's opposition to a litigation rollup.

"Explain to me why it benefits Tesla to deal with these arguments in four different lawsuits as opposed to one," the chancellor said to Brian T. Frawley of Sullivan & Cromwell LLP, counsel to Tesla.

"The whole case itself is going to be more unwieldy, more difficult for Tesla," Frawley said, arguing in part that consolidation would lead to multiday depositions. "It creates more discovery dispute situations where witnesses are going to have to provide discovery about issues that have nothing to do with them."

Consolidated by the decision Monday were claims lodged by the Employees' Retirement System of Rhode Island and the Cleveland Bakers and Teamsters Pension Fund, with Tesla stockholder Michael Perry's Brophy suit to be coordinated.

"We believe there is a full story to this, not only what Elon is alleged to have done at any particular moment in time," Marcus E. Montejo of Prickett Jones & Elliott PA, counsel to Rhode Island, told the chancellor.

Perry, Montejo said, "wants to litigate a single chapter of this story" with the insider trading claims.

Left to go forward on its own for now was a suit filed in 2022 by stockholder David Wagner seeking damages for Musk's multiyear string of allegedly disruptive public statements and tweets regarding his businesses, which came under U.S. Securities and Exchange Commission scrutiny.

During the hearing, Chancellor McCormick said she was unsure about what to do with Perry's insider trading, or Brophy, claims, which focused on a rush of stock sales in the fourth quarter of 2022.

Lee Squitieri of Squitieri & Fearon LLP, counsel to Perry, told the chancellor that the Perry case was filed ahead of the Rhode Island and Cleveland Bakers claims

"It's not a slice at all. It's not part of the story, and it's not small at all. It's a multibillion-dollar insider trading claim that should be dispatched as quickly as possible," Squitieri said.

Each of the three cases, the motions argued, points to Musk as Tesla's controller and challenges the conduct of the company's board of directors under Delaware law in the face of Musk's alleged breaches of fiduciary duty and self-interested actions.

The largest of the three suits, led by the Employees' Retirement System of Rhode Island, accused Musk of concealing his true intent to sell \$16 billion worth of Tesla stock as his Twitter takeover took shape, allegedly allowing the shares to go for inflated prices to buyers kept in the dark about the true

purpose.

Tesla's stock price dropped after the public learned of Musk's plan to buy Twitter, triggering reports that he and his brother, Kimbal Musk, a board member, would have made \$2 billion less on their sales had the plan come to light.

The chancellor has been presiding over a string of closely watched cases and decisions that included her Jan. 30 voiding of Elon Musk's proposed stock-based, 10-year compensation plan, then valued at around \$56 billion.

The compensation shutdown triggered a stockholder vote to reincorporate in Texas, although mountains of litigation remained in Delaware. Still pending, too, is a shareholder bid for a stock-based fee for the voided pay plan, potentially worth billions.

Frawley said "the question for the court is, 'What's in the best interest of the company, whose rights asserted here bear the brunt of discovery costs, brunt of the costs of litigation?'"

The Employees' Retirement System of Rhode Island is represented by Marcus Montejo, Bruce Jameson, Kevin Davenport, John Day and Seth Ford of Prickett Jones & Elliott PA, and Daniel Chiplock, John Nicolaou, Sean Petterson, Richard Heimann, Katherine Benson and Bruce Leppla of Lieff Cabraser Heimann & Bernstein LLP.

The Cleveland Bakers and Teamsters Pension Fund, Daniel Hazen and Michael Giampietro are represented by Christine M. Mackintosh, Vivek Upadhya and William G. Passannante II of Grant & Eisenhofer PA, Thomas Curry, David J. Schwartz, David L. Wales and Adam D. Warden of Saxena White PA, and Brian Schall of The Schall Law Firm.

Perry is represented by P. Bradford deLeeuw of DeLeeuw Law LLC, Lee Squitieri of Squitieri & Fearon LLP and Fletcher Moore of Moore Law PLLC.

Wagner is represented by Kurt M. Heyman and Gillian L. Andrews of Heyman Enerio Gattuso & Hirzel LLP, and Gustavo F. Bruckner, Samuel J. Adams and Ankita Sangwan of Pomerantz LLP.

Elon Musk, Kimbal Musk, Ira Ehrenpreis, James Murdoch, Robyn Denholm, Kathleen Wilson-Thompson, Joe Gebbia, JB Straubel, Larry Ellison, Hiromichi Mizuno and Tesla are represented by: Rudolf Koch, Kevin M. Gallagher and Andrew L. Milam of Richards Layton & Finger PA; John L. Reed, Caleb G. Johnson and Daniel P. Klusman of DLA Piper LLP (US); and Boris Feldman, Doru Gavril, Rebecca Lockert, Jon Fougner and J. Mia Tsui of Freshfields Bruckhaus Deringer LLP.

The cases are Employees Retirement System of Rhode Island v. Elon Musk et al., case number 2024-0631, Michael Perry v. Elon Musk et al., case number 2024-0560, Cleveland Bakers and Teamsters Pension Fund et al. v. Elon Musk et al., case number 2024-0646, and David M. Wagner v. Elon Musk et al., case number 2022-0953, all in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.

Update: This article has been updated to add counsel information.



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Ex-AutoZone CEO Must Face \$1M 'Short-Swing' Profit Suit

By **Sydney Price**

Law360 (November 18, 2024, 10:02 PM EST) -- A Tennessee federal judge said a former AutoZone Inc. CEO must face an investor suit seeking to recover over \$1 million in alleged "short-swing" trading profits on behalf of the company, saying the shareholder has plausibly alleged that the ex-CEO's trades were not exempt from certain insider trading rules.

AutoZone shareholder Nosirrah Management LLC alleged in its **March lawsuit** that William C. Rhodes III, who headed the car parts retailer between 2021 and 2023, made more than \$1 million trading AutoZone shares between December 2021 and July 2022.

Under federal securities laws, Nosirrah said, profits earned by company insiders on the purchase and sale, or sale and purchase, of company shares within a six-month period should belong to the company. According to the investor, Rhodes made more than \$1 million off trading AutoZone shares during that time period under the "universally accepted" method used to calculate such profits.

Rhodes argued in his motion to dismiss the suit that the shares at issue were part of grantor retained annuity trusts, or GRATs, that he was the beneficiary of, and that they were exempt from the short-swing profit rules established by the Exchange Act.

Rhodes said he funded the GRATs with shares of AutoZone common stock, which were contributed subject to an annuity obligation, and that the alleged wrongful transactions were annuity payments under the terms of the GRATs, Friday's order denying the motion states.

But U.S. District Judge Jon P. McCalla said on Friday the suit plausibly alleges that Rhodes' acquisition of AutoZone stock via the annuity payments from the GRATs meets each element for liability under Exchange Act rules.

Rhodes cited a 1997 no-action letter from the U.S. Securities and Exchange Commission involving such a trust to support his position, but Judge McCalla said Nosirrah has plausibly alleged the opportunity existed for Rhodes to abuse inside information.

"[T]here is a reasonable inference that defendant could exercise his discretion by substituting the stock in the GRATs with other property of equal value," the order states. "Indeed, defendant does not contest the GRATs had the power of substitution; he only states he did not exercise this power."

Nosirrah claimed in its suit that in August 2022, it had emailed AutoZone, which is a nominal defendant in the action, telling the company to seek disgorgement from Rhodes, which the investor followed up on for nearly a year and a half with "numerous" messages.

In January 2024, the investor said, it heard back from counsel for AutoZone that the company wouldn't pursue disgorgement of short-swing profits from Rhodes, citing the nearly three decades-old no-action letter.

But Nosirrah said the SEC letter was inapplicable because "there have been material changes in the terms of GRATs since the [SEC letter] was issued."

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

Nosirrah Management is represented by Ann Heimberger Jernow of Sterlington PLLC.

Rhodes is represented by Kristine L. Roberts and Pete A. Brunson of Baker Donelson Bearman Caldwell & Berkowitz PC.

The case is Nosirrah Management LLC v. AutoZone Inc. et al., case number 2:24-cv-02167, in the U.S. District Court for the Western District of Tennessee.

--Additional reporting by Emilie Ruscoe. Editing by Bruce Goldman.

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StraightPath Execs Must Face \$386M IPO Fraud Charges

By **Carolina Bolado**

Law360 (November 18, 2024, 9:04 PM EST) -- A New York federal judge denied a bid Monday by three principals of Florida-based private equity firm StraightPath Venture Partners to dismiss an indictment accusing them of raising \$386 million by defrauding over 2,000 investors through false promises about purchases of pre-IPO shares in private companies.

U.S. District Judge Jesse M. Furman denied a motion to dismiss by former StraightPath owners and co-founders Michael Castillero, Francine Lanaia and Brian Martinsen to dismiss the indictment, rejecting their arguments that it was legally defective.

The defendants had argued that count four of the indictment, which charges them with investment adviser fraud under the Investment Advisers Act, is legally defective, and that the legal defect is baked into the other charges, warranting dismissal of the entire indictment.

But Judge Furman said count four tracks the language of Section 206 of the Investment Advisers Act, which is "reason enough to reject defendants' request to dismiss the charge."

The judge also rejected the defendants' assertions that the indictment uses "nefarious language" such as "boiler-room style call centers" and "aggressive sales pitches using notes and pitch scripts." Judge Furman said there is nothing nefarious or unfairly prejudicial about these phrases.

"They merely provide factual context to describe the fraudulent scheme with which defendants are charged," Judge Furman said. "In any event, even if the court did agree that these phrases are unduly prejudicial, that would, at most, warrant striking the phrases, not dismissing the counts, in the indictment."

The judge also denied the defendants' demand that the government produce the identities of all alleged victims, identify all material misrepresentations or omissions and provide the particulars about the alleged breaches of fiduciary duty. Judge Furman said the indictment and the government's disclosures have provided them with "more than sufficient notice of the charges" and enough to prepare for trial.

The criminal charges, **unveiled last November**, mirror the actions alleged in civil suits filed by the U.S. Securities and Exchange Commission in **May 2022** and **March 2023**.

Prosecutors allege that between 2017 and 2022, Martinsen, Castillero and Lanaia sold pre-IPO shares they didn't own, commingled investor funds and made Ponzi-like payments to earlier investors who wanted their money back. Though they told investors they were not charging or had waived any upfront fees, the investors were charged excessive markups, according to prosecutors. The trio paid themselves nearly \$75 million over approximately 3½ years, and they also paid referral agents millions of dollars in investor funds, according to the U.S. Department of Justice.

The DOJ said the defendants used boiler-room style call centers to market nine StraightPath Funds. They allegedly told potential nonprofessional investors that the funds represented an opportunity to buy cheap shares in companies — such as Impossible Foods Inc., Kraken or Virgin Hyperloop — expected to go public in the near future, according to a statement.

They also misled investors about the nature of their investments while hiding the involvement of

Castillero and Lanaia, who were barred from the securities industry by the Financial Industry Regulatory Authority, the DOJ said.

According to the indictment, after the SEC opened an investigation into the firm, the defendants discussed in text messages whether to make an unnamed fund manager a scapegoat.

Martinsen allegedly texted, "Fran [Lanaia] is going to wamboosle the sec lady tomorrow. They will talk weather for 45 min and the lady will forget what she's looking for," the DOJ said in a statement.

Additionally, according to the indictment, Martinsen and Castillero deleted certain email records subpoenaed by the SEC and then falsely claimed those records never existed.

Attorneys for the three defendants did not respond to requests for comment.

The government is represented by Allison Carol Nichols, Adam Hobson and Jason Richman of the U.S. Attorney's Office for the Southern District of New York.

Castillero is represented by Grainne O'Neill of O'Neill and Hassen LLP and Megan Wall-Wolff of Wall-Wolff LLC.

Lanaia is represented by Benjamin R. Allee of Yankwitt LLP.

Martinsen is represented by Jonathan Etra of Nelson Mullins Riley and Scarborough LLP.

The case is U.S. v. Michael Castillero et al., case number 1:23-cr-00622, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Henrik Nilsson. Editing by Peter Rozovsky.



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J&J Posts \$1.17B Bond For Del. Merger Milestone Appeal

By **Dorothy Atkins**

Law360 (November 18, 2024, 9:44 PM EST) -- Johnson & Johnson Inc. has posted a \$1.167 billion surety-backed bond ahead of its planned appeal challenging a Delaware Chancery Court's finding that it owes more than \$1 billion to a medical robotics developer's former shareholders caught up in a post-acquisition dispute.

In a supersedeas bond signed last Wednesday and filed with the court Monday, Johnson & Johnson, its subsidiary Ethicon Inc. and three insurance companies serving as sureties agreed to severally post \$1.167 billion as the pharmaceutical giant appeals Vice Chancellor Lori W. Will's **September decision**, which found that J&J owes robotics company Auris Health Inc.'s stockholders for breaching their merger agreement and failing to make post-acquisition payments for milestones reached during J&J's development of Auris' iPlatform robotic surgical device.

The 10-figure bond reflects the court's \$1 billion judgment against J&J, including prejudgment interest, plus nine months of estimated postjudgment interest, and it requires J&J and its subsidiary to pay the judgment in full plus costs if J&J's appeal is withdrawn or dismissed, or if the judgment is affirmed on appeal, according to court documents.

Federal Insurance Co., Travelers Casualty and Surety Co. of America and Liberty Mutual Insurance Co. each signed on as a bond surety, and under the agreement, each company limited its liability to a third of the total bond, coming out to a maximum payout of about \$389 million each, the supersedeas bond says.

Counsel and representatives for the parties didn't immediately respond to requests for comment Monday.

The eye-whopping bond comes as J&J has vowed to appeal the nine-figure judgment in a lawsuit launched by Fortis Advisor in October 2020, following J&J's 2019 acquisition of Auris for \$3.4 billion in cash and \$2.35 billion in potential future earnings milestone payments.

In 2019, J&J had also acquired Ethicon, another surgical robotics company, and Fortis Advisor's lawsuit alleged J&J unfairly required a post-merger competitive "bake-off" between Ethicon's Verb and Auris' iPlatform. According to the complaint, Verb was ultimately declared the winner and J&J placed a hold on cash payments reserved for iPlatform milestones released in April 2020.

Fortis Advisor, which represents former Auris stockholders, alleged that J&J's post-acquisition conduct effectively robbed them of their contractually promised earnouts. And in September, Vice Chancellor Will found J&J liable for contractual breaches, among other claims.

The vice chancellor found that the parties' earnout provision required J&J to treat iPlatform as a priority device, "to provide efforts in support of the regulatory milestones, and to avoid making decisions based on the contingent payment."

"J&J violated each obligation — most blatantly when iPlatform was made to compete against and combine with Verb," the decision said.

Vice Chancellor Will added that J&J's defense argument that it missed milestones because of iPlatform "technical problems" was "dubious" and "concocted after J&J was sued," particularly

because there were indications that the problems were both "expected and solvable."

J&J and Ethicon are represented in-house by John H. Denton.

The surety companies are represented by Francesca Kazmierczak of Aon Risk Services Northeast Inc.

The case is Fortis Advisors LLC v. Johnson & Johnson et al., case number 2020-0881, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Brian Baresch.

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3M Can't Add DuPont, Others To PFAS Water RICO Fight

By **Dorothy Atkins**

Law360 (November 18, 2024, 10:01 PM EST) -- A Massachusetts federal judge rejected on Monday requests by 3M Corp. and other defendants to add DuPont entities and over a dozen additional companies as cross-defendants in a proposed racketeering class action seeking to hold the companies liable for conspiring to contaminate local drinking water with so-called forever chemicals.

In a 58-page order, U.S. District Judge Margaret R. Guzman denied multiple motions by the five defendants — 3M, Seaman Paper Co., its farm Otter Farms Inc., the defunct Newark Group Inc., and Massachusetts Natural Fertilizer Co., dubbed "MassNatural" — to add more than 15 new entities as cross-claim defendants in the sprawling litigation over who should be held liable for the alleged contamination.

The judge also denied a motion by the proposed class of Westminister, Massachusetts, residents seeking permission to file a third amended complaint that would also add Ball Corp., RustOleum and the DuPont entities to the litigation.

The judge found all the motions are untimely, particularly given that the plaintiffs should have known of the additional potential defendants since at least July 2023, but failed to seek amendment until months later. The defendants' other requests also have pleading issues making most of them futile, and the other cross-claims that might be viable would be logistically unmanageable to join at this stage of litigation, the judge wrote.

The ruling is the latest chapter in a proposed class action filed in **August 2022**, roughly a month after the Massachusetts Department of Environmental Protection ordered Otter Farm and MassNatural to stop organic composting operations at the 240-acre Westminister farm where MassNatural operates.

The order came after months of tests near the farm showed that the concentration of toxic per- and polyfluoroalkyl substances — known as PFAS — in underground drinking water was many times higher than the state's established limit of 20 parts per trillion.

The suit claimed that paper-manufacturers Seaman Paper and Newark Group dumped waste contaminated with PFAS made by the industrial giant 3M at the MassNatural composting facility exposing local residents to higher risks of cancer.

The complaint asserted civil violations of the federal Racketeer Influenced and Corrupt Organization Act, as well as numerous other state and common law claims, including allegations of negligence, medical monitoring, private and public nuisance and breaches of warranty.

After surviving multiple rounds of pleading, the judge allowed **the bulk of the allegations** to proceed against the five remaining defendants. But earlier this year, the defendants filed a series of motions asking the court to let them add cross-claims against other entities that allegedly played a role in the water contamination.

The companies identified as potential cross-claim defendants Ball Corp., Rust-Oleum Corp., New England Fertilizer Co., its successor-in-interest Synagro Technologies Inc., Little Leaf Farms LLC, Jordan Dairy Farms Inc., fellows of Harvard University, Anaergia Inc., Rhode Island Bioenergy Facility LLC, Baro Properties LP, Westminister Estates LLC, Casella Organics and multiple DuPont entities.

Many of the identified cross-defendants opposed the motions, arguing, among other defenses, that the defendants' requests are procedurally barred because the defendants failed to lodge the same claims against their co-parties.

In her ruling, Judge Guzman found that the motions must be denied on multiple grounds, including because they are all untimely and some of the defendants' allegations don't stem from the same transaction or occurrence as the plaintiffs' claims.

The judge noted that although some entities named as potential cross-defendants could be considered suppliers potentially aware of PFAS in their products, others like the Harvard cross-defendants wouldn't necessarily have been on notice and entities like Westminster and Baro, "who have zero commercial connection to MassNatural and are not part of its supply chain," would not be brought in.

"Similarly, entities like Anaergia and Rhode Island Bioenergy, who contracted out their waste disposal and had no role in selecting MassNatural as a final destination, [should not be allowed to be brought in as parties]," the order says.

The judge also noted that although the defendants may have identified some viable cross-claims against some of the defendants, joining them in the litigation at this stage "would delay the case and create logistical difficulties in evaluating each individualized claim."

She added that ultimately she has not yet decided liability.

"The court does not decide in this order whether an upstream entity in a supply chain involving hazardous materials, such as Newark or 3M, is liable in a case alleging specific, individualized mismanagement of those materials by one player at the end of the chain, such as a composting facility like MassNatural," the order says. "Ultimate liability has yet to be determined, and plaintiffs will have to meet their burdens in upcoming dispositive stages to win their case."

Counsel and representatives for the parties didn't immediately respond to requests for comment Monday.

PFAS — called forever chemicals because they persist in the environment without breaking down — have given rise to scores of lawsuits nationwide. The chemicals have been used since the 1940s in clothing, food packaging, heat-resistant nonstick cooking surfaces, machinery coatings and other things.

The residents are represented by Ian W. Sloss of Silver Golub & Teitell LLP.

3M is represented by Christopher B. Essig of Winston & Strawn LLP.

Massachusetts Natural Fertilizer is represented by George F. Hailer of Lawson & Weitzen.

Otter Farm and Seaman Paper are represented by Randolph T. Struk of Clark Hill PLC.

Newark is represented by John P. Gardella of CMBG3 Law LLC.

3M is represented by Christopher B. Essig of Winston & Strawn LLP.

The non-party DuPont entities are represented by Brandon L. Arber of Shook Hardy & Bacon LLP.

The non-party fellows of Harvard are represented by Michael P. Molstad of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

The case is Thomas Ryan et al. v. The Newark Group Inc. et al., case number 4:22-cv-40089, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by David Holtzman. Editing by Kelly Duncan.



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Chiquita Wants New Bellwether Trial In \$38M Paramilitary Case

By **Carolina Bolado**

Law360 (November 18, 2024, 7:43 PM EST) -- Chiquita told a Florida federal court that a landmark \$38 million bellwether loss to the families of victims of Colombian right-wing paramilitaries was the "product of numerous legal and evidentiary errors" that handicapped the banana company, which now wants a new trial.

Chiquita Brands International Inc. says in a Friday motion for a new trial that the court overseeing the multidistrict litigation over the company's funding of the paramilitaries made a number of errors during the trial earlier this year, including a refusal to have the jury apply Colombian law on causation, which requires plaintiffs to demonstrate by a preponderance of the evidence that each decedent's death would not have occurred without Chiquita's payments to the paramilitary group Autodefensas Unidas de Colombia.

The company contends it is undisputed that Colombian law applies to causation and that the court instructed the jury on Colombian law with respect to every element except causation, the most consequential one.

"Because there was a failure of evidence demonstrating that at trial, had the jury been properly instructed on causation, they would not have found Chiquita liable under Colombian law," Chiquita argues.

It adds that the decision to consolidate 10 disparate cases into one trial amplified the errors.

"As but one example of the extreme prejudice caused by consolidation, the central piece of evidence that plaintiffs relied on at trial — Chiquita's guilty plea in an earlier federal prosecution — concerned a time period applicable to only one third of the cases tried and tainted the rest," Chiquita says. "Consolidation blended the cases together to the confusion of the jury and Chiquita's prejudice."

In addition, the company claims, the court allowed the plaintiffs to present a "highly inflammatory and prejudicial closing argument" that painted Chiquita as willingly partnering with terrorists.

A West Palm Beach, Florida, federal jury in June awarded \$38.3 million to 16 of the plaintiffs, all survivors of eight of the nine victims of the AUC whose deaths were at issue in the case, which was the first to go to trial in the long-running MDL that began in 2008, when families of AUC victims sued Chiquita in an attempt to hold it liable for their relatives' deaths.

The families accuse Chiquita of paying the AUC nearly \$2 million to protect the company's interests during the armed conflict. Chiquita then took advantage of the war to buy cheap farmland beginning in the late 1980s, when it switched from a banana-buying-only operation to one that produced the fruit on its own farms, the families claim.

It eventually acquired about 35 farms and more than 10,000 acres of land in the Santa Marta and Urabá regions in northern Colombia. The farms were consolidated under its subsidiary Banadex, through which Chiquita made the payments to the AUC, the families say.

Chiquita executives testified at trial that the payments were extorted from the company. They said that beginning in 1988, the left-wing guerrilla group Fuerzas Armadas Revolucionarias de Colombia began demanding money from the manager of one of the farms the company had recently

purchased. The AUC began making similar demands when it moved into the area in 1998, according to the company.

Chiquita pled guilty in 2007 to federal charges stemming from the payments and agreed to pay a \$25 million fine to the U.S. Department of Justice.

A second bellwether trial was scheduled to start July 15, but U.S. District Judge Kenneth Marra canceled it, saying he did not see any purpose in holding another trial operating under the same parameters he set out for the first trial before the Eleventh Circuit has had a chance to review his actions.

Chiquita tried to have the \$38.3 million damages award reduced, arguing that the award far exceeds the caps on noneconomic damages in Colombian law. Those limits are 72 million Colombian pesos, or about \$17,560, for moral damages and 140 million pesos, or about \$34,146, for loss of relations damages, according to Chiquita.

But last month, Judge Marra found that Colombian law "does not provide for caps, or limitations, on non-monetary damages as to the instant civil tort matter." He added that even if there were caps, they would not apply because Chiquita is not domiciled in Colombia.

Jack Scarola, who represents the MDL plaintiffs, said Chiquita's motion for a new trial "recycles issues and failed arguments that have already been carefully considered and decisively rejected by the trial court."

"We are confident that the historic verdicts rendered against Chiquita will continue to withstand these challenges not only at the district court but also at the appellate level," he said.

The plaintiffs are represented by John Scarola, Victoria Mesa-Estrada and Mariano Garcia of Searcy Denney Scarola Barnhart & Shipley PA, James K. Green of James K. Green PA, Rick Herz, Maryum Jordan, Marissa Vahlsing and Marco Simons of EarthRights International, William J. Wichmann of the Law Offices of William J. Wichmann PA, William R. Scherer of Conrad & Scherer LLP, Agnieszka Fryszman and Leslie M. Kroeger of Cohen Milstein Sellers & Toll PLLC, Jonathan C. Reiter of Jonathan C. Reiter Law Firm PLLC, Terry Collingsworth of International Rights Advocates and Gabriela Paola Valentin Diaz.

Chiquita is represented by Michael L. Cioffi, Frank A. Dante, Melissa F. Murphy, Michael A. Stoolman and Serena S. Gopal of Blank Rome LLP.

The case is In re: Chiquita Brands International Inc. Alien Tort Statute and Shareholders Derivative Litigation, case number 0:08-md-01916, in the U.S. District Court for the Southern District of Florida.

--Editing by Kristen Becker.



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Electronics Co. Hit With Default In \$2B Price Fixing Case

By **Matthew Perlman**

Law360 (November 18, 2024, 7:38 PM EST) -- A California federal court will enter a default judgment against Irigo Group on claims that could total \$2 billion in damages in long-running litigation over an alleged conspiracy to fix cathode ray tube prices after finding the Chinese electronics company failed to preserve evidence.

U.S. District Judge Jon S. Tigar issued an order Friday that adopted the **recommendations** of a special master and imposed terminating sanctions on Irigo Group Corp. and Irigo Display Devices Co. Ltd., the last remaining defendants in the suit, which traces back to 2007.

The motion for sanctions came from two groups of buyers that accused Irigo of failing to preserve evidence despite repeated warnings from its outside counsel before ignoring the case for years.

"Irigo was not only ordered by the court to preserve evidence, but it was given detailed instructions, as well as admonitions, by its own counsel regarding its obligations," Friday's order said. "Irigo has never argued that it was incapable of complying with those obligations, or that anything it was required to do was outside its control."

Rather than follow the advice of its attorneys with Pillsbury Winthrop Shaw Pittman LLP, the judge said Irigo chose not to preserve any relevant evidence, aside from documents that were required to be retained under Chinese law, including by recycling the computers of departing employees without checking them for relevant documents.

The order said almost all of the key employees involved with cathode ray tube sales when the litigation started have now left the company.

While there's no evidence that Irigo specifically deleted any individual documents for the purpose of avoiding discovery, the order said Irigo's "wholesale failure to comply with its discovery obligations" makes identifying individual documents impossible.

The order added that the relevance of some of the missing information is known because other defendants in the case produced reports and meeting notes that came from Irigo.

"These documents are relevant, and it is implausible that they are the only documents of their kind that Irigo ever created," the order said. "This means that Irigo's conduct, without question, resulted in the destruction of relevant evidence."

Irigo is also accused of failing to secure a deposition from its former employee, Su Xiaohua. The deposition request came at the height of the COVID-19 pandemic, and **Irigo had argued** that Su resigned because he would have had to travel to Macau for the deposition and then face severe quarantine requirements on return to his home in mainland China.

But Judge Tigar said in Friday's order that Irigo approved Su's early retirement in 2022 despite knowing it would have to produce him for a deposition and said the company continued paying him after saying it no longer had control over him.

"Irigo also made multiple misrepresentations to the court and to the special master in apparent attempts to conceal the truth," the order said.

The order strikes Irico's answer and defenses in the case, directs the clerk to enter default against the company and vacates all pretrial and trial dates that have been scheduled. The order also calls for the sides to make proposals about how to determine damages, saying a jury trial on damages is not required after the entry of default.

FedArb special master Vaughn R. Walker had noted in May's report and recommendation on the sanctions bid that the buyers estimated Irico's liability at roughly \$2.42 billion in damages, after tripling under federal antitrust law and subtracting \$212.2 million in settlements from the other defendants.

Irico is the only company remaining in the litigation, which was first filed in 2007 in the wake of a U.S. Department of Justice criminal probe into price-fixing of cathode ray tubes, the electronic components used in older TVs and computer monitors. Claims against every other defendant, including major **electronics companies**, like LG Electronics, have been settled or otherwise resolved.

Representatives for Irico and the buyers did not respond to requests for comment Monday.

The plaintiffs are represented by lead counsel R. Alexander Saveri, Geoffrey C. Rushing, Matthew D. Heaphy of Saveri & Saveri Inc. and Mario N. Alioto and Lauren C. Capurro of Trump Alioto Trump & Prescott LLP.

Irico is represented by Jeffrey Margulies, Geraldine Young and Kaylee Yang of Norton Rose Fulbright.

The case is In re: Cathode Ray Tube (CRT) Antitrust Litigation, case number 4:07-cv-05944, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger and Bryan Koenig. Editing by Jay Jackson Jr.

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Meta, Netflix Shook Hands On Illicit Streaming Deal, Suit Says

By **Lauren Berg**

Law360 (November 18, 2024, 11:25 PM EST) -- Meta Platforms and Netflix made an unlawful agreement where the social media giant would cede the video-streaming market to Netflix by hobbling its competing service and the streaming giant would funnel its customers' data to boost Facebook's advertising algorithms, according to a proposed class action filed Monday in Illinois federal court.

Back in 2017, Facebook CEO Mark Zuckerberg and Netflix Co-Founder Reed Hastings came together and agreed that Facebook, since renamed Meta, would hobble its Watch platform in exchange for Netflix sending customer data and increasing its advertising on the social media site, according to the **complaint** filed by John Luis Bracamontes and Ronald Williams.

"This anticompetitive agreement between Facebook and Netflix decreased consumer choices in video-streaming services while at the same time increasing consumer costs because Netflix was able to charge subscribers more than it would have but for Facebook's relinquishing the video-streaming market to Netflix," the consumers said.

The deal was cemented in early 2019, according to Bracamontes and Williams, who allege that's when Netflix first raised its prices for all subscription options, ranging from 12.5% to 18% increases.

Facebook launched Watch in August 2017 as a new platform for watching video content, including original programming funded by the social media company, as a competitor to Netflix and Hulu, according to the suit. An investment firm at the time estimated that Watch could generate \$12 billion in revenue by 2022, about the same as Netflix's annual revenue at the time, the suit states.

More than a year after it premiered, Watch was a success and creators were lining up to provide original content for the service, according to the complaint.

But all of a sudden, Facebook reversed course and abandoned its long-term plans for the streaming platform, the suit states.

"Facebook has never offered a persuasive — or even coherent — explanation for Watch's demise," Bracamontes and Williams say. "Why did the company invest over one billion dollars into high-quality video content — to great initial success — only to effectively abandon the platform a year and a half after its debut?"

Because the company had a quid pro quo agreement with Netflix, which would continue to funnel its subscribers' data to Facebook and purchase hundreds of millions of dollars in targeted advertising on the social media platform, the pair allege.

Bracamontes and Williams want to represent a nationwide class of people who paid for Netflix at any time between August 9, 2017, and the present.

The suit claims unlawful allocation of markets through an agreement to not compete in the market for video-streaming services in violation of the Sherman Act. It seeks injunctive relief, treble damages, attorney fees and litigation costs.

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

The consumers are represented by Kenneth A. Wexler, Justin N. Boley, Tyler Story, Zoran Tasić and Margaret Shadid of Wexler Boley & Elgersma LLP, Kevin Landau and Archana Tamoshunas of Taus Cebulash & Landau and Daniel C. Hedlund, Michelle J. Looby and Bailey Twyman-Metzger of Gustafson Gluek PLLC.

Counsel information for Meta and Netflix was not immediately available.

The case is John Luis Bracamontes et al. v. Meta Platforms Inc. et al., case number 1:24-cv-11839, in the U.S. District Court for the Northern of Illinois.

--Editing by Emily Kokoll.

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The AI Consumer Class Action Threat Is Not A Hallucination

By **Ronald Levine and Richard Torrenzano** (November 18, 2024, 3:24 PM EST)

In the blink of an eye, artificial intelligence has erupted like a technological storm, turning industries upside down and making bold promises to reshape life as we know it.

Headlines scream of breakthroughs, each more revolutionary than the last, sparking a frenzy of excitement and speculation.

But behind the curtain of hype, something more complex brews — a powerful, mysterious force that few totally understand. And its ultimate impact is still a wild card.

Now, regulators are stepping up, sharpening their sights on tech titans and developers riding this wave, determined to keep the pace and control the chaos. The game has changed, and everyone's watching to see who will rise — or fall — next.

In September, the Federal Trade Commission launched Operation AI Comply, **targeting** companies accused of using AI to deceive and exploit consumers. [1]

The FTC reported that it zeroed in on five businesses allegedly exploiting AI hype — one claiming its AI could replace human lawyers, another promising guaranteed income through AI-driven online stores. [2]

Earlier this year, the U.S. Securities and Exchange Commission **settled** claims against two investment advisers, Delphia and Global Predictions Inc., accused of making false and misleading claims about their use of AI.

In announcing the settlement, SEC Chair Gary Gensler stated: "We've seen time and again that when new technologies come along, they can create buzz from investors as well as false claims by those purporting to use those new technologies." Gensler has referred to the making of false AI claims as "AI washing," similar to the greenwashing phenomenon. [3]

At the federal, state and local levels, **scrutiny is intensifying** over the use of AI in recruitment, hiring and firing — particularly regarding potential bias and discrimination.

Last year, the Consumer Financial Protection Bureau, the U.S. Department of Justice's Civil Rights Division, the U.S. Equal Employment Opportunity Commission and the FTC issued an unusual joint statement warning that "automated system outcomes can be skewed by unrepresentative or imbalanced datasets, datasets that incorporate historical bias, or datasets that contain other types of errors." [4]

Why These Moves Signal More Than Just Regulatory Pressure

When federal agencies such as the FTC, the DOJ or the SEC step in, it often triggers major class actions that send shock waves through entire industries.



Ronald Levine



Richard Torrenzano

Class action attorneys frequently monitor these government actions as a blueprint for launching large-scale litigation. Cease-and-desist orders and fines may just be the opening salvo in much bigger legal battles that follow.

Consumer products industries such as dietary supplements, pharmaceuticals and tobacco have already seen heightened scrutiny. Executives in these fields know all too well how a seemingly minor government review can quickly escalate into full-blown legal conflicts, with major public and investor consequences.

Until now, the AI industry's legal skirmishes have largely revolved around intellectual property, with copyright and trademark disputes dominating courtrooms.

But as scrutiny intensifies over whether AI systems can live up to their bold promises, the industry is on the verge of facing a new wave of class actions — this time targeting consumer fraud, unfair competition and breach of warranty claims.

Companies leveraging AI and emerging technologies should prepare for legal challenges surrounding their products' performance.

Take Tesla as a prime example — it's currently **facing a proposed class action**, In re: Tesla Advanced Driver Assistance Systems Litigation in the U.S. District Court for the Northern District of California, over allegations of false claims, including promises its vehicles would one day drive themselves coast-to-coast.

And in a different industry, a securities class action **was filed** in July — Hoare v. Oddity Tech Ltd. in the U.S. District Court for the Eastern District of New York — claiming that a beauty and wellness company overstated its AI technology capabilities before its IPO. A **July report** from Cornerstone Research saw a growing number of AI-related shareholder suits.

The stakes are escalating rapidly and companies that overpromise and underdeliver AI-driven capabilities risk becoming the focus of high-profile courtroom battles.

While a shift in presidential administrations might signal reduced enforcement from federal agencies, businesses should brace for increased scrutiny at the state and local levels, as well as more aggressive action in the courts.

Five Stages of Grief: Moving From Denial to Dollars

When executives find themselves entangled in class action litigation, they often go through their own corporate version of the classic five stages of grief.

No matter the industry, the pattern is strikingly familiar: denial ("This is baseless"), anger ("How dare they accuse us!"), bargaining ("Maybe we can quietly settle this"), depression ("These legal fees are crippling") and, finally, acceptance — typically marked by a hefty settlement.

But here's the truth: Corporate denial doesn't make lawsuits vanish — it just amplifies the fallout. Anger? It leads nowhere, fast.

While some companies successfully beat claims, fighting back hard often digs a deeper hole and sends legal costs through the roof. Smart executives understand that their definition of "right" rarely aligns with the opinions of their opponents, the courts, the public or investors.

Ignoring that reality only worsens the pain. If a company chooses to engage in battle, it is better to brace for a drawn-out war — astronomical legal bills, brutal media scrutiny and a social media circus that will challenge every move.

Denials may feel powerful in the boardroom, but crumble in the court of public opinion, especially when amplified by media and online commentary. While executives may feel secure in their defense, outside those walls, public perception is relentlessly shredded by scrutiny and skeptics.

Meanwhile, the legal machine grinds on. Motion after motion, each piling up legal fees. What seemed

like a solid strategy behind closed doors spirals into a public disaster. The harder you fight, the bigger the bill — and the deeper the hole you're digging with every delay.

In the end, corporate exhaustion sets in, and after months or years of motions and discovery — assuming the case isn't tossed — outside counsel will inevitably be told, "Just settle this and get it behind us." By then, the damage is done.

Swimming in a Regulatory and Judicial Shark Tank: Stay Sharp or Become Bait

AI companies can dodge the looming litigation trap by learning from the hard lessons of other industries, and taking swift, decisive action before it's too late.

Businesses leaders must prioritize fundamental best practices that are often overlooked. Neglecting these essentials not only endangers company reputation — a most valuable asset — but also exposes it to significant financial repercussions and risk.

Brace for Impact

Domestic and global regulations are shifting at lightning speed. What's legal today might be banned tomorrow, and international standards are evolving even faster.

If you're developing, marketing or deploying AI, stay ahead of changes. By the time your product hits the market, regulatory landscapes may have shifted — leaving your company exposed and unprepared.

Establish a Platinum Standard

Relying on industry self-regulation might seem ambitious, but it's no longer optional. Creating strong ethics, compliance and nondiscrimination policies is critical.

Do you have a publicly available AI code of conduct?[5] If not, you're already behind.

Taking a proactive stance isn't just smart governance — it's vital for keeping regulators off your back and preventing operational disasters.

Lead, Don't Follow

Waiting for issues to arise is a recipe for disaster. Conduct regular risk assessments, audits and scenario-based crisis simulations. These practices expose weaknesses before they spiral into crises.

Every AI tool, especially with public-facing applications, must undergo rigorous, real-world testing. And a well-trained customer service team is ready to act swiftly, using user feedback to identify patterns of potential risk.

Ensure the company has robust liability insurance and ironclad contracts with vendors, customers and third parties to cover bases.

Control the Message

In marketing AI promises, every word counts. Flashy headlines may grab attention, but they must be rooted in reality.

A single off-script comment can spark a firestorm of legal and reputational chaos, with consequences that may take years to repair.

Every piece of marketing material or public communication, including social media posts, must be meticulously reviewed to ensure accuracy and alignment with business objectives and values.

Every stakeholder has access to the internet and employees represent the organization in some capacity, so comprehensive training is essential to instill an understanding of the critical importance of honest, transparent communication.

In this advancing digital world, with information and data traveling globally at warp speed, ongoing education and oversight are not optional — they are the first line of defense against preventable crises.

Stick to approved, accurate messaging and resist the temptation to embellish. If claims are scrutinized by regulators or in court, there's no room for hyperbole — everything you say must be backed up by solid proof points.

Overpromising AI capabilities can lead to disaster, especially when unauthorized claims are posted and go viral on social media. Companies must be proactive in making sure that what is being called AI is not basic automation but is actually incorporating machine learning.

Transparency isn't simply important — it's nonnegotiable. Be upfront about what AI products and services can deliver and, crucially, what they can't. Clear, honest communication isn't just best practice — it's your strongest shield against erosion of trust.

Equally vital is staying laser-focused on client and customer feedback. Complaints about misleading information aren't just noise — they're early warning signals. Addressing these concerns quickly not only prevents a crisis from expanding, but also reinforces the commitment to accountability and integrity.

Disrupt or Be Disrupted: AI Race Comes With Lawyers

Winning in AI demands more than just technological brilliance. It requires a deep understanding of the shifting legal landscape, and the readiness to navigate it.

The future of AI is boundless — but only for companies that anticipate regulatory and legal storms. Those that blend innovation with foresight and transparency will lead. Those that don't will be left battling lawsuits, compliance breakdowns and tarnished reputations.

Remember the famous words of Warren Buffet 20 years before AI: "It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently."

Ronald J. Levine is counsel at Herrick Feinstein LLP.

Richard Torrenzano is chief executive at the Torrenzano Group. He was previously a member of the New York Stock Exchange management and executive committees.

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Plaintiffs Dispute Ruling Applying BIPA Change To Past Cases

By **Allison Grande**

Law360 (November 18, 2024, 11:19 PM EST) -- Workers suing over the allegedly unlawful collection of their fingerprints are urging an Illinois federal court to reject a recent ruling that a legislative amendment limiting damages under the state's Biometric Information Privacy Act applies to previously filed disputes, arguing that several state courts have reached the opposite conclusion.

In responses filed Sunday in separate lawsuits against food service company Sabert Corp. and fire sprinkler components distributor Viking SupplyNet, the plaintiffs pressing these disputes fired back at motions lodged by the companies to introduce as supplemental authority a ruling **issued Thursday** by Judge Elanie E. Bucklo of the Northern District of Illinois that backed the argument that a change made to BIPA in August applied retroactively.

The companies argued that the ruling, which marked the first federal opinion to confront this issue and was handed down in the same Illinois district court where the businesses are currently facing individual BIPA actions, made clear that plaintiffs in pending BIPA cases are covered by the **updated statutory language** that a company that collects a person's biometric information multiple times in the same manner has committed only one violation of the law and that plaintiffs can't seek damages for each individual time their identifiers were collected.

Judge Bucklo relied on this reasoning to dismiss the case before her against Central Transport LLC for lack of federal diversity jurisdiction. The same should be done in the cases against Sabert and Viking SupplyNet, since those disputes are similarly being pushed by individual plaintiffs who can only collect damages of between \$1,000 and \$5,000 for one-time statutory violations rather than for each allegedly unlawful finger scan, thus failing to meet the \$75,000 damages threshold necessary to sustain their claims, the companies argued.

But in nearly identical responses filed in the separate cases Sunday, the plaintiffs hit back at this assertion, slamming the companies for "relegating to a footnote" five state court decisions issued by different circuit court judges that have reached the opposite conclusion as Judge Bucklo.

While Sabert and Viking SupplyNet acknowledged in their supplemental authority requests, which were filed Friday, that they were "aware of a handful of Illinois Circuit Court orders addressing the applicability of" the BIPA amendment, they characterized those prior decisions as being "mixed as to the issue of whether [the amendment] applies to cases pending at the time of its enactment."

Further, the companies argued in the footnote that those orders shouldn't apply to their federal court cases because they "involved state court standards and relate to different issues, including with respect to which county division was the appropriate venue for the plaintiffs' claims."

"Unlike Judge Bucklo's decision in [the Central Transport case], none of those state court orders address the argument made by [both companies] here relative to federal subject matter jurisdiction," the motions said.

In their responses, the plaintiffs characterized the companies' descriptions of these state court authorities as being "inaccurate and misleading," arguing that several of these state court decisions are "highly relevant" to their disputes.

They specifically point to four "persuasive reasoned decisions" issued by Illinois Circuit Court judges

since the beginning of October that have "expressly" held that the BIPA amendment "is prospective only" and that plaintiffs with claims that predate this change remain free to collect liquidated damages for each scan or transfer of their biometric data.

"Contrary to defendant's footnote protestations, these authorities are not distinguishable," the plaintiffs added. "They decide the issue of law presented here that a plaintiff can legally recover more than \$75,000 in a pre-amendment BIPA case because the BIPA amendment is prospective only and is not retroactive in effect."

As Judge Bucklo did, the circuit court judges reasoned that an amendment to a statute can't be applied retroactively "unless the legislature expressly states that intention."

But while the state court judges found that the amendment couldn't have such a backward reach since it clearly became effective in August without any indication from the legislature that it should be retroactively applied, Judge Bucklo held that it could apply to prior disputes because in enacting the change, the Illinois General Assembly was responding to a call from the state Supreme Court to clarify an ambiguity in the statute rather seeking to overhaul the law.

In their responses Sunday, the plaintiffs contended that Judge Bucklo's Thursday ruling in the dispute against Central Transport and a subsequent order she issued Friday dismissing a similar BIPA case against Old Dominion Freight Line Inc. for the reasons laid out in her first ruling should be seriously scrutinized rather than accepted wholesale by other Illinois federal judges.

"Respectfully, Judge Bucklo is the only judge known to have reached this opposing holding," the plaintiffs argued, calling both decisions "incorrectly decided and unpersuasive."

They added that, contrary to Judge Bucklo's ruling, the state Supreme Court in its *Cothron v. White Castle* decision never asked for legislative "clarification" and that the majority "could not have been clearer ... that BIPA's language was unambiguous with regard to separate claims accruing upon each scan and transmission, even if that may produce a harsh result with regard to damages."

Counsel for the plaintiffs in the Sabert and Viking SupplyNet cases, which are the same attorneys representing the workers in the two cases decided by Judge Bucklo, added in the responses that neither of the federal court decisions is a final order or judgment. While they're still reviewing their options, plaintiffs' counsel said that they are planning to challenge Judge Bucklo's decisions through either a reconsideration motion or an appeal.

The plaintiffs in both cases are represented by David Bizar and Samuel L. Eirinberg of DJC Law PLLC.

Sabert Corp. and Viking SupplyNet are represented by Jody Kahn Mason and Gabriela G. Kawiecki of Jackson Lewis PC.

The cases are *Giles et al. v. Sabert Corp.*, case number 1:24-cv-02996, and *Schwartz v. Supply Network Inc. d/b/a Viking SupplyNet*, case number 1:23-cv-14319, in the U.S. District Court for the Northern District of Illinois.

--Editing by Jay Jackson Jr.



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Pa. AG-Elect Likely To Target AI, Robocalls And Opioids

By **P.J. D'Annunzio**

Law360 (November 18, 2024, 2:09 PM EST) -- Pennsylvania Attorney General-elect Dave Sunday is likely to focus on cracking down on artificial-intelligence-related scams that prey on vulnerable populations, unwanted robocalls, and opioid makers, while being less inclined to hammer down on energy and fossil fuel companies, experts said.

Sunday, a Republican, beat out Democratic challenger and former state Auditor General Eugene DePasquale in the Nov. 5 general election, part of a nationwide "red wave" of Republican victories. He ran on his bona fides as York County district attorney and espoused a tough-on-crime image.

Three experts who spoke to Law360 — Stephen C. Piepgrass, head of Troutman Pepper's regulatory investigations, strategy and enforcement practice group; Jerry W. Kilgore, Cozen O'Connor partner and former Virginia attorney general; and William M. McSwain, a former Philadelphia-based U.S. attorney and current Duane Morris partner — said that Sunday would translate the intensity he brings to criminal cases into certain civil and regulatory matters as well. Sunday did not respond to requests for comment.

McSwain, who serves on Sunday's transition team, said that Sunday wants to "be out in front" on the issue of criminal use of AI in particular.

"He's going to be focused on AI. It touches everything now and it's kind of a scary topic in some ways because we don't know what's in store for us there," McSwain said. "Criminals use AI and they're using it more and more, and oftentimes to scam seniors."

"I could see him setting up some kind of initiative to protect people from AI-related scams," he added.

Piepgrass said that AI is now used more frequently in robocall scenarios. He also noted that the Federal Communications Commission recently held that the **use of AI in telemarketing** violates the Telephone Consumer Protection Act.

Sunday could also use Pennsylvania's Unfair Trade Practices and Consumer Protection Law to prosecute AI scammers and might be interested in joining related interstate actions with other AGs, Piepgrass said.

The same is true of AG actions involving the **opioid epidemic**, according to Piepgrass, who pointed to holding opioid makers accountable as one of Sunday's key priorities. State AGs have secured several **large-scale settlements** in opioid litigation across the country.

"He focused a lot on opioid issues in the past; that tells me that the healthcare industry may be an area of focus for him," Piepgrass said. "Obviously, that's something state AGs have focused on in multistate groups and individually."

However, **environmental regulation** — at least as it is currently enforced in Pennsylvania — might look somewhat different under Sunday. According to Kilgore, the attorney general-elect would view energy companies through the lens of their contributions to the state. When Pennsylvania Gov. Josh Shapiro was attorney general, he prioritized reducing carbon emissions in the state, but was lukewarm about one of the largest multistate efforts to do so, the Regional Greenhouse Gas

Initiative, and declined to endorse the measure.

"One area that Pennsylvania will lead on now is the energy issues, on fracking and more energy sources," Kilgore said. "When rules are proposed by the [Environmental Protection Agency] or the Department of Energy on anything that affects energy production in the Commonwealth of Pennsylvania, the AG can work to protect jobs in the state and the AG can work to make sure that there are more energy sources in the commonwealth."

That is not an unusual stance for a Republican, Piepgrass said.

"To the extent that those issues come before him, we could probably expect a more energy-friendly approach than if a Democrat had taken office," Piepgrass said. "Given that he seems to be a traditional Republican, we can probably expect to see some pretty business-friendly policies."

Party differences, however, should not prevent a smooth working relationship between Shapiro and Sunday, McSwain said, adding that Sunday has a good relationship with outgoing Attorney General Michelle Henry.

Kilgore, a Republican, served under a Democratic governor as attorney general in Virginia and was optimistic about Sunday's relationship with Shapiro, given the latter's understanding of the job — though he added the possibility of friction for that same reason can't be excluded.

--Editing by Robert Rudinger.

Correction: This article has been correct to reflect an attorney's correct middle initial.



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SEC-Sanctioned Accounting Firm Sued Over Pre-IPO Work

By **Katryna Perera**

Law360 (November 15, 2024, 9:50 PM EST) -- The former public company accounting firm BF Borgers is facing a California state lawsuit by an ex-client that says it was forced to scuttle its plans for an initial public offering after the U.S. Securities and Exchange Commission accused the firm of being a "sham auditing mill."

Med-X Inc. filed its **complaint** Thursday asserting counts of fraud, theft by false pretenses, breach of written contract and others against Lakewood, Colorado-based BF Borgers CPA PC and its owner, Benjamin Borgers.

BF Borgers, which has been permanently suspended from public company accounting work as a result of an SEC enforcement action, is best known for having once served as the audit firm for former President Donald Trump's social media company.

According to the complaint, in May 2022, Med-X filed a registration form with the SEC with plans to go public, and it decided to switch accounting firms. The company contacted BF Borgers in January 2023, and during initial conversations, Med-X says the firm asserted it would conduct audits of Med-X's financial statements in line with generally accepted accounting principles.

"In addition, defendants agreed to conduct the audit of plaintiff's financial statements in accordance with the standards established by the [Public Company Accounting Oversight Board] which would be necessary for plaintiff to continue to attempt to list on the Nasdaq or go back to Regulation A crowdfunding," the complaint states.

The complaint states that BF Borgers provided auditing services to Med-X through May 2024 but never mentioned it was under investigation by the SEC during that time.

"Defendants concealed this information because they knew that such information would cause plaintiffs to no longer pay or retain defendants and to request a refund for any monies already paid," the complaint states. Med-X says it paid BF Borgers a total of \$272,500 for audits of its 2022 and 2023 financials.

The SEC investigation came to light in May after Med-X's 2023 audits were completed. At that time, the SEC announced that it had fined and **permanently suspended** the accounting firm and its owner. BF Borgers agreed to pay a \$12 million civil penalty, and Borgers agreed to pay \$2 million without admitting to or denying any wrongdoing.

Among the SEC's allegations against BF Borgers was that it engaged in a "deliberate and systematic" failure to comply with auditing standards set by the PCAOB, including by falsifying documents.

After learning that the defendants were permanently banned from practicing before the commission and that all their audits could not be relied upon, Med-X says it dismissed the firm and has since withdrawn its registration statements for its planned IPO.

"Plaintiff could not move forward with their plan to immediately file with the SEC for a Regulation A offering before hiring a new audit firm as the SEC made clear that the order of defendants' suspension made it impossible to move forward with their past audits," the complaint states.

The SEC's order, issued in May, did not identify BF Borgers' clients, but Trump Media & Technology Group Corp. said in a 2024 filing that it had engaged the firm to audit the fiscal year 2022 and 2023 statements of Digital World Acquisition Corp., the special-purpose acquisition company that took Trump's media company public in March. The SEC said BF Borgers had 350 clients at the time of the alleged fraud.

Med-X's suit seeks damages and attorney fees.

Counsel for Med-X did not immediately respond to requests for comment on Friday. Counsel and representatives for the defendants could not be reached.

Med-X is represented by Lester Winograde of The Law Offices of Lester Winograde APC.

Counsel information for the defendants was not available.

The case is Med-X Inc. v. BF Borgers CPA PC et al., case number unavailable, in the Superior Court of the State of California, County of Los Angeles.

--Additional reporting by Jessica Corso. Editing by Adam LoBelia.

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