

Scotts Miracle-Gro Leaders Sued Over Debt-to-Earnings Surprise

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Martina Barash

Scotts Miracle-Gro Co. directors and officers engaged in a scheme to unload excess inventory into distribution channels to prop up sales figures and stay in compliance with debt covenants, an investor alleges.

The lawn and garden care marketer's inventory woes stemmed from a misjudgment during the Covid-19 pandemic, when it made up for insufficient inventory in 2020 and 2021 by overpurchasing relative to demand, Gary Carone says in his suit on behalf of the company. He filed the derivative suit Tuesday in the US District Court for the Southern District of Ohio.

The suit is among several in which investors have sued over changes in consumer demand and growth rates during the course of the pandemic. Sales of pool supplies, barbecue equipment, tools, and entertainment subscriptions all allegedly rose with consumers' changed lifestyles and subsequently fell, leaving investors with losses.

After Scotts and its leadership made reassuring statements about inventory levels and its debt-to-earnings ratio, which factored into its debt covenants, the company in June 2022 announced halved expectations for earnings per share for 2022, Carone says. Then, in August 2023, it announced more disappointing numbers, including a 25% lower earnings guidance, he says.

Four executives and directors "collectively dumped over \$50 million worth of their Scotts stock at artificially inflated prices," he says.

The harm to the company includes its exposure to two investor class actions, damage to its reputation and goodwill, and millions of dollars in lost market capitalization, he says.

Carone brings claims for proxy misstatements, breach of fiduciary duties, unjust enrichment, insider trading. He seeks damages, restitution, and internal governance reforms.

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

Employment Law Partners LLC and Levi & Korsinsky LLP represent Carone.

The case is Carone v. Hagedorn , S.D. Ohio, No. 2:24-cv-04180, complaint 11/19/24 .

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Xerox Misled Investors About Job Cuts in Overhaul, Suit Says (1)

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Ben Miller

Xerox Holdings Corp. and two top executives misled investors about the company's "reinvention" plan, omitting key details from disclosures about the impact of workforce reductions implemented as part of the strategy, according to a proposed class action.

The workforce cuts disrupted Xerox's sales productivity and caused the company to sell its older products at a lower rate, which in turn delayed the launch of new products and ultimately led to lower sales and revenue, said the complaint filed Tuesday in the US District Court for the Southern District of New York.

Xerox's alleged misrepresentations and omissions about the organizational overhaul first became apparent to the public on April 23, when the company revealed declining revenue for the second quarter of 2024, citing "geographic simplification" and initial disruptions to sales operations, the suit said.

That day the company's stock price fell more than 10% to close at \$14.76 per share, according to the complaint.

Last month, Xerox's disclosures revealed "lower-than-expected improvements in sales force productivity," as well as delays in global launches for two new products, both of which had contributed to underperformance. The product delays were the result of a "forecasting issue," the company's President and Chief Operating Officer John Bruno said on an Oct. 29 earnings call cited in the complaint.

Xerox stock fell more than 17% that day to close at \$8.49 per share, the biggest single-day drop since March 2020 around the start of the Covid-19 pandemic, according to Bloomberg data.

The shareholder who brought the suit seeks to recover damages for all investors who acquired Xerox securities from Jan. 25 through Oct. 28, alleging the company and its officers violated the Securities Exchange Act.

A Xerox spokeswoman declined to comment.

Glancy Prongay & Murray LLP and Frank R. Cruz, who practices in Century City, Calif., represent the plaintiff and proposed class.

The case is *Wilson v. Xerox Holdings Corp.*, S.D.N.Y., No. 1:24-cv-08809, complaint filed 11/19/24 .

(Adds Xerox declining to comment in paragraph eight.)

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Okta, Investors Get \$60 Million Settlement Over Merger Finalized

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Martina Barash

The Okta Inc. website on a smartphone arranged in Dobbs Ferry, New York, on Feb. 28, 2021.

Photographer: Tiffany Hagler-Geard/Bloomberg

Okta Inc.'s \$60 million settlement of investor class claims over the progress of its integration with another user-authentication software company merits final approval, a federal court ruled.

But the investors' 22% attorneys' fee request is "slightly excessive in light of this case's history," Judge Susan Illston said Tuesday for the US District Court for the Northern District of California, citing the plaintiffs' choice not to amend the complaint after most claims were dismissed. A 17%, or \$10.2 million, fee award is fair and reasonable, she said.

- The plaintiffs alleged that after acquiring Auth0 Inc. in March 2021 for \$6.5 billion, Okta falsely reassured investors that the companies were integrating seamlessly—and then abruptly shut down a sales integration program, causing a 34% stock drop
- The investors' damages expert estimated the maximum potential recovery at \$1.04 billion, while Okta's expert pegged it at \$600 million, according to the investors' June 11 request for preliminary approval
- There were no objections to the settlement, Illston said in granting final approval

Labaton Keller Sucharow LLP is lead counsel for the investors. Gibson, Dunn & Crutcher LLP represents Okta.

The case is In re Okta, Inc. Sec. Litig. , N.D. Cal., No. 3:22-cv-02990, 11/19/24 .

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A pivotal moment for shareholder rights

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EpicentRx, Inc. v. Superior Court, now pending before the California Supreme Court (S282521), may empower shareholders to hold corporate insiders accountable for corporate misconduct by allowing civil claims to be tried before a California jury.

In *EpicentRx*, the 4th District Court of Appeal ruled that forum selection clauses in corporate bylaws designating the Delaware Court of Chancery function as pre-dispute jury trial waivers and therefore are unenforceable. 95 Cal. App. 5th 890 (2023). The decision reasoned that enforcing such clauses violates parties' California constitutional right to a jury trial. If the California Supreme Court affirms, corporate defendants will lose their ability to dismiss shareholder lawsuits from California courts using forum-selection clauses designating the Delaware Court of Chancery as the exclusive forum to resolve corporate misconduct claims.

Judicial enforcement of Delaware forum-selection clauses in corporate bylaws

Delaware's Court of Chancery sits in equity. Delaware's constitution does not establish the right to a jury trial for cases in equity. In contrast, Article I, Section 16 of California's constitution guarantees an "inviolable right" to a jury trial. Parties can only waive this right by taking actions prescribed by Code of Civil Procedure Section 631 after a case is pending. See *Grafton Partners v. Super. Ct.*, 36 Cal. 4th 944 (2002).

Boards of directors of many companies headquartered in California adopt bylaws designating Delaware as the exclusive forum for disputes regarding companies' "internal affairs," which includes self-dealing and other corporate misconduct that occurs in California. Under Delaware law, even if corporate boards unilaterally adopt forum-selection clauses in corporate bylaws, such clauses are presumptively valid and enforceable. See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

When shareholders file corporate misconduct claims in courts outside Delaware, enforcement of forum-selection clauses falls to those courts. When those courts enforce Delaware forum-selection clauses, the claims are dismissed, and shareholders are deprived of a jury of the wrongdoers' peers.

In *EpicentRx*, the California courts are taking a fresh look at the enforceability of Delaware forum-selection clauses in the corporate bylaws of California-based companies, considering California's constitutional right to a civil jury trial. The outcome could prioritize the California constitution and allow investors to protect their rights against corporate defendants where the disloyalty or bad faith occurred.

Overview of the *EpicentRx* case

EpicentRx, a biotechnology company incorporated in Delaware but headquartered in California, faces shareholder allegations that it misappropriated investors' funds and made misleading statements while obstructing access to corporate records, which shareholders have a statutory right to inspect. The shareholder sued in San Diego County Superior Court for fraudulent concealment, promissory fraud, breach of contract, and violations of California's Unfair Competition Law, demanding a jury trial.

The company moved to dismiss citing its forum-selection clause mandating litigation in the Delaware Court of Chancery. The trial court denied this motion, holding that California law entitles parties to a jury trial, a right that cannot be waived through pre-dispute agreements in corporate documents.

Court of Appeal ruling for shareholders

In its published ruling, the Court of Appeal agreed. The court noted that although prior cases had been dismissed based on Delaware forum-selection clauses, those cases did not analyze whether enforcing those clauses would undermine parties' California constitutional right to a jury trial. Typically, California courts enforce forum-selection clauses unless plaintiffs opposing their enforcement show they are unfair or unreasonable. The *EpicentRx* court flipped this burden: *defendants* must now prove that enforcing these clauses would *not* diminish plaintiff-shareholders' constitutional rights.

The court emphasized that the right to a jury trial is fundamental and can be waived only through specific statutory methods after a case is pending in California court, making pre-dispute jury waivers unenforceable.

The court also distinguished Delaware forum-selection clauses from arbitration agreements. Arbitration agreements are contracts to avoid submitting a dispute to *any* judicial forum, whereas forum-selection clauses are contracts to select a *specific* judicial forum--and if that preselected judicial forum is Delaware, which lacks jury trials, those clauses are unenforceable.

Institutional investors and their general counsel should prepare for the Supreme Court decision

The appeal before the California Supreme Court has been fully briefed since March 4, 2024, and is ready to be set for argument. The outcome will impact shareholders' rights beyond this small company. Friend of the court briefs have been filed by the U.S. Chamber of Commerce, a business association advocate group, supporting enforcement of forum-selection clauses and by the Berkeley Center for Consumer Law and Economic Justice, among others, supporting shareholders' jury trial rights.

General counsel should take steps now:

1. Monitor the case: Stay informed and seek guidance from shareholder rights and governance law experts on litigation strategies in California versus Delaware.
2. Review policies: Assess responsible investment policies to reflect California as a potential new forum to seek redress for shareholder rights violations. If current policies presume that litigation alleging corporate wrongdoing must be pursued in Delaware—including misconduct in California by California defendants--the *EpicentRx* decision may change fiduciary investors' analyses for initiating shareholder rights litigation, when warranted.
3. Begin with a confidential investigation: Before publicly filing litigation anywhere, expert counsel can assist shareholders in investigating the facts confidentially. This type of investigation can inform the decision of whether litigation is the best strategy to resolve governance challenges and enhance long-term value. If litigation is the right strategy, many outside counsel firms prosecute corporate misconduct on behalf of shareholders at no out-of-pocket cost to their clients and are only compensated based on a favorable resolution that benefits the company--and all its shareholders.

Conclusion

A Supreme Court ruling affirming the Court of Appeal in *EpicentRx* would empower investors to ensure corporate integrity and redress misconduct through California's constitutional right to a jury trial. For general counsel representing institutional investors, understanding the impact of this case and preparing for the final decision is essential to support fiduciary clients' vital role in promoting an equal playing field for all investors in the U.S. public equities market.

#382114

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Johnson & Johnson Co Inc

Johnson & Johnson threatened with legal action in UK over talcum powder

Group, which has faced multiple US lawsuits, hit with fresh claims that its products caused cancer



UK law firm KP Law has sent a pre-action letter to Johnson & Johnson ahead of a potential group action lawsuit © Justin Sullivan/Getty Images

Alistair Gray and Madeleine Speed 4 HOURS AGO



Johnson & Johnson has been threatened with legal action in the UK over claims that its talcum powder products caused cancer.

Law firm KP Law said on Wednesday that it had sent a pre-action letter to the US-based healthcare products company ahead of a potential group action lawsuit on behalf of cancer survivors, mainly women, as well as families of those who have died.

J&J has faced [long-running litigation in the US](#) over allegedly carcinogenic talcum powder. The law firm said the action it was preparing at the High Court in London would be the first such action against the company in the UK.

Tom Longstaff, partner at KP Law, said the firm had been contacted by 4,000 potential claimants and currently represented about 2,000.

He said in a statement that victims suffered from cancer after using J&J's talcum powder products. "In some cases, they have died from their cancer, leaving their families devastated," he said. "All of these innocent individuals deserve justice."

The majority of potential claimants were women, he said, though he added that some men who suffered from mesothelioma and peritoneal cancer may also have claims.

J&J has repeatedly denied that its talcum-based products contain asbestos or cause cancer.

Erik Haas, worldwide vice-president of litigation at J&J, said that "independent science makes clear that talc is not associated with the risk of ovarian cancer nor mesothelioma".

He added that a group of US mass tort plaintiffs' lawyers were "pushing a false narrative" about talcum to the media. "This is why the vast majority of trials in the US have resulted in defence verdicts and/or appellate outcomes," he said.

Haas added that since the separation of Kenvue, its consumer health business from the rest of the company in 2023, Kenvue is now responsible for any alleged talc liability that arises outside the US or Canada.

A UK subsidiary of Kenvue said: "We sympathize deeply with patients who are suffering from cancer and their families. However, the science and the facts show that their illnesses were not caused by the use of our talc-based products."

J&J has already set aside \$12bn to resolve tens of thousands of claims in the US that its talcum powder caused cancer.

The New Jersey-headquartered group has been attempting to use the US bankruptcy courts to resolve the claims by filing for Chapter 11 through a subsidiary company, in a move known as a [Texas two-step](#).

In July this year the World Health Organization's cancer agency, the International Agency for Research on Cancer classified talcum powder as "probably carcinogenic". Twenty nine experts had found that "talc exhibits key characteristics of carcinogens in human primary cells and experimental systems".

Colorado asks 10th Circuit to send \$60 epi-pen reimbursement to state court

 [courthousenews.com/colorado-asks-10th-circuit-to-send-60-epi-pen-reimbursement-to-state-court](https://www.courthousenews.com/colorado-asks-10th-circuit-to-send-60-epi-pen-reimbursement-to-state-court)

Amanda Pampuro

Designed by the New York firm Tracy, Swartwout and Litchfield, the Byron White U.S. Courthouse in Denver, Colorado, pictured here, was renamed in 1994 after the newly retired supreme court justice Byron White, who was born in Fort Collins, Colorado. (Amanda Pampuro / CNS)

DENVER (CN) — Colorado on Tuesday asked the 10th Circuit to reverse a lower court's order refusing to redirect a pharmaceutical manufacturer to state court for reimbursement of losses under the state's \$60 epi-pen program.

"If they have an adequate remedy in the state, then they should ligate the case in state court to determine if a taking took place," argued Colorado Assistant Attorney General Pawan Nelson.

Anaphylaxis is a common and severe allergic reaction, typically treated by an epinephrine autoinjector, commonly known by the brand name EpiPen. To address the prohibitive costs an estimated 500,000 Coloradans face in accessing the life-saving devices, state legislators enacted HB23-100 last year, capping the cost to obtain a two-pack of devices at \$60.

While insurance companies are expected to make up the difference between their insuree's \$60 copay and the cost to obtain the device, manufacturers are left covering the difference for uninsured Coloradans who purchase the device at a pharmacy.

The law enables pharmacies to bill the manufacturer for the cost of the device or to obtain replacement devices for free.

Teva Pharmaceuticals USA sold 14,000 generic autoinjectors for children to Colorado wholesalers in 2022, then sold through pharmacies. Teva doesn't know how many devices went to uninsured people and would trigger the Colorado law, but typically charges \$300 per two-pack.

Teva sued Colorado in federal court in October 2023, claiming the law violated its Fifth Amendment right against government takings.

Donald Trump-appointed U.S. District Judge Daniel Domenico denied Colorado's 11th Amendment sovereign immunity claim for dismissal on Dec. 27, 2023. The state appealed, arguing just compensation is available in state court.

Trump-appointed U.S. Circuit Judge Joel Carson quickly questioned whether the law is providing adequate compensation for takings.

“Tell me what the remedy is,” Carson pressed. “Do better than telling me they’re entitled to just compensation. Is the remedy they can file 14,000 lawsuits a year? Is their remedy they can bundle them up and file a big lawsuit every two years?”

Nelson explained that Teva would also be entitled to costs and attorneys fees if it prevailed in the state court.

“I’ll leave the litigation strategy up to their legal team,” Nelson added.

Senior U.S. Circuit Judge Bobby Baldock didn’t seem convinced that litigation itself is an efficient remedy.

“An adequate remedy to me would be a finality that would put an end to the litigation,” said the Ronald Reagan appointee.

Nelson suggested one lawsuit would easily determine the fair market value of the product taken, a notion defense attorney Jay Lefkowitz quickly dispelled by pointing out that the cost of medication varies depending on the time of year sold and in what quantities.

“The standard is does the party seeking relief seek prospective injunctive relief to prevent ongoing harm? That is the threshold question,” Lefkowitz said. On behalf of Teva, he emphasized the fact that the state filed a narrow 11th Amendment immunity appeal, while the parties agreed that a Fifth Amendment that required just compensation had taken place.

“Equitable relief should be available to avoid endless litigation,” said Lefkowitz, who practices with Kirkland and Ellis in New York.

U.S. Circuit Judge Robert Bacharach, appointed by Barack Obama, rounded out the panel. The panel heard the case at the Byron White U.S. Courthouse in Denver, but did not indicate when or how it would decide the case.

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Lens.com Class Action Claim Stays in Florida, Breach Claim Moved

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Daniel Seiden

A class action claim accusing Lens.com of improperly charging fees for contact lenses will remain in a Florida federal district court.

Rickey Martin says Lens.com violated the Florida Deceptive and Unfair Trade Practices Act by charging an undisclosed processing fee when he purchased contact lenses, and seeks to represent class of Florida residents that paid the fees. Lens.com, citing a forum selection clause, sought to transfer the claim to a Nevada court.

That clause is enforceable, but the FDUPTA class claim shouldn't be transferred because Florida has a "unique" interest in adjudicating the deceptive business practice claim, Judge David S. Leibowitz, of the US District Court for the Southern District of Florida, said.

The FDUPTA claim arises from the alleged charging of taxes and fees on products the Florida legislature deemed tax-exempt, the court said.

Clear "differences between Nevada and Florida procedural law" demonstrate that Florida's sovereign interest in adjudicating the FDUPTA claim shouldn't be put at risk of being undermined by transfer, Leibowitz said.

The record also shows that Martin will face "substantial hardship" if forced to litigate in Nevada, the court said.

Lens.com must file an answer to the FDUPTA claim by Dec. 2.

Contact lens purchasers have filed five class action suits over conduct similar to that alleged by Martin, the opinion said.

Leibowitz's decision, for example, follows a US District Court for the District of Nevada's ruling that Lens.com must face a proposed class action alleging deliberate concealment of extra fees added to purchases made on its website.

It also follows a decision from the US District Court from the Northern District of Illinois allowing the transfer of a class action to the US District Court for the District of Nevada.

Breach Claim

Leibowitz said that Martin's common law claims for breach of contract and unjust enrichment must be transferred to the US District Court for the District of Nevada.

The terms of use hyperlink on the Lens.com site was sufficiently conspicuous to put a prudent internet user on notice of the forum selection clause, the court said.

And Martin clearly manifested consent to the terms by clicking a “continue” button on the site, the court said. Martin had the opportunity to click on the hyperlink, read the terms, and decline to proceed with the transaction, Leibowitz said.

Methvin, Terrell, Yancey, Stephens & Miller PC; Mark, Migdal & Hayden; Meyers & Flowers LLC represent Martin. Boies Schiller Flexner LLP and Thorpe North & Western LLP represent Lens.com.

The case is Martin v. Lens.com Inc. , 2024 BL 419311, S.D. Fla., No. 24-cv-60489, docketed 11/19/24 .

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Judge to sanction Quinn Emanuel partner for witness questions

DJ [dailyjournal.com/articles/382122-judge-to-sanction-quinn-emanuel-partner-for-witness-questions](https://www.dailyjournal.com/articles/382122-judge-to-sanction-quinn-emanuel-partner-for-witness-questions)

Ethics/Professional Responsibility,

Business Law

Nov. 20, 2024

U.S. District Judge Edward Chen said he intended to sanction Valerie Lozano, a Los Angeles partner at Quinn Emanuel, for violating an evidentiary ruling pertaining to the scope of direct examination of her damages expert.



A federal judge in San Francisco said he intends to impose sanctions on a partner at Quinn Emanuel Urquhart & Sullivan LLP for violating a court order during her direct examination of a damages expert in a false advertising trial involving two oncology testing companies.

The case originates from a \$100 million false advertising lawsuit filed by oncology testing company Guardant Health Inc. against rival Natera in May 2021. Represented by Keller/Anderle LLP, Guardant alleged that Natera had launched a false and misleading advertising campaign targeting one of its new testing products. In response, Natera countersued, asserting that Guardant's "misleading commercial statements" about its product's efficacy directly impacted sales of Natera's competing product.

During Monday's proceedings, U.S. District Judge Edward Chen said he intended to sanction Valerie Lozano, a Los Angeles partner at Quinn Emanuel, for violating one of his prior evidentiary rulings. The violation pertained to the scope of direct examination for Jeffrey Stec, a damages expert from Berkeley Research Group, retained by her client.

Stec was providing rebuttal testimony to Guardant's expert, James Malackowski, a financial expert from consulting firm Ocean Tomo. Malackowski testified that Natera profited \$95 million from the alleged false advertising practices and that future corrective advertising would cost Guardant \$74.5 million.

According to court documents, Stec testified that Natera's profits did not come because of the advertising practices against Guardant's oncology testing product but rather because of other market factors. He also testified that Guardant could have run corrective advertising to mitigate the damages but did not.

Lozano asked Stec questions regarding Guardant's ability to include the later generation of its oncology testing product in its calculation of damages. Chen previously ruled that the newer product would be included in the calculation of damages.

Chen's order regarding the scope of Stec's testimony is sealed and no sanctions motion or order had been filed as of Tuesday.

Representatives for Quinn Emanuel could not be reached for comment Tuesday.

During an Oct. 15 pretrial conference, Chen sanctioned Natera after Quinn Emanuel attorneys admitted to the judge that they erred in not investigating the actions of a key oncology witness, Dr. Howard Hochster, who Chen said "lied" under oath about his early access to a clinical trial that was key to Natera's case. *Guardant Health, Inc. v Natera, Inc.*, 21-cv-04062-EMC (N.D. Cal., filed May 27, 2021).

In the amended jury instruction, filed by the court on Monday, Chen referenced the content of Stec's testimony and instructed the jury to consider the following when calculating actual damages.

"When considering a claim for lost profits, you may consider evidence that some or all of those claimed losses may be caused by other market factors or reasons and not as a result of the accused false advertising," Chen wrote. "Actual damages may include: The cost of corrective advertising reasonably required to correct any deception caused by the false advertising. Corrective advertising costs must be attributable to the false or misleading advertising."

In a motion for judgment as a matter of law, filed by the Quinn Emanuel team on Nov. 14, the team summarized their argument against Guardant's claim for disgorgement and damages for future corrective advertising.

"The second flaw is applying an arbitrary three times multiplier to the expenditures the newcomer actually spent to correct the misimpressions of the well-known market participant. Malackowski had no experience or expertise to apply such a multiplier," the defense attorneys wrote. "Again, this is akin to a 'penalty' on Natera, which is inconsistent with the Lanham Act. Finally, the corrective advertising damages are speculative because despite claiming it was harmed by the advertisements being disseminated during the critical launch period -- first half of 2021 -- Guardant has not actually spent any money on corrective advertising to date."

Guest Post: The Board's Post-Election Oversight of Corporate Compliance

K dandodiary.com/2024/11/articles/corporate-governance/guest-post-the-boards-post-election-oversight-of-corporate-compliance

November 20, 2024



By Kevin LaCroix on November 20, 2024
Posted in Corporate Governance



Michael W. Peregrine



Ashley Huff

There is no doubt that the upcoming change in Presidential administration will have important implications across a wide range of issue. In some cases, the change will present unique challenges for corporate boards. As boards work their way through these changes and challenges, they will also face an altered corporate compliance oversight environment. In the following guest post, Michael W. Peregrine and Ashley Huff of the McDermott Will & Emery LLP law firm consider the implications of this changed environment for corporate boards. I would like to thank Michael and Ashley for allowing me to publish their article as a guest post on this site. I welcome guest post submissions from responsible authors on topics of interest to this site's readers. Please contact me directly if you would like to submit a guest post. Here is the author's article.

Corporate boards across industry sectors should recognize the unique challenges to oversight of corporate compliance that may arise now that the presidential election is over. While there is a trending expectation that the incoming administration may adopt a more relaxed approach to federal corporate fraud enforcement, boards should nevertheless remain vigilant in the face of uncertainty – while continuing to monitor for any future changes or reversals in the government's overall approach.

A variety of recent media reports have included speculation that the new administration will be less likely to focus on white collar crime, corporate prosecutions and criminal sanctions against corporations. Instead, this speculation suggests the administration will likely prioritize traditional “law and order” issues associated with violent crime, border security and drug trafficking. If such theories hold, the Justice Department’s new approach would be a significant change from the current administration’s approach to federal law enforcement of corporate fraud.

Indeed, for the last four years the Department has pursued a “programmatic overhaul of corporate criminal enforcement,” with particular emphasis on “clarity, consistency and transparency in its policies.” Particular elements of this overhaul have included a renewed emphasis on individual accountability, swifter individual prosecutions, new executive compensation – grounded compliance incentives and disincentives, updated compliance program guidelines, and a new whistleblowing and voluntary self-disclosure paradigm.

A primary goal of the Department’s efforts under the current administration has been to provide a clear roadmap of corporate compliance expectations for corporate leadership, including the CEO, general counsel, board members, and chief compliance officers. Each of these have particular responsibilities (fiduciary, contractual or otherwise) for mitigating risk and supporting the company’s compliance with applicable law. And at many companies, corporate leadership has responded in kind by increasing resources to, and enhancing its monitoring of, corporate compliance programming.

When a new administration takes over leadership at the Justice Department, there is often a reassessment of the policies in place in both the Justice Manual and through controlling Attorney General and Deputy Attorney General memoranda. Initially, it is not unusual for an incoming administration to pause certain policies or make temporary adjustments, returning to previous controls while conducting the reassessment and alignment. There is always the possibility of few or no changes to be made for some time, if at all. As we have seen in previous transitions, much depends on newly established priorities.

Turning to speculation about corporate obligations in light of the transition in the Justice Department, compliance responsibilities may be impacted in at least three ways, should corporate crime and individual accountability no longer remain a top priority in federal law enforcement policies.

The first way is that boards, and executive leadership, will be challenged to maintain appropriate levels of compliance resources and oversight in the event that corporate enforcement policies are relaxed in some categories. Note in that respect that there is no indication that the Delaware courts will relax their own Caremark standards of officer and director compliance oversight responsibility.

The second way is that boards need to be carefully prepared to respond to legitimate questions from management about whether the organization's risk profile should be adjusted to reflect potentially relaxed regulation, especially with respect to certain proposed business initiatives. This may involve increasingly difficult questions surrounding the risk of violation versus the risk of investigation.

The third, and potentially more serious, way compliance responsibilities may be impacted is that boards may need to confront internal enforcement misperceptions by management team members who may be prone to "push the edge of the envelope"; i.e. managers who might view anticipated policy changes as a "green light" to accept much greater risk in their business strategies.

As former acting Attorney General Rod Rosenstein once observed, these risk-takers are the people who "either do not believe the government will enforce the penalty, or they calculate that the likely benefit of breaking the rule outweighs the potential penalty" (that would result from getting caught). It has always been and will continue to be a balancing act and some are more willing to step out on the corner of the beam. They exist in virtually every large organization.

In response, the board should continue to be motivated to support the General Counsel and the Chief Compliance Officer in their efforts to preserve the integrity of the company's legal control and compliance education systems. More broadly, boards should continue to encourage management to support corporate citizenship efforts, prioritize response and remediation when learning of misconduct, and promote a corporate culture that underscores ethics and legal compliance.

Conclusion

The ultimate post-election compliance oversight message is this: the challenges arising from the possibility of relaxed regulation can be just as difficult to navigate, but perhaps more subtle in presentation, as those arising from increased regulation.

Consistent with their Caremark obligations, corporate directors and officers will want to carefully steer their organizations through uncertainty while awaiting any corporate enforcement policy changes in order to reach an oversight platform that remains responsive and robust.

Additionally, it is important to be mindful that unless or until the current policies in place are transformed, they remain applicable. Namely, the Principles of Federal Prosecutions of Business Organizations found in Title 9 of the Justice Manual (9-28.000 et seq) abide, along with all current related guidance, until any formal change is announced and implemented. Proceeding with caution in oversight while anticipating any new policy changes is essential.

The authors are attorneys with McDermott Will & Emery LLP. Mr. Peregrine is a Fellow of the American College of Governance Counsel. Ms. Hoff is a former United States Attorney for the Western District of Texas.

An FCPA First* – FCPA Professor

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November 20, 2024

Foreign Corrupt Practices Act enforcement actions against a company based on the conduct of a Chinese subsidiary are numerous (including instances in which the Chinese subsidiary is part of the resolution process).

FCPA enforcement actions against Chinese companies for violations of the FCPA's books and records and internal controls provisions outside the context of foreign bribery (so-called non-FCPA, FCPA enforcement actions) have occurred. (See [here](#), [here](#) and [here](#) for instance).

The FCPA enforcement action earlier this week involving BIT Mining (500.com) is believed to be the first FCPA enforcement action in history to involve a “Chinese issuer.”

Well, sort of.*

At least as close to a “Chinese issuer” “resolving” an FCPA enforcement action without technically a “Chinese issuer” “resolving” an FCPA enforcement action.

Technically, 500.com was not involved in the DOJ or SEC resolutions for the simple reason that it no longer exists. And technically 500.com was not even a China issuer (it was incorporated in the Cayman Islands “with headquarters and major business operations in Shenzhen, China”).

Even so, the conduct at issue in the enforcement action took place between 2017 and 2019 when 500.com had American Depositary Shares (ADSs) traded on the New York Stock Exchange.

Since 2021, 500.com is now known as BIT Mining (a crypto assets mining business incorporated in the Cayman Islands and headquartered in Akron, Ohio. BIT Mining’s ADSs are traded on the NYSE.

Even though BIT Mining the entity technically resolving the DOJ and SEC enforcement actions, none of the conduct involved that entity.

So, what do you think?

Is this the first FCPA enforcement action to involve a “Chinese issuer”?

[As highlighted in this prior post, in 2017 Sinovac Biotech, a company with shares traded on NASDAQ, was the focus of media scrutiny for allegedly bribing a member of the Chinese Food and Drug Administration to assist its vaccine clinical trial and approval and the company disclosed an SEC investigation into the conduct. However, in 2018 the company disclosed that the DOJ and SEC had closed investigations into the matter]

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

 1.next.westlaw.com/Document/lc627f1e0a6b611efb6e68959988cdfc0/View/FullText.html

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11/19/24 cleveland.com (Cleveland, Ohio) (No Page)

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November 19, 2024

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

Jake Zuckerman; 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.

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

---- Index References ----

Company: FIRSTENERGY CORP.; Federal Bureau of Investigation

News Subject: (Crime (1CR87); Criminal Law (1CR79); Fraud (1FR30); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Social Issues (1SO05))

Industry: (Electric Utilities (1EL82); Energy & Fuel (1EN13); Utilities (1UT12))

Third ex-FirstEnergy lobbyist stonewalls hundreds of questions in bribery probe

[cleveland.com/open/2024/11/third-ex-firstenergy-lobbyist-stonewalls-hundreds-of-questions-in-bribery-probe.html](https://www.cleveland.com/open/2024/11/third-ex-firstenergy-lobbyist-stonewalls-hundreds-of-questions-in-bribery-probe.html)

November 20, 2024

1. Ohio Politics

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FirstEnergy Building in downtown AkronMegan Becka, special to cleveland.com

By

Jake Zuckerman, jzuckerman@cleveland.com

COLUMBUS, Ohio – An ex-FirstEnergy lobbyist on Wednesday refused to answer hundreds of questions under oath in a regulatory investigation into the company’s scandal plagued lobbying campaign for a 2019 nuclear bailout, making him the third of the company’s government affairs staff to invoke his rights against self-incrimination.

Ty Pine, who worked for the company from 2010 to 2021 including as director of state affairs in Ohio, stonewalled a state attorney in a deposition about a long running bribery scandal that has roiled state government.

The regulatory investigations at the Public Utilities Commission of Ohio had been stalled for 18 months while criminal probes continued into House Bill 6, 2019 legislation that provided a \$1.3 billion bailout for two nuclear plants owned at the time by a FirstEnergy subsidiary and created a “decoupling” mechanism worth tens of millions annually for the company.

Passage of the bill triggered a tsunami of criminal, civil and regulatory investigations into a massive bribery campaign in which FirstEnergy has admitted to paying off both ex-Ohio House Speaker Larry Householder and ex-Public Utilities Commission of Ohio chairman

Sam Randazzo with millions of dollars. Thus far, two men have been convicted (including Householder), two more pleaded guilty, two await trial, and two more (including Randazzo) died by suicide before their trials.

Earlier this year, the PUCO investigations restarted, triggering subpoenas for depositions by a handful of former FirstEnergy executives.

Donald Kral, an attorney for the Ohio Consumers' Counsel, asked Pine about a series of texts and emails dating back to 2017. They show Pine organizing meetings with Householder on bailout legislation, looped in on conversations showing FirstEnergy routing millions through secret "dark money" nonprofits, providing lobbying updates on HB6, included in group texts boasting about its passage, and more.

"Ty Pine has something to hand-deliver to you," Mike Dowling, FirstEnergy's former senior vice president of external affairs and one of two executives awaiting trial, texted to Householder in November 2019 after House Bill 6 passed and an effort to repeat it failed. "I understand you will see him tomorrow (Wednesday) night. Okay?"

"Ok – thanks," Householder responded.

Evidence from Householder's criminal trial indicates Pine was in regular contact with Householder, who was sentenced to 20 years for accepting a bribe in exchange for spearheading FirstEnergy's legislative efforts.

Little is known about Pine's departure from FirstEnergy. Pine's attorney, John Mitchell, indicated at the deposition that Pine entered a confidentiality agreement with the company in connection with his ouster. Pine refused to say where he currently works. He hasn't registered as a lobbyist in the state since 2021.

State law prohibits witnesses subpoenaed in PUCO investigations from refusing to testify due to concerns over self-incrimination. However, in return, it prohibits the state from prosecuting them over the substance of their testimony. But Pine's attorney said in a filing that this immunity doesn't stop the federal government from bringing charges. He said the OCC should obtain a judicial order compelling Pine to testify, which would shield him from federal charges and enable a more substantive deposition.

Thus far, Joel Bailey, Justin Biltz, and Pine have all appeared for depositions but answered almost none of the hundreds of questions asked. Several other company executives are scheduled to appear over this and next month. However, the OCC canceled one executive's looming deposition after prosecutors expressed concern with offering her immunity, a signal that she's being considered for criminal charges.

State attorneys have brought charges against FirstEnergy's former CEO, Chuck Jones, and Dowling. Court filings indicate that in the pre-trial evidence exchange, the state produce a document titled "Court Filing – Pine Immunity," but both parties have declined comment as to whether Pine signed an immunity agreement.



Stories by Jake Zuckerman

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

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

 1.next.westlaw.com/Document/I7cbd9c70a68f11ef82b7c37cd8f1340d/View/FullText.html

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November 19, 2024

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

Jake Zuckerman; 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.

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

Company: U.S. SECURITIES AND EXCHANGE COMMISSION; FIRSTENERGY CORP.; PLAIN DEALER PUBLISHING CO.

News Subject: (Crime (1CR87); Criminal Law (1CR79); Fraud (1FR30); Government (1GO80); Government Litigation (1GO18); Legal (1LE33); Lobby & Pressure Groups (1LO18); Social Issues (1SO05))

Industry: (Electric Utilities (1EL82); Energy & Fuel (1EN13); Utilities (1UT12))

Region: (Americas (1AM92); North America (1NO39); Ohio (1OH35); U.S. Midwest Region (1MI19); USA (1US73))

Language: EN

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Document

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NewsRoom

State asks PUCO to back down from deposing ex-FirstEnergy exec in HB 6 bribery scandal: Capitol Letter

[cleveland.com/open/2024/11/state-asks-puco-to-back-down-from-deposing-ex-firstenergy-exec-in-hb-6-bribery-scandal-capitol-letter.html](https://www.cleveland.com/open/2024/11/state-asks-puco-to-back-down-from-deposing-ex-firstenergy-exec-in-hb-6-bribery-scandal-capitol-letter.html)

November 20, 2024

1. Ohio Politics

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FirstEnergy's lobby in Akron, on Friday, Oct. 11, 2024. Laura Hancock - cleveland.com

By

Laura Hancock, cleveland.com

Rotunda Rumblings

More FirstEnergy charges? State prosecutors intervened in a regulatory investigation into FirstEnergy's Statehouse bribery scheme, asking an agency to nix its scheduled deposition of a former company executive. As Jake Zuckerman reports, prosecutors say the deposition would mean giving her immunity, which they called "concerning" and an outcome to be avoided.

And maybe a plea deal? State prosecutors told a Summit County judge that they could enter a plea deal as soon as this week with companies owned by a former top state regulator accused of taking a \$4.3 million bribe in 2019. As Zuckerman reports, a prosecutor told Judge Susan Ross that all parties had reached a deal "in principle."

Backing the blue? Legislation to require Ohio cities and villages to contribute more to police officers' pensions was waved ahead to the Ohio House floor on Tuesday. As Jeremy Pelzer reports, backers of House Bill 296 say the legislation – which would make public employers

pay an estimated \$70 million per year more in total to the Ohio Police and Fire Pension Fund – is needed to shore up the fund’s long-term finances and attract more law-enforcement job applicants. Opponents, including the city of Cleveland, call it an unfunded mandate that will force local officials to either make budget cuts or raise taxes.

I know you are but what am I? JD Vance called Grace Chong, chief financial officer and chief operating officer for Steve Bannon’s company, a “mouth-breathing imbecile” for tagging the vice president-elect on a social media message about showing up to the Senate to block President Biden’s judicial nominations. Chong deleted her post and Vance appeared in the Senate to vote against a nominee to a federal court in Oregon, Politico’s Mia McCarthy reports.

Falling in: U.S. Sen.-elect Bernie Moreno, an Ohio Republican who won with Donald Trump’s backing, said Tuesday that he’s supporting some of the president-elect’s most controversial nominations to key administration posts. Moreno said in a prepared statement he would vote to confirm former U.S. Rep Matt Gaetz, the subject of a House ethics investigation, as attorney general; ex-U.S. Rep. Tulsi Gabbard as the director of national intelligence; Fox News commentator Pete Hegseth as Defense secretary; and Robert F. Kennedy Jr. for secretary of Health and Human Services.

Confidential: U.S. Rep. Jim Jordan says the House Ethics Committee report examining allegations of U.S. Rep. and U.S. Attorney General-pick Matt Gaetz should not be made public. Gaetz is being investigated for illicit drugs, sexual misconduct and other allegations. The committee will vote Friday on whether to release it, the Hill’s Filip Timotija reports.

Lobbying Lineup

Five organizations lobbying on House Bill 22, which would require the Ohio Department of Health to collect data relating to stroke care from hospitals that are recognized by the state as comprehensive stroke centers, thrombectomy-capable stroke centers or primary stroke centers. The bill passed the House in March and is in a Senate committee.

1. Mercy Health
2. Ohio State Medical Association
3. Summa Health System
4. UC Health
5. American Heart Association

On The Move

Mariah Field has joined the CJR Group, a Columbus-based lobbying firm, to help manage state government affairs. Field previously worked as an associate at Ice Miller LLP's public affairs group and as a legislative lobbyist with Gov. Mike DeWine's office.

Veteran government affairs professional Katelyn Bowling has been named as the new senior director of government relations at the Ohio Association of Community Colleges. She'll will lead OACC's government relations efforts, advocating for policies that support Ohio's 22 community colleges and that meet the state's workforce development needs.

Birthdays

Hayley Carducci, press secretary for Lt. Gov. Jon Husted

State Sen. Jerry Cirino

State Rep. Roy Klopfenstein

Ben Weber, legislative liaison for Opportunities for Ohioans with Disabilities and legal extern to Franklin County Common Pleas Judge Dan Hawkins

Straight From The Source

"What fascinated me is that people don't realize they can go online and actually look up how much money say a man running for Speaker from a Senate seat donated to a candidate. In other words purchasing a vote. People just assume things are done behind closed doors."

-State Rep. Sara Carruthers, a Cincinnati-area Republican, who was defeated in her GOP primary by Diane Mullins. Ohio Senate President Matt Huffman gave Mullins \$5,000 in October. On Wednesday, he'll ask Ohio House Republicans to elect him that chamber's speaker.

Capitol Letter is a daily briefing providing succinct, timely information for those who care deeply about the decisions made by state government. Subscribe to get Capitol Letter in your email box each weekday for free.

Former ComEd board member testifies about how he got his seat in Mike Madigan corruption trial

 [courthousenews.com/former-comed-board-member-testifies-about-how-he-got-his-seat-in-mike-madigan-corruption-trial](https://www.courthousenews.com/former-comed-board-member-testifies-about-how-he-got-his-seat-in-mike-madigan-corruption-trial)

Dave Byrnes

Then-Illinois Speaker of the House Michael Madigan, D-Chicago, left, speaks with Illinois Rep. Thaddeus Jones, D-Calumet, right, while on the House floor after adjoining veto session, Thursday, Nov. 7, 2013 in Springfield Ill. (AP Photo/Seth Perlman, File)

CHICAGO (CN) — Juan Ochoa, a former board member of Illinois' largest electric utility company ComEd, took the stand Tuesday in the ongoing federal corruption trial of ex-Illinois House Speaker Mike Madigan.

Ochoa, current CEO of facilities services company Miramar Group, is a businessman who has been active in Chicago politics for decades. He told jurors Tuesday he had done "election work" for ex-Chicago Mayor Richard M. Daley and former Illinois Governor Rod Blagojevich, and he helped found the Latino Leadership Council PAC in Chicago in 2018.

Blagojevich also appointed Ochoa CEO of the Metropolitan Pier and Exposition Authority, which operates Chicago's McCormick Place and Navy Pier, in January 2007, though Ochoa left the authority in May 2010.

Ochoa only stayed on the board of ComEd for a year, from April 2019 to April 2020, but how he got his seat — and the \$78,000 pay that came with it — informs several of the government's conspiracy and bribery charges against Madigan. Jurors saw evidence Tuesday that then-House Speaker Madigan pushed ComEd to take on Ochoa as a favor to other influential Latino politicians in the Chicago area, including former Democratic Illinois Congressman Luis Gutierrez and current Democratic Illinois Congressman Jesus "Chuy" Garcia.

Madigan represented parts of Chicago's southwest side in the Illinois legislature for 50 years — areas which have become increasingly Hispanic since the 1990s. Gutierrez and Garcia endorsed Madigan in the 2016 state House election, and both later helped co-found the Latino Leadership Council alongside Ochoa.

Ochoa told jurors that he became interested in taking a seat on ComEd's board in late 2017, after a previous Latino board member, Jesse Ruiz, announced he was stepping down. Ochoa told jurors it was important to him for ComEd to have Latino leadership, and that he told Madigan himself as much in November 2017.

Some ComEd insiders reportedly expressed concern about Ochoa's qualifications, including how he had past financial issues, but behind the scenes Madigan was pulling for him. Jurors heard as much Tuesday in a May 16, 2018, call the FBI secretly recorded between Madigan and Mike McClain, his longtime ally, current codefendant and former ComEd lobbyist.

"Mike, my recommendation is go forward with Ochoa," Madigan told McClain on the call. "If the only complaint about Ochoa is that he suffers from bankruptcy twice, so did Harry Truman."

Ochoa also told jurors that Madigan had called him in April 2018, saying he ought to be on the board by that August.

"He informed me that I would not be seated in the upcoming ComEd board meeting but would likely be seated in the August meeting," Ochoa testified.

But in a separate, July 17, 2018, call that jurors heard Tuesday, Madigan told McClain he was more interested in keeping then-Congressman Gutierrez happy than Ochoa. On the call, McClain tells Madigan that he can call Ochoa with the good news that he'll be getting his board seat. Madigan responds that he'll call Gutierrez first.

"I mean, he's the reason I would talk to Juan Ochoa ... when I thought he was still going to be a congressman" Madigan says, referencing how Gutierrez chose not to seek reelection in 2018.

The August 2018 deadline came and went, but Ochoa had dinner with then-ComEd CEO Joe Dominguez and then-ComEd Vice President of Governmental and External Affairs Fidel Marquez that September. He told jurors Tuesday that Dominguez advised him he would be seated on the board after the November election.

McClain placed another call to Ochoa on Feb. 19, 2019, again bearing good news.

"I wanna call you in confidence, and the speaker knows I'm calling you," jurors heard McClain tell Ochoa in another secretly recorded call.

"If you kinda just keep it confidential until Dominguez calls and then you can say, 'thank you,'" McClain says later in the same call.

Ochoa is a major element of the ComEd "episode" of charges Madigan and McClain face, though four other episodes remain. The government's overall accusation in the ComEd episode is that Madigan backed ComEd's legislative agenda in the Illinois House, in exchange for his allies — including Ochoa — getting jobs and kickbacks from the energy company.

McClain, along with ex-ComEd CEO Anne Pramaggiore, ex-ComEd consultant Jay Doherty and ex-ComEd lobbyist John Hooker, make up the "ComEd Four." A federal jury convicted them in May 2023 on corruption charges separate from, but related to, the "ComEd episode" counts Madigan and McClain now face. ComEd itself admitted in 2020, in exchange for a deferred prosecution agreement and a \$200 million fine, to attempting to influence Illinois state lawmakers between 2011 and 2019.

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Categories / Courts, Criminal, Politics, Trials

<https://bsky.app/profile/annmlipton.bsky.social/post/3lbf3nvphqs2w>



Ann M. Lipton

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This is infuriating -

"Executives ...are using AI to refine word choice in their prepared remarks, for instance, in deciding whether to say the quarter was 'strong' or 'solid,' ...The firm's tool recently preferred "strong," based on the earnings metrics of other companies"



When IR Met AI: How the Technology Is Shaping Earnings-Day Prep

Generative AI is being increasingly used by investor-relations departments to predict and ready answers to analyst questions on earnings calls, refine word choice in ...

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3



5



14





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Frequently, shareholders bring fraud claims based on statements made on earnings calls, and courts routinely hold these kinds of remarks are puffery – meaning no investor would rely on them as a matter of law.

3



9



Ann M. Lipton @annmlipton.bsky.social · 2h

Of course, those legal holdings are divorced from what companies themselves apparently think investors find important.



1

6



Mike Nitabach @mnitabach.bsky.social · 2h

The enshittification of earnings reports...



2



Gad Weiss @gadweiss.bsky.social · 52m

Maybe it's not about what investors think when you do use this kind of language, but what they might think when you don't?



davidrlurie @davidrlurie.bsky.social · 2h

Creating puffery is a curious use of a massive amount of computing power.

1



1



davidrlurie @davidrlurie.bsky.social · 2h

But I can definitely see getting a large round of funding for a start-up devoted to the enterprise.

1



1



davidrlurie @davidrlurie.bsky.social · 2h

Puff Daddy is an obvious choice for the company name; but it is already taken, and now has serious negative connotations, in any event.

1



1



davidrlurie @davidrlurie.bsky.social · 2h

I am stopping now. I have given away too much of this entrepreneurial idea for free. :)



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<https://www.wsj.com/articles/when-ir-met-ai-how-the-technology-is-shaping-earnings-day-prep-5054a057>

When IR Met AI: How the Technology Is Shaping Earnings-Day Prep

Generative AI is being increasingly used by investor-relations departments to predict and ready answers to analyst questions on earnings calls, refine word choice in prepared remarks and more

By [Mark Maurer](#) [Follow](#), [Kristin Broughton](#) [Follow](#) and [Jennifer Williams](#) [Follow](#)

Nov. 19, 2024 6:00 am ET

Public companies frequently mention generative AI on earnings calls, citing its positive effect on the bottom line or promising results in tests. But there's one application they leave unspoken: the technology's role in those very calls.

Investor relations departments at companies such as shoe brand Skechers USA and networking-systems and software provider Ciena have begun using generative artificial-intelligence to help prepare their earnings commentary.

Some have used generative AI to predict the questions analysts might ask, for example, and to ready the best answers.

Finance teams in general have been slower to apply AI than other departments, like marketing and customer support, in part because they were still weighing the risks, costs and benefits. But they have begun to make an exception for investor relations.

Every quarter, U.S. public companies report their earnings with a rollout that involves a detailed earnings release and presentation, followed by an earnings call on which executives deliver prepared remarks and run a gantlet of analyst questions.

“Due to the language and communications involved in investor relations, generative AI has clear application for these processes,” said Shannon Cole, vice

president in the finance practice at research firm Gartner.

Indeed, 44% of investor-relations professionals have already folded AI into their companies' IR programs, primarily to create written content, according to a March survey from the National Investor Relations Institute, a professional group.

Some companies rely on AI as a way to gut-check their earnings approach. 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.”

Ciena is using AI as “very strong assistants” that can help draft the script of an earnings call and anticipate questions, said Gregg Lampf, vice president of investor relations.



Ciena is using AI for ‘ambiguity checks,’ to ensure their messages on earnings calls connect with the sorts of people who might be listening. PHOTO: CHRIS JUNG/ZUMA PRESS

AI can identify word choices or phrases that listeners might not fully understand. “We can run ambiguity checks, for lack of a better way of putting it, based on certain personas to help ensure that we are, in fact, articulating something in a way that will make most sense to most people,” Lampf said, referring to the different types of people who listen to earnings calls.

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.

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.

Increased reliance on AI in drafting news releases or conference-call scripts poses new risks for companies, advisers say, among them ethical issues, like transparency and accuracy. But the biggest may be keeping information private. Businesses that have adopted or invested in private large language models have better security for their not-yet-public details than those that turn to public tools, they said. Uploading private, material information to a public domain opens the possibility of unintended disclosure.

“It becomes very seductive to turn a little bit away from the risk factors, and just kind of lean in wholeheartedly because you just feel like, well, it’s going to make your life a lot easier,” said Evan Pondel, chief executive of investor-relations and strategic communications firm Triunfo Partners.

For CFOs, an AI assist with earnings-day prep could be a gateway to getting comfortable with the technology as they look for ways to clip costs, become more efficient and increase revenue, said May Habib, chief executive of enterprise AI startup Writer.

“IR is just such a great way for the CFO to hands-on understand what AI can do so that it doesn’t feel like magic,” Habib said.

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Matt Levine's Money Stuff: Short Squeezes Are Legal Now

By Matt Levine 2024-11-20T14:18:53871-05:00

Overstock

Every so often around here, I feel compelled to mention my all-time favorite US Securities and Exchange Commission enforcement action, the [MAAX zips case](#) against hedge fund manager Phil Falcone and his firm Harbinger Capital Partners. In 2006, Harbinger [owned some bonds](#), called “zips,” issued by MAAX Holdings Inc., a “leading manufacturer and distributor of bathtubs and showers in Canada.” The bonds were distressed — MAAX eventually went bankrupt in 2008 — and Harbinger started buying them at around 50 cents on the dollar.

But in the summer of 2006, the Harbinger analyst on the trade “began hearing rumors that there was aggressive short selling in the MAAX zips,” led by one of Harbinger’s own prime brokerage firms. And in fact the prime broker had a proprietary trader who *was* short the zips. (This was in 2006, when big banks had proprietary traders.) “Falcone was angered by this,” upset that his prime broker was “undercutting the value of his MAAX position and possibly borrowing his own notes to cover its short position.”

To get revenge, Falcone decided to buy up all the zips. Actually more than all of them: “By October 24, 2006, the Harbinger funds had purchased more than the entire issue of the MAAX zips — its position now stood at 174 million in face value in a 170 million bond issue”; by January 2007 it was at \$192.6 million in face value, or 113% of the bonds. It could do that because, again, other people were short: Short sellers own *negative* bonds, so if Falcone owned 193 million bonds, other people owned 37 million, and short sellers were short 60 million, the math would work.

And then:

Sometime in the spring of 2007, Harbinger, at Falcone’s direction, paid off the debt in its margin account and demanded that the Wall Street firm return any securities it had borrowed, including MAAX zips.

The “Wall Street firm” (Harbinger’s prime broker who was also short the zips) couldn’t find any zips to deliver, because “Harbinger was the only source of the notes — ... it had purchased more than the entire issue and had locked up the bonds” at a bank in Georgia. Harbinger offered to sell zips to the Wall Street firm at 100 cents on the dollar, but that price seemed ludicrously high — at that point Harbinger itself had the bonds marked at 40 “due to the current market in the senior debt and the deteriorating state of the company’s finances” — so the bank said no.

It kept trying to find bonds, things get more awkward, and then in September 2007 Falcone had one of the coolest conversations in the history of financial markets. A senior officer at the Wall Street firm “called Falcone to discuss the situation with the MAAX zips and its possible resolution,” and this happened:

During the conversation, Falcone insisted that the Wall Street firm buy in the MAAX zips. Falcone stated that he would be willing to settle with the shorts now at 105. ...

At some point, the conversation turned to the trading in the MAAX bonds. The senior officer asked Falcone how the Wall Street firm might satisfy its obligation to Harbinger. Falcone stated that the Wall Street firm should just keep bidding for the bonds. Falcone acknowledged that the Wall Street firm would suffer some losses doing so, but told the senior officer and the others that sometimes you are just on the wrong side of a trade.

In the course of this discussion, Falcone stated that he knew that the short position in the MAAX zips had created a “long” position in excess of the issue size. When the senior officer asked how he could possibly know this, Falcone stated that he was working the position himself and that he (i.e., Harbinger) had acquired approximately 190 million bonds. The senior officer and the other the Wall Street firm personnel were stunned.

I [first read this](#) in 2012, and probably every month or so since I have thought about Falcone saying “just keep bidding” and “sometimes you are just on the wrong side of a trade.” (Somewhat disappointingly, the bank stood firm, and eventually they settled at like 60 cents on the dollar.)

Anyway, I read it in 2012 because the SEC [brought an enforcement action](#) against Falcone, saying that this was market manipulation; [Falcone settled](#) in 2013. The question that I have had ever since is: *Was it market manipulation?* It’s extremely cool, for one thing, which makes me want the answer to be no. There is not really any indication that Falcone *lied* or *deceived* anyone ; in fact on his call with the bank he quite enthusiastically told them that he owned more than all of the bonds. Of course he

did! That's just awesome; why wouldn't he brag about it to anyone who would listen?

Sometimes market manipulation is defined as [trying to](#) "effect a price or price trend that does not reflect legitimate forces of supply and demand," and [the SEC says](#) that "market manipulation is when someone artificially affects the supply or demand for a security." I suppose this is arguably that, but only arguably. In fact the price of MAAX zips was high because there was a lot of demand (from Falcone) and no supply (because Falcone had it all). Perhaps *artificial* supply and demand, perhaps not *legitimate* supply and demand, but who's to say?

In any case, though, the SEC clearly thinks that this sort of short squeeze is illegal, and Falcone settled, so a court didn't get to disagree.

Phil Falcone is not the only guy who gets mad at short sellers. More usually, the people who get mad at short sellers are the chief executive officers of heavily shorted public companies, who feel personally affronted that someone would bet against their stocks. Some of them would also like to do short squeezes. Sometimes they do.

The technology of the short squeeze has advanced a bit since 2007. The state of the art these days, for companies, goes something like this:

- 1. A short seller of stock is legally required to borrow stock from a share lender to do the short sale, and she eventually has to return the stock to her share lender to close out the sale.
- 2. If there is a corporate action — a dividend, distribution, share split, spinoff, merger, etc. — her obligation to the share lender reflects the corporate action. If she borrows and shorts one share, and the stock pays a \$1 dividend, she owes her share lender one share of stock plus \$1. If there's a 5-for-1 stock split, she owes five shares. If there's a spinoff of a subsidiary, she owes one share of the original company plus one share (or whatever each original shareholder gets) of the spinoff company. Etc.
- 3. Normally, this is pretty straightforward: If there's a dividend, the short seller pays \$1 to the lender. If there's a spinoff, then the short seller goes to the stock exchange and buys one share of the spinoff company to deliver to the lender.
- 4. The trick, though, is to distribute something to shareholders that short sellers *can't* deliver to their stock lenders. You announce a corporate action like: "We are spinning out our widget subsidiary to shareholders. Each shareholder will get one share of the widget subsidiary for each share they own. But the widget subsidiary shares will not be registered with the SEC or listed on the stock

exchange, and in fact they won't be traded at all. Shareholders will *get* the widget subsidiary shares, but will never be able to sell them."

- 5. That is annoying for the shareholders! It is good, for a public company shareholder, to be able to sell your stock! It is bad to have shares that you can't sell! If the company distributes half its value to you in the form of a thing you can't sell, then in some sense your shares are half as valuable.
- 6. But it's *really* annoying for short sellers: If nobody can sell the spinoff shares, then the short sellers can't *buy* them, which means that they can't deliver them to their share lenders, which means ... I don't even know what it means? It means they're in trouble? It means they're stuck in a weird limbo forever? In practice my understanding is that it means something like "they negotiate to pay cash to the share lenders to settle this weird obligation," but in *theory* it means they have to deliver something that they cannot buy, so they end up in the situation of the MAAX zips short: "Just keep bidding," "sometimes you are on the wrong side of the trade."
- 7. And so what you actually do is you *announce* the upcoming distribution of the non-tradable thing, and all the short sellers say "oh no I have to get out of this short position before I get stuck in a weird limbo," and they buy back the stock before you actually do the distribution.
- 8. And because they are forced to buy back the stock all at once, the stock goes up. Which accomplishes two things: It makes your stock go up (which is good for shareholders), and it makes the short sellers lose money (which is what you really want, because you hate short sellers).

And then I suppose you go and do the non-tradable distribution. Ideally, after a while — after the shorts are all blown up — you make it tradable, so as not to inconvenience your actual shareholders too much. But probably you are mostly focused on hurting the shorts.

We have talked about a few versions of this. MMTLP is a big one, and a few months ago the SEC brought a fraud case against it. The Sorrento Therapeutics situation isn't *quite* the same thing, but it has some similar elements. I once joked that Tesla Inc. should pay a dividend in nontransferable flamethrowers, to burn the shorts.

But the best-known example — as far as I can tell, the inventor of this technology — is Overstock.com. Overstock tried this trade in 2019; the non-tradable thing that it wanted to distribute was a "Digital Voting Series A-1 Preferred Stock," roughly a substitute for Overstock common stock that would trade (1) only on Overstock's own blockchain platform and (2) not at all, for the first six months. This means that short sellers wouldn't be able to acquire it, so they would be stuck in weird limbo, and to avoid the weird limbo they bought back a lot of Overstock stock before the distribution. Overstock's stock price shot up and the shorts did in fact lose money.

And then Overstock said never mind, actually the weird preferred stock will be freely tradable from

day one, “in view of the feedback we received from industry participants, investors, and regulators.” I assume some of that was Overstock shareholders saying “actually it’s very inconvenient for us if you give us non-tradable stock, even if it burns the shorts.” But most of it was the SEC saying “come on this is market manipulation.” Because, again, the SEC thinks that short squeezes are market manipulation. (Thus the Falcone case, and the MMTLP one.) So Overstock restructured the deal to squeeze the shorts less — though after many of them had already been squeezed out of their positions.

But *was* it market manipulation? The SEC was apparently satisfied with making the dividend freely tradable, but the shorts who had already been squeezed out were unhappy. So they sued for market manipulation. And last month they lost: The US Court of Appeals for the Tenth Circuit ruled that actually short squeezes are fine.

Here is [the opinion](#), which goes through the facts. Overstock announced the dividend, which would create a squeeze:

If a short seller’s position remained open on the dividend’s record date, that short seller would receive an untransferable security that it was contractually obligated to transfer. So Overstock’s short sellers’ only route to avoid necessarily breaching their lending contracts was to close their short positions by buying new Overstock shares and returning them to their lenders before the dividend’s record date.

And it worked: “From the beginning of the short squeeze on September 3, 2019, through its peak during the trading day on September 13, Overstock’s common stock nearly doubled (from \$15.07 to a 52-week high of \$29.75) and trading volume increased 776% (from 2,122,416 to 18,613,100 shares traded).”

Meanwhile Patrick Byrne, Overstock’s colorful and short-hating chief executive officer, (1) “instructed his staff to sell all his remaining Overstock common stock at the height of the short squeeze,” (2) resigned as CEO and (3) “left the United States for Indonesia.” In Indonesia he wrote a blog about, among many other things, the short squeeze, saying things like “the OSM shorts were asleep at the switch and got caught in a jam. We Overstock shareholders won this hand fair and square,” the dividend was a “hand with four aces in it ready to play,” and “Mr. Shorty was sleepy and stepped on his weenie, and if the SEC objected after the fact, I would love to have met the SEC in court and put them on trial.”

Did he win fair and square, though? The short sellers say that “Defendants manipulated the market

by issuing an unregistered dividend to force Overstock's short sellers to cover their positions, drive Overstock's stock price to artificially high levels, and allow Byrne to sell his shares for a massive profit." Overstock says, well, yes, but what's the problem?

Defendants respond that these allegations fail to allege a "deceptive or manipulative act," because Overstock fully disclosed the dividend's terms five weeks before the short squeeze began, and sufficiently in advance of the dividend's record date.

And the court agrees (citations omitted):

The Supreme Court has interpreted "manipulation" to be "virtually a term of art when used in connection with securities markets." The term generally refers "to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity," and "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." Whether an open-market transaction may qualify as a manipulative act is an issue of first impression for this court. Consistent with the Second Circuit's approach, we hold that an open-market transaction may qualify as manipulative conduct, but only if accompanied by plausibly alleged deception. ...

Acting in a manner that results in an artificial price, on its own, is not enough to constitute manipulative conduct. ... For market activity to "artificially" affect the price of securities, the manipulative conduct must be "aimed at deceiving investors as to how other market participants have valued a security." Here, Defendants' truthful disclosure of the terms of the upcoming dividend transaction did not deceive investors as to how the market valued Overstock.

Overstock intentionally created an artificial stock price, yes, but everyone *knew* it was artificial, so it can't be market manipulation. I am not sure that this is right, or that other courts would agree with this decision, and nothing here is legal advice. On the other hand [here is a memo](#) from Katten Muchin Rosenman LLP:

The Tenth Circuit's decision may provide a blueprint for public companies seeking to defend against significant short-seller activities. Put simply, the decision creates a pathway for issuers to affect corporate transactions solely for the purpose of creating short squeezes without running afoul of the Exchange Act's antifraud provisions as long as they properly disclose the transaction to stockholders.

I mean, Overstock created that blueprint, and other companies *have* followed it. But not many, because the Overstock blueprint — “pay a dividend of non-traded stuff to create a short squeeze” — always seemed risky: It might be market manipulation, and the SEC stopped Overstock from doing it. But here is a court saying no, go ahead, knock yourself out, just be honest about what you are doing. It’s fine to engineer a short squeeze, as long as you put out a press release like “we are distributing shares of our Non-Transferable Preferred Stock in order to burn short sellers and make the stock go up.”

Which obviously is no impediment! The CEOs who love to burn the short sellers also love to say that they are burning the short sellers, and their shareholders often cheer them on. The court is right about that at least: Even if you think this is market manipulation, it is the least deceptive sort of market manipulation. Anyone who does this will also brag about it to anyone who will listen.

Paper checks

See I think it’s cool that a historically important method of transferring money is “you write a number of dollars on a piece of paper, and the person who gets the piece of paper has that number of dollars.” Just an incredible set of social and financial technologies embedded there in the idea of a check, the idea that writing a number down on a piece of paper could create money. Well, not *create* money. You have some money at the bank, and the check is an instruction for the bank to move the money. It is an impressively minimal instruction that is widely accepted as money.

Of course it is not the most technologically sophisticated way to move money, *now*. Now what you probably do is go to some website or app run by your bank, and you log in with some credentials so the app knows it’s you, and the app can look up how much money is in your account, and then you put your instructions into the app, and the bank moves the money. Or crypto found a way to do that stuff — checking credentials, checking that the money is in your account — in a decentralized way. But none of this was technologically feasible 100 years ago. Whereas “write the instructions on paper” is so straightforward and flexible.

Obviously though “you can send money by writing a number on a piece of paper” is going to have a much higher error rate than the app stuff, or possibly even crypto. Here’s [the Wall Street Journal](#):

Scammers are altering checks, depositing them and quickly withdrawing cash before banks flag the payments as suspicious, according to bank executives and their antifraud consultants.

Fraudsters frequent Telegram, a popular messaging app, Facebook and TikTok to promote the low-tech check scheme. The scams exploit banks' requirements to make customer money available before fully verifying checks. They have spread rapidly in the past few years, turning into a major headache for the financial industry. ...

The fraudsters' social-media messages suggest there are always potential new "glitches" to exploit. They move quickly from bank to bank, telling others of their latest targets, and their successes.

We have talked about these glitches before. I feel like some of what is happening here is that, in general, in 2024, it feels like it should be *harder* to hack a bank than this. Like you should have to guess some passwords and break through some encryption or something. But, no, if you write "pay me \$10,000" on a piece of paper, the bank might just do it.

All-Weather ETF

My thesis is that every financial product will eventually be sold to retail wrapped in an exchange-traded fund, and here is a financial product:

Bridgewater Associates founder Ray Dalio's All Weather strategy is coming to the exchange-traded fund market.

State Street Global Advisors plans to create the SPDR Bridgewater All Weather ETF, according to a Tuesday regulatory filing. The fund will be sub-advised by Bridgewater, which will provide a daily model portfolio specific to this product. ...

First launched in 1996 to manage Dalio's trust assets, All Weather is a so-called risk-parity strategy that allocates to different assets based on their volatility.

It is honestly weird that they're just getting around to this? [Risk parity ETFs](#) have been around for years, and by now people have moved on to private credit ETFs. "Systematically allocating to different public asset classes based on volatility" seems pretty vanilla and index-y for an ETF, these days.

How much do the senior partners at Jane Street make?

Ha, wouldn't you like to know! But you can't:

Compensation for eight senior Jane Street Group officers was ruled out of bounds as a topic for depositions by Millennium Management in the firms' trade-secrets fight over an allegedly stolen India options strategy.

US District Judge Paul Engelmayer on Tuesday granted Jane Street's request to limit several of Millennium's deposition topics, saying the proprietary trading firm had "legitimate interests in keeping discovery in proper proportion to the needs of the case." ...

He outright struck down as a deposition topic "the amount of income, profits or compensation received by [eight identified senior officers] of Jane Street" for 2022, 2023 and 2024 to date.

Honestly it was worth a shot. I have joked before about Jane Street's reputation for secrecy: "I read a dozen articles a week about Jane Street Group, and they all mention how secretive and press-shy it is." But it is probably true that you get information about financial firms in proportion to how much outside capital they take, and these days the most important financial firms without outside capital are the big proprietary trading firms. Big banks are pretty much open books: They're public companies, and their financial results and executive pay are extensively disclosed. Big private equity firms, these days, are pretty similar. Hedge funds are more secretive, but they have outside investors and send them investor letters that tend to get out, and there are regular [rankings](#) of which managers make the most money.

But the whole point of proprietary trading firms is that they trade with their own partners' money, so they don't need to disclose much to anyone. This is not strictly true of Jane Street, though: It has [issued bonds](#), so its financials are [now somewhat public](#). Still, if you want an answer to the question "how much do the top people at Jane Street get paid," a trade-secrets lawsuit is probably your best chance. Though not good enough.

Things happen

Archegos' Hwang Faces Sentence for Crimes That Shook Wall Street. [Credit Suisse](#) "had an almost perfect risk culture for a disaster like the Great Financial Crisis." Antitrust Enforcers Prepare Final Blitz Against [Big Tech](#). Trafigura Cuts Share Buybacks as New Generation Takes Over. Bitcoin Rises to Record With MicroStrategy Stepping Up Purchases. Italy puts brakes on 'reckless' e-scooter use with new helmet and insurance rules. Jersey Mike's Founder Is Worth \$7 Billion After Blackstone Deal. Here's Steve Schwarzman [eating a Jersey Mike's sub](#). Dental supply stock surges on [RFK's anti-fluoride stance](#), activist involvement.

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- 1. That's from the SEC complaint. I would not have said "cover": Whoever was shorting the zips was borrowing notes — perhaps Falcone's — to *do* the short, but "cover" normally means buying back the bonds to close out the short.
- 2. Sometimes we talk about companies where short interest is more than 100% of the outstanding shares, which people incorrectly believe means that there must be naked short selling. It does not. That said, the Harbinger complaint goes on: "Harbinger was able to acquire more than the entire issue of the MAAX zips because there is no 'locate' requirement when short-selling debt instruments. Under rules applicable to the equities market, a broker or dealer that is not engaged in bona fide market making cannot accept a short sale order in a stock unless it has borrowed or has arranged to borrow that stock, or has reasonable grounds to believe that it can borrow the stock and deliver on the delivery date. There is no similar rule applicable to bond trading. Thus, 'naked' short selling of bonds is legal, which can lead to 'long' positions far in excess of the issue size." In principle Harbinger could acquire more than 100% of the bonds without any naked shorting, but in that case *it would probably have to lend out its bonds*. Here it seems like Harbinger called in its bonds that were being loaned out, and could keep buying new bonds from short sellers, because those short sellers really were (legally) naked short.
- 3. The SEC complaint sort of halfheartedly alleges that he deceived people by not telling everyone that he owned all the bonds earlier, but he's not actually obligated to do that, and there's no suggestion that he affirmatively lied.
- 4. Or borrows it and maintains a short position in both the parent and the spinoff. But ultimately,

when she closes out her short, the short seller has to deliver both shares.

- 5. The MMTLP case is weird because the SEC accuses the company *both* of engineering this sort of short squeeze *and* of pretending to engineer this sort of short squeeze to trick retail investors and pump its stock. Or, rather, one or the other, but the SEC isn't sure which. There is an argument that the first theory is legal, if short squeezes are legal, and the second theory is not (it's fraud).
- 6. Now called [Beyond Inc.](#), after acquiring fellow Money Stuff favorite Bed Bath & Beyond.

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Secret Payments Scandal Mars Mining Tycoon's Rags-to-Riches Story

Published: Wed Nov 20 14:32:37 EST 2024

- Mineral Resources founder Chris Ellison loses billionaire tag
- The firm will face shareholders at AGM in Perth Thursday

By Paul-Alain Hunt

(Bloomberg) --

Chris Ellison's founder story is one of legend, even among the vast fortunes generated by Australia's commodities boom. He's the high school dropout who through hard work and good timing built Mineral Resources Ltd. into one of the country's largest and most successful diversified miners.

For almost three decades, the blunt-talking and at times controversial Ellison, who is now worth just under \$1 billion, leaned into his reputation as a wealth-generating machine and used it as a shield against criticism.

"I started with A\$10,600 (\$6,900) in the bank and a credit card with a A\$50,000 limit. And you think — we're running a A\$12 billion company," he said in frustration when analysts questioned Mineral Resources' debt pile on a February earnings call. "You think I don't know how to manage a goddamn balance sheet? That drives me insane."

Chris Ellison in Perth in 2023.

Photographer: Trevor Collens/Australian Financial Review/Getty Images

But lately, his fortunes have changed. In the past five weeks, allegations of impropriety, ranging from undeclared payments to offshore entities owned by Ellison, questionable property deals and conflicts of interest have plagued Ellison and Mineral Resources. Ellison has pledged to step down as managing director within 18 months, while his company's stock has slumped 24% since the accusations first surfaced last month and has more than halved since May, just before it shuttered projects amid lower commodity prices.

In a statement earlier this month, Ellison said he was "deeply sorry for the events" and the impact they have had on the company's reputation.

Ellison and Mineral Resources declined Bloomberg's request for an interview.

Read More: Mineral Resources Founder Ellison to Step Down After Probe

Investors are now grappling with an existential dilemma for the future of the company: the loss of their founder and managing director, who ruled more like a king than a servant to shareholders, but who had a record of producing strong results. On Thursday, shareholders get their first chance to question management when they gather in Perth, Western Australian for the company's annual general meeting.

The event is a litmus test of whether Ellison retains the confidence of shareholders. Some may not support resolutions, such as the adoption of the remuneration report or election of certain directors. It may also serve as an arena for disgruntled investors. Still, there are some shareholders who revere the wealth Ellison created for them.

"Shareholders put aside the governance issue because they say, 'he's making us money.' Which he was," said Helen Bird, a senior lecturer at Swinburne Law School in Melbourne. "From my point of view, the balance between wealth creation and duties is a real clear line. He simply shouldn't have done this."

Read more about governance:

Pension Fund HESTA Adds to Pressure on Mineral Resources' Board

Billionaire Sex Saga Is Latest Scandal to Hit Australia CEOs

Humble Beginnings

Ellison comes from humble beginnings in New Zealand. In his own words, he says his family was "very poor" — a far cry from the lifestyle he lives now with a helicopter flying him to and from work, and a large private yacht to indulge his passion for fishing.

The tycoon grew up in a rural community just outside Dunedin, a city near the bottom of New Zealand's South Island. His father was a pig farmer who later drove a front-end loader in a quarry and worked evenings cleaning offices, while his mother was a stay-home mom, Ellison said in a company video on the Mineral Resources website. As a child, he helped his father clean offices and milked cows at the weekend.

"I didn't have a dream on what I wanted to do with my life, I knew what I didn't want to do," Ellison said in the video. "I wanted to get out of the situation I was in."

After dropping out of high school the day he turned 15, Ellison got a job "the next day" on a farm, which proved to be a turning point in his life. His move across the Tasman Sea to Australia was driven by a dream of making enough money to buy his own farm back in New Zealand.

In the late 1970s, he and a friend flew to Australia, bought a black Holden Monaro and drove around looking for work. They told would-be employers they “could do anything.” This attitude saw Ellison work as a crane driver for Western Australia’s mines. He went on to buy a crane and start his own business in 1978.

“We were in business for about three years, and we were on the verge of going broke most of the time,” he said. But it was saved by the oil and gas boom in Australia’s far north. He sold the company at the age of 25, and went on to set up his next venture.

In 1992 he established Mineral Resources, which went public in 2006 and now has assets spanning iron ore, lithium, natural gas and mining contracting.

Today he counts among his friends iron ore billionaire Gina Rinehart, who recently acquired an interest in Mineral Resources’ gas tenements, a move that coincided with his current predicament.

[Read More: Mineral Resources in A\\$1.1 Billion Energy Deal With Rinehart](#)

Ellison’s fortune has fallen to \$965 million from \$1.8 billion at its peak in Jan. 2023, according to the Bloomberg Billionaires Index. Just before the allegations surfaced last month he was worth \$1.1 billion.

Coffee Breaks

Mineral Resources offers staff top working conditions, with the firm’s two-year-old headquarters boasting a cafe, restaurant, gym, creche, reflection room and wellness center along with on-demand psychologists.

Similarly, in the remote mining regions that Mineral Resources operates, the accommodation is second to none. At its Onslow Iron project in the Pilbara, fly-in, fly-out workers live in what Ellison describes as a “resort style” village.

Mineral Resources’ headquarters in Perth.

Photographer: Matt Jeloneck/Bloomberg

In return, Ellison demands hard work. In August, he made headlines when he said during an investor call that he wanted to hold his employees “captive all day long” and didn’t want them “walking down the road for a cup of coffee”.

[Read More: Mining Billionaire Who Banned Work From Home Targets Coffee Runs](#)

The recent revelations came to surface when Mineral Resources’ board confirmed in October it had hired law firm Herbert Smith Freehills to investigate transactions between the company and entities

owned by Ellison. As the weeks rolled on, more allegations surfaced around property and contracting transactions between Ellison and his family members.

The investigation released earlier this month found Mineral Resources had made payments of A\$3.8 million to an offshore company owned by Ellison for mining equipment and parts. Ellison was also found to have used Mineral Resources employees for his personal finances and to work on his boat.

Ellison was fined A\$8.8 million by the company and will forfeit his salary and other incentives worth as much as A\$9.6 million. The Australian Securities Exchange has launched a probe and the regulatory watchdog, the Australian Securities and Investments Commission, has opened its own inquiry.

At Thursday's meeting, Norges Bank Investment Management along with the California State Teachers' Retirement System have both committed to voting in favor of the remuneration report, while proxy firm ISS has recommended shareholders reject the report. One of Australia's largest pension funds, HESTA, has called for Ellison to leave earlier, saying the timeframe doesn't reflect the seriousness of the issues.

--With assistance from Andrew Heathcote.

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Sic Transit - TPM – Talking Points Memo

 talkingpointsmemo.com/edblog/sic-transit-15

November 20, 2024

Sic Transit

By Josh Marshall

|

November 20, 2024 9:08 a.m.



Here's a morsel of news that shows you how far we've come over the last eight years.

Donald Trump made a heavy play for the crypto world in the last campaign, promising to be a "crypto president" and courting donors in that space. He's now in talks to buy (through the parent company of Truth Social) the crypto trading firm Bakkt. This comes after he already founded his own new crypto venture, World Liberty Financial. Bakkt was formerly led by former appointed Sen. Kelly Loeffler, who was later defeated by Sen. Raphael Warnock. This was when Loeffler was an executive at Atlanta-based Intercontinental Exchange (ICE), the parent company of The New York Stock Exchange. Loeffler's husband Jeff Sprecher is ICE's CEO. Both Loeffler and Sprecher remain major backers and financial supporters of Donald Trump.

Josh Marshall (@joshtpm) is the founder and Editor-in-Chief of TPM.



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2 Firms To Rep Starbucks Investors Over 'Triple Shot' Strategy

By **Emilie Ruscoe**

Law360 (November 19, 2024, 8:20 PM EST) -- Robbins Geller Rudman & Dowd LLP and Keller Rohrback LLP will represent a proposed class of investors in litigation alleging Starbucks made overly positive projections for its so-called Triple Shot Reinvention strategy, hurting investors when its actual financial results did not bear out its optimism.

In a Tuesday order, U.S. District Judge John H. Chun appointed Robbins Geller lead counsel and Keller Rohrback liaison counsel in the matter, noting that the firms' three pension fund clients were unopposed by the matter's two other would-be lead plaintiffs.

Robbins Geller and Keller Rohrback represent institutional investors the Pavers & Road Builders District Council Pension Fund, Teamsters Local 237 Additional Security Benefit Fund and Teamsters Local 237 Supplemental Fund for Housing Authority Employees, whose total alleged losses in the matter are nearly \$260,000.

When the case's lead plaintiff **motions** were filed in October, Levi & Korsinsky client Ishwar Bhatia sought lead plaintiff appointment with alleged losses of about \$11,300, and Rosen Law Firm client Kyle N. Foley, whose alleged losses are about \$1,120, also wanted to lead the suit.

Bhatia withdrew the lead request, and Foley did not make further filings, the union funds noted on Monday.

Robbins Geller and Keller Rohrback will now lead litigation launched in August by Levi & Korsinsky client Charles Garbaccio, who claimed the company misled investors when it "touted the company's reinvention [plan] and confidence in the business's overall momentum" as it stated in November 2023 that it expected to see 5%-7% global comparable sales growth in its coming fiscal year.

"As we enter the current year, in the face of macro uncertainty, we remain confident in the momentum throughout our business and headroom globally. We expect sustained momentum throughout the company for years to come," Starbucks CEO Laxman Narasimhan said in November 2023, according to the complaint.

Garbaccio contended that the growth did not materialize, pointing to April, when the company announced its second quarter financial performance showing that it saw revenues fall by 2% as foot traffic and store sales slowed.

At the same time, the investor said, the company lowered its financial guidance for its full fiscal year, citing struggles to gain a foothold in China's competitive coffee shop market as one of the reasons it failed to see the growth it expected.

The April news precipitated a 15% decline in trading prices for Starbucks shares from \$88 to \$74, Garbaccio said.

The action's proposed class includes those who bought Starbucks shares between Nov. 2, 2023, and April 30, 2024.

Starbucks has characterized the suit's claims as meritless in an earlier statement to Law360.

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

The union funds are represented by Danielle S. Myers, Michael Albert and Kenneth P. Dolitsky of Robbins Geller Rudman & Dowd LLP, and Juli E. Farris of Keller Rohrback LLP.

Counsel information for Starbucks was not immediately available on Tuesday.

The case is Garbaccio v. Starbucks Corp. et al., case number 2:24-cv-01362, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Sydney Price. Editing by Vaqas Asghar.

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Undefined Terms Cinch Cloudera's Win In 'Cloudy' Fraud Suit

By **Bonnie Eslinger**

Law360 (November 19, 2024, 6:30 PM EST) -- The Ninth Circuit on Tuesday upheld the dismissal of a proposed class action against Cloudera Inc. alleging the data management and analytics company duped investors into buying stock at artificially inflated prices, saying the suit didn't substantiate its falsity claims with clear definitions for terms like "cloud native."

The **published opinion**, penned by U.S. Circuit Judge Eric D. Miller, notes named plaintiff Mariusz Klin and the other investors argued on appeal that they didn't need to provide an "expert supported definition" to support pleadings including the terms "cloud" and "native," whether separately or together.

The investors had said the terms can be understood using their "commonly-accepted definitions" and plain meaning.

However, the Ninth Circuit on Tuesday maintained the definition of the terms is not so obvious, particularly as cloud computing is a "fast-evolving market" that's changed over the years.

As a result, "experts in cloud computing acknowledge that the meaning of the term 'cloud' is, well, cloudy," the Ninth Circuit said, pointing to an online Microsoft document that explains "the definition for the cloud can seem murky"

Klin's failure to adequately plead falsity in his second amended complaint was fatal to all of his claims, according to the appellate court, which then reviewed whether the district court should have allowed the investor a third shot at amending his lawsuit.

The Ninth Circuit panel decided, as the lower court judge did, that "further amendment of the complaint would be futile."

The decision notes the district judge had warned Klin that if he couldn't fix the previously amended complaint, the district judge would dismiss the case with prejudice.

"The district court evidently saw no reason to believe that Klin would do better with another try, and neither do we," the Ninth Circuit panel said. "Klin has not identified, including in his appellate briefs, the specific facts that he would plead in a future complaint to remedy the previous complaint's shortcomings."

According to the complaint, Klin purchased Cloudera stock between its initial public offering and a subsequent price drop in June 2019, after the company announced negative quarterly earnings. The putative class action has alleged Cloudera and its officers and directors made substantive false and misleading statements, as well as omissions, about the technical capabilities of the company's products.

Cloudera offers products that use the cloud, and the meaning of terms related to the "cloud" is at the heart of the parties' dispute, the appellate panel said Tuesday. In addition, because fraud is alleged, Klin's claims were subject to a heightened pleading standard, the panel said.

The deficiencies in Klin's complaint are similar to those the Ninth Circuit identified back in 2021 in another case, **Wochos v. Tesla Inc.**,  the appellate panel said.

"In that securities-fraud case, the plaintiffs alleged that Tesla had made false statements about its manufacturing processes, and their theory of falsity relied on a specialized meaning of some of the terms in the statements," the panel noted.

When a plaintiff's claims the words used in a statement have some "special or nuanced" meaning different from "what the literal words suggest, the plaintiff must plead facts that will support this crucial premise," the Ninth Circuit said, quoting its Tesla decision.

Klin attempted to substantiate the terms in his complaint by citing a blog post, but that didn't help him because the post didn't use or define such terms in his complaint as "cloud-native" or "cloud architecture," according to the opinion.

According to Klin's suit, Cloudera's initial public offering was in April 2017. After the company announced negative quarterly earnings two years later, the stock price fell more than 40% the next day, the suit says. Klin had purchased Cloudera stock between the initial public offering and the price drop, it noted.

Cloudera misled investors by claiming "that it possessed an 'original cloud native architecture' and 'cloud-native platform,'" Klin asserted in his June 2019 complaint. Cloudera's software, "was not a cloud-native offering" and was "widely panned by Cloudera's existing and potential customers for lacking the key attributes of cloud products," Klin alleged.

In May 2021, then-U.S. District Judge Lucy Koh dismissed the complaint for failure to state a claim. The judge held that without a "contemporaneous definition or explanation for what 'cloud-native' technology meant ... the court has no basis to find that plaintiffs have adequately pled that Cloudera defendants' statements were false."

Koh was **subsequently confirmed** for a Ninth Circuit seat in December 2021.

The case was then taken over by U.S. District Judge Maxine M. Chesney who also tossed Klin's second amended complaint, finding the "same problem" previously identified by Judge Koh remained.

The Ninth Circuit, in its review, said it was critical for the complaint to explain what is false or misleading about the purportedly fraudulent statement. And to do that, the court needed to know Klin's assumed definitions for such phrases as "cloud native," the court said.

Klin attempted to do that by alleging the term "cloud-native" was understood by investors to mean a software offering "with specific core material attributes such as the use of containers, seamless scalability, ease-of-use, and security and elasticity," the panel said. But Klin didn't plead any facts that supported his definition of the terms, it said.

Klin's complaint also relied on statements made by Cloudera executives about the challenges the company faced.

"But as we have observed, 'later, sobering revelations' do not by themselves 'make the earlier, cheerier statement a falsehood,'" the Ninth Circuit said, citing its 1994 decision **In re Glenfed Inc. Securities Litigation**. 📍

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

U.S. Circuit Judges Marsha S. Berzon, Eric D. Miller and Lawrence VanDyke sat on the panel for the Ninth Circuit.

Mariusz Klin and the other plaintiffs are represented by Lewis S. Kahn, Ramzi Abadou, Alexander L. Burns, James T. Fetter and Alexandra Pratt of Kahn Swick & Foti LLC.

Cloudera and the individual defendants are represented by Anna Erickson White, Ryan Keats, Joseph R. Palmore and Joel F. Wacks of Morrison Foerster LLP.

The case is In re: Mariusz Klin et al. v. Cloudera Inc. et al., case number 22-16807, in the U.S. Court

of Appeals for the Ninth Circuit.

--Editing by Lakshna Mehta.

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Blood Vessel Maker Faces Investor Suit Over FDA Findings

By **Emilie Ruscoe**

Law360 (November 19, 2024, 10:04 PM EST) -- Biotechnology company Humacyte Inc. faces an investor's proposed class action alleging the company failed to disclose quality assurance issues at its manufacturing facilities that allegedly delayed regulatory review for its bioengineered blood vessel product candidate, leading to stock price declines.

In a **complaint** filed Monday in North Carolina federal court, Humacyte investor James A. Cutshall claimed that the company's shareholders were blindsided when the U.S. Food and Drug Administration said in October that it had observed quality oversight issues such as an absence of microbial testing at the Humacyte's Durham manufacturing facilities.

When the FDA's findings became available, Cutshall said, trading prices for Humacyte shares fell over 16% from about \$5.80 to about \$4.86, hurting investors.

Cutshall also pointed to market records from August showing that trading prices for Humacyte shares fell when it announced the FDA would miss its original deadline for reviewing Humacyte's product, with trading prices falling over 16% from just under \$8 to about \$6.60.

At that time, Humacyte representatives had acknowledged that the FDA had inspected its facilities, but the company failed to indicate those inspections had been anything other than routine, the complaint said.

Cutshall claimed that the regulator's adverse findings showed it was poised to delay its review of an application Humacyte had filed for its lab-grown human acellular blood vessel implant product candidate.

Because of that possible delay, Cutshall said, there was a substantial risk to the prospects for FDA approval of the blood vessel implant product, which the company hoped to market for the treatment of vascular trauma.

Cutshall described Humacyte and its subsidiaries as makers of "off-the-shelf, implantable, and bioengineered human tissues," noting that the company has yet to make money off of its products.

The company filed its application for its blood vessel implant in December 2023, the investor said, and in February, the FDA granted Humacyte's review request, saying at the time it would end its review process by Aug. 10.

The proposed class period includes those who purchased Humacyte shares between May 10, 2024, when Humacyte told investors that its FDA product application was "on track," and Oct. 17, when the FDA released its Form 483 inspection observations about Humacyte's manufacturing facilities.

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

Cutshall is represented by Charles H. Linehan and Garth Spencer of Glancy Prongay & Murray LLP and Howard G. Smith of the Law Offices of Howard G. Smith.

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

The case is James Cutshall v. Humacyte Inc. et al., case number 1:24-cv-00954, in the U.S. District Court for the Middle District of North Carolina.

--Editing by Dave Trumbore.

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Shaq Reaches \$11M Deal With Astrals NFT Buyers

By **Sydney Price**

Law360 (November 19, 2024, 7:43 PM EST) -- Hall of Fame basketball player Shaquille O'Neal and the creators of the Astrals nonfungible token project have agreed to pay \$11 million to settle a proposed securities class action with buyers of the tokens that O'Neal allegedly promoted.

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

According to Tuesday's settlement notice, the deal between O'Neal, the Astral defendants and the settlement class was the result of "informed, extensive arm's-length negotiations between experienced counsel, and multiple mediation sessions" with mediator Howard Tescher.

O'Neal has **also settled the claims** against him in the multidistrict litigation related to the collapse of crypto exchange FTX though the details were not yet available Tuesday.

Adam Moskowitz of The Moskowitz Law Firm PLLC, who represents the plaintiffs in both suits, said in a statement to Law360 that the settlements are "great resolutions."

"In this quickly changing crypto landscape, it cannot be overstated how important these federal judges, and willing partners, are for resolutions," Moskowitz said.

The Moskowitz Law Firm attorneys and its co-counsel will receive approximately \$2.91 million — or about 26% of the settlement fund — in fees. The Astral defendants and O'Neal will also each make \$15,000 payments separate from the settlement fund, according to the notice.

Legal questions, like whether the Astrals' NFTs were securities, would complicate further litigation and potentially result in no recovery for the settlement class, the settlement notice states.

Daniel Harper filed the proposed class action suit in May 2023, accusing O'Neal specifically of targeting Florida residents in his promotion of the Astrals Project and levied O'Neal's work as a promoter of collapsed crypto exchange FTX to hype both projects. O'Neal should have known that the NFTs and his promotional efforts implicated securities laws, the buyers argued.

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

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

The parties first met for mediation in February and agreed to continue talks before Tescher again in October.

Counsel for O'Neal did not immediately respond to requests for comment Tuesday.

The Astral buyers are represented by Adam M. Moskowitz and Joseph M. Kaye of The Moskowitz Law

Firm PLLC, and José M. Ferrer and Desiree Fernandez of Mark Migdal & Hayden LLP.

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

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

--Editing by Kristen Becker.

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The Bar Needs More Clarity On The Discovery Objection Rule

By **Tristan Ellis** (November 19, 2024, 11:54 AM EST)

There is confusion among the bar about what Rule 34 of the Federal Rules of Civil Procedure requires of a party objecting to a request for the production of documents, electronically stored information or other tangible things.

Oftentimes, the objecting party lodges objections, but then, subject to and without waiving those objections, agrees to produce some or all of the requested materials. However, the party who made the request is left to wonder whether the producing party is, in fact, agreeing to produce all of the requested materials, or only a portion of them.

On Dec. 1, amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence — among other federal rules — will go into effect. What these amendments will not include, however, is a change to Rule 34, despite the need for additional clarity.[1]



Tristan Ellis

The rules received a significant overhaul in 2015, and Rule 34 was amended to address precisely the above-described problem by imposing additional requirements on parties responding to requests for production.

More specifically, and as relevant here, the amended rules say that "[a]n objection must state whether any responsive materials are being withheld on the basis of that objection." [2]

The purpose of this amendment was to "end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections," according to a Rules Advisory Committee's note to the 2015 amendments. [3]

That commentary continues: "The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection." [4]

That is a laudable objective. Much back-and-forth about a party's Rule 34 requests, and the opposing party's objections to them, could be avoided altogether if the objecting party indicates whether it is objecting merely to preserve an objection, or instead objecting full stop and refusing to produce materials responsive to a particular request.

If a party objects to a request but still produces all materials in its possession, custody or control that are responsive to that request, the parties have no need to discuss and debate whether that request and the corresponding objections are appropriate.

Any dispute in that scenario would be illusory, because the requesting party would still be receiving all the materials it requested. There would be no need for the parties to meet and confer about those objections, and the parties could instead focus their time and attention on actual disputes.

However, despite Rule 34's seemingly clear mandate, many members of the bar appear to read the word "whether" in Rule 34 as meaning "if."

In other words, some attorneys seem to interpret Rule 34 to mean that an objection need only state whether materials are being withheld if the objecting party is, in fact, withholding responsive materials, with silence on the issue intending to imply that the party is not withholding responsive materials.

Of course, Rule 34 uses the word, "whether," not, "if," and this practice engenders the very same confusion that the 2015 amendment was meant to alleviate.

This practice, which violates both the spirit and letter of Rule 34, is not aberrant; it appears to be fairly commonplace. Indeed, there is no shortage of cases — even from just within the U.S. Court of Appeals for the Second Circuit — since the 2015 amendment addressing this very issue, faulting attorneys for failing to comply with the not-so-new requirement in Rule 34(b)(2)(C).[5]

It is important to keep in mind that this sampling of cases is just that — a sampling. It does not represent the full universe of situations in which a producing party has failed to comply with Rule 34(b)(2)(C).

On that score, it is worth keeping in mind that (1) not every discovery dispute is ultimately litigated such that there would be an available judicial decision on the issue, and (2) not every requesting party who receives responses that fail to comply with Rule 34(b)(2)(C) raise that deficiency as a point of contention.

All of this is to say that the problem is likely more widespread than even the abundance of cases addressing the issue would otherwise seem to indicate.

The source of this confusion is unclear. It could be that attorneys are simply slow to adapt their practices to revisions made to the rules.

For instance, it is not uncommon for a party objecting to a request made pursuant to Rule 34 to object on the basis that a particular request is not "reasonably calculated to lead to the discovery of admissible evidence,"[6] which, of course, is a reference to the scope of discovery under the rules before the 2015 amendments.

Rule 26 no longer contains that language, replacing it with language that favors proportionality, the relative importance of the materials or information sought, and the relative burdens on the parties. [7]

Nevertheless, some attorneys have been slow to recognize this change to Rule 26, relying on what is likely boilerplate language borrowed from pre-2015 discovery objections.

It is worth pausing here to note that, even before the 2015 amendment to Rule 26, that sort of boilerplate objection was not, and is not, permitted.[8] Attorneys did and do still make them, though. [9]

Attorneys who fail to heed Rule 34's requirement to state whether they are withholding any responsive materials on the basis of an objection do so at their own peril — and at their clients' peril. [10] The consequences for failing to comply with Rule 34 can be severe.

For instance, a court could deem the objections that do not adhere to Rule 34 as being waived.[11] That is a harsh result that hardly seems worth the risk that attends the failure to indicate whether a party is withholding responsive materials.

As risk-averse as attorneys are known to be, there is, as noted above, still an abundance of attorneys who perplexingly appear to be willing to assume that risk.

So what is the solution?

There are at least two. First, aside from courts continuing to call attention to this problem and calling out attorneys who are unfaithful to Rule 34, the Rules Advisory Committee could recommend adding the term "or not" after "whether," so that the revised Rule 34(b)(2)(C) would start: "An objection must state whether or not any responsive materials are being withheld on the basis of that

objection."

This simple and straightforward addition would add the clarity that the bar evidently needs by making clear that "whether" does not mean "if."

"Whether" means "whether," and Rule 34 requires objections to indicate whether or not the objecting party is withholding any responsive materials — not only if they are withholding any responsive materials.

The second solution pertains to the last line of the Rules Advisory Committee's notes to the 2015 amendments: "An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld.'"[12]

That sentence creates something of a legal fiction because, even if a party were to provide a detailed description of "the limits that have controlled the search for responsive and relevant materials" by, for example, listing document custodians whose documents the party searched, and the search terms used to conduct that search — in cases involving requests for electronically stored information — it would still not actually indicate whether there are responsive materials that a party is not producing, i.e., that the party is withholding responsive materials.[13]

That sentence is also ambiguous about the level of detail about "the limits that have controlled the search" a party must provide to qualify "as a statement that the materials have been 'withheld.'"[14]

And, because members of the bar seem to routinely disregard the requirement in Rule 34(b)(2)(C) in any event, there is reason to doubt that attorneys are reading the Rules Advisory Committee's notes; if they were reading those notes, then the requirement of indicating whether a party is withholding documents on the basis of an objection would be clear — the notes reflect the clear intent that "whether" means "whether" and not "if."

A solution to that issue — what sort of information qualifies as providing adequate information that documents are being withheld without explicitly saying that documents are being withheld — could come in two forms.

First, the Rules Advisory Committee could simply excise that line from the notes, leaving only the requirement that a party be explicit about whether they are withholding documents on the basis of an objection.

Second — and assuming that the Rules Advisory Committee would prefer to preserve that manner of indicating whether a party is withholding documents — the committee could make it explicitly part of Rule 34(b)(2)(C), instead of relegating it to the notes that append the rules.

For instance, to the middle of the current Rule 34(b)(2)(C), the committee could add a sentence along the lines of: "Alternatively, an objection may instead specify in detail the parameters that a party used to locate responsive materials by including information that supplies the requesting party with a sufficient basis to understand whether there may be responsive materials that the objecting party is not producing."

Of course, the committee need not use that precise language — certainly the committee is well positioned to draft clear language that conveys the intended meaning.

But, if the committee means to allow the rules to permit anything other than the explicit statement that a party is withholding documents on the basis of an objection — i.e., the plain meaning of the text of Rule 34 as currently drafted — it should say so in the rules themselves, instead of leaving a counterintuitive interpretation of Rule 34 for the notes to the rules.

Indeed, adding language along the lines of that proposed above would also provide additional clarity to the sentence that would precede it in Rule 34(b)(2)(C), which reads, "An objection must state whether any responsive materials are being withheld on the basis of that objection." [15] This is because it would tell attorneys that the only way to avoid explicitly stating that a party is withholding documents on the basis of an objection is to provide the detailed information the above-proposed revised rule would require.

Together, these two proposed amendments to Rule 34 would provide much-needed clarity about what a party objecting to a document request must say in its responses when it does not agree to produce all responsive materials in its possession, custody or control, but does agree to produce some of those materials.

That clarity, in turn, would help effectuate the purpose of the 2015 amendment to Rule 34(b)(2)(C), as explained in the Rules Advisory Committee's notes to the 2015 amendments: to "end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections." [16]

Nevertheless, in the absence of any clarifying amendments to Rule 34(b)(2)(C), attorneys would be well advised to be mindful of the rule's requirement that a party must state in its objections "whether any responsive materials are being withheld on the basis of [an] objection." [17] The benefits of adhering to the rule well outweigh the steep potential costs of noncompliance.

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[1] Pending Rules and Forms Amendments, United States Courts, <https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments> (last visited Nov. 5, 2024).

[2] Fed. R. Civ. P. 34(b)(2)(C).

[3] Id. advisory committee's note to 2015 amendments.

[4] Id.

[5] E.g., **Baptiste v. City Univ. of N.Y.** , No. 22-CV-2785 (JMF), 2024 U.S. Dist. LEXIS 18359, at *4 (S.D.N.Y. Jan. 31, 2024) (observing that a party who fails to state "whether they are continuing to withhold documents in response to any specific requests [are] expressly violating Rule 34(b)(2)(C)"); **Green Mt. Holdings (Cayman) Ltd. v. Precision Pro Contracting Servs. LLC** , No. 21 Civ. 3287 (WFK) (VMS), 2022 U.S. Dist. LEXIS 220949, at *6-7 (E.D.N.Y. Dec. 7, 2022) (observing that objections that do not specify whether documents are being withheld based on objections "are facially noncompliant with Fed. R. Civ. P. ... 34(b)(2)(C)"); **Cambridge Capital LLC v. Ruby Has LLC** , No. 20-cv-11118 (LJL), 2022 WL 889143, 2022 U.S. Dist. LEXIS 53814, at *14 (S.D.N.Y. Mar. 24, 2022) (noting the requirement in Rule 34(b)(2)(C) and observing that "[a] party who fails to make a timely objection or fails to comply with the provisions of Rule 34 regarding the manner of making objections to a request for production of documents may be deemed to have waived the objection"); **Fischer v. Forrest** , Nos. 14 Civ. 1304 (PAE) (AJP); 14 Civ. 1307 (PAE) (AJP), 2017 WL 773694, 2017 U.S. Dist. LEXIS 28102, at *4-5 (S.D.N.Y. Feb. 28, 2017) (noting the requirement in Rule 34(b)(2)(C) and the fact that, "[d]espite the clarity of the no-longer-new 2015 Amendments, the Court still sees too many non-compliant Rule 34 responses").

[6] See Fed. R. Civ. P. 26(b)(1) (2014).

[7] See Fed. R. Civ. P. 26(b)(1) (2024).

[8] E.g., **Hamilton Sundstrand Corp. v. Aircraft Propeller Serv.** , No. 19-cv-6472 (RA) (OTW), 2020 WL 8838031, 2020 U.S. Dist. LEXIS 251999, at *4-5 (S.D.N.Y. June 22, 2020) (observing that "Plaintiffs objected to the discovery requests with boilerplate, identical responses that the requests were 'overly broad, unduly burdensome, and disproportionate to the needs of this case because it seeks irrelevant information'" and that "Rule 34 specifically prohibit[s] boilerplate objections"); **Edwards v. Hearst Communs. Inc.** , No. 15-CV-9279 (AT) (JLC), 2017 WL 6458612, 2017 U.S. Dist. LEXIS 207540, at *20 (S.D.N.Y. Dec. 18, 2017) (observing that "objections [that] do not provide any

basis for its assertion that the request is overly burdensome ... run afoul of Rule 34, which requires that a party 'state with specificity the grounds for objecting to the request'" (quoting Fed. R. Civ. P. 34(b)(2)(B)); Fischer, 2017 WL 773694, 2017 U.S. Dist. LEXIS 28102, at *8 (Objections "stating that the requests are 'overly broad and unduly burdensome' is meaningless boilerplate. Why is it burdensome? How is it overly broad? This language tells the Court nothing."); **Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.** , 297 F.R.D. 99, 102 (S.D.N.Y. 2013) (observing that "general and conclusory objections as to relevance, overbreadth, or burden are insufficient to exclude discovery of requested information" (citation omitted) (alteration adopted)); **Freydl v. Meringolo** , No. 09 Civ. 07196 (BSJ) (KNF), 2011 U.S. Dist. LEXIS 67742, at *8 (S.D.N.Y. June 16, 2011) (by asserting nothing more than "boilerplate, general and conclusory language" in its objections, a party "failed to meet his burden of showing why discovery should be denied and his objections, based on the grounds that the requests are 'overbroad, unduly burdensome, vague and not reasonably calculated to lead to the discovery of admissible evidence,' are overruled").

[9] E.g., **Mbaye v. RCI Hosp. Holdings Inc.** , No. 23-CV-2967 (DEH), 2024 WL 1181831, 2024 U.S. Dist. LEXIS 50626, at *4-5 (S.D.N.Y. Mar. 19, 2024) ("Defendants objections are insufficient. Defendants first apply boilerplate language to argue that these requests are vague, ambiguous, overbroad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of Local Civil Rule 33.3. Defendants provide no basis in support of these general, boilerplate assertions — and the Court sees none." (citations omitted)); **Michael Kors LLC v. Su Yan Ye** , No. 1:18-CV-2684 (KHP), 2019 WL 1517552, 2019 U.S. Dist. LEXIS 60057, at *17, *21 (S.D.N.Y. Apr. 8, 2019) (referring to objections stating, "documents not relevant to any party's claims or defenses and imposes a burden that outweighs the needs of the case to the extent it is overbroad, unduly burdensome and to the extent it calls for the production of documents protected by privilege" as a "boilerplate objection [that] is unhelpful to getting to a resolution" and observing that the court "could find that [the party] waived its objections because it failed to explain them as required under the rules" (citation omitted) (alterations adopted)).

[10] See Fed. R. Civ. P. 34(b)(2)(C).

[11] **Cambridge Capital LLC** , 2022 WL 889143, 2022 U.S. Dist. LEXIS 53814, at *14 (finding that a party that fails to abide Rule 34(b)(2)(C) "may be deemed to have waived the objection"); see also, e.g., **Michael Kors LLC** , 2019 WL 1517552, 2019 U.S. Dist. LEXIS 60057, at *17, *21 (finding that the court "could find that [the party] waived its objections" by failing to provide the specificity required by Rule 34(b)(2)(B)).

[12] Fed. R. Civ. P. 34 advisory committee's note to 2015 amendments.

[13] See id.

[14] See id.

[15] Fed. R. Civ. P. 34(b)(2)(C).

[16] Id. advisory committee's notes to 2015 amendments.

[17] Fed. R. Civ. P. 34(b)(2)(C).



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J&J Wants Beasley Allen Atty Sanctioned For Depo No-Show

By **Jake Maher**

Law360 (November 19, 2024, 4:47 PM EST) -- Johnson & Johnson's talc unit called on a Texas bankruptcy court to sanction a Beasley Allen Law Firm attorney for "unilaterally" deciding not to attend a scheduled deposition in the company's bankruptcy case.

Andy Birchfield, head of mass torts at Beasley Allen, was scheduled two weeks in advance for a deposition on Monday, according to **J&J's brief**, but on Friday the so-called Coalition of Counsel for Justice for Talc Claimants filed an emergency motion to quash his deposition.

J&J opposed that motion, and the court did not have time to rule on it by Monday, but in spite of that, Birchfield "decided to sua sponte grant himself the relief" sought in the motion and did not show up for the deposition, J&J told the court. The company filed the sanctions motion later in the day on Monday.

"Mr. Birchfield's blatant violation of the discovery rules should not be countenanced," J&J told the court.

J&J rejected Birchfield's alleged reasoning for wanting to delay the deposition — that he wanted to have his deposition and that of his former co-counsel in the case, Allen Smith, on the same day. Beasley Allen **sued** Smith in September, accusing him and his firm of undermining Beasley Allen's work against J&J.

Birchfield's reason for the delay is "not a basis to postpone his deposition, let alone fail to show up for his properly noticed deposition," J&J wrote.

The company asked the court to order Birchfield to appear for his deposition at the time and place of its choosing and to postpone Smith's deposition until after Birchfield's. The company also protested some alleged document-based discovery issues, demanding an outline of documents that Beasley Allen and the coalition of plaintiffs' counsel produced for in camera review and demanding that they supplement "obviously cherry-picked" documents that they did turn over to J&J.

Birchfield rejected J&J's picture of events in a statement to Law360 Pulse on Tuesday.

"J&J is seeking a litigation advantage while wasting the court's time with unnecessary and frivolous filings," he said. "Ultimately, this bad faith bankruptcy will fail just as J&J's previous two attempts to avoid responsibility for its asbestos-laden talc products have failed."

A representative for J&J did not immediately respond to a request for comment on Tuesday.

J&J **filed for a Chapter 11 bankruptcy** in Texas in September that would create an \$8 billion fund to settle all current and future claims against the company after 83% of talc claimants voted in favor of the plan.

Monday's motion was the latest of several ethics attacks J&J has mounted against Birchfield and Beasley Allen, which represents plaintiffs alleging that J&J's talc-based baby powder contained asbestos and caused ovarian and other gynecological cancers, and which has been accused by J&J of seeking to scuttle the bankruptcy plan.

In September, J&J accused Beasley Allen of submitting about two dozen **fraudulent ballots** opposing the bankruptcy on behalf of clients of a different law firm. Before that, J&J accused Beasley Allen of refusing to disclose a "**clever**" **litigation financing scheme** that was obscuring that a third-party litigation funder was paying for the firm's work in massive multidistrict litigation against the company.

J&J also sought to have Beasley Allen disqualified from the MDL over the firm's alleged cooperation with a former outside counsel, a move Beasley Allen slammed as a "**locker-room brawl**"-style tactic.

Last month, J&J **defeated a bid** by the Coalition of Counsel for Justice for Talc Claimants and the U.S. Trustee's Office to have the bankruptcy case moved to New Jersey, where previously attempted bankruptcies were filed.

And most recently, the coalition filed a motion on Monday asking the court to compel certain plaintiff-side law firms, including Smith's, to turn over documents showing that they had the proper legal authority to cast votes on behalf of their clients in favor of the bankruptcy plan. The coalition said that despite "numerous" meetings since it filed the requests for production in October, members of the ad hoc committee of supporting counsel have not produced the requested documents.

The coalition said that the firms "submitted master ballots on behalf of thousands of purported clients, in many cases pursuant to purported powers of attorney that, based on the limited depositions conducted thus far, clearly do not authorize the lawyers to have voted on behalf of their purported clients."

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

The Coalition of Counsel for Justice for Talc Claimants is represented by Nicholas R. Lawson and Avi Moshenberg of Lawson & Moshenberg PLLC and Melanie L. Cyganowski, Adam C. Silverstein, Sunni P. Beville and Jennifer S. Feeney of Otterbourg PC.

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

--Additional reporting by Alex Wittenberg. Editing by Robert Rudinger.

Costco Shoppers Say Kirkland Fish Oil Pills Hide Heart Risks

By **Gina Kim**

Law360 (November 19, 2024, 8:51 PM EST) -- Costco shoppers filed a putative false advertising class action in California federal court Monday accusing the big-box retailer of misleading consumers to believe its Kirkland brand of fish oil omega-3 supplements have heart health benefits, despite there being increased risks associated with fish oil, including atrial fibrillation.



Costco was sued Monday in California federal court by a customer who says the wholesale retailer is falsely advertising its Kirkland-brand of omega-3 fish oil products as helping support heart health, despite recent studies that purportedly show an increased risk of atrial fibrillation associated with regular use of such supplements. (Court documents)

In a 37-page **complaint** filed in the Southern District of California, Carlsbad resident Donna Costan accused the wholesale big-box warehouse retailer of violating Golden State consumer protection statutes by deceptively labeling its brand of "sustainably sourced" Kirkland fish oil omega-3 supplements as helping "support a healthy heart."

These representations on the products' front labels are misleading, Costan alleges, and Costco is engaging in false business practices to gain a competitive edge in the market by tricking consumers into believing the fish oil capsules support heart health. Furthermore, none of the labels on the fish oil products disclose the risk to heart health.

"Unbeknownst to consumers, the products' heart health representation and omission are false and misleading because the products' Omega-3s do not support heart health and may even harm heart health," Costan's suit said. "Specifically, the products do not reduce the risk of heart disease or adverse cardiovascular events[.] Indeed, the products can actually harm health by increasing the risk of atrial fibrillation."

The popularity of omega-3 supplements has created a multibillion-dollar industry, with companies urging consumers to take fish oil capsules daily to support their heart health, the lawsuit says. However, recent studies have shown that regular use of fish oil supplements is associated with a heightened risk of heart conditions like Afib, or irregular heartbeat, Costan alleges.

"Defendant knew that consumers value products that support heart health," the complaint said. For that reason, defendant labeled and advertised its products with the heart health representations and omissions to gain a competitive edge and to induce plaintiff and class members to purchase its products at a premium price."

Costan's suit continued: "As a leader in the supplement industry, defendant is in a unique position to know that omega-3s do not support, and can harm, heart health, and thus defendant knew that the representations and omissions were false and misleading when it made them."

Costan says she bought Kirkland brand 1,000 milligram fish oil supplements from Costco after reading the heart health statement on the label and relying on it. She alleges that had she been made aware the fish oil products don't support heart health and could actually pose a risk to her heart health, she wouldn't have bought the supplements or would've paid less for them, according to the suit.

"As such, plaintiff has been directly financially injured by defendant's false and misleading labeling," the complaint said.

Costan asserts several causes of action against Costco, including violations of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law; breaches of express and implied warranties; quasi-contract and unjust enrichment; negligent and intentional misrepresentation, and fraud.

Costan seeks to represent a proposed class of all Golden State consumers who bought Kirkland brand fish oil supplements from Costco and a California consumer subclass who bought the products at issue for personal or household use.

Costan asks the court to certify the proposed classes, appoint her as class representative and her attorneys as class counsel, find that Costco's actions violate the causes of action alleged in her lawsuit, and issue injunctive or other equitable relief to the plaintiffs.

She also wants Costco to pay economic, monetary, actual, consequential, punitive and compensatory damages to the plaintiffs, and her attorney fees and costs.

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

Costan is represented by Ruhandy Glezakos, Benjamin Heikali, Joshua Nassir and Katherine Phillips of Treehouse Law LLP.

Counsel information for Costco was not immediately available.

The case is Donna Costan v. Costco Wholesale Corp., case number 3:24-cv-02156, in the U.S. District Court for the Southern District of California.

--Editing by Linda Voorhis.



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Court Won't Toss Consumer Antitrust Case Against Amazon

By **Matthew Perlman**

Law360 (November 19, 2024, 7:54 PM EST) -- A Washington federal court issued a sealed order Tuesday denying Amazon's bid to toss updated claims from consumers seeking billions of dollars over allegations that they pay higher prices thanks to the e-commerce giant's treatment of sellers on its platform.

U.S. District Judge John H. Chun issued a sealed order denying Amazon's motion to dismiss and called for the sides to propose redactions to the order by Dec. 2. An attorney for the consumers, Steve Berman of Hagens Berman Sobol Shapiro LLP, told Law360 on Tuesday they are pleased the motion appears to have been denied in its entirety.

Judge Chun largely denied Amazon's bid to **toss a similar case** from the Federal Trade Commission in late September, trimming only a few state law claims. Amazon is also facing claims from state-level enforcers in **D.C.** and **California** accusing the e-commerce giant of driving up the cost of online retail sales through its treatment of sellers on its platform.

The suits allege Amazon's "most favored nation" policy, and later its "fair pricing policy," bar or strongly discourage third-party merchants that sell on the platform from offering better terms or lower prices elsewhere, including their own website. They also target policies surrounding Amazon's "Buy Box" that allegedly suppress competition and drive prices up.

Elizabeth De Coster and Deborah Frame-Wilson are the lead plaintiffs in parallel **proposed class actions** targeting the activity that predates the FTC's case. De Coster seeks to represent consumers who allege they overpaid for goods on Amazon's platform because of the seller policies while Frame-Wilson seeks to represent those who say they purchased goods elsewhere at prices driven up by Amazon's policies.

Amazon lodged its latest dismissal bid in the De Coster case in May and the sides later agreed that a ruling on the motion would apply equally to both consumer cases.

Representatives for Amazon did not respond to a request for comment Tuesday.

The consumers are represented by Steve Berman, Barbara Mahoney and Anne F. Johnson of Hagens Berman Sobol Shapiro LLP, Zina G. Bash, Jessica Beringer and Shane Kelly of Keller Postman LLC and Alicia Cobb, Steig D. Olson, David D. LeRay, Nic V. Siebert, Maxwell P. Deabler-Meadows and Adam B. Wolfson of Quinn Emanuel Urquhart & Sullivan LLP.

Amazon is represented by John A. Goldmark and MaryAnn Almeida of Davis Wright Tremaine LLP and Karen L. Dunn, William A. Isaacson, Amy J. Mauser, Martha L. Goodman and Kyle Smith of Paul Weiss Rifkind Wharton & Garrison LLP.

The cases are Frame-Wilson et al. v. Amazon.com Inc., case number 2:20-cv-00424, and De Coster et al. v. Amazon.com Inc., case number 2:21-cv-00693, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Rachel Riley, Nadia Dreid and Rachel Scharf. Editing by Jay Jackson Jr.



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Advertisers Fight Google's Arbitration Bid In Ad Tech MDL

By **Matthew Perlman**

Law360 (November 19, 2024, 5:55 PM EST) -- A pair of advertisers seeking to represent a class in multidistrict litigation accusing Google of monopolizing key digital ad technology are fighting a bid to push their claims to arbitration, arguing Google's arbitration agreements are unenforceable.

The advertisers filed a response on Monday in New York federal court opposing Google's motion to compel arbitration, contending Google has not provided enough evidence showing the advertisers had proper notice of the arbitration agreement or a full opportunity to opt out.

The response also argued that even if the advertisers agreed to arbitrate, they could still bring their claims under California state law and ask for an injunction that would benefit the public at large, based on the so-called McGill doctrine.

The McGill doctrine prohibits a business from shielding itself from an injunction "primarily benefiting the public," and the advertisers said Google's arbitration provision only provides for relief on an individual basis.

"This provision violates McGill because if Google's ad-tech monopolies are enjoined, consumers throughout the economy will pay less for goods and services because retailers and other vendors no longer will bear monopoly overcharges for display advertising," the response said. "Breaking Google's stranglehold on such a vast portion of online commerce will result in a freer, more prolific online experience for the average American, funded by better, more efficient advertising."

The proposed class noted that Google only asks to compel two of the three named advertisers into arbitration, Michael Stellman and Cliffy Care Landscaping LLC, and said Google acknowledges that claims from the third advertiser, Hanson Law Firm, are not arbitrable.

U.S. District Judge P. Kevin Castel **oversees the MDL**, which includes claims from advertisers, publishers and others accusing Google of monopolizing the tools used to buy and place ads on third-party websites. The claims focus on Google products that allow website publishers to sell ads, advertisers to buy ads and the exchanges that conduct split-second auctions to decide which ads a user sees each time a website is loaded.

In addition to the MDL, Google is battling antitrust litigation over its display ad tools from a group of **attorneys general** led by Texas and the U.S. Department of Justice and a separate coalition of state enforcers. **The DOJ case** went to trial in September in Virginia federal court, with closing arguments scheduled for next week.

Google lodged its motion to compel arbitration for the advertisers in the MDL last month, saying they had previously argued it was too soon to decide if they had agreed to arbitration. But, the motion said, the evidence developed since makes it "indisputable" that Stellman and Cliffy Care agreed to arbitrate their claims.

The Monday response claimed Google failed to show it provided existing advertisers with proper notice in 2017 when it changed the terms and conditions for its advertising services to include the arbitration provision. It also said Google hasn't shown that newer advertisers received proper notice.

The response said Google's evidence purportedly showing the advertisers' acceptance of the terms

"fairs no better than its notification evidence and raises even more factual questions."

Google also argued in its motion that the advertisers cannot avoid arbitration by claiming they seek "public injunctive relief" since they are trying to represent a defined class of commercial entities, not consumers.

However, the advertisers said Monday that they are asking for an injunction that would stop Google's anticompetitive conduct, benefiting "the general public in the form of more effective, informative advertising and higher-quality and lower-priced goods and services."

"Consumers are the ones who see the display ads on platforms subject to Google's restraints, and they would be the primary beneficiaries of the innovations in advertising that free competition would permit," the response said. "Eliminating Google's ad-tech monopolies also would lower the prices of goods and services purchased online, benefiting a very broad set of consumers, to the extent advertisers freed of Google's monopoly pricing would be able to reduce their own prices."

A representative for Google declined to comment Tuesday. Representatives for the advertisers did not immediately respond to a request for comment.

The advertisers are represented by Ahdoot & Wolfson PC, Girard Sharp LLP, MoginRubin LLP, Taus Cebulash & Landau LLP and Radice Law Firm PC.

Google is represented by Justina K. Sessions and Eric Mahr of Freshfields Bruckhaus Deringer LLP.

The case is In re: Google Digital Advertising Antitrust Litigation, case number 1:21-md-03010, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Bryan Koenig and Dorothy Atkins. Editing by Drashti Mehta.

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Calif. Judge Says Crypto DAOs Are Entities That Can Be Sued

By **Hailey Konnath**

Law360 (November 19, 2024, 10:13 PM EST) -- A California federal judge has held that decentralized autonomous organizations and their governing members can indeed be sued, refusing to throw out a Golden State cryptocurrency investor's suit against Lido DAO that the judge said presents "several new and important questions" about liability in the crypto world.

U.S. District Judge Vince Chhabria on Monday denied several motions to dismiss from large institutional investors in Lido DAO, which Judge Chhabria held is not immune from investor Andrew Samuels' proposed class action claiming that the entity violated securities laws by failing to register its tokens as securities.

According to Judge Chhabria, Samuels' case "presents several new and important questions about the ability of people in the crypto world to inoculate themselves from liability by creating novel legal arrangements to profit from exotic financial instruments."

Notably, the judge agreed with Samuels that Lido is a general partnership within the meaning of California law and that institutional investors Paradigm Operations, Andreessen Horowitz and Dragonfly Digital Management are members of that general partnership. Just one large institutional investor, Robot Ventures, saw its motion to dismiss granted, the judge said. That's because Samuels hasn't adequately alleged that Robot is a member of the Lido general partnership, he said.

Another novel question addressed by Judge Chhabria on Monday was whether a DAO and its partners could be liable for losses incurred by investors. Samuels claims that he bought tokens initially issued by Lido on an exchange and that he ultimately lost money on that investment.

Judge Chhabria said that even though Samuels bought the tokens on a secondary market — not from Lido directly — Samuels has adequately alleged that Lido "solicited the purchase of these tokens on crypto exchanges." And that means that Lido and its partners could be liable for Samuels' losses, according to the **order**.

Finally, Judge Chhabria rejected the Lido partners' argument that a person can only be liable for the sale of an unregistered security if that sale is made in a public offering. The relevant statute, Section 12(a)(1) of the Securities Act, is not limited in such a way, Judge Chhabria said.

"So even if an exchange sale like this one categorically falls outside the scope of the term 'public offering,' the defendants are wrong to argue that it falls outside the scope of Section 12(a)(1)," the judge said.

Judge Chhabria's ruling drew the ire of some members of the decentralized finance, or DeFi, community, including attorney Miles Jennings, a former partner at Latham & Watkins LLP who now works as general counsel for crypto at Andreessen Horowitz, according to his LinkedIn profile.

Jennings said Monday that Judge Chhabria had "dealt a huge blow to decentralized governance."

"Under the ruling, any DAO participation (even posting in a forum) could be sufficient to hold DAO members liable for the actions of other members under general partnership laws," Jennings said in a post on X, formerly known as Twitter.

Jennings added that Lido's founders are "outside the U.S., they didn't make use of a U.S. entity, and the only apparent nexus to California is that some tokenholders happen to be there."

"It's not a strategic imperative for DAOs to use legal wrappers," he said.

Today, a California judge dealt a huge blow to decentralized governance.

Under the ruling, any DAO participation (even posting in a forum) could be sufficient to hold DAO members liable for the actions of other members under general partnership laws.

It's time to DUNA. pic.twitter.com/aKNBY7pfc9

— Miles Jennings (@milesjennings) November 19, 2024

Meanwhile, Nathan van der Heyden, head of business development and governance design at Aragon, said reactions like Jennings' were "overblown."

"Concern seems overblown and I'm still very hopeful in terms of DAO legislation in the U.S.," he said in his own post on X.

He said governments "were always going to go after DAOs, because DAOs offer something they can't. Cross-border co-ownership of assets is the silver bullet. Not owned by a state, not owned by a company. Something new, something fairer."

Governments were always going to go after DAOs, because DAOs offer something they can't.
Cross-border co-ownership of assets is the silver bullet. Not owned by a state, not owned by a company. Something new, something fairer.
Time to fight back. <https://t.co/aOI7PS7QsM>

— Nathan van der Heyden (@NathanVDH0x) November 19, 2024

Counsel for Samuels as well as Lido's institutional investors didn't immediately respond to requests for comment late Tuesday.

According to Judge Chhabria's order, Lido was founded by three investors "whose whereabouts are either remote or unknown, and who apparently cannot be hauled into court in the United States." One founder lives in Cyprus, another in an Australian territory and another's whereabouts are unknown, the judge said.

He described a DAO as "a type of organization that seems designed, at least in part, to avoid legal liability for its activities."

Samuels purchased 132 LDO tokens in April and May 2023 through the crypto exchange Gemini, the opinion said. He sold the tokens for a loss that June. Samuels wants to represent a class of everyone who purchased or obtained LDO since mid-December 2022.

Judge Chhabria noted that Lido DAO hasn't responded to the complaint or otherwise appeared in the case. However, an entity named Dolphin CL LLC appeared in the case, "purporting to make a limited appearance" to prevent default judgment against Lido and filing a motion to dismiss.

"It's not clear how Dolphin has standing to appear in court to argue on Lido DAO's behalf," Judge Chhabria said. "But Samuels did not object to it for purposes of the motion to dismiss."

In its motion, Dolphin argued that Lido is not a legal entity and therefore can't be sued at all, according to the opinion. Meanwhile, the institutional investors argued that Lido is not a general partnership, meaning that they can't be found liable as general partners.

In particular, Judge Chhabria held Monday that Lido's actions are those of "an entity run by people," not those of an autonomous software program, as Dolphin contended. Lido conducts tokenholder votes, maintains a treasury and has hired more than 70 employees, the judge said.

"Moreover, even if Dolphin is right that Lido is a 'protocol' that can be deployed by anyone, Samuels is not suing that protocol — he is suing the entity that operates the 'particular Lido deployment' identified in the complaint and referred to by Dolphin," the judge said.

He added that because the complaint adequately alleges that Lido is indeed a legal entity, "it's not clear that it's proper for Dolphin to appear on Lido's behalf."

As for the institutional investor defendants, Judge Chhabria said they didn't "have the audacity to argue that Lido is just a software." Still, their argument that Lido isn't a general partnership fails, he said.

"The complaint alleges that some number of people got together and agreed to create and operate an Ethereum staking service because they thought they could make money doing that," the judge said. "Samuels has therefore pled sufficient facts to allow the reasonable inference that a Lido DAO general partnership was formed."

And at the pleading stage, that's enough, he said.

The one area in which Samuels' complaint is deficient is its claims against Robot, according to the opinion. According to the complaint, Robot was chosen to get involved with the DAO because it could add its expertise, and Robot participated in a sale in which it and other entities purchased 30 million LDO. But Samuels hasn't alleged that Robot participated in Lido's governance or made any statements about doing so, Judge Chhabria said.

"So, at this juncture, Samuels has not pled that Robot is a member of the Lido DAO partnership; should discovery reveal that Robot was actually an active participant in governance, Samuels is free to seek leave to add it back as a defendant," the judge said.

Judge Chhabria said discovery against the four remaining defendants — Dolphin, Paradigm, Andreessen Horowitz and Dragonfly — can start immediately.

Counsel for Dolphin declined to comment Tuesday.

Samuels is represented by Jason Harrow, Charles Gerstein and Emily Gerrick of Gerstein Harrow LLP and James Crooks and Michael Lieberman of Fairmark Partners LLP.

Dolphin is represented by Arjun Sivakumar, Stephen D. Palley, Sigmund S. Wissner-Gross and Hayden A. Miller of Brown Rudnick LLP and Alex Golubitsky of Metalex Pro LLP.

Paradigm is represented by Peter B. Morrison, Zachary M. Faigen and Alexander C. Drylewski of Skadden Arps Slate Meagher & Flom LLP.

Andreessen Horowitz is represented by Susan E. Engel, Douglas K. Yatter, Matthew Rawlinson, Benjamin A. Naftalis and Morgan E. Whitworth of Latham & Watkins LLP.

Dragonfly and Robot are represented by Jason Gottlieb, Michael Mix and Rachel Fleder of Morrison Cohen LLP and Ellen London of London & Naor PC.

The case is Andrew Samuels v. Lido DAO et al., case number 3:23-cv-6492, in the U.S. District Court for the Northern District of California.

--Editing by Rich Mills.



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Jury To Decide If Gemini's Bitcoin Statements Were False

By **Sarah Jarvis**

Law360 (November 19, 2024, 9:02 PM EST) -- A New York federal judge has found that crypto exchange Gemini Trust Co. was the "maker" of alleged misrepresentations to the Commodity Futures Trading Commission about its plans to offer bitcoin futures contracts, but a jury will have to decide if the statements were materially false or misleading.

U.S. District Judge Alvin K. Hellerstein said in a Monday **opinion and order** that the Tyler and Cameron Winklevoss-led crypto exchange was the maker of the representations at issue in the case, "for Gemini made these representations directly, at a face-to-face meeting and in a telephone exchange, and indirectly through the [Cboe Futures Exchange] as the transmitter of Gemini's representations."

The finding came in an opinion denying the CFTC's motion for partial summary judgment, "except as to the issue of whether Gemini was the maker of the alleged misrepresentations."

But Judge Hellerstein said a jury should decide which statements were materially false and misleading and which were not. He said the statements "are difficult to separate out at the summary judgment stage, and are best considered wholesale at trial."

The judge also found that the case **Janus Capital Group Inc. v. First Derivatives Traders**  is not applicable to this case, rejecting Gemini's bid to mount a defense with the 2011 U.S. Supreme Court decision that said the "one 'makes' a statement by stating it," and the "maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."

Judge Hellerstein pointed out various differences between the instant case, an agency action over representations to a regulator, and Janus, which was a private securities lawsuit on behalf of a class.

"The post-Janus case law clearly reiterates the principle that liability flows from control over the statement at issue," the judge said. "Gemini, which drafted, edited, and provided information given or sent directly to the CFTC, and also communicated through [Cboe] to the CFTC, had ultimate authority over each of the alleged misstatements."

The CFTC **filed suit** in June 2022, accusing Gemini of leaving out information critical to the agency's analysis of whether its first-of-its-kind proposed bitcoin futures contract was susceptible to manipulation. The CFTC's case concerns 31 statements that the agency said the crypto exchange made as the commission assessed the novel futures contract proposal.

The agency claims Gemini misrepresented aspects of its procedures around self-trading prevention, the prefunding of transactions and rebates to certain market makers, all of which could have a bearing on the contract's susceptibility to manipulation.

Gemini sought partial summary judgment earlier this year, arguing that many of the statements at issue were made by the proposed listing exchange, Cboe Futures Exchange LLC, which is not named in the suit or accused of wrongdoing. The CFTC subsequently filed its own partial summary judgment bid, arguing Gemini was "deeply involved" in the submissions to the CFTC.

In June, Judge Hellerstein **denied** Gemini's bid for summary judgment, finding that whether Gemini

is liable for the statements is a question that a jury must decide. The trial is scheduled to begin on Jan. 13.

Last month, Judge Hellerstein also **rejected** Gemini's bid to immediately appeal his decision that Gemini could be held liable for the alleged misrepresentations.

The CFTC and counsel for Gemini did not immediately respond to requests for comment Tuesday.

The CFTC is represented in-house by K. Brent Tomer, Alejandra de Urioste, David Oakland, Katherine Rasor, Diana Wang, Andrew J. Rodgers, Peter Janowski and Manal M. Sultan.

Gemini Trust Co. is represented by John F. Baughman, Daniel A. Schwartz, Elizabeth J. Lee and Ernest E. Butner IV of Baughman Kroup Bosse PLLC.

The case is Commodity Futures Trading Commission v. Gemini Trust Co. LLC, case number 1:22-cv-04563, in the U.S. District Court for the Southern District of New York.

--Editing by Vaqas Asghar.

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BREAKING: Bankman-Fried Tech Deputy Who Parsed Code Avoids Prison

By **Pete Brush**

Law360, New York (November 20, 2024, 10:50 AM EST) -- A Manhattan federal judge allowed tech expert Zixiao "Gary" Wang to avoid jail Wednesday for his role in the \$11 billion FTX fraud, crediting his effort to detail programming "back doors" that enabled Sam Bankman-Fried to loot the bankrupt crypto exchange.

At a brisk morning sentencing, U.S. District Judge Lewis A. Kaplan ordered the 31-year-old Wang to be supervised for three years and to forfeit along with his co-defendants over \$11 billion.

Judge Kaplan said Wang played a limited role in the lawbreaking before a lightning-quick decision to cooperate. He testified at trial against Bankman-Fried, who was convicted and sentenced to 25 years in prison for perpetrating what prosecutors called one of the greatest financial frauds in American history.

"You're entitled to a world of credit," Judge Kaplan told Wang. "You immediately did the right thing. You did the right thing for yourself, and you did the right thing for the country."

A dark-suited Wang stood stock-still in court as the lenient sentence was announced. Family members in the gallery shed tears.

In late 2022, not long after FTX's collapse, Wang copped to four criminal counts, admitting he schemed with Bankman-Fried to defraud FTX's customer base as well as its Wall Street investors.

But, according to filings, he took little or no money out of the then-giant enterprise beyond his \$200,000 salary, and he elected to cooperate with the Manhattan U.S. Attorney's office promptly.

Wang was the first witness to provide "information about the code-based ways" in which Bankman-Fried stole money, a government memo said. Prosecutor Nicolas Roos told the court Wednesday that FTX's code was nearly "impossible" to parse out, adding that Wang's work to decipher it made "half the case for us" in a matter of days.

"He deserves special credit," Roos said.

A "trusting" Wang met Bankman-Fried at a young age at math camp, according to filings, and in 2017 agreed to help him launch FTX and Alameda Research — the two crypto businesses that underpinned the now-fallen criminal empire.

Prior to learning his sentence, an emotional Wang told the court that, as FTX began to collapse in 2022, he took the "cowardly path" before deciding to cooperate. He said he will continue trying to make amends to FTX customers.

"I'm deeply sorry to all the people who I've hurt by my actions," he said. "There are so many things I could have done differently."

Wang, who was born in China and became a U.S. citizen in 2020, currently works as a software engineer for a 3-D imaging company called Polycam.

Wang's lenient sentence followed Judge Kaplan's decision last month **to allow** another cooperator,

FTX's former chief engineer Nishad Singh, to avoid time behind bars. In September, Bankman-Fried's former top lieutenant and ex-girlfriend Caroline Ellison was given a two-year prison term despite what the court described as courageous cooperation.

After Wednesday's sentencing, the high-profile criminal case before Judge Kaplan — barring some **appellate reversal** or other intervening event — appears likely to begin to wind down.

Judge Kaplan has now sentenced all five defendants before him, including Bankman-Fried's **former friend** and political guru Ryan Salame.

Salame's girlfriend, former Long Island Republican political candidate Michelle Bond, also **stands charged** with fraud linked to FTX. Her case is pending before U.S. District Judge George B. Daniels. She is due in court in January.

FTX **remains in** Chapter 11 in Delaware bankruptcy court.

Wang's lawyer declined comment after Wednesday's sentencing.

Wang is represented by Ilan Graff and Alex Miller of Fried Frank Harris Shriver & Jacobson LLP.

The government is represented by Danielle Sassoon, Danielle Kudla, Thane Rehn and Nicolas Roos of the U.S. Attorney's Office for the Southern District of New York.

The case is USA v. Bankman-Fried et al., case number 1:22-cr-00673, in the U.S. District Court for the Southern District of New York.

--Editing by Alyssa Miller.

Update: This story has been updated to note that Wang's lawyer declined to comment.



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Pfizer Unit Can't Get \$75M Left In Insider Trading Deal Fund

By **Hailey Konnath**

Law360, Los Angeles (November 19, 2024, 11:35 PM EST) -- A New York federal judge Tuesday agreed with the U.S. Securities and Exchange Commission that roughly \$75.2 million leftover in settlement funds should be transferred to the U.S. Treasury — not a Pfizer subsidiary — now that distribution of the \$602 million insider trading deal has concluded.

U.S. District Judge Victor Marrero granted the SEC's motion to approve the final accounting and transferring of the leftover SAC Capital Advisors LP settlement funds to the U.S. Treasury, rejecting Pfizer Inc.'s competing motion requesting that the funds be transferred to its subsidiary Wyeth LLC.

Notably, Judge Marrero said Wyeth hasn't shown it was monetarily harmed by the scheme. That means it "is not a victim of the securities violations at issue here and thus cannot recover disgorgement funds," the judge said.

The **deal was reached** nearly a decade ago, putting to rest litigation stemming from a purported scheme involving SAC. According to prosecutors, the company dumped its holdings of Elan Corp. and Wyeth shares between July 21, 2008, and 29, 2008, after portfolio manager Mathew Martoma learned about the negative Alzheimer's drug study.

The trades earned SAC \$275 million in profits and avoided losses once the trial results were publicly announced, prosecutors claimed at the time. Pfizer has argued Wyeth was itself a victim of the scheme, and thus it is the "next best recipient" of the residual funds in the so-called "fair fund." Meanwhile, the SEC has argued Wyeth is not a victim because it hasn't established any monetary harm stemming from the alleged misappropriation of nonpublic information.

Judge Marrero said Tuesday that the SEC was incorrect in arguing that the residual funds aren't subject to the court's equitable discretion because they are supposedly civil penalties. He noted it's true that the residual funds also constitute remaining civil penalty payments, but, regardless, the funds are still subject to distribution for the benefit of the victims.

"In creating the fair fund, the SEC anticipated a possibility for which potentially the entire civil penalty payment would have to be distributed in order to fully compensate investors," Judge Marrero said.

Thus, the court does have discretion as to whether the residual should be distributed to additional victims of the alleged conduct, he said.

Still, Pfizer hasn't shown Wyeth experienced any pecuniary harm, according to the order. Such a finding must be made before a court can award disgorgement, Judge Marrero said. And contrary to Pfizer's argument, "Speculative claims about the general harm that can occur to a corporation as a result of insider trading are insufficient for this court to reach such a factual finding."

"The court certainly agrees that corporations whose secrets are misappropriated for insider trading purposes are generally victims of wrongdoing, but Pfizer has failed to allege how the insider trading scheme and Wyeth's subsequent reputational harm qualifies as pecuniary harm for purposes of distributing the disgorged funds," Judge Marrero said.

From the get-go, Pfizer, which bought Wyeth in 2009, objected to the deal, arguing that any

remaining settlement funds attributable to trades in Wyeth stock should be vested in Pfizer instead of sent to the U.S. Department of the Treasury. It agreed to drop that objection in January 2015 as part of a deal with the SEC in which no determination would be made regarding the distribution of money not included in the fair fund, established for victims of the alleged insider trading scheme.

In April, the SEC asked the court to issue an order approving the final accounting of the fair fund, which had been distributed to all eligible claimants. The commission also asked the court to sign off on the transfer of the leftover funds to the Treasury Department, a request Pfizer again opposed, maintaining that those funds should be transferred to Wyeth.

The SEC and Pfizer didn't immediately respond to requests for comment late Tuesday.

The SEC is represented in-house by Nichola L. Timmons, Susan S. Pecaro and Allison J.P. Moon.

Pfizer is represented by Jay B. Kasner, Daniel Michael, Peter A. Varlan and Katherine E. Giordano of Skadden Arps Slate Meagher & Flom LLP.

The case is Securities and Exchange Commission v. CR Intrinsic Investments LLC et al., case number 1:12-cv-08466, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Max Stendahl and Cara Salvatore. Editing by Kristen Becker.

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Vets' Attys Want Nonprofit To Get \$63M Of Agent Orange Funds

By **Bonnie Eslinger**

Law360 (November 19, 2024, 10:31 PM EST) -- Counsel representing a class of Vietnam veterans exposed to Agent Orange and their survivors in litigation that settled 33 years ago urged a California federal judge on Tuesday to hand \$63 million in unclaimed funds to a legal nonprofit, a request the federal government has contested.

The current dispute has its roots in a case filed back in 1986 on behalf of a class of Vietnam veterans who applied, or sought to apply, for money related to disabilities they incurred from active-duty exposure to a contaminant in the defoliant known as Agent Orange used in the Vietnam War.

In 1991, the U.S. Department of Veterans Affairs and the certified class entered into a consent decree that resulted in more service members receiving compensation for the health harms they suffered.

At a hearing in San Francisco on Tuesday, counsel for the veterans and their survivors told U.S. District Judge William H. Alsup that some 1,137 class members have now died with no known survivors or survivors they've not been able to locate. The money due to those class members adds up to an estimated aggregate of \$63.1 million, said Brooklyn Hildebrandt of Sidley Austin LLP who represents the class. The National Veterans Legal Services Program also represents the class.

Class counsel has "tried very diligently to try and find an appropriate payee for the money," Hildebrandt told the court, even hiring private investigators to help with the search. Of the 1,137, there are about 268 class members for whom "we have reason to believe there is someone surviving, but we have not been able to locate them," Hildebrandt added.

Judge Alsup asked Hildebrandt to respond to an argument the government made in its filed opposition to the proposal: that the money could be handed over to a nonprofit, and then class members who have not been located thus far can come forward and claim the benefits owed to them.

"It's highly unlikely that this would occur," Hildebrandt said, adding the court could address that concern by reserving a small portion of the funds for a set amount of time.

The judge also asked the class counsel to address the government's argument that the consent decree doesn't mention a cy pres — or as near as possible — option.

Hildebrandt said the court has the authority to grant the request regardless of there being a cy pres provision in the consent decree.

"In many class action settlement cases, there's often a remainder and often times no provision in the original agreement," the lawyer for the class said, later adding there's been no cases in which a district court's award of a cy pres designation was overturned due to the lack of a cy pres provision in the settlement agreement.

Judge Alsup asked about the proposed recipient, Legal Services Corp., a nonprofit established and funded by Congress.

The funds would go to serve the legal needs of veterans and survivors, Hildebrandt said.

"Here's what I think, being the cynic that I am," Judge Alsup responded. "We give the money to the Legal Services Corp. and then somebody in Congress says now we'll appropriate [\$63 million] less."

Hildebrandt said she didn't think the added millions would impact congressional funding, and she noted the nonprofit had been consulted and didn't express such concerns.

Counsel for the government argued to the court the consent decree contains no cy pres provision and ordering a cy pres award would circumvent the restrictions imposed by Congress on the veterans' disability compensation.

"The manner of the consent decree, the nature of the consent decree in this case does not provide for cy pres," Andrew Zee of the U.S. Department of Justice told the court.

The consent decree didn't involve a settlement fund from which purported unclaimed funds can be distributed, Zee added.

"All of the cases cited in the plaintiffs' papers involve a monetary settlement, which establishes a settlement fund from which class members can submit claims," the lawyer underscored.

Under the consent decree, the VA agreed to readjudicate claims for disability benefits; there's no set payout, Zee said.

"The settlement here involved no agreed upon amount of damages," the Justice Department lawyer told the court. "What it accomplishes are changes to the manner in which the VA would administratively process the claims."

In their written motion to the court, the veterans and their survivors had said allowing the VA to hold onto the funds would be to allow the federal agency to avoid its obligation to compensate veterans and their survivors "for the serious harms they suffered."

The government argued the consent decree obligation is to pay veterans' disability compensation benefits, noting that in recent years, the VA has also performed readjudications for sailors known as blue water Navy veterans.

Those claims are the result of a **2020 decision** from Judge Alsup, who ruled that under the 1991 consent decree, the VA must also compensate those U.S. Navy personnel who served in territorial waters — also known as blue water veterans — during the Vietnam War and developed diseases linked to exposure to Agent Orange.

Toward the end of the hearing Tuesday, Judge Alsup asked if under state laws, estates for the deceased veterans could be reopened to accept money.

Hildebrandt said she didn't know the answer for all 50 states. The judge asked her to look into the question for five states — California, Florida, Illinois, New York and Texas — and submit the answers in a supplemental briefing to the court.

Before wrapping up the hearing, the judge indicated the decision would be a difficult one.

"I don't know the answer, honestly," Judge Alsup said. "I wish you all would settle this."

The class of veterans is represented by Barton F. Stichman and Renee A. Burbank of the National Veterans Legal Services Program, and Sean A. Commons, Caleb J. Bowers and Brooklyn Hildebrandt of Sidley Austin LLP.

The VA is represented by Brian M. Boynton, M. Andrew Zee and Lesley R. Farby of the U.S. Department of Justice.

The case is Nehmer et al. v. U.S. Veterans Administration, case number 3:86-cv-06160-WHA, in the U.S. District Court for the Northern District of California.

--Editing by Lakshna Mehta.



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'You Stepped Over The Line': Judge Rips Quinn Emanuel Atty

By **Bonnie Eslinger**

Law360 (November 18, 2024, 11:05 PM EST) -- A California federal judge told a Quinn Emanuel partner defending Natera Inc. at trial Monday in Guardant Health Inc.'s false advertising case that she'd be sanctioned over her questioning of a Natera expert about Guardant's alleged damages, saying, "You stepped over the line, and you did it several times."

The comments from U.S. District Judge Edward M. Chen to Valerie Lozano of Quinn Emanuel Urquhart & Sullivan LLP came outside the presence of the jury, after Lozano had completed her direct examination of her client's damages expert, Jeffery Stec of Berkeley Research Group.

Stec disputed a \$95 million disgorgement assessment from Guardant's financial expert as well as an assessment that Guardant was due \$74.5 million to pay for future corrective advertising as a result of the allegedly false and misleading advertising.

Monday was the seventh day of trial in the dispute over marketing and advertising claims that Guardant and Natera have made about Reveal and Signatera, their respective tests for detecting the post-treatment presence of colorectal cancer.

Guardant's expert had said that all of Natera's Signatera sales during the relevant time period could be attributed to a Natera campaign that misleadingly compared results for Signatera and Reveal, based on different studies done for each test, but Stec said there were other factors that drove Natera's profits.

Those included Natera's advantage as the first to hit the market and the first to get Medicare approval for its product, Stec said. Then, if you subtract the costs of producing the product along with the expenses related to sales and marketing, that drops the profit number \$2.8 million into the negative, Stec said.

"After taking out the appropriate sales and the appropriate costs, there are no profits to disgorge," he said.

Stec said he wasn't offering opinions on whether Natera's campaign was false and misleading as Guardant claims. "My opinions are not relevant if you do not find liability," he told the jury.

He also disagreed with an assertion by Guardant's expert — James Malackowski, a financial expert at Ocean Tomo, a subsidiary of global consultancy firm J.S. Held — that Guardant was due \$74.5 million in damages for future advertising needed to correct Natera's statements.

"In your opinion, are prospective corrective advertising damages appropriate here?" Lozano asked.

Stec said no. Lozano asked why.

For one thing, "Guardant had the financial resources to actually conduct corrective advertising when the alleged false or misleading statements were occurring" and didn't, Stec said.

That raised an objection from Guardant, sustained by Judge Chen, who referenced an earlier ruling and told Lozano "not to elicit that line of questioning." He also told jurors to disregard the statement.

Later, Lozano asked Stec if he had other reasons to believe Guardant didn't need corrective advertising.

Stec said the ads at issue in the case are based on the study done about Reveal, and it was his understanding that Guardant had a new version of its test and that the one in the study "was a version of the product that's no longer used."

That also provoked a quick objection from a Guardant lawyer, sustained by Judge Chen.

The judge told jurors that the comment would be stricken since it also ran afoul of an earlier ruling.

"Move on," he told Lozano.

Outside the presence of the jury, Lozano said the fact that the previous version of Reveal is no longer on sale is relevant to the question of future corrective advertising.

Judge Chen said he had already ruled that because Guardant's newer product, Infinity, "was only one generation away" from Reveal, it could be included in the lost sales calculation.

The judge then swung back to Lozano eliciting information about whether Guardant had the ability to do corrective advertising at the time of Natera's campaign.

Lozano said her question was directed at whether Guardant had the financial means. Judge Chen said that was the same point.

"In my view, you violated my order," the judge said. "You elicited from him knowing that he was going to say they had the means to do it and didn't do it."

"You stepped over the line, and you did it several times," he said, raising his voice. "So there will be sanctions at some point."

This was not the first time that Judge Chen rebuked Natera's counsel. In October, he barred some of Natera's clinical trial evidence from the trial, saying the court **had been "duped"** by false and misleading statements from Natera's expert and counsel.

During opening trial statements on Nov. 6, Guardant's lawyer **told the jury** that Natera saw Guardant's competing colorectal cancer test as "an existential threat" and declared "war." The next day, a former Natera marketing vice president **defended the company**, testifying that there was a sales and marketing campaign against Reveal but its aim was to address Guardant's "misleading" claims.

Guardant CEO Helmy Eltoukhy **took the stand days later** and told jurors that it was Natera that had launched a misleading ad campaign and hurt its test launch.

On Friday, Natera's president of clinical diagnostics **testified that Guardant's claims** about its test were "dangerous."

Guardant Health is represented by Saul Perloff, Andre Hanson, Christopher LaVigne and Olin "Trey" Hebert of Allen Overy Shearman Sterling and Jennifer L. Keller, Gregory Sergi, Craig Harbaugh and Chase Scolnick of Keller Anderle LLP.

Natera is represented by Kevin P.B. Johnson, Derek L. Shaffer, Victoria F. Maroulis, Brian C. Cannon, Anne S. Toker, Valerie Lozano and Andrew Bramhall of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Guardant Health Inc. v. Natera Inc., case number 3:21-cv-04062, in the U.S. District Court for the Northern District of California.

--Editing by Brian Baresch.