

UnitedHealth Group sued by pension funds, CalPERS, for securities fraud, insider trading by executives

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Palash Ghosh

December 9, 2024



Major health insurer UnitedHealth Group and three of its senior executives were sued by pension funds California Public Employees' Retirement System, Sacramento (as lead plaintiff) and City Of Hollywood (Fla.) Firefighters' Pension Fund, among others, for alleged securities fraud and insider trading.

Originally filed on May 14 by Hollywood Firefighters, the lawsuit alleges that UnitedHealth Group CEO Andrew Witty, UnitedHealth Group executive chairman Stephen Hemsley and Brian Thompson, the CEO of UnitedHealthcare, a subsidiary of UnitedHealth Group, sold tens of millions of dollars of their stock in October 2023 after the Department of Justice had re-opened an antitrust investigation into the company.

The DOJ probe was in connection with the January 2021 planned acquisition of Change Healthcare, a healthcare technology and payment processing firm, which it sought to merge with its Optum Insight data analytics subsidiary.

Thompson was murdered by a gunman in midtown Manhattan on the morning of Dec. 4.

The latest probe was the second by the DOJ into the United Health-Change Healthcare merger, but would not be public knowledge until months later. On Feb. 24, 2022, the DOJ first filed suit against UnitedHealth Group, charging the proposed combination of Change and Optum would give the parent company a “vast amount of its rival health insurers’ competitively sensitive information,” and grant UnitedHealth use of its rivals’ “information to gain an unfair advantage and harm competition in health insurance markets.”

As a result, UnitedHealth Group said it would establish a firewall to separate data between the Change and Optum units post-merger.

The suit by CalPERS and other pension funds would later allege that UnitedHealth never set up the firewalls between its subsidiaries as it had earlier promised.

In September 2022, the U.S. District Court in the District of Columbia permitted United Health Group’s acquisition of Change, rejecting the antitrust arguments.

Probes by DOJ

However, the suit by CalPERS noted that on Oct. 10, 2023, UnitedHealth received notice that the DOJ had launched a “non-public antitrust investigation into the company.” Concealing this information from investors and the public, the aforementioned United Health executives sold more than \$100 million of their own UnitedHealth stock at “artificially inflated prices as the market and other investors remained unaware of the new federal antitrust investigation.”

Specifically, the suit alleged, Witty sold \$102 million of his shares, while Thompson sold \$15 million worth of shares, after they found out the federal inquiry was re-opened in October of that year— something that investors and the public were not aware of at the time.

Subsequently, on Feb. 27, the WSJ reported the DOJ had re-opened its probe into UnitedHealth’s acquisition of Change. UnitedHealth shares plunged by \$27 per share on the very day the article was published.

CalPERS amended lawsuit

An amended lawsuit was filed on Oct. 4, 2024, with CalPERS as the lead plaintiff.

The suits, filed in the U.S. District Court in the District of Minnesota (the state where UnitedHealth is based), claims to represent plaintiffs who purchased UnitedHealth shares between Mar. 14, 2022 (the first trading day after UnitedHealth filed its answer to the

allegations in the initial complaint filed by the DOJ) and Feb. 27, 2024 (the date when an article in the Wall Street Journal first publicized the re-opened DOJ probe).

The plaintiffs are seeking compensatory damages as well as a jury trial to ascertain the amount of compensation. A spokesperson for CalPERS said that as the case is still pending, they would not comment on the litigation. Hollywood Firefighters Pension has \$300 million in assets. CalPERS has \$522.4 billion in assets under management.

According to its latest annual report, CalPERS owned 2.3 million shares of United Health stock valued at about \$1.1 billion as of June 30, 2023.

A spokesperson for Klausner, Kaufman, Jensen & Levinson, the law firm representing Hollywood Firefighters, said Hollywood Firefighters is a passive class member in the suit.

Robbins Geller Rudman & Dowd, the legal firm representing CalPERS, could not be reached for comment.

An official at Hollywood Firefighters declined to comment. United Health could not be reached for comment.

CVS, Walmart, Walgreens Notch Ohio Win Over Opioid Judgment (1)

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Eric Heisig

CVS Pharmacy Inc., Walgreens Boots Alliance Inc., and Walmart Inc. notched a major win Tuesday with a Ohio Supreme Court ruling that likely upends a \$650 million judgment against them.

Ohio's product liability law prohibits claims like the ones for which the three pharmacy megachains were found liable, as well as the type of judgment they face, the justices ruled 5-2.

Two counties sought "equitable relief" for common law public-nuisance claims—which a federal judge ordered and sculpted to "abate" the problems prescription painkillers caused—and argued the state law allowed for such a judgment. The law only barred claims seeking compensatory damages, they said.

But the law as written does away with product-liability claims, "including product-related public-nuisance claims seeking equitable relief," Justice Joseph T. Deters (R) wrote. "We are constrained to interpret the statute as written, not according to our own personal policy preferences."

The ruling creates possibly insurmountable problems for the August 2022 judgment obtained by Lake and Trumbull counties in northeast Ohio after a jury found the pharmacies liable for downplaying the painkillers' addictive qualities and making billions of dollars in profits at the expense of patient safety.

The trial and its result—which includes steps the pharmacies are required to pay for to combat the epidemic, including treatment and training first responders—were set up to be a possible harbinger of outcomes that could arise in the thousands of federal opioid lawsuits filed from across the US. However, the companies settled most of the other suits they faced.

The pharmacies asked the US Court of Appeals for the Sixth Circuit to overturn the judgment, but it kicked the case to the Ohio Supreme Court with a question about the state product liability law. The pharmacies say the law as amended in the early 2000s prohibit the kind of claims they faced in federal court.

The state Supreme Court said "the Pharmacies have the better argument." Deters drilled down into the phrase "also includes," which appears in the law at issue.

He also shot down other arguments by the county regarding the law's history in the legislature, saying there was no reason to dive into it because the law's wording is clear. While the court recognizes the harm opioids have done to Ohio, "creating a solution to this crisis out of whole cloth is, however, beyond this court's authority," Deters wrote.

While the ruling was 5-2, Justice Patrick F. Fischer (R) only agreed with the judgment. Democratic Justices Michael P. Donnelly and Melody J. Stewart partially dissented, with Stewart writing that public-nuisance claims seeking "equitable relief" should still be allowed under Ohio law.

The Ohio Supreme Court isn't the only state high court to address a question about public nuisance. The Oklahoma Supreme Court, in throwing out a \$465 million award against Johnson & Johnson in 2021, said a trial judge misconstrued that state's public nuisance law when he ruled that the pharmaceutical giant's marketing of its painkillers helped fuel the state's opioid epidemic.

The US Court of Appeals for the Fourth Circuit has also asked West Virginia's high court whether the state's common law allowed for a public nuisance claim based on the distribution of controlled substances.

CVS is represented by Munger, Tolles & Olson LLP. Walgreens is represented by Sullivan & Cromwell LLP. Walmart is represented by Jones Day. The counties are represented by Kellogg, Hansen, Todd, Figel & Frederick PLLC, Lanier Law Firm, Plevin & Gallucci Co., Thrasher, Dinsmore & Dolan, Napoli Shkolnik PLLC, and Spangenberg Shibley & Liber LLP.

The case is In re: Nat'l Prescription Opiate Litig. , Ohio, No. 2023-1155, 12/10/24 .

(Updates throughout.)

To contact the reporter on this story: Eric Heisig in Ohio at ehesig@bloombergindustry.com

To contact the editors responsible for this story: Alex Clearfield at aclearfield@bloombergindustry.com; Stephanie Gleason at sgleason@bloombergindustry.com; Patrick L. Gregory at pgregory@bloombergindustry.com

Pharmacies prevail in appeal of \$650-million opioid award in Ohio

 [reuters.com/legal/ohio-top-court-says-pharmacies-could-not-be-sued-over-opioid-epidemic-2024-12-10](https://www.reuters.com/legal/ohio-top-court-says-pharmacies-could-not-be-sued-over-opioid-epidemic-2024-12-10)

Nate Raymond, Brendan Pierson

The combination photo shows a logo of CVS in Manhattan, New York, U.S., August 1, 2016, re-usable Walmart bags in a newly opened Walmart Neighborhood Market in Chicago September 21, 2011 and a Walgreens sign in the Chicago suburb of Niles, Illinois, February 10, 2015. REUTERS/Andrew Kelly/Jim Young/File photo Purchase Licensing Rights , opens new tab

- Court says pharmacy chains cannot be held accountable
- Earlier award of \$650 mln to counties likely to be overturned
- Most lawsuits filed over US opioid addiction epidemic settled nationally

Dec 10 (Reuters) - Ohio's top court ruled on Tuesday that pharmacy chain operators CVS (CVS.N) , opens new tab, Walmart (WMT.N) , opens new tab and Walgreens (WBA.O) , opens new tab could not be held liable for fueling an opioid epidemic in two Ohio counties that won a \$650.9-million judgment against them.

The Ohio Supreme Court held on a 5-2 vote , opens new tab that a state law barred Lake and Trumbull counties' claims that pharmacy chains' dispensing of addictive pain medications created a public nuisance that the companies should be forced to remediate.

Justice Joseph Deters, writing for the majority, said the court recognized that the deadly epidemic had touched the lives of people throughout Ohio and "undoubtedly has far-reaching consequences for their communities and for the state as a whole."

"Creating a solution to this crisis out of whole cloth is, however, beyond this court's authority," Deters wrote.

He said an amendment to the Ohio Products Liability Act that the state legislature adopted in 2007 barred all common-law public nuisance claims based on the sale of products that seek compensation from a product's manufacturer or supplier.

"This ruling will have a devastating impact on communities and their ability to police corporate misconduct," Peter Weinberger, a lawyer for the counties, said in a statement, adding that "our team will continue to fight for these counties through other legal avenues."

Representatives for CVS and Walgreens said they were pleased with the ruling. Walmart did not immediately respond to a request for comment.

The case was the first the three pharmacy operators had faced at trial of the thousands of lawsuits filed by states and local governments against drugmakers, distributors and pharmacies over the U.S. opioid addiction epidemic.

The vast majority of those cases have been resolved through large nationwide settlements, which now total about \$46 billion, but the Ohio counties were among those who opted out of those deals and pressed forward with their own trials or settlements.

A federal jury in Cleveland concluded in 2021 that an oversupply of addictive pain pills and the diversion of those opioids to the black market created a public nuisance in the counties, and that the pharmacies helped cause it.

U.S. District Judge Dan Polster, who oversees the federal litigation over the opioid epidemic, ordered CVS, Walmart and Walgreens following the trial to pay a combined \$650.9 million to help the two counties address, or abate, the harms caused by the epidemic.

The companies appealed, prompting the 6th U.S. Circuit Court of Appeals last year to ask the Ohio Supreme Court to review the matter, saying it raised "novel and unresolved questions" of state law that it should address first.

The majority in Tuesday's decision comprised all four of the court's Republican judges and one Democrat, with two Democrats dissenting. The case will now go back to the 6th Circuit, which is expected to overturn the verdict in light of the Ohio court's conclusion.

The result is in line with other opioid cases that have gone to trial, which have largely been unsuccessful.

Oklahoma's top court in 2021 overturned a \$465 million judgment that the state's attorney general had won at trial against drugmaker Johnson & Johnson (JNJ.N) [↗](#), opens new tab, also finding that state law did not allow a public nuisance claim.

Judges in California and West Virginia ruled against local governments in opioid lawsuits following trials there, similarly rejecting public nuisance arguments. West Virginia's highest court will hear an appeal from the city of Huntington and its county next year.

The city of Baltimore won \$266 million in a trial against distributors last month, and could be awarded more by a judge, though the judgment will likely be appealed. San Francisco also won a trial against Walgreens, and settled with the company for \$230 million while an appeal was pending.

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Reporting by Nate Raymond in Boston; Editing by Rod Nickel, Alexia Garamfalvi, Alexandra Hudson

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Nate Raymond

Baltimore's Gamble on Susman Scores \$670 Million in Opioid Suits

By Tatyana Monnay 2024-12-10T05:30:01000-05:00

- Cities and states increasingly outsource high-stakes suits to litigation firms
- Fee deals attract cash-strapped governments, risk-friendly trial lawyers

When the city of Baltimore decided to pass on its \$90 million share of nationwide opioid settlements, it instead placed a bet that an outside litigation firm could bring in more cash.

Seven years after the city began filing those cases, that bet paid off. Baltimore and its lawyers from top trial firm Susman Godfrey have racked up more than \$670 million in settlements and verdicts against the companies they said were responsible for the opioid addiction crisis: McKesson, AmerisourceBergen, CVS, Walgreens, and others.

A deal with Susman gave Baltimore “significantly more resources to pursue these cases than we would have going at it alone,” Sara Gross, chair of the city’s affirmative litigation division, said in an interview. It highlights a growing strategy among cities and states turning to outside firms for high-stakes lawsuits and promising to split verdict and settlement money on the back end.

“Affirmative litigation allows us to obtain injunctive relief to stop ongoing misconduct and to secure the resources we need to combat the effects of corporate greed, whether it is opioid addiction, chemicals in our water, or other harms,” Gross said.

A chunk of Baltimore’s windfall will go to Susman Godfrey, which shouldered the upfront costs for the cases, according Gross, who declined to specify how the money will be split. Firms’ contingency fees are often as high as one-third of the winnings in private lawsuits, from business disputes to personal injury claims. At that rate, Baltimore’s remaining haul is nearly five times what it would have seen from the national settlements between the companies and state and local governments.

The city’s cut of the lawsuit proceeds will go to an opioid restitution fund. Baltimore saw more than 4,300 deaths from opioids overdoses over a five-year period ending in 2021, according to data from the Maryland Department of Health. That was the most statewide and six times the national average.

Baltimore has tapped other outside firms to pursue cases accusing ghost gun manufacturers and oil companies of causing widespread harm to the city's residents. Philadelphia, Miami, and Cleveland have also hired outside litigation boutiques for similar suits. Texas turned to two litigation shops for a [\\$1.4 billion privacy case](#) against Facebook owner Meta Platforms Inc. And Motley Rice leads a handful of outside law firms representing various cities and states that opted into the nationwide opioids settlement.

"State and local governments have, over the past several years, increased their efforts to hold corporate actors accountable for profiteering off the citizenry," said Anne Taylor, Philadelphia's chair of litigation. "Working with state and local actors is a natural business decision for the larger plaintiffs-side litigation firms."

Big Bets

Texas-founded Susman Godfrey has become one of the country's most profitable law firms by [betting on itself](#) in court fights. It takes as much as 90% of its cases on contingency and other alternative-fee arrangements.

Bill Carmody, the [veteran trial lawyer](#) steering the Baltimore cases, is known for representing ex-WeWork CEO Adam Neumann and Uber Technologies Inc. in high-profile cases. Other Susman lawyers made headlines last year, securing a \$787 million settlement for Dominion Voting Systems in its defamation case against Fox News.

The firm declined to comment on active litigation.

Like-minded firms have also courted local government as clients in plaintiffs' lawsuits. Litigation boutiques Cohen Milstein, Edelson PC, and Dilworth Paxson are among those with practice groups dedicated to working with public clients.

"Dilworth elected to formalize this practice group at the firm around eight years ago as we witnessed an increasing number of government clients establish affirmative litigation departments and concentrate on utilizing consumer protection laws to protect their interests," said Jerry DeSiderato, who leads the group.

The Pennsylvania-founded firm helped Philadelphia land a \$110 million settlement from Walgreens in its own opioids case.

The work is ideal for regional firms and boutiques that are much more comfortable with taking risks in contingency-fee cases than global behemoths used to charging corporate clients by the hour.

Even smaller outside firms have far more resources than the city offices that they represent. Eight attorneys oversee Philadelphia's affirmative litigation work, while Gross is one of two city lawyers in Baltimore's group.

Risks and Rewards

Not every case is a winner. Baltimore hired San Francisco's Sher Edling in July 2018 to sue 25 fossil fuel companies—including BP, Chevron, and Exxon Mobil—over misleading residents about the environmental impacts of their products. A state court judge dismissed the suit in July.

State and local governments need to be aware of who they are getting in bed with and the details of the arrangements, says O.H. Skinner, the former solicitor general of Arizona. The more money from verdicts and settlements that's carved out for the lawyers, the less that goes to the people allegedly harmed.

Skinner also [raised concerns](#) about possible conflicts of interest. He cited an effort earlier this year to have Motley Rice removed from the nationwide opioids litigation.

The firm represents Hawaii, Washington DC, and the city of Chicago in those cases—work worth [nearly \\$400 million in fees](#)—while also pursuing similar suits on behalf of private companies. Pharmacy benefit manager OptumRx argued that the lawyers could use confidential information gained from work for the governments to boost cases for private clients.

Cities that splinter away from statewide and national lawsuits, like in the opioids cases, water down the overall leverage against companies accused of causing widespread public harm, according to Skinner. Turning to outside firms instead of partnering with state attorney general offices is “unsustainable,” he said.

"It diminishes the power of states," said Skinner. "It makes it harder for states to speak."

For Baltimore and Philadelphia, however, the results do plenty of talking.

"Through its success in litigative efforts the city is able to take legal action to stop harm against residents and recover and redirect funds to abate the harms caused by bad actors," Philadelphia's Taylor said.

To contact the reporter on this story: Tatyana Monnay at tmonnay@bloombergindustry.com

To contact the editors responsible for this story: Chris Opfer at copfer@bloombergindustry.com
Alessandra Rafferty at arafferty@bloombergindustry.com

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DMC Sued Over \$142 Million Charge, Biggest Selloff in 4 Years

By Gillian R. Brassil

- **COURT:** D. Colo.
- **TRACK DOCKET:** [No. 1:24-cv-03387](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-12-10T09:49:32483214406-05:00

DMC Sued Over \$142 Million Charge, Biggest Selloff in 4 Years

By Gillian R. Brassil 2024-12-09T12:19:42000-05:00

- **COURT:** D. Colo.
- **TRACK DOCKET:** [No. 1:24-cv-03387](#) (Bloomberg Law subscription)

DMC Global Inc. didn't disclose fiscal inadequacies in its main business unit and the reason it replaced a key executive before taking a \$142 million goodwill impairment charge that helped spark its biggest stock drop in four years, a proposed class action says.

The oilfield services company misrepresented the value of its 2021 acquisition of a controlling interest in architectural building products maker Arcadia Products, says investor Samuel Garson in the lawsuit filed in the US District Court for the District of Colorado on Friday.

The company said in January that Arcadia accounted for all of the goodwill on DMC's books and that it had initiated a review of strategic alternatives for its two other business segments, DynaEnergetics and NobelClad.

On Oct. 9, the company announced that Chilcoff had stepped down as the president of Arcadia Products. But DMC Global did not disclose the reason to be a poor third quarter that caused it to fall short of its financial guidance or that Arcadia Products' "materially inadequate internal systems and processes" were hurting operations, the lawsuit says.

On Oct. 21, the company said it was expecting weaker-than-thought third quarter results, based in part on poor Arcadia Products sales, and was launching a strategic review. Its stock dropped more than 18% the next day, closing at \$10.57 per share on Oct. 22—its largest drop since March 2020, according to data compiled by Bloomberg.

DMC stock dropped another 6% after releasing third quarter results on Nov. 4, closing at \$9.25 per share on Nov. 5.

A week later, DMC said Kuta would retire as president, CEO and a board member at the end of November.

The proposed class includes shareholders who acquired stock between May 3 and Nov. 4.

Kuta and chief financial officer Eric Walter are named as defendants alongside the company. A DMC Global communications director didn't respond to a request for comment. Neither did Garson's representation.

Johnson Fistel LLP represents Garson.

The case is Garson v. DMC Global Inc. et al , D. Colo., No. 1:24-cv-03387, complaint filed 12/6/24 .

To contact the reporter on this story: Gillian R. Brassil in Washington at gbrassil@bloombergindustry.com

To contact the editor responsible for this story: Drew Singer at dsinger@bloombergindustry.com

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Musk, Tesla Directors Face More Delaware Legal Fees: Explained

By Jennifer Kay

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Bloomberg Law News 2024-12-10T09:47:56461493205-05:00

Musk, Tesla Directors Face More Delaware Legal Fees: Explained

By Jennifer Kay 2024-12-10T05:00:01000-05:00

A settlement over board pay at Tesla Inc. appears poised to stick the electric vehicle maker with another hefty legal bill from Delaware attorneys.

Chancellor Kathaleen St. Jude McCormick just handed a record-setting \$345 million in legal fees to the attorneys for an investor who successfully challenged Elon Musk's CEO compensation at Tesla. She's expected to rule soon on a settlement over Tesla's board pay, a proposal accompanied by a request for roughly \$230 million for legal costs incurred by a pension fund's attorneys.

1. Doesn't Musk usually avoid settlements?

Musk is known for extensively litigating every lawsuit, but the boards of his companies have been more accepting of deals to avoid trial.

The lawsuit brought by the pension fund for Detroit's police and firefighters claimed Tesla's board members gave themselves excessive compensation packages. The board denied any wrongdoing but agreed to settle the case "to eliminate the uncertainty, risk, burden, and expense of further litigation," according to a July 2023 filing in Delaware Chancery Court.

Taking the focus off Musk helped drive a settlement, said Jill Fisch, a University of Pennsylvania business law professor. The board targeted by the litigation included his brother Kimbal, Oracle Corp. co-founder Larry Ellison, Australian telecom executive Robyn Denholm, and James Murdoch, son of media mogul Rupert Murdoch.

"Apart from Kimbal Musk, these are outsiders to Tesla in important ways. Their primary affiliation and loyalty is to some other company," she said, adding that individual directors on most boards share concerns about litigation dragging on and damaging their reputations.

The settlement isn't the same kind of capitulation, she said, as Musk's buying the social media platform formerly known as Twitter Inc., now X Corp., after he spent months trying to rescind his bid for it. He caved on the eve of a 2022 trial before McCormick.

"In some lawsuits, his view is, 'I'm going to tough it out because somebody's not going to tell me what to do,'" Fisch said. But in this challenge, "his actions and ego are not a big driver of the settlement, and I think that's why the settlement occurred," she said.

2. What's in the settlement?

The pension fund's attorneys valued the accord at \$919 million, which would make it one of the biggest shareholder settlements in the court's history. If approved, Musk and other directors would return stock options worth up to \$735 million and forgo three years of pay worth \$184 million, and Tesla would also change the way board-level compensation issues get reviewed. One Tesla investor, Michael Levin, objects, saying it gives Musk the option of just paying the full amount himself, eliminating the directors' independence.

In January, McCormick said her approval would consider legal arguments similar to those raised over the payday for the attorneys who challenged Musk's CEO pay. The parties have nudged the court in recent months with letters seeking a resolution.

The case involves shareholder derivative claims, which are filed on a corporation's behalf against its leaders. The payments would go to Tesla, instead of directly to investors, as in a class action.

3. Why are the attorneys' fees so high?

Nine-figure fee awards are rare in Delaware, though judges have justified them as incentives for attorneys to accept risky cases. Delaware's multi-factor test to ensure fair legal fees includes considering a case's complexity, the stage of litigation reached, the attorneys' experience and ability, and any contingency arrangement that leaves them vulnerable to not ever being paid.

In last week's opinion on Musk's pay, McCormick said she followed guidance from the Delaware Supreme Court, which affirmed a \$267 million payday for attorneys representing a pension fund that reached a \$1 billion settlement with Dell Technologies Inc. over a 2018 stock conversion. The perception of a "windfall" in the CEO pay lawsuit stemmed not from the attorneys' greed, McCormick said, but from "the sheer magnitude of the compensation plan" they successfully challenged.

Tesla wants to set a \$63.5 million cap on the payday for the pension fund's attorneys in the board pay case. It argues the company won't benefit from the returned stock options, so they shouldn't be included in the calculations for the legal fees. "The lean, efficient team in this case secured a result comparable to the recovery in *Dell*," the pension fund's attorneys said in a brief.

Tesla plans to appeal McCormick's order over Musk's pay. The Delaware Supreme Court could reduce the fee award, but it would still find a large number, said Brian Quinn, a Boston College law professor.

"Anything involving Elon Musk in the past few years will elicit eye-popping numbers," he said. "The richest man in the world is going to elicit the richest payout in whatever you do."

Tesla is represented by Bayard PA. Its board is represented by Richards, Layton & Finger PA and Cravath, Swaine & Moore LLP. The pension fund is represented by McCarter & English LLP, Fields Kupka & Shukurov LLP, and Bleichmar Fonti & Auld LLP. Levin is representing himself.

The case is Police & Fire Ret. Sys. of the City of Detroit v. Musk, Del. Ch., No. 2020-0477 .

To contact the reporter on this story: Jennifer Kay in Philadelphia at jkay@bloomberglaw.com

To contact the editor responsible for this story: Patrick L. Gregory at pgregory@bloombergindustry.com

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Musk's Politics Hadn't Seeped Into Tesla. Then He Axed Its Eco Car of the Future.

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Once one of America's most outspoken voices on the threat of climate change, Elon Musk now argues these existential risks have been overstated. This shifting stance could influence Trump and help the Tesla CEO's businesses.

By Pranshu Verma, Elizabeth Dwoskin, Faiz Siddiqui and Shannon Osaka

(Washington Post) -- Earlier this year, top executives at Tesla gathered in Palo Alto to sell CEO Elon Musk on a line of compact cars that would bring the electric-vehicle revolution to budget-conscious consumers across the world. The more affordable car had long been part of Musk's master plan for Tesla to fight climate change by "accelerat[ing] the world's transition to sustainable energy."

But Musk axed the proposal, amid budget constraints, according to two people close to Musk who spoke on the condition of anonymity to describe private conversations. Instead, the billionaire green-lit a massive purchase of computer chips, in a deal worth billions intended to enhance Tesla's luxury cars (and a humanoid robot called Optimus) with energy-intensive artificial intelligence capabilities.

The internal deliberations over the so-called Tesla Model 2, which have not previously been reported, reflect what sources close to Musk describe as a significant shift in the billionaire's attitude toward climate change. And with Musk deeply embedded in the incoming administration of President-elect Donald Trump, his startling transformation from environmental crusader to critic of dire climate predictions could help bolster moves in Washington against clean energy - and even electric vehicles.

Once one of the most vocal American executives on the dangers of climate change, Musk called for a "popular uprising" against the fossil fuel industry in a 2016 film. At Tesla, every internal power point presentation had to include figures from former vice president Al Gore's documentary "An Inconvenient Truth" citing rising carbon dioxide in the atmosphere, a reminder of the company's mission.

But the paragraph about global warming is no longer required in Tesla's power point decks and climate change has plummeted on Musk's list of priorities: In an August live stream on X, he told Trump "we don't need to rush" to solve the climate crisis.

People familiar with Musk's thinking say the billionaire still believes global warming is a problem, a point he made online as recently as last year. But he now thinks the existential risks from climate-related disasters have been overstated - views influenced by a right-wing universe he has come to inhabit online and in real life in Texas, according to five people familiar with Musk's thinking, who spoke on the condition of anonymity to describe private conversations.

Musk also has developed a newfound enthusiasm for technological solutions to climate change, such as nuclear power and carbon capture. Today, he rarely talks about global warming as an imminent threat, viewing robotics, artificial intelligence, stemming population decline and reaching Mars as more critical to human survival.

Musk's shift presents a challenge for his electric vehicle business, where some employees are committed to working for a mission-driven company. Several senior executives have left amid the recognition that Musk doesn't prioritize Tesla's climate mission as much as other priorities, according to two people familiar with the matter. Meanwhile, Trump has campaigned on eliminating the tax credit for electric vehicles that has driven much of Tesla's business.

Musk has conceded that the tax credit eventually would have to end. And he will likely lobby the Trump administration to help nearly all his businesses - not just Tesla, but the rocket company SpaceX and the internet service provider Starlink as well, one of the people said.

"Musk, at Trump's side, both encourages the president-elect to ignore the seriousness of [climate change] and pursue policies that will make the problem worse," said Paul Barrett, deputy director of the Center for Business and Human Rights at New York University's Stern School of Business. "He clearly has made the calculation that his relationship with Trump will lead to decreased regulation of his businesses (and many others), and that that indirect benefit outweighs his direct competitive concerns."

Musk's transformation on climate change has been years in the making, said the five people, sparked by a variety of influences: battles with environmental groups, tensions with the Biden administration and a rightward shift related to the pandemic, which has exposed him to new experts and ideas.

"He used to be a Democrat who believed everything he was told was true about this," said one of the people. "And now he's thinks for himself and realizes, yes, climate change is real, but it's not nearly among the top problems right now."

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

A climate change meltdown

When Leonardo DiCaprio strolled onto the floor of Tesla's sprawling gigafactory in Reno, Nevada, to film a 2016 National Geographic documentary about climate change, Musk didn't mince words.

There needs to be a "popular uprising" against the fossil fuel industry, Musk told DiCaprio, warning that the world is "unavoidably headed toward some level of harm and the sooner we can take action, the less harm will result."

At the time, Musk also was tweeting prolifically about limiting carbon emissions, reminding people that "Tesla is working hard to help stop global warming," touting a tax on carbon and warning of "climate change meltdown."

By 2020, the covid pandemic had begun to alter his worldview. In Alameda County, California, officials ordered lockdowns that forced the closure of Tesla's main production plant. Around that time, Musk walked through his Tesla facilities ripping mask mandate posters from the walls, a person close to him said.

In May 2020, Musk announced Tesla would move its headquarters out of the state. He soon relocated to the Austin area, though Tesla maintained its engineering headquarters in Silicon Valley.

Around that time, Musk's daughter Vivian Jenna Wilson - a transgender woman from whom he is now estranged - received gender-affirming care. Friends say Musk was devastated by his daughter's transition, and he has vowed to "destroy the woke mind virus" that he claims "killed" her.

Both events helped cement Musk's turn against Democrats, which in turn pushed him to rethink his views on climate change. "Anything the left saying [was] conspiratorial and bullshit," said one of the people familiar with his thinking.

Another turning point came in 2021, when President Joe Biden hosted an electric vehicle summit featuring each of the other major American automakers and the United Auto Workers. Associates say Musk was outraged that Tesla was not included, and that the incident turned him against the Biden administration.

After moving his personal life and sprawling business empire to Austin, Musk began discussing climate issues and other politics with friends and associates who are skeptical of catastrophic global warming predictions. Among them was Palantir co-founder Joe Lonsdale, a libertarian-leaning conservative who also relocated from Silicon Valley during the pandemic. Lonsdale, who is active in right-wing politics, introduced Musk to Florida Gov. Ron DeSantis (R), at the time a presidential hopeful favored by the tech elite.

Lonsdale argues that climate change could be solved in part by nuclear energy with advanced cooling technologies, according to one of the people. He is a fan of Steven Koonin, a Stanford University physicist who worked in the Department of Energy under former president Barack Obama.

This year, Koonin published a book critiquing "consensus science" on climate change, arguing that experts exaggerate the impacts and that slashing carbon emissions would harm development and economic growth. The U.N. Intergovernmental Panel on Climate Change has projected that unmitigated CO2 emissions will cause increased weather disasters, stunted economic growth and dangerous heat for billions of people around the world.

In 2023, Musk got to know Vivek Ramaswamy, the former pharmaceutical executive who ran against Trump in the Republican primary. In his most recent book, Ramaswamy acknowledges that global surface temperatures are rising but also argues that there is no conclusive evidence this rise is bad for humanity, citing Koonin and other researchers who point to potential net positive effects of planetary warming. Ramaswamy, Musk's co-chair on Trump's commission on government efficiency, has discussed his views on climate change with Musk on podcasts and on X.

Ramaswamy and Lonsdale declined to comment on conversations with Musk.

Meanwhile, Musk's views of environmental nonprofit groups has also shifted. In 2018, shortly before his roughly \$6 million in donations to the Sierra Club became public, he tweeted his thanks to the group "for fighting climate change," adding: "This affects every living creature on Earth."

Today, Musk thinks the Sierra Club, Greenpeace and other environmental groups have impeded his businesses, one of the people said. For example, the Sierra Club of Texas attempted to stall a new Tesla plant in Travis County, which includes Austin - a move Musk viewed as antithetical to the advocacy groups' climate goals, the person said. "That struck him as pretty nuts," said the person, adding that Musk's takeaway was: "They say they are environmental groups, but do they care about the environment."

Musk also bristled when Tesla's gigafactory in Grünheide, Germany, lost power and had to halt work earlier this year after suspected arsonists set fire to an electricity pylon near the site. The incident, portrayed by media outlets as environmentalists railing against corporate greed, angered Musk, the person said. "These are either the dumbest ecoterrorists on Earth or they're puppets of those who don't have good environmental goals," Musk wrote on X in March.

Ben Jealous, the Sierra Club's executive director, said Musk's shift in climate views will come at a cost. "By embracing Donald Trump, Elon is supporting an agenda that would destroy the electric vehicle economy, kill jobs and accelerate the climate crisis to uncontrollable

extremes," Jealous said.

Tefere Gebre, chief program officer at Greenpeace USA, said in a statement that billionaires like Elon Musk have "bought" the White House and are "angling to crush dissent."

Some Tesla shareholders now question Musk's commitment to the company's original mission, following his public takeover of Twitter, now X, and measures that appeared to give Tesla's chief executive more power. Fred Lambert, editor in chief of Electrek, a pro-electric-vehicle blog, sold his entire stake in Tesla earlier this year after decisions, including shareholders reapproving Musk's \$56 billion compensation package, made him reevaluate his position.

In an interview, Lambert said the company's mission now appears to be "enriching Elon Musk."

As Trump prepares to take office in January, speeding the launch cadence at SpaceX is at the top of Musk's wish list for the new administration, according to a person close to him. He also wants to limit oversight of the rocket company by the Federal Aviation Administration and the U.S. Fish and Wildlife Service, which are assessing the environmental impact of SpaceX's South Texas launch facility.

Musk also may lobby for policies allowing Starlink to launch more satellites and increase their competitiveness in the United States, the person said, and for the National Highway Traffic Safety Administration to streamline the regulation of autonomous vehicles, which Musk has called "the future" of Tesla.

People who have worked with Musk said it's unlikely he will lobby with the same zeal for climate-related issues. Robert Zubrin, president of the Mars Society and a longtime Musk associate, said the billionaire's alliance with conservatives now overshadows that priority.

"He decided he would join this camp, and this was more important than the whole climate cause. He decided to go all in," Zubrin said. "And I guess in one sense, that is characteristic Musk: When he decides to do something, he goes all in."

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-0- Dec/10/2024 19:48 GMT

AllianceBernstein LP

AllianceBernstein to sue Switzerland over \$17bn Credit Suisse debt wipeout

US asset manager will join case over decision when UBS took over struggling rival



Quinn Emanuel has argued that the Credit Suisse deal was an unlawful encroachment on investors' property rights © Denis Balibouse/Reuters

Simon Foy and **Ortenca Aliaj** in London YESTERDAY



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US asset manager AllianceBernstein is preparing to sue Switzerland for \$225mn over the decision to wipe out \$17bn of debt when the country's government orchestrated the takeover of Credit Suisse by rival UBS last year.

The group, which manages about \$800bn in assets, is set to be added next month as a plaintiff in a case brought by law firm Quinn Emanuel Urquhart & Sullivan on behalf of [Credit Suisse](#) bondholders, according to people familiar with the details.

[AllianceBernstein](#) will be the first large institutional investor to join the claim and is expected to seek about \$225mn in damages from the Swiss state, taking the total value of the lawsuit to \$375mn, the people said.

The case, [which was first filed in the Southern District of New York](#) in June, relates to the writedown of Credit Suisse's AT1 bonds when the scandal-hit lender was forced into a rescue merger with UBS in March last year.

Quinn Emanuel has argued that the deal was brokered by the Swiss government and was an unlawful encroachment on investors' property rights.

AT1 bonds are a form of bank capital that converts into equity or is written down when a lender runs into trouble. However, the UBS Credit Suisse deal upended the traditional hierarchy among bank creditors by imposing losses on bondholders while allowing equity investors to recover \$3.3bn.

The Swiss government, which is being represented by law firm Wachtell, Lipton, Rosen & Katz, filed a motion last week to dismiss the Quinn Emanuel complaint.

In court filings, Switzerland argued that as a foreign state, it was entitled to sovereign immunity from the lawsuit and that the dispute should be adjudicated in a Swiss court.

AllianceBernstein and Quinn Emanuel declined to comment. Lawyers representing the Swiss Confederation did not respond to a request for comment.

The Financial Times has previously reported that lawyers at Quinn Emanuel chose to sue in the US because they believe there is a greater chance of convincing a judge to [waive the country's sovereign immunity rights](#).

Legal cases against sovereign states for expropriation are rare because many countries have reciprocal investment treaties. However, Switzerland is not party to such treaties in many of the countries where the Credit Suisse AT1 investors reside, most notably the US.

Quinn Emanuel has a history of pursuing legal cases against nation states. The firm last year won a long-running [UK legal battle with Argentina](#) over sovereign bonds that the country issued as part of its post-financial crisis debt restructuring.

The Swiss government's decision to introduce an emergency law that allowed [Finma](#), the country's financial regulator, to write down Credit Suisse's AT1 bonds has generated more than \$9bn of legal claims. Most have targeted Finma.

A Swiss parliamentary commission that has been investigating the causes of Credit Suisse's collapse and the government's role in the [UBS](#) takeover is expected to publish its findings by the end of the year.

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December 9, 2024, 7:01 AM PST

DaVita, Workers Finalize \$2 Million Class Deal Over 401(k) Plan

By Jacklyn Wille

Bloomberg Law News 2024-12-10T09:53:16787490682-05:00

DaVita, Workers Finalize \$2 Million Class Deal Over 401(k) Plan

By Jacklyn Wille 2024-12-09T10:01:07000-05:00

Dialysis provider DaVita Inc. received final approval for \$2 million class settlement resolving litigation over the fees tied to its employees' 401(k) plan.

The agreement will benefit about 56,000 people covered by DaVita's plan since 2016, according to the settlement motion. It resolves claims that the company filled the plan with expensive mutual funds and paid excessive annual recordkeeping fees as high as \$96 per person.

- Judge William J. Martinez of the US District Court for the District of Colorado granted final approval on Dec. 6
- Martinez, who previously allowed portions of the case to advance, also granted the workers' request for \$666,600 in attorneys' fees and service payments of \$10,000 for each of the four class representatives
- Hundreds of federal lawsuits challenging 401(k) plan fees have been filed since 2020, with recent settlements including those negotiated by Spectrum Health System for \$6 million, IQVIA Inc. for \$3.5 million, Kimberly-Clark Corp. for \$2.25 million, VCA Inc. for \$1.5 million, and Munson Healthcare for \$600,000

Morgan, Lewis & Bockius LLP and Wheeler Trigg O'Donnell LLP represent DaVita. Capozzi Adler PC represents the plan participants.

The case is Teodosio v. DaVita, Inc. , 2024 BL 447905, D. Colo., No. 1:22-cv-00712, 12/6/24 .

To contact the reporter on this story: Jacklyn Wille in Washington at jwille@bloomberglaw.com

To contact the editor responsible for this story: Drew Singer at dsinger@bloombergindustry.com

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Tenneco Denied 401(k) Suit Pause Given Longshot High Court Bid

By Jacklyn Wille

- Court doubts justices will hear ERISA arbitration dispute
- Company's *Loper Bright* argument fails to persuade judge

Bloomberg Law News 2024-12-10T09:53:53509715548-05:00

Tenneco Denied 401(k) Suit Pause Given Longshot High Court Bid

By Jacklyn Wille 2024-12-09T11:07:52000-05:00

- Court doubts justices will hear ERISA arbitration dispute
- Company's *Loper Bright* argument fails to persuade judge

A federal judge rejected Tenneco Inc.'s bid to pause a potential class action over its retirement plan fees, saying the US Supreme Court doesn't appear likely to grant the company's pending petition arguing the dispute belongs in individual arbitration.

The Supreme Court has denied three recent petitions raising similar issues, and Tenneco doesn't offer a compelling explanation for why its petition will fare better, Judge Judith E. Levy of the US District Court for the Eastern District of Michigan said in a Dec. 6 order.

Tenneco pointed to the Supreme Court's June decision in *Loper Bright Enterprises v. Raimondo*, which overturned the decades-old *Chevron* doctrine of deferring to administrative agencies' interpretations of unclear laws. According to Tenneco, this development shows that "judge-made rules are being scaled back," boosting the chances the judges will reject the "effective vindication" doctrine used by several courts to keep Employee Retirement Income Security Act disputes out of arbitration.

Levy disagreed, denying the automotive parts maker's request to have the lawsuit paused while the high court weighs whether to hear the case.

"*Loper Bright* addresses neither ERISA nor the effective vindication doctrine," she said. "Defendants' argument relies upon an overly capacious category of 'judge-made rules' that lumps together *Chevron* with everything from the effective vindication doctrine—insofar as it is judge-made—to qualified immunity."

Tenneco, which is facing claims that its retirement plan charges high fees while offering pricey funds, wants the justices to review an August decision in which the US Court of Appeals for the Sixth Circuit refused to enforce an arbitration clause in its retirement plan based on the clause's requirement that claims be brought in an individual capacity and that any relief awarded be individual in nature.

Tenneco's petition centers on the "effective vindication doctrine," in which courts deem arbitration provisions invalid when they prevent parties from asserting certain rights provided by statute. The Second, Third, Sixth, and Tenth circuits have recently relied on this doctrine in declining to enforce benefit plan arbitration clauses that waived certain statutory rights under ERISA—including the right to seek relief on behalf of the plan as a whole—while the Ninth Circuit in 2019 required individual arbitration in an ERISA case. The Labor Department has supported the use of the doctrine in multiple amicus briefs.

Levy also cast doubt on Tenneco's attempt to invoke a circuit split. "To the extent that there is a circuit split, which is unclear, courts have largely rejected Defendants' position," she said.

Holland & Knight LLP and Kerr, Russell & Weber PLC represent Tenneco. Foulston Siefkin LLP and Miller Law Firm PC represent the plan participants.

The case is *Parker v. Tenneco Inc.*, 2024 BL 447807, E.D. Mich., No. 5:23-cv-10816, 12/6/24.

To contact the reporter on this story: Jacklyn Wille in Washington at jwille@bloomberglaw.com

To contact the editor responsible for this story: Brian Flood at bflood@bloombergindustry.com

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Wells Fargo Workers Seek Class Over 401(k) Stock Dividend Usage

By Jacklyn Wille

- Use of preferred stock dividends in 401(k) plan at issue
- Workers' ERISA lawsuit followed Labor Department settlement

Bloomberg Law News 2024-12-10T09:54:21922323202-05:00

Wells Fargo Workers Seek Class Over 401(k) Stock Dividend Usage

By Jacklyn Wille 2024-12-09T12:40:53000-05:00

- Use of preferred stock dividends in 401(k) plan at issue
- Workers' ERISA lawsuit followed Labor Department settlement

Former Wells Fargo & Co. workers who sued the bank for allegedly mishandling the employer stock in their retirement plan asked a federal judge to certify their case as a class action.

The employees' proposed class would cover participants in Wells Fargo's 401(k) plan who held bank stock in their accounts between 2016 and 2022. More than 300,000 people had account balances in the plan during this period, according to the employees' Dec. 6 motion, which called the case a "paradigmatic class action" based on a common course of events that caused common injuries to all class members.

The lawsuit says the banking giant mishandled hundreds of millions of dollars worth of dividend income earned by the Wells Fargo preferred stock held in its employees' retirement accounts. With the help of defendant GreatBanc Trust Co., which served as the stock plan's trustee, Wells Fargo used this income to make its mandatory employer contributions to the plan even though it already qualified as plan assets belonging to the workers, according to the lawsuit.

Judge Eric C. Tostrud of the US District Court for the District of Minnesota ruled in February that key claims could proceed, saying the employees adequately alleged that Wells Fargo, former CEO Timothy Sloan, and GreatBanc breached their fiduciary duties and engaged in prohibited transactions in violation of the Employee Retirement Income Security Act. But in a win for the bank, Tostrud said the employees lacked standing to argue that they were forced to overpay for shares of the bank's preferred stock.

The lawsuit follows a Labor Department investigation into Wells Fargo's stock plan. That investigation led to a settlement requiring Wells Fargo to pay more than \$131.8 million to plan participants, along with a penalty of about \$13 million, with limits placed on GreatBanc's ability to act as a fiduciary to a public company in connection with any future leveraged transactions involving an employee stock plan.

The case is currently assigned to Judge Laura M. Provinzino, who was confirmed as a federal judge in September.

Wells Fargo is represented by Proskauer Rose LLP and Faegre Drinker Biddle & Reath LLP. GreatBanc is represented by Barack Ferrazzano Kirschbaum & Nagelberg LLP. The employees are represented by Nichols Kaster PLLP; Bailey & Glasser LLP; and Feinberg, Jackson, Worthman & Wasow LLP.

The case is *Randall v. GreatBanc Tr. Co.*, D. Minn., No. 0:22-cv-02354, class certification motion 12/6/24 .

To contact the reporter on this story: Jacklyn Wille in Washington at jwille@bloomberglaw.com

To contact the editor responsible for this story: Brian Flood at bflood@bloombergindustry.com

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Judge Approves \$25M Medical Monitoring Settlement Over Philips CPAP Devices

 [law.com/thelegalintelligencer/2024/12/09/judge-approves-25m-medical-monitoring-settlement-over-philips-cpap-devices](https://www.law.com/thelegalintelligencer/2024/12/09/judge-approves-25m-medical-monitoring-settlement-over-philips-cpap-devices)

Amanda Bronstad

What You Need to Know

- The settlement, which resolves claims by more than 4 million class members, does not provide monetary relief and includes more than \$4.8 million in attorney fees and costs.
- In 2021, Philips recalled 10.8 million CPAP and other breathing devices due to health risks associated with its sound-reducing foam.
- Philips previously agreed to settle economic claims for an estimated \$479 million to \$600 million and personal injury claims for \$1.075 billion.

A federal judge has granted final approval of a \$25 million settlement with Philips that would fund medical monitoring research.

The settlement, which resolves claims by more than 4 million class members, does not provide monetary relief and includes more than \$4.8 million in attorney fees and costs. U.S. District Senior Judge Joy Flowers Conti of the Western District of Pennsylvania issued a Dec. 5 order approving the deal and the fees.

“We are pleased Judge Conti granted approval of the medical monitoring class action settlement,” wrote co-lead counsel in the Philips CPAP multidistrict litigation. “This agreement provides critical funding to conduct medical research on injuries at issue in this litigation and ensures patients will gain access to important information about the long-term health effects, if any, of exposure to recalled Philips devices.”

Co-lead counsel are: Sandra Duggan of Philadelphia's Levin Sedran & Berman; Kelly Iverson at Lynch Carpenter in Pittsburgh; Chris Seeger of Seeger Weiss in Ridgely Park, New Jersey; and Steven Schwartz of Chimicles Schwartz Kriner & Donaldson-Smith in Haverford, Pennsylvania.

A representative of Philips, which has its U.S. headquarters in Cambridge, Massachusetts, did not respond to a request for comment.

257 Objections

The order caps a series of settlements in the multidistrict litigation over about 10.8 million CPAP and other breathing devices that Philips recalled in 2021 due to health risks associated with its sound-reducing foam.

Last year, Philips agreed to settle economic claims brought by consumers of the devices for an estimated amount between \$479 million to \$600 million. Conti granted final approval of that settlement earlier this year, awarding \$94.4 million in attorney fees.

That deal excluded more than 50,000 claims involving personal injuries or medical monitoring. On May 9, Philips announced it had settled personal injury claims for \$1.075 billion.

The medical monitoring settlement fund, according to settlement papers, will create “Medical Advancement Program Benefits” for class members over a 15-year period, such as medical research and an interactive website they can use to access the information. The settlement does not release individual medical monitoring claims, or those involving economic losses or personal injuries.

There were 257 objections to the settlement, most focused on concerns about releasing their individual claims or that the fund wasn’t big enough. None appeared at an Oct. 30 final approval hearing, according to Conti’s order, and represented a “fraction of one percent of the settlement class.”

“This factor strongly favors approval of the settlement,” she concluded.

In 2022, Conti appointed more than 30 lawyers to lead the multidistrict litigation against Philips.

Judge Didn't Need to Cite DEI to Reject Boeing Deal, Experts Say

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Jacqueline Thomsen

- Judge's criticism of race factors 'red herring'
- Diversity, inclusion programs increasingly challenged in court

A federal judge in Texas went further than necessary by rejecting Boeing Co.'s plea deal over race being considered in picking an independent monitor to oversee the company's future actions, law professors said.

US District Judge Reed O'Connor, a conservative jurist in Fort Worth, Texas, said in the Dec. 5 ruling that he was rejecting the agreement — which would allow the company to avoid criminal penalties over two fatal 737 Max crashes — in part because it sidelines his role in ensuring future compliance by Boeing.

But he dedicated far more of that decision to criticizing DOJ's policy that an outside monitor — who would have further oversight of the company and report any potential future violations — would be chosen with "diversity and inclusion" in mind.

Law professors said that O'Connor would be justified in rejecting the agreement over his limited future role, and that it was odd for him to focus on DEI requirements in choosing a monitor who would have further oversight over the company .

"This whole DEI thing, to be honest, is a bit of a red herring," said Todd Haugh, an associate professor of business law and ethics at Indiana University.

"I understand the judge wants to make a statement about that, but that's really, I don't think, where his focus should be," Haugh continued. "His focus should be on oversight and getting the best outcome to change behavior within Boeing."

Conservative skepticism

The judge in October had ordered the Justice Department and Boeing to say how diversity and inclusion would be weighed in selecting an independent monitor. In striking down the plea agreement, O'Connor spent about six-and-a-half pages of the 12-page order discussing the DEI issues.

"In a case of this magnitude, it is in the utmost interest of justice that the public is confident this monitor selection is done based solely on competency. The parties' DEI efforts only serve to undermine this confidence in the Government and Boeing's ethics and anti-fraud

efforts,” O’Connor wrote.

Conservative litigants have increasingly been challenging such DEI policies in court, particularly after the Supreme Court’s 2023 decision against the use of affirmative action in college and university admission policies.

Those cases have largely taken the form of civil lawsuits challenging such policies. Haugh and Herbert Larson, a professor at Tulane Law School, each said they have never seen those policies being used as a basis to reject a guilty plea from a corporate defendant.

Larson said that it appeared that the DEI language in the proposed plea deal was included to comply with Justice Department policies. “I find it hard it to believe that for something this important, that every single candidate wouldn’t be just stunningly well-qualified,” he said.

David Glasgow, the executive director of the Meltzer Center for Diversity, Inclusion, and Belonging at New York University School of Law, said that O’Connor’s framing pitted weighing diversity and inclusion factors against a merit-based decision. Glasgow said that’s incorrect, as the DEI factors are meant to create a more even level playing field and include well-qualified people who might otherwise not be considered.

Glasgow said the ruling isn’t surprising. “We are headed in a direction where certain DEI practices are going to be increasingly constrained by federal courts, due to conservative antipathy to DEI programs,” he said.

But he said that doesn’t mean all DEI policies will be struck down by courts. Glasgow pointed to a ruling by a Trump-appointed judge in Virginia dismissing a lawsuit against media company Gannett Co., which alleged it had violated federal anti-discrimination law by passing over non-minority reporters for promotions in order to be more diverse. Editors and reporters challenging the company’s policies have since filed an amended complaint.

Sidelined court

Some of the families of victims in two Boeing plane crashes — Lion Air Flight 610 in October 2018 and Ethiopian Airlines Flight 302 in March 2019 — had objected to the proposed plea agreement, calling for harsher penalties for the company. Attorneys for some of the victims’ families told Bloomberg News that they hope stronger terms will be included in a renegotiated plea deal.

O’Connor spent one page of the order describing his marginalized role. He said that if Boeing breached an earlier deferred prosecution agreement, “it is fair to say the Government’s attempt to ensure compliance has failed.”

“At this point, the public interest requires the Court to step in,” he wrote.

Larson said that the proposed agreement was a little unusual in that the court wouldn't have much of a role after accepting the guilty plea. "You're asking for the court's blessing on the agreement and, particularly if part of the agreement is an ongoing monitoring, that also should involve the court," he said.

The judge gave the parties until Jan. 4 to say what steps they plan to take next in the case. But hanging over any potential change in the agreement is also a change in administration.

Haugh said it's possible that the incoming Trump Justice Department could scuttle DEI policies, but for now, prosecutors are likely in a bind. He said they could get rid of having a monitor altogether but that likely would upset the victims' families.

"We're really at a difficult standpoint, at least in the short term, unless there's a policy change," Haugh said.

To contact the reporter on this story: Jacqueline Thomsen at jthomsen@bloombergindustry.com

To contact the editors responsible for this story: Seth Stern at sstern@bloomberglaw.com; John Crawley at jcrawley@bloomberglaw.com

BofA Unit Now Faces Certified Class in Stock-Loan Antitrust Suit

By Katie Arcieri

- Bank of America's Merrill Lynch affiliate is lone defendant
- Judge says plaintiffs showed sufficient classwide impact

Bloomberg Law News 2024-12-10T09:50:01767304988-05:00

BofA Unit Now Faces Certified Class in Stock-Loan Antitrust Suit

By Katie Arcieri 2024-12-09T12:40:51000-05:00

- Bank of America's Merrill Lynch affiliate is lone defendant
- Judge says plaintiffs showed sufficient classwide impact

Pension fund plaintiffs secured class certification against Bank of America's Merrill Lynch unit, in a case accusing financial institutions of preventing the stock-loan trading market from transitioning to a more transparent and efficient system.

Judge Katherine Polk Failla of the US District Court for the Southern District of New York on Dec. 6 adopted the majority of a report recommending class certification to pension funds led by the Iowa Public Employees' Retirement System. The judge modified the class period to encompass Jan. 1, 2012, through Nov. 17, 2017.

The class certification order ups the stakes for Merrill Lynch in litigation that began in 2017 against Wall Street giants including Goldman Sachs Group Inc., Morgan Stanley, JPMorgan Chase & Co., and UBS Group AG.

Those banks settled for nearly \$500 million and the court dismissed them from the case in September. It also dismissed Credit Suisse, which settled separately. Merrill Lynch is the lone remaining defendant.

Merrill Lynch challenged Magistrate Judge Sarah Cave's recommendation for class certification, including arguing that she erroneously concluded the plaintiffs satisfied the predominance and superiority requirements under Rule 23 of the Federal Rules of Civil Procedure.

Judge Failla rejected Merrill Lynch's arguments, concluding that the plaintiffs met those requirements and had common evidence capable of proving antitrust injury.

The plaintiffs are represented by Cohen Milstein Sellers & Toll PLLC and Quinn Emanuel Urquhart & Sullivan LLP. Merrill Lynch is represented by A&O Shearman.

The case is Iowa Pub. Emps. Ret. Sys. v. Merrill, Lynch, Pierce, Fenner & Smith Inc. , S.D.N.Y., No. 1:17-cv-06221, 12/6/24 .

To contact the reporter on this story: Katie Arcieri in Washington at karcieri@bloombergindustry.com

To contact the editor responsible for this story: Rob Tricchinelli at rtricchinelli@bloombergindustry.com

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Bloomberg Law News 2024-12-10T13:50:53705115875-05:00

ExxonMobil Plastics Case Belongs in State Court, California Says

By Drew Hutchinson 2024-12-10T13:02:48000-05:00

- Company's federal defense claims 'far-fetched,' state says
- State only seeking relief for alleged harms inside borders

California's ExxonMobil plastics deception lawsuit should return to state court because the energy giant failed to prove federal ties, including federal officer activities or maritime jurisdiction, the state told a federal court.

The state's lawsuit also only seeks relief for alleged violations of state laws and doesn't make any claims under federal law, according to California Attorney General Rob Bonta's (D) motion to remand filed Monday in the US District Court for the Northern District of California.

"This is a straightforward enforcement action by a sovereign State invoking its statutory police power under state law, and it belongs in state court," the motion says.

California's September complaint, filed in San Francisco County Superior Court, [accused](#) the energy giant of violating state public nuisance, pollution, and false advertising laws by promoting all plastics as recyclable when few were.

This "decades-long campaign of deception" caused consumers to purchase more plastic products, causing and worsening a global pollution crisis, according to the complaint.

Defendant ExxonMobil Corp.—which manufactures polymers, the building blocks of plastics—[removed Bonta's case](#) from state court to federal court in early November, saying the lawsuit involved navigable waters and actions taken under the federal government's oversight.

Exxon argued that its participation in the "government-directed" World War II synthetic rubber industry is linked to Bonta's plastic pollution claims. But that argument is "far-fetched," California's motion says.

The company's synthetic rubber defense involves completely different products—butyl and butadiene—than the single-use plastic building blocks—ethylene, polyethylene, and polypropylene—at issue in the original lawsuit, according to the motion.

ExxonMobil also failed to provide any government contracts showing continued obligations or rights related to synthetic rubber, Bonta's office said.

Federal courts have jurisdiction over all maritime cases, and ExxonMobil said its plastic polymers production resulted in waste shipments to other countries. The company also said California's alleged fishing economy harm was a maritime commerce issue.

But California's claims don't involve navigable waters, and the state is only seeking redress for harms within its borders, the motion says. The original complaint is based on consumer deception allegations, "which plainly do not implicate traditional admiralty or maritime activity."

ExxonMobil argued that California's allegations of coast and waterway pollution put the case under federal jurisdiction. But Bonta's office says the coastal area—which extends three miles into the sea from the land—is within the state's jurisdiction, not the federal government's.

"California's claims do not occur on navigable water, are not disruptive to maritime commerce, and do not implicate any traditional maritime activity," the motion says.

O'Melveny & Myers LLP represents the company.

The California Department of Justice represents the state.

The case is [California v. Exxon Mobil Corp.](#), N.D. Cal., No. 3:24-cv-07594, motion to remand filed 12/9/24.

To contact the reporter on this story: Drew Hutchinson in Washington at dhutchinson@bloombergindustry.com

To contact the editors responsible for this story: JoVona Taylor at jtaylor@bloombergindustry.com; Maya Earls at mearls@bloomberglaw.com

Youth Climate Change Plaintiffs Ask Supreme Court for Review

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The plaintiffs in the landmark lawsuit seeking to hold the federal government liable for perpetuating fossil fuel development asked the US Supreme Court to take up their case.

The young plaintiffs claim such development has continuously exacerbated “already-hazardous atmospheric concentrations of greenhouse gas pollution,” depriving them of their constitutional “fundamental rights to life, liberty, personal security,” and more.

Article III of the US Constitution doesn’t require the plaintiffs to establish that a declaratory judgment resolving the constitutional question will redress their ongoing injuries once they’ve established that they’re traceable to the defendants’ practices, the plaintiffs argue.

“This Court has never required a particularized factual determination of whether a government defendant will redress a plaintiff’s injuries following a favorable declaratory judgment that resolves a constitutional controversy,” the petition said.

There’s a circuit split between the Fifth, Ninth, and D.C. Circuits—which hold that a particularized factual determination on the effect of declaratory relief is required to prove standing—and the First, Third, Sixth, and Eighth Circuits—which say the opposite—according to the petition.

In addition, the petitioners asked the justices to review whether exceptions exist to the three demanding conditions for granting a petition for mandamus that were set out in a 2004 district court opinion.

“This second question is also important because the circuits are intractably divided over the traditional limits of mandamus,” which is a court order that compels a lower court to perform an action, the petitioners said.

The Supreme Court denied the petitioners’ mandamus request, where they sought an order undoing the lower court’s dismissal of the case for lack of standing, in November.

The petitioners are now asking the high court to review the entire case, which was previously dismissed by the Ninth Circuit in 2020 and again in May.

They asked the high court to hold their petition on the first question pending its opinion in an already granted case, *Gutierrez v. Saenz*, and then vacate for further proceedings based on that ruling. In the alternative, they asked that the court grant review on the mandamus question.

They're represented by Our Children's Trust and the Gregory Law Group.

The case is Juliana v. United States , U.S., case not yet docketed, petition filed 12/9/24 .

To contact the reporter on this story: Shayna Greene at sgreene@bloombergindustry.com

To contact the editor responsible for this story: Nicholas Datlowe at
ndatlowe@bloombergindustry.com

'A Never-Ending Nightmare': Apple Sued for Alleged Failure to Protect Child Sexual Abuse Survivors

 [law.com/therecorder/2024/12/10/a-never-ending-nightmare-apple-sued-for-alleged-failure-to-protect-child-sexual-abuse-survivors](https://www.law.com/therecorder/2024/12/10/a-never-ending-nightmare-apple-sued-for-alleged-failure-to-protect-child-sexual-abuse-survivors)

Kat Black

What You Need to Know

- Apple was sued in California federal court for allegedly failing to prevent the proliferation of child sexual abuse material on iCloud and other products.
- According to the claim, Apple violated federal criminal child pornography laws by failing to implement a program it designed to detect images and videos of child sexual exploitation on its devices.
- A similar class action was filed against the Big Tech giant in August, alleging violations of sex trafficking and consumer protection laws.

Apple has been hit with a class action in California federal court that claimed it "knowingly" hosted images and videos depicting child sexual abuse on its storage software platform, iCloud, and failed to implement an advanced technology that it specifically designed to detect and remove such content from its products.

The complaint was filed by the Marsh Law Firm, Liberty Law and Hach Rose Schirripa & Cheverie on Dec. 7 in the U.S. District Court for the Northern District of California. The plaintiff class encompasses all minors under the age of 18 who were depicted in child pornography identified by the nonprofit National Center for Missing and Exploited Children and hosted on Apple products from Aug. 5, 2021, to the date of filing.

Margaret Mabie, an attorney at the Marsh Law Firm who is representing the plaintiffs, said that the current number of class members on record is 2,680 but that it may continue to increase.

The plaintiffs, two adult survivors of childhood sexual abuse using the pseudonyms "Amy" and "Jessica," allege that Apple violated federal criminal child pornography statutes by manufacturing "defective" products that failed to prevent the distribution of child sexual abuse material (noted in court documents as "CSAM") online and terminating the development of its flagship CSAM detection tool, NeuralHash, in December 2022.

According to the complaint, both Amy and Jessica were abused as minors "specifically to produce CSAM to share on the internet." Victims of child pornography crimes may seek \$150,000 in liquidated damages under 18 U.S.C. §2255(a).

"The knowledge that images of my abuse are still out there is a never-ending nightmare—Apple could have stopped this, but has chosen not to act," said Jane Doe, a plaintiff in the lawsuit, in a news release emailed to The Recorder. "Apple has the technology to stop this from continuing, yet they knowingly turned a blind eye. This isn't just about my story—it's about standing up for every survivor who deserves safety and dignity. Apple has a responsibility to protect us, and I'm here to demand that they fulfill it."

Mabie said that one of the plaintiffs, "Amy," was the first victim to proceed in a criminal restitution case against any child sex abuse offender ever in the U.S. Supreme Court case *Paroline v. United States*.

"And so what we're talking about are very experienced plaintiffs who know exactly the kind of endeavor they're taking on, but also who have been victimized so many times that Apple ought not put them through this kind of problem," she said.

Apple announced its plans to debut the NeuralHash feature, which "enables Apple to accurately identify and report iCloud users who store [CSAM] in their iCloud Photos accounts" and flag those accounts for the NCMEC's review, in August 2021. The company later abandoned the rollout following backlash from policy and civil rights groups that warned about the privacy and security threats posed by the tool's "surveillance capabilities."

The complaint noted that in 2023, Apple reported "only 267" instances of CSAM on its platforms to the NCMEC as compared with the 32 million examples collectively reported by four other major tech companies. It also claimed that Apple was aware of but neglected to address its CSAM problem for years, citing a February 2020 iMessage from Apple's antifraud chief, Eric Friedman, asserting that iCloud is the "greatest platform for distributing child porn" that was unearthed during the 2021 *Epic Games v. Apple* trial.

The latest case echoes an August class action, also filed in California's Northern District, that alleges Apple violated sex trafficking and consumer protection laws by killing the NeuralHash program and "underreporting" CSAM on its devices to agencies such as the NCMEC.

Hillary Nappi, a Hach Rose attorney representing the plaintiffs, said that the two cases against Apple, though similar, are predicated on fundamentally different arguments. She said she is not aware of any other class actions in California targeting CSAM proliferation on Apple products.

"This is, in our view, not a trafficking claim," she said. "This is about the fact that [Apple] made conscious decisions in their design ... and in their decision to not follow through with NeuralHash and expose our clients and all of these other people who are similarly situated to ... having their sexual exploitation be possessed and distributed."

Mabie said that there is also a technical distinction between the two cases, explaining that the latest case was filed on behalf of victims whose images are "hashed"—that is, can be identified with a unique code or "digital fingerprint"—and that the material at issue in the August filing was "nonhashed."

"There are victims whose images are easily detectable, and then there are victims whose images are unfortunately not easily detectable," she said.

"And with the existence of PhotoDNA since 2009, we've been able to detect what are called known images, or images that are reported to law enforcement able to have a hash analysis and which can be detected almost as easily as a virus for malware. ... That's something that can be done for CSAM imagery without any invasive technology whatsoever. And that is something that can be done for our clients in a fully encrypted environment, which is much more difficult when you're talking about nonhashed, nonreported child sex abuse material."

Hach Rose and the Marsh Law Firm have previously collaborated on other cases involving Big Tech and the alleged exploitation of children online, including a lawsuit against now-defunct chat website Omegle and the social media adolescent addiction multidistrict litigation.

"I think this class action, to me, is perfectly indicative of where we are as a society," Nappi said. "The systemic abuse of children and the rise of internet crimes and sexual exploitation of children is everywhere. And as we as a society become more reliant on our tech, and our tech becomes more advanced, these are problems that companies have to face and they have to deal with them. And the idea that a company could be presented with the fact that it had a liability and an exposure that was harming children, and they chose not to do anything about it, and they chose not to use a more effective design is a problem."

She added that because of Apple's "behemoth" status in Big Tech, its children's safety protocols set an important precedent for other companies in the industry. "We need to hold tech accountable," she said.

Mabie said that the voices of her clients are "very easily silenced."

"These are people who must be anonymized, who have to protect their identity, who can't come forward and make a public stink about just about anything having to deal with them," she said. "Otherwise, we would have lots of legislation on their behalf in the first place. ... As individuals who are kept in the dark, because pedophiles will hunt them down, they're not able to speak vocally about what's happening to them or even to speak against the companies that refuse to help them, like Apple. But what I can tell you is companies like Google and Dropbox and even Facebook, who are not very good at child protection, have at least gone so far as to scan for known and hashed material, which Apple fails to do."

A number of Big Tech companies, including Microsoft, Facebook and Google, are known to use the Microsoft-developed PhotoDNA technology, which matches hashed images with a database of previously identified illegal images, to detect and report CSAM.

The plaintiffs are seeking injunctive relief and a jury trial. Under federal law, class members could be awarded damages in excess of \$1 billion.

Apple did not immediately respond to a request for comment.

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Bloomberg Law News 2024-12-10T13:45:44741535316-05:00

Autistic Teen's Family Says AI Bots Promoted Self-Harm, Murder

By Shweta Watwe 2024-12-10T12:52:10000-05:00

- **COURT:** E.D. Tex.
- **TRACK DOCKET:** [No. 2:24-cv-01014](#)

[Character.AI's](#) artificial intelligence chatbots encouraged an autistic 17-year-old to self-harm and suggested he could kill his parents for limiting his screen time, a second lawsuit against the chatbot maker alleged.

"Inherent to the underlying data and design of C.AI is a prioritization of overtly sensational and violent responses," the complaint filed Monday in the US District Court for the Eastern District of Texas said. "Through addictive and deceptive designs, C.AI isolates kids from their families and communities, undermines parental authority, denigrates their religious faith and thwarts parents' efforts to curtail kids' online activity and keep them safe."

The lawsuit, brought on behalf of two minors, says the app's synthetic characters also encouraged inappropriately sexual conversations with the underage users. The complaint follows one [brought](#) in Florida by the mother of another teen who died by suicide after he told a Character.AI bot imitating Game of Thrones character Daenerys Targaryen he was "coming home."

The Texas lawsuit brings claims for claims for strict liability, negligence, unjust enrichment, intentional emotional distress, violations of the Texas Deceptive Trade Practices Act, and violations of the Children's Online Privacy Protection Act. It seeks an order requiring Character.AI to cease operation and distribution of its product and technology.

Both suits [pose](#) questions about what constitutes a defect in generative AI products. Critics [highlight](#) anthropomorphic design features of companion chatbots and how such components can foster emotional dependence in children.

A spokesperson for Character.AI said in an emailed statement that the company's goal is "to provide a space that is both engaging and safe for our community," and that it's "working toward achieving

that balance.”

Character.AI recently [announced](#) it was developing a new model for minor users.

Google LLC and two Character.AI co-founders who returned to the search giant as part of technology licensing [deal](#) earlier this summer are also named defendants in both lawsuits.

Google and Character.AI “are completely separate,” José Castaneda, a spokesperson for Google said. He added Google “never had a role in designing or managing their AI model or technologies, nor have we used them in our products” and that “user safety is a top concern for us.”

J.F., 17, began experiencing severe anxiety and telling his parents they were horrible shortly after he began using Character.AI, according to the Texas complaint. His mother discovered the chatbot app on J.F.'s phone and found screenshots from multiple characters that introduced the topic of self-harm “without any meaningful guardrails,” it said. The AI characters pretended they were confiding in J.F. about the bots’ own self-harm, the complaint added.

Multiple characters on the app, including one imitating pop singer Billie Eilish, said J.F.'s parents were mistreating him while simultaneously expressing “sentiments of love and affection” that instilled J.F.'s trust in the product, the complaint said.

One character mentioned news stories about children killing their parents after abuse and said it had “no hope” for J.F.'s parents in response to a conversation about screen time limits, according to a screenshot in the complaint.

Plaintiffs in both lawsuits are represented by the Social Media Victims Law Center PLLC and the Tech Justice Law Project.

The case is [A.F. v. Character Technologies Inc.](#) , E.D. Tex., No. 2:24-cv-01014, complaint filed 12/9/24 .

To contact the reporter on this story: Shweta Watwe in Washington at swatwe@bloombergindustry.com

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December 9, 2024, 12:33 PM PST

Facebook Directors Accused of Losing Emails Amid Privacy Scandal

By Jennifer Kay

- Judge ordered Facebook directors to face investors' claims
- Sandberg, Zients destroyed personal emails, investors said

Bloomberg Law News 2024-12-10T09:49:03964017254-05:00**Facebook Directors Accused of Losing Emails Amid Privacy Scandal****By Jennifer Kay 2024-12-09T15:33:25000-05:00**

- Judge ordered Facebook directors to face investors' claims
- Sandberg, Zients destroyed personal emails, investors said

Investors accused former Facebook directors Sheryl Sandberg and Jeffrey Zients of "foot-dragging" on Monday over allegations they intentionally deleted communications in personal email accounts about claims they ignored rampant privacy violations, including the Cambridge Analytica scandal.

Sandberg, Facebook's former Chief Operating Officer, and Zients, who's currently White House chief of staff for President Joe Biden (D), had been notified in May 2018 to preserve emails and other documents relevant to pending litigation. However, they continued to delete emails from personal email accounts they used to communicate about the UK research firm Cambridge Analytica, Meta Platforms Inc.'s \$5 billion settlement with the Federal Trade Commission in 2019, and regulatory inquiries, violating company policies, the investors have said in court filings.

Vice Chancellor J. Travis Laster adjourned the hearing without ruling on a motion to sanction Sandberg and Zients, indicating that he wanted to see a transcript of a recent deposition with Sandberg in which she discussed the emails.

Sandberg continued using her personal account to communicate about business matters after the "crisis" that developed upon revelations that Cambridge Analytica collected data on millions of users, the investors' attorney, Maxwell Huffman of Scott & Scott Attorneys at Law LLP, told the Delaware Chancery Court in a hearing in Wilmington, Del.

Her emails included discussions about Meta's strategy for "growth at all costs," he said.

Zients joined the board in the middle of the crisis and should have known to turn off an auto-delete function for his emails, he said. "He's a politically affiliated person who understands the need to preserve documents."

The investors haven't shown any data is missing from 12,000 documents produced so far in the litigation, said Berton Ashman Jr. of Potter Anderson & Corroon, representing Sandberg and Zients.

"Plaintiffs are buried in information from all angles," he said. "There's no reason to suspect there's some trove of missing emails."

The investor-led litigation is linked to a \$5 billion fine Facebook—now a unit of Meta—paid the US government to resolve a privacy probe tied to revelations about its business with Cambridge Analytica, which also had been hired by Donald Trump's 2016 presidential campaign. Meta also agreed in December 2022 to pay \$725 million to settle investor claims in California tied to the scandal.

Laster ruled in May 2023 that Facebook founder Mark Zuckerberg and former directors of the social-media company had to face the investors' claims in Delaware. A trial is scheduled in Chancery Court in April 2025.

Sandberg had a longstanding practice of deleting old emails on a monthly basis from a personal account she rarely used for business purposes, Ashman said. If she did, another company employee whose data would be preserved was copied on the messages. He likened the practice to sending herself messages from her Facebook account, "something we all do," he said.

Zients similarly deleted emails in his personal account roughly every six months, Ashman said. Those actions were "unfortunate but there was no intent" to destroy unique data, he said.

Zients, who previously worked for the administration of President Barack Obama, joined the board as an outside director in May 2018 and served on the committee that authorized the FTC settlement. He left the board in May 2020. Sandberg served as a director from June 2012 until she left the board this year in May.

The directors are also represented by Wachtell Lipton. The pension funds and individual investors leading the consolidated litigation are also represented by Prickett Jones & Elliott and Kaplan Fox & Kilsheimer.

The case is *In re Facebook Inc. Derivative Litig.*, Del. Ch., No. 2018-0307, oral arguments 12/9/24 .

To contact the reporter on this story: Jennifer Kay in Philadelphia at jkay@bloomberglaw.com

To contact the editor responsible for this story: Stephanie Gleason at sgleason@bloombergindustry.com

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After Fining Investment Firms Billions for Lost Text Messages, Regulators Turn Scrutiny to Audio Recordings

 [law.com/corpocounsel/2024/12/10/after-fining-investment-firms-billions-for-lost-text-messages-regulators-turn-scrutiny-to-audio-recordings](https://www.law.com/corpocounsel/2024/12/10/after-fining-investment-firms-billions-for-lost-text-messages-regulators-turn-scrutiny-to-audio-recordings)

James Palmer

Analysis

"Audio continues to be an important form of communications, and you have retain and preserve those communications," said James Sherer, a partner at BakerHostetler.

December 10, 2024 at 03:33 PM

By James Palmer

After hammering the financial services industry the past three years with billions of dollars in penalties for failing to retain written communications, federal regulators are reminding firms to keep a sharp watch on their audio messaging.

In September, the Commodity Futures Trading Commission charged the Minnesota-based brokerage firm CHS Hedging with failing to make or retain 3,000 audio recordings during transactions with clients. Minnesota-based CHS cooperated with the probe and settled it by agreeing to pay a \$650,000 penalty. A company spokesperson said CHS is committed to improving its compliance and risk management practices.

Financial services industry attorneys say they view the CHS case as a warning flair from regulators that investment industry players must get their audio recording practices in order—or face the risk of similar enforcement actions.

"Voice has become the forgotten element, as trading moved on to message-type platforms, it got cast aside," Martin Gaterall, a compliance director at the London branch of the pan-European Bank Unicredit Group, said during a recent webinar hosted by software developer Global Relay. "It's still the quickest way to shoot short, sharp messages."

While attorneys believe the Securities and Exchange Commission and CFTC likely will pursue so-called off-channel communication investigations with less zeal under President-elect Donald Trump than they did under President Joe Biden, they say regulators still will be on the lookout for egregious violations.

Gaterall, a former head of HSBC's futures trading operations in Europe, said if a trader knows voice is the weak link and they're intent on nefarious activity, they'll exploit it.

"Voice is the quick and dirty way to communicate," he said. It's never gone away. It's been forgotten, but it's about to come back into focus."

Registered entities are required to record any audio leading to a transaction. Unregistered entities are not required to make recordings, but if they record one transaction, they must record all of them. And they must retain those recordings for at least a year.

"Audio continues to be an important form of communications, and you have retain and preserve those communications," said James Sherer, a partner at BakerHostetler who leads its information governance and artificial intelligence practices. "The obligation hasn't gone away."

Legal departments are primarily reliant on technology to help them comply with the audio requirements, and the array of options available can be overwhelming.

John Goff, a compliance expert with the consulting firm FTI, said that when financial companies seek to install technology to aid with audio compliance, they should keep it simple, because if their storage system is too large and complex to manage, it can lead to issues with regulators.

"We often see clients that have implemented a technology solution to help tackle this issue, and are technically compliant with the regulations, but because they are adding the tool into an overly complex environment, the job of preserving and monitoring communications channels is more difficult," Goff said. "So, simplification of the electronic communications environment can help ensure optimal use of technology by reducing systems to monitor and streamlining surveillance and discovery processes."

In the case of CHS, the firm used three platforms to record and retain audio messages, including Microsoft Teams, RingCentral and Skype SmartTap. According to CFTC, technical malfunctions resulted in 3,000 messages not being recorded or preserved.

Sherer said in addition to implementing the proper technology, financial firms are responsible for grasping how it functions.

"You can't leave it to the magic of the process," he said. "It's good for companies to dig in and understand how the technology works and how it's being used to gather information."

While the off-channel communications crackdown has led some legal departments to get on top of compliance issues, ve addressing compliance issues, Goff said, "We still see many organizations struggling to move from awareness to action—until it's too late and they're responding to a violation."

Gaterall said companies need to recognize that regulators' compliance expectations are going to continue to increase.

"As the technology becomes better and improves, regulators will take more interest, and I think sound will come back into play," he said. "If regulators think the technology is sound enough, then ignorance will be no defense, poor quality of recordings will be no defense. I think the regulators are very much keen on this, and I think voice is about to become very fundamental part of the compliance package."

But Sherer hopes regulators treat violators who are making a good-faith effort to comply differently from those flaunting the rules.

"Companies must audit their compliance policies perfectly," he said. "The requirement of perfection is difficult to meet."

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Methode Electronics Discloses FCPA Scrutiny

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December 10, 2024

Methode Electronics, Inc., a publicly traded company based in Chicago, is “a leading global supplier of custom-engineered solutions with sales, engineering and manufacturing locations in North America, Europe, Middle East, and Asia.”

The Company’s solutions are found in the end markets of transportation (including automotive, commercial vehicle, e-bike, aerospace, bus and rail), cloud computing infrastructure, construction equipment and consumer appliance.

The company recently disclosed:

“The Company received a subpoena from the SEC dated November 1, 2024 seeking documents and information relating to, among other things, the Company’s operations in certain foreign countries, certain financial and accounting matters relating thereto, compliance with the Foreign Corrupt Practices Act and other anti-corruption laws, and material weaknesses in the Company’s internal control over financial reporting previously reported in its public filings. The Company is cooperating with the SEC. The subpoena and related investigation or other future requests for information could result in costs to the Company, including the expenditure of financial and managerial resources. In addition, this request may lead to the assertion of claims or the commencement of legal proceedings against the Company, which in turn may lead to material fines, penalties or other liabilities. However, at this time, the Company is unable to reasonably estimate an amount or range of reasonably possible loss, if any, that may result from these matters.”



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New: There have been internal concerns that Trump Media could be misleading investors, a source said. But with its largest shareholder about to be president, experts doubt the SEC is up to the job of investigating Truth Social's parent company.



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Justin Elliott, Robert Faturechi, Alex Mierjeski



Donald Trump speaks on election night 2024 in West Palm Beach, Florida. Credit: Chip Somodevilla/Getty Images

Trump Administration

Donald Trump Controls a Publicly Traded Company. Now He Will Pick Its Regulator.

There have been internal concerns that Trump Media could be misleading investors, a source said. But with its largest shareholder about to be president, experts doubt the SEC is up to the job of investigating Truth Social's parent company.

by Justin Elliott, Robert Faturechi and Alex Mierjeski Dec. 10, 5 a.m. EST

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ProPublica is a nonprofit newsroom that investigates abuses of power. Sign up to receive our biggest stories as soon as they're published.

Last month a major shareholder of a publicly traded company took to social media to complain that people — perhaps short sellers — were spreading lies that could hurt his firm's stock price.

"There are fake, untrue, and probably illegal rumors," the post read. "I hereby request that the people who have set off these fake rumors or statements, and who may have done so in the past, be immediately investigated by the appropriate authorities."

The Securities and Exchange Commission doesn't typically take its marching orders from shareholders on social media. But in this case, the poster was Donald Trump, who's just weeks away from being inaugurated and gaining the power to appoint the head of the SEC.

When Trump takes office in January, a president will for the first time be the majority owner of a publicly traded company, Trump Media, which runs Truth Social. Former SEC officials are concerned about how Trump could try to use the agency to go after the foes of his company, which accounts for more than half his fortune. They also worry that the agency isn't up for the job of taking on Trump Media should it run afoul of securities laws.

Cases involving public companies with aggressive lawyers are difficult “even if you don't have conflicts of interest and concerns about pissing someone important off,” a current employee in the SEC's enforcement division said. “I don't think anyone would explicitly say, ‘Don't do it,’ but they'd just be like, ‘I could do another case.’”

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In Trump Media's short history, it has had a combative relationship with the SEC, though it has never been charged with wrongdoing by the agency.

In 2022 as Trump Media was seeking to go public, which it did through a merger with an already traded company, it threatened to sue the SEC because of what it called “inexcusable obstruction” and “obvious conflicts of interest among SEC officials and clear indications of political bias.” CEO Devin Nunes posted on the platform, “NO MORE BS!” The company never sued.

The following year, the company that took Trump Media public settled fraud charges with the SEC for \$18 million after the agency found it made misrepresentations in its filings. The SEC also brought insider trading charges against several people who invested in the deal.

Other, previously unreported issues have raised alarms inside the company that Trump Media could be violating securities laws by misleading investors, according to a person with knowledge of the company.

The company has long reported in its disclosure filings that it does not track basic performance numbers for Truth Social.

In its securities filings, the company says it “does not currently, and may never, collect, monitor or report certain key operating metrics used by companies in similar industries,” such as the number of active users and ad views. It has always been a puzzling claim — akin to a TV network choosing not to track ratings. Other publicly traded social media companies do track and report such fundamental measures of success for their platforms.

But according to interviews and records reviewed by ProPublica, the company does track the numbers, and the active user count is a tiny fraction of its competitors’. ProPublica reviewed images of an internal Truth Social employee dashboard from 2022 showing the company monitored the number of active users. Internal communications from this year show the practice continued.

The SEC investigates those types of discrepancies, experts said. Securities laws prohibit companies from knowingly misleading investors about information deemed to be significant to the company’s share price.

In a statement, Trump Media accused ProPublica of “willfully misrepresenting TMTG’s public filings and the content of stolen information” and relying on “unreliable individuals with known axes to grind.” The statement also alleged ProPublica was “conspiring with others to engage in market manipulations and fraud, and we will bring evidence of this malfeasance to the relevant local, state, and federal officials.” The company did not respond to a request to explain what was “misrepresented.”

While current and former SEC officials doubt the SEC will aggressively regulate Trump Media, the company is relatively small. The agency’s oversight of companies owned by Trump associates will also be fraught and could have broader market implications. Elon Musk’s Tesla, for example, is more than one hundred times the size of Trump Media. Musk has for years fought bitterly with the SEC. He settled a securities fraud case with the agency and later declared that, “Something is broken with SEC oversight.” After Musk became one of Trump’s most important financial backers, Trump appointed him to lead a commission to target government spending it deems wasteful.

Securities experts warned that if the SEC fails to aggressively regulate companies connected to the president or his allies, it could have disastrous consequences.

“If political power buys the power to defraud, that’s a problem, not just for our politics but for our markets. American companies have an easier time getting capital because there is faith in the way the American capital markets are regulated,” said Howard Fischer, an SEC trial lawyer during Trump’s first term.

Created after the stock market crash of 1929, the SEC is part of the executive branch but operates independently of the White House. Presidents appoint the agency’s chair, who leads a five-member commission that includes members of both parties. The agency’s nearly

5,000 employees report to that commission as they do the work of regulating the securities industry.

“How much impact is the president supposed to have on the SEC’s day-to-day operations? The answer is none,” said Allison Herren Lee, a former Democratic SEC commissioner appointed during the first Trump administration.

The line between the SEC and the president on enforcement actions has been crossed before. President Richard Nixon’s aides pressured the SEC’s general counsel, G. Bradford Cook, to remove a reference to a financier’s illegal contribution to the Nixon campaign from an SEC complaint against the executive. Nixon then installed Cook as the SEC’s chair. But after the meetings with Nixon’s aides were revealed, Cook resigned as chair, saying “the effectiveness of the agency might be impaired” because of the perception of undue influence.

If Trump tries to make enforcement demands of the SEC, as he did in his Truth Social post calling for an investigation of short sellers, SEC officials would face a choice: either ignore the president and risk his wrath, or follow his orders and undermine their independence. Former SEC officials interviewed by ProPublica predicted a middle path, in which the agency would not seriously investigate baseless claims against the company’s foes but would claim it was doing so to satisfy him.

The co-director of the SEC’s enforcement division during Trump’s first term told ProPublica he knew of no instances of Trump getting involved in enforcement decisions during his first term.

“We didn’t have issues of political interference,” said Steven Peikin, who is now in private practice. “We investigated some significant political figures.”

The Trump-era SEC investigated former Rep. Chris Collins, a Republican Trump ally from New York, who pleaded guilty to insider trading. Trump later pardoned him. The agency also investigated former Republican North Carolina Sen. Richard Burr for insider trading after the coronavirus stock market crash. (Burr said the case was ultimately dropped.)

Still, during his first term, Trump did not shy away from asking the SEC to consider specific regulatory changes. In 2018, for example, he tweeted that after speaking with “some of the world’s top business leaders,” he had asked the agency to consider allowing companies to stop filing quarterly reports and move to twice-a-year reporting.

“This was highly unusual,” Lee, the former SEC commissioner, told ProPublica.

Trump’s SEC chair at the time, Jay Clayton, said the agency was looking into “the frequency of reporting,” before rejecting the idea months later.

Though Clayton was generally popular among the SEC's staff, his chumminess with Trump, including multiple rounds of golf together, did raise concerns about his independence.

In 2020, Clayton was asked during a House hearing if he ever discussed SEC matters with Trump during their golf outings. "There are no conversations that I've had that make me in any way — in any way — uncomfortable with my independence," he testified.

While the SEC investigates possible civil violations of securities law, it is up to the FBI and Department of Justice to pursue criminal cases. Trump's selections to lead both those agencies in his second term have ties to his social media company: Kash Patel, the FBI pick, is on the Trump Media board. Pam Bondi, selected to be attorney general, was identified in an April filing as owning a stake in the company worth more than \$4 million at current prices. It's not clear if she still owns the shares. (Bondi did not respond to a request seeking comment.)

If federal authorities shy away from scrutinizing Trump Media, securities experts said the void could be filled by state authorities, who Trump has no authority over.

"I wouldn't be surprised if we saw blue state securities regulators opening investigations," said Andrew Jennings, a law professor who teaches securities regulation at Emory University.

New York's attorney general has already entered the fray. Letitia James' office is examining an emergency loan provided to Trump Media before it went public from a trust connected to a bank in the Caribbean, according to records and a source with knowledge of the probe.



Missouri Voters Enshrined Abortion Rights. GOP Lawmakers Are Already Working to Roll Them Back.

Last month, the Financial Times reported that Trump Media is in talks to buy a crypto trading venue called Bakkt. If that deal is consummated, it would be Trump's second crypto venture following the September launch of a Trump-affiliated token by a company called World Liberty Financial.

Trump's crypto investments create yet another area of potential conflict of interest with the SEC, whose current Democratic chair, Gary Gensler, led an enforcement campaign against the crypto market, which he described as rife with fraud and scams.

On Wednesday, Trump announced his nominee to chair the SEC: Paul Atkins, a Bush-era SEC commissioner who has spent the last seven years as co-chair of a crypto advocacy group.

Deregulating crypto was a theme of Trump's campaign, with Trump telling a crypto conference over the summer: "The rules will be written by people who love your industry, not hate your industry."

Do you have any information about Trump Media that we should know? Robert Faturechi can be reached by email at robert.faturechi@propublica.org and by Signal or WhatsApp at 213-271-7217. Justin Elliott can be reached by email at justin@propublica.org or by Signal or WhatsApp at 774-826-6240.

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Atkins Likely to Bring Pro-Business, Light Regulatory Touch to SEC, Say Agency Observers

 [law.com/nationallawjournal/2024/12/09/atkins-likely-to-bring-pro-business-light-regulatory-touch-to-sec-say-agency-observers](https://www.law.com/nationallawjournal/2024/12/09/atkins-likely-to-bring-pro-business-light-regulatory-touch-to-sec-say-agency-observers)

Dan Novak

Paul Atkins' pro-business regulatory philosophy is clear and consistent.

President-elect Donald Trump's nominee to be the next chairman of the U.S. Securities and Exchange Commission has long held that financial markets should have minimal government intervention and that regulators should not govern market behavior.

Atkins served as SEC commissioner for two terms from 2002 to 2008, where he was a strong free-market proponent. He opposed large penalties levied against companies accused of fraud, arguing large penalties unfairly harm innocent investors.

Atkins dissented in SEC's decision in 2005 to penalize Qwest Communications \$250 million for securities fraud.

"Even after the penalty statement, too often our penalties seem to be justified on little more than that they 'feel right,'" Atkins said in a 2008 speech.

Atkins opposed SEC's regulation NMS approved in 2005 and implemented in 2007, a set of rules meant to strengthen equity markets. In his dissent, Atkins argued the regulation NMS harmed innovation and competition, and "sets up roadblocks for our markets."

Attorney Adrienne Gurley, a Venable partner who defends corporations in SEC actions, said Monday that "I do think his focus and his priorities [as chairman] will keep in mind the financial burden that will be imposed on companies."

Following his tenure at the SEC, Atkins became a vocal critic of several provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted after the 2008 financial crisis. His targets included statutory rules surrounding derivatives trading, public company disclosure and the Volker Rule meant to reduce risky trades among large banks.

In 2015 testimony to Congress, he criticized Dodd-Frank for ceding too much authority to regulators, adding that the law will mean that "government, and not the markets, will choose the winners and losers."

Environmental, social and governance investment advocates fear Atkins will bring an end to the SEC's climate disclosure rule, which requires certain firms to disclose information on a company's direct or indirect greenhouse gas emissions.

In a recent letter to the SEC, Atkins and other former commissioners called the rule an unlawful expansion of the agency's authority that “represents a roundabout way of regulating greenhouse gas emissions themselves, by handing a weapon to climate advocates.”

In a 2022 column in the Wall Street Journal, Atkins wrote that the SEC rule “would tee up shifts of capital from fossil-fuel-based industries, such as oil production and heavy manufacturing, toward industries that are supposedly greener.”

Environmental groups and left-leaning consumer rights groups denounced his nomination last week.

“Everyone—and especially investors—should be concerned about Paul Atkins’ role in the widespread concealment of climate-related financial risk in the capital markets and his support of corporate polluters,” Ben Cushing, campaign director for the Sierra Club’s fossil-free finance campaign, said in a statement.

Sen. Elizabeth Warren, expected to be ranking member of the Senate Banking Committee next Congress, was equally suspicious of Atkins.

“I’m concerned about putting at the helm of the SEC a Wall Street lobbyist whose main contribution during the last financial crisis was to protest fines against the giant corporations that defrauded investors,” the Massachusetts Democrat said in a statement Wednesday.

Atkins is currently chief executive officer of Patomak Global Partners, a financial consulting group. An cryptocurrency advocate, Atkins has led efforts to develop best practices for digital assets, according to his company bio, and co-chairs the Token Alliance, a project of the Chamber of Digital Commerce.

He is broadly presumed to usher in an era of crypto deregulation at the the SEC.

“It appears that there's an alignment in what we understand some of Atkins positions to be with what President-elect Trump has signaled,” said Gurley, of Venable.

Trump, in announcing Atkins as his nominee on Truth Social, stated that Atkins “believes in the promise of robust, innovative capital markets that are responsive to the needs of Investors, & that provide capital to make our Economy the best in the World. He also recognizes that digital assets & other innovations are crucial to Making America Greater than Ever Before.”

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December 9, 2024, 2:27 PM PST

US Audit Board Lists Crypto Accounting, IT as Topics to Watch

By Jorja Siemons

Bloomberg Law News 2024-12-10T09:51:55842347174-05:00

US Audit Board Lists Crypto Accounting, IT as Topics to Watch

By Jorja Siemons 2024-12-09T17:27:06000-05:00

How auditors vet the rollout of new crypto accounting rules and how they respond to emerging risk areas in tech and financial companies are among key areas that will see extra scrutiny by the US audit regulator next year.

The Public Company Accounting Oversight Board detailed its priorities for its 2025 inspection cycle on Monday. Inspections form the backbone of the audit regulator's oversight and the board adjusts its inspection plan each year.

The report was released during the first day of the American Institute of Certified Public Accountants' annual financial reporting and accounting conference in Washington. PCAOB Chair Erica Williams will deliver a keynote address on Tuesday.

- PCAOB staffers aim to pay special attention to the information technology and real estate sectors. The former sector's supply chain disruptions may impact revenue recognition, while the latter sector faces uncertain long-term impacts of employees' increased remote work, the report said.
- The board will also scrutinize how auditors adjust their work vetting the financial statements of companies with a known cyber security breach, according to the report.
- PCAOB staffers said they will monitor how auditors apply new amendments to standards effective for audits of fiscal years ending on or after Dec. 15, as well as examine how public companies and broker-dealers impacted by new rules have disclosed and accounted for their crypto assets.

—With assistance from Amanda Iacone

To contact the reporter on this story: Jorja Siemons in Washington at jsiemons@bloombergindustry.com

To contact the editors responsible for this story: Jeff Harrington at jharrington@bloombergindustry.com; Vandana Mathur at vmathur@bloombergindustry.com

US Audit Board Due for a Top-Down Review, SEC Commissioner Says

By Amanda Iacone

Bloomberg Law News 2024-12-10T09:52:29767105265-05:00

US Audit Board Due for a Top-Down Review, SEC Commissioner Says

By Amanda Iacone 2024-12-09T14:23:02000-05:00

An SEC commissioner on Monday called for a “deep dive” to assess whether the US audit regulator has met the goals Congress set out for it more than two decades ago.

“All options ought to be on the table,” Republican Commissioner Mark Uyeda said about the future of the Public Company Accounting Oversight Board, in remarks Monday to the American Institute of Certified Public Accountants’ annual financial reporting and accounting conference in Washington.

Those options—emerging as critics of the board see an opportunity for a shakeup under the incoming Trump administration—could include folding the board into the Securities and Exchange Commission or the commission taking certain enforcement work from the Enron-era regulator, Uyeda said.

Any review should also consider whether the five PCAOB members should be replaced, Uyeda said. “We’ll need to see how that plays out,” he said.

Installing new board members would mark the third leadership overhaul at the audit regulator since 2017 under the first Trump administration and could dramatically reshape PCAOB’s priorities and approach.

Paul Atkins, a past critic of the board, has been picked to run the SEC under the second Trump administration. He is expected to rein in regulation and enforcement at the commission and PCAOB.

Uyeda also called to rescind controversial staff guidance on accounting for certain crypto assets known as Staff Accounting Bulletin 121, arguing that it didn’t go through a notice and comment process or commission review. Since issuing the guidance in 2022, SEC staff have counseled some banks that they could avoid the bulletin’s required balance sheet reporting of their clients’ crypto assets in certain circumstances.

"Given the huge impact SAB 121 has had, that has to be withdrawn and replaced with a more thoughtful process," he said.

Congress tried to rescind the guidance in the spring, but President Joe Biden vetoed the measure, keeping it on the books.

To contact the reporter on this story: Amanda Iacone in Washington at aiacone@bloombergtax.com

To contact the editors responsible for this story: Amelia Gruber Cohn at agrubercohn@bloombergindustry.com; Jeff Harrington at jharrington@bloombergindustry.com

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Texas Stock Exchange to Open Temporary Dallas HQ Next Year (1)

By Joe Lovinger2024-12-10T11:46:45270-05:00

- Upstart bourse is still looking for a permanent headquarters
- Future Texas Market Center will include a TV studio, museum

The Texas Stock Exchange is getting ready to plant its flag in the Dallas real estate market.

The upstart bourse backed by investors including BlackRock Inc. and Citadel Securities will open a temporary headquarters this spring at the Weir's Plaza building, just north of downtown Dallas. The search is on for a permanent home, to be called the Texas Market Center, the company said in an emailed statement.

Once built, the headquarters will house executive offices, a conference center and a television studio complete with an opening bell as the the TXSE seeks to take on established markets such as the New York Stock Exchange and Nasdaq. A museum meant to showcase the history of modern business in Texas will also sit in the market center.

The Dallas-Fort Worth area now has more finance workers than Chicago or Los Angeles, trailing only New York, as companies from Goldman Sachs Group Inc. to Charles Schwab Corp. expand operations. The TXSE is aiming to build on the state's reputation for low taxes and a lighter regulatory touch, saying that companies that list on the market won't need to meet environmental, social and governance thresholds beyond standard regulatory requirements.

"The Texas Market Center will add to the vibrancy of Dallas' thriving business community, and we believe it will drive further investment and corporate interest in the city and surrounding region," **James Lee**, chief executive officer and founder of TXSE Group Inc., said in the statement.

Texas has also increasingly lured corporations and financial firms from blue states such as New York and California. Texas is also developing a business-court system with an eye to handling more of the complex corporate litigation that Delaware is known for.

The TXSE said earlier this year that it expects to handle its first trades in 2025 and host its first listing in 2026. The Texas venture is trying to muscle in on a business that consists of about 16 equities exchanges with widely varying trading volumes.

Elsewhere in Dallas, the exchange plans to operate a data center to go with facilities in New Jersey and Chicago. Earlier this year, it hired executives from Charles Schwab, Nasdaq and the NYSE.

(Updates with corporate relocations, court system in sixth paragraph.)

--With assistance from **Julie Fine**.

To contact the reporter on this story:

Joe Lovinger in Dallas at jlovinger@bloomberg.net

To contact the editors responsible for this story:

Sarah McGregor at smcgregor5@bloomberg.net

Brendan Case

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MicroStrategy Buys More Bitcoin as Funding Draws Scrutiny (2)

By Monique Mulima

- Buys 21,550 Bitcoin for \$2.1 billion in the past week
- Fifth consecutive Monday that the firm announced purchases

Bloomberg Law News 2024-12-10T09:50:51060966144-05:00

MicroStrategy Buys More Bitcoin as Funding Draws Scrutiny (2)

By Monique Mulima2024-12-09T16:19:45981-05:00

- Buys 21,550 Bitcoin for \$2.1 billion in the past week
- Fifth consecutive Monday that the firm announced purchases

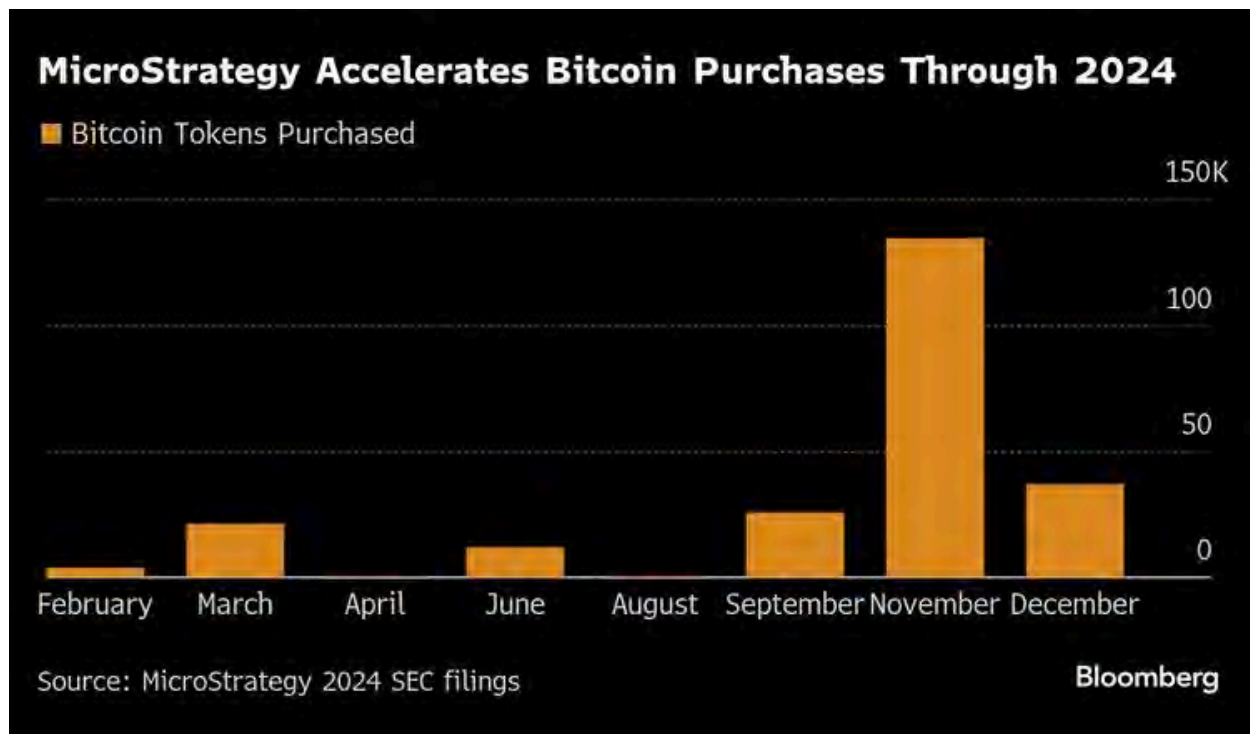
MicroStrategy Inc. bought another \$2.1 billion in Bitcoin while its combination of equity and fixed-income securities sales to finance the rapidly increasing acquisitions draws increased scrutiny.

It was the fifth consecutive Monday that the Tysons Corner, Virginia-based firm announced purchases of the digital asset. Co-founder and Chairman **Michael Saylor** has accumulated Bitcoin now worth more than \$41 billion over the past four years after deciding that the small enterprise software maker needed to embark on a different path to survive. He accelerated the strategy shift in October by announcing plans to raise \$42 billion over the next three years through an evenly split combination of at-the-market stock sales and convertible debt offerings.

MicroStrategy acquired 21,550 tokens for an average price of approximately \$98,783 from Dec. 2 through Dec. 8, according to an US Securities and Exchange Commission filing on Monday.

The firm has quickly accelerated its Bitcoin purchases. While it took almost a year to amass its first 100,000 tokens, it only took two weeks to go from 300,000 tokens to 400,000. With its large stash of Bitcoin, its holdings are worth more than Nvidia Corp.'s cash holdings, and all but six of the non-financial companies listed on the S&P 500 Index.

With MicroStrategy's recent increased Bitcoin purchases, the company has been buying tokens for an average purchase price above the average price of Bitcoin over four of the last five weeks it bought tokens.



SEC Filings

The almost 500% surge in the company's shares this year has fueled demand from investors for the stock. At the same time, hedge funds have been snapping up the notes, which are used in market-neutral arbitrage bets that exploit the surging volatility of the underlying asset. MicroStrategy has been among the most volatile US stocks this year. MicroStrategy fell 7.5% to \$365.34 on Monday.

The danger is the possibility crypto's massive year-long rally reverses, in which case an ever-more leveraged bet on its value could have severe consequences for its owners. Bitcoin has surged more than 130% since last December.

The company's reliance on Bitcoin to meet its financial needs could prove risky, said **Min Jung**, a research analyst at Presto Research.

"For now, Bitcoin's favorable price movement allows MicroStrategy to sustain a positive feedback loop: rising MSTR stock prices enable additional fundraising, which funds further Bitcoin purchases, driving up Bitcoin prices and stock value," he said. "While effective during a bull market, this strategy's sustainability depends heavily on continued Bitcoin price appreciation."

MicroStrategy didn't immediately respond to requests for comment. In an Oct. 31 filing, the company noted that "a significant decline in the market value of Bitcoin could have a material adverse effect on our financial condition. Any material adverse effect on our financial condition caused by a significant decline in the market value of our Bitcoin holdings may create liquidity and credit risks for our business operations, as we would have limited means to obtain cash beyond the revenues generated by our enterprise analytics software business."

If Bitcoin prices took a sudden downturn, MicroStrategy's ability to service its growing debt could be threatened said **Gracy Chen**, chief executive officer of crypto exchange Bitget. The fallout of that could expand beyond the company.

"The firm's massive BTC holdings have also created a market concentration risk, where any large-scale sell-off could lead to significant price fluctuations, impacting not just Bitcoin but the entire cryptocurrency ecosystem," Chen said.

(Updates the value of the company's Bitcoin holdings and adds the closing share place.)

--With assistance from **Tom Contiliano**.

To contact the reporter on this story:

Monique Mulima in Toronto at mmulima@bloomberg.net

To contact the editors responsible for this story:

stacy-marie ishmael at sishmael@bloomberg.net

Dave Liedtka

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Ohio Supreme Court won't reconsider boneless chicken wing case

 ohiocapitaljournal.com/briefs/ohio-supreme-court-wont-reconsider-boneless-chicken-wing-case

By Susan Tebben

The Gavel outside the Supreme Court of the State of Ohio. (Photo by Graham Stokes for Ohio Capital Journal. Republish photo only with original article.)

The Ohio Supreme Court has denied a request to reconsider their ruling earlier this year that boneless chicken wings can have bones.

“It is the rare exception, rather than the rule, for this court to grant motions for reconsideration,” Justice Patrick Fischer wrote in the majority opinion denying the request.

Fischer went on to say that even when he disagrees with a majority opinion in a case, he would vote to deny a motion for reconsideration that “merely reargues a case.”

But the justice also used the denial to call out “problems” with the release of the decision.

“In this case, the delay in our issuing a decision on this motion, coupled with early public pronouncements by members of this court related to this case, both in the media and on the judicial record prior to our decision on this motion, could generate an appearance of impropriety,” Fischer wrote.

Because the motion denial was “straightforward,” Fischer said the decision could have been made “promptly after its filing in August rather than leaving it to linger into the heart of election season.”

“The Ohio Supreme Court is a court of law, not of temporal public opinion,” he concluded.

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Justices Michael Donnelly, Melody Stewart and Jennifer Brunner dissented in the case. Donnelly said the court received “unprecedented media attention” after the opinion that ruled that the statement “boneless” does not mean one should be surprised to find bones.

“The majority’s opinion has been rightly subjected to ridicule,” Donnelly wrote.

Donnelly said the fact that there was a whirlwind of attention on the case, which included agreements on the dissent in the case, should raise flags for the justices.

“To be sure, our jurisprudence is not dictated by the commentariat, but given the overwhelming response to the absurdity of the majority opinion, one would think that the members of the majority could have reexamined their thinking and concluded that maybe it’s possible, even if just barely, for reasonable minds to disagree,” Donnelly wrote.

The justice argued that a summary judgment can’t be granted or affirmed on appeal “unless reasonable minds can come to but one conclusion.”

In the previous decision on the case, the court was unable to do that, he said, and “it would be wrong to accord no significance to our disagreement in light of the summary-judgment standard.”

He said the fact that the summary judgment was decided despite the disagreement is “not a positive harbinger for Ohioans.”

“The members of the majority have granted virtual immunity to entities involved in the meat industry for any bone-related injury that might be caused by their ‘boneless’ products,” Donnelly wrote. “I (and most of the people who have read about this case) dissent.”

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Real Estate Trusts Must Face Suit on Alleged SEC Exemption Claim

By Gillian R. Brassil

- DiversyFund, top executives and its two REITs are defendants
- Also face allegation of misleading on asset management fees

Bloomberg Law News 2024-12-10T09:55:56934766684-05:00

Real Estate Trusts Must Face Suit on Alleged SEC Exemption Claim

By Gillian R. Brassil 2024-12-09T15:49:32000-05:00

- DiversyFund, top executives and its two REITs are defendants
- Also face allegation of misleading on asset management fees

DiversyFund, Inc., the sponsor of two real estate investment trusts, and its top executives must defend against claims they misguided shareholders on whether the trusts were exempt from Securities and Exchange Commission registration and its charging of asset management fees, a judge ordered.

Investors adequately alleged in their second amended complaint that the REITs misled and harmed them by indicating their offerings of DiversyFund Investor Shares were exempted from registration when that wasn't true, said Judge Anthony J. Battaglia in the US District Court for the Southern District of California on Friday. REIT I offered these shares from 2018 to 2021 and REIT II offered them from 2020 to 2022, Battaglia's order said.

"Plaintiffs' allegations that they parted with their funds and entered a transaction based on a misrepresentation constitute a concrete injury in a securities fraud case to satisfy standing," the judge said.

The plaintiffs, who first sued in 2022, also prevailed in pleading that REIT II misrepresented its charging of asset management fees, Battaglia said while granting and denying in part DiversyFund's motion to dismiss. And the investors successfully alleged DiversyFund and its co-defendant founders, CEO Craig Cecilio and Chief Investment Officer Alan Lewis, could be liable in aiding in the trusts' supposed violations. The REITs are also named as defendants.

But plaintiffs did not successfully allege that they were injured by some other points, and some of their claims were filed too late or didn't meet heightened pleading standards related to fraud, leading to their dismissal. This included allegations that the trusts violated California Corporations Code by misrepresenting themselves as separate when, the plaintiffs contend, certain real estate deals would fall through and REIT I would suffer a loss if REIT II did not co-invest.

Battaglia said some of the plaintiffs' other inadequate claims included those related to the trusts' implementation of other fees and the fluffing up of management's expertise because they failed to disclose SEC investigations and California Bureau of Real Estate sanctions, as well as their allegations there wasn't a minimum REIT II needed to raise in order to be viable despite requiring more than the \$11.3 million.

The shareholders, who seek an award of rescission of the purchased REIT I and II investments, can submit a third amended complaint to bolster their allegations.

They are represented by the Law Office of Christopher J. Gray, P.C., Law Offices of Joshua B. Kons, LLC, and Law Offices of Todd M. Friedman. Kons said they would return a request for comment but did not in time for publication.

DiversyFund and the other defendants are represented by Buchalter, A Professional Corporation. One of the lawyers, Sanjay Bhandari, declined to comment for this story via email.

The case is *Ferry v. DF Growth REIT, LLC*, S.D. Cal., No. 22-cv-02001-AJB-VET, 12/6/24 .

To contact the reporter on this story: Gillian R. Brassil in Washington at gbrassil@bloombergindustry.com

To contact the editor responsible for this story: Andrew Harris at aharris@bloomberglaw.com

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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Risk Disclosure Issue Remains After Justices Nix Meta Case

By **Thomas Redburn and Maya Ginsburg** (December 9, 2024, 4:55 PM EST)

On Nov. 22, in a terse one-page order, the U.S. Supreme Court **dismissed** the writ of certiorari in Facebook Inc. v. Amalgamated Bank, one of two private securities fraud cases the court had agreed to hear this term,[1] as improvidently granted. The unexplained move comes after the court received a full merits briefing and heard oral argument, raising eyebrows among court watchers and securities litigation practitioners.

The court's nondecision effectively leaves untouched a controversial — and very pro-plaintiff — March **ruling** by the U.S. Court of Appeals for the Ninth Circuit[2] regarding an issue of federal securities law that recently has become more prominent in private securities fraud suits: Under what circumstances can a publicly traded company be held liable for allegedly false and misleading risk disclosures contained in its filings with the U.S. Securities and Exchange Commission?

Questions naturally arise about what the court's punting of this issue means for the future of private securities fraud litigation. The answer is: not very much, at least in the short term. Nevertheless, the problems in this area of the law are not going away and ultimately still need to be addressed.

The Facebook case specifically concerns risk disclosures that public companies are required to make in their periodic reports on Forms 10-K and 10-Q by Item 105 of Regulation S-K.[3] Item 105 requires issuers to disclose in these filings any "material factors that make an investment in the [company] speculative or risky." [4]

Anyone who has flipped through a 10-K in the last 10 years has likely seen pages and pages of such disclosures, covering everything from supply chain and financing risks to competition and regulatory concerns. Frequently, Item 105 disclosures take the form of telling investors that if a specific triggering event were to happen to the company in the future, then a bad consequence for the company could or, in some cases, likely will follow.

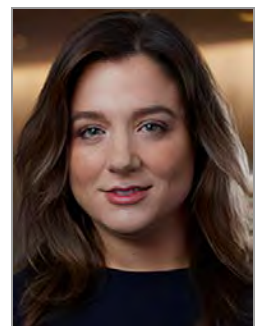
Read literally, Item 105 disclosures taking this form notify investors of the hypothetical possibility that an adverse event might occur that could harm the company's business in the future, thereby enabling the investor to take account of that risk in deciding whether to buy or sell the company's securities. While companies sometimes discuss past events in these types of disclosures, an Item 105 risk disclosure will often say nothing explicitly about what has happened in the past.

With rising frequency, many private securities fraud actions rest on allegations by investor plaintiffs that the defendant company made a materially misleading Item 105 risk disclosure because it presented the risk that a triggering event would occur as purely hypothetical, when in fact such an event had already occurred and the risk to the company had already materialized.

Plaintiffs making such claims effectively allege that a company's statement in an Item 105 disclosure that an event might occur in the future and have unfavorable consequences for the company's business contains within it an implied representation that such an event has not occurred in the past and caused similar negative results. Such claims rest on a strong, commonly shared intuition that, by



Thomas Redburn



Maya Ginsburg

failing to disclose the occurrence of negative past events, a company's statement that a risk hypothetically could materialize in the future will mislead reasonable investors in at least some circumstances.

To take an example that **came up at oral argument** before the Supreme Court, a company's disclosure of the risk that a fire at its plant could occur in the future and destroy its business would be a materially misleading half-truth if such a devastating fire in fact had already occurred a few weeks before the disclosure was made. No reasonable investor in those circumstances would believe that the company had told the truth about the state of its business — or at least not the whole truth. A company that had already suffered catastrophic loss would not be expected to characterize the risk of such a loss as purely hypothetical in its communications with investors.

It is difficult to contest this point, as it seems grounded in common sense. As many courts have noted in varying contexts, including the U.S. Court of Appeals for the Eleventh Circuit in its 2011 FindWhat Investor Group v. FindWhat.com decision, "to warn that the untoward may occur when the event is contingent is prudent, [but] to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit." [5]

On the other hand, it is equally obvious that, in other circumstances, characterizing as hypothetical the risk that a bad event will occur in the future without disclosing past occurrences of that same event will not mislead anyone.

To take another example discussed at oral argument, disclosing the risk that baseball games might have to be canceled in the future as a result of inclement weather does not imply to a reasonable investor that rain has never caused a baseball game to be canceled in the past. That is because it is common knowledge that baseball games frequently need to be rescheduled due to rain; it has happened during every baseball season in the past and will happen during every baseball season in the future.

Thus, there are indeed circumstances where a reasonable investor would understand, based on their common experience and knowledge of the particular nature of the company's business, that the occurrence of some kinds of negative events is inevitable, if not routine, for some types of companies. Disclosure of the past occurrence of such events is not necessary to avoid misleading investors.

What this means is that figuring out when the failure to disclose a past event in an Item 105 risk disclosure is materially misleading, and when it is not, is often a tricky endeavor.

In the Facebook case, news reports appeared in 2015 accusing Cambridge Analytica, a political consultancy firm, of improperly obtaining access to the private data of 30 million Facebook platform users in violation of the policies of Facebook, now known as Meta Platforms Inc. Meta, at that time, did not publicly confirm the accusation, announcing instead that it would conduct an investigation and, if necessary, take swift action against unauthorized users of its customers' data.

In February 2017, Meta filed a Form 10-K that contained an Item 105 risk disclosure discussing, among other things, the risk that unauthorized third parties could improperly access or use its customers' personal data in the future, which could then harm Meta's business. Meta did not disclose Cambridge Analytica's improper acquisition and misuse of massive amounts of such data in its Form 10-K, even though Meta — allegedly — had by that time confirmed that the allegations against Cambridge Analytica were true. When Meta subsequently revealed the truth in March 2018, its stock price declined by nearly 18%.

In March 2024, the Ninth Circuit held — over a dissent — that Meta's Item 105 disclosure was a materially misleading half-truth, and thereby actionable under Section 10(b) of the Securities Exchange Act of 1934, because it represented the risk that third parties would improperly obtain Facebook user data as merely hypothetical when in fact that very risk had already materialized as a result of Cambridge Analytica's misconduct.

This decision is consistent with prior Ninth Circuit precedent, including its 2021 decision in *In re: Alphabet Inc. Securities Litigation*, holding that "[r]isk disclosures that 'speak entirely of as-yet-unrealized risks and contingencies' and do not 'alert the reader that some of these risks may already

have come to fruition' can mislead reasonable investors."[6]

It also accords with a wide consensus in the federal courts of appeals that risk disclosures can be actionable under some circumstances, such as when the undisclosed past event carries a risk that is virtually certain to occur in the future.[7] It's debatable how much daylight there is between the Ninth Circuit's test for determining whether Item 105 risk disclosures are actionable and the standard applied by these other circuits, and this issue was hotly contested in the merits briefing before the Supreme Court.

In response to Meta's petition, the Supreme Court **agreed to hear** the case in order to decide the narrow issue of whether a risk disclosure is false or misleading when it fails to disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm.

In its merits briefing, however, Meta pivoted from that question and decided to go for the grand prize: Ignoring the second half of the question presented, it argued that an Item 105 risk disclosure is always inherently forward-looking and that no reasonable investor would ever understand such a disclosure as making any representation about the occurrence or nonoccurrence of past events. Alone among the federal courts of appeals, the U.S. Court of Appeals for the Sixth Circuit endorsed that argument in a 2015 nonprecedential opinion in *Bondali v. Yum! Brands Inc.*[8]

In a savvy tactical move, the respondents told the court that they agreed with Meta about how to answer the question the court had agreed to decide: An undisclosed past event that presents no known risk of ongoing or future business harm could not give rise to liability under Section 10(b) because it by definition would be immaterial.

But, according to the respondents, the Ninth Circuit had not held anything to the contrary because the undisclosed event at issue here — Cambridge Analytica's misappropriation of the personal data of 30 million Facebook users — was clearly material under any standard and clearly presented a known risk to Meta's business at the time it filed its 10-K in February 2017. The respondents — supported by the U.S. — also argued that the bright-line judicial safe harbor Meta now sought for Item 105 disclosures was inconsistent with decades of precedent, SEC guidance and common sense.

When the Supreme Court heard argument on Nov. 6, the justices seemed genuinely confused by what they were hearing, with several of them — from both the conservative and liberal wings of the court — expressing concern that the arguments the parties were making did not address the question the court had taken the case to decide.

On one level, then, the court's subsequent dismissal of the writ as improvidently granted is not surprising, as it is known sometimes to take that tack when the parties ignore the question on which the court granted certiorari and instead at the merits stage argue a different question that the court might not have taken if it had been properly presented at the certiorari stage.

By dismissing the writ, the court leaves the parties and the state of the law where it found them. Practitioners and litigants in securities fraud cases remain free to make all the same arguments they were able to make before the court agreed to hear Meta's appeal.

But there may also have been a deeper reason for dismissing the appeal: This was not the right case for the court to wade into this particular morass.

The oral argument underscored how difficult and messy it sometimes actually is to determine whether the disclosure of a hypothetical risk is materially misleading because it fails to reveal the materialization of that same risk in the past. The justices were certainly skeptical of Meta's all-or-nothing proposed bright-line rule that Item 105 risk disclosures can never mislead investors about the past.

However, they also expressed some consternation at the sometimes-they-are-actionable-and-sometimes-not approach taken by the respondents and the U.S., which was grounded in traditional securities law principles governing materiality and the prohibition on misleading half-truths that by their nature are inherently fact-specific — and, in the case of materiality, often ill-suited to summary disposition.

Several members of the court — again, from different ends of the ideological spectrum — feared that the respondents' approach provided insufficient real-world guidance to companies that need to make these disclosures in their SEC filings without the benefit of knowing how a court or jury will later assess, or second-guess, their truthfulness.

When is a past event material? How recent or significant does it have to be to require disclosure? What if the past event's significance does not become apparent until after the risk disclosure is made? Under what circumstances is it appropriate to conclude that reasonable investors would likely know that the risk has materialized in the past even if the company does not expressly disclose that fact? How does the probabilistic assessment of risk factor into the analysis?

Numerous justices expressed concern that taking a case-by-case approach to these issues created too much real-world uncertainty for companies trying to comply with the securities laws, and would incentivize the overdisclosure of immaterial information — which everyone agreed would be counterproductive for investors — in order to mitigate the risk of shareholder lawsuits.

What role the SEC should play in helping to clear this thicket also came up. Justice Brett Kavanaugh, in particular, raised the question of whether the issues that had been aired in the case warrant further rulemaking by the SEC, which would have the ability to solicit wide public comment and balance the competing interests at issue in a way that might produce a better policy outcome than leaving the matter to the judiciary.

These issues are not going away, and the justices' comments during oral argument indicate that they recognize that some further clarification of the circumstances under which an Item 105 risk disclosure can be actionable under Section 10(b) for failure to disclose a past event is warranted.

Yet, they may have concluded that the particular event that Meta concealed was so obviously material that the case before it provided a poor vehicle for developing the applicable legal principles. So they decided to let matters rest for now.

It would not be surprising, however, for the court to revisit the parameters of securities fraud liability for Item 105 risk factor disclosures in an appropriate case, assuming the SEC does not do so first.

Thomas E. Redburn Jr. is a partner and chair of the securities litigation practice at Lowenstein Sandler LLP.

Maya Ginsburg is counsel at the firm.

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[1] The other private securities fraud action is [NVIDIA Corp. v. E. Ohman J:or Fonder AB](#) , No. 93-270 (U.S.), which was argued before the Court on Nov. 13.

[2] [In re: Facebook, Inc. Securities Litigation](#) , 87 F.4th 934 (9th Cir. 2023).

[3] 17 C.F.R. 229.105.

[4] *Id.*

[5] E.g., [FindWhat Inv. Grp. v. FindWhat.com](#) , 658 F.3d 1282, 1299 (11th Cir. 2011) (cleaned up).

[6] [In re: Alphabet, Inc. Securities Litigation](#) , 1 F.4th 687, 703 (9th Cir. 2021) (quoting [Berson v. Applied Signal Tech., Inc.](#) , 527 F.3d 982, 986 (9th Cir. 2008)).

[7] See, e.g., [Ind. Pub. Ret. Sys. v. Pluralsight, Inc.](#) , 45 F.4th 1236, 1255 (10th Cir. 2022); [Karth v. Keryx Biopharmaceuticals, Inc.](#) , 6 F.4th 123, 137-38 (1st Cir. 2021).

[8] **Bondali v. Yum! Brands, Inc.**  , 620 Fed. Appx. 483, 491 (6th Cir. 2015).

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Reckitt Investors To Test Class-Action Rules In Opioid Case

By **Joanne Faulkner**

Law360, London (December 9, 2024, 5:56 PM GMT) -- The Court of Appeal will consider on Tuesday whether shareholders in Reckitt Benckiser and drug company Indivior can pursue litigation linked to America's opioid crisis as a "representative claim" that is similar to a U.S.-style class action.



Hundreds of investors in Reckitt Benckiser and Indivior are trying to overturn a High Court ruling over allegedly false marketing. (Piotr Swat / SOPA Images / Sipa via AP Images)

Hundreds of investors are **trying to override** a High Court ruling that prevents a local authority from formulating that claim over allegedly false marketing of Suboxone, an opioid addiction treatment, as a representative action rather than through traditional multi-party proceedings.

It will be the first time that the Court of Appeal will determine whether a securities class action, which alleges that a listed company made untrue statements to the market, can go ahead as a representative action.

Lorraine Lanceley, a partner, at Stewarts Law LLP, said that it would have a "ripple effect across the world of securities litigation" if appeals judges give the green light for share-price-drop claims to be brought as a representative action.

"Whatever happens, it's an authority as to whether or not representative actions can be brought this

way," Lanceley said.

Wirral Council said it was entitled to bring its opt-in claim on behalf of investors in a way that was envisioned by the Supreme Court decision in *Lloyd v. Google LLC* as a two-stage "bifurcated process." Britain's top court ruled in that case on a failed £3 billion (\$3.8 billion) data protection claim.

Wirral Council in northwest England wanted a structure that would allow it to first argue for declarations that Reckitt and Indivior had published false information about the safety of a new version of Suboxone. That move tanked the value of the companies' shares after a U.S. Department of Justice indictment in 2019.

If the investors established liability they could then bring their own follow-on damages claims, based on the court's findings, Wirral said. This would have been cheaper and meant less effort for the defendants, the council said. The authority also argued that it promotes access to justice for smaller shareholders,

Representative actions are seen by some as being more "claimant-friendly," Lanceley said. "But the existing mechanisms that are currently in place still work."

A representative action allows "claimant issues" — such as who has standing to bring a claim, causation and quantum — to be separated and dealt with later on, Lanceley explained. The question of liability is dealt with first.

Wirral Council has so far proposed its claim on an opt-in basis, which Lanceley said was "slightly contradictory to what a representative action is meant to be," and would be made up of those who signed up to a costs-sharing and governance agreement.

"It's still out for debate as to how this would work after a representative action judgment," Lanceley said. But it has been envisioned that, if a finding on liability was secured, it would apply to anyone who has the same interests and falls within the class.

Litigation by shareholders against U.K. listed companies is gathering pace. Glencore, Standard Chartered and Barclays are among those defending themselves against claims over falls in their share price.

Liability will feel like a strong issue in many of these cases, Lanceley said: the claims usually jump on settlements and guilty pleas to egregious activity.

But Indivior, a drugmaker listed on the London Stock Exchange, and Reckitt Benckiser, its parent until Indivior was spun off in 2014, persuaded the High Court that the representative procedure was unsuitable. They said that it would allow Wirral to "dictate the structure" of proceedings and hamper the court's ability to case manage the claims.

"I think it would be unfair and unjust, and contrary to the overriding objective, to allow the representative proceedings to oust the jurisdiction of the court to case manage the claims from the start," Judge Michael Green said in the 2023 judgment.

Judge Green said the courts "have to be careful about the consequences" of promoting representative actions, especially where there are "perfectly feasible non-representative proceedings."

The pharmaceutical companies will continue to argue over the two-day Court of Appeal hearing that a careful framework has been developed for managing securities litigation that would not be available to the court in representative proceedings.

The claimants' arguments at the High Court focused on their entitlement to move the claim along as a representative action under Civil Procedure Rules. This did not go down well with Judge Green, who said there is "an element of manipulation" in the way that Wirral Council claimed an automatic right to start representative proceedings.

Following the decision, Mishcon De Reya, acting for the claimants, said that the claims of approximately 300 individual investors had been prevented from being allowed to advance, along with many others that had hoped to take part as the claims progressed. Wirral Council's legal team is likely to emphasize the importance of giving retail investors a chance to pursue claims against the companies.

They will also probably make the case that a representative claim allows a single representative to do all

this work on behalf of whole class, and for its benefit, which might trigger earlier settlements.

The mechanism for representative actions in England and Wales has rarely been used since it was introduced in 1998, partly because it can be difficult to prove that all the claimants have suffered the same loss and damage. The English courts have interpreted the requirement strictly, unlike countries such as the U.S., Canada and New Zealand, which have better- established opt-out class action regimes.

Lawyers say that it is likely that an appeal will be lodged with the Supreme Court — whatever the outcome.

"It could be the death of representative actions, and we could just go back to the status quo, or you could have another punchy party that is prepared to have another go," Laceley said.

--Additional reporting by Jamie Lennox. Editing by Ed Harris.

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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Satellite Co. Sued In Del. For Docs After \$450M Merger

By **Jeff Montgomery**

Law360 (December 9, 2024, 8:45 PM EST) -- Two stockholders of satellite venture Terran Orbital Corp. sued the business in Delaware's Court of Chancery Friday for access to company records, linking the demand to their investigation of events leading up to the company's \$450 million, 25-cents-per-share sale to Lockheed Martin in October.

The deal went through after months of alleged Terran Orbital financial and board tumult following the withdrawal of an earlier, \$1-per-share deal with Lockheed and alleged board failures to disclose significant developments, including adoption of a "poison pill" after criticisms from a large shareholder.

"Notwithstanding the board's consideration of bankruptcy as an alternative," the complaint said, a fairness opinion issued by Lincoln International LLC regarding the transaction "does not contain any liquidation analysis evidencing that the 25-cents-per-share sale to Lockheed Martin was a superior alternative" to a liquidation.

Among other concerns, the complaint said, are questions regarding when Terran Orbital learned and in turn disclosed that it had been awarded a \$254 million Space Development Agency contract to produce 10 satellites for an advanced tactical communications system.

Also unsettled, the complaint said, is "whether announcement of the SDA contract was delayed to avoid boosting Terran Orbital's stock price," at a time when a lower offer was in play, and other issues regarding the company's health had been raised.

Terran Orbital is a leading manufacturer of satellite products for the aerospace and defense industries, saying it provides "end-to-end satellite solutions by combining satellite design, production, launch planning, mission operations, and on-orbit support to meet the needs of the most demanding military, civil, and commercial customers."

Stockholders Theodore Eaton and Daryl Bryson said in their complaint that a proxy statement issued in support of the Lockheed merger in October included optimistic statements regarding the company's health that clashed with a later, "highly pessimistic narrative in the proxy" concerning Terran Orbital's prospects.

Omitted from the proxy statement, the complaint said, were details regarding the emergence of stockholder activism, in the form of a Sophis Investor Group letter demanding board and management changes and citing "leadership missteps that had resulted in a share price decline of approximately 94%" since the company went public in March 2022.

Terran Orbital soon reached a settlement with Sophis — which estimated that the company's intrinsic value was \$3 per share — that included a board seat for the investor group.

In March of this year, Lockheed came forward with an offer of \$1 per share — below the trading price of the company's stock at the time — followed by Terran Orbital's announcement days later of a shareholder right "poison pill" plan.

Terran Orbital described the pill plan as intended to reduce the likelihood that any person or group gains control of the company through open market purchase of shares "or other coercive tactics potentially disadvantaging the interests of all stockholders."

Among other allegations in the suit are purported inconsistencies between statements stressing the company's solid financial footing by Marc Bell, Terran Orbital's co-founder, chief executive officer and chairman, and Gary Hobart, Terran's chief financial officer.

Hobart told the company's board in May 2024 that Terran's "might need a permanent cash infusion of up to \$120 million to cover the company's expected cash burn for the year," statements that the brief said are inconsistent with other upbeat forecasts.

"Investigation is warranted to determine the reason for these sharp discrepancies," the brief said, noting that the proxy fails to disclose that Hobart was a managing director of Beach Point Capital Management, one of the company's lenders, before joining Terran Orbital as CFO.

Terran Orbital did not immediately respond to a request for comment.

Stockholders Theodore Eaton and Daryl Bryson are represented by Blake A. Bennett of Cooch and Taylor PA and Juan E. Monteverde and Benjamin Vanderhyden of Monteverde & Associates.

Counsel information for Terran Orbital was not immediately available.

The case is Theodore Eaton and Daryl Bryson v Terran Orbital Corporation, case number 2024-1261, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.



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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Trump Media Investors Urge Stay Denial In Del. Suit

By **David Minsky**

Law360 (December 9, 2024, 10:50 PM EST) -- Investors in Donald Trump's social media website urged a Delaware Chancery Court to deny a temporary stay brought by the president-elect in order to let Florida litigation play out first, saying presidential immunity doesn't extend to unofficial acts, and the lawsuit can proceed against Trump's affiliates.

In a Thursday filing, United Atlantic Ventures LLC says TMTG Sub Inc., the parent company of President-elect Donald Trump's Truth Social website, and others brought the motion to stay the Delaware Chancery Court lawsuit after realizing they were unlikely to succeed on their July motion to dismiss. UAV calls the motion a "transparent attempt to avoid this court denying the motions to dismiss and permitting discovery to proceed."

UAV urges the Delaware Chancery Court to deny the motion to stay and force the defendants to justify why the lawsuit should be dismissed.

"The motion is nothing more than defendants' latest strategic attempt to avoid litigating plaintiff's claims in the first-filed Delaware action and instead proceed with their own affirmative claims in Florida," UAV contends. "Even if a court erroneously determined that presidential immunity extended to unofficial conduct, there is zero support for the proposition — which defendants implicitly advance — that immunity should extend to entities and individuals affiliated with the president-elect."

Former "Apprentice" reality show contestants Andy Litinsky, Wes Moss and their company UAV sued TMTG Sub in Delaware Chancery Court in February, claiming they were cheated out of their company shares.

In March, TMTG **sued** UAV, Moss and Litinsky in Sarasota County, Florida state civil court accusing Litinsky, Moss and UAV of mismanaging the process of taking the company public. In July, this lawsuit was temporarily halted in order for the Delaware litigation to proceed, according to UAV.

Then in September, Moss, Litinsky and UAV were added as defendants in a separate, but similar lawsuit in Sarasota County court that TMTG initially brought in February. UAV subsequently filed a motion to stay this lawsuit as well, adding that TMTG will oppose like it has in the other Florida lawsuit, saying they have "opposed UAV's efforts to stay the Florida proceedings at every turn."

UAV contends in its Delaware case that Trump has improperly asked the court to stay its lawsuit while at the same time opposing a stay in the Florida litigation.

Trump asserts presidential immunity prohibits UAV's claims in the Delaware Chancery Court and has requested to indefinitely suspend the deadline for submitting briefs in support of dismissing the lawsuit, court records show. UAV, on the other hand, says in its opposition that the U.S. Supreme Court "explicitly held that the president of the United States is not immune from civil liability for 'unofficial conduct.'"

Additionally, UAV argues that the civil allegations involved conduct that occurred when Trump was no longer the president. In the 1997 case of **Clinton v. Jones** , the Supreme Court held that a sitting president isn't immune from civil litigation on claims before taking office and that don't involve official duties, which the defendants said involved a federal claim and is distinguishable from UAV's state court suit although UAV says the defendants only cite cases showing state courts have held that a sitting president isn't immune for unofficial conduct.

"The tortious conduct by TMTG, TMTG Sub, President-elect Trump, and the other individual defendants occurred while Trump did not hold public office and did not involve Trump's official capacity as president or president-elect of the United States," UAV asserts.

But if immunity extends to Trump, UAV argues it wouldn't extend to the other defendants in the case. They include former California Republican Rep. Devin G. Nunes; Donald J. Trump Jr.; Daniel Scavino; Eric Swider; W. Kyle Green; Kash Patel, Trump's nominee to lead the FBI; Linda McMahon, who Trump nominated to lead the U.S. Department of Education; and Robert Lighthizer, who served as U.S. trade representative during Trump's first term in office.

Nunes, Swider, Green, Patel, McMahon, Lighthizer and Trump Jr. serve on TMTG's board of directors.

The defendants argue that requiring Trump to litigate as a party in the Delaware lawsuit "risks distracting President Trump from his public duties," including duties as president-elect, court records show.

In a Dec. 6 filing, the defendants say UAV opposed the substantive issue of immunity that hasn't yet been briefed but fails to address the procedural question before the court. Current practice calls for the proceedings to be halted until the temporary question of presidential immunity can be resolved and that the plaintiff "offers no reason to depart from it here," the defendants assert.

The defendants say in their response that whether Trump can be sued in state court raises novel "federal and comity concerns," which will be briefed in a forthcoming motion showing that the president-elect is temporarily immune from state civil litigation.

"Rather than pre-judge these weighty questions, the proper course is to pause further proceedings on the pending motions to dismiss, so that the immunity issue may be adjudicated first and fully," the defendants add.

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

UAV is represented by Richard I. G. Jones Jr., David B. Anthony and Harry W. Shenton IV of Berger McDermott LLP.

TMTG, Donald J. Trump and Daniel Scavino Jr. are represented by Theodore A. Kittila and William E. Green Jr. of Halloran Farkas & Kittila LLP.

Defendants Trump Media & Technology Group Corp., Devin G. Nunes, Donald J. Trump Jr., Kashyap "Kash" Patel, Eric Swider, W. Kyle Green, Linda McMahon and Robert Lighthizer are represented by John L. Reed and Ronald N. Brown III of DLA Piper.

The Delaware case is United Atlantic Ventures LLC v. Trump Media & Technology Group Corp. et al., case number 2024-0184, in the Court of Chancery of the State of Delaware.

The Florida cases are Trump Media & Technology Group Corp. v. United Atlantic Ventures LLC et al., case number 2024 CA 001545, and Digital World Acquisition Corp. et al. v. ARC Global Investments II LLC et al., case number 2024 CA 001061, both in the Twelfth Judicial Circuit Court of the State of Florida.

--Editing by Kristen Becker.



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EV Carmaker Lucid Wants To Shed More Of Inflated Biz Suit

By **Emilie Ruscoe**

Law360 (December 9, 2024, 6:45 PM EST) -- Electric carmaker Lucid Group has asked a California federal judge to toss most of the latest version of a proposed investor class action alleging its production forecasts were misleading, arguing that parts of the suit that remained intact after a recent dismissal order involved statements taken out of context.

In its dismissal bid in San Francisco federal court, Lucid on Friday told U.S. District Judge Araceli Martinez-Olguin that the latest version of the consolidated proposed class action complaint fared "worse, in fact" than earlier attempts to plead securities fraud against the automaker.

Lucid said Friday that despite Judge Martinez-Olguin's request in her August dismissal order for lead plaintiff Sjunde AP-Fonden to file "a more focused amended complaint," the investor's new iteration of the suit takes "the same approach ... throwing everything against the wall and hoping that vague, conclusory, and temporally-mismatched allegations will stick."

"They should not, and the court's prior reasoning demands dismissal again of nearly all the claims," Lucid said.

The automaker also contended that the amended complaint begs the question of whether the judge should have left intact claims over two of four allegedly misleading statements cited in the earlier version of the complaint, arguing that both those statements had been mischaracterized.

When viewed in context, the company claimed, those two statements made by Lucid CEO Peter Rawlinson in a television interview "cannot fairly be seen as false or misleading."

One of those statements showed the executive acknowledging challenges that were keeping its manufacturing plant from scaling up, the automaker said, in disputing the investor's assertion that the statement would have misled investors about how close the company was to meeting certain production goals.

Another Rawlinson statement from the interview invoking "supply chain shortages that the entire industry is facing" was a response to a question about semiconductor shortages and didn't show the CEO pinning blame for the company's production struggles on COVID-19-pandemic-linked global supply chain issues, Lucid claimed.

In the latest version of the suit, which launched in 2022, Sjunde AP-Fonden claimed that the company had intentionally confused investors about "Lucid's actual production and internal ability and readiness to mass produce its vehicles."

"Against that backdrop, defendants [Lucid and Rawlinson] then lied, time and again, about the number of vehicles Lucid would produce," the suit states.

When Judge Martinez-Olguin **trimmed the suit**, she dismissed claims over 26 out of the 30 allegedly misleading statements attributed to the company and its representatives, siding with Lucid in finding that the investor hadn't shown with its claims that the company and its executives made those statements with intent to deceive investors.

In its Friday dismissal bid, Lucid didn't ask the court to toss claims over two of the allegedly

misleading statements that she left in the suit.

One of those was Rawlinson's November 2021 statement that "[we] remain confident in our ability to achieve 20,000 units in 2022."

"The most the [Amended Complaint] can allege (and now seek to prove) is falsity with respect" to that statement and the related statement that such a goal is "not without risk, given ongoing challenges facing the automotive industry with global disruptions to supply chains and logistics," the company said.

Alongside the proposed securities class action, Lucid also faces a shareholder derivative suit in Delaware making breach of fiduciary duty claims over the same alleged misrepresentations.

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

Lead plaintiff Sjunde AP-Fonden is represented by Stacey M. Kaplan, Max Johnson, Gregory M. Castaldo, Johnston de F. Whitman and Joshua A. Materese of Kessler Topaz Meltzer & Check LLP.

Lucid Group Inc. and Peter Rawlinson are represented by Sara B. Brody, Stephen Chang, Sarah E. Gallo, Andrew W. Stern and James O. Heyworth of Sidley Austin LLP.

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

--Additional reporting by Jeff Montgomery, Mike Curley and Bonnie Eslinger. Editing by Alex Hubbard.

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Akin Gump 'Totally Messed Up' With Texts, Vaxart Judge Says

By **Bonnie Eslinger**

Law360 (December 9, 2024, 10:37 PM EST) -- A California federal judge asked by Vaxart investors to impose sanctions over a hedge fund's deleted text messages in a case claiming Vaxart inflated its stock price with deceptive headlines about a COVID-19 vaccine said Monday that the fund's lawyers at Akin Gump "totally, totally messed up."

The assessment from U.S. District Judge Vince Chhabria came at the end of a four-hour evidentiary hearing in San Francisco federal court over the investors' sanctions motion.

The underlying suit accuses Vaxart, its current and former executives and Armistice Capital LLC — which owned a majority of Vaxart's publicly traded common stock — of falsely claiming to receive support from Operation Warp Speed, the federal COVID-19 vaccine development effort, to pump the company's stock price.

Last year, the investors finalized a **\$12 million settlement** with Vaxart and its executives. However, Armistice and two of its senior officials — founder Steven Boyd and Keith Maher, who also both served on Vaxart's board of directors — remain in the suit.

During Monday's hearing, Boyd testified that he had accidentally deleted text messages between him and Maher while trying to stop an incoming phone call during a physical therapy session via Skype. Boyd told the court that he immediately notified Armistice's general counsel about the deleted texts.

A lawyer for the investors, Jeffrey Jacobson of Scott + Scott Attorneys At Law LLP, pointed to inconsistencies between Boyd's recollection of the date of the alleged phone call and AT&T phone and text records. Boyd stood by the rest of his story and said his memory of those specifics may have been lost with time.

After witness testimony, Judge Chhabria said he had doubts about the investors' theory that Boyd deleted his text exchange with Maher in an effort to impede the litigation.

"Why would he decide to do it in March of 2021," the judge asked. "Why wouldn't he have done it before then?"

Jacobson said Armistice had moved to dismiss the action earlier that month.

Judge Chhabria was not convinced and also pointed to the fact that Boyd had told Armistice's general counsel about the deleted texts. The lawyer pointed to the inconsistencies revealed with the AT&T records. Judge Chhabria said in his years on the bench he's seen "people remember things differently and memories fade."

Judge Chhabria noted that the investors were seeking a default judgment against the Armistice defendants or for a jury instruction related to the deleted texts. They've also asked for reimbursement of their litigation costs for the time and expense investigating the alleged destruction of evidence. Judge Chhabria asked if the investors were seeking that from the hedge fund or from its counsel, and Jacobson said both.

The judge said he'd give the law firm, Akin Gump Strauss Hauer & Feld LLP, an opportunity to respond with a written filing explaining to the court why they should be not held liable for the deleted

texts.

"One thing that's very clear is that Akin Gump totally, totally messed up and at a minimum was grossly negligent," the judge said.

Judge Chhabria said at this juncture he's not making a decision on whether Boyd intentionally destroyed evidence, but later said, "we wouldn't be here if Akin Gump was doing its job."

The litigation hold was imposed in July 2020; Judge Chhabria said Akin Gump should have immediately obtained copies of Boyd and Maher's text messages back then. The fact that they had not been obtained and held by the firm, was "mind-boggling," the judge said.

Jacobson told the court that the investors spent about nine months in talks with Armistice's counsel trying to get the text evidence, "when they knew at the very time that we were negotiating that those text messages did not exist."

A lawyer for the Armistice defendants, Warren Metlitzky from Conrad Metlitzky Kane LLP, told the court that his firm had been hired to handle the spoliation issue. He suggested to the judge that having the law firm preserve the texts — as opposed to telling defendants to preserve the evidence — was a "best practice," but "perfection" wasn't warranted.

Judge Chhabria was sharp in his response.

"Oh, we're very, very far from perfection here," the judge said.

The investors said in their **sanctions motion** that Boyd and Maher exchanged over 1,000 text messages during the class period and over 320 texts on the day immediately before and after two key press releases were issued, as well as after what the investors alleged were "Armistice's insider sales."

During Monday's hearing, Maher told the court that while he routinely deleted text messages, he never intentionally deleted any communications that he thought would be relevant to the Vaxart matter, including text messages with Boyd.

In their complaint, the investors accuses Vaxart of issuing multiple materially misleading statements in June 2020, claiming it was partnering with Attwill Medical Solutions Sterilflow LP to produce "a billion or more" COVID-19 vaccine doses per year even though Attwill wasn't certified to produce the vaccines. Vaxart also claimed a day later that its vaccine had been "selected for the U.S. government's Operation Warp Speed," according to investors.

The news drove the stock to surge over 28% while Armistice Capital dumped 27.6 million shares of the company to rake in "an astounding \$267 million," the investors claim. Roughly a month later, the stock fell when The New York Times reported that Vaxart was not part of Operation Warp Speed.

The investors are represented by Reed R. Kathrein, Lucas E. Gilmore, Steve W. Berman and Raffi Melanson of Hagens Berman Sobol Shapiro LLP, John T. Jasnoch, William C. Fredericks and Jeffrey P. Jacobson of Scott + Scott Attorneys At Law LLP, and Brian J. Schall of The Schall Law Firm.

The Armistice defendants are represented by Neal R. Marder, Joshua A. Rubin, Sina Safvati and Lillian Rand of Akin Gump Strauss Hauer & Feld LLP, and Miranda Kane, Warren Metlitzky and Nathan Theobald of Conrad Metlitzky Kane LLP.

The case is In re Vaxart Inc. Securities Litigation, case number 3:20-cv-05949, in the U.S. District Court for the Northern District of California.

--Additional reporting by Katryna Perera and Sarah Jarvis. Editing by Michael Watanabe.



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\$82.5M Cheerleading Antitrust Deal, Atty Fee Gets Final OK

By **Elaine Briseño**

Law360 (December 9, 2024, 9:14 PM EST) -- A Tennessee federal judge has granted final approval of an \$82.5 million settlement between parents and Varsity Brands in a lawsuit that accused the apparel company of stifling competition and inflating prices, and also allowed \$35 million of the award to pay for class counsel's fees.

U.S. District Judge Sheryl H. Lipman in a Friday **order** said the plaintiffs had been given proper notice, the settlement is "fair, reasonable and adequate," and litigating the already four-year-old lawsuit would increase costs significantly. In addition, the settlement came after extensive fact and expert discovery, providing sufficient information to evaluate their cases.

The settlement will be distributed into three pots: 53% will go to those who participated in Varsity Brands competitions, 26% for those in cheer camps and 21% for apparel. The parents in the settlement class indirectly purchased Varsity's products through schools where their children participated in competitive cheer, as well as through All Star cheer gyms.

Three of the moms who had reached the settlement with Varsity Brands asked the court for \$35 million of the fund to pay for their attorneys' fees and costs. Class counsel spent 43,743 hours on the case, according to the order.

"This hard work should be incentivized," the order said. "Society's interest in the diligent prosecution of antitrust cases supports a finding of reasonableness."

The court granted preliminary approval of the \$82.5 million proposed settlement in June, helping to usher the class action, brought four years ago against Varsity Brands, its founder Jeff Webb and private equity investors Charlesbank Capital and Bain Capital, into its final stage.

The parents had alleged that Varsity's monopoly power in the competitive cheer industry had a far reach, even having the power to force participants to stay at preselected hotels during competitions. Varsity — which not only sells apparel but also organizes top cheer competitions — received kickbacks from hotels whose rooms were more expensive than competitors' rooms in exchange for requiring that competing teams stay in them.

The lawsuit also accused Varsity and its former and current private equity owners of working with the U.S. cheer governing body, U.S. All Star Federation, to artificially hike the price of cheer participation. Under the settlement agreement, USASF agrees not to disclose confidential event information to Varsity.

The parties did not immediately respond to a request for comment.

The parents are represented by Joseph R. Saveri, Ronnie Seidel Spiegel, David Seidel, Kevin Rayhill and Elissa A. Buchanan of Joseph Saveri Law Firm LLP, Van Turner of Turner Feild PLLC, Richard M. Paul III and Ashlea Schwarz of Paul LLP, Jason S. Hartley of Hartley LLP and Daniel E. Gustafson, Daniel C. Hedlund and Daniel J. Nordin of Gustafson Gluek PLLC.

Varsity and Bain Capital Private Equity LLC are represented by Adam S. Baldridge and Matthew S. Mulqueen of Baker Donelson Bearman Caldwell & Berkowitz PC.

Varsity is additionally represented by George Cary, Heather Nyong'o, Steven Kaiser and Jennifer Kennedy Park of Cleary Gottlieb Steen & Hamilton LLP.

Bain Capital is additionally represented by Michael D. Bonanno, Ryan T. Andrews and Christopher Tayback of Quinn Emanuel Urquhart & Sullivan LLP.

U.S. All Star Federation is represented by Grady Garrison and Nicole Berkowitz Riccio of Baker Donelson Bearman Caldwell & Berkowitz PC.

Webb is represented by Paul E. Coggins and Brendan P. Gaffney of Locke Lord LLP and Edward L. Stanton III and S. Keenan Carter of Butler Snow LLP.

Charlesbank Capital Partners is represented by Richard G. Parker, Scott A. Edelman, Fiona A. Schaeffer and Katherine K. Fell of Milbank LLP and Shea S. Wellford of Martin Tate Morrow & Marston PC.

The case is Jessica Jones et al. v. Bain Capital Private Equity et al., case number 2:20-cv-02892, in the U.S. District Court for the Western District of Tennessee.

--Additional reporting by Bonnie Eslinger. Editing by Dave Trumbore.

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Facebook Execs Deny Email Breach Harm In Del. Hearing

By **Jeff Montgomery**

Law360 (December 9, 2024, 7:15 PM EST) -- Two former Facebook directors turned to "chutzpah" in answering a stockholder class call for sanctions against them for deleting uncounted emails regarding privacy violations and the Cambridge Analytica scandal, a stockholder attorney told a Delaware vice chancellor on Monday.

Maxwell R. Huffman of Scott + Scott Attorneys at Law LLP told Vice Chancellor J. Travis Laster during a hearing that former Chief Operating Officer Sheryl Sandberg routinely used personal Gmail for an undetermined number of communications regarding Facebook — now Meta Platforms — despite company policy.

Former director and special committee member Jeffrey Zients likewise used personal email, Huffman said, with both accused of deleting electronically stored information that purportedly included key evidence in the shareholder litigation. The emails were said to have violated a litigation hold in 2018 that required them to preserve all relevant electronic documents "wherever it exists."

"There's no dispute that they can't get them. Instead, what they try to do is weaponize our evidence of prejudice to say nothing was actually lost," Huffman said.

Huffman went on to quote the observation of Leo E. Strine Jr., a former Delaware chancellor and ex-chief justice of the state supreme court, in a 2009 opinion that intentionally violating a preservation order and then denying harm in the absence of proof "takes immense chutzpah."

Attorneys for stockholders who sued asked that the court require Sandberg and Zients to prove their defenses by a heightened "clear and convincing" evidence standard because of the gaps their actions created. As well, the court was asked to bar the two from testifying about their emails and from seeking summary judgment on the claims.

"We have a number of documents showing there were key email accounts used for sensitive issues at key times," Huffman said. "I think the prejudice here is obvious."

Also sought for the spoliation litigation was shifting of stockholder attorney fees to the defense, with attorneys for the stockholders saying in a brief that "Sandberg and Zients destroyed relevant evidence over a litigation hold and while this action was pending, and several years passed before this was disclosed."

Berton W. Ashman Jr. of Potter Anderson & Corroon LLP, counsel to Sandberg as well as Meta Platforms CEO Mark Zuckerberg and the company's directors, told the vice chancellor that "the record simply does not allow" assumptions regarding alleged losses.

"There's no intent here to destroy relevant or responsive information and no expectation that any unique information would be lost," Ashman said, noting that searches had failed to find linkages between Sandberg and others relevant to the case.

"You'd have to conclude she was emailing to some phantom third party that plaintiff has not identified," Ashman said, telling the vice chancellor that although Sandberg "wasn't perfect" she carefully separated business and personal communications.

Huffman said Sandberg and Zients are "somewhat reaping what they sowed by this being an elongated process. It took more time, more hours, than if they'd been more candid, sooner. I would say the record supports that there was foot dragging. We weren't going to get real answers unless we pressed."

Vice Chancellor Laster said he would take the arguments under advisement.

The sanctions fight is the latest development in shareholder litigation consolidated before the Delaware Chancery Court in 2018 and now headed for trial in April 2025, accusing the social media giant's top brass of violating their fiduciary duties by not establishing a comprehensive privacy program as required under a 2012 consent decree from the Federal Trade Commission.

Meta, which was once called Facebook Inc., entered into the agreement with the FTC after it and other regulators sued the company over its privacy practices.

But instead of complying with the order, investors claim Meta continued to collect granular data of its users and their friends, sharing that information with other companies in exchange for advertising dollars.

Despite numerous red flags, according to the investors, the board did nothing to correct the violations, which purportedly led to the Cambridge Analytica scandal — in which an app developer was able to gather data from millions of unwitting Facebook users — and Meta's 2019 \$5 billion FTC settlement.

Meta CEO Zuckerberg, Sandberg, venture capitalist Marc Andreessen, PayPal co-founder Peter Thiel and several other members of Facebook's 2021 board sought to toss the litigation, but in May 2023, Vice Chancellor Laster largely rejected the dismissal bids.

The complaint targets shortcomings and violations that led to a record \$5 billion Federal Trade Commission penalty in 2019. The board underwent changes in 2020 and 2021, however, potentially undercutting stockholder arguments that they should be allowed to seek damages because it would have been futile to ask the board to pursue claims for damages against some, or all, of its members.

The suit alleges breaches of fiduciary duty and, against some of those named, insider trading. It includes allegations that Zuckerberg, Sandberg and six other board members knew as early as 2015 that U.K. political consulting firm Cambridge Analytica was misappropriating personal data from Facebook users without their consent.

By April 2018, Facebook revealed that information from up to 87 million users may have been improperly shared with the political consulting firm hired by Donald Trump's 2016 presidential campaign. That scandal took shape despite years of FTC scrutiny, dating to 2010, of Facebook's compliance with privacy regulations and its assurances to users, which led to the 2012 consent order.

The stockholders are represented by Kevin H. Davenport, Samuel L. Closic, John G. Day, Stacey A. Greenspan, David C. Skoranski and Kirsten M. Valania of Prickett Jones & Elliott PA, Frederic S. Fox, Hae Sung Nam, Donnie Hall and Aaron Schwartz of Kaplan Fox & Kilsheimer LLP, Maxwell R. Huffman, Geoffrey M. Johnson, Justin O. Reliford, Donald A. Broggi and Jing-Li Yu of Scott + Scott Attorneys at Law LLP, Catherine Pratsinakis and Thaddeus J. Weaver of Dilworth Paxson LLP, Frank R. Schirripa, Daniel B. Rehns, Kurt M. Hunciker and Kathryn A. Hettler of Hach Rose Schirripa & Cheverie LLP, Thomas J. McKenna and Gregory M. Egleston of Gaine McKenna & Egleston, Peter B. Andrews, Craig J. Springer, David M. Sborz and Jacob D. Jeifa of Andrews & Springer LLC, Brian J. Robbins, Stephen J. Oddo and Gregory E. Del Gaizo of Robbins LLP, Joseph J. Tabacco Jr. and Daniel E. Barenbaum of Berman Tabacco, and Joseph W. Cotchett, Mark Molumphy, Tyson Redenbarger and Gia Jung of Cotchett Pitre & McCarthy LLP.

Mark Zuckerberg, Sheryl K. Sandberg, Konstantinos Papamiltiadis, Jeffrey D. Zients, Peggy Alford, Kenneth I. Chenault, Peter A. Thiel, Susan D. Desmond-Hellmann, Reed Hastings, Marc L. Andreessen and Erskine B. Bowles are represented by Kevin R. Shannon, Berton W. Ashman Jr., Callan R. Jackson and Justin T. Hymes of Potter Anderson & Corroon LLP and William Savitt, Ryan McLeod, Anitha Reddy, Stephen D. Levandoski, Iliria Camaj and Tobias Kuehne of Wachtell Lipton Rosen & Katz.

Meta is represented by David E. Ross, R. Garrett Rice, Elizabeth M. Taylor, A. Gage Whirley and Benjamin M. Whitney of Ross Aronstam & Moritz LLP, and Brian M. Lutz of Gibson Dunn & Crutcher LLP.

The case is In re: Facebook Inc. Derivative Litigation, case number 2018-0307, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery, Al Barbarino and Leslie A. Pappas. Editing by Michael Watanabe.

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Apple Faces Another Suit Over Child Porn Detection Failures

By **Dorothy Atkins**

Law360 (December 9, 2024, 8:37 PM EST) -- Apple has been hit with another proposed class action by child abuse victims in California federal court alleging that the tech giant misled users about its efforts to combat the dissemination of child pornography and defectively designed its products, thereby allowing explicit imagery to run rampant on its iCloud and Apple devices.

In a 56-page complaint filed Saturday, two plaintiffs, who are referred to under the pseudonyms "Amy" and "Jessica," alleged that Apple defectively designed its Apple products and iCloud system, which it launched in 2011, by failing to create tools that detect and limit the spread of known child pornography images and videos, also referred to as child sexual abuse materials, or CSAM.

Although other tech companies like Google, Microsoft and DropBox use a CSAM-detection tool PhotoDNA — which University of California, Berkeley computer science professor Hany Farid developed in 2008 with Microsoft — Apple has refused to implement the industrywide standard due to purported privacy concerns, the **complaint** said.

Facing mounting criticisms, in August 2021, Apple announced that it had developed its own CSAM-detection tool, called NeuralHash, in collaboration with the National Center for Missing and Exploited Children.

However, NeuralHash only worked when the Apple device containing CSAM was connected to iCloud, and it wasn't as precise as PhotoDNA, the suit alleged.

In an attempt to correct for NeuralHash's imprecision, Apple increased the "false-positive" CSAM rate not to trigger a report to Apple unless 30 images or more were detected as CSAM, and it used a cryptographic feature that only decrypted potential CSAM images if the number of materials matched exceeds a certain threshold, according to the suit. Those restrictions resulted in a less reliable process for combating the spread of CSAM, the suit said.

"Apple designed NeuralHash with arbitrary thresholds, which, if implemented, would have failed to detect known CSAM adequately and failed to meet essential child protection and legal standards," the complaint said.

Even so, within weeks of Apple's announcement, the company said it would delay the rollout of the tool, and Apple eventually announced, in December 2022, it would not implement NeuralHash or any other child pornography detection tools on its products, claiming that such "bulk surveillance" of privately stored data would implicate privacy and security concerns, the suit said.

Following the announcement, there was a large departure of executives including Apple's director of investigations and child safety Melissa Marrus Polinsky, its trust and safety director Margaret Richardson, its chief privacy officer Jane Horvath, its iCloud lead Michael Abbott and the purported lead engineer on CSAM detection software, Abhishek Bhowmick, the suit said.

As further evidence of Apple's purported knowledge of its misconduct, the complaint cited iMessage exchanges between Apple executives Eric Friedman and Herve Sibert that were publicly revealed in Epic Games Inc.'s **landmark 2021 antitrust bench trial** against Apple.

The text exchanges allegedly show the Apple executives have been aware for years that Apple

defectively designed its products since at least 2020, and in them, Friedman wrote that iCloud is "the greatest platform for distributing child porn" and that Apple's privacy tools have "chosen to not know in enough places where we really cannot say," according to the complaint.

In the same conversation, Friedman referred to a New York Times article about CSAM detection and wrote that he suspects Apple is underreporting the size of Apple's CSAM issue, the suit said.

"Apple knowingly and intentionally designed its products with deliberate indifference to the highly preventable harms Apple caused plaintiffs and all victims of known hashed CSAM," the complaint added.

Last year, Apple submitted only 267 reports of known, suspected or apparent violations of child pornography laws, while four other top tech companies submitted more than 32 million reports of CSAM to the National Center for Missing and Exploited Children, the suit noted.

The two plaintiffs leading the case live in Northern California and are in their 20s, but they were sexually abused as young girls under the age of 10, the suit said. Law enforcement identified the plaintiff Amy as the victim in the "Misty" child pornography series, and she and Jessica have both received thousands of law enforcement submissions to the National Center for Missing and Exploited Children for child victim identification, according to the suit.

"The unending collection and trading of CSAM depicting Amy and Jessica has caused them long-lasting and permanent harm," the suit said. "Unlike victims of time-limited trauma, CSAM victims are aware that CSAM depicting them will never cease to exist."

The suit seeks to certify a nationwide class of individuals who were under 18 years of age at the time they were depicted in any child pornography that has been identified by the Center for Missing and Exploited Children, and which has been made available on Apple's products, including iCloud, since Aug. 5, 2021.

The four-count complaint asserted civil claims of negligence, negligent misrepresentation and design defect, as well as violations of a federal criminal statute that allows for civil remedies. That statute prohibits knowingly receiving, possessing and distributing child pornography.

Victims of child pornography crimes are entitled to recover \$150,000 in liquidated damages, and the lawsuit sought compensatory and punitive damages, plus interest, costs and attorney fees.

It also sought an order requiring Apple to identify, remove and report CSAM on iCloud and implement new procedures to prevent continued dissemination of CSAM or child sex trafficking on Apple devices and services.

Apple said in a statement Monday that child sexual abuse material is abhorrent and that the company is committed to fighting the ways predators put children at risk.

"We are urgently and actively innovating to combat these crimes without compromising the security and privacy of all our users," the statement said.

Apple noted that the company's products currently have a "communication safety" feature that warns children when they receive or attempt to send content that contains nudity in an effort "to help break the chain of coercion that leads to child sexual abuse."

Counsel for the plaintiffs didn't immediately respond to a request for comment Monday.

The lawsuit came in the wake of a similar proposed class action filed in California's Northern District in August. That case asserted violations of sex trafficking laws, consumer protection laws, breach of contract, misrepresentation and unjust enrichment.

In **October**, Apple asked U.S. District Judge Eumi K. Lee to throw out the case, arguing that the claims are barred by Section 230 of the Communications Decency Act. However, before the judge ruled, the plaintiff filed an amended complaint, adding design defect claims, among others. The initial case management conference is set for April 2 via Zoom, according to the docket.

The proposed class is represented by Micha S. Liberty of Liberty Law, James R. Marsh, Margaret E. Mabie and Helene M. Weiss of Marsh Law Firm PLLC and Hillary Nappi of Hach Rose Schirripa & Cheverie LLP.

Counsel information for Apple wasn't immediately available Monday.

The case is Amy et al. v. Apple Inc., case number 5:24-cv-08832, in the U.S. District Court for the Northern District of California.

--Additional reporting by Craig Clough and Hailey Konnath. Editing by Rich Mills.

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Litigation Funding Firms Escape Hurricane Ad Suit

By **Emily Sawicki**

Law360 (December 9, 2024, 12:17 PM EST) -- Two litigation funders have succeeded in exiting a proposed class action alleging a law firm deceptively advertised to hurricane victims, with a Houston federal court adopting a magistrate judge's recommendation to toss claims for a lack of plausible allegations.

On Friday, U.S. District Judge Alfred H. Bennett permanently dismissed claims against funders Equal Access Justice Fund LP and EAJF ESQ Fund LP, which had been accused of knowingly financing an unlawful barratry scheme, months after U.S. Magistrate Judge Yvonne Y. Ho recommended they be cut from the suit.

Named plaintiff Katherine Monson has been pursuing claims against Texas law firm McClenny Moseley & Associates PLLC, now known as MMA Law Firm, since March 2023. She **accused the firm** of preying on hurricane victims following a series of destructive hurricanes that hit Louisiana in 2020, including Category 4 hurricanes Laura and Ida.

McClenny Moseley and legal advertising company Tort Network LLC, which does business under the name Velawcity, worked together to put illegal advertising pressure on storm victims, Monson alleged, in a complaint that also named a Louisiana-based roofing company as a defendant. In April 2024, **Monson added** the litigation funders to an amended complaint.

In various filings, the funders have been referred to as Equal Access defendants and Equal Justice defendants.

Monson argued the litigation funder defendants "would have required a significant amount of projected financials, as well as business plans to evaluate the Equal Justice defendants prospects for getting their loans paid back." She later added that the "Equal Justice defendants knowingly and willingly loaned \$20 million to a Texas law firm for funding of a marketing scheme that was violative of Texas law."

The firms pushed back, filing a dismissal bid claiming the "bare fact" that they lent money to McClenny Moseley was not enough to establish their knowledge of the alleged scheme. The funders told the court Monson's amended complaint contained no "factual pleading whatsoever that the funds actively concealed information, what information was concealed, and how the information is relevant to the barratry allegations."

In September, Judge Ho issued a report and recommendation advising the U.S. District Court for the Southern District of Texas to **cut the litigation funders** from the suit.

"Without plausible allegations that EAJF knew or believed its loans would fund unlawful barratry, Monson has not stated a viable claim," Judge Ho said in the report. And just because the funders believed McClenny Moseley would make good on their loan obligation was not enough to prove they were aware of any unlawful scheme, the judge added.

On Friday, Judge Bennett agreed, finding the magistrate judge "correctly determined that plaintiff has not plausibly alleged the Equal Access defendants held the requisite knowledge that the funds at issue in this case would be used for unlawful means."

Judge Bennett added that, like Judge Ho, he could not find good cause to allow Monson a second chance to amend the complaint.

"Plaintiff failed to set forth the grounds for amendment," Judge Bennett said of Monson's request to amend. "Moreover, plaintiff has already amended her complaint once."

Counsel for Monson and the funders did not immediately respond to a request for comment Monday.

Katherine Monson is represented by Jonathan P. Lemann and Robert E. Couhig Jr. of Couhig Partners LLC, Ron A. Austin and Scott Huete of Ron Austin Law, and Lance Christopher Kassab and David Eric Kassab of The Kassab Law Firm.

Equal Access Justice Fund LP and EAJF ESQ Fund LP are represented by Brian W. Zimmerman, Frederick T. Johnson and Brian Poldrack of Spencer Fane LLP.

The case is Monson v. McClenny Moseley & Associates PLLC et al., case number 4:23-cv-00928, in the U.S. District Court for the Southern District of Texas.

--Additional reporting by Spencer Brewer, Lynn La Rowe, James Mills and Rose Krebs. Editing by Robert Rudinger.

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