Will U.S. Supreme Court forgo investor class actions after Meta, Nvidia dismissals?

reuters.com/legal/government/will-us-supreme-court-forgo-investor-class-actions-after-meta-nvidia-dismissals-2024-12-12

Alison Frankel

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

Dec 12 (Reuters) - Shareholder lawyers are doing a bit of gloating after the U.S. Supreme Court tossed a second securities class action on Tuesday.

The justices dismissed a case in which chipmaker Nvidia (NVDA.O), opens new tab was challenging an appellate decision that revived an investor class action accusing the company of misrepresenting its dependence on the volatile crypto mining industry.
Although the court's one-sentence order offered no explanation, the dismissal wasn't a surprise: As my Reuters colleague John Kruzel had reported, some of the justices signaled concerns during oral arguments last month that the case did not present a clear legal issue and was instead a dispute over facts.

The Nvidia dismissal came three weeks after the justices dismissed Facebook's attempt to reverse an appellate opinion allowing investors to proceed with claims that the Meta (META.O), opens new tab subsidiary fraudulently failed to reveal improper data harvesting by political consulting firm Cambridge Analytica. During oral argument in that case, Reuters reported, the justices struggled to discern principles for disclosing risk in the context of events that have already occurred.

Both Facebook and Nvidia told Reuters that they will continue to defend themselves in the lower courts.

The securities defense bar was optimistic last spring when the Supreme Court agreed to hear the Facebook and Nvidia cases, since both offered the justices an opportunity to tighten the standards for securities fraud complaints.
Broadly speaking, defendants hoped that the court would make it harder for shareholders to survive dismissal motions, which are a key hurdle in securities class actions. (Investors are not permitted to obtain discovery from corporate defendants until they have defeated motions to dismiss their cases.) So you can see why plaintiffs lawyers are relieved that the court opted not to decide either case.

The obvious question going forward, though, is whether the justices – having been burned twice in granting review of shareholder class actions – will be shy about agreeing to hear new securities cases.

The most optimistic take I heard on Thursday from plaintiffs' lawyers is that the Facebook and Nvidia dismissals are a tacit acknowledgment from the Supreme Court that it doesn’t need to keep meddling with private securities litigation.

Shareholder counsel Javier Bleichmar of Bleichmar Fonti & Auld and Paul Bland of Berger Montague, who both filed a friend-of-the-court brief in the Nvidia case, said the Supreme Court has already weighed in on the big questions arising from a 30-year-old law intended to dissuade frivolous securities class actions and may not want to get tangled in fact-specific issues.

"These two cases are not an aberration," said Nvidia shareholders' counsel Deepak Gupta of Gupta Wessler. "The court is definitely going to think twice about hearing class action cases raising the same kind of tropes."

Kevin Russell of Russell & Woofter also predicted heightened scrutiny from the court, especially when petitions present “open-ended questions or multiple theories for reversal.” (Russell was Supreme Court counsel for Facebook's investors but was speaking just as an appellate practitioner.)

Both the Facebook and Nvidia cases, Russell said, evolved after the Supreme Court granted review, leaving the justices with a “mismatch” between the issues they originally expected to resolve and the issues that emerged after full briefing. To avoid falling into the same trap in the future, Russell said, the court “will want to see defendants articulating clear, discrete legal rules.”

Defense lawyer Morgan Ratner of Sullivan & Cromwell also told me that strategic framing will be crucial for companies asking the justices to take securities cases. She and fellow Sullivan & Cromwell partner Judson Littleton, who both filed amicus briefs in this term’s securities cases, said it’s important for the Supreme Court to find broad legal principles in fact-specific cases in order to guide lower courts.

The trick for the securities defense bar, Ratner said, will be to convince the justices, “without overselling their case,” to provide that necessary guidance through their clients’ cases.

It’s even arguable that the Supreme Court’s decision to punt on the Facebook and Nvidia cases makes it more likely, rather than less, that the justices will eventually have to resolve the questions those cases presented, said defense lawyer Mark Foster of Skadden, Arps, Slate, Meagher & Flom and law professor Joseph Grundfest of Stanford University.

One of the big questions, opens new tab in the Nvidia case was whether plaintiffs should be permitted to rely on an expert opinion to establish a defendant’s fraudulent intent. That question remains unresolved after the Supreme Court’s dismissal of Nvidia’s petition – which means, according to Grundfest and Foster, that shareholder lawyers will probably increase their use of expert opinions in securities class action complaints. Foster said he expects to see more expert reports on, for instance, market conditions or industrywide knowledge. Plaintiffs' lawyers, he hypothesized, will use such reports to argue that the only explanation for defense conduct is fraud.
It's quite likely, he and Grundfest said, that as these reports become more common, lower courts will reach different conclusions about their interpretation – and that the Supreme Court will ultimately have to set a uniform standard.

“Dismissing Nvidia means the issue is delayed, not decided,” said Grundfest, who submitted amicus briefs at both the petition and merits stages of the case. “This question will be back.”

Moreover, as lower courts continue to mull the questions left unresolved by the Nvidia and Facebook dismissal, corporate defendants will at least have the benefit of Supreme Court briefing – from not only shareholders and defense lawyers but also the U.S. Justice Department, which argued on behalf of the shareholders in both cases – to focus and sharpen their arguments.

That’s not much solace for companies worried about shareholder class actions. But it’s all they’re getting for now.

Read more:

US Supreme Court dismisses Nvidia's bid to avoid securities fraud suit
US Supreme Court tosses case involving securities fraud suit against Facebook
In Nvidia and Meta cases, Supreme Court will review shareholder class action dismissal rules
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Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

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

What to Expect in the Securities Enforcement Space in 2025

law.com/newyorklawjournal/2024/12/13/what-to-expect-in-the-securities-enforcement-space-in-2025

Lisa Bebchick and Helen Gugel and Amish Shah and Dominique Rioux

Securities enforcement is not going anywhere in 2025. The enforcement agenda of the Securities and Exchange Commission (SEC) will surely be impacted by its new leadership under Paul Atkins, President-elect Donald Trump's selection for SEC chair and a former SEC commissioner from 2002 to 2008. But the agency's core commitments—policing fraud and market manipulation, perceived conflicts of interest, and conduct that may harm retail investors—have historically been championed by commissioners of both parties and are likely to continue unabated. Even in areas in which enforcement is likely to substantially diminish—such as crypto or environmental, social, and governance (ESG) disclosures—the SEC will likely still have interest when there are concrete allegations of fraud or investor harm. One notable change, however, is that the SEC may be less likely to support enforcement based on technical violations of the federal securities laws that lack intentionality or specific underlying harm. New leadership might also implement procedural changes that will affect how investigated parties and their counsel experience the enforcement process, and we may see a substantial reduction in penalties against public companies, given that Atkins has criticized such penalties as harming existing shareholders. Finally, there is uncertainty regarding staffing at the SEC that may impact SEC enforcement in the coming years.

Substantive Priorities—What Will Change and What Will Remain the Same?

Diminished crypto-related enforcement actions but a continued focus on fraud

The SEC's scrutiny of the crypto industry—and the articulation of its broad view that digital assets are securities subject to the agency's jurisdiction—began during Trump's first term under the leadership of former Chair Jay Clayton. Over the last four years, however, President-elect Trump has become a vocal supporter of crypto, and his nomination of Paul Atkins for SEC chair suggests that the SEC's focus on the crypto industry will relax significantly in 2025. Under Chair Gary Gensler, there has been a substantial increase in the number and reach of crypto-related enforcement actions and a willingness to bring cases against well-established exchanges and other market participants based on the SEC's determination that they are listing or otherwise transacting in securities. This approach has been heavily criticized as "regulation by enforcement" by proponents of the industry and, perhaps more critically, by Atkins and the two current Republican SEC commissioners (one of whom will also serve as acting chair until a permanent chair is appointed). For instance, Commissioners Hester Peirce and Mark Uyeda have repeatedly criticized the agency for failing to provide clear guidance about when digital assets are considered a security, thereby stifling innovation and creating an untenable environment for market participants in this space. (See Peirce & Uyeda, “On Today’s Episode of As the Crypto World Turns: Statement on ShapeShift AG” (March 5, 2024)). Atkins has similarly expressed concerns that the SEC’s approach to crypto enforcement has driven innovation abroad, harming U.S. interests. (See Dave Michaels, “Trump Picks Paul Atkins to Run SEC,” Wall Street Journal (Dec. 4, 2024)). While we expect that the SEC will take a less aggressive approach to crypto enforcement going forward and bring fewer cases for an alleged failure to register with the agency in connection with transactions involving digital assets, the SEC is not likely to step back from crypto enforcement entirely. As Commissioner Peirce has said, “focusing on crypto, which has been plagued by fraud, is not inherently problematic.” (See Peirce, “Hobs and Hobbes: Wharton FinTech Lecture” (Nov. 1, 2024); see also Peirce, “Overdue: Statement of Dissent on LBRY” (Oct. 27, 2023)). Crypto cases that implicate fraud or retail investor harm are likely to be a continuing priority.

Potential for increased AI-related enforcement and anti-ESG enforcement

The SEC has long prioritized enforcement actions for false or misleading statements, disclosures, or marketing materials. The SEC recently extended these cases to cover “AI-washing,” which is when companies, investment advisers, or other regulated entities overstate the extent to which they are using artificial intelligence (AI) as part of their business. Enforcement actions focused on AI-washing are likely to continue in 2025, as they squarely fit within the SEC’s traditional enforcement of false and misleading statements.

For the same reason, we expect the SEC to continue to bring enforcement actions that allege misstatements related to ESG. Beyond that, however, we anticipate that other ESG-related enforcement actions will continue to be deprioritized, as they have been towards the end of the Biden administration. It is possible that the Commission might even advance new, potentially opposing policy priorities in 2025, whether anti-ESG, anti-DEI, or other policy preferences of the incoming Trump Administration. (See, e.g., “Agenda47: President Trump Continues to Lead on Protecting Americans from Radical Leftist ESG Investments”, Trump Campaign Website (Feb. 25, 2023); Gram Slattery & Nathan Layne, “Trump vows to fight ‘anti-white feeling’ in the United States,” Reuters (May 4, 2024)). For instance, the commission could adopt a position similar to that of Republican Attorneys General who have argued, among other things, that ESG is antithetical to funds’ fiduciary duty to maximize returns. (See “Letter from 21 Attorneys General to Asset Managers” (March 30, 2023)). Indeed, Atkins has expressed the view that ESG funds are politicized investment products and that activism through investment can harm investors by leading “fund managers to compromise their fiduciary duty in service of a political agenda.” (See Paul Atkins, “Opinion: Activist Investment Puts Millions of Retirees at Risk,” Newsweek (March 6, 2023)).

A renewed focus on traditional enforcement theories

Under Gensler, the SEC advanced novel legal theories that have pushed the boundaries of securities enforcement. Some of these theories were successful, such as the SEC’s recent trial victory in the *Panuwat* “shadow trading” case. In that case, the SEC brought an insider trading action against an individual who—in contravention of his employer’s insider trading policy—used nonpublic information about his employer to purchase call options in a different, comparable company. (See SEC Director of Enforcement Gurbir S. Grewal, “Statement on Jury’s Verdict in Trial of Matthew Panuwat” (April 5, 2024)). Other novel theories have failed, such as the recent SolarWinds litigation in which the SEC attempted to argue that the cybersecurity deficiencies at SolarWinds that resulted in the SUNBURST cyberattack (discovered in December 2020) violated Section 13(b)(2)(B) of the Exchange Act, which requires public companies to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that … access to assets is permitted only in accordance with management’s general or specific authorization.” (See *Securities & Exchange Commission v. SolarWinds*, No. 23-civ-9518 (PAE) (S.D.N.Y. July 18, 2024)). The court rejected the SEC’s broad reading of Section 13(b)(2)(B) to cover areas unrelated to financial accounting or transactions, explaining that the SEC’s reading of the statute would grant the agency authority to regulate “all systems public companies use to safeguard valuable assets,” whether the selection of padlocks, background checks for security guards, or the length of passwords—an expansion of the SEC’s authority that Congress clearly did not intend.

We expect that the SEC under the Trump administration will be less inclined to aggressively pursue novel legal theories, particularly given the Republican commissioners’ emphasis on predictability and avoiding regulation by enforcement. Instead, we anticipate seeing a focus on the more traditional SEC priorities that have been bipartisan: financial and offering fraud, fiduciary duty and conflicts of interest disclosure, well-established insider trading theories, revenue recognition and other accounting control violations, the Foreign Corrupt Practices Act (FCPA), and straightforward violations of SEC rules.

Decline in technical rule violation cases where there is no intentional wrongdoing or specific underlying harm

As part of its aggressive enforcement agenda under Gensler, the SEC brought many cases alleging only technical rule violations without any indicia of intentional wrongdoing or specific underlying harm. The most notable category of these cases is the SEC’s off-channel communications sweep, which aggressively policed registered entities' compliance with the record keeping requirements of the federal securities laws. Since launching the initiative in December 2021, the SEC has charged over 100 firms and collected over $2 billion in penalties. Going forward, we anticipate that the SEC will not pursue off-channel communications actions that are purely technical violations and instead will likely prioritize only those cases in which there are significant and extensive record keeping failures—such as those where there was a "widespread failure" that was "firmwide," "not hidden," and impacted the commission's ability to carry out its responsibilities. (See Peirce & Uyeda, "A Catalyst: Statement on Qatalyst Partners LP," (Sept. 24, 2024)). Commissioners Peirce and Uyeda have also signaled an openness to modifying and modernizing the record keeping rules to better align with the realities of today's technology.

We may also see a decline in other technical rule violation cases. For example, the SEC recently announced actions against 23 entities and individuals to enforce the deadlines of various reporting requirements of Sections 13 and 16 of the Exchange Act. Some of these actions covered filings that were years old or merely two weeks late. It is unclear if the SEC under new leadership would support such enforcement actions absent evidence of specific underlying harm or other aggravating factors, such as the insider or company being a serial offender.

Potential Procedural Changes

With new leadership, we can also expect some shifts in the SEC's enforcement procedures in 2025. One possible change concerns the exchange of information between the SEC and the potential target of an enforcement action, known as the "Wells Process." If, following an investigation, the SEC is prepared to recommend an enforcement action to the commission, the Enforcement staff will typically notify the prospective defendant in a "Wells notice." Defense counsel subsequently makes a Wells submission and requests a meeting with staff to explain why the respondent should not be charged. In recent years, the SEC has taken steps to limit the number of Wells meetings conducted at the end of an investigation and reduce the frequency of director-level participation in Wells meetings, affording more deference to the staff attorneys closest to the investigation. (See SEC Director of Enforcement Gurbir S. Grewal, "Remarks at SEC Speaks 2021" (Oct. 13, 2021); SEC Deputy Director of Enforcement Sanjay Wadhwa, "Remarks at SEC Speaks" (Sept. 9, 2022)). A new Director of Enforcement may be more willing to take Wells meetings and engage in more dialogue with counsel at the end of an investigation.

The existing deference to SEC staff in other areas could also change under new leadership. For instance, the Commission may insist on substantive review of formal orders authorizing Enforcement staff to issue subpoenas (or may require such review for particular types of cases). The Commission might also require more senior officials to take part in settlement discussions. Such developments may result in more protracted investigations or reduce the overall number of investigations that are initiated. We will also likely see changes to the Enforcement Division's approach to remedies. For instance, the Enforcement Division under the prior Trump administration imposed less severe penalties than under the previous and subsequent administrations. Indeed, as a former commissioner, Atkins criticized large penalties against public companies, arguing that such penalties further victimize shareholders who were already harmed by a company's wrongdoing. We might also see the SEC requiring more limited undertakings in settlement agreements.

Uncertainty Regarding SEC Staffing

We have already seen turnover recently at senior levels in the Enforcement Division. Presidential transitions are frequently a time for higher volumes of staff departures from federal agencies and this trend can be expected to continue in 2025. There is a question about how the SEC will handle this expected attrition given its current hiring freeze. At least in the near term, reductions in staff will necessarily require the Enforcement Division to be even more selective about the investigations it prioritizes and to focus on more traditional priorities.

President-elect Trump has also signaled that he will implement the policy described in his October 2020 "Schedule F" executive order. Before being reversed by President Joe Biden, that executive order stripped civil service protections from a number of career federal employees that had positions of a "confidential, policy-determining, policymaking, or policy-advocating character." If Trump successfully implements Schedule F, the extent of the impact on SEC personnel is unclear but has the potential to further reduce the SEC's staffing levels and affect substantive priorities.

Conclusion

It is important to remember that while change will come with any new administration, the bulk of an agency's work will remain largely unaltered. We expect that historical precedent to hold true for the SEC in 2025. It also remains to be seen how long it will take for any of the Commission's new agenda shifts to take hold. Practitioners and registered entities are well served by continuing to adhere to the SEC's current rules and guidance as they keep a close eye on leadership and priority changes as they unfold.

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Argo Investors Lose in Insurance Reserves Misstatements Suit

By Ufonobong Umanah 2024-12-13T10:39:04000-05:00

- Investors said Argo knew that it lacked sufficient reserves
- Task force's existence isn't proof Argo knew of money issues

Argo Group International Holdings Ltd defeated a securities suit that said top leadership misrepresented the strength of its US specialty construction insurance business.

Investors' argument that Argo's creation of a task force to evaluate the business was evidence of poor financial prospects "is a far stretch," the US District Court for the Southern District of New York said, dismissing the complaint.

Argo's construction-specific business focused on defects in building components or materials that require repair or replacement. When Argo broke out its construction business into a standalone unit in 2018, leadership called it successful. But investors said in 2022, Argo announced it had to increase reserves to address construction defect claims from 2017 and earlier.

Reserves are a key metric for an excess and surplus insurance underwriter such as Argo. The plaintiffs said because of the reserves news, Argo's common stock had lost about 55% of its value in less than six months, according to the opinion Thursday.

But that Argo "acted to tighten underwriting guidelines and exposures going forward does not show that their reserves for past underwritten policies were inadequate, let alone that they knew or believed they were," Judge Lewis A. Kaplan said.

The majority of the confidential witness statements the plaintiffs presented failed to speak to Argo's construction defect reserves before 2017, the court said. To the extent they touched on the reserves, it said they carried "little to no probative value given their speculative, subjective, and uncorroborated nature."

To make Argo "incorporate sweeping disclosures about all facets of their business (past and present) every time they make statements about one specific unit would tend to suppress any statements or

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disclosures by companies, and would swamp those that did speak in litigation," Kaplan said. "That is not the law, nor should it be."

The investors also lacked sufficient evidence to prove Argo leadership had knowledge of wrongdoing, the court said. To the extent their complaint suggested Argo had fraudulent intent, it said there were more innocent explanations available.

"Predicting loss reserves is an inherently inexact and speculative task," the court said, and that Argo "had an independent actuary and outside auditor team reaffirm their projections undermines any inference of fraudulent intent."

Grant & Eisenhofer PA represented the plaintiffs. Skadden, Arps, Slate, Meagher & Flom LLP represented Argo.

The case is The Police & Fire Ret. Sys. City of Detroit v. Argo Grp. Int'l Holdings, Ltd. , S.D.N.Y., No. 1:22-cv-08971, 12/12/24 .

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Securities Law News

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Kodak Investor Derivative Appeal Faces Dubious Second Circuit

By Ben Miller

- Judges ask if investor challenge was waived under N.J. law
- Firm that investigated claim has ties to CEO, investor argues

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Kodak Investor Derivative Appeal Faces Dubious Second Circuit

By Ben Miller 2024-12-12T13:55:04000-05:00

- Judges ask if investor challenge was waived under N.J. law
- Firm that investigated claim has ties to CEO, investor argues

Eastman Kodak Co. investors sought to persuade a federal appeals court that top executives and directors must face allegations over self-dealing that doomed a $765 million Covid-19 government loan, but the Second Circuit panel appeared skeptical of the derivative suit.

A federal district judge who tossed the underlying case wrongly ruled that the Kodak board conducted a good faith investigation before it rejected the derivative claims of insider trading related to stock options executives received before the loan was announced, the investors' lawyer said at oral arguments Thursday.

The government loan agency backed out of the arrangement—which would have involved Kodak producing an ingredient for Covid-19 vaccines—in August 2020, after reports of the stock transactions. That was followed by a steep decline in Kodak's share price.

A subsequent investigation by lawyers at Akin Gump Strauss Hauer & Feld LLP found Kodak had mishandled the process, but didn't conclude that the transactions with CEO James Continenza and another director were instances of insider trading.

Akin's ties to Continenza—both as his personal lawyers in other matters and through his work on other company boards that hired the firm—posed conflicts of interest that prevented it from conducting an independent investigation, according to Lee Rudy, a partner at Kessler Topaz Meltzer & Check LLP who represents the investors.

"Here we have specific allegations of self-dealing," he told the panel from the US Court of Appeals for the Second Circuit. "The question is really about stockholder standing."

Judge Myrna Pérez asked whether the board's subsequent choice to create a special committee for further investigation and hire a second law firm, Crowell & Moring LLP, solved the conflicts of interest posed by the initial selection of Akin. The appeals court shouldn't endorse a regime where boards can appoint an endless list of committees and law firms to avoid such conflicts, Rudy said in response.

Judges on the panel said they were puzzled by the appellants' view, noting a departure from the standard for issuing summary judgment. The procedural argument over how New Jersey state law applies to Kodak's board in the case at hand has "a little bit of a 'square peg,round hole' feel to it," Judge Alison Nathan said.

The US District Court for the Western District of New York was right to decide in September 2023 that Kodak's board acted reasonably in rejecting the derivative litigation, according to Kristen Loveland, counsel at Akin. The investors waived their procedural challenge by insisting that the New Jersey business statute required the district court to make a factual determination, she argued Thursday.

Continenza's prior involvement with the law firm, as an individual and as a member of other company boards, were immaterial to Akin's ability to independently investigate the claims related to the stock transactions at issue in the derivative suit, Loveland said.

"Even if someone did represent the target of an investigation, there have to be even more indices of allegiance," she said. Loveland also sought to persuade the appeals panel that the board's hiring of a second committee and law firm were the "epitome" of due diligence, rather than examples of gross negligence, as alleged by the shareholders.

Rudy and Loveland declined to comment on behalf of their respective parties. A Kodak spokesman declined to comment on pending litigation.

The case is In re Eastman Kodak Co. Derivative Litig., 2d Cir., No. 23-7571, oral arguments 12/12/24 .

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Investors Sue in New York Over $440M International Crypto Ponzi Scheme

law.com/newyorklawjournal/2024/12/13/investors-sue-in-new-york-over-440m-international-crypto-ponzi-scheme

Michael A. Mora

What You Need to Know

- Crypto Ponzi schemes are evolving with sophistication, according to attorneys.
- Investors, spread across nearly every continent worldwide, seek accountability for a $440 million crypto Ponzi scheme.
- Social media influencers allegedly played a pivotal role in promoting this alleged crypto house of cards.

More than 210 investors, spread across nearly every continent worldwide, filed a complaint in a New York federal district court against defendants named in an over $440 million cryptocurrency Ponzi scheme that exploited elements of traditional multilevel marketing programs.

Chet B. Waldman and Matthew Insley-Pruittand of Wolf Popper in New York and Max Burwick of Burwick Law in Miami represent the plaintiff investors who sued several defendants, including Guillermo Gharib, the “genius level trader” behind the scheme. Burwick noted that decades ago, a television host who established trust with viewers was limited by regulations on what the person could say.

“Now we live with these online communities without disclosures or methods to determine the truth of what people are saying,” Burwick said. “If a person says, ‘I am an expert crypto trader,’ and you can see from their wallet that this person has made a lot of money, people will think he knows what he is talking about. But these types of individuals that know what they are doing know you are looking at their wallets, and they are telling a story that might not be the whole truth.”

The defendants did not respond to a request for comment.

Marcelo Diaz-Cortes, a partner at Levine Kellogg Lehman Schneider + Grossman in Miami, is an expert in Ponzi scheme litigation who is not involved in the matter. He observed that while crypto Ponzi schemes have increased in the last five to 10 years, the recent differentiating factor is that they are more structured and complicated.

"The reason I say that is the complaint tells a detailed story on how people were duped into investing in various ways involving NFTs, tokens and asset management accounts," Diaz-Cortes said. "The way the crypto Ponzi schemes seem to be evolving is that they appear to be a lot more sophisticated."

U.S. District Senior Judge Lewis A. Kaplan of the Southern District of New York. Photo: Ryland West/ALM

Now, the case is pending before U.S. District Judge Lewis A. Kaplan, who presides in the Southern District of New York.

The case dates back to the second quarter of 2023 with the launch of TradeAI, an NFT-gated investment platform in which users purchased specific NFTs to invest in high-yield investment pools. The NFT that the investor held determined the amount that they could invest in the pools, and if an investor wanted to invest more money, they would have to purchase additional NFTs.

To expand their reach and receive more investment funds, TradeAI allegedly conspired with prominent individuals in the crypto community, with large followings on X and Discord, and ran exclusive communities known as "alpha groups," per the complaint. These key opinion leaders control access to their alpha group with membership passes in the form of NFTs.

Alpha group members were essentially paying for access to the advice and opportunities offered by the key opinion leaders, who, with their collaboration with TradeAI and recruitment of hundreds of investors, enabled a structure resembling a multilevel marketing scheme, per the complaint. And the defendants promised that Gharib would deliver them unparalleled returns—as high as 25% in seven days—with little risk.

Facade of the U.S. Court House of the Southern District of New York in Lower Manhattan. Credit: Jannis Werner

The operation flourished until TradeAI suddenly collapsed, locking the plaintiffs' investments in the TradeAI accounts. After failing to make payments to investors, the operators of TradeAI quickly pivoted, launching a new investment vehicle called StakX that prolonged the scheme while giving the appearance of innovation. However, within months, StakX stopped functioning.

Burwick said that an internet sleuth tipped them off to the scheme and that a review of the accounts revealed that Gharib, the "genius level trader," lost more than $4 million through trading losses and transaction fees. The only way payments and profits were remitted to investors was by receiving new money from subsequent investors, which is a classic hallmark of a Ponzi scheme.

Burwick pointed to an X post published by one of the plaintiffs, which said that Gharib allegedly admitted to him that TradeAI and StakX were Ponzi schemes: “I’ve heard it myself from his mouth to my ears.”

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Trending

Who Got The Work

Shumaker, Loop & Kendrick partner Tom BenGera has entered an appearance for Gardma in a pending patent infringement lawsuit. The court action, asserting a single patent related to a shade system, was filed Oct. 15 in North Carolina Eastern District Court by Womble Bond Dickinson on behalf of Shibumi Shade. The case, assigned to U.S. District Judge Louise Wood Flanagan, is 5:24-cv-00588, Shibumi Shade, Inc. v. Gardma LLC.

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New Suit - Copyright

Benjamin Haith Intellectual Property filed a copyright infringement lawsuit on Dec. 13 in Missouri Eastern District Court centered on the design for the flag for the holiday Juneteenth. The case, filed by Voytas Law, takes aim at car accessories seller Eurosport Daytona and Anthony Schimenti for allegedly selling copies of the plaintiff's work and using it for marketing purposes without consent. Counsel have not yet appeared for the defendants. The case is 4:24-cv-01684, Benjamin Haith Intellectual Property, LLC v. Eurosport Daytona, Inc.

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Legal Fee Tracker: Meta case yields Texas-size fees as more firms ink state contracts

reuters.com/legal/government/legal-fee-tracker-meta-case-yields-texas-size-fees-more-firms-ink-state-2024-12-12

David Thomas, Mike Scarcella

The logo of Meta Platforms' business group is seen in Brussels, Belgium December 6, 2022. REUTERS/Yves Herman/File Photo Purchase Licensing Rights, opens new tab

Dec 12 (Reuters) - Texas' appetite for litigation has been keeping several law firms busy working for the state in high-profile lawsuits against major U.S. companies.

Chicago-founded Keller Postman, opens new tab and Dallas-founded McKool Smith, opens new tab billed the Texas attorney general's office a combined $142.6 million last month for their work on the state's 2022 consumer privacy lawsuit against Facebook parent Meta Platforms (META.O), opens new tab, documents show. The case led to a $1.4 billion settlement with Meta in July.

McKool Smith and Keller Postman contracted with the state to spearhead the lawsuit in exchange for a cut of a successful recovery. The requested payout - $93.3 million for Keller Postman and $42.6 million for McKool Smith - works out to an average of $3,100 per hour for 42,600 hours the firms combined said they invested in the case.
Zina Bash, a Keller Postman partner and former senior counsel to Texas Attorney General Ken Paxton, in a statement called the Meta accord the "largest settlement achieved by a single state in U.S. history."

It isn't uncommon for states to hire private law firms to handle large, complex cases using contingency contracts. In the case of Texas, Paxton's office has signed outside counsel contracts with at least 15 law firms since 2018, according to state records.

Tapping attorneys from Mark Lanier's Lanier Law Firm and Kelley Drye & Warren, Texas on Wednesday sued, opens new tab 3M, Corteva and DuPont for allegedly concealing health and environmental risks of toxic PFAS "forever chemicals."

Paxton said the state is "taking action to penalize these companies and hold them accountable for deceiving Texans into buying consumer products without vital information." The companies did not immediately respond to requests for comment.

"We are honored to bring our expertise to this arena as well," Lanier said in an email. Lawyers at Kelley Drye did not immediately respond to a request for comment.

Texas's contracts with outside counsel are governed by state law that protects against unreasonable fees, a spokesperson for Paxton's office said.

Last month Texas turned to outside counsel to sue asset managers BlackRock, Vanguard and State Street for allegedly violating antitrust law and driving up energy prices through climate activism. BlackRock and State Street have called the lawsuit baseless. Vanguard did not respond to a request for comment.

Contracts with Paxton's office show that Tony Buzbee's Buzbee Law Firm and Cooper & Kirk stand to receive success fees of up to $3,780 per hour or 10% of Texas' potential recovery in the case.
Other firms with open contracts with the state include Norton Rose Fulbright, which Texas hired in January 2022 for a biometric privacy lawsuit against Alphabet's (GOOGL.O), opens new tab Google. Like the settled case against Meta, the lawsuit claims Google unlawfully collected the biometric privacy data of millions of Texans without their consent. Google has denied wrongdoing.
Norton Rose Fulbright's 2022 agreement with Texas shows it could collect as much as $3,780 an hour or 27% of any successful recovery. Norton Rose partners representing the state did not immediately respond to a request for comment.

--DaVita Inc on Monday said in court papers that it has reached a settlement in principle, opens new tab in a dispute over attorney fees with a former company executive who blew the whistle on the company's alleged violation of federal anti-kickback laws.
DaVita in July paid $34.4 million, opens new tab to the U.S. government to settle claims that it violated the False Claims Act by paying kickbacks to doctors in exchange for referring their patients to the company's dialysis centers. DaVita made no admission of liability.
Dennis Kogod, a DaVita executive who sued the company under the FCA's whistleblower provision, received an award of $6.37 million from the federal government, the Justice Department said.

Kogod and his lawyers at Constantine Cannon also sought $14.1 million in attorney fees, opens new tab from DaVita, arguing they are entitled to fees after spending more than 30,000 hours litigating the case.
DaVita's lawyers at Sidley Austin countered, opens new tab that the company's settlement only involved a "small subset" of Kogod's claims. The company also said Kogod's fee demand "reflects a lack of any reasonable billing judgment."
In their joint Tuesday filing, DaVita and Kogod said they were still finalizing the settlement terms but were expecting to finish by Dec. 31. They asked U.S. District Judge Philip Brimmer to pause the case proceedings until Jan. 10.

Lawyers for Kogod and DaVita did not immediately respond to requests for comment.

(Legal Fee Tracker is a weekly feature exploring attorney compensation awards and disputes in class actions, bankruptcies and other matters. Please send tips or suggestions to D.Thomas@thomsonreuters.com, opens new tab.)

Litigators of the Week: 3 Former SGs Team Up In a Major Opioid Win for Pharmacies at the Ohio Supreme Court

law.com/litigationdaily/2024/12/13/litigators-of-the-week-3-former-sgs-team-up-in-a-major-opioid-win-for-pharmacies-at-the-ohio-supreme-court

Ross Todd

After federal jurors in Cleveland found Walgreens, Walmart and CVS liable for public-nuisance claims tied to the opioid epidemic, U.S. District Senior Judge Dan Polster awarded the two Ohio counties who brought the suit $650 million in abatement funds.

But with the verdict pending on appeal, the Sixth Circuit certified a question to the Ohio Supreme Court asking whether the Ohio Product Liability Act abrogates the counties' common law public-nuisance claim. Plaintiffs argued that the law didn't bar the equitable relief—funds to deal with forward-looking abatement activites—they were seeking and that it only applied to defective, not dangerous, products.

But the Ohio Supreme Court weighed in this week, finding that the statute's definition of a product liability claim, which was amended in 2007 to say it "also includes any public-nuisance claim," did not allow the sort of claims brought by the counties.

"We recognize that the opioid crisis has touched the lives of people in every corner of Ohio," wrote Ohio Supreme Court Justice Joseph Deters. "The devastation experienced by these private citizens, individually and collectively, 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."

The pharmacies' defense team was led by a trio of former U.S. Solicitor Generals: **Jeffrey Wall** of **Sullivan & Cromwell** represented Walgreens, **Noel Francisco** of **Jones Day** represented Walmart and **Donald Verrilli Jr.** of **Munger, Tolles & Olson** represented CVS. Wall argued for the defendants at the Ohio Supreme Court.

Litigation Daily: What was at stake for the pharmacy defendants in this appeal?

Jeff Wall: The pharmacies were held liable on a public-nuisance theory. The idea is that they contributed to a public nuisance by filling prescriptions that were for lawful medications and that were written by licensed doctors. The problem for the counties is that many states have pushed back on novel expansions of public-nuisance law, and Ohio is one of them. Years ago, the Ohio General Assembly said by statute that it did not want to allow claims like these. We were asking the Ohio Supreme Court to uphold the General Assembly's work.

How did you and your firms get involved in this matter?

Noel Francisco: Jones Day has a broad and deep relationship with Walmart, which includes representing the company in a wide variety of cases around the country where it faces claims related to opioid medications. As relevant here, Jones Day represents Walmart in the ongoing opioid-related multidistrict litigation that is pending before Judge Polster in the Northern District of Ohio. Judge Polster consolidated the Lake and Trumbull County cases for a bellwether public-nuisance trial against Walmart, Walgreens and CVS. Jones Day represented Walmart in the trial, and then, along with Sullivan & Cromwell and Munger, handled the appeal in the Sixth Circuit and this certification to the Ohio Supreme Court.

Don Verrilli: CVS wanted to supplement its terrific trial team at **Zuckerman Spaeder** with experienced appellate counsel, and we have had a great working relationship with our colleagues there.

Wall: We had a relationship with Walgreens and we’ve handled other appeals in the Sixth Circuit, so the company reached out after the verdict. We jumped at the chance to work with Don and Noel and their teams.

Who all was on your team and how have you divided the work on the appeal?

Wall: The Sixth Circuit briefing was a true team effort. The verdict and the damages award were flawed for a lot of reasons, so each of us took some of the issues and dug into those. For S&C, the credit really goes to **Morgan Ratner**, who is one of the partners in our appellate practice and a former colleague in the SG’s Office, and **Zoe Jacoby**, who was the lead associate but has since joined the SG’s Office. Zoe is a future superstar and we were lucky to have her help all the way through the argument.

Francisco: At trial, the Jones Day team was led by our business & tort litigation partners **John Majoras** in Washington and **Tina Tabacchi** and **Tara Fumerton** in Chicago. The Jones Day appellate team consisted of three partners in our issues & appeals practice: **Anthony Dick** and I in Washington and **Jim Saywell** in Cleveland. Jim Saywell was an associate when the appeal began, but became a partner while it was still pending. We worked collaboratively on the appellate briefing with the teams from Sullivan & Cromwell and Munger Tolles.

Verrilli: For Munger, the briefing team was led by **Ginger Anders**, with assistance from **Rachel Miller-Ziegler** and associate **April Hu**.

Who took the lead on the Ohio Products Liability Act question that the Sixth Circuit certified to the Ohio Supreme Court?

Wall: S&C had briefed the OPLA issue in the Sixth Circuit, so once that court certified, we briefed and argued the issue in the Ohio Supreme Court, but with a lot of help and input from everyone. Again, it was a team effort from start to finish.

Given that you were dealing with a statute that had been amended by the legislature a couple of times, I'm impressed that you got the court to go your way in finding the statutory language was unambiguous. The court also found that the legislative history leaned toward your reading of the statute. How did you decide how much weight to give to the statutory language versus the legislative history?

Francisco: In our view, the legislature's amendments to the statute made it even more clear that we had the correct position. As amended, the plain text of the statute was very strong for us. And the amendments showed that the legislature had repeatedly made clear that it did not want to allow any public-nuisance claims based on the sale of products. We always like to lead with the statutory text since that is what the legislature enacted, and that is what we did here.

I expected that oral arguments would be a tedious watch given that the distinction between the words "includes" and "also includes" plays prominently in the resulting decision. But Jeff, I found the arguments presented by you and the counties' counsel, David Frederick of Kellogg Huber, engaging, accessible and a good primer on the intersection of public nuisance and product liability under Ohio law. Are there moments that stand out from that argument now that you have this decision in hand?

Wall: The argument was exactly what you would expect. The justices were all prepared and engaged, and they peppered us with questions on the text and history of the Ohio statute. In particular, I had exchanges about the text with Justice Fischer and Justice Brunner that seemed very important at the time, and they both voted for our position. I had never argued at the Ohio Supreme Court, and the courtroom is stunning and majestic.

What can defendants facing public nuisance claims tied to products take from this decision?

Verrilli: This is an important decision. Though focused on a specific Ohio statute, the Ohio Supreme Court's decision reflects and reinforces the important insight that public-nuisance litigation is an especially poor way to deal with the huge public policy challenges posed by equally huge and complex social problems like the opioids crisis. Solving such crises requires the full engagement of elected officials and expert government bodies.

The Sixth Circuit has its answer on the certified question. What happens now?

Francisco: The Ohio Supreme Court's ruling requires a reversal of the liability verdict and a full vacatur of the "equitable abatement" award entered by Judge Polster in the district court, including the $650 million in monetary relief and the extensive injunctive relief that the award had imposed. Since the judgment below turned entirely on the counties' public-nuisance claims, and the Ohio Supreme Court has now ruled that those claims are barred as a matter of law, the Sixth Circuit should direct the district court to enter judgment in favor of the defendant pharmacies.

What will you remember most about getting this result?

Wall: I've worked in the government twice. Don was my boss the first time, and Noel the second time. They're friends and mentors, and it has been incredibly rewarding to have a chance to work with them again.

Bloomberg Law News 2024-12-13T13:09:15064981936-05:00

Hyatt, Wyndham Get AI Price-Fixing Case Moved to California

By Katie Arcieri 2024-12-13T11:43:27000-05:00

- Judge says a similar suit in California is further along
- Hotels accused of colluding to raise extended day room rates

Hyatt Corp. and Wyndham Hotels and Resorts Inc. are among a group of companies that convinced a federal judge to transfer from Illinois to California an antitrust case alleging they colluded to inflate extended stay hotel room rates via an algorithm.

Judge Georgia N. Alexakis of the US District Court for the Northern District of Illinois in a Thursday order granted the defendant hotel companies' motion to transfer the case to the Northern District of California, saying they "met their burden by pointing to the inconvenience of litigating the California action while litigating the substantially similar Illinois action." She also said a nearly identical case already in California is further along in litigation.

"The transferee district is already more familiar with the allegations, facts, and legal disputes via motions and oral argument, and is poised to resolve a fully briefed outstanding motion to dismiss," Alexakis said. "The Illinois action, if transferred to the Northern District of California, would likely benefit from the Court's steps-ahead familiarity with the facts, law, and allegations involved. This factor, too, weighs in favor of transfer."

The litigation is among a flurry of cases alleging hotel companies colluded to raise room rates through an algorithmic database that uses sensitive nonpublic data from subscribers to recommend optimal prices.

The case that will be moved to California was filed by consumer plaintiffs earlier this year. They alleged defendant hotel firms including Hyatt, Wyndham, and Hilton Domestic Operating Co. Inc. conspired to raise extended stay hotel guest room rentals with help from the "IDeaS" revenue solutions pricing algorithm that uses predictive analytics to provide pricing recommendations.

The defendant hotel companies have already moved to dismiss the similar proposed class action in the Northern District of California, where an oral argument is pending.

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The hotel defendants are represented by firms including Davis Polk & Wardwell LLP, Quinn Emanuel Urquhart & Sullivan LLP, Ropes & Gray LLP, Hogan Lovells US LLP, ArentFox Schiff LLP, and Jenner & Block LLP. The plaintiffs are represented by Robins Kaplan LLP, Burns Charest LLP and Cohen Milstein Sellers & Toll PLLC.

The case is In re Extended Stay Hotel Antitrust Litig. , N.D. Ill., No. 1:24-cv-06324, 12/12/24 .

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Securities Law News
December 12, 2024, 11:57 AM PST

Wells Fargo Defeats Consumers' Unauthorized Enrollment Lawsuit

By Shweta Watwe

- Customers say bank charged for products without telling them
- Unclear how they were unaware of the charges, judge said

Bloomberg Law News 2024-12-13T10:46:43996318115-05:00

Wells Fargo Defeats Consumers' Unauthorized Enrollment Lawsuit

By Shweta Watwe 2024-12-12T14:57:49000-05:00

- Customers say bank charged for products without telling them
- Unclear how they were unaware of the charges, judge said

Wells Fargo Bank NA convinced a federal judge Thursday that consumers alleging the bank unlawfully enrolled them into multiple financial products were time-barred and that their claims should be dismissed.

The consumers alleged Wells Fargo concealed the unauthorized products by not including them on bank statements and financial records and that the bank charged fees and costs for such products. The US District Court for the Northern District of California rejected their argument that the statute of limitations for their claims could be tolled.

"It is unclear from the allegations how Plaintiffs could not have discovered that they were enrolled and being charged by Wells Fargo and third parties—for several years in some instances—for these unauthorized products by looking at their bank statements and financial records," Judge Trina L. Thompson said.

Not all of the plaintiffs' claims were time-barred though, because remediation letters from Wells Fargo didn't include enrollment dates, Thompson said.

The bank sent letters around November 2023 to ask customers whether they felt enrollment in certain products was unwanted.

Thompson rejected the consumers' argument that the letters meant Wells Fargo admitted to fraud. The letters lack such an admission and only asked if the products were unwanted or unauthorized, the judge said.

The consumers allegations were "conclusory," and they must show how Wells Fargo omitted the product enrollment from financial documents yet still charged customers for them, Thompson said.

Thompson dismissed the suit with leave to amend. She gave the consumers until December 27 to file an amended complaint.

The consumers are represented by the Dann Law Firm, Zimmerman Law Offices PC, and Keller Rohrback LLP.

Wells Fargo is represented by McGuireWoods LLP.

The case is In re Wells Fargo Unauthorized Prods. Litig. , N.D. Cal., No. 3:24-cv-01223, 12/12/24 .

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US judge says law firm Baker Hostetler must face racketeering claims

reuters.com/legal/legalindustry/us-judge-says-law-firm-baker-hostetler-must-face-racketeering-claims-2024-12-12

Mike Scarcella

Signage is seen outside of the legal offices of the BakerHostetler law firm in Washington, D.C., U.S., May 10, 2021. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights, opens new tab

Dec 12 (Reuters) - U.S. law firm Baker & Hostetler must face part of a lawsuit in bankruptcy court in Texas accusing it of helping to facilitate a former client's "blatant" insurance fraud scheme, a federal judge ruled.

U.S. Bankruptcy Judge Marvin Isgur in Houston on Wednesday rejected, opens new tab for now Baker Hostetler's bid to dismiss civil racketeering claims linked to the firm's work for bankrupt former client Alliance Health.

The liquidation trustee for Alliance sued Baker Hostetler in 2022, claiming the Cleveland-founded firm knew about and "provided cover" to Alliance as it operated and managed a sophisticated insurance fraud scheme that caused more than $100 million in damages.

The alleged scheme involved Alliance's purchase of diabetes test strips for which it received oversized reimbursements, according to court records.

Isgur's order on Wednesday dismissed some claims against Baker Hostetler, including fraud and legal malpractice.

Baker Hostetler, which employs more than 1,000 lawyers in the United States, did not immediately respond to a request for comment, and neither did its attorneys at Vinson & Elkins.

Attorneys for Alliance liquidating trustee Yvette Austin Smith also did not immediately respond to a similar request.

Alliance filed for bankruptcy protection in 2017 after federal agents raided the company's Salt Lake City headquarters.

The trustee's lawsuit said Baker & Hostetler knew "Alliance's business model was dependent on billing fraud." The complaint cites internal records that allegedly show the firm was aware of Alliance's misconduct.
Baker Hostetler had denied the allegations and asked Isgur to dismiss them. The firm said claims were time-barred and also that it could not be considered a "person" under federal racketeering law.

Isgur said Baker Hostetler was not a “passive instrument” in its client's conduct and that the court could impute the actions of a partner at the firm — who is not named as a defendant — to the firm itself.

“The firm allegedly continued to acquiesce to the violations of the law and benefited from the continued legal fees in representing Alliance,” Isgur wrote.

The case is Yvette Austin Smith v. Baker & Hostetler LLP, U.S. Bankruptcy Court for the Southern District of Texas, No. 22-03275.

For Yvette Austin Smith: David Cimo and Marilee Mark of Cimo Mazer Mark

For Baker Hostetler: George Kryder of Vinson & Elkins

Reporting by Mike Scarcella

Texas probes tech platforms over safety and privacy of minors

reuters.com/technology/texas-probes-tech-platforms-over-safety-privacy-minors-2024-12-12

Kanishka Singh

Reddit logo is seen in this illustration taken November 7, 2022. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights, opens new tab

WASHINGTON, Dec 12 (Reuters) - Texas Attorney General Ken Paxton said on Thursday his office launched investigations into over a dozen technology platforms over their privacy and safety practices for minors.

Those being probed included artificial Intelligence chatbot startup Character.AI and fourteen other platforms like Reddit, Instagram (META.O), opens new tab and Discord, the Texas attorney general added.

WHY IT'S IMPORTANT

Tech platforms have come under increasing scrutiny over their impact on children. Top U.S. social media platforms made an estimated $11 billion in advertising revenue from users younger than 18 in 2022, according to a Harvard study published last year.

U.S. Surgeon General Vivek Murthy last year warned that young people using social media risked suffering body image issues, disordered eating, poor sleep quality and low self-esteem, especially among adolescent girls.

KEY QUOTE

"Technology companies are on notice that my office is vigorously enforcing Texas' strong data privacy laws," Paxton said.

CONTEXT

Social media companies have said they will work with officials to protect young users, and say they have introduced new tools designed to protect teens online, including parental control features. The firms had no immediate comment on Thursday.

Paxton's statement said the probes would focus on the platforms' compliance with two Texas laws - the Securing Children Online through Parental Empowerment (SCOPE) Act and the Texas Data Privacy and Security Act (TDPSA).

The SCOPE Act bans digital service providers from sharing, disclosing, or selling a minor's personal identifying information without permission from the child's parent or legal guardian. The legislation requires firms to provide parents with tools to manage and control the privacy settings on their child's account.

The TDPSA imposes notice and consent requirements on companies that collect and use minors' personal data, Paxton's office said.

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Reporting by Kanishka Singh in Washington; Editing by Alistair Bell

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- Suggested Topics:
- Boards, Policy & Regulation

Kanishka Singh
Thomson Reuters

Kanishka Singh is a breaking news reporter for Reuters in Washington DC, who primarily covers US politics and national affairs in his current role. His past breaking news coverage has spanned across a range of topics like the Black Lives Matter movement; the US elections; the 2021 Capitol riots and their follow up probes; the Brexit deal; US-China trade tensions; the NATO withdrawal from Afghanistan; the COVID-19 pandemic; and a 2019 Supreme Court verdict on a religious dispute site in his native India.

Consulting firm McKinsey to pay $650 mln to resolve US opioid probe

reuters.com/legal/consulting-firm-mckinsey-pay-650-mln-resolve-us-opioid-probe-2024-12-13

Nate Raymond, Mike Spector

The logo of consulting firm McKinsey and Company is seen at the high profile startups and high tech leaders gathering, Viva Tech,in Paris, France May 16, 2019. REUTERS/Charles Platiau/File Photo Purchase Licensing Rights, opens new tab

BOSTON, Dec 13 (Reuters) - McKinsey & Co has agreed to pay $650 million to resolve a U.S. Department of Justice investigation into the consulting firm's work advising opioid manufacturer OxyContin maker Purdue Pharma on how to boost sales.

McKinsey has entered into a five-year deferred prosecution agreement filed in federal court in Abingdon, Virginia, to resolve criminal charges brought as part of a rare corporate prosecution concerning the marketing of addictive painkillers that helped fuel the deadly U.S. opioid epidemic.

Prosecutors said that McKinsey provided Stamford, Connecticut-based Purdue advice on measures it could take to "turbocharge" OxyContin sales. It was charged with conspiring to misbrand a drug and obstruction of justice.

A former senior partner at McKinsey, Martin Elling, has also agreed to plead guilty to obstruction of justice for destroying records related to McKinsey's work for Purdue, according to court papers. He is scheduled to enter his plea on Jan. 10.

McKinsey and a lawyer for Elling did not respond immediately to requests for comment.

McKinsey previously reached agreements totaling nearly $1 billion to settle widespread lawsuits and other legal actions alleging the company helped fuel the opioid epidemic through its work advising OxyContin maker Purdue Pharma and other drugmakers. The settlements involved all 50 states, Washington, D.C., U.S. territories, various local governments, school districts, Native American tribes, and health insurers.

In 2019, McKinsey announced it would no longer advise clients on opioid-related businesses. The company has maintained that none of its settlements contain admissions of liability or wrongdoing.

Purdue pleaded guilty in 2020 to criminal charges covering widespread misconduct regarding its handling of prescription painkillers, including conspiring to defraud U.S. officials and pay illegal kickbacks to both doctors and an electronic healthcare records vendor.

Purdue is currently involved in court-ordered mediation over a multibillion-dollar settlement reached in bankruptcy proceedings that the U.S. Supreme Court turned aside.
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Reporting by Nate Raymond in Boston and Mike Spector in New York Editing by Frances Kerry

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Mike Spector is an Investigative Reporter for Reuters’ legal team. He strives to pursue special reports and other enterprising and exclusive stories that expose wrongdoing, highlight threats to consumers and illuminate how ordinary people are affected by the decisions of judges and lawyers across the United States. His stories often involve corporate crises linked to bankruptcy proceedings, mass tort litigation and government investigations. He was the first journalist to expose Johnson and Johnson’s plan to offload into bankruptcy lawsuits alleging its iconic Baby Powder and other cosmetic talc products caused cancer. A series he led explaining how companies and nonprofits use the bankruptcy system to evade lawsuits over sexual abuse and deadly products received the Deadline Club’s Daniel Pearl Award for Investigative Reporting. He has also investigated pervasive secrecy in American courts that covers up evidence of deadly products and allegations from Black women that chemical hair relaxers sold by large cosmetics companies caused cancer. He previously worked at The Wall Street Journal covering bankruptcy, private equity, mergers and acquisitions and the automotive industry.

McKinsey

Prosecutors label $650mn McKinsey opioid pact a warning to consultants

Firm settles criminal investigation and former senior partner admits obstruction of justice

McKinsey's advice on how to boost sales of opioids came at a time of an addiction crisis that has claimed hundreds of thousands of lives in the US © AFP/Getty Images

Stephen Foley in New York and **Stefania Palma** in Washington 20 MINUTES AGO

McKinsey has agreed to pay $650mn to settle a US criminal investigation into its work for opioid manufacturers, and a former senior partner has admitted obstructing the investigation by destroying documents, according to court filings on Friday.

In the deferred prosecution agreement with the US Department of Justice, McKinsey accepted responsibility for its actions, which prosecutors said included "knowingly and intentionally conspiring with Purdue Pharma and others to aid and abet misbranding of prescription drugs".

McKinsey's advice on how to boost sales of opioids came at a time of a spiralling addiction crisis that has claimed hundreds of thousands of lives in the US. It has previously paid about $1bn in civil settlements over the work, which it ceased in 2019.

The latest agreement sharply curtails McKinsey's ability to work for other pharmaceuticals companies in the future. The firm will not do "any work related to the marketing, sale, promotion or distribution of controlled substances" under the five-year deferred prosecution deal.

Martin Elling, a former senior partner who advised Purdue Pharma, the maker of OxyContin, has also agreed to plead guilty to one count of knowingly destroying documents with the intent to obstruct justice. He faces a sentence of up to 12 months in prison under the agreement with prosecutors, according to court documents.

In 2018, after news reports that US authorities were investigating Purdue, Elling deleted more than 100 files relating to the work. "He emailed himself an apparent to-do list with the subject line, 'When home'," according to one court filing. "The items listed included: 'delete old pur [Purdue Pharma] documents from laptop'."

Elling helped McKinsey win an engagement with Purdue that became known as "Evolve to Excellence", or E2E. This developed plans for how to "turbocharge" OxyContin sales, prosecutors said, by focusing on "high value prescribers, including those who were prescribing opioids for uses that were unsafe, ineffective, and medically unnecessary and that often led to abuse".

"McKinsey knew the risks and dangers associated with OxyContin, a powerful and addictive opioid," prosecutors said. But it "chose to continue working with Purdue Pharma to improve sales" of the drug.

The agreement is the first time a management consultant has been held criminally responsible for advice that resulted in a client's illegal activity.

"If a consulting firm conspires with a client to engage in criminal conduct, the fact that you're an outside consultant will not protect you," Joshua Levy, the US attorney in Massachusetts, said at a press conference on Friday. "We will cut through the slick PowerPoints and the consultant speak and hold you accountable."

The mounting cost of opioid settlements has strained the finances of McKinsey, which has annual revenues of about $16bn, and created dissent among partners. The latest agreement allows the firm to stagger payments over five years, with only $175mn payable now. It will, however, have to pay interest on the remainder, meaning the total cost of the settlement could be closer to $700mn by 2028.

In explaining why it was deferring prosecution — which allows for the criminal charges to eventually be dropped if McKinsey adheres to the terms of the agreement — the DoJ said McKinsey had implemented "extensive remedial measures", including voluntarily ending work on opioid matters and firing Elling and another senior partner who communicated about deleting material. The firm has agreed to adopt further client screening processes, risk management measures and training programmes, subject to review by several branches of the US government.

McKinsey said its opioid work was a source of "profound regret". "Since these issues first arose, we have significantly enhanced our risk management processes to ensure we never find ourselves in this situation again."

A lawyer for Elling said he had no comment.

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https://www.wsj.com/articles/mckinsey-to-pay-650-million-to-settle-federal-opioid-claims-56f79e36

BANKRUPTCY

McKinsey Apologizes for Its Opioid Consulting in $650 Million Federal Settlement

The consulting firm said it was 'deeply sorry' for its work advising Purdue Pharma as part of a settlement of criminal and civil opioid claims with the Justice Department

By Alexander Gladstone

Updated Dec. 13, 2024 12:57 pm ET | WSJ PRO

McKinsey has already paid nearly $1 billion to settle hundreds of civil lawsuits alleging the firm helped fuel the opioid crisis. PHOTO: LANNA APISUKH FOR THE WALL STREET JOURNAL

McKinsey said it agreed to accept responsibility for its role in helping Purdue Pharma turbocharge sales of its OxyContin opioid painkiller as the consulting firm entered into a $650 million settlement and deferred-prosecution agreement with the U.S. Justice Department.

McKinsey's payment to the federal government will resolve criminal and civil claims stemming from its opioid-related work. Prosecution will be deferred and ultimately terminated if the consulting firm fulfills a government-imposed compliance program overseen by the Department of Health and Human Services.

"We should have appreciated the harm opioids were causing in our society and we should not have undertaken sales and marketing work for Purdue Pharma," McKinsey said in a statement Friday. "This terrible public health crisis and our past work for opioid manufacturers will always be a source of profound regret for our firm."

McKinsey also said it was sorry for the actions of a former partner who deleted documents related to Purdue. A plea agreement with respect to that former partner, Martin Elling, was entered into the court record Friday, in which Elling will plead guilty to having obstructed justice by destroying those documents.

For years, prosecutors have been investigating how McKinsey advised clients including Purdue Pharma, Endo International and Mallinckrodt on strategies and practices to maximize their sales of opioid products. The Wall Street Journal in April reported that the Justice Department was conducting a criminal investigation into McKinsey's opioid-related work.

McKinsey has already paid nearly $1 billion to settle hundreds of civil lawsuits alleging the firm helped fuel the opioid crisis by advising on drugmakers' marketing and sales efforts. In 2021, McKinsey reached a settlement with all 50 states; five U.S. territories; and Washington, D.C., to pay $642 million to resolve civil opioid-related litigation against the firm, without admitting wrongdoing. The firm in 2023 reached separate settlements totaling $347 million with Native American tribes, public school districts, insurance companies and municipal governments, also without admitting wrongdoing.

McKinsey stopped doing work on opioid-specific businesses in 2019. Before Purdue filed for bankruptcy that year while facing mass opioid-related lawsuits, McKinsey had helped the company develop an initiative to increase sales of OxyContin, according to court records made public through the settlements with state and local governments. Endo and Mallinckrodt would also file for bankruptcy after being hit with mass opioid litigation from both public and private plaintiffs.

McKinsey consultants advised Purdue's sales team to pursue healthcare providers it knew wrote high volumes of OxyContin prescriptions and spend less time on doctors who prescribed the opioid medication the least, according to documents made public through the firm's settlements with state and local governments.

McKinsey also advised both Purdue and Endo on how to target the U.S. Department of Veterans Affairs for sales of their products, the court records show. This advisory work occurred while McKinsey was simultaneously working as a consultant for the VA itself. McKinsey has said that it advised the VA on matters unrelated to opioid procurement.

A 2013 email disclosed as part of the settlements also shows that McKinsey had worked on a 10-year strategy plan for Mallinckrodt to boost sales of its products including hydrocodone and morphine.

Pharmaceutical companies began marketing opioids as a safe-to-use pain reliever in the 1990s, leading many doctors to prescribe the pills for all manner of injuries and ailments. The volume of pills from Purdue and other manufacturers that flooded the U.S. is believed to have contributed to the opioid epidemic. Nearly 645,000 people died from overdoses involving opioids from 1999 to 2021, according to the Centers for Disease Control and Prevention.

The Justice Department successfully prosecuted Purdue and several of its executives in 2007, when the company pleaded guilty to a felony charge of misbranding OxyContin with the intent to defraud or mislead. Purdue separately pleaded guilty in 2020 to three federal felonies related to the marketing and distribution of OxyContin.

Endo reached a criminal resolution earlier this year in which it pleaded guilty to a one-count misdemeanor for introducing misbranded drugs into interstate commerce.

Mallinckrodt disclosed last year that it faced a grand-jury subpoena from the U.S. attorney's office in the Western District of Virginia seeking data and information about the company's reporting of orders for suspicious controlled substances.

Earlier this month, McKinsey reached a separate $122 million settlement with the Justice Department to resolve allegations that the firm had paid bribes to officials at two South Africa state-owned companies to help it win consulting work. A McKinsey partner said that settling the South Africa and opioid-related Justice Department matters will resolve the two main legal problems that the firm faced and help it turn a new leaf.

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Bloomberg Law News 2024-12-13T13:06:45366618412-05:00

McKinsey Will Pay $650 Million to Resolve DOJ Opioid Probe

By Ben Penn 2024-12-13T12:54:46000-05:00

Consulting giant McKinsey & Co. has agreed to pay $650 million while avoiding a guilty plea for conspiring with Purdue Pharma and other pharmaceuticals to misbrand addictive opioids.

In a five-year deferred prosecution agreement with the Justice Department, McKinsey will pay a combination of civil and criminal penalties stemming from its role advising Purdue on obtaining FDA approval of OxyContin and how to “turbocharge” sales of the painkiller. DOJ charged the company with intentionally aiding Purdue and other drugmakers in deceptively marketing opioids to be sold without medically appropriate prescriptions.

A former McKinsey senior partner has also agreed to plead guilty to obstruction of justice for destroying evidence during the investigation, prosecutors said in court filings Friday.

The investigation was brought by the US attorney’s offices in the Western District of Virginia and Massachusetts, along with the Commercial Litigation Branch at DOJ headquarters.

The privately-held consultancy had already paid hundreds of millions of dollars in 2021 to settle states’ claims that it fueled the US opioid epidemic through its sales analysis and marketing advice.

Although McKinsey didn’t voluntarily disclose the wrongdoing, prosecutors awarded it cooperation credit for updating them on information obtained from the company’s internal investigation, highlighting the important documents in these voluminous productions, and facilitating interviews.

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Ex-FirstEnergy exec takes Fifth in scandal

1.next.westlaw.com/Document/If102f690b92011efba2589e15e84e68f/View/FullText.html

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December 13, 2024

Section: News

Ex-FirstEnergy exec takes Fifth in scandal

Chack has not been accused of any crime

Jessie Balmert

December 13, 2024

A former FirstEnergy executive wouldn't answer questions about the company's pay-to-play scandal or a conflict of interest with his daughter's business − instead invoking the Fifth Amendment right to avoid self-incrimination.

FirstEnergy's former Senior Vice President Dennis Chack was one of three executives fired in October 2020 − shortly after former Ohio House Speaker Larry Householder and four others were arrested for a quid pro quo scheme that traded FirstEnergy's money for a nuclear plant bailout in House Bill 6.

In the years since, FirstEnergy admitted to bribing Householder and former Public Utilities Commission of Ohio Chairman Sam Randazzo and paid a $230 million penalty.

Householder was sentenced to 20 years in federal prison. The other two fired executives, former CEO Chuck Jones and former Senior Vice President of External Affairs Michael Dowling, now face criminal charges for a $4.3 million payment to Randazzo, who died by suicide in April. They have pleaded not guilty.

Chack, who oversaw product development, marketing and branding, has not been accused of any crime. He was deposed Wednesday as part of an Ohio Consumers Counsel probe into how FirstEnergy's bribery scandal impacted Ohioans' electric bills.

FirstEnergy documents shared as part of that deposition alleged Chack failed to disclose more than $500,000 paid by Cleveland restaurateur Tony George, a FirstEnergy vendor and intermediary with Householder, to Chack's daughter's consulting business, "purportedly for providing advertising and billboard services." Chack's daughter, Denise Angerstien, is trained as a registered nurse.

At the time, Chack was in charge of approving payments to George as a FirstEnergy vendor, according to the document from October 2021 − a year after Chack's firing.

"After receiving direction from the Company to preserve information on his Company-issued computer, Chack deleted documents from his Company-issued computer, including documents related to Angerstien," according to the document titled "Misconduct Overview: Failure to Disclosed Related Person Transactions and Document Deletion."

During the deposition, Chack did not answer any questions about his daughter's business, why he was fired or FirstEnergy's pay-to-play scandal.

"On the advice of my counsel, I assert my rights to not testify under the Fifth Amendment to the United States Constitution and Section 10, Article 1 of the Ohio Constitution and therefore I decline to answer that question," Chack said when asked when he last spoke to a former FirstEnergy lobbyist. He then reiterated that right by declining to answer dozens of other questions.

Ohio Attorney General Dave Yost has said that the state's investigation into the pay-to-play scandal is ongoing.

Jessie Balmert covers state government and politics for the USA TODAY Network Ohio Bureau, which serves the Columbus Dispatch, Cincinnati Enquirer, Akron Beacon Journal and 18 other affiliated news organizations across Ohio.
---- Index References ----

Company: Public Utilities Commission; FIRSTENERGY CORP.; THE COLUMBUS DISPATCH CHARITIES

News Subject: (Corruption, Bribery & Embezzlement (1EM51); Crime (1CR87); Criminal Law (1CR79); Fraud (1FR30); Government Litigation (1GO18); Legal (1LE33); Social Issues (1SO05))

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

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Securities Law News
December 12, 2024, 4:59 PM PST

Cantor to Pay SEC $6.75 Million for Alleged SPAC Lapses (1)

By Nicola M. White and Bailey Lipschultz

- Cantor had two SPACs in 2020, 2021 that raised $750 million
- Firm settled without admitting to or denying SEC's allegations

Bloomberg Law News 2024-12-13T10:45:44042245189-05:00

Cantor to Pay SEC $6.75 Million for Alleged SPAC Lapses (1)

By Nicola M. White and Bailey Lipschultz2024-12-12T19:59:16611-05:00

- Cantor had two SPACs in 2020, 2021 that raised $750 million
- Firm settled without admitting to or denying SEC's allegations

Cantor Fitzgerald LP agreed to pay $6.75 million to settle US Securities and Exchange allegations that it misled investors in two blank-check firms before their stock-market debuts.

The firm, led by Chief Executive Officer Howard Lutnick, controlled two special purpose acquisition companies in 2020 and 2021 that raised $750 million. The SPACs claimed in regulatory filings that they hadn't had substantive talks with potential merger targets, the agency said in a statement on Thursday. In reality, the entities had already started negotiations with a small group of candidates, it said.

"This enforcement action reflects the straightforward proposition that any disclosures about substantive discussions with potential targets must be materially accurate," Sanjay Wadhwa, acting director of the regulator's enforcement division, said in the statement.

The firm settled without admitting to or denying the allegations. Lutnick, tapped by President-elect Donald Trump to run the Department of Commerce, isn't a defendant in the civil case.

Read More: King of Cantor Gets a Boss of His Own in Trump

"No investor was ever harmed by the alleged issues described in the order," Cantor said in a statement. "We are pleased to have concluded this matter by mutual agreement with the SEC."

The Cantor-led SPACs took smart-glassmaker View Inc. and satellite company Satellogic Inc. public.

SEC Commissioner **Mark Uyeda**, one of the commission's two Republicans, dissented from the enforcement action, saying the alleged misstatements and omissions were not material, nor were investors financially harmed. He said he also didn't support the SEC's similar settlement with Digital World Acquisition Corp., the blank-check firm that took Trump's social media company public. The firm in 2023 agreed to pay the SEC $18 million to settle allegations about misleading statements.

SPACs are publicly listed entities armed with a war chest of cash that seek out a promising private company to take public through a merger. The arrangement helps established companies avoid the labor-intensive process of a traditional initial public offering. But as a result, investors buy in without knowing what entities they might ultimately acquire.

Once seen as the backwater of the public markets, SPACs surged in popularity in 2020 and 2021 before regulatory scrutiny and high-profile blowups soured the deals.

Cantor has embraced SPACs as a critical part of its business, both as a sponsor and as an underwriter. The company sponsored nine blank checks, six of which have successfully completed deals, while underwriting more than 100 deals going back to 2020, according to data from SPAC Research.

Since the SPAC boom went bust in 2022, Cantor Fitzgerald has remained a top player as a banker to the industry. The bank has been credited with $3.2 billion of deals, placing it ahead of bulge bracket banks such as JPMorgan Chase & Co. and Morgan Stanley, data compiled by Bloomberg show.

The View and Satellogic deals have been among the firm's worst performers. Satellogic has lost more than half its value since going public in 2022. View, which touted windows for commercial buildings that automatically darken and lighten in response to sunlight, filed for bankruptcy protection in April.

Cantor, Lutnick and other parties involved in View's blank-check merger agreed in August to pay $12 million to end litigation challenging the deal. Shareholders in a lawsuit filed in 2023 claimed Lutnick and others were driven by lopsided incentives to trick SPAC investors into a bad deal.

That settlement was designed to put the allegations "to rest, finally and forever, without in any way acknowledging any wrongdoing, fault, liability, or damages," according to a joint court filing at the time.

(Updates with Uyeda statement, detail about Cantor's SPAC deals)

--With assistance from **Sally Bakewell**.

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Musk Ups SEC Feud Over Neuralink Probe, Twitter Claims (1)

By Peter Blumberg and Nicola M. White2024-12-13T12:02:26999-05:00

- His lawyer's letter cites looming SEC action on Twitter probe
- Billionaire calls agency 'just another weaponized institution'

Elon Musk renewed his longstanding feud with the Securities and Exchange Commission by posting a letter that said the agency is investigating his brain-computer interface company, Neuralink Corp.

The letter that Musk posted on X on Thursday, which appeared to be from his long-time lawyer **Alex Spiro**, said the commission this week "reopened" a probe into Neuralink. It also said the SEC is preparing to take action against him related to his investment in Twitter Inc.before he bought the platform in 2022.

The regulator has been examining the timing and disclosure of Musk's purchase of Twitter stock before he acquired the company for $44 billion. The letter said the agency gave Musk a 48-hour deadline to accept a settlement over the probe or face an enforcement action.

The SEC has extended the deadline until Monday, according to a person familiar with the matter.

In the letter, Spiro did not say what the SEC was investigating about Neuralink. The SEC declined to comment on the matter.

The letter was addressed to outgoing SEC Chair Gary Gensler. In it, Spiro said that the commission recently subpoenaed him, but that he refused to testify. The lawyer demanded to know whether it was Gensler or "the White House" who is directing an "improperly motivated campaign against Mr. Musk."

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

Musk has had a testy relationship with the SEC for years, going back to when it sued him for securities fraud in 2018 after he tweeted about taking Tesla Inc. private. He took another dig at the agency on X earlier Thursday.

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In the fall of 2023, animal advocacy group the Physicians Committee for Responsible Medicine and four US lawmakers asked the SEC to investigate Musk and Neuralink for possible securities fraud over what the group said were misleading claims by the company.

(Updates with SEC time extension in fourth paragraph)

--With assistance from **Kurt Wagner**, **Sarah McBride** and Lydia Beyoud.

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Peter Blumberg, Megan Howard

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SEC 'reopens' probe into Neuralink, Musk's lawyer says

reuters.com/technology/sec-reopens-probe-into-elon-musks-neuralink-2024-12-13

Mrinmay Dey

Item 1 of 2 A smartphone with a Neuralink logo displayed is placed on a computer motherboard in this illustration taken on May 15, 2024. REUTERS/Dado Ruvic/Illustration/File Photo

[1/2]A smartphone with a Neuralink logo displayed is placed on a computer motherboard in this illustration taken on May 15, 2024. REUTERS/Dado Ruvic/Illustration/File Photo
Purchase Licensing Rights, opens new tab

Dec 12 (Reuters) - The U.S. Securities and Exchange Commission (SEC) this week has reopened an investigation into Elon Musk's brain-chip startup Neuralink, according to a letter , opens new tab shared by Musk on Thursday on social media platform X.
The Dec. 12 letter from Musk's lawyer Alex Spiro and addressed to outgoing SEC Chair Gary Gensler also said that the agency had issued Musk a 48-hour settlement deadline to either accept a monetary payment or face charges over the probe into his $44 billion takeover of Twitter.

Musk has since renamed Twitter as 'X.'

The settlement amount was not disclosed in the letter.

Musk has long sparred with the SEC and last year four lawmakers asked the commission to investigate whether Musk committed securities fraud by allegedly misleading investors about the safety of a brain implant developed by Neuralink.
How much traction the SEC would gain in any action against Musk is unclear.

The billionaire entrepreneur who also heads Tesla (TSLA.O), opens new tab and SpaceX is set to gain extraordinary influence after spending more than a quarter of a billion dollars to help Donald Trump win November's presidential election. His companies are expected to be well insulated from regulation and enforcement measures.
Trump has also appointed Musk to a task force that plans a sweeping overhaul of the U.S. government.

Spiro wrote in the letter that he and Musk would not be "intimidated" by the SEC and that they reserved their legal rights.

The SEC and Neuralink did not immediately respond to requests for comment outside regular business hours.

A federal judge in November rejected the SEC's request to sanction Musk after he failed to appear for court-ordered testimony in relation to the Twitter takeover probe on whether Musk violated securities laws in 2022.

The commission had also sued Musk in 2018 over his Twitter posts about taking Tesla private. He settled that lawsuit by paying a $20 million fine, agreeing to let Tesla lawyers review some posts in advance and stepping down as chairman.

(This story has been corrected to say that the settlement demand was issued in connection with the SEC probe into Musk's Twitter takeover, not Neuralink, in paragraph 2)

Reporting by Mrinmay Dey in Bengaluru; Editing by Edwina Gibbs

Bloomberg Law

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Securities Law News
December 12, 2024, 9:53 AM PST

Comtech Former CEO Sued by SEC Over Insider Trading Claims

By Gillian R. Brassil

- **COURT**: E.D.N.Y.
- **TRACK DOCKET**: No. 2:24-cv-08475 (Bloomberg Law subscription)

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Comtech Former CEO Sued by SEC Over Insider Trading Claims

By Gillian R. Brassil 2024-12-12T12:53:20000-05:00

- **COURT**: E.D.N.Y.
- **TRACK DOCKET**: No. 2:24-cv-08475 (Bloomberg Law subscription)

Former Comtech Telecommunications Corp. CEO Ken Peterman engaged in insider trading after he learned he was getting fired and about an impending negative earnings announcement, the SEC says in a lawsuit.

Peterman skirted about $12,000 in losses, says the lawsuit filed in the US District Court for the Eastern District of New York on Wednesday. "Peterman would have avoided significantly more losses had he succeeded in his attempts to similarly sell additional shares of Comstock stock he held in a different account," the lawsuit says.

The US Department of Justice also indicted Peterson on counts of insider trading and securities and wire fraud, it said on Wednesday. The DOJ filed its criminal case in the same court on Dec. 3.

Peterman learned negative earnings results for the second quarter of the 2024 fiscal year on March 4, when the information was confidential and there were two trading blackouts in effect, the lawsuit says.

Comtech's board on March 12 told Peterman he'd been fired, the US Securities and Exchange Commission says. Hours later, it says Peterman placed a market order to sell all 8,241 Comtech shares. Comtech announced Peterman's ousting the next morning, and about a half hour later, his brokerage firm started selling the shares in that account, according to the suit. All of Peterman's shares were sold at a weighted average price of $4.94 per share, leading him to net $40,454.54, the SEC says.

The company announced a delay to its earnings report and the stock fell to $4.19 the following day, a drop of 27%. It was the stock's worst session in more than three months, according to data compiled by Bloomberg. Comtech fell another 25% on March 19 after disclosing the negative results.

Peterman did not respond to a message on LinkedIn or to the group he recently founded, SpyGlass Group, seeking comment. An attorney for the SEC also did not respond to an email seeking comment.

The case is Securities And Exchange Commission v. Ken Peterman , E.D.N.Y., No. 2:24-cv-08475, complaint filed 12/11/24 .

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SEC's Top Corporate Reporting Official Under Gensler to Leave

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Andrew Ramonas

Securities Law

Erik Gerding will step down as the director of the Securities and Exchange Commission's Division of Corporation Finance on Dec. 31.

Photographer: Joshua Roberts/Bloomberg

- Erik Gerding to step down as SEC division director Dec. 31
- Official has led Division of Corporation Finance since 2023

Erik Gerding, who oversaw SEC work to write and implement disclosure rules for companies, plans to depart later this month after nearly two years as a top lieutenant of outgoing agency Chair Gary Gensler.

Gerding will step down as director of the Securities and Exchange Commission's Division of Corporation Finance on Dec. 31, the agency announced Friday. His departure will come three weeks before Gensler is set to leave on Jan. 20, when President-elect Donald Trump takes office.

Gerding became director in 2023. In this role, he has helped oversee agency work to review companies' disclosures to investors and develop the SEC's corporate climate reporting rules, among other responsibilities.

"I am humbled to have been a part of what I view as the crown jewel of the agency," Gerding said in a statement.

He came to the SEC in 2021 to lead legal and regulatory policy in the Division of Corporation Finance as a deputy director. Gerding has been a professor at the University of Colorado Law School.

The SEC didn't detail Gerding's post-SEC plans. An agency spokesperson declined to comment on his future.

Cicely LaMothe, deputy director for disclosure operations in the Division of Corporation Finance, will serve as acting director when Gerding leaves.

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Macy's Missed Expenses Spark More Internal Control Concerns

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Amanda Iacone

- Control failures, misstatement signal red flag to investors
- Macy’s says control patches will prevent similar problems

Macy’s has laid out a detailed plan to fill gaps in internal financial guardrails that allowed a former employee to hide $151 million in delivery expenses and forced the retailer to correct past financial accounting.

But that repair job is just a first step to rebuild confidence of investors as auditors, and likely regulators, will be on the look-out for signs of other problems at the struggling retailer.

The recently reported control failures raise concerns whether the company’s other financial statement guardrails, known as internal controls over financial reporting, are similarly at risk, likely triggering deeper scrutiny from auditors ahead of Macy’s annual report next year.

“You are now saying that you can no longer rely on our internal controls report. That goes beyond small parcel delivery cost accounting—that speaks to the entirety of the financial environment,” said Jesse Silvertown, principal at forensic accounting firm The Ledge Company.

Internal controls serve as the foundation of a company’s financial reporting and are meant to ensure that investors can rely on their corporate accounting. Auditors also lean heavily on those controls and for large clients like Macy’s they test those financial reporting guardrails each year to make sure they provide an effective backstop.

The retailer and its auditor KPMG LLP withdrew their Feb. 3 assessments that Macy’s internal controls ensured that investors received accurate and reliable information about the company’s financial performance and cited a material weakness related to its delivery expenses and other accounts, the company reported Wednesday.

Company officials have said that there was no theft and that the former employee, who masked delivery expenses, acted alone and sought no personal gain. Macy’s has declined to answer questions about its internal financial reporting safeguards.

“Integrity is paramount at Macy’s Inc., and we promote a culture of ethical conduct. When discovered, we move quickly to investigate and address the issue,” Tony Spring, chairman and CEO of Macy’s, said during an earnings call with analysts on Wednesday. “We’ve also identified and begun to implement additional controls to be a stronger and more disciplined organization so that an action like this could not happen again."

A Material Weakness

Macy's financial reporting guardrails didn't account for employees that would falsify documents or make erroneous accounting entries, the company said.

To combat that risk recurring, the retailer is putting in place new safeguards that address the reliability and completeness of information used for accounting and manual adjustments related to delivery expenses and non-merchandise expenses. The company also took extra steps to ensure its accounting complies with US standards.

Macy's hasn't said whether other staff signed off on the ex-employee's work—a redundant layer of review that serves as a common form of protection at US companies.

"But it does raise questions and issues of tone at the top. Was this person under so much duress that they needed to protect their division?" said Stacey Ritter, assistant accounting professor at Santa Clara University. "Does it seem like the type of place where people might look the other way because you're trying to do what's right for the company?"

Macy's internal controls are likely to receive extra attention from its auditors at KPMG who will be tasked with ensuring that there aren't other faults in the retailer's safeguards and that the just-announced fixes work as intended.

The audit will likely require more work and could pressure the company to meet deadlines for it's annual financial report, Silvertown said.

KPMG, meanwhile, will also face scrutiny from the US audit regulator, which will check whether the firm should have caught the accounting error and what steps it took to spot such a problem, Ritter said.

KPMG declined to comment.

SEC Scrutiny

"A sufficient investment in internal accounting controls is really important," said Ryan Wolfe, chief accountant of the Securities and Exchange Commission's enforcement division, in remarks Wednesday to an American Institute of Certified Public Accountants' financial reporting conference in Washington. "If more companies are making the necessary investments in their internal accounting controls, more errors are going to be prevented and detected before they make it to investors."

Wolfe declined to comment on Macy's accounting woes, but he told the conference that commission staff look at every restatement. Promptly fixed errors are less likely to trigger an investigation, he noted.

The SEC also keeps a close eye on how companies report accounting restatements and whether they issue informal fixes or whether they reissue entire financial statements because investors could no longer rely on them. The agency's top accountant has issued written guidance countering corporate justifications for relying on revisions to fix errors.

Macy's described its delivery expense error as immaterial to past reporting periods and so the company didn't need to reissue three years of financial statements to correct the misstatement. Instead, the company revised certain line items on the income statement and balance sheet disclosing the adjustments in a press release on Wednesday and its quarterly SEC filing issued on Thursday.

The errors didn't affect the company's debt covenant compliance, vendor payments, or cash flows, the company said.

"In one sense it's a rounding error," said Michelle Leder, editor of Footnoted.com. "But on the other hand, it's a significant amount of money."

Such a prominent correction stands apart from typical revisions. Known as "Little R" restatements, revisions are normally tucked quietly into the financial statement footnotes of an SEC filing with little fanfare or notice.

The company could just have easily told investors not to rely on its past financial statements, what is known as a "Big R" restatement, with a very similar release, said Rachel Thompson, an assistant accounting professor at North Dakota State University.

Macy's restatement choice could eventually trigger a comment letter from SEC staff asking how the retailer determined the error was ultimately immaterial, Thompson said.

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Payments Co. Marqeta Faces Investor Suit Over Growth Woes

By **Emilie Ruscoe**

Law360 (December 12, 2024, 9:21 PM EST) -- Card issuing and transaction processing company Marqeta Inc. faces a proposed investor class action alleging it concealed the impact that heightened regulatory scrutiny of its small bank partners would have on the growth of its business.

In a **complaint** filed Tuesday in California federal court, plaintiff David Ford pointed to market records showing that in November, trading prices for Marqeta shares fell from nearly $6 to about $3.40 when the company told investors that in its most recent quarter it realized that it had "greatly underestimated the magnitude and time horizon for all parties to adapt to the new [program management] standards" for working with small banks.

During his proposed class period of May to November 2024, Marqeta and certain of its executives "created the false impression that they possessed reliable information pertaining to the company's projected revenue outlook ... while also downplaying the potential for longer customer onboarding timelines for new deal launches caused by heightened regulatory scrutiny," Ford said.

Ford claimed that as a result, during the class period, Marqeta's shares were artificially inflated in part because the company was hiding that its "investment in compliance and program management capabilities were inadequate to deal with regulatory scrutiny facing its banking partners, leading to significantly longer onboarding delays for new customers."

Marqeta operates a cloud-based open application programming interface platform that issues cards and processes transactions for its customers, the complaint said.

The investor's proposed class period starts in May, when representatives for the company said it was "starting the year strong" and touted its compliance-related services, predicting they would be "a key selling point and differentiator for our platform" in 2024.

In November, the company announced negative results for its third quarter of the 2024 fiscal year and cut its guidance for its upcoming 2025 fiscal year, citing, among other things, the increased workload it had seen in connection with the regulatory obligations its small bank partners face.

"We underestimated the increased operational burden these changes made on both Marqeta's and the bank's onboarding and compliance teams," the company's CEO said in November.

On Thursday, a representative for Marqeta said that the company doesn't comment on pending litigation. Counsel for Ford didn't immediately respond to a request for comment.

Ford is represented by Adam M. Apton of Levi & Korsinsky LLP.

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

The case is Ford v. Marqeta Inc. et al., case number 4:24-cv-08892, in the U.S. District Court for the Northern District of California.

--Editing by Rich Mills.

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TD Bank Sued Over AML Controls After Ex-Employee's Arrest

By **Katryna Perera**

Law360 (December 12, 2024, 6:42 PM EST) -- Toronto-Dominion Bank and its top brass concealed and downplayed issues with the bank's anti-money laundering controls, according to a class action filed one day after a former employee was arrested and charged with assisting in a money laundering scheme that sent millions of dollars in narcotics proceeds from the U.S. to Colombia.

Pedro Gonzalez filed a civil **complaint** in New York federal court on Wednesday on behalf of a proposed class of individuals and entities who purchased or acquired TD securities between March 7, 2022, and Oct. 9, 2024. The complaint names as defendants TD's CEO Bharat Masrani; Chief Financial Officer Kelvin Vi Luan Tran; former CFO Riaz Ahmed; and Leovigildo Salom, the CEO of TD subsidiary TD Bank NA.

The suit was filed one day after a former TD Bank employee who worked in Florida **was charged** with one count of conspiracy to commit money laundering. Leonardo Ayala, 24, appeared Tuesday in Florida federal court in Miami, where he invoked his rights to remain silent and to counsel, according to court documents. U.S. Magistrate Judge Lisette Marie Reid set bond at $100,000 and transferred the case to New Jersey federal court.

"Ayala repeatedly and corruptly issued numerous debit cards for TD Bank accounts originally opened in New Jersey, and had those debit cards mailed to an address in New Jersey, despite knowing that he was being directed to do so by individuals that were not the identified account holder," the criminal complaint says.

The cards aided the laundering of money through automatic teller machine withdrawals in Colombia, according to the complaint.

Gonzalez's proposed class action focuses on alleged misrepresentations the bank and its executives made about TD Bank's anti-money laundering and Bank Secrecy Act controls, processes and procedures.

Gonzalez says that through the class period, TD Bank assured investors it was "committed to taking all reasonable and appropriate steps to detect and deter persons engaged in money laundering" and repeatedly touted its "Risk Governance Structure" through which TD's Audit Committee purportedly "[o]versaw the execution and ongoing effectiveness of" the company's AML controls to ensure that money laundering is "appropriately identified and mitigated."

But in reality, the bank repeatedly downplayed and minimized the problems it faced related to its AML controls, according to Gonzalez, who claims that from January 2014 through October 2023, the bank's controls were plagued with "pervasive" and "systemic deficiencies."

"Despite these 'known' and 'glaring deficiencies,' TD 'chose profits over compliance' and 'failed to appropriately fund and staff its AML program, opting to postpone and cancel necessary AML projects' to keep its costs down because 'senior executives' required that TD's annual budget not increase," the complaint states. "As a result, from January 2018 to April 2024, TD failed to monitor the vast majority of its total transactions which allowed criminals to launder hundreds of millions of dollars using the company's banking products and services."

Gonzalez says the truth began to emerge this past May when The Wall Street Journal reported that a

U.S. Department of Justice investigation into the bank's AML controls — specifically focusing on how Chinese crime groups and drug traffickers used the bank to launder money from the sale of fentanyl in the U.S. — had revealed that hundreds of millions of dollars of proceeds were laundered through TD Bank.

It was also revealed that Canadian regulators had fined TD Bank $6.7 million for failing to file required suspicious activity reports related to money laundering. On this news, Gonzalez says, the price of TD stock declined by $3.42 per share, or 5.9%, from $58.08 per share on May 2, to $54.66 on May 3.

In October, The Wall Street Journal further reported that the bank planned to plead guilty to criminal charges that it had failed to build proper AML systems, that it faced **$3 billion in penalties** for its misconduct, and that the Office of the Comptroller of the Currency was expected to impose an asset cap on the bank that would bar it from growing above a certain level in the U.S., according to the complaint.

TD Bank confirmed the reports the following day in a press release, according to the complaint, and on this news, the bank's stock declined by $4.07 per share, or 6.4%, from $63.51 per share on Oct. 9, 2024, to $59.44 on Oct. 10, 2024.

The bank is the largest in U.S. history to plead guilty to Bank Secrecy Act breaches and the first to plead guilty to conspiracy to commit money laundering, U.S. Attorney General Merrick Garland said in an October news conference. The monetary penalty is the largest to be imposed under the Bank Secrecy Act.

Gonzalez's suit seeks damages, attorney fees and a jury trial.

In a statement to Law360 on Thursday, a spokesperson for TD Bank said the bank's disclosures are accurate, and it plans to vigorously defend the lawsuit.

Counsel for Gonzalez did not immediately respond to requests for comment on Thursday.

The criminal case against Ayala alleges that during his employment at a TD Bank branch in Doral, Florida, in exchange for bribes, he issued dozens of debit cards on accounts for shell companies that another bank employee had opened. The complaint shows a photo of Ayala working at a drive-through teller window on June 14, 2023, when he is said to have issued 25 debit cards for one shell company within one hour.

Gonzalez is represented by Javier Bleichmar, Ross Shikowitz and Adam McCall of Bleichmar Fonti & Auld LLP.

Counsel information for TD Bank and the individual defendants was not immediately available.

The case is Gonzalez v. The Toronto-Dominion Bank et al., case number 1:24-cv-09445, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Carla Baranauckas. Editing by Marygrace Anderson.

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Pharma Co. Says Federal Court Must Weigh Atty Fee Bid

By **Katryna Perera**

Law360 (December 12, 2024, 8:00 PM EST) -- Harpoon Therapeutics Inc., which was acquired earlier this year by Merck Sharp & Dohme LLC, has asked a California federal judge to weigh an attorney fee bid by Monteverde & Associates PC, which sued Harpoon over allegedly incomplete merger disclosures.

The former pharmaceutical company filed a **notice of removal** on Wednesday, arguing that Monteverde's **fee bid**, which the law firm filed in California state court in October, should be considered at the federal level because its claims "arise from and depend on the application of federal law and thus belong in federal court."

"Because Monteverde seeks fees for vindicating a federal right, its claims necessarily implicate substantial, disputed issues of federal law, notwithstanding Monteverde's attempt to plead around these federal issues and assert claims purportedly sounding in state law," the filing stated.

"Monteverde cannot plead around federal jurisdiction by artificially styling its claims as state law causes of action," Harpoon said.

The attorney fee bid relates to a demand for supplemental disclosures Monteverde sent Harpoon in February on behalf of a putative Harpoon shareholder.

The demand was sent after Harpoon entered into a **merger plan** with Merck in January and filed a definitive proxy statement with the U.S. Securities and Exchange Commission on Feb. 8.

Monteverde sent a "demand for supplemental disclosures in the form of a draft complaint" on Feb. 16, claiming the filed proxy statement was incomplete and misleading, according to Wednesday's filing. The draft complaint was to be filed in the Southern District of New York and asserted federal claims against Harpoon and members of its board of directors for alleged violations of the Exchange Act.

On Feb. 28, the filing stated, Harpoon complied with the demand and filed a supplemental definitive proxy statement with the SEC, which "contained new information mooting" Monteverde's disclosure requests.

Harpoon shareholders voted to approve the merger in March, and it was consummated a few days after the vote, according to the filing.

Monteverde then filed the current action in California state court in October, seeking recovery of "its reasonable attorneys' fees and expenses" accrued in asserting the demand.

"Monteverde asserts that it conferred a 'common benefit' on Harpoon shareholders by causing Harpoon to disseminate the supplemental disclosures in advance of the shareholder vote to approve the acquisition," Wednesday's filing stated.

But Harpoon argued that since Monteverde's draft complaint exclusively asserted federal law claims and was intended to be filed in federal court, the current action should be litigated in federal court.

"Monteverde's entitlement to attorneys' fees, if any, flows from federal law," the filing stated.

"Although a plaintiff remains 'master of his own pleadings,'" the filing said, "he may not seek to circumvent federal jurisdiction by 'omitting from the complaint allegations of federal law that are essential to the establishment of his claim.'"

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

Harpoon is represented by Amy S. Heath, Mark P. Gimbel and Robert C. Gianchetti of Covington & Burling LLP.

Monteverde is represented in-house by Juan E. Monteverde and David E. Bower.

The case is Monteverde & Associates PC v. Harpoon Therapeutics Inc., case number 3:24-cv-08935, in the U.S. District Court for the Northern District of California.

--Editing by Robert Rudinger.

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Fla. Judge Awards $114M To Crypto-Forex Exchange Investors

By **Carolina Bolado**

Law360, Miami (December 12, 2024, 7:58 PM EST) -- A Florida judge issued a directed verdict Thursday against absent foreign exchange currency broker FxWinning Ltd. awarding investors more than $114 million after they told the court how they were swindled out of their investments when the company abruptly stopped honoring withdrawal requests.

Following about two hours of testimony before jurors, Miami-Dade County Circuit Judge Lisa Walsh granted the investors' request for a directed verdict against FxWinning, a Hong Kong firm accused of stealing over $114 million by purporting to be a legitimate online trading operation.

The judge had previously ruled in favor of the investors in two separate lawsuits, leaving only the question of damages for the joint trial, where FxWinning was absent from the courtroom.

"The defendants had the opportunity to come to the courtroom today and challenge the evidence, but they're not here," David Levine, who represents investors Cody Kerns and Christopher McGinnis and their companies, said.

Kerns, who runs a social media marketing company and is a portfolio manager at hedge fund Kerns Capital Inc., said FxWinning made itself out to be an online trading platform and brokerage. He opened an account there in early 2022 and said that initial withdrawal requests were honored, until late May 2023, when he made a request and was told the money would be transferred to his bitcoin wallet within 15 business days. But the money never arrived.

Other investors told similar stories of how FxWinning began slowing down honoring withdrawal requests in early 2023 and stopped altogether that May.

Renan de Rocha Gomes Bastos, who appeared on behalf of himself and his company CFT Solutions, said he and the company lost approximately $42 million. He said he chose to invest in FxWinning in November 2020 because he had recently immigrated to the United States from Brazil and, without a Social Security number, he could not yet invest in an American brokerage.

He said the last two years "were the most difficult of my life," and he was forced to sell his house in Miami as well as other personal items.

"I just want to rebuild my life again," Gomes Bastos said. "I have a son now, and I feel obligated to put my life back on track again."

In their suits, the investors accuse FxWinning, its CEO Rafael Cutie, its shareholder and broker David Merino and three other alleged operators of participating in a "globe-sprawling fraudulent scheme" that bilked tens of millions of dollars from users. The firm shut down in June 2023 and allegedly instructed users to withdraw their funds, but the investors maintain their withdrawals were never processed.

FxWinning initially appeared in the suit to challenge jurisdiction but stopped after Judge Walsh determined the company could be hauled into court in Florida. In a filing in February, the company said it reserves the right to challenge both jurisdiction and venue.

The investors' claims against Cutie and Merino remain. The two defendants, both of whom reside in

Dubai, tried to get the claims dismissed by arguing that the complaint fails to show they had sufficient contacts in Florida tied to the alleged activity. But Judge Walsh found the complaint pled ample facts to show that both Cutie and Merino directed the FxWinning business in Florida, including traveling to the state to do business.

Levine said he was "very happy for this result" on Thursday.

"It was the right result and justice was served," Levine said.

An attorney who previously represented FxWinning in the litigation did not respond to a request for comment.

Kerns and McGinnis are represented by David M. Levine, Fausto Sanchez and Robert Kemper of Sanchez Fischer Levine LLP.

The CFT plaintiffs are represented by Ryan Todd, Justin Kaplan and Nina Griscelli of Nelson Mullins Riley & Scarborough LLP and Jo-Jean Panton Figueira of Jo-Jean Panton Figueira PA.

FxWinning declined to appear in the trial.

The cases are Kerns et al. v. FxWinning Ltd. et al., case number 2023-020202-CA-01, and CFT Solutions LLC et al. v. FxWinning Ltd. et al., case number 2023-016392-CA-01, in the Eleventh Judicial Circuit Court of Florida.

--Additional reporting by Aislinn Keely. Editing by Jay Jackson Jr.

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UnitedHealth To Pay $69M In Suit Over 401(k) Fund Roster

By **Emily Brill**

Law360 (December 13, 2024, 10:26 AM EST) -- UnitedHealth Group has agreed to pay $69 million to settle a class action claiming it included low-performing investment options in its 401(k) plan to preserve its business relationship with Wells Fargo, according to a filing Friday in Minnesota federal court.

Sanford Heisler Sharp McKnight LLP, which represents the class alongside Halunen Law, said in the **settlement memorandum** that it believes this is the "largest settlement in the history of investment performance cases in an [Employee Retirement Income Security Act] context." The memorandum asks the court to grant preliminary approval to the deal, which would end the roughly 3-and-a-half-year-old litigation.

"This is a tremendous and historic result," Charles H. Field, who chairs Sanford Heisler's ERISA litigation practice group and helped represent the class, said in a statement.

Field also praised lead plaintiff Kim Snyder's "leading and decisive part in the litigation," saying she "fought with courage and strength against a major corporation."

A UnitedHealth spokesperson said Friday that the company continues to deny allegations that it mishandled its 401(k) plan but sees the settlement as a way forward.

"Our 401(k) plan fiduciaries have always acted in the best interests of plan participants, and we strongly deny any allegations to the contrary," the spokesperson said. "If approved by the court, this settlement will enable all parties to put this matter behind them and move forward."

Snyder sued UnitedHealth in April 2021, claiming the insurance company refused to remove an underperforming suite of Wells Fargo investment funds from its 401(k) plan because it didn't want to alienate the banking company, with which it had a lucrative business relationship. The funds performed worse than 70% to 90% of comparable funds over the course of a decade, Snyder alleged.

She said that because UnitedHealth held onto the funds for so long, workers who kept their retirement savings in UnitedHealth's 401(k) plan lost out on hundreds of millions of dollars in savings that they could have accrued from better-performing investments. She accused UnitedHealth of breaching its ERISA-imposed duties to remain loyal to its workers and make prudent investment decisions on their behalf.

"As a direct and proximate result of the UnitedHealth defendants' breaches of fiduciary duty, the plan and its participants who invested in the Wells Fargo target fund suite have suffered hundreds of millions of dollars of damages and lost-opportunity costs," Snyder said in her amended complaint, filed in August 2022.

Snyder **won class action status** for her suit in 2022, as U.S. District Judge John R. Tunheim allowed her to represent the thousands of UnitedHealth employees who'd kept money in the 401(k) plan since April 23, 2015.

Earlier this year, UnitedHealth **lost its bid** to beat the suit before it went to trial. Judge Tunheim said "a reasonable trier of fact could easily find that plaintiff Kim Snyder caught defendant UnitedHealth Group Inc. with its hand in the cookie jar."

UnitedHealth knew that the Wells Fargo funds were underperforming and chose to hold onto them anyway, Judge Tunheim said. It would be possible for the court to find that this was for dubious reasons, the judge held.

"There was a large, two-way business relationship between United and Wells. United generated between $50 and $60 million in revenue from 2014-2017 as Wells's health insurance provider," Judge Tunheim said. "On the other side of the ledger, Wells provided United with substantial banking services. And United was Wells's largest client and lifeline in the [target date fund] industry. In the balance between the two companies, the plan constituted around 45% of the business flowing from United to Wells."

Snyder and UnitedHealth told the court they began talking about settling in 2022. **The parties announced** in September of this year that they had reached a settlement but did not disclose the amount.

Wells Fargo, which was not a defendant in the suit, declined to comment.

Snyder and the class are represented by Charles Field, David Sanford, Kevin H. Sharp, Leigh Anne St. Charles, Brent Hannafan and Shannon Henris of Sanford Heisler Sharp McKnight LLP and by Susan M. Coler of Halunen Law.

UnitedHealth Group Inc. is represented by Drew M. Horwood and Martin S. Chester of Faegre Drinker Biddle & Reath LLP and by Craig S. Primis, K. Winn Allen and Madelyn A. Morris of Kirkland & Ellis LLP.

The case is Snyder v. UnitedHealth Group Inc. et al., case number 0:21-cv-01049, in the U.S. District Court for the District of Minnesota.

--Editing by Abbie Sarfo.

Update: This story has been updated with a comment from a UnitedHealth spokesperson.

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Align Tech's $27.5M Antitrust Deal Hits Nerve With Judge

By **Bonnie Eslinger**

Law360 (December 12, 2024, 9:58 PM EST) -- A California federal judge said Thursday that a proposed $27.5 million deal for teeth-aligner buyers to resolve antitrust claims alleging Align Technologies Inc. colluded with the now-bankrupt SmileDirectClub to illegally restrict competition might be "inherently improper" due to a coupon component that "would bring additional business to the monopolist."

U.S. District Judge Vince Chhabria made the comments during a Zoom hearing to discuss plaintiff Misty Snow's request for preliminary approval of the deal her lawyers struck with Align Technologies. In addition to $27.5 million for a proposed class of nearly 1.45 million SmileDirectClub teeth-aligner buyers, the settlement includes the option for class members to receive a $300 coupon for Invisalign treatment and a $50 coupon for an Align retainer.

Judge Chhabria said he was "struggling" with the idea of a settlement in an antitrust case that "involves a coupon program that presumably would bring additional business to the monopolist," adding he was not sure if that would be appropriate.

The judge asked a lawyer for the consumers, Rio Pierce of Hagens Berman Sobol Shapiro LLP, the estimated value of the coupons. Pierce said if there was a 5% to 10% claims rate, that would equate to $30 to $40 million in coupons.

The judge said he was undecided on the issue of the coupons.

"I think there's an argument that that is just inherently improper," he said.

A lawyer for Align, Mark Levine of Bartlit Beck LLP, said the $300 coupon is for people who did not like the teeth alignment treatments they had done and want it redone.

Judge Chhabria suggested that class members receive a neutral coupon for Invisalign or an alignment treatment offered by another provider. The settlement administrator would reimburse class members who choose a different brand for the $300.

"Why shouldn't they be able to use the coupon for a different brand if they want?" the judge said.

Pierce agreed with the judge that it is more in the interest of the class to give them a choice, but said the settlement reached with Align was the best they could do.

"It takes two people to make a deal." Pierce said.

Judge Chhabria was quick in his response.

"Well it actually takes three," the judge said.

The judge told the parties he had not made a final decision and would study the matter more.

"But I think I've proposed a way to do it, or at least to significantly mitigate the concerns," the judge said.

Levine said he would need to talk to his client.

"We're not going to negotiate for them on the fly in terms of a new settlement agreement," he said.

The lawyer for Align Technologies noted that the court's proposed coupon would require additional money beyond the $27.5 million "that could be used to help out competitors that make aligners."

Judge Chhabria suggested that the idea be reframed.

"You're providing something of value to class members," the judge said. "For them to decide how to use them, as opposed to steering them in the direction of your own company."

A different lawyer for Align, Joseph Doman of Bartlit Beck LLP, told the judge that the coupon program was not intended to provide additional sales to his client. Later in the hearing, Doman reminded the court that Align has a duty to its shareholders.

"To provide a coupon to class members to be able to buy other competitor's products would be problematic," Doman said.

Judge Chhabria said an alternative idea would be to bump up the $27.5 million settlement amount.

Doman said the legal team would go back and talk to their client, adding that the settlement had been "hard-earned" using "nationally renowned mediators" and many rounds of negotiations.

The judge said the lawyer hit one of his pet peeves.

"The fact that nationally renowned mediators were involved, and I don't even know who they were, that doesn't mean much to me," the judge said, later adding that he has seen settlements struck by "good mediators that were totally unreasonable."

The deal aims to bring a close to litigation **first filed in 2021** accusing Align and the now-bankrupt SmileDirectClub LLC — which is not a defendant — of scheming to restrict the direct-to-consumer clear aligner market, which Snow said allowed the companies to overcharge customers for the aligners, a plastic form of dental braces, in violation of Section 1 of the Sherman Act. One patent dispute with SmileDirectClub, the consumers alleged, led to a series of 2016 deals through which Align bought a stake in SmileDirectClub and under which the two companies agreed to divvy up the market.

Even though some of its key patents have expired, Align is accused of implementing a scheme to monopolize the market for hand-held digital mouth scanners, which dentists use to take images of patients' jaws, teeth and bite to create individualized aligners, according to the suit. By selling its own scanners that do not work well with other aligner brands, Align knocked out its rivals and ensured that dentists use Align products for their patients, the lawsuit says.

Shortly after the case was filed, the consumer litigation was coordinated with another antitrust action filed by Simon and Simon PC, which does business as City Smiles. That case is an antitrust action specifically targeting Align's teeth-aligners, and not SmileDirectClub's products.

After multiple rounds of pleading, Snow's lawsuit survived a motion to dismiss, and in 2022, the judge refused to let Align add SmileDirectClub as a fellow defendant, without providing specific details behind his reasoning. A year later, SmileDirectClub filed Chapter 11 with more than $1 billion in debt.

The consumers' **motion for preliminary settlement approval**, which was filed with the court in August, notes that $27.5 million represents 15.2 percent of the estimated maximum amount of recoverable damages.

According to the motion, class counsel plans to seek to recover $3 million in litigation expenses, as well as attorney fees of up to $6.875 million, or 25% of the $27.5 million cash settlement fund, plus an additional 25% of the value of the reimbursed coupons.

"But the combined value of the attorneys' fees sought will be capped at 30% of the cash settlement fund ($8.25 million)," the motion states.

The proposed class includes consumers nationwide who purchased SmileDirectClub clear aligners from Oct. 22, 2017, to Aug. 18, 2022.

Snow is represented by Steve W. Berman, Theodore Wojcik, Joseph M. Kingerski and Rio S. Pierce of Hagens Berman Sobol Shapiro LLP.

Align Technology is represented by Karma M. Giulianelli, John M. Hughes, Joseph W. Doman, Mark L. Levine, Robert B. Tannenbaum and Luke C. Beasley of Bartlit Beck LLP, and James M. Pearl, Abigail H. Wald, Thomas A. Counts, Adam M. Reich, Michael F. Murray and Noah B. Pinegar of Paul Hastings LLP.

The case is Misty Snow v. Align Technology Inc., case number 3:21-cv-03269, both in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins and Nadia Dreid. Editing by Vaqas Asghar.

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Incora's Opt-Outs Not Like Class Actions, US Trustee Says

By **Ben Zigterman**

Law360 (December 12, 2024, 9:12 PM EST) -- The U.S. Trustee's Office on Thursday objected to the third-party releases in the Chapter 11 plan from aircraft parts supplier Incora, arguing in a Texas bankruptcy court that the opt-out mechanism for the releases is not comparable to class action procedures.

While U.S. Bankruptcy Judge Marvin Isgur raised the class action comparison at a hearing in September, the U.S. Trustee's Office said in its objection Thursday that the analogy is "misplaced."

Federal class action law doesn't apply to bankruptcy plan confirmations, the U.S. Trustee argued **in its objection**, also noting the "rigorous procedural requirements" to qualify for class certification that don't exist for bankruptcy classes.

Instead, the U.S. Trustee said the opt-outs should be considered a matter of state contract law under which it says affirmative consent to third-party releases is needed.

"Failure to return an opt-out form is not consent because, whether they are asked to vote or not, claimants have no reason to expect that an offer to contract with non-debtors will be included in the plan solicitation," the U.S. Trustee wrote.

Incora hopes to confirm its plan at a hearing set for Monday. Two voting classes in the proposed plan will be able to opt out of the third-party releases, which Incora called an "integral part" of its plan, according to court documents.

Since the U.S. Supreme Court's June decision in Harrington v. Purdue Pharma LP barring nonconsensual third-party releases, bankruptcy courts have been grappling with what constitutes consent, with judges **allowing opt-outs** in Chapter 11 plans from appliance-parts maker Robertshaw and **fitness equipment maker** BowFlex, while **rejecting them** in the Chapter 11 plan from software company Ebix.

In September, U.S. Bankruptcy Judge Craig T. Goldblatt of Delaware **limited the use** of opt-outs for voters who didn't return ballots in the restructuring of specialty mushroom farming company Smallhold Inc.

The U.S. Trustee favorably cited the Smallhold decision's reasoning, but said it disagrees with Judge Goldblatt's conclusion that opt-outs are OK for returned ballots.

"The act of voting on a plan without taking an additional step to opt-out is still merely silence with respect to the non-debtor release," the U.S. Trustee wrote.

Incora filed for bankruptcy relief **in June 2023** in the Southern District of Texas with $3.1 billion in debt, citing struggles stemming from sluggish passenger air travel, supply chain disruptions and inflation.

Incora and groups of creditors have been warring over a 2022 restructuring in which only certain noteholders were permitted to swap their debt for new, higher-ranking securities. The so-called up-tier transaction demoted some investors in the repayment order.

In July, Judge Isgur ruled Incora **improperly stripped collateral rights** from certain secured noteholders when it raised $250 million as part of the transaction, deciding to restore the excluded creditors' liens on the company's assets.

Since then, Incora, private-equity backer Platinum Equity and creditors **have been feuding over the effects** of Judge Isgur's decision and how to incorporate it into a Chapter 11 plan.

In October, Incora **said that** it hopes to reach a consensual plan that will let the debtor emerge from bankruptcy while preserving everyone's rights to appeal Judge Isgur's ruling.

A spokesperson for the U.S. Trustee's Office declined to comment Thursday, and counsel for Incora didn't immediately respond to a request for comment.

Incora is represented by Dennis F. Dunne, Samuel A. Khalil and Benjamin M. Schak of Milbank LLP, and Charles A. Beckham Jr., Patrick L. Hughes, Martha Wyrick and Re'Necia Sherald of Haynes and Boone LLP.

The U.S. Trustee's Office is represented in-house by Andrew Jiménez.

The bankruptcy case is In re: Wesco Aircraft Holdings Inc. et al., case number 4:23-bk-90611, in the U.S. Bankruptcy Court for the Southern District of Texas.

--Additional reporting by Alex Wittenberg. Editing by Melissa Treolo.

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McKinsey To Pay $650M For Work With Opioid Maker Purdue

By **Julie Manganis**

Law360 (December 13, 2024, 10:09 AM EST) -- Consulting giant McKinsey & Co. will pay $650 million to resolve conspiracy and obstruction charges relating to its work with Purdue Pharma in the marketing of OxyContin, according to a Friday filing in Virginia federal court.

In addition to the company's five-year deferred prosecution agreement, Martin Elling, a former McKinsey senior partner, will plead guilty to destroying relevant documents in 2018, the government said. According to a plea deal, the government is expected to recommend a $250,000 fine and six to 12 months in prison for Elling.

The deferred prosecution deal was struck between the company and federal prosecutors in Virginia, Massachusetts and the U.S. Department of Justice's consumer protection unit.

The case is United States of America v. McKinsey & Co. Inc., case number 1:24-cr-00046, in the U.S. District Court for the Western District of Virginia.

--Editing by Robert Rudinger.

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Cantor Fitzgerald To Pay SEC $6.75M Over SPAC Disclosures

By **Katryna Perera**

Law360 (December 12, 2024, 10:24 PM EST) -- Cantor Fitzgerald on Thursday agreed to pay a $6.75 million penalty to the U.S. Securities and Exchange Commission to resolve claims that it caused two special purpose acquisition companies that it controls to make misleading statements to investors ahead of the SPACs' initial public offerings.

The SEC issued an **order** stating that the global financial services firm agreed to pay the civil monetary penalty without admitting to or denying any of the regulator's allegations.

According to the order, a small team of Cantor executives and other personnel employed by Cantor subsidiaries caused the SPACs to make the alleged misleading statements ahead of their IPOs. The SEC said this "small Cantor team" controlled the actions of the SPACs, including their search for potential business combination targets and the discussions that took place about potential mergers.

The executives and personnel were not named in the SEC's order. Cantor Fitzgerald's most well-known executive is CEO Howard Lutnick, who has been picked by President-elect Donald Trump to be his Commerce secretary.

The SEC's claims focus on two mergers announced in 2020 and 2021. The first, announced in November 2020, was between Cantor-controlled CF Finance Acquisition Corp. II and View Inc.

The SEC said in Form S-1 filings and a prospectus that Cantor caused CFAC II to falsely state that neither it nor anyone acting on the SPAC's behalf had initiated any substantive discussions with any potential business combination target; approached any specific business target; or contacted any businesses considered by a previous SPAC Cantor had controlled.

"In fact, Cantor personnel, acting on behalf of the SPAC, had already initiated discussions with View and at least one other potential target regarding a potential business combination as early as June 2020, and those discussions continued during the time period before the CFAC II IPO," the order said. "The Form S-4 filings and a business combination proxy statement … also included false statements about the true history of Cantor's interactions with View."

The SEC said the same false statements were filed regarding a merger between Cantor-controlled CF Acquisition Corp. V and Satellogic Inc. that was announced in July 2021.

"Pre-IPO discussions with Satellogic about a potential business combination with a Cantor SPAC explicitly included the possibility of using the not-yet-launched CFAC V as the acquisition vehicle," the order said.

Cantor has sponsored nine SPACs, most of which launched their IPOs between August 2020 and February 2021, according to the order. The SEC alleged that when Cantor reached a merger agreement with a specific business target, it would often "roll" discussions happening with other target companies over to another one of its controlled SPACs.

"When one particular potential SPAC target questioned why paperwork reflected the name of an already merged SPAC, members of the Cantor team responded that it did not matter which SPAC name was referenced in the paperwork, because they 'always ha[ve] a SPAC available' for a possible business combination," the order said.

The SEC's acting director of the Division of Enforcement, Sanjay Wadhwa, said in a statement that the enforcement action against Cantor "reflects the straightforward proposition that any disclosures about substantive discussions with potential targets must be materially accurate."

In a statement to Law360 on Thursday, a spokesperson for Cantor said: "No investor was ever harmed by the alleged issues described in the order. We are pleased to have concluded this matter by mutual agreement with the SEC."

Republican SEC member Mark Uyeda issued a dissenting statement Thursday, saying he does not support either the enforcement action against Cantor or two previous actions against other companies in the SPAC space — Digital World Acquisition Corp. and Northern Star Investment Corp. II — over allegations of false and misleading statements about communications with potential target companies.

Digital World Acquisition Corp., which took Truth Social parent company Trump Media & Technology Group Corp. public last year, **settled with the SEC** in July 2023 for $18 million, while Northern Star, the SPAC that engaged in a failed merger with Apex Fintech Solutions in 2021, **settled with the SEC** in January for $1.5 million.

"I have declined to support these cases because the alleged misstatements and omissions are not material, and I do not view the facts in the order as demonstrating investor harm," Uyeda said.

Uyeda noted that SPACs are "fundamentally different" from operating companies and their day-to-day purpose is to find an operating business to acquire.

"The SPAC's 'death' is planned for and sought after from the time the SPAC is formed. Given this distinction, the probability/magnitude test, as applied to information concerning a SPAC's preliminary merger negotiations, should result in such information not becoming material until a time much closer to the SPAC and target company reaching a binding agreement on the acquisition price and structure," Uyeda said. "Any discussions prior to such time, even if they are 'substantive,' are part of the day-to-day operations of a SPAC."

Cantor is represented by George S. Canellos of Milbank LLP and David Kornblau, Charles Farrell and Alyssa Landow of Dentons.

The SEC is represented by its own Eugene Bull, Rebecca Schendel Norris, Gargi Chaudhuri and Laura B. Josephs.

The case is In the Matter of Cantor Fitzgerald LP, case number 3-22348, before the Securities and Exchange Commission.

--Editing by Michael Watanabe.

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