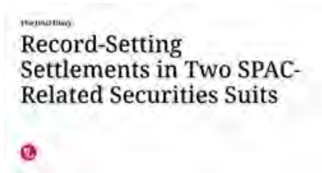
Record-Setting Settlements in Two SPAC-Related Securities Suits

dandodiary.com/2025/01/articles/securities-litigation/record-setting-settlements-in-two-spac-related-securities-suits

January 13, 2025



By Kevin LaCroix on January 13, 2025
Posted in Securities Litigation

After the 2021 peak of the SPAC IPO frenzy, many SPACs wound up liquidating, while another significant tranche of the SPACs (or the SPACs post-merger successor companies) wound up in litigation. The post-frenzy glut of SPAC-related lawsuits has since been making its way through the courts ever since, and some have made it to the settlement stage. In recent days, the parties to two of these SPAC-related lawsuits have reached noteworthy settlements. As discussed below, the two settlements – the Alta Mesa SPAC-related lawsuit settled for $126.3 million and the Grab Holdings SPAC-related lawsuit settled for $80 million – are among the largest ever SPAC-related lawsuit settlements and could potentially set standards for future SPAC lawsuit settlements. The two settlements are subject to court approval.

Alta Mesa

Background

The Alta Mesa lawsuit related to a SPAC IPO from an earlier era; indeed, the Alta Mesa lawsuit was already pending as the SPAC IPO frenzy reached its crescendo in 2021.

Silver Run Acquisition Corporation II, a Special Purpose Acquisition Company (SPAC), completed an IPO in March 2017. On August 16, 2017, Silver Run announced its plan to merge with two separate but interrelated oil-and-gas companies, Alta Mesa Holdings LP (AMH) and Kingfisher Midstream LLC. The merger proxy stated that AMH and Kingfisher were "poised for accelerating growth" with significant increases in production and earnings expected by 2019. The merger closed on February 9, 2018, with the transaction valued at $3.8 billion. The combined company was known as Alta Mesa Resources, Inc., with AMH and Kingfisher as subsidiaries of Alta Mesa.

Two months after the merger closed, Alta Mesa filed its first 10-K as a public company, and also issued an earnings release. Among other things, the company released EBITDA and production estimates that were, as the subsequently filed securities complaint alleged, "dramatically reduced" from the equivalent figures in the proxy statement. As 2018 progressed, the company continued to release similarly disappointing news.

In February 2019, the company announced that it would not be able to file its 2018 annual report on time and that it was going to be taking material asset impairment charges, with the write-downs totaling $3.1 billion (less than twelve months after the merger transaction that had valued the company at $3.8 billion). In May 2019, the company announced that the SEC was investigating circumstances involved possible material weaknesses in the company's internal controls.

In September 2019, the company filed for Chapter 11 bankruptcy protection. Alta Mesa's assets sold for $320 million, less than 10% of Alta Mesa's claimed post-merger value of $3.8 million.

The Lawsuit

In January 2019, shareholder plaintiffs filed a securities class action lawsuit against Alta Mesa in the Southern District of Texas. The plaintiffs filed their Second Amended Consolidated Complaint (here) on April 6, 2020. The complaint names as defendants 12 individuals who were officers or directors of Alta Mesa (including one individual who had been CEO of Silver Run prior to the merger); two other individuals who were officers of Silver Run; and four related entities, including Riverstone, which had sponsored the Silver Run SPAC, and the three investment firms that owned AMH or Kingfisher prior to the merger. Several of the individual defendants were also officers or directors of Riverstone, the SPAC sponsor.

The complaint alleges that prior to the merger, the defendants made a series of misrepresentations to induce Silver Run investors to vote in favor of the merger, including, among other things, using misleading reserve and financial projections to overstate the value of AMH and Kingfisher. The complaint alleges further that the misrepresentation of the company's reserves and projections continued after the merger.

As discussed here, in April 2021, Southern District of Texas Judge George C. Hanks, Jr., denied the defendants' motion to dismiss. As a general matter, Judge Hanks said that "the circumstances surrounding the company's financial reporting … are alone enough to entitle Plaintiffs to discovery."

In ruling on the motion with respect to the plaintiffs' claims under Section 10(b), Judge Hanks focused on the company's various disclosures shortly after the merger closed, as well as the $3.1 billion write-down. Judge Hanks said, "Under the circumstances, the enormity of the write-down over such a short period of time is enough for the case against these defendants to proceed."

Subsequent Proceedings and Settlement

Following the dismissal motion denial, the case headed into discovery. Following discovery and a series of pretrial motions, the parties entered into settlement negotiations. As reflected in the plaintiffs' January 6, 2025, unopposed Motion for Preliminary Settlement Approval (here), the plaintiffs and various of the defendants reached separate settlements over the course of Fall 2024. The case apparently had reached the trial stage as to the remaining defendants in December 2024 when the final settlement with the remaining defendants was reached. According to the plaintiffs' counsel's January 8, 2025, press release about the settlement (here), the jury trial was in its third week when the parties concluded the settlement.

According to the January 6, 2025, Stipulation of Settlement in the final settlement (here) – involving Alta Mesa and certain of its directors and officers, as well as Riverstone — the final portion of the settlement is to be funded with the "remaining proceeds" of the settling defendants' D&O insurance policies, with the remaining unpaid balance to be paid by Riverstone. Plaintiffs' counsel has indicated they intend to seek approximately 33%, or about $41.7 million, in fees.

According to plaintiffs' counsel's press release, the $126.3 million settlement would represent the "largest-ever securities fraud class action recovery involving a SPAC, if approved by the court."

Grab Holdings Ltd.

Background

Altimeter Growth Corp. was a SPAC. It completed its IPO on September 30, 2020. On December 1, 2021, Altimeter completed a business combination with Grab Holdings Limited, a delivery app organized under the laws of Cayman Islands and based in Singapore, with Grab as the surviving entity with its shares listed on Nasdaq.

On March 3, 2022, Grab released its fourth quarter 2021 financial results. The company announced that its quarterly revenues had declined 44% from the previous quarter. The company also reported a $1.1 billion loss. In its financial release, the company stated that the revenue declined as the company "preemptively invested to grow driver supply to support strong recovery in mobility demand." In a conference call held in connection with the earning release, the company's CEO said that "our driver supply base moderated down amid lower mobility demand in the third quarter." According to the complaint, the company's share price declined over 37% on this news.

The Lawsuit and Settlement

On March 16, 2022, a plaintiff shareholder filed the first of two securities class action subsequently consolidates lawsuits in the Southern District of New York against Grab, its CEO, and its CFO. A copy of the initial complaint can be found here.

The complaint alleges that the defendants failed to disclose to investors: "(1) that Grab's driver supply declined during the third quarter; (2) that, as a result, Grab continued to invest heavily in driver and consumer incentives to 'preemptively recalibrate driver supply'; (3) that, as a result, the Company's financial results would be adversely impacted, including, among other things, a significant decline in revenue; and (4) that, as a result of the foregoing, Defendant's positive statements about the Company's business, operations, and prospects were materially misleading and/or lacked a reasonable basis."

On March 12, 2024, the court entered an order granting in part and denying in part the defendants' motion to dismiss. The case moved into discovery, and, while discovery went forward, the parties also entered mediation, which ultimately resulted in $80 million settlement.

The parties' January 2, 2025, Stipulation of Settlement (here) says that Grab "shall pay, or cause to be paid by Defendants' insurers to pay" the settlement amount into the settlement escrow fund according to the settlement stipulation's timetable. Plaintiffs' counsel had indicated that they intend to request up to one-third of the settlement fund, or about $26.6 million, in fees.

Discussion

The sheer volume of SPAC-related litigation working its way through the courts has been an important part of the D&O liability landscape since the peak of the SPAC IPO frenzy. The courts themselves have commented on the sheer quantity of litigation. For example, Delaware Vice Chancellor Sam Glasscock, in a November 2024 opinion (discussed here), noted that an anaconda snake eats just once a year. Open the snake's belly, he said, and you will not see what it is eating, but what it has eaten in the past. So too with the progress of the SPAC litigation. As VC Glasscock put it "the bulge of the SPAC carcasses continues to be digested." And as the mass of litigation has slowly made its way through the system, some of the cases – like these two – have made their way to the settlement stage.

These two settlements are indeed noteworthy, if for no other reason than their size. While these two settlements – as large as they are – would not rank anywhere near top of the list of the largest of the overall securities class action lawsuit settlements, they are definitely among the largest when it comes to SPAC-related securities lawsuits.

Indeed, the plaintiffs' counsel in the Alta Mesa lawsuit claimed, in their press release about the settlement, that the Alta Mesa settlement is the "largest-ever securities fraud class action recovery involving a SPAC, if approved by the court." I have no reason to contest this assertion. The Grab Holdings also is among the largest SPAC-related securities lawsuit settlement; indeed, as far as I know, it is the second-largest (readers can correct me if I am wrong about that).

To my knowledge, prior to these two settlements, the largest prior SPAC-related securities class action lawsuit settlement was the April 2021 $35 million settlement in the Akazoo securities class action lawsuits, discussed here. The SPAC-related Securities Class Action lawsuit filed against Clover Health Investments settled in April 2023 for $22 million (of which $19.5 million was funded by D&O Insurance).

Many of the other notable SPAC-related lawsuit settlements of which I have been aware have been in the Delaware breach of fiduciary duty direct action lawsuits (as opposed to securities class action lawsuits). MultiPlan, the first of the Delaware SPAC-related breach of fiduciary duty direct action cases, settled for $33.75 million. As discussed here, the various ATI Physical Therapy lawsuits (inclusive of securities class action litigation; derivative litigation; and the Delaware direct action breach of fiduciary duty lawsuits) settled in September 2024 for a combined $31 million, of which the settlement of the securities class action lawsuit represented $18.9 million, the settlement of the direct action fiduciary duty lawsuit represented $6 million, and the settlement of the derivative lawsuit represented $6.45 million.

The potential longer-term significance of these two recent SPAC-related lawsuit settlements has to do with the mass of SPAC-related litigation that remains pending. One factor that always comes up in negotiations to try and settle corporate and securities litigation are the settlements that have gone before. One party or the other will try to argue what “cases like this settle for.” Indeed, the various parties may attempt to cite prior settlement examples they think are relevant to the case they are trying to settle. In future SPAC-related lawsuit settlement negotiations, plaintiffs’ lawyers may well try to cite these two settlements in an attempt to set the potential settlement range.

However, a factor that may come into play in these putative future negotiations is the amount of D&O insurance available. D&O insurance practitioners who were active during the peak of the SPAC IPO frenzy know that insurance for many of these transactions was scarce and expensive. The SPAC IPOs that launched during that period likely will have lower levels of D&O insurance available for possible settlement than apparently were available for the settlement of these two cases. The dearth of D&O insurance, where applicable, could make these two settlement data points less relevant.

I will say this about the Alta Mesa settlement – it was complicated. It is hard to tell from the electronic court file everything that was going on, but the one thing that is clear is that the case settled in a piecemeal fashion. There were various settlements with various defendants over the course of Fall 2024 before the final settlement during the trial in the case against the remaining defendants. I am guessing that one reason for this piecemeal process is that the various groups of defendants (the SPAC officer, the officers of the SPAC sponsor, the SPAC sponsor, the pre-merger target companies, the owners of the pre-merger companies, the post-merger successor company) all had their own D&O insurance programs, a feature of these SPAC-related suits that can make them difficult to resolve.

There is one final note that should not be overlooked here, and that is the fact that the Alta Mesa case settled during trial. Readers of this blog know that trials in securities class action lawsuits are extremely rare. Depending on how you count, there have only been about 25-30 securities class action lawsuits that have gone to trial since the enactment of the PSLRA in late 1995. There have more than 2,200 securities class action lawsuits filed since then. The fact that the Alta Mesa case went to trial at all is a noteworthy face about the case, even though in the end the case did not make it all the way to a jury verdict.

Litigation

Jan. 13, 2025, 7:54 AM PST

FIGS Again Beats Investor Claims in Supply Chain Suit For Now

By Gillian R. Brassil

- Judge letting shareholders re-plead, urged concise complaint
- Plaintiffs failed to allege apparel company, others' intent

Medical outfitter FIGS, Inc. again beat investors' challenge over statements concerning its demand, inventory, and shipping costs, a federal judge ruled.

Judge Otis D. Wright II is letting shareholders re-plead some claims again in the US District Court for the Central District of California, but said he'll have a heightened level of scrutiny if the second amended class action complaint is "byzantine" like the first.

"Accordingly, the Court will take a jaundiced view of any amended pleading that is lengthier than the FAC, and will be inclined to strike an amended pleading that perpetuates this prolixity, preventing meaningful analysis of the claims," he wrote in his Jan. 10 order granting in part and denying in part FIGS and others' motions to dismiss.

Lead plaintiffs Ronald Hoch, City of Pensacola Police Officers' Retirement Plan, City of Warren Police and Fire Retirement System, Kissimmee Utility Authority Employees' Retirement Plan, and Pompano Beach Police & Firefighters' Retirement System alleged FIGS—a direct-to-consumer medical clothier—lied about or misled them on the company's ability to anticipate demand, inventory, and air-freight use before and after its 2021 initial and secondary public offerings.

They also sued FIGS executives, underwriters, and venture capitalist Tulco LLC, which held significant stake in FIGS stock. All three groups filed motions to dismiss, saying that there was a failure to plead material misrepresentation or omission, lack of standing, and lack of statutory liability: Wright on the whole agreed, dismissing with prejudice claims on air freight use statements. The court dismissed some claims without leave to amend and some with.

FIGS, founded in 2013, saw heightened growth during the coronavirus pandemic when people were buying medical apparel through its services. The company went public then had an secondary offering in 2021. The proposed class included people who bought FIGS stock traceable to its IPO and secondary offering and from March 9, 2022 through Feb. 28, 2023, per the complaint.

FIGS share prices from its June 2021 IPO through March 1, 2023, the day after the investors' proposed class period ends.

Since the court dismissed investors' claims in 2024, the plaintiffs included new allegations from confidential witness statements and board meeting materials. But most of plaintiffs' witness statements weren't reliable or based on personal knowledge, Wright said, and fraud claims against FIGS fell short of heightened pleading standards.

They didn't adequately plead why statements on data analytics, shipping, and ability to maintain low inventory were false or misleading, Wright said. And they didn't sufficiently connect how certain executives, Tulco, or underwriters were involved in alleged IPO and secondary offering misstatements, given their claims were "neither short nor plain" under pleading requirements.

While plaintiffs didn't properly allege Tulco was a statutory seller, they did provide a plausible inference as to underwriters, Wright said.

Levi & Korsinsky LLP and Robbins Geller Rudman & Dowd LLP represent the investors as lead counsel. Cooley LLP represents FIGS. Skadden, Arps, Slate, Meagher & Flom LLP represents Tulco. None of these firms responded immediately to emails seeking comment. Morgan Lewis and Bockius LLP, which represents underwriters, declined to comment due to firm policy.

The case is Ryan v. FIGS, Inc. , C.D. Cal., No. 2:22-cv-07939, 1/10/25 .

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

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

https://www.wsj.com/articles/purdues-sacklers-back-new-bankruptcy-settlement-for-opioid-lawsuits-fc4df44d

EXCLUSIVE BANKRUPTCY

Purdue's Sacklers Back New Bankruptcy Settlement for Opioid Lawsuits

The bankrupt OxyContin manufacturer's family owners are boosting their offer to resolve mass opioid litigation after the Supreme Court struck down a prior settlement plan

By Alexander Gladstone

Jan. 13, 2025 6:30 am ET | WSJ PRO

Purdue Pharma, based in Stamford, Conn., filed for bankruptcy in 2019. PHOTO: TIMOTHY A. CLARY/AGENCE FRANCE-PRESSE/GETTY IMAGES

Purdue Pharma's Sackler family owners are offering to increase their financial contribution to a bankruptcy settlement of opioid lawsuits while accepting some exposure to future litigation, according to people with knowledge of confidential mediation discussions.

Certain members of the Sackler family who own Purdue have agreed to boost their total contribution to roughly $6.5 billion over time, the people said, up from $6 billion under a previous plan that was rejected last year by the Supreme Court.

Purdue has been trying since to craft a new path out of bankruptcy since last year's ruling, in which the Supreme Court found that people who rejected the Sacklers' offer in favor of pursuing lawsuits against them couldn't be barred from doing so and forced to accept the settlement terms.

Representatives of the Sacklers, Purdue, state attorneys general and individual opioid claimants are expected to be in New York this week for negotiations over the plan's final terms. The various parties have coalesced around a framework in which individual claimants would be eligible for financial settlements that would come in two parts, the people involved in the discussions said.

All claimants would receive compensation from Purdue itself. Separately, they would be offered a settlement by the Sacklers in return for releasing all their opioid-related claims against the family members. Those who don't accept the settlement offer would preserve their claims and be able to pursue litigation against the Sacklers if they wish, the people said.

Representatives of the Sacklers didn't respond to requests for comment. A Purdue representative said the company can't comment on specifics in light of the court-ordered confidentiality covering its negotiations, but noted that the company is "currently engaged with our creditors in a productive mediation to achieve a plan that maximizes the value for opioid abatement and enables the company to emerge from bankruptcy as an engine for good."

Talks are continuing and there is no guarantee the proposed terms will be finalized. But court-appointed mediators said in a November report filed in bankruptcy court that a new reorganization plan for Purdue would be filed this month containing a higher cash contribution than before.

If approved in court, Purdue's new plan could end the longest and costliest corporate bankruptcy case stemming from the U.S. opioid epidemic. The drugmaker introduced OxyContin in the late 1990s and filed for chapter 11 in 2019 after it was sued in thousands of lawsuits from state and local governments, hospitals and other plaintiffs alleging the company mismarketed its drugs and fueled addiction. Many lawsuits also targeted the Sacklers, alleging they moved money out of Purdue to thwart opioid-related judgments, which they denied.

In addition to the contribution from the Sacklers, Purdue itself is expected to hand over its assets, including its cash and operating business, as part of any settlement. State, municipal and local governments would receive most of the settlement proceeds for programs to mitigate opioid addiction and overdoses. A separate pot of money would compensate individual claimants for personal injuries allegedly tied to its flagship painkiller, OxyContin.

Lawyers for Purdue and the Sacklers previously argued that the family needed to be provided with the legal immunity provision, known as a third-party release, for them to be willing to hand over billions of dollars held in offshore trusts.

A New York bankruptcy court approved the prior plan with legal immunity for the Sacklers in 2021. The Office of the U.S. Trustee, a civil division of the Justice Department that supervises the nation's bankruptcy courts, appealed that ruling to the Supreme Court arguing that the bankruptcy code doesn't allow such releases for parties like the Sacklers who didn't file bankruptcy themselves.

Gregory Garre, an attorney for Purdue, said during the Supreme Court hearing in 2023 that "if the trustee succeeds here, the billions of dollars that the plan allocates for opioid abatement and compensation will evaporate. Creditors and victims will be left with nothing, and lives literally will be lost."

Since the Supreme Court ruling in June, members of the Sackler family have shown that they are still motivated to resolve as much civil opioid liability as possible, said people familiar with the discussions. The Sacklers' overall wealth has grown since Purdue's bankruptcy filing due to the appreciation of investment assets and financial holdings, some of the people said.

Professionals involved in Purdue's chapter 11 case, including lawyers, bankers and other advisers, had already billed more than $900 million in fees as of the end of last year, court filings show. Individual opioid claimants have been expected to receive around $750 million, though the final amount is still being negotiated and could increase, people familiar with the talks said.

Write to Alexander Gladstone at alexander.gladstone@wsj.com

Purdue's Sacklers offer to increase contribution in new opioid settlement, WSJ reports

reuters.com/business/healthcare-pharmaceuticals/purdues-sacklers-offer-increase-contribution-new-opioid-settlement-wsj-reports-2025-01-13

Reuters

A pharmacist holds a bottle OxyContin made by Purdue Pharma at a pharmacy in Provo, Utah, U.S., May 9, 2019. REUTERS/George Frey/File Photo Purchase Licensing Rights, opens new tab

Jan 13 (Reuters) - The Sackler family owners of Purdue Pharma are offering to increase their financial contribution to a bankruptcy settlement of opioid lawsuits, while agreeing to some exposure to future litigation, the Wall Street Journal reported on Monday.

Some family members who own the OxyContin maker have agreed to raise their total contribution to the settlement to about $6.5 billion from $6 billion under a previous plan, the Journal reported, citing people with knowledge of confidential mediation discussions.

Purdue Pharma, along with the members of the wealthy Sackler family, is at the center of thousands of lawsuits filed by state and local governments, alleging the company fueled a deadly opioid-addiction crisis in the U.S. through deceptive marketing of its pain medication, OxyContin.
The Stamford, Connecticut-based company declined to comment on specifics of a potential settlement, citing the confidentiality agreement imposed by the court for the mediation process.

"We are currently engaged with our creditors in a productive mediation to achieve a plan that maximizes the value for opioid abatement and enables the company to emerge from bankruptcy as an engine for good," Purdue said in a statement to Reuters.

Over the past twenty years, the opioid crisis in the United States has resulted in more than 500,000 people succumbing to overdoses.
Last year, the U.S. Supreme Court blocked Purdue Pharma's bankruptcy settlement of up to $6 billion, which would have shielded Sackler family members from lawsuits over their role in the opioid epidemic.

Representatives for the Sackler family declined to comment, saying that settlement talks were still confidential.

The proposed settlement would provide compensation to all claimants from Purdue, the newspaper reported. Additionally, the Sackler family would offer a separate settlement in exchange for the claimants releasing all opioid-related claims against family members.

Claimants who opt out of the settlement would still have the option to pursue litigation against the Sacklers if they choose to do so, the report added.

Reporting by Rhea Rose Abraham in Bengaluru; Additional reporting by Dietrich Knauth and Sneha S K; Editing by Tasim Zahid and Bill Berkrot

Bloomberg Law

Request a Demo Login

Securities Law News

Jan. 13, 2025, 2:00 AM PST

This Week in Chancery Court: Palantir, Truth Social SPAC Cases

By Jennifer Kay

Two disputes concerning blank-check companies linked to President-elect Donald Trump's Truth Social platform and, separately, Palantir Technologies Inc. board members come before the Delaware Chancery Court this week.

A look at what else is on the calendars for the Chancery Court and Delaware Supreme Court:

Monday: Witmer v. Armistice Cap. LLC, Del. Ch., No. 2022-0807, settlement hearing 1/13/25.

At issue: An Aytu BioPharma Inc. investor sued Armistice Capital LLC in 2022, alleging the hedge fund engaged in a scheme to unload unprofitable affiliates on the drug company before exiting its own stake through insider trades. To partially resolve the claims in a second amended complaint, Vice Chancellor Morgan T. Zurn must approve a proposed settlement. The proposal includes adding new independent directors to Aytu's board, including one who's an audit committee financial expert and subject to stockholder approval, among other corporate governance changes. Separate claims against Armistice "for its role in orchestrating the related-party transactions and its insider sales" aren't subject to the settlement and remain to be litigated, according to a brief.

Court action: The settlement hearing will be held in Wilmington, Del.

Armistice Capital Sued for 'Looting,' Insider Trades at Aytu Bio

Wednesday: Cent. Laborers' Pension Fund v. Karp, Del. Ch., No. 2023-0864, hearing 1/15/25.

At issue: A pension fund sued Peter Thiel and other Palantir board members in August 2023 over claims they made billions in insider trades while jacking up its stock price through a spree of reckless investments with doomed blank-check companies. Thiel, Palantir, its president Stephen Cohen, and CEO Alex Karp, who co-founded Palantir with Thiel, have moved to dismiss or stay the amended complaint. The allegations "rely on conspiracy theories which are rebutted" by internal documents that have been produced for the pension fund, according to a brief filed by the defendants. The pension fund claims the defendants "walked away with billions," according to an answering brief.

Court action: A hearing is scheduled in Wilmington, Del.

Palantir SPAC Spree Draws Insider Trading Lawsuit Against Thiel

Wednesday: ACRA Assets SA v. ARC Global Inv. II LLC, Del. Ch., No. 2024-1141, hearing 1/15/25.

At issue: The former CEO of the blank-check company that combined with the Truth Social platform faces allegations that he stole millions of shares by funneling them to offshore shell entities. Trump isn't accused of any wrongdoing in connection with the claims against Patrick Orlando, who's been involved in multiple court cases this year over Truth Social and the SPAC created to take it public. Orlando and other defendants have filed motions to dismiss or stay the litigation, while the investors behind the lawsuit seek a status quo order.

Court action: A hearing on the pending motions will be held in Wilmington, Del.

Truth Social SPAC Ex-CEO Sued by Investors on Stock Theft Claims

Wednesday: Himawan v. Cephalon Inc., Del., No. 226,2024, oral arguments 1/15/25.

At issue: The Delaware Supreme Court hears an appeal seeking the reversal of a post-trial ruling that rejected claims Cephalon Inc. and the Israeli drug giant Teva Pharmaceutical Industries breached their agreement with former Ception Therapeutics Inc. investors. The litigation in Chancery Court focused on claims that Teva and Cephalon failed to bring Ception's esophageal inflammation therapy to market despite successfully commercializing the same drug to treat lung inflammation. It also sought $200 million in post-deal payments.

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

Teva Beats $200 Million Lawsuit Over Pharmaceutical Acquisition

Thursday: Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund v. Pioneer Nat. Res. Co., Del. Ch., No. 2024-0101, telephonic ruling 1/16/25.

At issue: Senior Magistrate Judge Selena E. Molina is scheduled to deliver a ruling on a pension fund's books-and-records lawsuit seeking internal files regarding Pioneer Natural Resource Co.'s $60 billion sale to ExxonMobil Corp. The matter went to trial Jan. 9. ExxonMobil wasn't named as a defendant. The pension fund seeks to investigate allegations the Texas-based energy exploration and production company's executives concealed a looming impairment charge at Exxon worth $2.4 billion to $2.6 billion. Pioneer said it had produced hundreds of pages of board meeting minutes, related materials, and other corporate records. The pension fund additionally sought former Pioneer CEO Scott Sheffield's text messages and emails related to the merger.

Court action: Molina will deliver her ruling via teleconference.

Exxon's $60 Billion Pioneer Buyout Draws Pension Fund Lawsuit

Friday: Genesee Cnty. Emp. Ret. Sys. v. Vista Equity Partners Mgmt. LLC, Del. Ch., No. 2024-0299, oral arguments 1/17/25.

At issue: A pension fund sued Vista Equity Partners Management LLC last April over the $4.6 billion take-private sale of Cvent Holding Corp., claiming Vista accepted an unfair price in exchange for a sweetheart side deal with Blackstone Inc. Vista wants the case dismissed, arguing in a brief that its actions in the merger “enabled minority stockholders to receive increased consideration for their shares.” The pension fund says in an answering brief that the June 2023 merger was “fraught with conflicts.”

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

Vista Sued by Fund Over Cvent’s $4.6 Billion Sale to Blackstone

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

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

Litigation

Jan. 10, 2025, 1:09 PM PST

Federal Appeals Court Won't Revive Eargo Investor Insurance Suit

By Gillian R. Brassil

- Suit claimed Eargo, executives misled on insurance requisites
- Ninth Circuit said investors relied on puffery for claims

A federal district court properly dismissed a securities lawsuit against hearing-aid seller Eargo Inc. and two executives, the Ninth Circuit affirmed in an unpublished judgment on Friday.

Investor Xiaobin Cai and the IBEW Local 353 Pension Plan failed to allege that Eargo, its chief executive officer, and chief financial officer had the necessary intent to commit securities fraud, the three-judge panel for the US Court of Appeals for the Ninth Circuit said. Many of the company's statements that the shareholders claimed were misleading were non-actionable puffery or corporate optimism, said Circuit Judges Milan D. Smith, Jr. and Patrick J. Bumatay and Senior District Judge George H. Wu.

Shareholders had sued on behalf of Eargo investors from Nov. 20, 2020, through March 2, 2022, alleging misstatements in the company's initial public offering prospectus and after its IPO.

But Eargo's IPO prospectus made clear there were a wide range of risks associated with the business and that it was evaluating whether a potential customer had an insurance policy that covered hearing aids, judges said. Insurers had reimbursed claims for almost three years before the prospectus statements were made, the judges said—and fraud in hindsight is not actionable. The IPO allegations didn't require plaintiffs to show scienter, or intent.

Investors also said statements about a Blue Cross Blue Shield audit following the IPO as well as the company's revenue, risk factors, and growth were misleading, which the Ninth Circuit disagreed with. The ruling said Eargo did disclose information around the audit and potential damage. The decision added "many of the challenged projections reflect puffery or corporate optimism, which are not actionable."

The plaintiffs failed to plead intent, the ruling said, as "Eargo's chief executive officer and chief financial officer increased their Eargo stock holdings during the class period, which contradicts the inference of scienter."

Judge Charles R. Breyer of the US District Court for the Northern District of California properly dismissed the last version of the complaint, which he did for failure to state a claim in August 2023, the panel affirmed.

Eargo went public in October 2020. Its business model allowed patients to avoid an in-person hearing test; investors alleged that was incompatible with insurance requirements for federal employees and retirees.

In 2021, insurance carrier Blue Cross Blue Shield told Eargo it would need to review claims and required supporting documentation. The company said later that year the US Department of Justice was investigating it over allegedly false insurance claim submissions. The stock collapsed 68% on the news, investors said.

The DOJ switched to civil, rather than criminal, allegations and settled with Eargo—which denied the allegations—for more than $34 million in 2022.

Block & Leviton LLP and Bernstein Litowitz Berger & Grossman LLP represent the investors. Latham & Watkins LLP represent Eargo and the executives. Neither side's attorneys have responded yet to emails seeking comment.

The case is Cai v. Eargo, Inc. , 9th Cir., No. 23-3470, unpublished 1/10/25 .

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

To contact the editor responsible for this story: Kiera Geraghty at kgeraghty@bloombergindustry.com

Litigation

Jan. 13, 2025, 7:09 AM PST

Oil Industry Spurned by Supreme Court on Hawaii Climate Suit (1)

By Greg Stohr

- Honolulu law accuses industry of deceiving consumers on risks
- Case is one of dozens of similar lawsuits around the country

The US Supreme Court buttressed efforts by environmental advocates to hold oil companies accountable for climate change, letting Honolulu press a lawsuit that accuses the industry of deceiving customers about the risks posed by fossil fuels.

The high court, without comment Monday, refused to consider company arguments that federal law bars the suit, one of more than two dozen similar cases around the country. The suits collectively seek billions of dollars from companies that include Exxon Mobil Corp., BP Plc and Chevron Corp.

Companies led by Sunoco LP told the justices that by letting the Honolulu suit proceed, the Hawaii Supreme Court had created a road map for litigation elsewhere. The ruling will "permit suits alleging injuries pertaining to global climate change to proceed under the laws of all 50 states – a blueprint for chaos," the companies argued.

In a separate appeal, Shell Plc said that "jury verdicts in cases like this could threaten the energy industry."

Justice Samuel Alito didn't take part in the court's consideration of the appeals. Although Alito gave no explanation, his most recent financial disclosure report indicates that either he or his wife own shares of ConocoPhillips and Phillips 66, two of the companies pressing the appeal.

The core question in the appeals was whether Honolulu and its water board could use state consumer protection law to try to tackle climate change. The companies say the issue is a global one that can be addressed only under federal law, including the Clean Air Act.

In urging the Supreme Court to reject the two appeals without a hearing, Honolulu said that "deceptive commercial practices fall squarely within the core interests and historic powers of the states."

The rebuff comes after the Biden administration said Supreme Court intervention would be premature. The administration said the Hawaii courts haven't yet ruled on other company arguments that could sharply limit the scope of the case.

The Supreme Court in 2023 turned away company appeals that sought to shift the lawsuits into federal court, where corporate defendants often fare better.

The latest cases are Sunoco v. Honolulu, 23-947, and Shell v. Honolulu, 23-952.

(Updates to say in fifth paragraph that Alito didn't take part.)

Supreme Court Denies Oil Giants' Appeal to End State Climate Suits

law.com/nationallawjournal/2025/01/13/supreme-court-denies-oil-giants-appeal-to-end-state-climate-suits

Jimmy Hoover

The Supreme Court turned away a pair of appeals from the oil and gas industry seeking to defeat a lawsuit from Hawaiian municipal authorities over the companies' alleged cover-up of their products' environmental effects.

January 13, 2025 at 11:43 AM

By Jimmy Hoover

The Supreme Court will not hear a pair of oil and gas industry appeals of state lawsuits seeking to hold the companies liable for the effects of climate change.

The court without comment denied review Monday morning.

The companies had asked the justices to review a Hawaii Supreme Court decision clearing the way for a state court to hear a lawsuit the city and county of Honolulu and a municipal water board brought over the damage and massive remedial costs associated with climate change.

In their lawsuit, Honolulu plaintiffs claim the companies knowingly hid the effects of greenhouse gas emissions for decades and spread disinformation to cast doubt on the science of climate change to the public. The companies filed a motion to dismiss on the grounds that the claims are preempted by the federal Clean Air Act or the federal common law of transboundary air pollution.

The Hawaii Supreme Court rejected those arguments, affirming the denial of the motion to dismiss.

The Biden administration had urged the justices to pass on the cases, saying the high court lacked jurisdiction to review the Hawaii Supreme Court's ruling. The state court's decision affirming the denial of a dismissal is an “interlocutory” order, whereas the U.S. Supreme Court only has the authority to hear appeals of “final judgments” from a state’s highest court, U.S. Solicitor General Elizabeth Prelogar wrote in an amicus brief to the justices.

Justice Samuel Alito Jr. did not participate in the court's consideration of the companies' appeal. Alito did not publicly disclose the reason for his recusal, but it is likely due to his previously disclosed stock ownership in one of the companies, ConocoPhillips.

The cases were *Sunoco LP v. City and County of Honolulu*, No. 23-947, and *Shell PLC v. City and County of Honolulu,* No. 23-952.

Supreme Court nixes fossil fuel giant fight to dismiss liability lawsuit

courthousenews.com/supreme-court-nixes-fossil-fuel-giant-fight-to-dismiss-liability-lawsuit

Ryan Knappenberger, Kelsey Reichmann

Oil and gas companies will be forced to face a suit seeking damages over Honolulu's claims they downplay their products' contribution climate change.

The logo for Exxon Mobil is seen above a trading post on the floor of the New York Stock Exchange. (AP Photo/Richard Drew, File)

WASHINGTON (CN) — The Supreme Court turned down an appeal from fossil fuel giants on Monday, rejecting an attempt to skirt a climate change lawsuit seeking to hold companies liable over claims of deceptive marketing about the effect of greenhouse gases.

Companies such as Sunoco, Exxon Mobil, Chevron and BP said they are facing dozens of lawsuits, leaving a vital industry at risk of owing billions of dollars over accusations it causes climate change.

The justices denied the oil and gas companies' petition without further explanation in Monday's orders list.

“This case presents a case-dispositive and recurring question of extraordinary importance to the energy industry, which is facing dozens of lawsuits seeking billions of dollars in damages for the alleged effects of global climate change,” Kannon Shanmugam, an attorney with Paul Weiss, wrote in the companies’ petition.

In 2017, Honolulu filed a lawsuit against Exxon Mobil, Chevron, Sunoco and others, saying the companies misled consumers about fossil fuels' impact on climate change. The city claims their behavior led to increased fossil fuel consumption and exacerbated the local impacts of climate change in Hawaii.

Honolulu cites state laws in its complaint, but the fossil fuel companies wanted the case moved to federal court. Three courts — a district court, the Ninth Circuit and the Supreme Court — had already shot down the companies’ first attempt to move the case to federal court.

Once the case was kicked back to state court, the companies tried to get lawsuit dismissed. Exxon and others argue that state courts do not have jurisdiction to hear the dispute because the case involves the impact of interstate and international climate change.

The fossil fuel companies want to expand on a similar ruling involving oil and gas companies in Maryland. In *BP P.L.C. v. Mayor & City Council of Baltimore*, the justices held that federal courts could review an order remanding a case to state court. The 7-1 ruling allowed oil and gas companies to challenge an order to have state courts review Baltimore's complaint.

Exxon and others wanted the court to go further.

"Having litigated the question whether those cases were removable to federal court — including before this court in *BP P.L.C. v. Mayor & City Council of Baltimore* — the question now is whether the plaintiffs' claims can legitimately proceed on the merits," Shanmugam wrote.

Oil and gas companies frame the question as whether climate change cases can proceed in state court even though the injuries claimed include the effects of interstate and international greenhouse gas emissions.

Honolulu rejects that characterization. The city says its case is narrowly focused on the effects of climate change that oil companies caused in violation of Hawaii's regulation on marketing laws. Honolulu says its case would not force the companies to curb emissions in any way.

"The complaint 'do[es] not ask th[e] court to limit, cap, or enjoin the production and sale of fossil fuels' by petitioners or anyone else," Victor Sher, an attorney with Sher Edling representing the city, wrote in its brief. "Instead, it seeks damages for local climate-change impacts in Honolulu that are attributable to petitioners' deceptive conduct, and it requests equitable relief to mitigate the ongoing risks posed by those local impacts through, for example, infrastructure projects to protect respondents from sea level rise."

Honolulu urged the justices to skip the fossil fuel companies' appeal, arguing that the high court's intervention was unnecessary at this stage.

After the Supreme Court declined oil and gas companies' petition to review whether to move the case to federal court, a state trial court shot down another motion to dismiss the complaint on federal preemption. The Hawaii Supreme Court unanimously affirmed.

Honolulu said the state high court's interlocutory order is not a final judgment on the case and therefore is not under the U.S. Supreme Court's jurisdiction to review.

"Reversing the decision below would not terminate the litigation; no federal policy would be 'seriously erode[d]' by litigating this case to final judgment; and petitioners have raised additional federal defenses that might warrant this court's review at a later date," Sher wrote.

The Supreme Court asked the Biden administration to weigh in before deciding whether to hear the case.

Follow @Ryan_Knappy Follow @KelseyReichmann

Categories / Business, Energy, Environment, National

SCOTUS declines to hear Big Oil's appeal of Hawaii climate change ruling

legalnewsline.com/stories/667576866-scotus-declines-to-hear-big-oil-s-appeal-of-hawaii-climate-change-ruling

January 13, 2025

WASHINGTON (Legal Newsline) - The U.S. Supreme Court will let stand a ruling in Hawaii that paves the way for government officials represented by contingency fee lawyers to sue the oil industry over the effects of global warming.

Despite pleas from companies like Exxon and Chevron and the attorneys general of 20 states, the justices on Monday declined to hear the appeal of a Hawaii Supreme Court ruling that denied Big Oil's motion to dismiss the case, brought by Honolulu.

“The Supreme Court’s decision not to hear this case at this time is unfortunate because it prolongs litigation when there is general agreement that state law — in this instance, Hawaii’s — cannot govern, let alone impose liability on, the manufacture, sale and promotion of energy around the world," said Phil Goldberg, special counsel for the Manufacturers' Accountability Project.

At issue is whether state court judges should have the power to essentially impact the international energy market. Twenty Republican state attorneys general argue the Hawaii case involves questions of interstate and international law that can only be decided by Congress or in federal courts.

Years ago, two separate federal judges dismissed some of the earliest-filed of these cases, finding it inappropriate to ask courts to decide issues of international energy policy. Those dismissals were undone by the U.S. Supreme Court later when it held the cases belong in state courts around the country.

Lawyers at firms like Sher Edling filed their complaints to plead violations of state consumer protection and public nuisance laws. In Hawaii, the state Supreme Court has allowed their case to move past a motion to dismiss, leading to Big Oil's appeal.

A Baltimore judge has reached the opposite conclusion than Hawaii courts did. Judge Videtta Brown said the litigation goes beyond the limits of Maryland law, or whatever state other cases are filed in. Most municipalities and states that have filed suit are near oceans, though Boulder, Colo., has also sued.

"The explanation by Baltimore that it only seeks to address and hold Defendants accountable for a deceptive misinformation campaign is simply a way to get in the back door what they cannot get in the front door," she wrote.

The claims of consumer deception are ludicrous, legal scholars Richard Epstein and John Yoo argued in an amicus brief to the Supreme Court. Under Honolulu's theory, the oil companies have damaged the city by conducting a "disinformation campaign" that caused consumers worldwide to burn more fossil fuels than they would have, had they known the true risks of global warming.

Honolulu claims the oil companies "are in possession of information on global warming of which the plaintiffs are ignorant," Epstein and Yoo wrote. "But nothing could be further from the truth. Information about climate change is a matter of public knowledge and can be obtained from many different sources, each with its own distinctive perspective."

ORGANIZATIONS IN THIS STORY

U.S. Supreme Court

American Airlines' focus on ESG in retirement plan is illegal, US judge rules

reuters.com/business/aerospace-defense/american-airlines-focus-esg-401k-plan-is-illegal-us-judge-rules-2025-01-10

Daniel Wiessner

An American Airlines commercial aircraft flies over Washington as it approaches to land at Dulles International Airport, as seen from Washington, U.S., August 5, 2024. REUTERS/ Umit Bektas/File photo Purchase Licensing Rights, opens new tab

- Plan should stick to financial factors, judge says
- Ruling is among first of its kind
- ESG investing facing backlash from conservatives

Jan 10 (Reuters) - A federal judge in Texas on Friday said American Airlines (AAL.O), opens new tab violated federal law by basing investment decisions for its employee retirement plan on environmental, social and other non-financial factors.
The ruling by U.S. District Judge Reed O'Connor appeared to be the first of its kind amid growing backlash by conservatives to an uptick in socially-conscious investing.
O'Connor said American had breached its legal duty to make investment decisions based solely on the financial interests of 401(k) plan beneficiaries by allowing BlackRock (BLK.N), opens new tab, its asset manager and a major shareholder, to focus on environmental, social and corporate governance (ESG) factors.

"The evidence made clear that [American’s] incestuous relationship with BlackRock and its own corporate goals disloyally influenced administration of the Plan," wrote O'Connor, an appointee of Republican former President George W. Bush.

A BlackRock spokesperson said: "We always act independently and with a singular focus on what is in the best financial interests of our clients. Our only agenda is maximizing returns for our clients, consistent with their choices."

The judge ruled after holding a four-day non-jury trial in June, in a class action by American pilot Bryan Spence on behalf of more than 100,000 participants in the retirement plan. O'Connor said he would decide later on whether class members suffered financial harms and American must pay them damages.

American said in a statement that it was reviewing the decision. Lawyers for Spence did not immediately respond to requests for comment.

BlackRock, which on Thursday said it was leaving an environmentally focused investor group under pressure from Republican politicians, is not involved in the lawsuit.

In November, BlackRock and two rival asset managers were sued by 11 Republican-led states who claim the firms violated federal antitrust law through climate activism that reduced coal production and caused energy costs to increase. BlackRock called the claims baseless.

Spence sued American in 2023, saying it had violated the federal Employee Retirement Income Security Act (ERISA) by failing to remain loyal to 401(k) plan participants and to prudently oversee their assets.

O'Connor last February rejected American's claims that the lawsuit should be dismissed because Spence could not show that the 401(k) plan had underperformed, paving the way for a trial.

On Friday, the judge said that American had breached its duty of loyalty to retirement plan participants. But the company's decisions did not violate its duty of prudence, O'Connor said, because it was acting according to prevailing industry standards.

O'Connor is known for frequently ruling in favor of conservative litigants challenging laws and regulations governing guns, LGBTQ rights and healthcare.

The Biden administration in 2023 adopted a rule allowing 401(k) and other plans to consider ESG factors as a "tiebreaker" between financially equal investment options.

The rule replaced a regulation adopted during Republican President-elect Donald Trump's first administration barring the consideration of any non-financial factors, which could be resurrected after Trump takes office for the second time later this month.

A Texas federal judge is currently considering a legal challenge to the Biden administration rule by 25 Republican-led states and oil drilling company Liberty Energy (LBRT.N), opens new tab.

Reporting by Daniel Wiessner in Albany, New York; editing by Alexia Garamfalvi and Diane Craft

Daniel Wiessner
Thomson Reuters

Dan Wiessner (@danwiessner) reports on labor and employment and immigration law, including litigation and policy making. He can be reached at daniel.wiessner@thomsonreuters.com.

Securities Law News

Jan. 10, 2025, 9:42 AM PST; Updated: Jan. 11, 2025, 10:33 AM PST

American Airlines Held Liable for 401(k) Plan ESG Investing (2)

By Jacklyn Wille

- Case questions legitimacy of socially conscious investing
- Airline breached duty of loyalty, not duty of prudence

American Airlines Inc. violated federal law by filling its 401(k) plan with funds from investment companies that pursue environmental, social, and corporate governance goals, a Texas federal judge ruled Friday in the biggest victory yet for opponents of the strategy.

The airline breached its fiduciary duty of loyalty—but not its fiduciary duty of prudence—in allowing its $26 billion retirement plan to be influenced by corporate goals unrelated to workers' best financial interests, Judge Reed O'Connor of the US District Court for the Northern District of Texas said after a four-day, non-jury trial.

The 2023 lawsuit, which says the airline wrongly offered 401(k) funds managed by companies that pursue ESG policy goals through proxy voting and shareholder activism, is the latest battle in the broader debate over socially conscious investing.

A decision on the validity of these investment strategies in 401(k) plans would have ripple effects, particularly within the US Court of Appeals for the Fifth Circuit, which recently sent a case seeking to prevent enforcement of the Labor Department's ESG-friendly investing rule back to district court.

Disloyal, Not Imprudent

According to O'Connor, the American pilots proved that the airline's activities—which included hiring BlackRock Inc. to manage billions of dollars in plan assets despite its "ESG-oriented investing and proxy voting activism"—violated the Employee Retirement Income Security Act's directive to act loyally and in the best interests of plan participants.

"ERISA does not permit a fiduciary to pursue a non-pecuniary interest no matter how noble it might view the aim," O'Connor said, asserting that ESG investments "often underperform traditional investments by approximately 10%."

But the pilots failed to prove a violation of the statute's prudence rule, he said, because the airline "acted according to prevailing practices and in a manner similar to other fiduciaries in the industry." That's true even though those standards may stem from BlackRock's "alarming degree of control and influence over the retirement industry"—an industry O'Connor described as "incestuous" and full of "oligopolist or cartel-like behavior."

The pilots' prudence claim is best understood as an attempt to "shift industry standards" to better prioritize proxy voting oversight as an avenue for protecting workers' financial interests, O'Connor said.

"Perhaps that shift should occur," he continued. "And maybe at some point it will. But this future-looking goal reveals the fatal flaw underlying Plaintiff's prudence claim: Defendants' practices were not incongruent with the prevailing industry standards *at the time*."

A BlackRock spokesperson said in an emailed statement Saturday that the company "always" acts "independently and with a singular focus on what is in the best financial interests of our clients. Our only agenda is maximizing returns for our clients, consistent with their choices."

BlackRock isn't a party to the suit.

Trial Outcome

O'Connor is a George W. Bush appointee who critics say has been a subject of "forum shopping" by conservative plaintiffs seeking a sympathetic court in challenges to federal policies.

O'Connor's prior rulings in the case denied the airline's motion to dismiss, certified a class of as many as 100,000 plan participants, and allowed the plaintiffs to present their claims at trial.

The June 2024 trial he oversaw included testimony from the airline's asset management director, who said his team didn't believe the negative press surrounding BlackRock and proxy voting was a reason for the airline to be concerned over the firm's handling of pilot retirement plans.

An expert witness for the pilots testified that BlackRock's May 2021 proxy vote at ExxonMobil, which focused on ESG priorities, devalued energy stocks and caused the airline's 401(k) plan to suffer more than $15 million in losses, an estimate American called "deeply flawed."

O'Connor's post-trial opinion, which resolves questions of liability but not potential damages, includes a lengthy discussion of which types of investments fall within the ESG rubric.

According to O'Connor, ESG investing "considers or pursues a non-pecuniary interest as *an end* itself rather than as a means to some financial end." Investing aimed at reducing material risks or increasing returns for the sole purpose of seeking financial benefits "is *not* ESG investing," he said.

O'Connor instructed the parties to file briefs on damages and other outstanding issues by Jan. 31.

O’Melveny & Myers LLP and Kelly Hart & Hallman LLP represent American. Hacker Stephens LLP and Sharp Law LLP represent the pilots.

The case is Spence v. Am. Airlines, Inc. , N.D. Tex., No. 4:23-cv-00552, 1/10/25 .

(Updates Jan. 10 story to add BlackRock’s comment in tenth paragraph.)

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

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

Fight Over Amicus-Funding Disclosure Surfaces in Google Play Appeal

law.com/therecorder/2025/01/10/fight-over-amicus-funding-disclosure-surfaces-in-google-play-appeal

Avalon Zoppo

The debate over requiring greater disclosure of the funding sources for amicus briefs was itself at the center of a friend-of-the-court brief filed this week in the U.S. Court of Appeals for the Ninth Circuit, as part of Google's appeal over Google Play platform changes.

University of Masssachusetts Amherst political science professor Paul Collins Jr. wrote that public records show numerous amici supporting Google in the underlying antitrust case have had financial ties to the company. He urged the panel to view those filings with skepticism.

"Google has deployed the 'amicus machine' in numerous high-profile cases, using amici with financial ties to Google to amplify its arguments without disclosing those relationships," Collins' brief stated. "Google's apparent use of these tactics is evident in this case, where many of its amici have a history of receiving substantial funding from Google."

Google did not return a request for comment.

Collins' amicus brief did not address the merits of Google's underlying legal fight against "Fortnite" maker Epic Games, which convinced a jury in 2023 that Google illegally wielded monopoly power over Android app distribution and in-app payments. Instead, Collins called for greater transparency in amicus funding, which comes as a judiciary committee considers tweaking Rule 29 of the Federal Rules of Appellate Procedure to require amicus filers to more broadly disclose financial ties to parties and nonparties.

The current rule requires amici to disclose whether a company provided funding specifically to prepare their brief.

U.S. Sen. Sheldon Whitehouse of Rhode Island and other Democrats have said tougher disclosures would prevent parties with deep pockets from manufacturing support through amici and skirting page limits, but Republican lawmakers and a Fifth Circuit judge have slammed broader disclosure as a threat to the First Amendment right to free speech.

Here, Epic Games conditioned its consent to amicus participation on amici disclosing whether they received funding in the past year from a party or another amicus, the company confirmed to the National Law Journal.

Collins stated in his brief that most amici supporting Google declined to disclose the information and instead sought leave of the court, which is permitted under the appellate rules.

Collins alleged that amici with ties to Google include the U.S. Chamber of Commerce and the Washington Legal Foundation. Collins stated those two organizations and other amici appear on Google’s list of “politically-engaged trade associations, independent third-party organizations and other tax-exempt groups that receive the most substantial contributions from Google’s U.S. Government Affairs and Public Policy team.”

“Amicus does not wish to impugn the integrity or motivations of any of the organizations, lawyers, scholars, judges, or experts named above," Collins wrote. "But taken together, this veritable nesting doll of Google influence demonstrates the extent to which a deep-pocketed party can use its wealth to shape not only case outcomes but law and public policy generally.”

Collins is represented by Alexander Aronson of Court Accountability, a liberal organization which states on its website that it is "fighting court corruption [and] building toward a better democracy." Aronson, a founder and the executive director of the group, served as Whitehouse's chief counsel.

Neither the Washington Legal Foundation nor the U.S. Chamber of Commerce responded to requests for comment.

The Washington Legal Foundation, in its motion for leave to file its amicus brief, declined to make the disclosures, saying they exceed Rule 29’s requirements.

And in its motion for leave, the U.S. Chamber of Commerce stated it “maintains the confidentiality of its membership” and would not provide the requested information.

“An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts,” the motion stated. “To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation’s business community.”

The U.S. Chamber of Commerce has also opposed tougher amicus disclosure rules.

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

There will be a hearing on the proposed rule change for greater amicus funding disclosure on Feb. 14.

Google, in its Ninth Circuit appeal, is challenging the jury's verdict and U.S. District Judge James Donato of the Northern District of California's remedial order that the company open its Play Store to competitors for three years.

Apple fights $1.8 billion App Store lawsuit in first of UK class actions against tech giants

reuters.com/technology/apple-fights-18-billion-app-store-lawsuit-first-uk-class-actions-against-tech-2025-01-13

Sam Tobin

Item 1 of 2 People walk past an Apple store in London, Britain, January 13, 2025. REUTERS/Isabel Infantes

[1/2]People walk past an Apple store in London, Britain, January 13, 2025. REUTERS/Isabel Infantes Purchase Licensing Rights, opens new tab

LONDON, Jan 13 (Reuters) - Apple (AAPL.O), opens new tab has abused its dominant position by charging app developers an unfair 30% commission through its App Store, costing British consumers up to 1.5 billion pounds ($1.8 billion), a London tribunal heard on Monday.
The U.S. tech company is facing a mass lawsuit brought on behalf of around 20 million iPhone and iPad users in the United Kingdom, who were allegedly overcharged for app purchases.

The Technology Roundup newsletter brings the latest news and trends straight to your inbox. Sign up here.

Apple, however, says the case is meritless and overlooks the benefits to consumers of the integrated approach of its iOS operating system, which prioritises security and privacy.

The lawsuit at London's Competition Appeal Tribunal is the first mass lawsuit against a tech giant to come to trial under Britain's burgeoning class action-style regime, with many other cases waiting in the wings.

A similar $1.1 billion case against Google (GOOGL.O), opens new tab over the commission it charges app developers for access to its Play Store begins later in 2025.

Apple is facing a separate case brought on behalf of app developers over its App Store commissions, while Google, Meta (META.O), opens new tab and Amazon (AMZN.O), opens new tab are also fighting high-value mass lawsuits in Britain.

'100% MONOPOLY'

Rachael Kent, the British academic bringing the case which began on Monday, argues Apple has made "exorbitant profits" by excluding all competition for the distribution of apps and in-app purchases.

This dominant position, her lawyers argue, allows Apple to impose restrictive terms on app developers and charge excessive commission, which they say is ultimately borne by consumers.

"Apple is not just dominant ... it holds a 100% monopoly position," Kent's lawyer Mark Hoskins said in court filings.

But Apple – which has faced mounting pressure from regulators in the U.S. and Europe over the fees it charges third-party developers – says 85% of developers do not pay any commission at all.

The company's lawyer, Marie Demetriou, said in court filings that the commission reflects "the enormous benefits conferred through Apple's innovation by the iOS ecosystem as a whole".

Kent's case simply ignores Apple's intellectual property rights, Demetriou added, describing the contention that Apple must let developers use its technology as they wish as "expropriation of property rights masquerading as competition".

The seven-week trial is expected to hear evidence from Apple's chief financial officer Kevan Parekh later this week.
Reporting by Sam Tobin; Editing by Kirsten Donovan

News from Bloomberg Terminal
Jan. 13, 2025, 10:06 AM PST

Edison Utility Sued Over Role of Equipment in Los Angeles Fire

By Jef Feeley, Mark Chediak and Malathi Nayak

(Bloomberg) --

Edison International Inc.'s southern California utility was hit with a lawsuit blaming the energy provider's equipment for igniting one of the wildfires still raging in the second-largest US metropolis.

The lawsuit is on behalf of a group of homeowners, renters, business owners and others with properties destroyed by the Eaton Fire in the Pasadena area. The suit alleges a Southern California Edison pole holding power lines was the cause of the blaze that leveled the community of Altadena.

The suit Monday is believed to be the first of what's expected to be thousands of legal claims tied to the fire, which is only partially contained. The complaint appeared on the website of Los Angeles Superior Court Monday, but hasn't yet been fully processed by the court.

Edison said it was looking into the matter and couldn't immediately comment on the suit.

The suit claims Edison didn't properly maintain its electrical infrastructure, presenting "an inherent risk and danger of fire to private property" and that the company's vegetation management wasn't complaint with local rules. It seeks damages for property losses caused by the raging fires in and around the Eaton Canyon area.

"Edison knew about the significant risk of wildfires caused by its aging and overloaded utility towers and power poles before the Eaton Fire began," according to the complaint.

As of early Monday, the Eaton fire was 27% contained but had consumed more than 14,000 acres, destroyed or damaged thousands of structures and killed at least 16 people.

(Updates with more context from the lawsuit starting in paragraph 4.)

To contact the reporters on this story:
Jef Feeley in Wilmington, Delaware at jfeeley@bloomberg.net;
Mark Chediak in San Francisco at mchediak@bloomberg.net;
Malathi Nayak in San Francisco at mnayak21@bloomberg.net

To contact the editors responsible for this story:
Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net;
Brian Eckhouse at beckhouse@bloomberg.net
Peter Jeffrey, Peter Blumberg

'Tragedy of Unspeakable Proportions:' Could Edison, DWP, Face Lawsuits Over LA Wildfires?

law.com/therecorder/2025/01/10/tragedy-of-unspeakable-proportions-could-edison-dwp-face-lawsuits-over-la-wildfires

Amanda Bronstad

What You Need to Know

- Lawyers are already fielding calls from Los Angeles residents impacted by the fires. 'My phone is ringing off the wall,' attorney Mikal Watts told Law.com.
- Southern California Edison faces scrutiny over the Eaton fire, which has destroyed 7,000 structures.
- Lawyers are raising concerns about Los Angeles Department of Water & Power's decisions prior to the Palisades fire, which leveled 5,000 structures.

Lawyers are looking at Southern California Edison and the city of Los Angeles as potential defendants in predicted lawsuits over Southern California's series of wildfires, which have caused 10 deaths and more than 10,000 homes, schools and businesses to burn to the ground.

Although no cause of the fires has been identified, plaintiffs' lawyers who have brought previous lawsuits against utilities over wildfire damages are already getting calls from prospective clients.

"My phone is ringing off the wall," Mikal Watts of Watts Law Firm in Austin, Texas, told Law.com. He's gotten hundreds of calls. "It's a tragedy of unspeakable proportions. And I worry about the number of bodies we're going to find."

Lawyers are already eyeing potential defendants in lawsuits that could come out of the wildfires, which JP Morgan has estimated could end up costing $50 billion in damages. Brian Panish, whose home on Friday was less than a mile from one of the fires, said Edison might have had some responsibility over the Eaton fire, which erupted near Pasadena on Tuesday night and has leveled thousands of structures.

Nationally renowned trial lawyer Brian Panish leaves Orange County Superior Court□s West Justice Center in Westminster, California, on Monday, June 13, 2022, during a break in his testimony in a civil trial related to a case he worked with Michael Avenatti 11 years ago. Photo: Meghann M. Cuniff/ALM.

“We believe it was Edison involved in the Eaton fire, and we’ve had many, many clients calling us for representation due to the other work we’ve done,” Panish, of Los Angeles-based Panish Shea Ravipudi, told Law.com. “We’ve got some investigators out there and seen some evidence supporting that.”
Watts agreed. He said reports Edison filed with the California Public Utilities Commission indicate the utility failed to shut down power to parts of Altadena, the area north of Pasadena near the Eaton fire.

“Basically, they artfully said we shut down the power in the easterly direction from a certain pole. They didn’t shut it down westerly,” he told Law.com. “Altadena is to the west. The power was not shut off and it was completely torched. And so it was their equipment that started it, and their failure to shut the power off. Both are reasons the Eaton fire decimated Altadena and caused damage to 10,000 structures.”

As for the Palisades fire, which sparked earlier on Tuesday, and has caused widespread destruction to a region in West Los Angeles, Panish raised questions about the role that the city of Los Angeles played in reducing the Los Angeles Fire Department’s budget by more than $17 million, failing to have enough water available and having poor locations for the fire stations.

“Firefighters are doing everything they can, but the city has let everyone down,” he said.

Watts said he believed a downed power pole operated by Los Angeles Department of Water & Power could have caused the Palisades fire. He also blamed a “cursory fire mitigation plan.”

“Upgrading a utility grid is a choice,” he said. “You either choose to do it or choose to ignore what’s going to happen. The water and power department has a lot to answer for here because a downed utility pole is the most preventable mechanism of action for a fire there is.”

Southern California Edison, owned by Edison International, has acknowledged that the Eaton fire started in its service area but, in a statement to Law.com, spokesperson Gabriela Ornelas said, “We will review all information made available to us as part of our investigation.”

Representatives of the city of Los Angeles and the Los Angeles Department of Water & Power did not respond.

Ali Moghaddas, of Edelson, said it’s too soon to say who is responsible for the fires but that “everything is on the table.” On Thursday, Edelson also set up an online brochure at www.lafireattorneys.com to assist residents on what to do.

“We have clients reaching out,” he said. “People are scared. They’re looking for answers.”

He encouraged residents to document their damages and expenses.

“We live in this smart phone era where we’re seeing that survivors wind up being a key part of their own cases because their videoing what’s happening,” he said. “Document all the money you’re spending on lodging, on food, travel, anything and everything, that could be something you’re able to get compensated on later on.”

'It's a Nightmare'

For lawyers in Los Angeles, the fires, which also include the Hurst Fire in Sylmar and additional blazes propping up all week throughout Southern California, the damage is personal. Many have lost their homes, or been evacuated, and their schools and religious buildings have burned to the ground. Some areas have issued restrictions on water use and imposed curfews to combat potential looting of unoccupied homes.

And even without those impacts, nearly all residents in Los Angeles are facing air quality problems from the smoke.

Law firms in downtown Los Angeles, Century City and eastern Santa Monica have allowed lawyers to operate remotely, but those with offices near evacuation zones in Santa Monica closed, including Cooley, Cozen O’Connor, Goodwin Procter and Orrick, Herrington & Sutcliffe.

Some firms have made their offices available to those displaced or need essential items. At Quinn Emanuel, where the downtown Los Angeles office has been closed all week, lawyers raised $500,000 for their colleagues in a day and a half. Many need clothes, hotel rooms or supplies for pets, office managing partner Christopher Tayback told Law.com.

"There's eight to 10 people who've confirmed their homes have been destroyed, and a multiple of that who don't know if their home is destroyed," he said. "A higher multiple of that that have been evacuated and may or may not have their homes salvageable. All that leads to a lot of displacement and different kinds of needs."

Many courthouses have been closed. Los Angeles Superior Court's courthouses in Hollywood and Pasadena reopened on Friday after being closed on Thursday.

"It's a nightmare," Panish said. "My house is in serious jeopardy, and many lawyers in the firm lost their homes. I've got children. Their schools have burned down, churches burned, grocery stores burned down. It's devastating for everyone."

Many of his friends in Pacific Palisades have lost their homes, as have three lawyers at his firm.

"It's multiple fires, people from all different social economic classes being affected," he said. "The Pacific Palisades is a more expensive area, but other areas not are affected, and it's devastating for everyone no matter whether rich or poor."

Ali Moghaddas of Edelson. Courtesy photo

Panish said he happened to be in Maui to attend a hearing in the litigation over the Hawaii wildfires of 2023 when he got word of the evacuation order at his house, which borders Pacific Palisades. He is continuing to work in Maui, where a planned Zoom call on Thursday about a trial planned to start next week in Los Angeles was put off another day.
"The lawyers and staff were not available," he said. "They didn't have any clothes, lost everything, couldn't get to court."

Moghaddas, at Edelson, said his house is standing but remains in a mandatory evacuation so, after a few days, he temporarily moved with his family to Sacramento.

"This is a very unique situation because I'm actively involved in several wildfire cases that Edelson has, from Oregon to Colorado," he said. "This past week has been so eye-opening for me. I've heard clearly first accounts from clients what they went through. Living it myself is a whole other story. It makes me understand so much more the traumatic experiences they've gone through."

Private airplane buyers get unusual tailwind in price-hike class action

reuters.com/legal/litigation/column-private-airplane-buyers-get-unusual-tailwind-price-hike-class-action-2025-01-10

Jenna Greene

Private jets are seen on the tarmac of Nice international airport, France, September 6, 2022. REUTERS/Eric Gaillard/File Photo Purchase Licensing Rights, opens new tab

Jan 10 (Reuters) - In some ways, it's hard to feel too badly for several dozen people who say they plunked down deposits to buy their own six-seat turboprop airplanes, only to find, after years of waiting, that manufacturer Epic Aircraft discontinued the model, replacing it with an updated version that would cost them hundreds of thousands of dollars more than the originally agreed-upon price.

I know. Oh, the humanity. You can't buy a new Epic airplane ("the luxurious and spacious handcrafted interior is a flawless extension of the aircraft's sleek and elegant lines …") for $2.75 million anymore.

What's notable to me is that the case, which is pending in federal court in Eugene, Oregon, has been certified, opens new tab as a breach of contract class action. Never mind that there are at most 50 class members (the defense argues that there are actually 34), seeking compensatory damages of up to $1.1 million each, plus punitive damages and legal fees, according to court papers.
It's like a class action upside-down world. Instead of a large number of people seeking small payouts, a small number of people are seeking large payouts.

Epic and its lawyers did not respond to requests for comment, but the privately held, Bend, Oregon-based company in its answer, opens new tab to the complaint filed last week argues there was "no breach of contract, no bad faith or unlawful dealing."
The case raises wider questions to me on the applicability of Rule 23's numerosity criteria, opens new tab for certifying a class. Shouldn't the lawsuits be reserved for vindicating "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all," as the U.S. Supreme Court put it in 1997, opens new tab? (I'm fairly sure airplane buyers do not fall into this category.)

Or perhaps there's something to be said for petite class actions? Even a small class promotes judicial economy, and the class size means it's possible to ensure every member is notified of the case, the ability to opt out, and of their right to claim a share of any settlement.

Class action expert Brian Fitzpatrick, a Vanderbilt Law School professor who is not involved in the case, told me it's unusual but not unprecedented to have such a small class size, and "extremely unusual" for individual members to have seven-figure damage claims.

"Most class actions are small-change affairs, where people have $50 at stake," he said.

While class members here stand to benefit by paying smaller legal fees – class action lawyers typically take 25% of the recovery, versus up to 40% for individual lawyers, he said – they also give up control over the case.

Those who don't opt out are "putting all their eggs in one basket," Fitzpatrick said.

The airplane dispute began in 2014, six years before Epic's E1000 model was approved for sale by the U.S. Federal Aviation Administration, when the two named plaintiffs each put down a fully refundable deposit of $27,500. The deposits gave the men first dibs on buying the 28th and 38th airplanes that Epic would produce.

Plaintiffs' lawyers from Leiman Law in Eugene and The Bruno Firm in Chicago, who did not respond to requests for comment, allege, opens new tab that the agreements "locked in" a base price of $2.75 million, $2.95 million or $3.25 million, depending on when the deals were executed.
But Epic's lawyers from Curtis, Mallet-Prevost, Colt & Mosle in New York and Rosen & Schneider in Portland, Oregon, argue that the reservation deposit language specified it "shall not be construed or interpreted as a purchase agreement," and that it "does not contain any obligation on the part of Customer to purchase or Epic to sell an Aircraft."

It's not disputed that Epic originally estimated it would take three years and cost $20 million to obtain FAA certification, but, instead, it took nearly seven years and cost $200 million.

Plaintiffs say Epic, looking to boost its bottom line, "knew that it could make substantially more revenue in the marketplace if it devised a way to be released from its contractual obligations" to honor the prices in its reservation agreements.

A competing aircraft with similar features had a retail price of $4.1 million in 2016, the plaintiffs note – more than a million dollars higher than Epic's E1000.

Shortly after receiving FAA approval, the plaintiffs say Epic in 2020 sent a letter to reservation holders informing them that the E1000 aircraft was no longer for sale, and that instead, it was introducing a new model, the E1000 GX, which had a retail base price of $3.85 million. The named plaintiffs say there were asked to pay $635,000 more.

The new model had a different autopilot system (the old one was no longer available) and a five-blade propeller rather than four. But the plaintiffs allege the GX model "was not a new aircraft" and that its primary features and equipment were "identical" to the original.

The new model was a "pretextual reason" for refusing to honor the customer reservation agreement prices, they say.

U.S. District Judge Michael McShane last year certified the class, noting that there are "few bright-line rules and district courts have broad leeway in making class certification decisions."

Epic asked the 9th U.S. Circuit Court of Appeals to intervene and reverse the decision but was rebuffed, opens new tab in July.
Which means at least for now, Epic is stuck litigating the lawsuit as a class. Buckle up for turbulence ahead.

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting by Jenna Greene

Opinions expressed are those of the author. They do not reflect the views of Reuters News, which, under the Trust Principles, is committed to integrity, independence, and freedom from bias.

Jenna Greene
Thomson Reuters

Jenna Greene writes about legal business and culture, taking a broad look at trends in the profession, faces behind the cases, and quirky courtroom dramas. A longtime chronicler of the legal industry and high-profile litigation, she lives in Northern California. Reach Greene at jenna.greene@thomsonreuters.com

Trump's company taps ex-Bannon lawyer as outside ethics advisor

reuters.com/legal/government/trumps-company-taps-ex-bannon-lawyer-outside-ethics-advisor-2025-01-10

David Thomas

A general view of Trump Tower in New York City, U.S., October 1, 2023.REUTERS/David 'Dee' Delgado/File Photo Purchase Licensing Rights, opens new tab

Jan 10 (Reuters) - U.S. President-elect Donald Trump's company said Friday it has retained William Burck, a managing partner of U.S. trial firm Quinn Emanuel Urquhart & Sullivan and longtime Republican insider, as its outside ethics advisor.

Burck will help the Trump Organization develop and maintain internal ethics policies to ward against conflicts of interest, the company said in a press release posted on X by Trump's son Eric, who is an executive vice president of the company.

The Trump Organization consists of hundreds of companies that are ultimately owned by the Republican president-elect, including his golf and resort business. Reuters has estimated the company was on track to generate over $600 million in revenue last year.
"The Trump Organization is dedicated to not just meeting but vastly exceeding its legal and ethical obligations during my father's presidency," Eric Trump said in Friday's release.

Donald Trump retained ownership of the company when he first took office in 2017, but he placed control in the hands of his sons Eric and Donald Jr., breaking with U.S. precedent by not divesting his businesses or putting them into a blind trust.

This raised conflict of interest concerns, and Democratic congressional investigators later found that businesses tied to Trump received at least $7.8 million in foreign payments from 20 countries during his four years in the White House.

Eric Trump told Reuters last month there will be a "very large wall" separating the Trump Organization's business activity from the U.S. government.
Burck said in an email that the Trump Organization assignment would have no effect on his role at Quinn Emanuel. The 1,000-lawyer firm's other clients include billionaire Tesla CEO and Trump ally Elon Musk.

Burck previously defended Trump's former political strategist Steve Bannon on charges of defrauding donors in a border-wall scheme, which were dismissed when Bannon was pardoned by Trump. Burck also represented Bannon before a U.S. Senate committee investigating the Trump campaign's links to Russia, and he represented ex-Trump officials including U.S. Secretary of State Mike Pompeo and former White House Counsel Don McGahn.

Earlier Burck was a federal prosecutor in Manhattan and served as deputy White House counsel in the George W. Bush administration.

China-based drone maker DJI last month hired Quinn Emanuel in a lawsuit challenging DJI's inclusion on a U.S. Defense Department list of entities allegedly working with Beijing's military.
Asked if Quinn Emanuel's work for DJI could raise conflict concerns when the incoming Trump administration inherits responsibility to defend against the case, Burck said the firm is "governed by bar ethics and conflicts rules and will abide by them as we always do."

Reporting by David Thomas

David Thomas
Thomson Reuters

David Thomas reports on the business of law, including law firm strategy, hiring, mergers and litigation. He is based out of Chicago. He can be reached at d.thomas@thomsonreuters.com and on Twitter @DaveThomas5150.

Pfizer must face lawsuit over diversity fellowship program, US court rules

reuters.com/legal/pfizer-must-face-lawsuit-over-diversity-fellowship-program-us-court-rules-2025-01-10

Nate Raymond

Item 1 of 2 A person walks past the Pfizer building in Manhattan, New York City, U.S., March 2, 2021. REUTERS/Carlo Allegri/File Photo

[1/2]A person walks past the Pfizer building in Manhattan, New York City, U.S., March 2, 2021. REUTERS/Carlo Allegri/File Photo Purchase Licensing Rights, opens new tab

- Court revives lawsuit against Pfizer's diversity fellowship
- Group claims Pfizer program discriminates against white, Asian-American applicants
- Pfizer defends diversity efforts, lawsuit follows Supreme Court ruling on race-conscious policies

Jan 10 (Reuters) - A U.S. appeals court on Friday revived a lawsuit by a conservative group opposed to diversity initiatives in medicine that challenged a Pfizer (PFE.N), opens new tab fellowship program designed to boost the pipeline of Black, Latino and Native American people in leadership positions at the drugmaker.
At the urging of the group Do No Harm, a 2-1 panel of the New York-based 2nd U.S. Circuit Court of Appeals revisted, opens new tab a decision it issued last year holding the organization lacked legal standing to challenge the drugmaker's program in court.

That earlier decision had raised the bar for groups like Do No Harm to pursue similar cases on behalf of their membership by finding that they needed to identify members who were affected by the alleged discrimination they were suing over by name.
Do No Harm and other conservative advocacy groups had urged the 2nd Circuit to reconsider that holding, which they said would chill civil rights litigation by exposing individuals to harassment and retaliation if their identities were revealed.

The 2nd Circuit panel that issued that decision agreed to reconsider it, and on Friday concluded a trial court judge applied too strict of a standard in assessing whether Do No Harm had standing and should reconsider the issue.

Stanley Goldfarb, Do No Harm's chair, in a statement said it was pleased the court "reversed course and correctly recognized our right to protect our members in the district court."

Pfizer in a statement said Do No Harm's claims were without merit and that it was "proud of its commitment to diversity, equity, and inclusion."

Virginia-based Do No Harm, which is a non-profit that counts doctors, medical students and others as members and aims "to protect healthcare from radical, divisive and discriminatory ideologies," had no immediate comment.

Do No Harm sued Pfizer in 2022 over the company's Breakthrough Fellowship Program, which aimed to increase the pipeline of Black, Latino and Native American leaders in the company, arguing it discriminated against white and Asian-American applicants.

The lawsuit was filed a month before the U.S. Supreme Court heard arguments in cases in which its conservative majority would later declare unlawful race-conscious college admissions policies used by Harvard University and the University of North Carolina.
That June 2023 decision, while focused on college admissions, has prompted several lawsuits challenging diversity programs at companies, some of which have since altered their policies.
Walmart and McDonald's are among the companies that have recently backed away from diversity practices following pressure from conservative activists.
Do No Harm challenged Pfizer's program on behalf of two anonymous white or Asian-American members the group claimed were not able to apply to the fellowship, alleging it violated federal anti-discrimination laws.

The program's criteria has since been changed to allow anyone to allow apply.

Reporting by Nate Raymond in Boston, Editing by Alexia Garamfalvi and Deepa Babington

LAW360 Pulse

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Law360 Pulse Spotlight On Mid-Law Work

By **Emma Cueto**

Law360 (January 10, 2025, 4:02 PM EST) -- Parker Poe's work on the sale of a majority stake in a $575 million real estate portfolio and Keker Van Nest's handling of a first-of-its-kind challenge under a new California gaming law lead this edition of Law360 Pulse's Spotlight on Mid-Law Work, recapping the top matters for Mid-Law firms from Jan. 1 to 10.

A Major Portfolio Transaction

Carolinas heavyweight Parker Poe Adams & Bernstein LLP represented Southeast real estate company Childress Klein in selling a majority stake in its $575 million Carolinas portfolio to the New York-based INDUS Realty Trust Inc. The firm assisted Childress Klein in negotiating and structuring the deal, which includes 13.2 million square feet of industrial space, according to a Jan. 3 announcement.

Childress Klein retains a minority stake in the portfolio and will continue to manage and lease the property after the transaction, which also helped it simplify its overall industrial portfolio, the firm said.

Taking on the House

San Francisco litigation boutique Keker Van Nest & Peters LLP is representing seven California tribes utilizing a new state law to **sue dozens of private casinos**, accusing them of profiting from illegal gambling by offering games such as blackjack and baccarat in card rooms. The complaint, filed Jan. 2, alleges that the casinos are ignoring the tribes' exclusive right to offer such games in California.

According to Keker Van Nest, this is the first time a challenge has been brought under a bill signed into law in September, which gave tribes the right to petition the courts to determine whether games offered at nontribal establishments were unlawful.

Watery Remodel Woes

White and Williams LLP is representing an AIG insurer in a suit filed Jan. 2 that claims a contractor and plumbing company owes $302,000 to cover flooding damage to the home of Philadelphia Eagles player Darius Slay Jr. The suit claims that Aussie Home Remodeling Inc. and George R. Coulter Plumbing and Heating Inc. **botched a remodel** of Slay's New Jersey home and should be made to cover the money AIG paid out after the house flooded in 2023.

Transcribing Antitrust Trouble

Plaintiffs firms Robbins Geller Rudman & Dowd LLP and Seeger Weiss LLP have taken on a challenge to the National Court Reporters Association, representing court reporters who claim in a proposed class action complaint filed Jan. 3 that the organization **exploits its monopoly** to charge its members inflated and unnecessary membership dues, an alleged violation of antitrust law.

A Not-so-Sweet Browser Extension

Influencers represented by DiCello Levitt LLP have accused PayPal of **hijacking commissions** through its Honey browser extension, which it markets by partnering with online influencers, according to a complaint filed in California Jan. 3. The proposed class action says that the extension replaces influencers' affiliate marketing cookies at checkout with Honey's own tracking cookies, thereby taking credit for customer purchases and depriving online content creators of commissions.

Powering an Offshore Wind Deal

Delaware's Department of Natural Resources and Environmental Control relied on Foley Hoag LLP in connection with agreements reached between it and wind energy development company US Wind in a deal valued at $128 million, according to a Jan. 7 announcement. Under the deal, US Wind will build two proposed offshore wind energy projects, provide renewable energy credits, and fund projects such as coastal waterway dredging and clean energy workforce training.

--Additional reporting by Joyce Hanson, Hope Patti, Jack Karp and Gina Kim. Editing by Adam LoBelia.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

9th Circ. Affirms Hearing Aid Co.'s Win Over Investor Suit

By **Katryna Perera**

Law360 (January 10, 2025, 7:13 PM EST) -- The Ninth Circuit on Friday handed a win to Eargo Inc. and affirmed the dismissal of a securities class action against the hearing aid company, which alleged that the company and its top brass acted with intent to commit insurance billing fraud.

A three-judge panel for the Ninth Circuit issued a memorandum saying "in context," Eargo's prospectus for its initial public offering made clear that the company was evaluating whether potential customers had an insurance policy that covered hearing aids, contrary to the plaintiffs' claims in the suit.

"Further, insurers had reimbursed Eargo's claims for nearly three years before the statements in the prospectus were made. And '[f]raud by hindsight is not actionable,'" the memo says.

The panel also disagreed with investors' claims that Eargo failed to disclose known uncertainties and risks of forfeiting past insurance proceeds or the risks associated with insurers' exclusion of "over-the-counter" hearing aids from coverage.

"Eargo's prospectus disclosed a wide range of potential risks to its business, including the inherent risk of a new market-disrupting business model, the possibility that insurers could limit or reduce coverage, and the legal risks of failing to comply with federal laws and regulations such as the False Claims Act," the memo says. "These disclosures put prospective investors on notice of the fundamental risks to Eargo's business. And Eargo's growth statements are clearly puffery and thus nonactionable."

The panel also affirmed the district court's dismissal of the investors' misrepresentation claims that focused on post-IPO statements, statements about Blue Cross Blue Shield's audit of Eargo and statements about revenue recognition, risk factors and the company's growth.

The panel said again that "in context," Eargo explained that "much of its business growth depended on insurance reimbursement, that its business could suffer significantly if it had issues with insurers, and that it could face serious liability if it was found to violate the False Claims Act."

Eargo also disclosed the Blue Cross Blue Shield audit and the potential damage it could cause, according to the memo.

"Further, Eargo's description of the audit as 'routine' was an opinion, and plaintiffs do not allege with particularity that this was an actionable statement," the memo says. "Finally, many of the challenged projections reflect puffery or corporate optimism, which are not actionable. And Eargo's revenue guidances are protected as forward-looking statements."

The panel also said the suit did not adequately plead scienter since Eargo's CEO and chief financial officer increased their company stock holdings during the class period, which contradicts the inference of scienter.

The suit, led by IBEW Local 353 Pension Plan and Xiaobin Cai, alleged that Eargo, its executives, directors and initial public offering underwriters inflated the company's revenue potential and misled investors about an insurance audit that led to a U.S. Department of Justice probe while knowing that Eargo's business model was incompatible with federal insurance reimbursement requirements.

Investors asked the Ninth Circuit last year **to revive the suit** after U.S. District Judge Charles R. Breyer **found** that although the investors' second amended complaint added information from documents Eargo gave to the DOJ in the insurance fraud investigation, it did not correct any of the deficiencies identified in the **previous complaints**.

Eargo makes and sells air conduction hearing aids directly to the public. In 2017, it began marketing and selling its products to customers with coverage under the Federal Employees Health Benefits Program, or FEHBP.

The investors claimed that before Eargo's IPO, the company and its executives knew or were reckless in not knowing that its telecare business model was incompatible with FEHBP insurance policies, which require a diagnosis of "medical necessity" for a hearing aid.

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

U.S. Circuit Judges Milan D. Smith Jr. and Patrick J. Bumatay sat on the panel for the Ninth Circuit along with U.S. District Judge George H. Wu, sitting by designation.

The investors are represented by John Rizio-Hamilton, Robert Kravetz, Shane D. Avidan and Jasmine Cooper-Little of Bernstein Litowitz Berge & Grossmann LLP and Jeffrey C. Block, Jacob Walker, Mark B. Byrne, Michael Gaines and Brendan Jarboe of Block & Leviton LLP.

Eargo and the individual defendants are represented by Eric Leon, Michele Johnson, Nicholas Siciliano, Michael Bern, Whitney Weber, Daniel Gherardi, Christina Gay and Clarissa Lu of Latham & Watkins LLP.

The case is Cai et al. v. Eargo Inc. et al., case number 23-3470, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Stephen Berg.

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

American Airlines Faulted For ESG Focus In 401(k) Plan

By **Kellie Mejdrich**

Law360 (January 10, 2025, 6:07 PM EST) -- A Texas federal judge ruled Friday that American Airlines violated federal benefits law by emphasizing environmental, social and governance factors in its 401(k) plan decisions, but he put off deciding whether the retirees suffered losses and what remedy they should receive.

U.S. District Judge Reed C. O'Connor entered a **70-page findings of fact and conclusions of law** in the proposed class action from American Airlines pilot Bryan Spence alleging violations of the Employee Retirement Income Security Act. Judge O'Connor's order follows a four-day bench trial in the case, which Spence first brought in **June 2023**.

Judge O'Connor said American's focus on ESG factors in its 401(k) plan management strategy — both through its own actions and through the unchecked actions of its investment manager, BlackRock — violated ERISA's fiduciary duty of loyalty.

"Defendants turned a blind eye to BlackRock's ESG activism," Judge O'Connor said, adding that evidence at trial showed that "American's own corporate interests and the influence of a major industry player," its investment manager BlackRock, were to blame for the fiduciary lapse.

Judge O'Connor said American's breach was proved by a combination of evidence: "defendants' undeniable corporate commitment to ESG plus the endorsement of ESG goals by those responsible for overseeing the plan plus the influence of and conflicts of interests with BlackRock plus the lack of separation between the corporate and fiduciary roles."

Together, that evidence made clear that American's "incestuous relationship with BlackRock and its own corporate goals disloyally influenced administration of the plan," Judge O'Connor said.

Even while faulting American for breaching ERISA's duty of loyalty, Judge O'Connor said a claim from retirement plan participants alleging that the ESG emphasis by American breached ERISA's fiduciary duty of prudence had failed because the practices "did not fall short of the prevailing industry standards."

Judge O'Connor said "credible and unrefuted testimony" from American's expert at trial also backed the conclusion that American's overall investment management process was up to par.

Judge O'Connor also rejected the 401(k) plan participants' argument that even if overall 401(k) procedures were up to ERISA standards, monitoring processes were lacking because of the lack of review of BlackRock's proxy voting activities by individual members of the company's employee benefits committee.

"While outsourcing most of the plan oversight to Aon helped avoid a breach of the duty of prudence, the same is not true for the duty of loyalty given that loyalty carries an even higher standard," Judge O'Connor said.

As for the question of losses and remedies, Judge O'Connor said he would defer a ruling until the parties submitted cross-supplemental briefing by the end of the month on multiple issues. Those included whether there were any actual losses supported by the evidence, how to weigh certain expert testimony, whether specific evidence could link ESG investing to financial underperformance, and additional questions about a 2021 proxy vote by BlackRock discussed at trial that caused Exxon stock to drop in value.

Judge O'Connor also asked the parties to discuss whether an injunction against American's investment strategy, a form of relief that American 401(k) participants requested in their complaint, would be necessary if the court concluded no losses occurred from the breach.

Asked for comment on the ruling, American Airlines spokesperson Jessica Johnson said, "We are reviewing the decision."

When asked for comment, BlackRock spokesperson Amanda Friedman provided a statement that said: "We always act independently and with a singular focus on what is in the best financial interests of our clients. Our only agenda is maximizing returns for our clients, consistent with their choices."

Counsel for the proposed class didn't immediately respond to a request for comment Friday.

Spence is represented by Andrew B. Stephens and Heather G. Hacker of Hacker Stephens LLP and by Hammons P. Hepner, Isaac Diel and Rex A. Sharp of Sharp Law LLP.

American is represented by Russell D. Cawyer and Dee J. Kelly Jr. of Kelly Hart & Hallman LLP and by Brian D. Boyle, Charles J. Mahoney, Jeffrey A. N. Kopczynski, Mark W. Robertson, Shannon Barrett and William Pollak of O'Melveny & Myers LLP.

The case is Spence v. American Airlines Inc. et al., case number 4:23-cv-00552, in the U.S. District Court for the Northern District of Texas.

--Editing by Nick Petruncio.

Update: This story was updated to provide comment from BlackRock.

LAW360
Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

High Court Won't Scrutinize Huge Class Of Meta Advertisers

By **Jeff Overley**

Law360 (January 13, 2025, 9:56 AM EST) -- The U.S. Supreme Court declined Monday to assess the certification of an enormous class of businesses that social media colossus Meta Platforms allegedly defrauded by inflating the reach of Facebook and Instagram advertisements, upping the odds of a major payout in the closely watched case.

In an order list, the high court said it won't review **a Ninth Circuit opinion** that allowed a supersize cluster of companies to seek damages in what Meta has called "one of the largest fraud classes in the Ninth Circuit's history, encompassing millions of diverse advertisers."

Some advertisers contend Meta scammed them with bogus boasts about the "potential reach" of advertisements. Meta purported to quantify that reach by citing the number of individual users in an ad's target audience, but the number it cited actually reflected accounts — a much larger category that includes duplicate or phony profiles, such as those for automated bots.

In its Supreme Court petition in Meta Platforms v. DZ Reserve, Meta presented two questions regarding the Ninth Circuit's opinion **favoring Meta advertisers**. One of the questions asked about the Federal Rule of Civil Procedure 23's requirement that common legal or factual issues are predominant among class members. Meta said the Ninth Circuit improperly allows certification when someone misrepresents something in the same way to all class members, regardless of whether the members found the misrepresentation material or relied on it.

A second question asked the Supreme Court whether the Ninth Circuit has flouted Rule 23 by giving more deference to district court rulings that certify classes than it gives to rulings that decline to certify classes.

In its handling of the issues covered by each question, the Ninth Circuit's approach "sharply splits from other circuits and will attract forum-shopping plaintiffs seeking to certify sweeping, nationwide fraud class actions," Meta averred in its unsuccessful petition.

Meta has said the certified class will likely contain businesses ranging from sole proprietorships to Fortune 500 corporations, and the lead plaintiffs — DZ Reserve and a man named Cain Maxwell — provide an illustration of the disparate business sizes. DZ Reserve was an e-commerce platform that paid more than $1 million for Meta ad campaigns, while Maxwell ran an online store selling firearm mounts and paid less than $400.

In their successful opposition to Meta's petition, the plaintiffs spotlighted another class case, Facebook v. Amalgamated Bank, which dealt with pleading standards and risk disclosures to investors. The justices in November heard arguments in that case, but they ultimately **dismissed the matter without a decision** and said they erred by hearing it at all. That episode was a cautionary tale, DZ Reserve and Maxwell contended in their opposition brief, because Facebook convinced the high court to grant review by declaring that a Ninth Circuit decision would "light a beacon for class action lawsuits that would be dismissed in any other circuit."

"Now the same company, today known as Meta Platforms, makes similarly hyperbolic arguments for review of another Ninth Circuit class action decision," the opposition brief stated. "Just like the last time, Meta's overblown claims turn out to present none of the promised legal questions or circuit splits. Instead, they boil down to a naked plea for fact-bound error correction of a case-specific result that the company simply doesn't like."

Although litigants routinely implore the Supreme Court to clarify issues involving class certification, the justices haven't been terribly eager to do so in recent years. One prominent exception occurred in a 2021 case, TransUnion LLC v. Ramirez, in which the high court in **a 5-4 opinion** adopted a relatively narrow view of when consumers have suffered injuries that make them eligible to join a class.

When the Supreme Court has waded into significant disputes involving class actions, it has often done so to review rulings of the Ninth Circuit. The TransUnion case was one example, Facebook v. Amalgamated Bank was another, and yet another was Wal-Mart Stores v. Dukes, in which the high court in 2011 issued **a 5-4 opinion** that outlined a relatively narrow view of when a common question could resolve the claims of a massive class.

The justices signaled interest in Meta's petition by requesting a response from DZ after it initially waived its right to weigh in. That request occurred only a few days after the U.S. Chamber of Commerce and other industry groups **expressed support for Meta** in an amicus brief that said, "In multiple ways, Ninth Circuit law on class certification conflicts with the law in other circuits and allows classes to be certified without the rigorous analysis that Rule 23 and this court's precedents demand."

Meta took its case to the Supreme Court in October after a split Ninth Circuit panel upheld certification of a damages class while also unanimously overturning the certification of an injunction class. Meta asked the Ninth Circuit to **take a fresh look**, averring that the panel majority had embraced "an unprecedented standard" for whether common issues predominate among class members, but the appeals court **balked at rehearing the matter**.

Counsel for the parties had no immediate comment Monday.

Meta is represented by Latham & Watkins LLP.

The plaintiffs are represented by Cohen Milstein Sellers & Toll PLLC and the Law Offices of Charles Reichmann.

The case is Meta Platforms Inc. v. DZ Reserve et al., case number 24-384, in the Supreme Court of the United States.

--Editing by Alyssa Miller.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

PowerSchool Blamed For Breach of Student, Teacher Data

By **Lauren Berg**

Law360 (January 10, 2025, 9:27 PM EST) -- The personal data of tens of millions of students, parents and teachers was put at risk last month when hackers were able to worm their way into PowerSchool's systems because the educational software company's security safeguards were not up to snuff, two lawsuits filed in California federal court allege.

Both proposed class actions, one **filed Wednesday** by Sheilah Buack-Shelton and her underage daughter and another **filed Thursday** by Kimberly Kinney, accuse PowerSchool Holdings Inc. of failing to properly secure addresses, Social Security numbers, grades, medical records and other sensitive information that was accessed by hackers in the Dec. 28 data breach.

What's more, when PowerSchool discovered the breach, it didn't inform the victims until Jan. 7, the complaints state.

"PowerSchool failed to maintain reasonable security safeguards and protocols to protect its users' [personal identifiable information]," Buack-Shelton said. "For example, it appears that none of the information accessed in the data breach was encrypted."

"PowerSchool also lacked proper controls to determine which students, parents and faculty were impacted by the data breach, as it was unable to alert impacted individuals for nearly ten days," she added.

PowerSchool provides a host of services to school districts, including management, communication and educational technology, and as a result receives sensitive information for millions of students, parents and school faculty across the country, according to the suits.

"By obtaining, collecting and storing plaintiff's and class members' private information, defendant assumed legal and equitable duties over the private information and knew or should have known that it was thereafter responsible for protecting plaintiff's and class members' private information from unauthorized disclosure," Kinney said.

She added that, "plaintiff and class members relied on defendant to keep their private Information confidential and securely maintained, to use this information for business purposes only and to only make authorized disclosures of this information."

Kinney, a teacher in Indiana, wants to represent a nationwide class of "all individuals whose PII was exfiltrated or stolen in the data breach."

Her suit asserts claims of negligence, breach of implied contract, invasion of privacy, unjust enrichment and breach of fiduciary duty. It seeks injunctive and equitable relief, damages, restitution, litigation costs and attorney fees, among other relief.

San Diego resident Buack-Shelton and her school-age daughter, identified in the suit as S.S., want to represent both nationwide and California classes of people whose PII was stolen in the data breach.

Their suit claims violations of the California Consumer Privacy Act and negligence. It seeks damages, injunctive relief, litigation costs and attorney fees.

A spokesperson for PowerSchool told Law360 on Friday that the company "became aware of a potential cybersecurity incident" through one of its customer portals on Dec. 28. The company then immediately activated its cybersecurity response protocols and "mobilized a cross-functional response team, including senior leadership and third-party cybersecurity experts."

"PowerSchool is not experiencing, nor does it expect to experience, any operational disruption and continues to provide services as normal to our customers," the spokesperson said. "We have no evidence that other PowerSchool products were affected as a result of this incident."

"We take our responsibility to protect student, family and educator data privacy extremely seriously, and we are committed to helping affected customers, families and educators with resources and support as we work through this together," they added.

Counsel for the plaintiffs did not immediately respond to requests for comment Friday.

Buack-Shelton and her daughter are represented by Daniel J. Mogin and Timothy Z. LaComb of MoginRubin LLP.

Kinney is represented by Caleb Marker and Brian C. Gudmundson of Zimmerman Reed LLP and Christopher D. Jennings and Tyler B. Ewigleben of Jennings & Earley PLLC.

Counsel information for PowerSchool was not immediately available.

The cases are Sheilah Buack-Shelton et al. v. PowerSchool Holdings Inc., case number 2:25-at-00037, and Kimberly Kinney v. PowerSchool Holdings Inc., case number 2:25-cv-00098, both in the U.S. District Court for the Eastern District of California.

--Editing by Jay Jackson Jr.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

SafeMoon CEO Wants 'Misleading' Reddit Post Explained

By **Sydney Price**

Law360 (January 10, 2025, 5:52 PM EST) -- The CEO of bankrupt cryptocurrency asset company SafeMoon LLC asked a Brooklyn federal judge Friday to order the government to explain whether it had a role in a social media user's "misleading" post that promised to connect SafeMoon investors with the U.S. government.

In a letter, counsel for SafeMoon LLC CEO Braden John Karony said that a post from a Reddit user asking SafeMoon investors to come forward to be put in touch with U.S. authorities was inaccurate and misleading because it implied a causal relationship between SafeMoon losses and the company's liquidity pool representations. Karony previously asked the government whether it posted the Reddit query, but he did not receive an acceptable response, according to the letter.

Karony and SafeMoon Chief Technology Officer Thomas Smith were indicted alongside co-founder Kyle Nagy in November 2023 on charges of conspiracy to commit securities fraud, wire fraud and money laundering in connection with their crypto token SafeMoon. The government claims the executives misled buyers, including by leading them to believe that swaths of the purportedly decentralized assets were locked, or inaccessible, when the executives actually used the funds for their own interests.

Karony filed to dismiss the indictment in April, with Smith joining his submission in September.

"If directed by the government, communications like the Reddit post improperly taint the testimony of alleged SafeMoon victims in this case — particularly if they continue unabated," Friday's letter states. "Karony's due process rights would be infringed."

In October, the U.S. government said that Karony and Smith **should not be allowed to escape** the securities fraud conspiracy and wire fraud conspiracy allegations by claiming their alleged activity lacks the necessary domestic ties. According to Brooklyn federal prosecutors, the Second Circuit has held that extraterritoriality is a merits question that requires discovery.

While the executives claim the transactions took place on a blockchain and decentralized marketplace that don't have matching servers or data centers in the U.S., prosecutors assert that Karony and Smith were U.S. citizens and residents when they perpetrated the scheme through SafeMoon, a U.S. limited liability company. Karony and Smith also targeted investors, including those in New York's Eastern District, with misleading statements, prosecutors said.

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

The government is represented by Drew Rolle, John Enright and Matthew Galeotti of the U.S. Attorney's Office for the Eastern District Of New York.

Karony is represented by Nicholas D. Smith of David B. Smith PLLC.

Smith is represented by Jeffrey Dahlberg, James Darrow and Kathryn Wozencroft of the Federal Defenders of New York.

The case is U.S. v. Karony et al., case number 1:23-cr-00433, in the U.S. District Court for the Eastern District of New York.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Ex-McKinsey Partner Admits To Obstructing Purdue Probe

By **Ben Zigterman**

Law360 (January 10, 2025, 3:50 PM EST) -- A former senior partner at consulting giant McKinsey & Co. pled guilty Friday to obstructing the U.S. Department of Justice's investigation into the firm's work with opioid manufacturer Purdue Pharma LP, a month after McKinsey agreed to pay $650 million to resolve related charges.

Martin Elling pled guilty to one count of knowingly destroying and concealing documents, and prosecutors intend to recommend a $250,000 fine and six to 12 months in prison, according to the plea deal.

"Today's guilty plea moves us forward in holding accountable not only those corporations responsible for the opioid crisis in America, but also the executives that have exacerbated the tragedy," Zachary T. Lee, the acting U.S. attorney for the Western District of Virginia, said in a statement.

The former McKinsey partner is scheduled to be sentenced April 4, according to the government.

Counsel for Elling said in a statement that he "sincerely regrets his conduct for which he has fully accepted responsibility."

When McKinsey **struck a five-year deferred prosecution agreement** in December with the U.S. attorney's offices in the Western District of Virginia and Massachusetts, as well as the U.S. Department of Justice's Consumer Protection Branch, the firm said it was "deeply sorry" for its past work with Purdue "and the actions of a former partner who deleted documents related to his work for that client."

"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," the consulting firm said. "This terrible public health crisis and our past work for opioid manufacturers will always be a source of profound regret for our firm."

McKinsey's pharmaceutical and medical products practice worked with Purdue from 2004 until 2019 on 75 different projects, according to the government.

Prosecutors accused Elling of having deleted numerous documents from a McKinsey-issued laptop in August and September 2018, soon after learning that the Massachusetts Office of the Attorney General had named a former Purdue board member in a lawsuit over OxyContin marketing.

After requesting the personal email of a fellow senior partner, the partner wrote that "it probably makes sense to have a quick conversation with the risk committee to see if we should be doing anything other tha[n] eliminating all our documents and emails. Suspect not but as things get tougher there someone might turn to us,'" a court filing showed.

The government alleged that Elling emailed himself a reminder to "delete old pur documents from laptop," and that a forensic analysis of the laptop confirmed he removed an email folder named "Purdue Pharma" and a Windows folder named "Purdue."

A spokesperson for the federal prosecutors declined to comment.

Elling is represented by Thomas J. Bondurant Jr. of Gentry Locke and John Francis Hundley and Marjorie J. Peerce of Ballard Spahr LLP.

The government is represented by Randy Ramseyer of the U.S. Attorney's Office for the Western District of Virginia, Amanda P. Masselam Strachan and William B. Brady of the U.S. Attorney's Office for the District of Massachusetts, Kristen M. Echemendia, Jessica Harvey and Steven R. Scott of the Justice Department's Civil Division, and Kristin Gray and Kimberly Bolton of the Virginia Office of the Attorney General.

The case is USA v. Elling, case number 1:24-cr-00045, in the U.S. District Court for the Western District of Virginia.

--Additional reporting by Julie Manganis. Editing by Covey Son.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

SEC Fines Cannabis Co. Acreage Over Accounting Violations

By **Emilie Ruscoe**

Law360 (January 10, 2025, 7:06 PM EST) -- A multi-state cannabis industry operator recently acquired by Canadian cannabis industry giant Canopy will pay $225,000 to resolve administrative U.S. Securities and Exchange Commission claims that it orchestrated a $4.2 million round-trip transaction with an affiliate to inflate its reported cash balance.

In an administrative cease-and-desist order Friday, the SEC said that in December 2019 and early January 2020, the company, Acreage Holdings Inc. arranged the transfer of cash from, and back to, an affiliated entity, boosting Acreage's year-end 2019 cash balance for its internal accounting records.

Acreage consented to entry of the order without admitting or denying the regulator's allegations, and the order also commits the company to cooperating with subsequent "investigations, litigations or other proceedings" that might arise from the matter. The entity involved is not identified by name in the order, which also cites several Acreage employee emails without identifying those parties by name.

The order resolves, for now, the regulator's administrative claims that Acreage violated recordkeeping provisions of the federal Securities Exchange Act as it was preparing to wrap up its 2019 fiscal year by seeking out the cash transfer from the entity "with the express understanding that Acreage would return all the money" once the year ended.

According to the SEC, Acreage received the multimillion-dollar lump sum on Dec. 26. Eight days later, on Jan. 3, the regulator said, Acreage sent the exact same amount back to the same party.

Following the cash hand-back, the SEC said, Acreage "subsequently created journal entries and other records that mischaracterized the round-trip transfer, first as a repayment of debt owed by [the entity] and subsequently as a short-term loan from" the unidentified other party to Acreage.

Those records "misrepresented the true nature of the transfers," the SEC said, noting that the company eventually added an accounting entry that "effectively reversed the transaction from an accounting perspective" after employee concerns about the matter were escalated to the Acerage board, prompting a director to start asking questions about it.

The SEC also claimed that the company misrepresented the cash transfers in written documents to the accounting firm handling its 2019 fiscal year audit.

The SEC described Acreage as operating through subsidiaries in several states and working with entities other than its subsidiaries, including the entity from which it received the cash transfer.

According to the regulator, Acreage had a contract with the entity involved in the transaction at issue, according to which Acreage provided the entity with management consulting and services such as billing, day-to-day operational support, employee training, and "financial oversight, controls, planning, and access to capital."

Acreage also loaned to its affiliate via a line of credit, and for roughly three years before the alleged round-trip transaction, the lender hadn't collected its management fees or sought repayment of amounts owed under the credit line terms, the SEC said, asserting that the Acreage instead allowed those sums to accrue over time.

According to the SEC, Acreage senior management "became increasingly concerned about the company's cash balance" as it neared the end of its 2019 fiscal year amid focus on that metric from cannabis industry analysts.

The regulator cited emails between Acreage's senior officers in which one unidentified company official allegedly asked "all of our competitors are showing [cash flow] positive. Why are we so far off?"

At the time, the SEC said, the principal owed on the affiliated entity's line of credit was about $4.65 million before interest, and a subsequent email from an Acreage accounting employee to company brass included the employee's estimate that the affiliate entity had enough cash on hand to make a payment of about $1.5 million to Acreage while still being able to cover other expenses it needed to pay for.

But the SEC said that the company later decided it would instead ask the entity to temporarily hand over "virtually all of its cash" instead of asking it to pay down its line of credit, with one of Acreage's officials stating in emails that the transfer would be "accounted for as short term financing."

An email from Acreage leadership to the entity allegedly states that Acreage wanted the funds so it could "clarify our revenues and cash on-hand for potential investors," and the same email states that "[t]he funds that will be wired into the Acreage account will be returned in whole on January 2nd."

"Lacking a legitimate justification for the transfers and absent appropriate guidance or accurate information from senior management, Acreage accounting staff made a series of journal entries in an attempt to record the transfers on Acreage's books in some way," the SEC said, describing the resulting entries as "inaccurate."

The SEC claimed that the company later got a number of employee questions and concerns about its unusual transactions, including a complaint to its compliance hotline stating that "there was a sizeable cash movement between Acreage and one of its affiliated entities near the end of the calendar year that seemed to lack a business purpose."

In May 2020, the SEC said, Acreage allegedly told its auditor that the round-trip transaction had been an error and that the "money was returned to [the entity] on January 2, 2020, once the error was identified."

New York-headquartered Acreage, which is incorporated in Canada, was listed on the Canadian Securities Exchange at the time, the SEC said. At the end of 2024, it was acquired by the U.S. subsidiary of Canopy, which Canopy's CEO touted as a boon to its growth in the U.S.

On Friday, the SEC and counsel for Acreage declined to comment.

The SEC is represented by its own Kiran Patel, Nandy Celamy, Russel Feldman and George N. Stepaniuk.

Acreage is represented by Joseph Dever at Cozen O'Connor.

The matter is In the Matter of Acreage Holdings Inc., administrative proceeding number 3-22389, before the U.S. Securities and Exchange Commission.

--Editing by Vaqas Asghar.