

EarthLink's \$85 Million Investor Accord Approved in Merger Case

By Martina Barash

EarthLink Holdings Corp. has received final court approval for its \$85 million class settlement of investor claims over a merger with now-bankrupt Windstream Holdings Inc.

The internet service provider's agreement with shareholders who received Windstream stock in exchange for their EarthLink stock as part of the merger is fair, adequate and reasonable, Judge James M. Moody Jr. said for the US District Court for the Eastern District of Arkansas. Moody also approved a 32% attorneys' fee award, amounting to about \$27 million, in the nearly seven-year-old case.

- The former EarthLink investors alleged the companies misrepresented Windstream's finances as stable in the offering documents associated with the merger
- The deal is the largest-ever settlement of a securities fraud class action in the Eastern District of Arkansas, according to the investors' preliminary request for approval
- Litigation expenses of more than \$630,000 are also approved, Moody said

Robbins Geller Rudman & Dowd LLP was lead counsel for the investors. Skadden, Arps, Slate, Meagher & Flom LLP and Wright Lindsey Jennings represented EarthLink, Windstream, and some of the individual defendants. Norton Rose Fulbright US LLP represented other individual defendants.

The case is *Murray v. EarthLink Holdings Corp.*, E.D. Ark., No. 4:18-cv-00202, 2/6/25.

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

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

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NexPoint Agrees to Settle Suit Over Acquisition for \$12 Million

By Martina Barash

- Target company's stockholders called offered price too low
- Deal with Jernigan Capital investors is fair, plaintiff says

A NexPoint Advisors LP unit has offered to pay \$12 million to settle class securities claims on behalf of an acquired property investment firm's shareholders, according to a federal court filing.

The deal to compensate Jernigan Capital Inc.'s former investors for an allegedly underpriced take-private offering warrants preliminary approval, the class representatives told Judge Jennifer L. Rochon, of the US District Court for the Southern District of New York, on Feb. 7.

Lead plaintiff John Erickson alleges he and other class members owned stock in Jernigan when it was publicly traded. The shareholders voted to sell the real estate investment trust to affiliates of NexPoint, an alternative investment firm, for \$900 million at a price of \$17.30 per share in a deal that closed in November 2020.

Jernigan's proxy statement falsely claimed that other self-storage REITs would have "limited interest" in acquiring Jernigan's portfolio, Erickson alleges. And it allegedly failed to disclose that rival Extra Space Storage Inc. provided one-third of the total offer in exchange for seats on the board and rights to the properties of the newly private company, renamed NexPoint Storage Partners.

Rochon certified a class of investors in 2023 and rejected NexPoint's request for an immediate appeal.

The proposed settlement represents 62% of the damages according to one valuation, and about 33% of a higher valuation that would be harder to prove at trial, the investors said in the filing seeking Rochon's approval.

Robbins Geller Rudman & Dowd LLP is lead counsel for the class. Winston & Strawn LLP represents NexPoint Storage Partners.

The case is Erickson v. Jernigan Capital, Inc. , S.D.N.Y., No. 1:20-cv-09575, motion 2/7/25 .

Class Action

Feb. 11, 2025, 7:53 AM PST

Researcher ICON Sued by Investor Over Revenue Miss Stock Dive

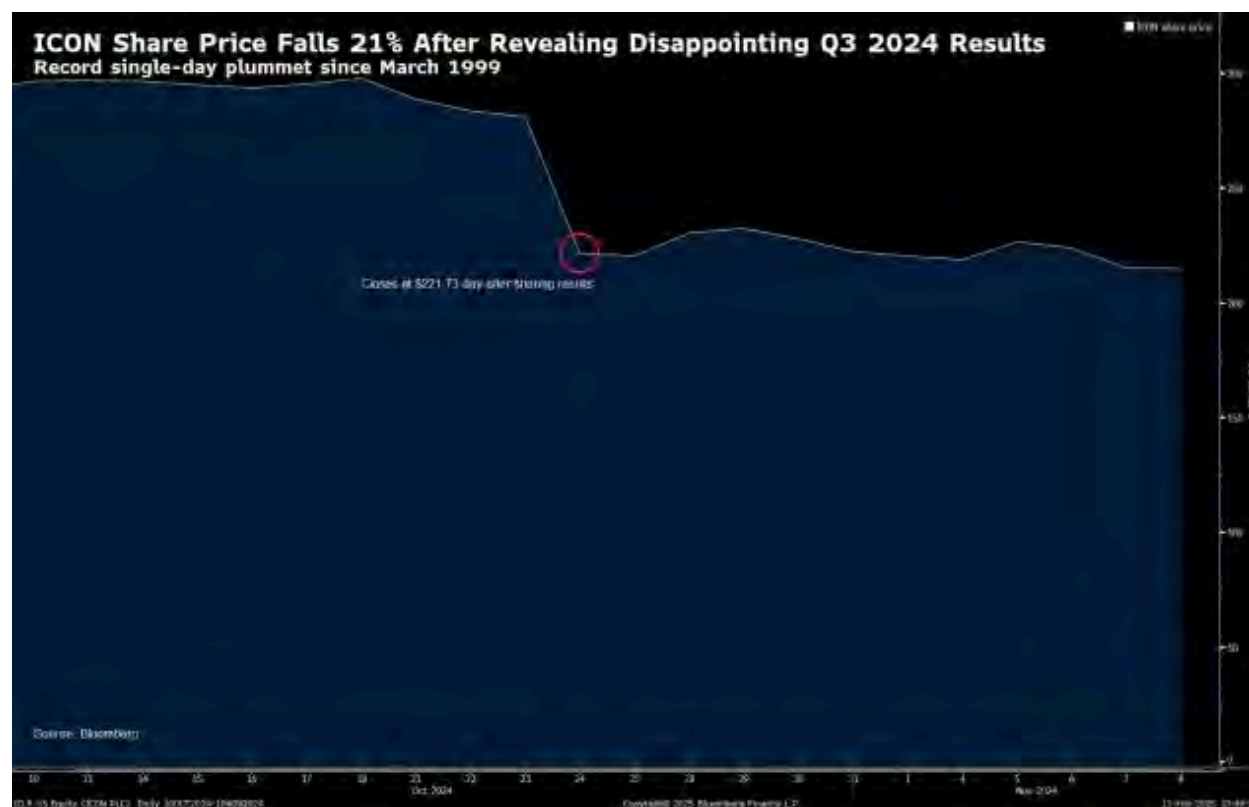
By Gillian R. Brassil

- **COURT:** E.D.N.Y.
- **TRACK DOCKET:** [No. 2:25-cv-00763](#) (Bloomberg Law subscription)

Clinical research conductor ICON Plc downplayed impacts from demand softness from the pharmaceutical and biotechnology industries, surprising investors with a \$100 million revenue shortfall that led to a steep stock plunge, a proposed class action says.

ICON and two top executives in 2024 touted its competitiveness as the industries that make up its customer base took cost-cutting measures amid a “tightening capital and high interest rate environment,” said investor Chan Kwok Shing in the complaint filed in the US District Court for the Eastern District of New York on Monday.

The day after ICON released a revenue shortcoming from customer budget cuts for the third fiscal quarter of 2024, share prices slipped 21%, the most in a day in over 25 years, according to data compiled by Bloomberg.



Company officials also participated in insider trading while the stock was wrongly inflated, Shing alleged, collectively selling “nearly \$78 million worth of ICON stock” in the proposed class period.

ICON had claimed its unique model meant it was benefiting from clients consolidating their reliance on clinical trial organization services, Shing said, even as large pharmaceutical companies like Pfizer were reducing research spending and smaller biotech clients, largely dependent on outside investors, similarly took steps to deal with an economic drag. In reality, the complaint said, "ICON's customers had canceled contracts, limited or reduced engagements, delayed clinical trial work, and/or failed to enter into new contracts with ICON for additional clinical trial work at historical rates once existing projects ended (or were scheduled to end) in 2024."

ICON revealed revenue missed consensus analyst estimates by over \$100 million, plus poor indicators of future customer demand, in its Q3 results on Oct. 23, Shing said. The chief executive officer said that two large pharma customers significantly cut trial work and that ICON expected continued financial hits. "As a result, ICON cut its annual revenue guidance for fiscal 2024 by \$220 million at the midpoint," Shing said.

Analyst firm Truist Securities later published a report claiming ICON had known it faced economic headwinds, the complaint said. Shing said investors suffered "hundreds of millions of dollars of financial losses" from an about 20% stock decline over two trading days from Oct. 23 to Oct. 25, when it closed at \$220.47 a share.

In January, ICON shared full-year 2025 revenue and earnings-per-share expectations that were significantly below analysts' expectations, reflecting continued adverse effects from demand, Shing said.

Robbins Geller Rudman & Dowd LLP and Johnson Fistel LLP represent Shing, who seeks damages and other relief for alleged violations of the Securities Exchange Act of 1934.

The proposed class would include people who invested in ICON from July 27, 2023 through Oct. 23, 2024; Shing estimated there are thousands of potential members.

ICON didn't immediately respond to a request for comment through its website.

The case is Shing v. ICON plc, E.D.N.Y., No. 2:25-cv-00763, complaint filed 2/10/25.

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

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

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Class Action

Feb. 11, 2025, 9:34AM PST

FIGS Investors Intend to Appeal Dismissal of Class Action Claims

By Gillian R. Brassil

FIGS Inc. investors plan to appeal a district court dismissal of allegations the medical outfitter misled them.

Stockholders notified the US District Court for the Central District of California on Monday that they plan to appeal to the Ninth Circuit the January order granting and denying in part defendants' motions to dismiss their first amended class action complaint alleging securities law violations. The investors say the company misled them on its ability to predict demand, its use of core products to maintain low inventory risk, and the reason for increased air-freight shipping around its initial and secondary public offerings.

- Judge Otis D. Wright II dismissed with prejudice claims on air-freight use statement, without leave to amend some claims based on FIGS's secondary public offering, and with ability to re-plead others
- Said complaint's "disorganized, prolix nature" was another reason to dismiss and simply adding allegations "to this already byzantine pleading" wasn't likely to convince federal court investors could "state a plausible claim"; Wright previously tossed their initial consolidated complaint
- Defendants FIGS, company executives, underwriters, and venture capitalist Tulco LLC, which held significant stake in the clothier's stock, listed as appellees on notice of appeal

Robbins Geller Rudman & Dowd LLP and Levi & Korsinsky LLP are co-lead counsel for the proposed class representing lead plaintiffs. Cooley LLP represents FIGS and executives. Skadden, Arps, Slate, Meagher & Flom LLP represents Tulco. The firms didn't respond immediately to emails seeking comment.

Morgan, Lewis and Bockius LLP, which represents underwriters, declined to comment.

The district court case is *Ryan v. FIGS, Inc.*, C.D. Cal., No. 2:22-cv-07939, notice of appeal filed 2/10/25.

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

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EV Startup, SPAC Merger Exec Suit Should Be Tossed, Judge Says

By Gillian R. Brassil

- Magistrate judge recommends dumping PIPE deal investor suit
- Didn't adequately plead EV leaders made alleged misstatements

Bankrupted electric vehicle startup executives, SPAC leaders, and an accounting firm shouldn't face investor allegations surrounding a \$130 million private investment in a public entity deal, a federal magistrate judge recommended.

Shareholders failed to adequately plead that three executives of Electric Last Mile Inc.—which became Electric Last Mile Solutions after a 2021 special purpose acquisition company merger—were the makers of alleged misrepresentations, Judge Laura D. Hatcher said Feb. 7 in her recommendation of granting five motions to dismiss.

Plaintiffs didn't sufficiently allege co-CEOs of SPAC Forum Merger III Corp. acted with intent, she said for the US District Court for the District of Delaware. And auditor BDO USA LLP's statements weren't actionable because they were opinions, and investors didn't properly plead the opinions fell under an exemption for claiming liability, she said.

Investors alleged in their amended class action complaint that in 2020, ELM co-founders Jason Luo and James Taylor issued 99,000 shares of its common stock for \$10 a share, mainly to entities held by each. A share could be exchange for over 800 shares of ELMS common stock that was also \$10 each—meaning each ELM share bought for \$10 was worth \$8,000 post-merger. Later, Luo sold another 1,000 ELM shares to an entity held by other company executives. The \$130 million private placement closed with the merger in 2021, the complaint said.

While the proxy disclosed transactions, shareholders said defendants didn't properly record the share-based compensation at fair market value or disclose the sale of shares was below market value, Hatcher said. Investors alleged BDO wrongly misrepresented ELM's financials complied with accounting principles.

In 2022, ELMS said it failed to properly disclose compensation from the transactions, financial statements for 2020 required restatement, and Luo and Taylor were resigning, Hatcher said. Shareholders alleged that as a result of these disclosures, ELMS stock fell 51%.

Two weeks later, ELMS said BDO would resign as its auditor, Hatcher said. ELMS said it was delisting from the NASDAQ and filing for Chapter 7 bankruptcy in June 2022, Hatcher said.

Lead Plaintiffs Izac Ben-Shmuel as Trustee of the ILS Trust FBO Izac Ben-Shmuel, Robert Green as Trustee of both the Robert Green Revocable Trust and the Green Children's Trust, Shmuel Levy, and Isidore H. Mayrock had alleged all six defendants violated part of the Securities Exchange Act of 1934 and SEC Rule 10b-5, and all but BDO breached another part of the Exchange Act.

Robbins Geller Rudman & Dowd LLP is lead counsel for the proposed class. Friedlander & Gorris, PA is liaison counsel.

Paul, Weiss, Rifkind, Wharton & Garrison LLP represents Luo. Barnes & Thornburg LLP represents Taylor. Berger McDermott LLP represents Albert Li, ELM's chief financial officer. Young Conaway Stargatt & Taylor LLP represents Marshall Kiev and David Boris, co-CEOs of FIIL. McDermott Will & Emery LLP represents BDO.

None of the firms immediately responded to emails seeking comment.

The case is Levy v. Luo , D. Del., No. 1:23-cv-00653, 2/7/25 .

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

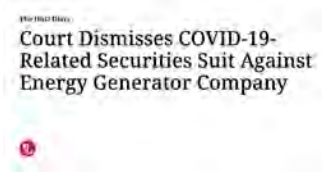
To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

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Court Dismisses COVID-19-Related Securities Suit Against Energy Generator Company

dandodiary.com/2025/02/articles/coronavirus/court-dismisses-covid-19-related-securities-suit-against-energy-generator-company

February 11, 2025



By Kevin LaCroix on February 11, 2025

Posted in Coronavirus

GENERAC

As I have noted on this site (most recently here), plaintiffs' lawyers have launched a plethora of lawsuits against companies whose prospects soared during the initial government shut-down phase of the pandemic, but whose fortunes waned as the pandemic moved into the return-to-work phase. While plaintiffs' lawyers have been quick to file these kinds of pandemic-related suits, the cases have not always fared particularly well.

Last week, in the latest example of one of these kinds of suits stalling at the initial pleading stage, a federal district court granted the defendants' motion to dismiss – albeit without prejudice – in a pandemic-related lawsuits that had been filed against the portable energy generation company, Generac Holdings. The court's February 7, 2025, decision, which can be found here, makes for interesting reading and arguably has important implications for other lawsuits of this type.

Background

Generac Holdings sells a variety of energy-related products, including power generators, solar power storage systems, and other products. At the outset of the pandemic and as government stay-at-home orders went into effect, Generac reported increased product sales, driven largely by orders for its home standby (HSB) generators. Demand for the HSB generators surged, leading to substantial increases in the company's orders and sales. The company's share price climbed.

However, as the pandemic progressed, Generac had trouble keeping up with orders, and despite efforts in increase capacity, its sales stalled. As government stay-at-home orders lapsed, its orders decreased and demand for its HSB generators waned. The company's stock price dropped, ultimately losing almost 80% of its peak value.

The Lawsuit

In December 2022, plaintiff shareholders filed the first of several securities class action lawsuits against Generac and certain of its directors and officers. The cases ultimately were consolidated and the lead plaintiffs filed a 139-page, 316-paragraph consolidated amended complaint.

As later summarized by the Court, the amended complaint alleged that the defendants “defrauded investors by accurately reporting Generac’s historic sales and orders for its products, while failing to disclose three negative ‘trends’: (1) the weakening demand for Generac’s HSB generators; (2) a major defect in Generac’s SnapRS solar energy products; and (3) the ‘overconcentration’ of Generac’s sales of solar energy products through a single distributor, Pink Energy.” The defendants filed a motion to dismiss, arguing that the lead plaintiffs failed to state an actionable claim under any of the three theories.

The Court’s February 7, 2025, Order

In a lengthy and detailed 31-page opinion, Eastern District of Wisconsin Judge Brett H. Ludwig granted the defendants’ motions to dismiss, albeit with leave for the plaintiffs to file an amended complaint. In granting the motion, the Court held that the plaintiffs have not adequately pled falsity and scienter on their primary theory (that is, the theory that the company failed to adequately disclose weakening demand for the HSB generators), and also failed to satisfy the pleading requirements for falsity, scienter, and materiality on their remaining theories.

The Court began its analysis by noting that the plaintiffs’ amended complaint was “unnecessarily lengthy,” citing “virtually every public disclosure Defendants made during the relevant period.” The plaintiffs, the Court said, “appear to be throwing everything at the wall in the hopes they can convince the Court that they have support for their fraudulent nondisclosure theories.” The plaintiffs’ approach, the Court said, “serves only to highlight Lead Plaintiffs’ remarkable failure to identify any statement that was actually false.” But the Court declined to dismiss the Amended Complaint as an improper “puzzle pleading”; rather, the Court was dismissing the Amended Complaint based on its “failure, despite its lengthy and repetitiveness, to offer specific plausible allegations of falsity, scienter, and materiality.”

In holding that the plaintiffs’ had failed to plead falsity with respect to the the HSB generator demand issue, the Court said that the plaintiffs “utterly fail to plausibly suggest that Defendants knew that demand was declining or that they were intentionally misleading investors about customers’ demand for their product,” adding that “given the multitude of accurate statements indicating that demand remained high, Lead Plaintiff’s conclusory assertions to the contrary fail to satisfy their heavy burden.”

With respect to the scienter issue, the Court said “As Defendants repeatedly disclosed to investors, the COVID-19 pandemic created unprecedented and unpredictable demand for HSB generators. [The Defendants] all made public statements to that effect. Without particularized allegations supporting a ‘strong’ inference that [the individual defendants] knew in advance when that demand was waning and deliberately withheld that information from investors, Lead Plaintiffs’ allegations amount to little more than ‘fraud by hindsight’.”

Finally, with respect to the plaintiffs’ “secondary” fraud allegations (concerning the SnapRS product defect and the alleged dependency on Pink Energy), the court also found that the plaintiffs had failed to provide specific, particularized support that defendants were aware of the supposed problems and shortcomings at the time the allegedly misleading statements were made.

In the opinion’s final section, the Court summarizes the case and his conclusions in a way that is worth setting out at length here:

Generac’s stock price skyrocketed during the COVID-19 pandemic as customer interest in HSB generators exploded and investors flocked to Generac as a bright spot in an otherwise troubled economy. As the pandemic waned, and the company was unable to keep up with order, demand dissipated, despite the company’s demonstrated efforts to boost its production capacity.... This led investors to abandon the company, and Generac’s stock price fell. Perhaps unsurprisingly, Lead Plaintiffs and others filed suit against the company and its executive officers, accusing them of securities fraud. **But misfortune does not necessarily equate with fraud.** Lead Plaintiffs’ overly long Consolidated Amended Complaint is heavy in the sheer number of allegations and in its conclusory accusations of fraud. But the pleading is light on specific plausible factual allegations supporting a claim of actual securities fraud against any of the three Defendants. (*Emphasis added.*)

Discussion

Judge Ludwig’s opinion is lengthy and detailed. It is worth reading in full and at length. Within the opinion, there are several commonsense propositions stated that are worth highlighting.

First, in an observation that I think should be a requisite guiding principle for any court being asked to consider fraud allegations in a COVID-related securities suit, Judge Ludwig observed that “no reasonable investor would have believed that the surge in demand from the pandemic would continue indefinitely.” This observation seems particularly apt in cases, like this one, brought against companies whose fortunes soared at the outset of the pandemic but whose results slumped as the pandemic evolved.

Second, in his concluding remarks, Judge Ludwig makes an observation that arguably is relevant to just about every securities class action lawsuit; that is, he said that “misfortune does not necessarily equate with fraud.” Merely because a company’s financial results have

declined, and/or merely because a company's share price has resultingly declined, does not mean that the federal securities laws were violated. This statement is a relevant observation with respect to the allegations in a surprising number of securities class action lawsuits.

Some readers may think that this discussion of a pandemic-related lawsuit basically is just old news. And it is true that so far in 2025, there have been no further pandemic-related securities class action lawsuits filed. But according to the *Stanford Law School Securities Class Action Clearinghouse* website (here), there were 16 pandemic-related securities suits filed in 2024, with another 11 filed in 2023.

Many of the cases filed in the last two years now have or soon will have motions to dismiss pending. In connection with the courts' consideration of these motions, Judge Ludwig's observations – and, in particular, his observation that “no reasonable investor would have believed that the surge in demand from the pandemic would continue indefinitely” – will in many instances be relevant, arguably highly relevant.

I would be remiss if I did not note here that Judge Ludwig's dismissal was without prejudice. The plaintiffs will now have the opportunity to amend their complaint to seek to address the Court's concerns. Their amended pleading may well be able to survive a renewed dismissal motion. However, given that the amended complaint that Judge Ludwig already considered was very much of a “kitchen sink” complaint, they may face an uphill battle in seeking to address the pleading shortcomings that Judge Ludwig identified.

One final observation about this case. Judge Ludwig was appointed to the federal district court bench by Donald Trump during his first term. I mention this because I have read a lot of speculation about what the implications may be from Trump's anticipated judicial appointments during his second term. Whatever the implications may be with respect to, say, civil rights or environmental law, the implications with respect to securities law cases, if Judge Ludwig's approach is any way representative, are likely to be favorable for corporate defendants (and, from a liability standpoint, for their insurers, as well).

NYC Funds Challenge Paramount-Skydance Deal, Seek Bidding War

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2025-0126](#) (Bloomberg Law subscription)

New York City's public pension funds are asking a judge to make Paramount Global's board consider an 11th-hour bid that could scuttle its \$8 billion merger with Skydance Media LLC.

The shareholder lawsuit unsealed Monday is the latest in a flurry of court activity concerning the transaction, which would hand Paramount's reins to producer David Ellison and backers led by his father, billionaire Oracle Corp. founder Larry Ellison. The filing comes about two weeks after a Paramount board committee said it was contractually bound to ignore a \$13.5 billion topping bid from an investor consortium called Project Rise Partners.

The "egregious" Skydance deal "will produce two winners," the court complaint says, referring to media mogul Shari Redstone—Paramount's controlling stockholder—and Skydance. "The losers? Paramount's public stockholders, who are being forced to to accept a transaction that the market has universally derided," it says.

The suit in Delaware's elite business court—where several related cases are already pending—is the latest hurdle to emerge as the transaction approaches the finish line. The deal is supposed to close in the first half of 2025, but President Donald Trump's administration is reportedly considering a fresh round of regulatory scrutiny over a "60 Minutes" interview with former Vice President Kamala Harris that the president has called misleading.

Trump is suing CBS, which is owned by Paramount, over the interview.

The court complaint seeks an injunction invalidating the deal terms that prevent Paramount's special transaction committee from considering the Project Rise bid. In the alternative, the suit requests an order temporarily blocking the transaction and directing the committee to extend the go-shop period or look seriously at an "efficient breach"—a repudiation of the merger agreement that would allegedly benefit Paramount's investors overall.

Paramount didn't respond to a request for comment on the new lawsuit.

The suit, targeting only members of the board's transaction committee, doesn't name Redstone as a defendant.

Of the other parallel suits in Delaware's Chancery Court, one directly challenges the transaction—requesting \$1.75 billion in damages—and two seek internal merger files from Paramount. Those lawsuits cite a law giving investors broad access to corporate records if they have preliminary but credible suspicions of self-dealing. Document disputes often reflect an attempt to drum up fiduciary breach claims for future litigation.

One of the records lawsuits was brought by a Rhode Island pension fund, the other by billionaire investor Mario Gabelli.

Vice Chancellor J. Travis Laster ruled in favor of Rhode Island on Jan. 29, although he said Paramount can hold off on turning over documents until a magistrate decides which files are relevant. Gabelli's suit is set for an April 1 trial.

Lucrative Leadership Fight

The shareholders seeking damages, meanwhile, have asked the court's chief judge, Chancellor Kathaleen St. J. McCormick, to name them lead plaintiffs—a request they renewed Feb. 4. The various pension funds seeking corporate records are only dragging out the process, they've argued.

The funds oppose that request, saying their investigations will lead to stronger claims that give public investors a better chance of recovering damages. At stake is the right to lead litigation that could potentially yield a lawyer payout worth hundreds of millions.

An investor lawsuit involving Dell Technologies Inc. recently yielded \$270 million in legal fees, while the shareholder attorneys who killed Elon Musk's \$56 billion Tesla Inc. pay package will take home \$345 million if they prevail on appeal.

The new court complaint, originally filed under seal Feb. 4, says the Skydance deal terms—particularly an indemnification clause that Redstone took almost a month to negotiate—make clear she “knew she was breaching her fiduciary duties” by “unilaterally appropriating for herself hundreds of millions of dollars in stockholder value.”

The New York funds are represented by Grant & Eisenhofer PA. Gabelli is represented by Farnan LLP and Entwistle & Cappucci LLP. The investors leading the suit for damages are represented by Berger Montague PC. Rhode Island is represented by Prickett, Jones & Elliott PA and Kessler Topaz Meltzer & Check LLP.

Other pension funds investigating the merger, including the California State Teachers' Retirement System, are represented by Bernstein Litowitz Berger & Grossmann LLP, Robbins Geller Rudman & Dowd LLP, Berman Tabacco, and Equity Litigation Group LLP.

In the related disputes, Paramount is represented by Morris, Nichols, Arsht & Tunnell LLP and Simpson Thacher & Bartlett LLP. Redstone is represented by Abrams & Bayliss LLP and Ropes & Gray LLP. David Ellison is represented by Ross Aronstam & Moritz LLP. Other Paramount board members are represented by Richards, Layton & Finger PA and Cravath, Swaine & Moore LLP.

The case is N.Y. City Emp. Ret. Sys. v. Byrne , Del. Ch., No. 2025-0126, complaint unsealed 2/10/25 .

—With assistance from Jef Feeley

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editors responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com; Laura D. Francis at lfrancis@bloombergindustry.com

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The Top 100 U.S. Class Action Settlements of All Time as of December 2024

 issgovernance.com/library/the-top-100-us-class-action-settlements-of-all-time-as-of-december-2024

February 4, 2025



FEBRUARY 05, 2024

Extract: Total settlement dollars in U.S. securities-related class actions where final approval was granted in the year 2024 were down from 2023. Nonetheless, these same settlements were still an important source of recovery for investors. Indeed, in the U.S. alone, \$4.75 billion was secured in securities-related class action settlements for eligible class members in 2024. While this figure was down 18% from 2023, this fact says more about the strength of 2023 opposed to any weakness of 2024. Significantly, ISS Securities Class Action Services (“ISS SCAS”) previously hailed 2023 as a “banner year,” because there were two billion-dollar settlements that year. So, ISS SCAS believes that 2024 was still a robust year for recoveries.

As a testament to the strength of 2024, ISS SCAS verified 136 approved monetary securities-related class action settlements in the United States in 2023, a 7% increase.

Author:

Donald Grunewald

Director of Litigation Services

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Olaplex to Face IPO Documents Fraud Claims Over Toxic Ingredient

By Bernie Pazanowski

- Olaplex product's ingredient banned by EU when documents filed
- IPO documents presented hypothetical risks instead of facts

Olaplex Holdings Inc. must face claims brought by an investor alleging its initial public offering documents didn't disclose that the European Union banned an ingredient in one of its hair care products, a federal court said.

Olaplex's documents were misleading because the company presented the possibility of laws prohibiting the use of certain ingredients in its products and their potential harm as purely hypothetical, rather than describing the facts at the time, Judge Steven Victor Wilson said Feb. 7 for the US District Court for the Central District of California.

The luxury haircare company describes its products as "non-toxic" and "cruelty-free." But one of its products, No. 3 Hair Perfector, was banned in the EU because it contained lilial, which poses a risk to reproduction in humans. Lilial is a fragrance enhancer that Olaplex then removed from its product, but it kept using its inventory of the old labels until at least January 2022, the court said.

Olaplex's offering documents released in September 2021 said that laws and regulations could prohibit the use of certain ingredients, and reformulations could damage its reputation. The documents also said that Olaplex's large social media presence drove its market reputation but could also be its downfall if it received negative publicity. The documents additionally touted Olaplex's focus on producing "clean" products.

Olaplex's stock initially sold at \$21 a share, but when a TikTok user with a larger following spread the word about the EU ban, the price fell. Within a few months, it was worth \$5.75 a share. Investor Leslie Lilien and others sued Olaplex, making claims against several individuals and the company, including a claim that Olaplex made false statements on its offering documents, in violation of Section 11 of the Securities Act of 1933.

The statements about the potential impact of laws and regulations were actionable under Section 11, because the EU ban had already occurred when Olaplex filed its offering documents, Wilson said. A reasonable investor could have interpreted hypothetical disclosures as being mere conjecture, he said.

The company's statements regarding the risks that an Olaplex product could be found unsafe were also actionable, Wilson said. It was "certainly misleading for Olaplex to warn of the hypothetical risks that its products could be found unsafe while not disclosing that one of its products was in fact found to be unsafe," he said.

The statements regarding the risk of reputational damage, product liability suits, and declining sales weren't actionable, because, at the time of the IPO, none of them had come to fruition, he said.

Olaplex's statements regarding its strong online reputation and competitive position were akin to puffery and weren't actionable, Wilson said.

Olaplex also didn't violate Section 11 by touting its "clean" products, Wilson said. Those statements were either aspirational, subjective, or didn't provide concrete facts, he said.

Lilien sufficiently alleged that "failure to disclose the EU ban in Olaplex's registration statements both rendered certain risk disclosures misleading and violated applicable regulations," Wilson said.

Pomerantz LLP represented Lilien. Ropes & Gray LLP represented Olaplex.

The case is *Lilien v. Olaplex Holdings Inc.*, 2025 BL 41015, C.D. Cal., No. 2:22-cv-08395-SVW-SK, 2/7/25.

To contact the reporter on this story: Bernie Pazanowski in Washington at bpazanowski@bloombergindustry.com

To contact the editor responsible for this story: Blair Chavis at bchavis@bloombergindustry.com

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Class Action

Feb. 11, 2025, 10:08 AM PST

Xponential Fitness Leaders Sued Over Franchise Failures, Losses

By [Martina Barash](#)

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [No. 8:25-cv-00258](#) (Bloomberg Law subscription)

Xponential Fitness Inc. executives and directors made blatantly false statements about the success of franchised studios and pressured franchisees to keep locations open, an investor alleges on behalf of the company.

Former CEO Anthony Geisler “personally monitored franchisee Facebook groups to track and suppress any signs of dissent,” Stefanie Nelson says. She filed the shareholder derivative suit Monday in the US District Court for the Central District of California.

After Fuzzy Panda Research published a short-seller report in June 2023, Xponential “was forced to take charges of \$13.8 million to dispose of failing studios and expected additional charges of up to \$27 million in 2024,” Nelson says.

Investigations by federal prosecutors, the Securities and Exchange Commission, and state legislators followed, Nelson says. The company also faces potential liability from lawsuits brought by franchisees and from a consolidated securities class action, she says.

Plaintiffs in the investor class suit allege the revelation of misrepresentations, including in a secondary public offering, caused stock selloffs of 37%, 26%, and 31%.



Nelson brings claims for breach of fiduciary duties, securities law violations, contribution, unjust enrichment, and insider selling. She seeks damages, disgorgement, and injunctions.

Xponential didn't immediately respond to an email seeking comment on behalf of the company and the individual defendants.

Bragar Eigel & Squire PC represents Nelson.

The case is Nelson v. Geisler , C.D. Cal., No. 8:25-cv-00258, complaint 2/10/25 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

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

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9th Circuit reverses course, dismisses shareholder lawsuit against Slack

[dailyjournal.com/articles/383506-9th-circuit-reverses-course-dismisses-shareholder-lawsuit-against-slack](https://www.dailyjournal.com/articles/383506-9th-circuit-reverses-course-dismisses-shareholder-lawsuit-against-slack)

Securities,

Class Action,

9th U.S. Circuit Court of Appeals

Feb. 11, 2025

The ruling follows a U.S. Supreme Court decision that found plaintiffs must prove they purchased shares traceable to the allegedly misleading registration statement. The decision is a major win for direct listings, a growing alternative to traditional IPOs.



9th Circuit Judge Eric D. Miller

A 9th U.S. Circuit Court of Appeals panel reversed itself Monday in the wake of a U.S. Supreme Court decision and directed a San Francisco judge to dismiss a shareholder lawsuit against Slack Technologies Inc. accusing the company of making a misleading registration statement in its direct listing.

The panel followed Justice Neil M. Gorsuch's decision for a unanimous Supreme Court vacating the panel's previous decision allowing plaintiff Fiyyaz Pirani's putative class action against the company to go forward.

The ruling is good news for direct listings, which have become a popular way for companies to go public since the method was first introduced in 2018. They allow employees and early investors to sell their registered and unregistered shares on a public stock exchange without a lockup period required after a traditional initial public offering.

9th Circuit Judge Eric D. Miller, who dissented from the original 9th Circuit ruling, wrote Monday's decision, which cited Gorsuch's opinion saying that securities law "requires a plaintiff to plead and prove that he purchased shares traceable to the allegedly defective registration statement." *Slack Technologies LLC v. Pirani*, 22-200 (S. Ct., filed Aug. 31, 2022).

Miller wrote that Pirani had not done so.

"The [Supreme] Court held that section 11 [of the Securities Act of 1933] requires plaintiffs to show that the securities they purchased were registered under a materially misleading registration statement," he wrote.

"Because the plaintiff previously conceded that he cannot make such a showing, and because we conclude that section 12(a)(2) requires the same showing, all of the claims in this case fail," Miller added. *Pirani v. Slack Technologies Inc. et al.*, 2025 DJDAR 951 (9th Circ., filed July 23, 2020).

Pirani sued in the Northern District of California, arguing that Slack filed a false and misleading registration statement and prospectus by failing to mention its revenue growth was declining and marketing expenses increasing due to competition from Microsoft Teams before it went public in 2019.

The stock dropped after a bad earnings report later in the year. Pirani and other plaintiffs sued.

Senior U.S. District Judge Susan Y. Illston of San Francisco rejected Slack's motion to dismiss the class action on the grounds that Pirani's purchased shares could not be traced to the allegedly defective registration statement in violation of Section 11 and 12.

The 9th Circuit panel, in a decision written by U.S. Court of International Trade Judge Jane A. Restani, affirmed Illston's decision - leading to the Supreme Court appeal by Slack.

Restani and Senior 9th Circuit Judge Sidney R. Thomas concurred with Miller's Monday opinion.

After Gorsuch's ruling, the case returned to the panel and the question was whether the case could survive.

Attorneys for Pirani - in a brief written by Kevin K. Russell, a partner with Goldstein, Russell & Woofler LLC - argued that he "has adequately pleaded he purchased at least some registered shares and could certainly do so with even greater clarity in an amended complaint."

But attorneys with Gibson, Dunn & Crutcher LLP, led by Palo Alto partner Michael D. Celio, successfully countered that Pirani "conceded repeatedly that he cannot trace his Slack shares to the allegedly misleading registration statement."

Celio declined comment and wrote that Slack Technologies also would not comment.

Russell and Pirani's other attorneys with Bragar Eagel and Squire PC in San Francisco could not be reached by press time.

#383506

Craig Anderson

Daily Journal Staff Writer
craig_anderson@dailyjournal.com

Securities Law Prof Blog

 lawprofessors.typepad.com/securities/2025/02/new-securities-law-articles-in-print.html

Monday, February 10, 2025

New Securities Law Articles in Print

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

Annie Brett, *Rethinking Environmental Disclosure*, 112 Cal. L. Rev. 1535 (2024).

Onnig H. Dombalagian, *Are Crypto Exchanges the Exchange Act's Trojan Horse?*, 21 Berkeley Bus. L.J. 327 (2024).

John Madigan, Note, *Reconsidering Scierter with Social Media: Adapting Rule 10b-5 in the Age of Elon Musk Tweets*, 18 Brook. J. Corp. Fin. & Com. L. 787 (2024).

Austin S. McCleery, Note, *"Sugar, We're Goin Down"?: Major Questions Doctrine and the Securities and Exchange Commission's Climate Disclosure Rule*, 35 Colo. Env't L. Rev. 355 (2024).

Minor Myers, *SPACs and the Corporate Foundations of Capital Market Innovation*, 48 Del. J. Corp. L. 19 (2024).

Grant Newman, Note, *Accounting for the Unaccountable: Does the Holding Foreign Companies Accountable Act Deter Chinese Companies?*, 33 Minn. J. Int'l L. 273 (2024).

Jennifer M. Pacella, *The Conundrum of Compliance Officer Liability*, 21 Berkeley Bus. L.J. 249 (2024).

Mary Grace Thurmon, *Making Money Green: A Proposal for a Sustainable Stock Exchange*, 48 Wm. & Mary Env't L. & Pol'y Rev. 265 (2024).

Sarah J. Williams, *Regulating Congressional Insider Trading: The Rotten Egg Approach*, 45 Cardozo L. Rev. 1399 (2024).

Delaware TripAdvisor Ruling Puts Governance in Investors' Hands

- *Law professors analyze implications for good governance*
- *Whether Nevada sees influx will depend on investor priorities*

The Delaware Supreme Court issued a landmark ruling last week in a case involving TripAdvisor Inc.'s leadership's decision to reincorporate the company from Delaware to Nevada's more permissive legal system. TripAdvisor's victory signals more leeway for controllers to game differences in state corporate laws, putting the onus on investors to reassess their appetite for risk related to different governance frameworks.

The opinion comes against a backdrop of several large public controlled companies—such as Tesla Inc., Trade Desk Inc., DropBox Inc., and Meta Platforms Inc.—considering or making moves from Delaware to other states, including Nevada. This threat to Delaware's prominence has been dubbed "DExit."

The Delaware Supreme Court took judges out of the DExit debate. The opinion in the TripAdvisor case, *Maffei v. Palkon*, sidestepped whether controllers and directors face a conflict of interest when choosing to move their companies to Nevada based on a hypothetical future transaction that would face judicial review in Delaware but not in Nevada.

The ruling leaves open a path for judicial review if reincorporation is approved while a conflicted deal is pending. It also said allowing controllers and boards of directors to more freely change the state of corporate domicile "furtheres the goals of comity by our declining to engage in a cost-benefit analysis" of the Delaware and Nevada corporate governance frameworks. The court thus avoided having to say what many take as a given—that Delaware's corporate law provides better protection for investors than Nevada's.

Although the opinion is narrowly written, the upshot is that every corporate controller in Delaware can depart the state for the accommodating confines of Nevada's corporate law. With the Delaware judiciary now generally unable to restrict such opportunism, investors will have to decide how much they value good corporate governance and a judicial system that deters fiduciaries from exercising corporate power self-servingly.

Delaware and Nevada deliberately pursue different corporate policy objectives. Delaware has long led in corporate governance, balancing between facilitating legitimate business and protecting investors from abuse by overreaching fiduciaries.

The business judgment rule, a ubiquitous feature of virtually all corporate law systems, insulates well-intentioned corporate managers from judicial scrutiny. Delaware, like many jurisdictions (but not Nevada), balances deference to managers with protection for investors by permitting enhanced judicial scrutiny when fiduciaries act under an actual or situational conflict.

In the controller context, Delaware has achieved that balance by permitting judicial review of conflicted decisions for fairness. Despite the prospect of a judicially sponsored “kicking of the tires” in conflict situations, Delaware historically imposed personal liability only when the judicial review process uncovered egregious, immoral, and disloyal behavior.

To compete with Delaware, Nevada made a much different policy choice. Because the decision to select a place of incorporation requires director approval, Nevada adopted a universal business judgment rule, effectively prohibiting judicial review of business decisions based solely on the existence of a conflict and potential fiduciary misconduct.

Nevada’s corporate law prevents a stockholder from getting discovery and a chance to prove their claims unless they can credibly plead “intentional misconduct, fraud or knowing violation of law.” Investors filing suit in Nevada must overcome this hurdle without the benefit of prior access to internal corporate documents—a right that Section 220 of Delaware’s corporate law statute provides.

While investors in controlled companies have an established path in Delaware to protect themselves against egregious abuse by conflicted controllers, Nevada provides narrow, if any, prospect of holding misbehaving controllers accountable.

The business judgment rule is grounded in the realities of how the business world operates. Most, if not all, corporate fiduciaries exercise their power properly and for their stockholders’ benefit. But there are some who wield power over investor capital improperly. Such individuals surely would prefer to sidestep a judicial system willing to ferret out sophisticated corporate wrongdoing.

Investors must decide how much to risk relying on Nevada’s corporate laws. The Delaware Supreme Court’s decision to let controllers freely move their companies to Nevada tasks investors with deciding whether and how much they are willing to entrust their money without the robust fiduciary enforcement mechanisms they take for granted in Delaware.

If investors believe judicial oversight helps achieve better governance, which in turn leads to better financial results, they will be more cautious when investing in Nevada companies and more willing to rely on Delaware’s judicial system to continue balancing investor protection with deference to good-faith business activities.

Academic research is mixed on whether investors differentiate based on competing corporate law systems. Between the race-to-the-bottom versus race-to-the-top theories of how corporate law regimes develop and evolve, it has long seemed that Delaware prevailed by achieving the optimal balance between the interests of directors and those of investors.

Studies of market valuations in the 1980s and 1990s showed that investors assigned a premium to Delaware companies over those incorporated in Nevada. This premium was often attributed to the perception that Delaware provided meaningful governance protections while reducing legal uncertainty for business planners.

But more recent academic studies suggest that investors either no longer place a premium on good governance or don't see a meaningful difference between Delaware and Nevada law. This shift may be driven by the increasing nationalization of corporate governance standards, federal interventions such as the Sarbanes-Oxley Act and Dodd-Frank Act, and the growing influence of institutional investors who demand governance reforms regardless of incorporation jurisdiction.

Because few major public corporations incorporated in Nevada until recently, it is possible that the largest, most diversified, and sophisticated institutional investors didn't have strong enough reasons to parse the legal differences among competing corporate jurisdictions when making investment decisions. With larger controlled companies now making the move to Nevada, that rational indifference may have to change.

The Delaware Supreme Court's TripAdvisor ruling may keep judges out of the reincorporation race. But it should motivate market-leading institutional investors to assess how much they value judicial protection of fiduciary duties and enmesh those judgments into their investment policies and decisions.

The market's reaction to the growing DExit trend, and the prospect of holding minority investments subject to the whim of controllers enjoying the permissiveness of Nevada's corporate law, may determine whether Delaware maintains its prominence—or whether Nevada enjoys an influx of controlled companies whose leadership prefers to avoid judicial oversight.

The case is *Maffei v. Palkon*, Del., No. 125, 2024, decided 2/4/25.

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Author Information

Mark Lebovitch is lecturer in law at Columbia Law School.

Anat Alon-Beck is associate professor of law at Case Western Reserve University School of Law.

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Feb. 10, 2025, 9:55 AM PST

Delaware DOJ Appellate Lawyer Named Chancery Court Magistrate

By Jennifer Kay

A Delaware Department of Justice appellate attorney has been named as a new Magistrate in Chancery, filling a vacancy left by Vice Chancellor Bonnie W. David's promotion to the top bench in Chancery Court.

David Hume IV will serve as one of five judicial officers appointed to help manage the business court's heavy workload. He has "extensive experience handling complex, sensitive, and often high-profile matters," Chancellor Kathaleen St. Jude McCormick said in a statement Monday. "He has labored long to improve the administration of justice for Delawareans, and has done so at an extremely sophisticated level."

- Hume spent over 25 years with Delaware's justice department, serving as its head of felony screening, sex crimes, and felony trial units in Sussex County before becoming the county's chief prosecutor in 2016. He joined the justice department's appellate unit in 2023 while also serving as its chief legal ethics officer.
- The chancellor appoints Magistrates in Chancery to manage a caseload involving trusts, estates, and guardianships, as well as corporate and contract disputes. Until July 2023, they were known as "Masters in Chancery."
- David succeeded Vice Chancellor Sam Glasscock III, who retired last month. Both Hume and David will be based in the Chancery Courthouse in Georgetown, Del.

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

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

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Hertz Starts Talks With Bondholders Over Make-Whole Payout Suit

By Dorothy Ma

- Firm had previously requested a Supreme Court review
- Both sides made proposals, entered into confidential talks

Hertz Corp. has kicked off negotiations to settle litigation surrounding a make-whole payout of over \$270 million that has been demanded by some bondholders, the company said on Monday.

Both sides have made settlement proposals since last week, according to a regulatory filing. The holders have entered into a confidentiality agreement and no agreement has been reached yet.

The car rental company, which has over \$6 billion of debt, has been mired in legal battles with bondholders following its controversial bankruptcy, during which it became solvent. Because of the unusual situation, the company repaid all creditors in full and handed stockholders more than \$1 billion.

Investors holding Hertz bonds demanded interest payments and a fee for being paid back early as part of the bankruptcy. After years of litigation, an appeals court ruled last September that because the company was solvent, it needed to make bondholders whole.

The company's willingness to enter talks marks a shift from its previous public position. It had requested a Supreme Court review after the ruling. And at a December bankruptcy court hearing, a Hertz lawyer said the company does not have to pay the bondholders until all appeals have run out.

Hertz and bondholders also disagreed on the exact amounts owed for the make-whole premiums and post-petition interest, the lawyer said at the time. The bondholders initially asked for over \$270 million. With interest accruing on that sum, the payment could grow to over \$300 million.

"For now, the court will turn to an evidentiary hearing to determine" the amount, **Negisa Balluku**, a Bloomberg Intelligence analyst, wrote before the new settlement talks began. The company's request for Supreme Court review may not get resolved until at least May, she wrote.

To contact the reporter on this story:

Dorothy Ma in New York at dma143@bloomberg.net

Charter Communications Ex-Workers Sue Over 401(k) Forfeiture Use

By Jacklyn Wille

- **COURT:** E.D. Mo.
- **TRACK DOCKET:** [No. 4:25-cv-00157](#) (Bloomberg Law subscription)

Charter Communications Inc. mismanages its \$7.8 billion retirement plan by using the money departing workers forfeit to satisfy its obligation to contribute to the plan, three former employees said in a proposed class complaint.

The telecommunications company's 401(k) plan document explicitly required that forfeitures be used first to pay for administrative expenses, and only earmarked for employer contributions after all administrative expenses were paid, the workers said. Despite this requirement, plan participants were charged more than \$31 million in administrative expenses between 2020 and 2023—a period during which the company put more than \$141 million in forfeitures toward its own contributions, according to the complaint.

"Charter disloyally and imprudently benefitted itself by continuously prioritizing the use of Plan forfeiture assets to reduce its required employer matching contribution obligations rather than using those Plan assets to pay for administrative expenses charged to Plan participant accounts," the workers said in the complaint.

The lawsuit is among a spate of recent cases centering on the portion of an employee's 401(k) account that comes from contributions made by their employer. Unlike salary contributions, which are immediately fully vested, employer contributions can be forfeited in whole or in part when a worker leaves the company after a few months or years.

The lawsuits say companies violate the Employee Retirement Income Security Act when they opt to use forfeitures to reduce the amounts they'd otherwise have to contribute to their plans instead of reducing workers' expenses. Cases against Qualcomm Inc. and Intuit Inc. have advanced, while claims against HP Inc., Honeywell International Inc., BAE Systems Inc., Thermo Fisher Scientific Inc., and Clorox Co. were rejected.

Charter amended its plan document in January to direct forfeitures toward employer contributions, according to the lawsuit, which was filed Feb. 7 in the US District Court for the Eastern District of Missouri.

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

Schlichter Bogard LLC represents the workers.

The case is O'Donnell v. Charter Commc'ns, Inc. , E.D. Mo., No. 4:25-cv-00157, complaint 2/7/25 .

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

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

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Northern Trust's \$2.5 Million Deal Over AutoZone 401(k) Approved

By Jacklyn Wille

- Case involves retirement plan investment allocation service
- Autozone, workers awaiting decision after 2023 trial

Northern Trust Corp. finalized a \$2.5 million class settlement with AutoZone Inc. workers challenging the fees and investment allocation services in their 401(k) plan.

Judge Mark S. Norris granted final approval to the deal and awarded class counsel nearly \$1.3 million in fees and expenses in a Feb. 7 order.

The settlement resolves claims against Northern Trust, an investment adviser for the 401(k) plan. It doesn't affect the workers' pending claims against automotive parts retailer AutoZone, which went to trial in October 2023. The settlement also blocks AutoZone and Northern Trust from bringing claims against one another in connection with the case.

The lawsuit says AutoZone breached its duties under the Employee Retirement Income Security Act by filling its \$550 million 401(k) plan with expensive mutual funds and allowing Prudential Financial Inc.'s GoalMaker investment allocation service to steer money toward high-cost investments. The workers also brought claims against Northern Trust in its capacity as an investment adviser.

Norris, who sits in the US District Court for the Western District of Tennessee, hasn't issued a post-trial decision on the workers' claims against AutoZone.

Northern Trust is represented by King & Spalding LLP and Harris Shelton. AutoZone is represented by Morgan, Lewis & Bockius LLP and Bass, Berry & Sims PLC. The workers are represented by James White IV and Lange Clark of Birmingham, Ala., along with Wiggins Childs Pantazis Fisher & Goldfarb LLC.

The case is *Iannone v. AutoZone, Inc.*, W.D. Tenn., No. 2:19-cv-02779, 2/7/25 .

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

To contact the editor responsible for this story: Andrea Vittorio at avittorio@bloombergindustry.com

Adding Some New Pages to the Class Action Defense Playbook, With an Eye Toward Trial

 [law.com/litigationdaily/2025/02/11/adding-some-new-pages-to-the-class-action-defense-playbook-with-an-eye-toward-trial](https://www.law.com/litigationdaily/2025/02/11/adding-some-new-pages-to-the-class-action-defense-playbook-with-an-eye-toward-trial)

Ross Todd

My former colleague Jenna Greene shouted out **Crowell & Moring's** annual Litigation Forecast in a column a half-decade ago as “one of the best” law firm publications out there. It's been on my must-read list ever since. The forecast reads like a magazine and typically features conversational, forward-looking analysis of trends the firm's lawyers see playing out in their cases.

In this year's cover story, **Sarah Gilbert** and **Jennifer Romano** outline an approach to class action strategy heavily influenced by Romano's experience taking two class actions to trial.

They start with the typical defense playbook. Allow me to paraphrase. Defense counsel typically files an early motion to dismiss aiming to knock out or narrow the claims. While the motion is pending, they might see if a settlement can be reached with the named plaintiff. They typically engage in limited discovery focused on scuttling class certification. If, heaven forbid, a class is certified, they file a longshot Rule 23(f) appeal taking a second swing. Somewhere in there, they file summary judgment motions. And if the defendant is still facing a certified class after all that, they're probably sitting down to talk settlement.

Litigation Daily sat down with Gilbert and Romano last week to talk shop about how they think the playbook should be augmented to tell the defendant's story better.

The following has been edited for length and clarity.

Lit Daily: What are the shortcomings of just pulling that typical playbook out?

Sarah Gilbert: I think there are several. It can be very short-sighted. The way that cases often get litigated, it's sometimes not until the end that you really start developing what we call the order of proof—where you go through all of the elements and all of your defenses and line up what evidence you have at that point to go to trial. It might be a little bit too late to find out that you don't have the documents or testimony that you really wish you had developed earlier in the case.

You don't have to do a full order of proof at the outset of the case, but it's really important to think through what your defenses are, what documents and testimony you're going to need to support those defenses or to undermine the plaintiff's claims. Then you can build your early-case discovery strategy around that. That may mean being much more aggressive. The typical instinct—and understandable instinct—from defendants who are getting sued

over and over again is that they don't want to do any more discovery—which is expensive and very disruptive—than they have to. But if you don't go through that strategic exercise, it could ultimately end up costing more for the company.

Even if you're ultimately positioning for settlement, the discovery that has been developed is really what you're talking about in settlement discussions—how strong the record is in favor of your client. We aren't saying you should take every case to trial. We're saying you should think about it at the outset, because whether you go to trial or not, you're going to get a better result for your client in most instances.

Jennifer Romano: I'll just add a couple of things. I completely agree with what Sarah just said. The first thing I want to make clear is we're not saying throw out the typical playbook; you probably are still going to file a motion to dismiss. You are absolutely going to oppose class certification. You likely will want to consider settlement on an individual basis early or settlement on a class-wide basis after class certification. You're going to want to assess all of those things. Our suggestion is that, in addition to that, you should be planning for trial.

I'll add one more thing on top of what Sarah just said: identify the witnesses who are going to tell your client's story. Whether it's on the merits or on the individualized issues, you want to identify the actual people who will be able to do that and have them do it in their depositions, and essentially prepare for that trial testimony really early through discovery as well.

You guys use the term “industrialized” to talk about the approach taken by the plaintiff bar. You say: “It’s not unusual to see a given firm file the same type of case against different companies dozens of times or more, or file serial cases against the same company based on similar theories.” Are you saying it’s necessary to respond to this industrialized approach by the plaintiff’s bar with an individual narrative approach in dealing with the underlying claims in some cases?

Romano: I would say all cases need an individualized approach in the response. They may look strikingly similar if it's a similar portfolio of cases. But the exercise of developing that individualized approach is very important, in my view.

Gilbert: I agree. You may go through this assessment that we've been talking about and say, “All right, this is, for whatever reason, not one where it makes sense to change the standard playbook.” And that's fine. We're not suggesting throwing the playbook out. But you need to go through this strategic analysis at the outset. Even when the cases are repetitive, there are always differences—whether it's the forum, whether it's the named plaintiff, whether there's some difference in the underlying facts that could change the outcome.

Romano: The amount of exposure and the amount at risk can vary significantly from class action to class action. That is, of course, something that you and the client will take into account when assessing how much to invest in the defense. Of course, that also means it's

very important to figure out how much could be at issue and what the risk and exposure are early on to inform the decisions about what you're going to invest in defense.

How much consideration are you giving upfront to who sits for deposition for your client?

Gilbert: For me, I give it quite a bit, because there are a lot of decisions that come early. For example, who's going to verify an interrogatory? You want to make sure that the person who does that is someone that you would want to be deposed. Who are your custodians going to be? You have to follow the rules in identifying custodians, but you can be strategic about everything. A lot of our clients are companies that we represent more than once. We start to get to know the business. And one of the real benefits of that is that you start to know who the really strong witnesses are. But it is certainly something that, for me, if I know this is going to be a case where there's more investment, it's something that comes at the very beginning.

Romano: In almost every case that we are handling, the other side wants to depose a corporate designee, and they identify the various topics that the person needs to be prepared to testify about. The decision of who you put up as the corporate designee is very important—and also the decision of whether you put up multiple people because sometimes the range of topics can spread significantly, so putting up multiple people to address specific topics is the better way to go. Of course, that's all based on what the story is, what the narrative is, what is going to be important to be shared in these depositions about how the company conducts itself.

Jennifer, what about your trial experience led you to this approach? What did you learn from trying these cases that led you to rethink the playbook to a certain extent?

Romano: Both of the cases that I tried were litigated over several years. There are a lot of things that we did later in the case, before trial, that I would now recommend we do much earlier. Can you still get it done later? Yes, of course you can. But I do think you create more efficiencies for the client. Your witnesses can be more prepared if they have been deposed before.

There's one example we have in the article about identifying folks to be individual witnesses at trial who are similarly situated to class members but who are not part of the class. And the example in the article is where there is an allegation that something wasn't disclosed properly. So some people were confused. The people in the class were those people who made a decision that they thought was disadvantageous, claiming they didn't understand. We were able to find some individuals who had understood, who weren't disadvantaged. So they weren't part of the class, but they had been exposed to exactly the same information as those folks in the class and what they were complaining about. So we identified a few people

at trial. It was very short testimony they gave to explain what they saw, what they understood and why they made the more advantageous decisions. It was incredibly effective. *Incredibly effective.*

I think that the earlier you're doing things like that, you increase the chance that you will find people just like that. We found them. They did it. It was excellent. And I would look much earlier to do that now, because those types of people are hard to find. So that is just one example of something that happened at that trial. And it was also a stunning experience for a second-year associate to be able to handle their testimony at trial. They were little small witnesses who turned out to be truly impactful.

Gilbert: One thing I wanted to emphasize in thinking about things that you can but don't often do earlier in the case is retaining your experts. If you know that this case is big enough and contentious enough that you're likely to get to the expert phase, it's helpful just to have them retained—one, so that nobody else can retain them. But also, from the perspective of what we're talking about, front-loading some of that expense and work can actually be extremely helpful in discovery. Your experts can look at what you're agreeing to produce—in terms of your own data, what you're asking for in terms of data from other parties. Because you certainly don't want to get your experts engaged down the road and have them say, “We can't do this economic analysis the way we want to do it, because you guys were too aggressive in pushing back on discovery requests.”

Romano: Expert expenses can be really sizable in the class action. If you are able to get them focused early on, in terms of what their analysis will be, and they're helping you get focused on discovery and asking for the right things, it avoids spinning wheels and a lot of extra expenses on things that aren't ultimately used at trial.

Judge grants preliminary approval of \$95 million settlement in Apple's Siri eavesdropping suit

 [courthousenews.com/judge-grants-preliminary-approval-of-95-million-settlement-in-apples-siri-eavesdropping-suit](https://www.courthousenews.com/judge-grants-preliminary-approval-of-95-million-settlement-in-apples-siri-eavesdropping-suit)

Michael Gennaro

This image provided by Apple shows a display of the new iPhones equipped with technology for use with faster new 5G wireless networks that Apple unveiled Tuesday, Oct. 13, 2020. (Apple via AP)

OAKLAND, Calif. (CN) — Roughly a month after Apple agreed to pay \$95 million to settle a class action accusing it of eavesdropping on users who accidentally activated the virtual assistant Siri on their iPhones and other Apple devices, a federal judge preliminarily approved the settlement Monday morning in an 11-page order.

When Apple agreed to settle on Dec. 31, it did not acknowledge that it was guilty of any wrongdoing.

The preliminary approval moves the case ever closer to the end of more than five years of litigation. As part of the settlement agreement, Apple must permanently delete any relevant individual audio recordings the company collected before October 2019 within six months of its approval. A final approval hearing for the settlement is set for Aug. 1 in Senior U.S. District Judge Jeffrey S. White's Oakland courtroom. White is a George W. Bush appointee.

The plaintiffs claimed in their 2019 complaint that Apple violated their privacy by recording their private conversations through the Siri voice assistant without being prompted via its typical voice command of "Hey, Siri!" or through a button press.

The plaintiffs also claimed they were not aware that Apple was disclosing the recorded conversations to human third-party contractors to review them to improve Siri and were also unaware that Apple shared the data with advertisers.

Around the time the lawsuit was filed, The Guardian reported the conversations being reviewed included confidential medical information, drug deals, and recordings of couples having sex. Apple apologized for "not living up to our high ideals" in 2019.

As part of the settlement, tens of millions of consumers who owned iPhones, iPads, and other Apple devices from Sept. 17, 2014, through the end of 2024 are eligible to file claims.

Each consumer could receive up to \$20 per Siri-enabled device covered by the settlement, although the payment may vary based on the amount of claims submitted. Consumers will be limited to five devices for their claims.

Of the total \$95 million, the case's attorneys may seek up to \$28.6 million to cover their fees and other costs. The case's lead plaintiffs could also earn up to \$10,000 each as compensation for their time and effort serving as class representatives.

As part of the preliminary approval of the settlement, White appointed Angeion Group to serve as the settlement administrator. Angeion has helped settle consumer litigation against Apple in the past.

The consumer class will be notified by email, postcard, and full class documents. Apple has 30 days to provide Angeion with the names and contact information of all members of the settlement class for whom it has records.

Consumers looking to submit a claim must do so by submitting a form online or by mail within 135 days.

If the settlement falls through for any reason, the settlement agreement will be null and void, and the plaintiffs and Apple will resume their battle from where they left off before agreeing to settle the claims.

Counsel for the plaintiffs did not respond to requests for comment. Counsel for Apple and Apple media relations did not respond to requests for comment.

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Hawaii Supreme Court gives green light to \$4 billion Maui fire settlement

 [courthousenews.com/hawaii-supreme-court-gives-green-light-to-4-billion-maui-fire-settlement](https://www.courthousenews.com/hawaii-supreme-court-gives-green-light-to-4-billion-maui-fire-settlement)

Michael Gennaro, Candace Cheung

The settlement had been held up by insurance companies who had hoped to go after those being held liable for the massive blaze to recoup some of the insurance payments made to Maui homeowners and businesses.

FILE - A general view shows the aftermath of a wildfire in Lahaina, Hawaii, on Aug. 17, 2023. (AP Photo/Jae C. Hong, File)

(CN) — The Hawaii Supreme Court cleared the way Monday morning for the finalizing of a \$4 billion settlement meant to resolve hundreds of lawsuits filed in the wake of the deadly Lahaina wildfires, despite protests from insurers who attempted to recoup property damage payouts they've made.

In an unanimous decision issued just four days after justices heard arguments, the state's highest court determined insurance companies cannot block settlement proceedings and sent the issue back to Maui Circuit Court to finalize payments to victims and next of kin of the fires that destroyed the town of Lahaina on Maui and killed over 100 people and left thousands more displaced in 2023.

Maui Circuit Court Judge Peter Cahill had asked the court to resolve questions over if casualty and property insurers should be limited in their ability to pursue reimbursements and independent legal actions against third-parties held liable for damages.

Cahill had asked the high court to determine if 2017's *Yukumoto v. Tawarahara* — where the Hawaii Supreme Court concluded that health insurers do not have broad, unrestricted subrogation rights against third-party tortfeasors responsible for injuring their insureds and their rights are confined to those established by statute — extended to casualty and property insurers.

Citing state laws controlling insurance reimbursement, the justices that *Yukomoto* did apply and wrote that "the lien provided for under HRS § 663-10(a) is the exclusive remedy for a property and casualty insurer to recover claims paid for damages caused by a third-party tortfeasor in the context of a tort settlement between an insured and the tortfeasor."

Fire victims, along with the state and other defendants of the lawsuits, including Hawaiian Electric Company — whose equipment widely is accused of causing the fire — originally agreed to the settlement in August.

Proceedings were stalled after a group of over 100 insurers who covered harmed homeowners and businesses attempted to sue the electric utility and other defendants — like the state and Maui County, along with landowners like Kamehameha Schools and telecommunications companies, who are accused of neglecting the proliferation of the quick-burning brush that contributed to the blaze — to recoup some of the nearly \$2.3 billion insurers have paid out, a process known as subrogation.

Counsel for the insurance companies said at last week's hearing that they were not trying to block the settlement, but were merely taking issue with the plaintiffs settling the insurers' claims as a part of their settlement deal.

Subrogating insurers, the insurance companies argued, have rights that cannot be dismissed or negotiated away by other people or other parties.

Responding to another question from Cahill, the high court also determined that the "made whole" doctrine in Hawaii laws does not apply to the settlement. The doctrine establishes that states an insurer cannot seek reimbursement or subrogation from an insured's recovery from a third party unless the insured has been fully compensated for their losses.

The Supreme Court's decision figures to have massive ripple effects for Hawaii — the victory for the plaintiffs could come with consequences for the Hawaii insurance market, which is reeling from ongoing risks related to climate change.

If the state Supreme Court had sided with the insurers, Hawaiian Electric has indicated that it could have gone bankrupt and victims could have seen their payments delayed for years.

At the hearing last week, counsel for Hawaiian Electric said that a settlement was the only pragmatic way to handle the thousands of lawsuits filed against the utility and the other defendants.

At the hearing, an attorney for the plaintiffs said that insurers only opposed the settlement because they wished to recoup a bigger piece of the pie, and that Maui needed every dollar of the settlement in order to rebuild Lahaina.

Counsel for the plaintiffs, the consolidated class plaintiffs and the State of Hawaii, Maui County and Hawaiian Electric did not immediately respond to requests for comment on the Supreme Court's ruling. Counsel for the insurers also did not immediately respond to requests for comment.

Categories / Environment, Financial, Regional

Panel Sends Depo-Provera Lawsuits to 3M Earplug Judge Rodgers in Florida



law.com/therecorder/2025/02/10/panel-sends-depo-provera-lawsuits-to-3m-earplug-judge-rodgers-in-florida

Amanda Bronstad

What You Need to Know

- Nearly 70 lawsuits have been filed against Pfizer and the manufacturers of generic Depo-Provera, an injectable birth control linked to brain tumors.
- Chris Seeger and Bryan Aylstock, co-lead counsel and lead counsel in the 3M earplug multidistrict litigation, both supported sending the Depo-Provera cases to Rodgers.
- Pfizer had recommended sending the Depo-Provera cases to the Southern District of New York, near its headquarters..

A federal judicial panel chose a Northern District of Florida judge who handled the largest mass tort in the country to oversee lawsuits tying the injectable birth control Depo-Provera to brain tumors.

Nearly 70 lawsuits have been filed against Pfizer Inc. and the manufacturers of generic Depo-Provera. Plaintiffs' lawyers had pushed for the cases to be coordinated in various districts in California, Massachusetts and Florida, while Pfizer recommended New York's Southern District, where it's headquartered.

The U.S. Judicial Panel on Multidistrict Litigation, however, found in a Feb. 7 order that Florida's Northern District "offers the necessary judicial resources and expertise to manage this nationwide litigation in an efficient and convenient manner."

The panel chose U.S. District Judge M. Casey Rodgers, who is "an able jurist with extensive and exceptional experience presiding over large products liability MDLs," the panel wrote in its Friday order.

Rodgers specifically oversaw the largest mass tort in the nation: At its highest point, about 320,000 cases alleged 3M's combat earplugs caused deafness and ringing of the ears in U.S. military service members. After 16 bellwether trials, most of which occurred while the COVID-19 pandemic shut down courthouses in 2020 and 2021, and the bankruptcy of a subsidiary that was ultimately dismissed, 3M agreed to settle the lawsuits in 2023 for \$6 billion.

Chris Seeger and Bryan Aylstock, co-lead counsel and lead counsel in the 3M earplug multidistrict litigation, both supported sending the Depo-Provera cases to Rodgers. The Depo-Provera litigation is anticipated to grow significantly; plaintiffs' lawyers plan to file thousands of cases given that it has been used by nearly 2 million American women.

Seeger, of New York's Seeger Weiss, said, "We applaud the JPML's selection of Judge Rodgers, whose extensive experience managing the landmark 3M earplug litigation makes her exceptionally qualified to oversee these proceedings."

"Judge [Karen] Caldwell, the chair of the JPML, did recognize that as 3M earplugs litigation is closing out and that's done, it was such an impressive and very expedient handling of the largest MDL in history, and because of that, because she was able to do it so efficiently, that it made sense, according to the panel's ruling," Virginia Buchanan, of Levin Papantonio, Proctor, Buchanan, O'Brian, Barr & Mougey in Pensacola, Florida, told Law.com. "She has the tools and organizational skills to be able to handle even a giant MDL."

In addition to 3M earplugs, Rodgers oversaw the multidistrict litigation involving prescription drug Abilify, linked to compulsive behaviors.

In its Depo-Provera order, the panel limited the alleged injuries to those tied to a brain tumor called intracranial meningioma.

"We will be delighted to litigate these cases before such a skilled jurist and are pleased the panel recognized that defendant's request for their backyard, the S.D.N.Y, did not prevail," Ellen Relkin, of Weitz & Luxenberg, who filed the first Depo-Provera case, and argued for the Northern District of California, told Law.com. "We also are also pleased the panel recognized the important safer alternative design theory underpinning the lower dose injectable Depo Sub Q Provera 104, and limited the MDL to the salient injury—meningioma."

'Certain to be Complex and Hard-Fought'

Depo-Provera, approved by the U.S. Food and Drug Administration in 1992, is a contraceptive that stops a woman's menstrual cycle for three months. But recent studies, particularly a 2024 report in the British Medical Journal, found that the drug had a 550% higher risk of developing intracranial meningioma. The tumors, while benign, cause dizziness and headaches and require surgery to remove them.

Pfizer described the studies as impacting a "small fraction of patients" in the decades since Depo-Provera was created.

Joseph Petrosinelli, with Williams &
Connolly. Photo: Diego M.
Radzinski/ALM

"This litigation is almost certain to be complex and hard-fought," wrote Pfizer attorney Joseph Petrosinelli, of Williams & Connolly, in a brief before the MDL panel. Pfizer and the generic defendants, Petrosinelli wrote, "will vigorously defend the medicine's safety and efficacy." Although Pfizer recommended New York, Petrosinelli also supported, as an alternative, multidistrict litigation before a judge in the Eastern part of the country "with experience deciding important threshold issues in a large pharmaceutical MDL."

"The efficiency and effective resolution of the litigation would be well served by placing it in front of a judge with experience managing a similarly expansive and complex pharmaceutical MDL and, particularly," he added, "one with experience deciding thresholds issues related to preemption, the reliability of scientific evidence, and general causation."

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Trending

Corporate Deal

Columbus McKinnon Corp., a manufacturer of intelligent motion solutions for material handling, has agreed to acquire Kito Crosby Limited from funds managed by global investment firm KKR & Co. in an all-cash transaction valued at \$2.7 billion. The transaction is expected to be funded with \$2.6 billion in committed debt financing and an \$800 million perpetual convertible preferred equity investment from Clayton, Dubilier & Rice. The transaction, announced Feb. 10, is expected to close later this calendar year. Columbus McKinnon, which is based in Charlotte, North Carolina, was advised by DLA Piper and Hogan Lovells. KKR and Kito were counseled by Kirkland & Ellis, and CD&R was represented by Debevoise & Plimpton.

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'AI washing' — what lawyers need to know to stay ethical

 [reuters.com/legal/legalindustry/ai-washing-what-lawyers-need-know-stay-ethical-2025-02-10](https://www.reuters.com/legal/legalindustry/ai-washing-what-lawyers-need-know-stay-ethical-2025-02-10)

Sean McGrane, Steven Delchin

A message reading "AI artificial intelligence", a keyboard, and robot hands are seen in this illustration taken January 27, 2025. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

February 10, 2025 - A tech startup wants to sell and promote a new product to investors that is powered by artificial intelligence. The company's internal AI team tries to explain the technology to its in-house lawyer, but it's very complicated with all its "neural networks" and "machine learning algorithms." The lawyer is somewhat tech savvy, but still struggles to get a good sense of the AI.

One thing is clear, though. The lawyer's company is in a competitive environment, and the C-Suite is feeling AI FOMO (Fear Of Missing Out). It wants to market the product as the "World's Best AI" to attract investment dollars and to stay ahead of market competitors who are making their own lofty AI claims. Although initially hesitant about the marketing message, the lawyer ultimately defers to the company's tech experts because the lawyer doesn't have the necessary technical background to verify their claims.

As time goes on, the lawyer realizes that the company's product may not be as great as the company claimed. More troubling, the lawyer learns that the U.S. Securities and Exchange Commission ("SEC") has launched an investigation into deceptive trade practices relating to the company's AI product.

This scenario isn't new. There has been a surge in companies making exaggerated (or arguably exaggerated) claims about their AI-driven products. They may be stretching the truth about the capabilities of their technology to attract investors' attention.

This practice is called "AI washing," and it has been receiving increased regulatory scrutiny in the U.S.

In March 2024, the SEC penalized , opens new tab two investment firms around \$400,000 for making misleading statements about their use of AI. The SEC has continued to warn companies that they must be truthful to investors when marketing products related to AI. The crackdown on AI washing likely will continue , opens new tab despite the deregulation push of the Trump administration.

For lawyers, AI washing raises not only legal compliance issues, but also potential ethical challenges under the rules of professional conduct. Here is what lawyers need to know to keep their companies in compliance while protecting their reputation and law licenses.

AI washing is making waves

"AI washing" is the new buzzword to describe false or misleading AI hype by companies seeking to attract investors by overstating the capabilities, innovativeness, or intelligence of an AI product or service. The SEC has warned companies about AI washing in no uncertain terms: "Don't do it," said former Chair Gary Gensler at a conference in December 2023, as quoted [\[1\]](#), opens new tab in The Wall Street Journal. The SEC likened AI washing to "greenwashing [\[2\]](#), opens new tab," which involves making false or misleading claims to investors about whether a company's products or practices are aligned with environmental principles.

At its core, AI washing is an unfair and deceptive trade practice. This presents obvious issues for all kinds of lawyers, but more nuanced ones for inside counsel, especially those who serve in a legal compliance role.

As one of a company's primary risk assessors, it is incumbent upon in-house counsel to monitor their company's compliance with SEC regulations. Many of these regulations deal with material disclosures. Because the inner workings of AI are relatively unknown and its capabilities are ever-changing, companies must be extra careful about the language they use to market it.

AI washing implicates in-house counsel's ethical duties

When it comes to AI tech, in-house lawyers need to stay in the loop for a more basic reason: to comply with their ethical obligations.

AI washing implicates a lawyer's ethical duties, and one of the key rules is Rule 1.13 of the Model Rules of Professional Conduct [\[3\]](#), opens new tab, which addresses the issues that arise when a lawyer's client is an organization.

Under Model Rule 1.13(b), attorneys have an ethical obligation to report information to higher authority and even to the organization's board when warranted by the circumstances. Before referring the matter up the ladder, it may be appropriate in some circumstances for the lawyer to ask the individual with whom the lawyer is dealing to reconsider the individual's proposed action or plan. A good example is when the individual has an innocent misunderstanding of the law and subsequently accepts the lawyer's advice.

What triggers the duty to counsel on a change of course or to report to higher authority under Model Rule 1.13? When the attorney for the organization "knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization"

In such situations, "[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law." This could include the board or outside directors.

What does all this mean as a practical matter? If an in-house lawyer becomes aware that substantial injury to the company is likely to result from employee action that either violates the employee's legal obligations to the company, or that would be a legal violation that reasonably might be imputed to the company, then the lawyer must act to protect the company.

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization, the lawyer must "report up" the ladder to the company's "higher authority" and when warranted by the circumstances to the "highest authority." Comment 5 to Model Rule 1.13 [opens new tab](#) explains that a company's "highest authority" to whom a matter may be referred "ordinarily will be the board of directors or similar governing body."

Moreover, depending on the jurisdiction, Rule 1.13 also permits, but does not require, in-house lawyers to "report out" client confidential information outside the company under certain circumstances if the company did not act on the lawyer's warnings. The reporting out rules vary among jurisdictions, so in-house lawyers must be aware of which ethics rules apply to them, which is not always clear. The scenario could implicate ethics choice-of-law questions under Rule 8.5, which can be complicated.

It is, of course, highly prudent for any in-house lawyer to consult with independent ethics counsel before reporting out. Lawyers should rarely if ever act as their own ethics counsel, especially when client confidential information is at stake.

In addition to their ethical duties under Rule 1.13, in-house counsel also must comply with corresponding "up-the-ladder" reporting rules adopted by the SEC pursuant to Section 307 of the Sarbanes-Oxley Act. Once again, it is prudent for in-house attorneys to seek independent legal advice to understand their rights and duties, especially if the SEC rules are more permissive than a particular state's version of Rule 1.6 on the duty of confidentiality, which raises a preemption question.

Beyond the requirements of Rule 1.13 and the corresponding SEC rules, AI washing also implicates a lawyer's duty of competence under ABA Model Rule 1.1 [opens new tab](#), which includes the duty of technological competence. Thus, lawyers must have a general understanding of the AI technology that their companies may be hyping to investors.

This does not mean that lawyers need to become computer coders, but they do need to be generally educated on how AI technology works (and doesn't work).

Final thoughts — old issue meets new tech

At the end of the day, AI washing is not a new type of fraud. It simply uses different buzzwords. The same legal and ethical rules apply. It remains the responsibility of lawyers to guard against the risk of AI washing and to understand their ethical duties when doing so. Lawyers who get too caught up in the AI hype may find themselves ethically entangled.

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Sean McGrane

Sean McGrane is a partner at Squire Patton Boggs (US) LLP and leads the litigation practice group in Cleveland. He can be reached at sean.mcgrane@squirepb.com.



Steven Delchin

Steven Delchin is a senior attorney and firm ethics lawyer at Squire Patton Boggs (US) LLP; he is based in Cleveland. He can be reached at steven.delchin@squirepb.com.



Lawyers in Walmart lawsuit admit AI 'hallucinated' case citations

 [reuters.com/legal/legalindustry/lawyers-walmart-lawsuit-admit-ai-hallucinated-case-citations-2025-02-10](https://www.reuters.com/legal/legalindustry/lawyers-walmart-lawsuit-admit-ai-hallucinated-case-citations-2025-02-10)

Sara Merken

By Sara Merken

February 10, 2025 3:35 PM PST Updated 16 hours ago

A view shows the logo of a Walmart store in Ciudad Juarez, Mexico June 24, 2024.

REUTERS/Jose Luis Gonzalez Purchase Licensing Rights , opens new tab

Feb 10 (Reuters) - Lawyers representing plaintiffs in a lawsuit against Walmart (WMT.N) , opens new tab over alleged injuries from a defective hoverboard toy said on Monday that they inadvertently included made-up cases generated by artificial intelligence in a court filing. A federal judge in Wyoming on Thursday had asked the plaintiffs' attorneys to explain why they should not be sanctioned, after lawyers for Walmart and co-defendant Jetson Electric Bikes told the court that they could not find nine cases that the plaintiffs had cited in a court document and suggested AI played a role.

The case, involving lawyers from national plaintiffs' law firm Morgan & Morgan, is the latest in which AI-generated case citations have proven prone to error, testing lawyers and judges' ability to sort legitimate legal research from fiction.

The plaintiffs' lawyers — Rudwin Ayala and T. Michael Morgan from Morgan & Morgan, and Taly Goody from three-lawyer Goody Law Group — withdrew the filing that contained the nine cases on Friday.

In their filing on Monday to U.S. District Judge Kelly Rankin, they said the cases cited "were not legitimate" and that an internal AI platform "hallucinated" the cases.

"This matter comes with great embarrassment and has prompted discussion and action regarding the training, implementation, and future use of artificial intelligence within our firm," the lawyers said in the filing submitted by Morgan.

The three lawyers did not immediately respond to requests for comment.

A lawyer representing Walmart and Jetson declined to comment. Walmart declined to comment.

Judges across the country have weighed and in some cases imposed sanctions on lawyers for including AI-generated citations in court documents.

While some judges and courts have issued orders governing how attorneys can use AI tools, use of the technology is generally permitted. Groups including the American Bar Association

have said lawyers much consider their ethical obligations to verify information in court submissions.

The underlying case in Wyoming was filed in July 2023 by two parents on behalf of themselves and their children, claiming they suffered burns and emotional distress after a hoverboard made by Jetson and sold by Walmart exploded and burned down their house.

Walmart and Jetson have denied the allegations and argued the fire originated in a "smoking shed" outside of the house.

Reporting by Sara Merken

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Former Government Officials Offer Job Assistance To Law Students, Lawyers Hit By Trump's Hiring Freeze

A abovethelaw.com/2025/02/former-government-officials-offer-job-assistance-to-law-students-lawyers-hit-by-trumps-hiring-freeze

February 11, 2025

President Donald Trump's government hiring freeze continues to tank budding lawyers' career prospects. Not only have third-year law students' permanent job offers been revoked and summer internship programs been canceled, but government agencies have also pulled out of law school recruitment events for future legal roles. However, thanks to a group of ex-officials from the Treasury and the Justice Department's Tax Division, things are looking a bit brighter.

As noted by Bloomberg Law, the group — composed of lawyer representing law firms, accounting firms, nonprofits, and private companies — has stepped in to assist attorneys and law students find jobs. Here are some additional details:

The group has set up an email address (taxhiring25@gmail.com) where students and attorneys whose offers were revoked by the IRS and Justice's Tax Division can send their resume, a writing sample, offer received, and notice of rescission.

A member of the group with access to the email will review these submissions, ensuring they're complete, and then send the candidate a survey asking questions about the person's preferred position, preferred employer such as a law firm, accounting firm, nonprofit, graduation years, and preferred location.

The information will be populated in a spreadsheet, which employers can use as a "sortable index of candidates," the email said.

Caroline Ciruolo, who formerly served as acting assistant attorney general for the Justice Department's Tax Division, is now a partner and founder of Kostelanetz's Washington office, and acts as a primary point of contact for the group. "Law firms, accounting and consulting firms, corporations, educational institutions, bar associations, state and local government agencies, courts, non-profits, and other stakeholders are spreading the word regarding these efforts," she told Bloomberg Tax, "facilitating connections, and meeting with those seeking employment to offer encouragement, networking, and career counseling."

Scott Levine, former deputy assistant secretary for international affairs at the Treasury Department, is trying to get other agencies to help the law students and lawyers' whose jobs were lost. "Some of us are also reaching out to other sectors in an attempt to replicate this initiative in other areas as the IRS and the DOJ Tax Division are not the only federal agencies to rescind offers," he said.

This is a description from the group of those who now need help securing work: “a pool of approximately 200 candidates, including: law students who accepted summer internships; law and LLM students who accepted permanent positions through the Honors Program; and lateral attorneys with one or more years legal experience.” If your firm or company is willing to step up to the task and offer assistance, please do so.

By

Best of luck to all aspiring government lawyers who have been left out in the cold by Trump's hiring freeze.

IRS, DOJ Hires With Rescinded Jobs Get Aid From Ex-Officials [Bloomberg Law]

Staci Zaretsky is a senior editor at Above the Law, where she's worked since 2011. She'd love to hear from you, so please feel free to email her with any tips, questions, comments, or critiques. You can follow her on Bluesky, X/Twitter, and Threads, or connect with her on LinkedIn.





Ann M. Lipton @annmlipton.bsky.social · 10h

Okay, so we all noted that this explains why Goldstein wrote that NYT op-ed asking Biden to dismiss cases against Trump.

I'll also remind you of Aaron Sorkin's op-ed urging Dems to nominate Romney, which he repudiated as soon as Harris took over - just after publication.

So that's 2 examples -



Joshua J. Friedman @joshuaifriedman.com · 22h

SCOTUSblog cofounder Tom Goldstein was rearrested today after prosecutors alleged that he secretly received over \$8 million in cryptocurrency and paid out \$6 million in recent days. Prosecutors argued that he presented "an urgent risk of flight."
storage.courtlistener.com/recap/gov.us...

**GOVERNMENT'S EX PARTE MOTION UNDER 18 U.S.C. § 3148
FOR ARREST WARRANT AND REVOCATION OF RELEASE ORDER**

Pursuant to 18 U.S.C. § 3148, the United States of America, by and through undersigned counsel, respectfully moves the Court to issue an arrest warrant and revoke the current Order Setting Conditions of Release ("Order") authorizing the pretrial release of Defendant Thomas C. Goldstein (ECF 6). There is clear and convincing evidence that Goldstein has violated the Order by failing to disclose the existence of two cryptocurrency wallets through which he received over \$8 million in cryptocurrency and sent more than \$6 million of cryptocurrency over the last five days. There is also probable cause that Defendant committed violations of 18 U.S.C. § 1001 based on his false statements to Pretrial Services officers. Defendant's conduct demonstrates that he is a serious risk of flight, that he cannot abide by the conditions of release, and that he has lied to this Court and Pretrial Services. A rebuttable presumption that Defendant is a danger to the community now applies, and Defendant's conditions of release should be revoked.

RLT



Ann M. Lipton @annmlipton.bsky.social · 10h

Of NYT functionally getting trolled on its own op-ed pages and that probably says something about the NYT op-ed desk.



Supreme Court lawyer Tom Goldstein is detained as flight risk in tax case

 [reuters.com/legal/government/supreme-court-lawyer-tom-goldstein-arrested-again-over-crypto-transfers-2025-02-10](https://www.reuters.com/legal/government/supreme-court-lawyer-tom-goldstein-arrested-again-over-crypto-transfers-2025-02-10)

David Thomas

By David Thomas

February 10, 2025 6:31 PM PST Updated 13 hours ago

The U.S. Supreme Court is pictured in Washington, U.S., October 8, 2024.

REUTERS/Annabelle Gordon/File Photo Purchase Licensing Rights , opens new tab

Feb 10 (Reuters) - Prominent former U.S. Supreme Court lawyer Tom Goldstein was arrested and detained on Monday after a judge in Maryland said he violated the terms of his pretrial release on previous tax-related charges tied to his high-stakes poker playing.

Chief U.S. Magistrate Judge Timothy Sullivan said Goldstein posed a flight risk and could not be trusted to remain free after prosecutors said he transferred millions of dollars in cryptocurrency assets using accounts he concealed from the court.

Sullivan ordered , opens new tab Goldstein, publisher of the SCOTUSblog news website, to remain in federal custody as he fights the tax charges leveled against him last month. Defense attorneys who previously appeared for Goldstein, John Lauro and Christopher Kise, did not immediately respond to requests for comment. Sullivan indicated in his order that Goldstein has decided "to represent himself in this case."

Goldstein, who argued more than 40 Supreme Court cases before retiring from legal practice in 2023, was indicted last month on 22 counts of tax evasion and other tax crimes allegedly connected to his side career as a poker player.

The indictment said Goldstein won and lost millions of dollars in individual poker matches and made improper payments through his law firm to cover debts. He pleaded not guilty on Jan. 27 and was granted pretrial release.

Maryland federal prosecutors in their new arrest warrant , opens new tab on Monday alleged Goldstein received more than \$8 million in cryptocurrency and sent more than \$6 million in cryptocurrency over the last five days. He was obligated to disclose all of his financial accounts to the court, prosecutors said.

Goldstein's receipt and transfer of millions of dollars to other wallets "strongly suggests he is preparing to offshore his assets and flee," prosecutors said.

They also alleged that Goldstein tried to stop a potential witness who knew about his personal and law firm finances from cooperating with the investigation by "[offering] things of value, including cryptocurrency."

The earlier indictment against Goldstein said he borrowed millions of dollars to stake poker matches, underreported his gambling winnings, and used funds from his law firm, then known as Goldstein & Russell, to pay off his debts.

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](https://twitter.com/DaveThomas5150).

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Tom Goldstein, a Top Supreme Court Lawyer in Washington, Faces a Gambling Scandal

 airmail.news/issues/2025-2-8/tommy-supreme-and-the-blitz

George Pendle

[Go Back](#)



Tom Goldstein, a top Washington, D.C., lawyer, is currently facing indictment.

Washington Confidential

Tommy Supreme and the Blitz

Tom Goldstein was a star in arguing cases before the Supreme Court. He was also one of the world's highest-rolling—and most reckless—poker players. Then his worlds collided



By George Pendle

February 8, 2025

Reading Time: 21 minutes



Tom Goldstein is slight, pale, and bald. Look in the dictionary, and next to the word “lawyer” you’ll find a picture of him. But in the legal circles of Washington, D.C., he is regarded with awe. That’s because Goldstein is one of the most successful Supreme Court advocates of the age.

Appearing just once in front of the Supreme Court of the United States—SCOTUS, for short—is, for most lawyers, the pinnacle of their career. Goldstein has done it 44 times, more than all but three lawyers in private practice in the Court’s modern history. His most recent case, *Google v. Oracle*, was described as the “copyright case of the century.”

So, it was a surprise when, three weeks ago, Goldstein was hit with a 50-page, 22-count federal indictment accusing him of massive tax evasion and listing a panoply of wild stories, including one-on-one poker games played with billionaires, multiple women he allegedly had “intimate personal relationships” with on his company’s payroll, and tens of millions of dollars won and, ultimately, lost.

To say it caused a stir in the Washington legal community is an understatement. But for those outside the capital, at the ultra-high-roller tables of Las Vegas, the glistening casinos of Macau, and the private poker games of Hollywood, it may not have come as a surprise at all.

The “Cooler”

Arguing in front of the Supreme Court is an intimidating experience. When a green light blinks on, you can begin your opening statement: three minutes dense with legal doctrine and precedent. The nine unsmiling justices then spend the next 27 minutes tearing that statement apart: exposing its contradictions, interpolating abstruse theoreticals, and generally doing everything in their power to push the lawyer in front of them to the breaking

point. This is “oral argument.” Sometimes, when the justices are particularly aggrieved—a “hot bench,” in legal parlance—they’ll double-team an unimpressive advocate and toss their specious argument from one to another like killer whales tossing a seal around.



Goldstein in front of the Supreme Court, 2013.

There are two broad types of Supreme Court advocate. The first is what is termed in legal circles a “heater,” a lawyer who ramps up the temperature of an argument, aggressively asserting that disaster will follow if the Court should be so foolish as to rule against them. Then there is what is known as a “cooler,” such as Goldstein, who often approaches the bench with no notes, keeps a level tone, and tries to make it as easy as possible for the Court to rule in his favor. Nevertheless, some Court-watchers say he can seem a little too pleased with himself, even condescending.

Unlike the vast majority of Supreme Court advocates, Goldstein didn’t attend an Ivy League university, clerk for a Supreme Court justice, or work for the solicitor general’s office. A star debater at the University of North Carolina, he failed to get into any top-notch law schools and had to call on family connections to squeeze his way into American University in Washington, D.C., according to a 2012 *Atlantic* profile.

While at A.U., he spent two summers interning for N.P.R.'s longtime Supreme Court correspondent, Nina Totenberg, the first of Goldstein's many influential connections, gathering statistics about the voting patterns of the newest justices. She, in turn, gave him the perfect introduction to the institution in which he would spend most of his professional life.

Appearing just once in front of the Supreme Court of the United States is, for most lawyers, the pinnacle of their career. Goldstein has done it 44 times.

After Goldstein graduated, in 1995, he joined Jones Day, a large international law firm, as an associate. He was assigned the task of finding cases that the Supreme Court might accept (SCOTUS accepts less than 1 percent of the petitions it receives) to raise the firm's prestige. Usually, this was done by seeking decisions in the U.S. Courts of Appeal—the courts one level below SCOTUS—when two or more courts disagreed, causing “a circuit split.” Within two years, by creating his own predictive algorithms, Goldstein found five cases that the Supreme Court took up.

But when Goldstein put himself, a lowly associate, forward to argue one of them, he was promptly slapped down. Supreme Court cases are like golden apples that go to only the most senior members of a law firm. Goldstein hadn't argued a single case in any court, let alone the Supreme Court. It was an early sign of his supernatural chutzpah.

Goldstein quit and formed his own law firm. Identifying possible Supreme Court cases, he cold-called the plaintiffs to offer his services. At the time, it was generally believed that lawyers should be sought out by plaintiffs, not the other way around. One Supreme Court justice dismissed Goldstein as an “ambulance chaser.” Chief Justice John Roberts, then in private practice, allegedly remarked about him, “If I'm going to have heart-bypass surgery, I wouldn't go to the surgeon who calls me up,” according to *The American Lawyer* in 2000.

Traditionally, law firms representing big corporations were the predominant filers of “cert petitions,” the documents in which a lawyer lobbies the Court to take a particular case. Goldstein, by contrast, sought individuals with SCOTUS-friendly cases. And he offered to represent the plaintiffs for free.

So it was that, in 1999, he found himself standing before SCOTUS arguing not just his first Supreme Court case, but his first case of any kind. He lost 9-0. But he won the next case, and he went on winning. He said that he only made \$8,000 from his first eight cases, but the stature it gave him in Washington was priceless.

“He was young,” Totenberg says of Goldstein in this period. “He was brash. He talked too fast. He had a little bit of an attitude.” But he was good at making contacts and brokering deals. He assisted David Boies and Laurence Tribe, the top litigators on Al Gore's legal team, on *Bush v. Gore* in 2000. Impressed, they sent clients his way.

Soon he established first-of-their-kind Supreme Court litigation clinics at Stanford and Harvard, teaching the students the tricks of the trade while using their unpaid labor to help him prepare for his upcoming cases. He was, by all reports, welcoming and open, even playing poker for quarters with the students during their downtime. Many of his students went on to become high-powered lawyers and solicitors general themselves.

But just as revolutionary as his law practice was his creation, in 2002, with his wife, Amy Howe, of SCOTUSblog. Up until that point, SCOTUS was a closed book. If you wanted to read one of the Court's judgments you had to wait a week for the Court to send you a paper transcript. The Court had no Web site and was in no hurry to get one.

Sensing an unmet need, Goldstein and Howe started live-blogging SCOTUS proceedings, rushing from the courtroom when opinions were read out—where computers and phones are forbidden—and revealing the result in near-real time. They also digitized the Supreme Court's previous opinions, allowing instant access. Their blog soon became an essential resource not only for lawyers but also, it was said, for the Supreme Court justices themselves, who found it much more convenient than the Court's own library.

SCOTUSblog's greatest success came in 2012, when SCOTUS was set to rule on whether Obamacare was constitutional. In the rush to report the judgment, both Fox and CNN misreported that the Court had shot it down. But they hadn't understood the complex decision. Within 10 minutes Goldstein and Howe had parsed the judgment and revealed that the law had been, in fact, affirmed. Almost 1 million unique users accessed the blog that day. The Web site later won a Peabody Award for excellence in electronic media.

A Maniac Among Maniacs

In 2009, NBC bought Goldstein's life rights in order to create a TV series called *Tommy Supreme*, which the network described as being the “inverse *House*—a likable guy in the most unlikable profession.” He was named one of the 50 Most Powerful People in Washington, D.C., by GQ. He was known, as Totenberg said, as “a quintessentially decent person.”

Suffice it to say, no one has ever described Dan “the Blitz” Bilzerian in such terms. The muscle-bound son of 1980s Wall Street fraudster Paul Bilzerian (a major figure in James B. Stewart's *Den of Thieves*), he is known as the “King of Instagram.” Bilzerian, who has been through navy SEAL training, earned this title by wowing his 30 million followers with videos of himself firing bazookas, driving fast cars, smoking cigars, sitting in hot tubs surrounded by scantily clad women, and playing high-stakes poker. He had dedicated his life to one creed according to his self-published autobiography, *The Setup*: “I wanted to get tons of pussy, and I wanted total freedom.”



Dan Bilzerian, the so-called King of Instagram, and his retinue in 2020.

In 2008, Bilzerian wrote, he was making his living by taking advantage of clueless “whales,” the poker pro’s term for bad but very wealthy players. Bilzerian frequented the poker room of the Bellagio hotel, in Las Vegas, where he tipped generously enough to be alerted by the staff whenever a whale with money arrived at a table. That’s how he met Goldstein.

Bilzerian put it more succinctly in his memoir: “To this day, I have never met anyone with less respect for money proportionate to their net worth than Tom. And I’ve met some true degenerates.”

In poker there are two broad ways of playing: “tight” and “loose.” A tight player plays very few hands, bluffs rarely, and only bets when he is fairly certain of having the winning hand. A loose player plays many more hands, bets aggressively, and bluffs when he can.

Their blog soon became an essential resource not only for lawyers but also, it was said, for the Supreme Court justices themselves.

A less common subset of the loose player is known as “the maniac.” The maniac plays almost all of the hands dealt to them, no matter what their cards, and bluffs as much as possible. Whether they win or lose, it is sure to involve a large amount of money.

And then there was Goldstein: a maniac among maniacs.

A member of the TwoPlusTwo gambling forum described the Bellagio game that Bilzerian walked in on as the “Craziest Poker Game of my life.” Goldstein was reportedly betting tens of thousands of dollars without even looking at his cards. Soon, hardened poker professionals were surrounding the table to watch the action. Some were so desperate to take Goldstein on that they paid those already at the table to rent their seats for an hour.

Yet Goldstein “dominated the game” and did so without gloating or “being anything less than a polite gentleman.” The forum member declared, “if you had to pick the king of insane poker maniacs of all players in all games in the Bellagio poker room, by appearance only, Tom might be your last pick.”

Bilzerian noted in his autobiography that despite his crazy playing style, Goldstein was “savvy enough to read people and situations.” Starting with \$12,000 on the table, and with many ups and downs in between, Goldstein ended up with around \$100,000.

There was a fearlessness to Goldstein’s play that impressed Bilzerian. For Goldstein it seems the attraction of Bilzerian was that he offered the pasty-faced lawyer entry into a world of models and machine guns, far from the staid marble halls of SCOTUS.

So began an odd-couple story for the ages.

The Bet

“I was one of those people who just got caught up watching poker on ESPN,” Goldstein told *The Washington Post* in 2008, the same year he met Bilzerian. He said he’d been playing Texas Hold ‘Em—which had rapidly become the most popular variant of the game—for five years, and had made the news for having “dominated” a charity tournament held at the Palm restaurant in Washington, D.C. The top prize was \$2,240, which Goldstein donated to charity.

It was no secret that Goldstein enjoyed poker. He frequented Washington’s private games, although he said he stayed away from playing “judges and justices”; he had become the attorney for the Poker Players Alliance and had also begun representing the online-poker companies Full Tilt and PokerStars against the federal government, which was trying to ban them.

Gambling is hardly unknown in the legal world. One might even say the skills involved are complementary. David Boies, one of Goldstein’s mentors at the Supreme Court, has been known to regularly bet thousands of dollars in craps games. Nevertheless, it seemed Goldstein wanted to keep the “maniac” side of his life separate from his more sedate legal career.

The 2012 *Atlantic* profile of Goldstein began with a brief anecdote about Goldstein shipping his brand-new 2011 black Ferrari 458 (price tag: approximately \$250,000) to Las Vegas to race against Bilzerian's 1965 Shelby Cobra for a bet. The accompanying illustration depicted Goldstein driving a Ferrari down the steps of the Supreme Court. After his indictment earlier this year, the author of the piece posted on X that Goldstein was "very unhappy that [she] exposed his gambling issues."

"To this day, I have never met anyone with less respect for money proportionate to their net worth than Tom. And I've met some true degenerates."

According to Bilzerian's autobiography, no sooner had Goldstein bought his Ferrari than he began texting Bilzerian, "talk[ing] shit" and challenging him to a race. Bilzerian accepted. Goldstein said he wanted it to be a bet, so Bilzerian suggested they race for \$100,000. Goldstein countered with \$300,000. They agreed on a quarter-mile drag race at the Las Vegas Motor Speedway.

Bilzerian hired a drag-race instructor, while Goldstein sought advice and opinions through online racing forums. Goldstein continued to taunt Bilzerian, allegedly saying he wanted Bilzerian's girlfriend to ride in the car with him so she could "see what a winner looks like."

Before the night of the race, Bilzerian claimed that Goldstein "begged" him to up the stakes of the bet even further, offering to put up an additional \$85,000 to Bilzerian's \$40,000, and also demanding that if Bilzerian lost, he had to agree not to masturbate or have sex for a month. Bilzerian in turn stipulated that Goldstein had to smoke marijuana if he lost; Goldstein had apparently never tried a drug before.

The race at the track on March 9, 2011, attracted poker players and car enthusiasts alike, all placing their own side bets. Goldstein, wearing a dark three-piece suit and crash helmet, lowered himself into his Ferrari. Bilzerian, in his polished aluminum Cobra, strapped his arms to the steering wheel. Amid burning rubber and smoke, Bilzerian beat Goldstein by three-quarters of a second.

But Goldstein wouldn't accept the loss. "He was like one of those people at a funeral who, despite seeing the body, refuses to accept that the person is dead," Bilzerian wrote. A film of the race, made by the now defunct NSEntFilms, was allegedly removed from YouTube after Goldstein "forced" them to take it down.

According to Bilzerian's autobiography, true to his word, Goldstein allegedly "hit a few bong rips" and ate some weed brownies with Bilzerian. Goldstein apparently got so stoned he left his brand-new Ferrari on the Las Vegas Strip with the keys still inside before staggering into the Bellagio's poker room and begging Bilzerian for money so he could continue gambling.

The following month, Goldstein would appear before the Supreme Court for the 24th time, successfully overturning a Vermont law that restricted the sale of physician prescription data for marketing purposes.

“Flight of Fancy”

In 2014, Bilzerian was approached by *Hustler* to take part in a photo shoot at his compound in Las Vegas. Photos were taken of Bilzerian cleaning his guns and playing poker surrounded by nude models. The climactic final shot was to have Bilzerian throw a porn star named Janice Griffith off the roof of his house and into the pool below. But the throw went wrong. Griffith landed in the water but injured her foot on the edge of the pool.

Video of the stunt went viral, garnering Bilzerian international attention and a million new followers on Instagram. However, he also received a letter from Griffith’s attorney demanding \$85,000 for lost wages due to her injury. Bilzerian turned to Goldstein for advice, and the veteran SCOTUS advocate composed what might be his most famous piece of legal writing.

“I am genuinely sorry that your client was hurt,” Goldstein began. “No one wants to see anyone injured. But the suggestion that Mr. Bilzerian is responsible for the injury is embarrassing. I’m sorry she made you suggest it in writing.

“So like your client,” he continued, “the facts of the claim won’t, quite, fly. The tape shows the two carefully practicing this flight of fancy under *Hustler*’s direction, and your client expressly agreeing to go ahead. In legal lingo, she assumed the risk.”

Goldstein apparently got so stoned he left his brand-new Ferrari on the Las Vegas Strip with the keys still inside.

Goldstein went on to dispute that Griffith had lost any earnings at all, citing her Twitter feed: “Just trust me that her recent missives with the hashtags ‘#deepthroat,’ ‘#fatpussies’ and ‘#NSFW’ ... suggest that her career is gangbusters.” He concluded that “if she sues, the complaint will be sanctionably frivolous” before going on to say that Bilzerian would sue her back for “every last bit of property” and would then “probably blow it up with a mortar in the desert.” He signed off, “I enjoyed our brief correspondence.”

The letter seemed as much a play for Bilzerian’s admiration as it was a legal notice, and it too went viral, appearing on both TMZ and in the *ABA Journal*, a legal trade magazine. A few months later he was back in front of the Supreme Court arguing *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*.

Ultra-High-Stakes

Paul Phua (the last name is pronounced “pwa”) started out as a bookmaker in Malaysia in the 1990s, when international sports gambling was booming throughout Asia. According to an ESPN profile in 2015, he was allegedly responsible for the Floodlights Affair of 1997, when two English Premier League matches were suspended because the stadium lights suddenly lost power in the second half.

Unlike in the West, Asian bookmakers pay off on matches that end prematurely, and bets on the suspended games allegedly made Phua an enormous amount of money. It was later discovered that a security guard had been bribed to flick the switch. ESPN called it “the first confirmed incidence of Asian-backed match-fixing on English soil.” Phua was never charged, and he later denied the allegation vehemently, telling *PokerNews*, “It’s absolute nonsense and without any basis in fact. It’s some rumors. Being in the gambling circles you get these kinds of allegations, but it’s nonsense.”



Bookmaker Paul Phua in 2015.

Nevertheless, Phua's winnings allowed him to become the biggest bookie in the region. He moved to Macau in 2008, just as U.S. gambling companies such as Wynn Resorts and Las Vegas Sands were establishing outposts there. Phua was allegedly paid a commission to attract Chinese gamblers to these resorts on junkets, and, ESPN also reported, he helped encourage such renowned American poker players as Tom Dwan and Phil Ivey to prey on the rich Chinese bettors for whom poker was still a novelty. Phua's rumored links to Chinese organized crime—the Triads—ensured that the high rollers could not run back to the mainland to escape their debts.

In July of 2014, Phua traveled to Las Vegas as it was hosting the World Series of Poker, the world's most prestigious poker tournament. When the F.B.I. raided Phua's villa at Caesars Palace they found a "wire room" that was said to have handled nearly \$400 million in illegal wagers taken. Phua was arrested, and only gained bail by putting up his \$48 million Gulfstream V jet as collateral.

When Phua asked Dwan for legal help, Dwan referred him to Goldstein, and after months of legal argument a judge eventually ruled that the F.B.I.'s search of Phua's villa had violated his rights. Phua denied all allegations of criminality and Mafia-ties, telling Poker News, "The truth is that I was not guilty of the crimes they charged me with, and I'm not a 14k Triad, and that's why I stayed on to fight the case at the risk of jail time."

According to Bilzerian's book, Phua offered to fly both Goldstein and Bilzerian to London for a celebratory poker game. But the plane was apparently diverted to Montenegro, due to Interpol's concerns about Phua's alleged involvement with the Triads. So, he claims, Bilzerian, Goldstein, and Phua ended up staying in Phua's multi-million-dollar "castle" in the country until Bilzerian grew bored and left to go on a Mediterranean cruise with two dozen models. Both Macau and Montenegro would feature in Goldstein's federal indictment. (Phua did not respond to AIR MAIL's request for comment.)

The indictment, which focuses mainly on the years 2016 to 2022, paints a picture of a gambler increasingly out of control, dipping ever deeper into his legal business to pay off his gambling debts. In 2014, a year in which he had four cases in front of the Supreme Court, Goldstein is alleged to have borrowed \$10 million from a California billionaire that he agreed to pay back with interest. Over the next two years, according to the indictment, he went on to lose most of that money in poker matches. (By the end of 2022 he allegedly still owed the billionaire more than \$8.89 million.)

In 2016, the indictment alleges, Goldstein allegedly began a series of "heads-up" (one-on-one) poker matches with three "ultra-wealthy individuals." Two were located in Asia and one in Beverly Hills. He prepared for these games by obtaining guidance and coaching from two professional poker players, studying his opponent's historical playing patterns, and playing

against computer simulations aping their style. It was not too dissimilar from the preparation he would have made for a Supreme Court argument. And as in his SCOTUS cases, his preparation paid off in a big way.

The indictment paints a picture of a gambler increasingly out of control, dipping ever deeper into his legal business to pay off his gambling debts.

According to prosecutors, that September, Goldstein traveled to Asia for his first match and won approximately \$13.8 million. He parlayed these winnings into the next match, with a “businessman” in Beverly Hills, and this time won more than \$26 million. In December 2016, Goldstein traveled back to Asia for another game. He was allegedly assisted in these “heads-ups” by “a Malaysian Citizen, a G&R Client, and an ultra-high stakes poker player,” who could possibly be Phua.

Goldstein won more than \$8.8 million in total, which was wired to a Montenegrin bank at which both the “Malaysian” and Goldstein held accounts. According to the indictment, Goldstein had made more than \$50,000,000—or an hourly rate, the lawyer calculated, of \$660,000. He allegedly spent millions on unnamed “personal expenses including luxury purchases.”

Then the cooler’s luck began to cool. Between late 2016 and February 2017, Goldstein allegedly lost more than \$9.5 million in a series of poker games with a Californian real-estate magnate in Los Angeles. By the middle of 2017, he had allegedly compounded those losses to more than \$16 million.

In order to pay off his debts, prosecutors allege, he began to divert his legal fees directly to his personal account. He asked the partner of a law firm with whom he had done business whether he wanted to “invest” in his future poker matches. (The practice of “buying action”—sharing in the profits, or losses, of a match—is common among high-stakes gamblers.) He allegedly sent the lawyer links to an online gambling forum denigrating his opponent’s poker skills. Not mentioned was the fact that Goldstein had already lost nearly \$10 million to him (the Californian real-estate magnate). Barely a month after he was allegedly scraping these funds together he could again be found in front of the Supreme Court, arguing two cases in eight days.

According to the indictment, a pattern began to emerge. When Goldstein won, the money would be immediately re-invested in future games. And sometimes when he lost, such as in 2016, he would call his law firm’s manager—“typically a recent college graduate with no formal accounting or bookkeeping experience and whose responsibilities also included, among other things, picking up Goldstein’s dry cleaning”—to unknowingly send a wire

transfer from the company's funds to satisfy his debt. These transfers would be labeled "Legal Fee." As the sole proprietor of his law firm, only Goldstein knew what was allegedly going on with the company's accounts.

Poker games with movie producers, actors, and Texas billionaires followed, and his losses mounted, according to prosecutors. Legal fees were now allegedly being funneled directly into his gambling account without being declared to the I.R.S. Neither did he declare his winnings, on the increasingly rare occasions when he won. If the allegations are true, Goldstein was in too deep.

Substantial Amounts of Money

In 2017, in an interview with the University of North Carolina's alumni magazine, Goldstein declared that he had mellowed. He had traded in his Ferrari for a Tesla, he said, and had given up poker. He talked about the trials of being a parent to young children and how all he did these days was talk about legal briefs. "I think most people would find what I do boring," he said.

But if prosecutors are correct, nothing could have been further from the truth.

A year after the interview, he allegedly traveled to Macau, won big, and flew back to Washington with a duffel bag containing "approximately \$968,000 in United States dollars." When asked by a customs official about the money he admitted that they were gambling winnings, but he then allegedly failed to report it on his 2018 income. (When later interviewed by the I.R.S. about this discrepancy he said the funds represented a "loan" but did not back it up with documentation.)

What's more, according to the indictment, Goldstein was seemingly following Bilzerian's example in pursuing personal relationships with "at least a dozen women," to whom he transferred hundreds of thousands of dollars from his company's accounts, even while he owed "substantial amounts of money to the Internal Revenue Service," according to the indictment.

It also alleges that he hired some of these women as nominal employees at his law firm, which allowed them to be paid by the firm as well as to obtain health insurance, while they did "little or no work." Goldstein's payments to them were allegedly declared "business expenses."

And in 2020 and 2021, when the pandemic shut down poker rooms, Goldstein is alleged to have engaged in dozens of crypto-currency transactions totaling more than \$10 million, none of which he is said to have declared.

Goldstein was pursuing personal relationships with “at least a dozen women,” to whom he transferred hundreds of thousands of dollars from his company’s accounts.

By 2021, according to the indictment, he was more than \$14 million in debt, owed at least \$5 million in unpaid income taxes, and had allegedly filed a mortgage application for a \$2.6 million house in Washington, without declaring his debt—a serious financial crime. And throughout this allegedly sordid period, Goldstein was successfully arguing cases in front of SCOTUS and the appellate courts.

In 2023 he announced he was retiring from his U.S. Supreme Court practice after 25 years. In an e-mail to Reuters, he blamed part of his decision to retire on the fact that SCOTUS was too ideologically divided for him to help the “little guy” anymore. He said he was an “entrepreneur at heart” and wanted to try something new that would appease the more adventurous side of his personality. And he took one farewell shot at the legal profession, saying that most law firms were “horrifically run. Lawyers are terrible at this. Including me.”

Wild Style

In May of last year, a mysterious poker player calling himself “Thomas,” who was rumored to be a European entrepreneur, entered the Hustler Casino Live Million Dollar Game II in Las Vegas. The event was being streamed live, and for a \$1 million buy-in, you could play against some of the biggest names in the game, including Dwan and Doug Polk.

Wearing a face mask, with a hoodie pulled down over a baseball cap, and with tattoos on his hands, “Thomas,” according to Poker News, played a “loose, wild style.” He took a massive defeat, losing \$2,731,000, and caused a stir by accidentally throwing away a winning hand that would have won him a pot worth \$540,000. It wasn’t long before the online-poker crowd worked out that Thomas was Goldstein.



Bilzerian, right, recently told Piers Morgan that Jews “basically invented genocide.”

Why was he playing in disguise, even going as far as putting fake tattoos on his hands? Was he trying to avoid his debtors? His wife? The feds? And if so, why appear at a streaming poker tournament? Did he think this might be his last game?

On November 15 as the election dust was still settling, in an opinion essay for *The New York Times*, Goldstein argued that “although this idea will pain my fellow Democrats” all of the criminal cases against Donald Trump “should be abandoned.” He enraged many of his liberal colleagues with the line “a central pillar of American democracy is that no man is above the law. But Mr. Trump isn’t an ordinary man.” Was Goldstein perhaps making his opening argument in favor of a presidential pardon?

After his federal indictment was served, Goldstein hired attorneys John Lauro and Christopher Kise to represent him. Lauro recently defended Donald Trump in his January 6 election-interference case, while Kise represented him in his New York civil business-fraud trial. He also engaged Risa Heller, the crisis-communications specialist. “The Biden Justice Department brought this indictment on the eve of its departure, while ignoring critical facts that we expect will be established at trial,” Lauro says. “Mr. Goldstein entered a not guilty plea to these charges, and he intends to challenge the government’s interpretation of tax law, as well as contesting the government’s allegations of criminal intent. Some of these charges deal with years where taxes have been paid with applicable penalties and interest.”

It's been suggested that, given the severity of the charges against him, cooperation with the government is his best shot at avoiding decades of prison time; the charge of making false statements to mortgage lenders alone carries a maximum 30-year sentence. The prospect that Goldstein will cop a plea is potentially sending shivers through his gambling partners in Las Vegas and Macau, and perhaps his old friend Bilzerian too.

Goldstein hired attorneys John Lauro and Christopher Kise to represent him. Lauro recently defended Donald Trump in his January 6 election-interference case, while Kise represented him in his New York civil business-fraud trial.

In the past two years, Bilzerian has seen his empire of debauchery begin to crumble. A battle with a supplements company he was hired to promote led to a long, expensive legal battle. He has put his Las Vegas compound up for sale. The King of Instagram hasn't posted anything new in six months.

When one of his holding companies filed for bankruptcy last year, court papers suggested that the Blitz too had secrets of his own. Despite his boasts that that his decadent multi-millionaire lifestyle was funded by his winnings at private high-stakes poker games, court documents allege that Bilzerian's millions were largely given to him by his family. In November he sued his father for \$50 million.

That same month, Bilzerian gave his last public appearance to date, in an interview with Piers Morgan. The two discussed the Israel-Gaza war, and Bilzerian made a number of anti-Semitic comments, shocking even Morgan, and declared that Jews "basically invented genocide."

After the interview, pictures of him could be found on the Instagram page of Hassan Shibly, a lawyer who was once the Florida chapter head of the Council on American-Islamic Relations. Bilzerian is seen wearing a kaffiyeh and announcing that the call to prayer "is the most fantastic thing I have ever heard." It's said he now wants to move to Dubai, an emirate that, not incidentally, has no formal extradition treaties with the United States. (Bilzerian did not respond to AIR MAIL's request for comment.)

Bilzerian is not the first person you might think to go to for psychological insight, yet despite all the bluster of his autobiography, he gave as good a take on the mind of Tom Goldstein as anyone has offered so far.

"He loved the action, but it was almost like he subconsciously wanted to lose," Bilzerian wrote. "I think he liked that everyone at the table loved him so much, and as a ruthless lawyer, he probably didn't get that kind of a warm welcome elsewhere. The more he lost, the happier everyone around him got, and I think he was partially addicted to that feeling, but he was fully addicted to the rush of gambling."

Illustration: John Cuneo. Photos: Alex Brandon/AP Photo; Jerod Harris/Getty Images
Entertainment/Getty Images; John Locher/AP Photo; @instagram/hassanshiblyesq



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UBS Whistleblower's Trial Win Axed Over Unfit Jury Instructions

By Quinn Wilson

- Whistleblowing must actually cause firing, majority rules
- Jury must resolve if whistleblowing was actual cause of firing

A former UBS Group AG researcher saw his trial victory overturned after a split federal appeals court ruled Monday the jury was misinformed on how to prove whistleblower protection violations.

The district court's jury instructions improperly expanded the definition of "contributing factor," allowing it to hold UBS liable without finding that Trevor Murray's whistleblowing contributed to his termination, the US Court of Appeals for the Second Circuit said. The jury must consider if Murray's protected whistleblower activity "actually" caused or helped cause his termination, the opinion by Judge Michael H. Park said.

Murray alleges he was pressured by the UBS Securities LLC trading desk to write his reports in a way that would support their business strategies, according to his 2014 complaint. He said that he was terminated after raising ethical and legal concerns to his supervisor, in violation of Sarbanes-Oxley Act.

UBS said his position was eliminated due to market pressures, the opinion said.

A jury sided with Murray in 2020. The Second Circuit initially reversed the victory in 2022, but the US Supreme Court vacated that decision, holding that retaliatory intent isn't required to prove a Sarbanes-Oxley Act violation.

Back on remand, the Second Circuit held that the district court's instructions wrongly allowed the jury to hold UBS liable when whistleblowing "generally tends to affect a termination" or affected the firing "in any way."

The instructions were also "doubly overbroad," Park wrote. The words "tends to" increased the level of abstraction for the jury to consider than the statutory text of the Sarbanes-Oxley Act allows, and "in any away" allowed it to consider effects that didn't contribute to Murray's termination.

Nor was the error harmless, Park said. The act requires the jury to find “clear and convincing” evidence supporting UBS’ liability rather than a preponderance of the evidence, he said. The jury therefore couldn’t consider UBS’s affirmative defense—that it was going to fire him anyway—because its instructions allowed it to find liability based only on a preponderance of the evidence.

Judge Steven J. Menashi joined the opinion.

Judge Myrna Pérez dissented. There wasn’t sufficient evidence showing that the jury misunderstood the instructions or made any impermissible errors, she said.

Stulberg & Walsh LLP, Scott A. Korenbaum of New York, New York, and Herbst Law PLLC represent Murray. Gibson Dunn & Crutcher LLP represents UBS.

The case is *Murray v. UBS Securities LLC*, 2d Cir., No. 20-04202, opinion 2/10/25 .

To contact the reporter on this story: Quinn Wilson in Washington at qwilson@bloombergindustry.com

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

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Securities Law

Feb. 11, 2025, 9:01AM PST

Matt Levine's Money Stuff: Sure Elon Musk Might Buy OpenAI

By Matt Levine
Opinion

OpenAI hostile takeover

In the spring of 2022, Elon Musk [offered to buy](#) Twitter Inc. for about \$44 billion. Twitter's board of directors met with its investment bankers to discuss exactly one question: Was Musk's offer more than Twitter was worth otherwise (on its own or in a competing deal)? The bankers and board concluded that Twitter was not going to do better for its shareholders than Musk was offering, so they took Musk's deal.

A lot of Twitter employees and users were sad about this. Musk's takeover was, let's say, a mixed bag for Twitter's employees and users and advertisers, and for its role in public life. At the time, the employees expressed their sadness at a town hall with Parag Agrawal, then Twitter's chief executive officer. Agrawal was unmoved, as Casey Newton reported, saying that the board's job was to "act in the interest of our shareholders and look for value for them in the long term":

OK sure, employees said, but how is it in Twitter's best interest to go private?

"This is the answer you don't want to hear, right?" Agrawal said. "Twitter is a public company owned by shareholders. There are other companies which may have other legal mechanics ... Twitter is not one of those companies."

We [talked about this](#) at the time. It was 2022, remember, and I wrote that "now we have stakeholder capitalism and environmental, social and governance investing" and talk of "redefining the purpose of a corporation":

And then Twitter's CEO shrugs and says, in effect, "meh look this deal might be bad for our users and employees and product and mission, but we can't think about that; the price is right and my only duty is to shareholders." It's strange!

Strange but understandable. I don't think it's exactly right that Twitter's only duty, in considering Musk's offer, was to think about what would make shareholders the most money, but I understand why Twitter's board thought that. And I think that a board and chief executive officer with a more compelling vision of *what Twitter was* might have been better positioned to say no to Musk: Visionary tech founders can confidently turn down big-dollar buyout offers, both because they are motivated by some mission other than making money, and because they think that if they achieve that mission they will make even more money than whatever they're being offered now. Lacking that sort of vision, Twitter shrugged and sold.

If you are the board of directors of a *nonprofit organization* and a consortium led by Elon Musk comes to you with a \$97.4 billion hostile takeover offer, are you obligated to get the highest possible price, or are you allowed to consider other factors in deciding whether or not to accept his offer? Man: I do not know! It seems very unlikely that any nonprofit board has ever faced this problem before, and when I put it like that, it sounds completely incoherent. Nonprofits do not get hostile takeover offers, nonprofits do not get acquired by investor consortiums for \$97 billion, and surely nonprofit boards do not have an obligation to maximize their valuation? Like, generally, the opposite? Of all of that?

And yet there is something extremely clever here:

A consortium of investors led by Elon Musk is offering \$97.4 billion to buy the nonprofit that controls OpenAI, upping the stakes in his battle with Sam Altman over the company behind ChatGPT.

Musk's attorney, Marc Toberoff, said he submitted the bid to OpenAI's board of directors Monday.

The unsolicited offer adds a major complication to Altman's carefully laid plans for OpenAI's future, including converting it to a for-profit company and spending up to \$500 billion on AI infrastructure through a joint venture called Stargate. He and Musk are already fighting in court over the direction of OpenAI. ...

The bid is being backed by Musk's own artificial intelligence company xAI, which could merge with OpenAI following a deal.

Get it? OpenAI is, currently, a [nonprofit organization](#) that controls a for-profit subsidiary. The for-profit subsidiary has some investors who have written big checks in exchange for [quasi-equity profit shares](#) in the business. OpenAI's plan is to make the for-profit subsidiary a more normal standalone for-profit company, so that it can sell more normal shares, raise more money from investors and, uh, have more profits. (Eventually.)

But you cannot just take the assets of a nonprofit organization and give them to a for-profit company. The nonprofit's assets have to remain "irrevocably dedicated to its charitable purpose." OpenAI-the-nonprofit's main asset is [control of OpenAI-the-business](#), and it can't just give that away. It can *sell* it, though. The newly independent for-profit business could pay OpenAI-the-nonprofit the fair value of its current ownership, and then OpenAI-the-nonprofit's assets (that payment) could remain dedicated to charitable purposes.

In practice that value is very large, and the for-profit entity wouldn't just write the nonprofit a check for the value; instead, the value would be expressed in *shares* of the for-profit. The for-profit arm would become a normal corporation with normal shareholders, and the nonprofit would be one of those shareholders.

How much should the nonprofit get? Well, you know, OpenAI-the-nonprofit hires some bankers, and OpenAI-the-for-profit hires some bankers, and OpenAI's for-profit investors (Microsoft Corp. and some venture capitalists) hire some bankers, and they build financial models and propose valuations. In theory, the nonprofit's bankers should seek a high number, arguing that the nonprofit currently controls OpenAI's business and so should get most of the value of that business, while, for instance, Microsoft's bankers will seek a lower number, arguing that most of the profits of that business have already been promised to investors, and so those investors should end up with most of the ownership.

And then they negotiate, and they come to an answer that they can all live with, and they get some sort of fairness opinion or valuation blessing that answer, and they submit it to the California and Delaware state attorneys general (and probably eventually to a court), and eventually it gets more or less blessed. At The Information, Martin Peers estimates that those negotiations might give the nonprofit something like a 25% stake in OpenAI's business, which is currently raising money at a \$260 billion [pre-money valuation](#), making the nonprofit's stake worth about \$65 billion.

And then Musk threw a spanner in the works by proposing a bigger number. Because if the nonprofit needs to be fairly compensated, then if Musk is offering a bigger number, that implies that OpenAI's smaller number is not fair compensation. From Musk's lawyer's emailed statement:

"If Sam Altman and the present OpenAI, Inc. Board of Directors are intent on becoming a fully for-profit corporation, it is vital that the charity be fairly compensated for what its leadership is taking away from it: control over the most transformative technology of our time," said Marc Toberoff, the attorney representing the investors.

"As we understand the OpenAI, Inc. Board's present intentions, they will give up majority ownership and control over OpenAI's entire for-profit business in exchange for some minority share of a new, consolidated for-profit entity. Who on Earth would make that trade? If the Board is determined to relinquish OpenAI, Inc.'s assets, it is in the public's interest to ensure that OpenAI, Inc. is compensated at fair market value. That value cannot be determined by insiders negotiating on both sides of the same table. After all, the public is OpenAI, Inc.'s beneficiary, and a sweetheart deal between insiders does not serve the public interest." ...

Musk and his investment partners have determined that the ownership and control that OpenAI, Inc. represents it has over its various for-profit OpenAI subsidiaries and affiliates is worth no less than \$97.375 billion. They offer that amount today, and they are prepared to consider matching or exceeding higher bids. Because OpenAI, Inc.'s assets are held in charitable trust, this entire purchase price will flow into the charity and be irrevocably dedicated to charitable purposes.

And so you are left with the absolutely bizarre circumstance that a nonprofit plausibly *might* have a fiduciary obligation to sell to the highest bidder, even if it finds that highest bidder unsavory and uncharitable. What if it got a topping bid from the Chinese Communist Party? What if a robot wearing a fake mustache came in and said "I will pay \$150 billion for your company and will not use it to take over the world and enslave humanity, what even gave you that idea"? Would the charity's obligation – its obligation not to give assets away to a for-profit company, but to be paid fair value for them – require it to sell to the highest bidder?

And, recognizing that bizarre circumstance, Musk, the richest man in the world, lobbed in a bid. I cannot fault it! It is top-tier M&A trolling.

One assumes he is not serious. The point here is not to *buy OpenAI*; the point is to *raise the price*. If the right valuation of the nonprofit's stake in OpenAI is north of \$100 billion, then that means that the nonprofit needs to get a bigger chunk of the company, which leaves less for the for-profit shareholders. It is harder to [raise \\$40 billion](#) from SoftBank if that \$40 billion gets SoftBank a smaller share of the company. The Wall Street Journal notes:

The higher the valuation of the nonprofit, the bigger its stake would likely be in the for-profit OpenAI following a conversion.

At the same time, OpenAI is negotiating how much equity Microsoft, its biggest investor, should get in the for-profit company, along with other backers and employees. It is also seeking to raise up to \$40 billion of new capital. Investors in that round will likely expect equity when OpenAI becomes a for-profit as well.

Satisfying all those parties was already complicated. If Musk's gambit increases the equity awarded to the nonprofit, it will be even more difficult.

And [here's Sam Altman](#) :

"I think he is probably just trying to slow us down. He obviously is a competitor," Altman said in an interview with Bloomberg Television Tuesday on the sidelines of the Paris AI summit. "I wish he would just compete by building a better product, but I think there's been a lot of tactics, many, many lawsuits, all sorts of other crazy stuff, now this." ...

In the interview on Tuesday, Altman chided Musk, saying: "Probably his whole life is from a position of insecurity – I feel for the guy." Altman added that he doesn't think Musk is "a happy person."

Also:

Altman added in the interview Tuesday that the OpenAI board is looking at a range of options for the business in the future. But selling the AI operations is not on the table.

"OpenAI is not for sale," he said. "The OpenAI mission is not for sale."

Yeah I mean sort of? The nonprofit board's obligation is to its mission, and it should make decisions that are in the best interests of building AI for the benefit of humanity, not to maximize dollars. On the other hand, OpenAI kind of literally is for sale, in that the nonprofit really is not allowed to *give it away* to a for-profit company. Someone has to buy OpenAI-the-business from OpenAI-the-nonprofit. OpenAI would like that someone to be OpenAI-the-business, but OpenAI has put itself in play, and now there's a higher bidder.

And again, as with Twitter, the problem here – the thing that leaves the board vulnerable to Musk – is the *fuzziness* of OpenAI's vision. If OpenAI had a vision like "we are going to build open AI, [for the benefit of mankind](#) , rather than for profit," then there would be absolutely no question of it selling out to the highest bidder. That would be an absurd suggestion. Or if OpenAI had a vision like "we are going to make zillions of dollars building AI, it's gonna be absolute Skynet up in here," there would be no question of it selling to Elon Musk for any price even he could name. But OpenAI is trying to do both: It is still pursuing its benefit-of-humanity mission while also converting to a for-profit. That is messy and arguably insupportable, and Musk pounced.

By the way: I assume he does not have \$97 billion of committed financing? Like:

1. That would be a lot: by a factor of 2 the largest-ever leveraged buyout, and by a factor of, uh, probably infinity, the largest-ever leveraged buyout of a *nonprofit*.

- 2. Honestly how would you even get financing to do a leveraged buyout of a nonprofit? I'm sure there is an answer, but, man.
- 3. This is mostly trolling? Like the goal here is not to *buy OpenAI*, but to make it awkward and difficult for OpenAI to convert to a for-profit company. Seems silly to get commitment letters for this.

At the same time, though, he's not *kidding*, right? Like he clearly *could* raise \$97 billion for a stunt like this. I suppose OpenAI could reject his offer for the uncertainty of his financing, and then he'd come back 12 hours later and be like "aha, I have the money right here," and then where would they be? He'll roll up with 9.7 trillion *pennies*, won't he?

Hedge fund fees

Here's how Goldman Sachs Group Inc. works :

1. It uses money to do various sorts of trades that, broadly speaking, serve customers: It uses its balance sheet to buy and sell bonds for customers, it acts as a counterparty on derivatives, etc.

- 2. Goldman earns revenue by doing those trades.
- 3. To do the trades, Goldman needs money. It gets a lot of that money by borrowing it, and some of it from investors. The investors are called "shareholders."
- 4. The lenders get paid some market interest rate for their money. The shareholders do not; Goldman has no obligation to pay them back anything.
- 5. But the shareholders *expect* some return on their capital; they expect dividends and stock buybacks and appreciation of the value of their shares.
- 6. There is a popular notion, among investment bank shareholders and executives, that the shareholders expect a certain *number* for that return: The bank has a "cost of capital," or at least a "target return on equity," and if it regularly returns less than that target, shareholders will be mad. (Goldman's target return on equity is 14% to 16%.) If the shareholders are mad, there's not *that* much they can do about it – they can't take their money out – but it's probably unpleasant for the executives.
- 7. Goldman pays various costs – for office space and computers and travel and photocopying, but especially the salaries and bonuses of its employees – out of the money that it makes.
- 8. Those payments that Goldman makes are largely *not* determined directly by its revenue. It's not like Goldman only pays rent when it has a good quarter of trading; it incurs costs to try to make money, whether or not it actually makes money.
- 9. The obvious exception to that is that a pretty big chunk of Goldman's costs are *bonuses* for bankers and traders and executives, and you'd expect those bonuses to be pretty closely tied to revenue. But not

perfectly. A desk, or the bank, could have a bad year and still pay traders a lot to keep them around. The bonuses are not set at a fixed percentage of revenue; they are determined by competitive market pressures.

- 10. You take the revenue and you subtract the costs (mostly compensation) and what's left over is the net income available for shareholders.
- 11. If the net income is at or above the return on equity target, good. If it's below the target, bad. Goldman tries to beat the target, but it is a big complicated machine and it doesn't always work. "Wait you missed the target because you paid big bonuses, why not just pay lower bonuses," you might naively say, but then Goldman would shake its head at your naivete.

I submit to you that, in 2025, big multistrategy hedge funds play a role similar to that played by big investment banks, and *they work the same way*:

1. Balyasny, for instance, uses money to do various sorts of trades that, broadly speaking, [fill some economic niche](#) in the markets. It uses its balance sheet to buy Treasury bonds and [provide Treasury futures](#) to investors, or to help index funds with rebalancing, or to [manufacture](#) index volatility out of single-stock volatility. Balyasny does not have *customers* in quite as direct a way as Goldman does, but it is performing a similar economic function.

- 2. Balyasny earns revenue by doing those trades, though the revenue is more likely to be called something like "gains."
- 3. To do the trades, Balyasny needs money. It borrows some of it, and gets the rest from investors. The investors are called "limited partners in the fund."
- 4. The lenders get interest; the LPs do not.
- 5. But the LPs *expect* some return on their capital; they expect cash payments and/or appreciation in the value of their stakes in the fund.
- 6. Balyasny's LPs expect some number for their return, with that number based on (1) the volatility of Balyasny's results (lower volatility means lower expected return), (2) what they could get elsewhere (from Citadel or Millennium or Treasury bonds or the stock market) and (3) the same rule-of-thumb-type calculation that makes Goldman target mid-single-digit returns.
- 7. Balyasny pays various costs out of the money that it makes.
- 8. Those costs are not directly determined by revenue.
- 9. The obvious exception is bonuses, but again they are only a partial exception. If Balyasny needs to guarantee a star portfolio manager \$50 million to hire her, it's going to pay her \$50 million, even in a down year.
- 10. You take the gains and you subtract the costs (mostly comp) and what's left over is the money available for the LPs.
- 11. If the returns to the LPs are above the target, good. If they're below, bad.

- 12. If they're below the target for a long time, the investors eventually can take their money out of the fund, though they are probably locked up for a while. But it's not like one year of below-target returns are a disaster. Businesses are supposed to earn their cost of capital over the long term.
- 13. Balyasny tries to beat the target, but it is a big complicated machine and it doesn't always work. "Wait you missed the target because you paid big bonuses, why not just pay lower bonuses," you might naively say, but then Balyasny would shake its head at your naivete.

This is not a perfect model, but I want to argue that it is a better model than "Balyasny is an investment fund, it takes its limited partners' money and invests it in stuff, and if the stuff goes up the investors get the returns, minus some fees that they pay to Balyasny." The limited partners are not *partners in Balyasny's investing*; they are *capital providers to Balyasny's business*. And they get the returns that they get.

Anyway Bloomberg's Hema Parmar, Weihua Li, Kyle Kim and Armand Emamdjomeh [report on passthrough fees](#) :

In 2023, the main hedge fund at billionaire Dmitry Balyasny's eponymous firm notched a gross return of 15.2%.

Investors walked away with a gain of just 2.8%.

The rest they paid in fees – more than \$768 million – mainly for compensation but also a wide variety of other costs down to mobile-phone service.

That parceling out of costs is one of the most coveted perks of running a multistrategy hedge fund. Investors are so eager to pony up money that they effectively write a blank check, agreeing to cover just about any expense managers deem reasonable, in good times and bad.

The term for that: Passthrough fees. ...

A Bloomberg analysis of the group's regulatory filings shows their publicly disclosed lists of expenses eligible to pass through have exploded in recent years. A decade or so ago, they typically called out run-of-the-mill categories like compensation, rent and computers. Now, some firms specify that fees may include artificial intelligence, compliance costs, internal referral payments, the expense of terminating staff and catch-all items – like "extraordinary or non-recurring expenses." ...

Last week, Citadel issued a bond prospectus, obtained by Bloomberg, with pages of details on costs it charges. They include technology and travel "of all forms," such as booking or leasing a private jet. Investors can also foot bills for employee gifts, entertainment for employee gatherings, as well as snacks, drinks and "other nourishment," the document shows. ...

"There is no limit on the amount of passthrough expenses that may be charged," Point72 wrote in a 2020 filing, the first year it used that language. The fees are generally expected to increase as fund performance improves. But they "are expected to be substantial regardless of the performance."

One industry study shows that the portion of gross returns shared with clients is shrinking. Multistrats kept 59 cents of every dollar they made for investors in 2023, according to a BNP Paribas report. That was up from 46 cents two years earlier.

Goldman had \$14.3 billion of net income on \$53.5 billion of net revenue last year, meaning that it kept about 73 cents of every dollar it made for investors, so the multistrats are still relatively lean.

Memecoins

We [talked about memecoins](#) yesterday, and I don't want to talk about them today, but I do feel obligated to mention three updates.

First: I wrote yesterday that memecoins have become the main line of US crypto in part because, unlike more useful crypto ideas, they avoid scrutiny from the US Securities and Exchange Commission.

"Memecoins are *obviously* not securities," I wrote; "they are *obviously* not 'an investment of money in a common enterprise with profits to come solely from the efforts of others,' because there are no enterprise, no profits and no efforts."

I think that is right, but a reader pointed out that some lawyers disagree, and have made a business of suing memecoin promoters for doing unregistered securities offerings. Here's one against "the 'Hawk Tuah Girl,'" whose memecoin we have [discussed previously](#) :

At the heart of the lawsuit is the allegation that the \$HAWK token constitutes an unregistered security. The complaint states, "[t]he \$HAWK Token exhibits all the characteristics of an unregistered security under established legal precedent." The plaintiffs argue that the defendants leveraged Haliey Welch's celebrity status to create "a speculative frenzy that caused the [\$HAWK] Token's market value to spike shortly after launch, reaching a significant market capitalization." As alleged in the complaint, the defendants engaged in actions that potentially violated federal securities laws. The lawsuit claims that the \$HAWK token exhibits characteristics of an unregistered security, and was offered and sold to the public without proper registration with the SEC.

The important lesson of this column is that everything is securities fraud, including the things that I don't think are securities fraud.

Second:

The leader of one of Africa's poorest nations has mimicked Donald Trump with the launch of a so-called memecoin, only to see its value immediately crash over concerns the project was an elaborate fake.

Faustin-Archange Touadéra, president of the Central African Republic, said on X that the country's memecoin was "an experiment designed to show how something as simple as a meme can unite people, support national development and put CAR on the world stage in a unique way". ...

The \$CAR memecoin's value has plunged 95 per cent since trading began early on Monday, hitting around \$0.04 on Tuesday. The token has a market capitalisation of \$37mn, according to data provider CoinMarketCap, down from a shortlived peak of \$350mn.

Yes look if you are a country you should definitely launch a memecoin? A memecoin is, like, sovereign debt with no maturity, no interest and no inflationary effect: You just sell it for money and then forget about it. What's not to like?

Third: Someone launched a "Money Stuff by Matt Levine (MONEYSTUFF)" coin on pump.fun, the main site for memecoins. When I checked this morning it had a market capitalization of about \$5,700, which, uh. It should go without saying that (1) I didn't launch this coin, (2) I don't own any of it and (3) you should not buy it.

A new kind of financial adviser

This kind:

Unlike most rich clients, who seek out financial advisors in the hope of getting even richer, the 18- to 35-year-olds at the Making Money Make Change conference in Nashville are here to do the opposite. As the children of millionaires and billionaires, they are among the heirs to the greatest wealth transfer in American history – some \$16 trillion that will be passed down in the next decade alone. And they don't want it. ...

Those attending the conference say they have found it surprisingly difficult to figure out how to divest themselves of their money. Depending on how their trust funds are set up, accessing their funds might require them to go through their family or a trustee, who often have a vested interest in keeping the money locked up for generations to come. "The trustees are like, 'What about your children's children?'" Meg recalls being asked. "And we're like, 'What about everybody else's children?'"

What's more, the personal-finance industry is predicated on building wealth, not getting rid of it. "Almost all of my clients are really frustrated with the financial team that they come in with," says Iris Brilliant, a money coach who works with heirs to redistribute their wealth. Originally a poetry major, Brilliant worked as an organizer at Resource Generation for five years before launching her own practice. Now she's overwhelmed by the demand for her services. "There is a huge blossoming of interest, and I have a waitlist for individual coaching," she says. "I imagine that's the case for a lot of my peers."

I love capitalism, and probably my favorite kind of capitalism – really the main thing I write about around here – is the kind where you relieve people of their money and make them feel good about it. This is perhaps the most transparent way to do that: financial advisers who help heirs give away all their money.

No, just kidding, not *all* their money. That's just marketing. Really:

Given all the "Tax the Rich" and "Liberation" T-shirts they're wearing, you wouldn't guess that the people at the conference possess a combined net worth of at least \$246 million. And that's not including the wealth they stand to inherit from their families – some \$1.5 billion, a "money survey" completed by all but seven of the attendees found. ...

By the end of the conference, 35 heirs have pledged to redistribute a total of \$9.2 million.

That's roughly 3.7% of their combined wealth? You can get like 4.3% in a money market fund.

Things happen

Trump Curbs Enforcement of Antibribery Law. Goldman Sachs Abandons [IPO Diversity Pledge](#) With US DEI Goals Under Fire. Proxy Adviser ISS Kills [Diversity Criteria](#) for Assessing Boards. Deloitte asks consultants to US government to remove gender pronouns from emails. Powell Says Law Doesn't Allow Trump to [Fire Fed Board](#) . JPMorgan Defector Aims to Make [Wells Fargo](#) a Wall Street Force. [Credit Quants](#) Target Bulk Trades to Conquer \$8 Trillion Market. Shopify takes down Ye website selling swastika shirts after Super Bowl ad. Behind the Scenes at the Westminster Dog Show.

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To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Michael Newman at mnewman43@bloomberg.net

- 1. Are these comparisons unfair? Musk's lawyer's statement says: "At x.AI, we live by the values I was promised OpenAI would follow. We've made Grok open source, and we respect the rights of content creators. ... It's time for OpenAI to return to the open-source, safety-focused force for good it once was. We will make sure that happens." He's got a case that he's the **most** charitable option.
- 2. I should say: Everyone, including me and Sam Altman, assumes that Musk will not actually buy OpenAI. But ... I mean, he would do it for \$97.4 billion, no? Like that's an incredible bargain? If he bought the nonprofit's controlling stake for \$97.4 billion, he'd control the business. OpenAI-the-nonprofit wants to give up control of the business, because that will help with fundraising, but Musk wouldn't. Musk would pay \$97.4 billion to get control of a \$260 billion-ish business. He'd have minority shareholders (or weird-profit-interest-holders), but he could deal with them. And he'd have no trouble with fundraising.
- 3. Also a larger percentage ownership for the nonprofit might be off-putting to investors even outside of worries about cutting back their own stake. A, say, 40% nonprofit ownership would mean (1) more overhang (more shares to be sold eventually) and (2) more **control** for the nonprofit, which might make the for-profit investors nervous. The nonprofit control has not always been [good for valuation](#) .
- 4. Exercise for the reader: If Musk, through xAI, buys OpenAI, is that positive or negative for [the credit of X](#) ?
- 5. Down here in a footnote I am just going to throw out there that, if Bill Ackman doesn't launch a hostile bid for Harvard in the next couple of years, I'll be a little disappointed.
- 6. Disclosure, I used to work at Goldman, though this litany is not really about Goldman; it's about investment banks with market businesses generally.

"This was my first thought when I heard Elon and his acolytes were accessing Treasury systems. There are a handful of exceptions to the no-disclosure-of-material-tax-information rule, but "crazed billionaire who is pretending to play government" is not one of them. 1/" — Bluesky

 bsky.app/profile/snbrnsn.bsky.social/post/3lhvqqmp52c2n



Sam Brunson

@snbrnsn.bsky.social

This was my first thought when I heard Elon and his acolytes were accessing Treasury systems. There are a handful of exceptions to the no-disclosure-of-material-tax-information rule, but "crazed billionaire who is pretending to play government" is not one of them. 1/

25. The Internal Revenue Code, 26 U.S.C. § 6103, provides that “[r]eturns and return information shall be confidential” and prohibits the disclosure and use of this information by United States employees and other defined persons, except as specifically authorized by statute. This protection is an essential component of the due process granted to taxpayers by the

ALT



7h

EPIC files suit for damages against the Trump/Musk/Doge cartel for its illegal breach of privacy & security on behalf of tens of millions of Americans. "These basic security failures have resulted in the unlawful disclosure of personal data—including social security numbers & tax information."

<https://epic.org/wp-content/uploads/2025/02/EPIC-v-OPM-25-cv-255-complaint-021025.pdf>



epic.org

February 11, 2025 at 5:19 AM

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In fact, if the president wants to provide taxpayer information to a White House employee (which I doubt Elon is), he has to designate the person by name in a personally-signed document. Given that there's no way he did that, any taxpayer information they saw was unlawful. 2/

(g) DISCLOSURE TO PRESIDENT AND CERTAIN OTHER PERSONS

(1) IN GENERAL

Upon written request by the President, signed by him personally, the Secretary shall furnish to the President, or to such employee or employees of the White House Office as the President may designate by name in such request, a return or return information with respect to any taxpayer named in such request. Any such request shall state—

- (A) the name and address of the taxpayer whose return or return information is to be disclosed,
- (B) the kind of return or return information which is to be disclosed,
- (C) the taxable period or periods covered by such return or return information, and
- (D) the specific reason why the inspection or disclosure is requested.

ALT

Litigation

Feb. 11, 2025, 9:47 AM PST

Musk Increases Attacks on Judges Who Rule That DOGE Must Pause

By Dana Hull

- Dozens of suits question the legality of Musk's actions in DC
- Musk has long used X to go after business and political rivals

Elon Musk, now President Donald Trump's most prominent adviser, has increased his attacks on the federal officials and judges he sees as obstacles to his sweeping government cost-cutting crusade.

It's a tactic the world's richest person has long employed to take on his political and corporate rivals. But now, from his perch in the White House as a special government employee, his threats of retribution and calls for impeachment on X have taken on new heft.

Musk's latest targets are the federal judges who will decide whether Trump's blitz of executive orders – and Musk's actions in carrying them out – violate constitutional limits on the power of the presidency. On Monday night, after a judge found that Trump officials had violated a temporary restraining order to unfreeze all \$3 trillion in federal funds, Musk warned on X that “democracy in America is being destroyed by judicial coup. An activist judge is not a real judge.”

He also blasted a federal judge in Boston who on Monday paused the Trump administration's plans to cut National Institutes of health funding, calling it “judicially-mandated corruption.”

Musk's biggest target has been US District Judge Paul Engelmayer, who on Saturday [temporarily blocked](#) Musk's government efficiency team from accessing some Treasury Department information and ordered the destruction of data they've already gathered.

The next day, Musk called for the US House to begin proceedings that could ultimately lead to Engelmayer's removal from the bench.

“A corrupt judge protecting corruption,” Musk said on X of Engelmayer, who had been appointed by President Barack Obama. “He needs to be impeached NOW!”

The prominence of the federal courts has risen in recent weeks as the Republican-led Congress has largely backed Trump's orders and Musk's actions, even as the president challenges the legislature's constitutionally protected power of the purse.

House Speaker Mike Johnson, who met Monday with Musk, signaled support for the administration's efforts to rein in federal spending, saying Trump is allowed some discretion in directing federal funds. He likened Musk's team's work to a “forensic audit.”

“I think the courts should take a step back and let this process play out,” Johnson told reporters.

No Mercy

At his six companies, including Tesla and SpaceX, Musk has [shown no mercy](#) in his attacks on rivals or employees he deems disloyal. Now, as the head of the Department of Government Efficiency, the billionaire is bringing his no-holds-barred rhetoric to bear on US government employees, agency heads and elected officials.

Earlier this month, he called Republican Senator Todd Young a “deep state puppet” for considering opposing Tulsi Gabbard’s nomination to be the director of national intelligence. Musk later deleted the X post and praised Young as a “great ally in restoring power to the people from the vast, unelected bureaucracy.”

Young ultimately went on to support Gabbard’s nomination in the Intelligence Committee, ensuring its move to the floor for a vote expected Wednesday.

With his megaphone via X and effectively bottomless cash reserves, Musk has become a swift and unanticipated force in US politics. He appeared alongside Trump at campaign rallies and funded vast get-out-the-vote efforts on Trump’s behalf in swing states. Musk spent more than \$274 million on the 2024 elections, emerging as the top donor this cycle.

Musk has said, quite clearly, that his recent foray into politics wasn’t a one-off. His political action committee, America PAC, remains active. The PAC is preparing for special elections and the midterms and will play a “significant role in primaries,” he said.

[Read more: The World’s Richest Man Is Now America’s Biggest Political Donor](#)

Even before Trump’s campaign, Musk targeted public officials on X, especially those he saw as impediments to his commercial interests. After Democratic Senators Jeanne Shaheen and Jack Reed wrote a letter last year to the Inspector General of the Defense Department and then-Attorney General Merrick Garland expressing concern about Musk’s top-secret security clearance, Musk wrote on X that he would “find out who’s making those accusations and nuke them.”

Later, of the senators who signed the letter, he wrote, “They’re just the puppets. Who actually wrote this and made those knuckleheads sign it?”

[Read more: Elizabeth Warren Presses Trump on ‘Massive’ Musk Ethics Conflict](#)

--With assistance from **Billy House**, Erik Wasson, Chris Dolmetsch and Zoe Tillman.

To contact the reporter on this story:

Dana Hull in San Francisco at dhull12@bloomberg.net

To contact the editors responsible for this story:

Megan Scully at mscully32@bloomberg.net

Trial Lawyers Denounce Musk Attack on New York Federal Judge

 [law.com/nationallawjournal/2025/02/10/trial-lawyers-denounce-musk-attack-on-new-york-federal-judge-](https://www.law.com/nationallawjournal/2025/02/10/trial-lawyers-denounce-musk-attack-on-new-york-federal-judge-)

Alyssa Aquino

After Elon Musk called for the impeachment of the New York federal judge who temporarily blocked his commission from the U.S. Treasury's payment systems, the American College of Trial Lawyers blasted the billionaire adviser to the president for making a "dangerous" and "groundless" demand.

Musk called U.S. District Judge Paul Engelmayer of the Southern District of New York "a corrupt judge protecting corruption" who "needs to be impeached NOW!" on his social media platform X, shortly after the judge issued a temporary restraining order on Saturday barring anyone "other than civil servants with a need to access to perform their job duties" into the Treasury's payment records and systems.

"This ruling is absolutely insane! How on Earth are we supposed to stop fraud and waste of taxpayer money without looking at how money is spent? That's literally impossible!" said Musk, who continued his attacks throughout the weekend, resharing a post critical of Engelmayer's order and even suggesting the annual firing of 1% of all appointed judges.

The statements sparked a swift rebuke from the American College of Trial Lawyers, a fellowship of trial lawyers from the U.S. and Canada that promotes the rule of law and judicial independence.

"We recognize that any litigant ... any person within the public has a right to be critical of judges and critical of decisions and the like," said Richard Deane Jr., ACTL's president. "What we thought was inappropriate about this was to suggest that the judge did something incorrectly, and that he had done something that suggested he could be impeached, without any allegation of impeachable conduct."

"Just because you disagree with an opinion, to suggest that a judge is corrupt and that he or she should be impeached... particularly by someone who has a significant public position... fosters a distrust of the judiciary, undermines the rule of law and frankly exposes the judges to the risks of actual danger," he told the New York Law Journal.

Representatives for Musk and the Manhattan federal court didn't immediately respond to Monday's requests for comment.

Judicial safety has been a recurring issue within the legal community, with federal lawmakers passing legislation protecting judges' personal information, following the 2020 killing of the son of a New Jersey federal judge by a self-described "anti-feminist" attorney. In 2024, New

York lawmakers passed their own judicial protections, as jurists overseeing cases against Trump were coming under personal attack.

While ACTL denounced Musk's statements, Musk drew support online from Vice President JD Vance, who wrote: "Judges aren't allowed to control the executive's legitimate power."

The ruling that drew Musk's ire comes in a lawsuit filed by New York Attorney General Letitia James and the attorneys general for 18 other states challenging the Trump administration's decision to allow Musk and the Department of Government Efficiency access to the Treasury's payment systems.

Tasked with cutting federal spending, DOGE sought Treasury access as part of its efforts to dismantle U.S. Agency for International Development, a federal agency that accounts for a small amount of the federal budget.

But the attorneys general argue that the payment systems include sensitive personal information that, under law, can only be accessed by a "select group of civil services" with certain security clearances. They further argued that allowing Musk and other special government employees access risked granting them the power to freeze federal funds "with the click of a button."

In suing, the attorneys general pressed for a temporary restraining order, which Engelmayer granted hours after the lawsuit was filed, citing the potential risks of sensitive information being disclosed. The judge further found that the states had a chance of winning their case overall, noting that their statutory claims appear "particularly strong."

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Latest

Trending

Trump Allies Start Bullying Judges After Adverse Rulings (1)

By Jacqueline Thomsen

- Musk, Vance criticize judges' reach after Manhattan court decision
- Obama appointee put block on accessing Treasury information

Top allies of President Donald Trump are attacking federal judges online, as many of the new administration's policies have been initially blocked in court.

Elon Musk, Vice President JD Vance, and Sen. Tom Cotton's criticisms stopped short of saying the administration should defy court rulings, although several conservative figures have since done so in social media posts.

Adding to the tension between the branches is a Monday ruling by Chief US District Judge John J. McConnell, Jr. in Rhode Island, who said that the Trump administration wasn't complying with his prior decision mandating officials to restore federal funds that were earlier frozen.

The potential showdown between the Trump administration and federal courts, whose power comes from their perceived legitimacy, comes at a perilous moment as support for institutions like the Supreme Court has eroded.

"If the view is that courts are not only part of our political system, that they are part of ordinary politics, that's a very dangerous view because it makes the rule of law essentially impossible," said Stephen Burbank, a law professor emeritus at the University of Pennsylvania. "I'd be very concerned about that."

Musk, Vance, and Cotton sharply criticized the judiciary in the wake of the late Feb. 8 ruling from US District Judge Paul Engelmayer. That decision blocked Musk's efficiency team from accessing Treasury Department information.

Musk said that "it's time" for Congress to start impeaching judges, and that "the worst" 1% of appointed judges should be fired annually.

Vance said that judges “aren’t allowed to control the executive’s legitimate power,” analogizing it to a judge trying to tell a military general or attorney general how to exercise their powers. And Cotton referred to Engelmayer, an appointee of Barack Obama, by name in calling the ruling “outrageous.”

“This outlaw should be reversed immediately and Engelmayer should be forbidden by higher courts from ever hearing another case against the Trump admin,” Cotton wrote on X, the Musk-owned platform previously known as Twitter.

Legal experts said that federal judges — who have life tenure and can only be removed through impeachment, resignation, retirement, or death — won’t be intimidated against issuing fair rulings or as they oversee the dozens of high-profile lawsuits that have been filed against Trump administration actions so far.

Burbank said that if administration officials were to fail to comply with a court ruling, a federal judge could hold them in contempt.

Former federal judge Paul Grimm said the idea of ignoring court rulings is a dangerous one.

“Without those checks and balances, we don’t have the rule of law,” said Grimm, the director of the Bolch Judicial Institute at Duke Law School. “No right of any individual in this country is safe.”

Independent Courts

Legal experts said that the Trump White House could encourage Congress to punish judges by preventing them from getting raises or even trying to impeach them.

Removal from the bench would require two-thirds of the Senate to vote to convict a judge of high crimes and misdemeanors.

These kinds of threats underscore the importance of the Constitution granting federal judges life tenure, said Martin Redish, a law professor at Northwestern University who has written about judicial independence.

“If we don’t have an independent federal judiciary, then we don’t have a constitutional democracy,” he said.

Redish said that doesn’t mean judges won’t face harassment. He said that while private citizens have a First Amendment right to criticize court rulings, he hopes that politicians — of any political party — “would be very careful in their choice of words” about judges.

Burbank said that Congress could also define where resources are allocated based on a court’s jurisdiction. That would allow lawmakers to dictate which courts could still get funds to carry out the administration’s priorities — like making sure border courts can process immigration cases — while hamstringing ones that have issued rulings against Trump.

Shira Scheindlin, who used to sit on the US District Court for the Southern District of New York alongside Engelmayer, said that he is a measured and thoughtful judge. She called the attacks against him “disrespectful.”

Scheindlin, now of counsel with Boies Schiller Flexner, noted that Trump attacked judges by name during his first White House term.

“Judges are the only bulwark and guardrails that we have against this administration it seems,” she said, noting that judges appointed by a variety of presidents, including Ronald Reagan, have issued adverse rulings against Trump so far.

Grimm said that Engelmayer was faced with a lawsuit in which people had said their rights were at risk, and issued a temporary ruling.

“It’s not appropriate, nor is it for the benefit of the public at large to criticize or vilify a judge for doing that, when there’s a process to seek an appeal or seek a stay of the injunction and allow the courts to deal with it,” Grimm said.

(Updates with additional reporting throughout.)

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

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

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Trump Eases Enforcement of Law Banning Overseas Bribes (1)

By Jenny Leonard

President Donald Trump signed an executive order rolling back enforcement of a law that bars US companies from bribing foreign officials, arguing that the restriction puts American firms at a disadvantage.

Trump is ordering Attorney General Pam Bondi to pause actions taken under the Foreign Corrupt Practices Act until she issues new enforcement guidelines, according to a fact sheet on the executive order. All current and past actions will also be reviewed.

The act bars a company or person with US links to pay money or offer gifts to foreign officials as a way to win business overseas. Trump weighed trying to scrap the law during his first term.

"U.S. companies are harmed by FCPA overenforcement because they are prohibited from engaging in practices common among international competitors, creating an uneven playing field," the fact sheet said.

"It turns out that in practicality it's a disaster," Trump said in the Oval Office on Monday afternoon. "Nobody wants to do business with the Americans."

The act has been used to impose hundreds of millions of dollars in fines on companies around the world, including Glencore Plc and Goldman Sachs Group Inc.

"This is a horrible idea that US companies DO NOT WANT," Richard Nephew, senior research scholar at Columbia University and former anti-corruption coordinator at the State Department, said on X. "Sure, you may find one or two, but most appreciate the fact that FCPA allows them to be firm in refusing bribes because most private sector companies — sensibly — see bribery as an unproductive cost."

(Updates with Trump signing executive order.)

To contact the reporter on this story:

Jenny Leonard in Washington at jleonard67@bloomberg.net

Donald Trump Gives the Greenlight to Goldman Sachs and JPMorgan Chase to Return to Bribing Foreign Officials

 wallstreetonparade.com/2025/02/donald-trump-gives-the-greenlight-to-goldman-sachs-and-jpmorgan-chase-to-return-to-bribing-foreign-officials

By Pam Martens and Russ Martens: February 11, 2025 ~

The President of the United States appears to be on a mission to Make Corruption Great Again.

Just yesterday, Trump's Justice Department ordered prosecutors to drop corruption charges against New York City Mayor Eric Adams. Also, Trump issued a pardon to former Illinois Governor Rod Blagojevich, who was convicted in 2011 on corruption charges, including an FBI-recorded attempt to sell the U.S. Senate seat that was vacated when Barack Obama took the office of the President. Trump had commuted Blagojevich's sentence during his first term as President.



President Donald Trump Tells Fox News that Americans Would End Up Poor Without His Brain in the White House

In a further jaw-dropping move yesterday, Trump issued an Executive Order that suspends the Foreign Corrupt Practices Act (FCPA) for 180 days, giving a greenlight to megabanks on Wall Street and other U.S. corporations to bribe officials in foreign countries to get business deals approved. The order bars federal prosecutors from starting any new FCPA investigations, enforcing new actions and orders a review of existing FCPA investigations to “restore proper bounds” on applying the FCPA law.

Two of the megabanks on Wall Street – Goldman Sachs and JPMorgan Chase – had previously been charged with outrageously brazen violations of the Foreign Corrupt Practices Act (FCPA). (See [here](#) and [here](#).)

The FCPA has been the law of the United States for almost half a century. It was enacted in 1977 and protects the reputations of giant publicly-traded companies in the U.S., the stock of many of which are held to the tune of billions of dollars in public pension funds. It also supports the reputation of the United States as a country that will not allow its largest corporations to engage in predatory practices against vulnerable countries through bribery.

Trump's moves yesterday to normalize corruption are being interpreted by some media outlets as an effort by Trump to normalize his own history of corruption as simply what smart dealmakers do. Trump is, after all, the first convicted felon (a 34-count convicted felon to be precise) to serve as President of the United States in 248 years.

Trump's unprecedented moves since taking office just last month are ringing more and more alarm bells. Trump has stunned the world at large with his announcement last Tuesday that the U.S. would take ownership of Gaza, the homeland of the Palestinian people, and develop it into "the Riviera of the Middle East." Trump expanded on that in an interview with Fox News, portions of which were released yesterday. In that interview, Trump said the Palestinians would not be allowed to return to Gaza.

From firing Inspectors General, to shuttering federal agencies, to allowing the unprecedented breaches of U.S. government payment and computer systems, to appointing grossly disqualified individuals to lead critical federal agencies, Trump is increasingly appearing to be destabilizing the U.S. government.

Yesterday, five former U.S. Treasury Secretaries (Robert Rubin, Larry Summers, Tim Geithner, Jack Lew and Janet Yellen) jointly penned an OpEd at the New York Times. In it, they wrote the following about Elon Musk and his band of young techies gaining access to the U.S. Treasury's \$6 trillion payment system:

"These political actors have not been subject to the same rigorous ethics rules as civil servants, and one has explicitly retained his role in a private company, creating at best the appearance of financial conflicts of interest. They lack training and experience to handle private, personal data — like Social Security numbers and bank account information. Their power subjects America's payments system and the highly sensitive data within it to the risk of exposure, potentially to our adversaries. And our critical infrastructure is at risk of failure if the code that underwrites it is not handled with due care. That is why a federal judge this past weekend blocked, at least temporarily, these individuals from the Treasury's payments system, noting the risk of 'irreparable harm.' "

One member of Congress who appears to have sized up the machinations of Donald Trump, Elon Musk and his 19-25 year old tech bros running amok in the computer systems of critical federal agencies is Senator Sheldon Whitehouse (D-RI).

When the news of the mass firings of Inspectors General by Trump made their way to Whitehouse, he summed up the Trump agenda with one sentence at X (formerly Twitter):

"Corruption 101: Clear out the cops before you send in the thieves."

Over the weekend, another cop has been gutted by the Trump administration in a brazen coup d'état. The building of the Consumer Financial Protection Bureau (CFPB) has been shuttered for at least this week, its government website gives a 404 error notice, and its major operations have been suspended by a Trump appointee, Russell Vought (a key author of *Project 2025*), who has also been installed as the Director of the Office of Management and Budget (OMB).

The CFPB was created in 2010 under the Dodd-Frank financial reform legislation, duly passed by both houses of Congress and signed into law by President Barack Obama. It allows average Americans to file complaints directly with the CFPB against financial institutions that have ripped them off. That complaint database is publicly available and allows journalists to mine it, looking for the latest predatory actions against vulnerable Americans. Taking down the CFPB has been on Wall Street's wish list since its creation.

Senate and House Democrats funneled their outrage against the Trump administration's unlawful actions against the CFPB in a quickly launched protest rally in front of its shuttered building yesterday.

[Securities Law](#)

Feb. 11, 2025, 10:49 AM PST

Trump's Sons Back Friend's Penny Stock, Spurring 84% Price Jump

By Annie Massa

- **Trump Jr. and Eric Trump are investing in Dominari Holdings**
- **They will also join firm's advisory board as it pivots to AI**

Two of President Donald Trump's sons [are investing](#) in a small, unprofitable biotechnology firm-turned-investment bank headquartered in Trump Tower, adding to the first family's growing list of business interests from within its own orbit.

Donald Trump Jr. and **Eric Trump** also joined the advisory board of the firm, Dominari Holdings Inc., according to a [statement](#) Tuesday. The news sent shares of Dominari – which traded below \$1 as recently as December – surging as much as 84%. That followed a 91% gain on Monday.



Donald Trump Jr. at the Republican National Convention on July 16.

Photographer: David Paul Morris/Bloomberg

The Trumps will help Dominari focus on artificial intelligence and data centers, according to the statement. Dominari is a relatively new entrant to both fields, after it pivoted from [developing cancer treatments](#) as Alkido Pharma Inc. in 2022.

The chief executive officer of Dominari's securities business, **Kyle Wool**, called himself a personal friend of the Trumps in a phone interview Tuesday.

Wool said he has known Trump's oldest sons, who are the executive vice presidents of the Trump Organization, for about five years. He said he's a member of Trump National Golf Club in Jupiter, Florida.

"They're very great businessmen, and I think they both have an interest in the AI and data center space," Wool said. "They could be very helpful giving me guidance as advisers."

Eric Trump and Trump Jr. didn't immediately respond to requests for comment.

Penny Stock

Wool has been accused of unauthorized trading and other infractions at previous employers, including Morgan Stanley and Revere Securities, with alleged damages totaling more than \$1.5 million, according to regulatory filings. He denied the claims and declined to comment beyond the filings.

He has also appeared on Fox News, to discuss data centers, AI and other topics.

Eric Trump and Trump Jr. have recently announced a series of investments in companies and crypto projects that tend to spike on news of their involvement. For instance, shares of drone company Unusual Machines Inc. nearly doubled when Trump Jr. joined as an adviser on Nov. 27. Dominari was the lead underwriter on Unusual Machines' initial public offering and a subsequent private placement deal.

Dominari, which lost more than \$52 million over the past three years, saw its shares surge Tuesday to their highest intraday price since January 2022, when it was still a biotech company. The Trump sons both participated in a [private placement](#) that saw it issue shares and warrants at a combined purchase price of \$3.47.

Wool and his wife, Soo Yu, the company's chief operating officer, together own a majority stake in Dominari. Their shares were worth about \$28 million combined as of Tuesday at 1:40 p.m.

Dominari has shape-shifted since its founding in 1967 as Spherix Inc., which in 2004 was [selling a sweetener](#) called Naturlose for pharmaceutical use. From 2017 through 2022 it developed anticancer and antiviral therapies. Wool became a board member at the company in 2021, and it bought a Connecticut-based bank and broker dealer in September 2022. He became CEO of the broker dealer subsidiary in 2023.

Asked whether the relationship between his new advisers and the president could be relevant to the company, Wool said, "They're friends and advisers. I have no relationship with the government."

--With assistance from **Bailey Lipschultz**.

To contact the reporter on this story:

Annie Massa in New York at amassa12@bloomberg.net

To contact the editors responsible for this story:

Kristine Owram at kowram@bloomberg.net

Steven Crabill

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'No Limit' Hedge Fund Fees Are Eating Up Their Clients' Gains

By Hema Parmar, Weihua Li, Kyle Kim (News) and Armand Emamdjomeh

Deep Dive

For the full experience visit: [Hedge Funds Are Pocketing Much of Their Clients' Gains With 'No Limit' Fees](#)

In 2023, the main hedge fund at billionaire Dmitry Balyasny's eponymous firm notched a gross return of 15.2%.

Investors walked away with a gain of just 2.8%.

The rest they paid in fees — more than \$768 million to be exact — covering everything from trader compensation to mobile-phone service.

That parceling out of costs is one of the most coveted perks of running a multistrategy hedge fund. Investors are so eager to pony up money that they effectively write a blank check, agreeing to cover just about any expense managers deem reasonable, in good times and bad.

The term for that: Passthrough fees.

For some, the fees appear outrageously high. "Passthroughs are wild. You are paying for everything including the copier paper," said Joe Reilly, chief executive officer of family office network Circulus Group.

Yet others view it as an acceptable trade-off for more reliable performance. They're willing to shake off weak years, like Balyasny's performance in 2023 — which the firm calls "an anomaly in our 24 year history."

Multistrats — known for their trading "pods" that chase profits in all kinds of markets — say they need that freedom to compete for talent, invest in cutting-edge technologies and stay nimble as markets evolve. Prominent firms with the fee structure include Millennium Management, Citadel, Point72 Asset Management, Balyasny Asset Management and ExodusPoint Capital Management. Those five alone manage more than \$200 billion.

A Bloomberg analysis of the group's regulatory filings shows their publicly disclosed lists of expenses eligible to pass through have exploded in recent years. A decade or so ago, they typically called out broad categories like compensation, rent and computers. Now, some firms specify that fees may include office furniture and fixtures, tuition, entertainment, insurance against the death of a billionaire founder, travel unrelated to investments, and catch-all items — like “extraordinary or non-reoccurring expenses.”

Altogether, the group's list of potential expenses has increased by almost 40% since 2018.

There are several reasons why firms are disclosing more expenses, according to people close to hedge funds.

The appearance of a new item may mean it wasn't previously passed through, that an existing cost has swelled or that clients have asked about it. Some firms may have erred on the side of disclosing more to avoid running afoul of tougher regulatory oversight, especially during the Biden administration.

The filings also hint at other changes. For example, some money managers have expanded their descriptions of who might get paid with investor cash. In 2023, Ken Griffin's Citadel tweaked its description of passthrough fees to note they also cover “third party consultants/contractors.” That outsourcing saves investor money, a person close to the firm said.

Last week, Citadel filed a bond prospectus, obtained by Bloomberg, with pages of detail on costs it charges. They include travel “of all forms,” such as leasing or booking out a private jet. Investors can also foot bills for employee gifts, entertainment for employee gatherings, as well as snacks, drinks and “other nourishment,” the document shows.

From the start of 2022 and through last September, Citadel's three biggest funds racked up almost \$12.5 billion of passthrough fees, with more than \$11 billion paying for employee compensation and benefits.

Last year, Point72 told investors they will now pay for certain costs that founder Steve Cohen once covered. The change was expected to shift hundreds of millions of dollars in costs to clients. The firm uses a partial-passthrough structure, with many back-office expenses covered under a fixed-management fee.

Passthrough fees are so expansive that the youngest of the five firms, ExodusPoint, recently tried a new approach. It now lists seven things the fees won't cover. They include artwork.

'No Limit'

How much firms may spend on approved items is another matter.

“There is no limit on the amount of pass-through expenses that may be charged,” Point72 wrote in a 2020 filing, the first year it used that language. The fees are generally expected to increase as fund performance improves. But “are expected to be substantial regardless of the performance.”

One industry study shows that the portion of gross returns shared with clients is shrinking. Multistrats kept 59 cents of every dollar they made for investors in 2023, according to a BNP Paribas report, that was up from 46 cents two years earlier.

The result is that passthrough fees exceed the hedge fund industry's traditional "2-and-20" structure that has itself long been seen as rich. Under that framework, firms take 2% of client assets to cover basic operational costs, plus 20% of profits generated. Some multistrat clients estimate they effectively pay anywhere from 7-and-20 to 15-and-20.

Last year, for example, ExodusPoint handed investors an 11% gain after charging 8.4 percentage points in passthrough fees. That means clients received about 57% of the year's haul, while the firm kept the rest.

The various fees add up. Since 1969, hedge fund managers globally have pocketed roughly \$1.8 trillion in total fees — almost half of the industry's gains, according to fund-of-hedge-funds LCH Investments.

Representatives for Millennium, Point72 and ExodusPoint declined to comment for this story. Balyasny said it has a long history of delivering consistent double-digit returns.

"As in any business, when revenues are below expectations, expense ratios will be higher," it said of its lackluster 2023. "We addressed the issues and had a strong 2024 with performance and net margin returning to target."

Citadel said it has used the fees to invest in people, technology and infrastructure to create a "winning franchise" that has lasted more than three decades. "Principals and employees, who are the largest investor in the Citadel funds, also pay the same fees and expenses as external investors, ensuring an exceptionally strong alignment of interests," the firm said.

For investors, agreeing to pay passthrough fees is a bet that the firm will produce such an exceptional gross return that the costs won't hurt. In fact, the industry even points to studies suggesting that the higher the passthrough fees, the better the end result is for investors.

Take, for example, Citadel's gross return of 60% in 2022. Though fees ate up more than a third of that, clients still reaped a 38% gain — a knockout year for any hedge fund making diversified bets. The S&P 500, meanwhile, fell more than 19%.

Broadly, clients expect multistrats to generate steady returns of at least 12% annually with few downswings. For most firms, it's rare to hand customers single-digit returns, such as Balyasny did in 2023. All five funds have avoided any down years over the past half-decade.

That's why so many investors are willing to lock up their money, even as Treasuries yield more than 4% and S&P 500 index funds soar.

Passthroughs helps the firms recruit armies of highly talented pods that bet on tens of thousands of securities, reducing net risks, said Justin Young, director of investments at Multilateral Endowment Management Co. Firms can also set up infrastructure to keep trading costs low and provide additional cash at key moments to ramp up winning bets.

"This approach has delivered far more diversification, capital efficiency, downside protection and higher returns," Young said. "They aren't really comparable to your typical long/short equity fund that has 20 stocks in a single sector. The fees reflect this."

One concern is that if a multistrat's returns aren't high enough to cover such hefty expenses, managers might be tempted to start taking even bigger risks to reverse their fortunes — like an unlucky gambler doubling down at the card table, hoping to get their money back, according to a senior Wall Street executive.

Another worry is that managers who do generate windfalls may spend more than necessary on perks.

That poses a reputational risk for pensions, philanthropies and other institutions under public scrutiny to agree to passthrough fees, said Scott Radke, CEO of New Holland Capital, which allocates to hedge funds and runs a multistrat that charges partial passthroughs.

"It can be embarrassing for a pension fund to be paying for lavish office space and other non-investment-related expenses for wealthy hedge fund managers," Radke said. While some costs are widely accepted as necessary, "there's some other things that can seem miscellaneous or luxurious."

The amount of detail provided by individual hedge funds runs the gamut. Citadel and Millennium have consistently used catch-all phrases to describe what their passthrough fees cover — essentially saying investors pay all costs related to a fund. At the other end of the spectrum, ExodusPoint ticks off more than one hundred types of expenses.

Though regulatory filings show the types of items charged to investors, it remains less clear how much each one costs. Investors get only periodic breakdowns of expenses lumped into broad categories, such as compensation, technology and travel.

To learn more, an investor may set up a call with the hedge fund. Clients say those conversations can be subject to preexisting non-disclosure agreements.

Some hedge fund investors may not realize what they're signing up for. Much of the industry is moving downmarket, reeling in smaller customers. A growing throng of wealthy individuals, like doctors or lawyers, now use their banks' investing platforms to find hedge funds.

But big institutions are paying closer attention.

Blackstone Inc., with an internal database of almost 100 funds that pass through fees, ran an analysis. It found that on average, passthrough fees amount to about 6.5% of a fund's assets, with the most expensive managers reaching the high-teens, David Ben-Ur, who helps oversee Blackstone's investments in external hedge funds, said at a Bloomberg conference in June.

The fees have been compounding at an annual growth rate in the "high-single digits" over the past five years, Ben-Ur said.

It's all the more unsettling when clients — known as limited partners — can't tell exactly how all of that money gets spent, said Radke.

"The fact that it is opaque on what exactly is passed through makes LPs suspicious about what they're paying for," he said.

To contact the authors of this story:

Hema Parmar in New York at hparmar6@bloomberg.net

Weihua Li in New York at wli823@bloomberg.net

Kyle Kim (News) in New York at kkim578@bloomberg.net

Armand Emamdjomeh in Washington at aemamdjomeh1@bloomberg.net

To contact the editor responsible for this story:

David Scheer at dscheer@bloomberg.net

Janet Paskin

David Ingold

Alex Newman

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Bribery and corruption

Top cases brought under the US anti-corruption law now in Trump's crosshairs

Prosecutors have pursued high-profile cases since Foreign Corrupt Practices Act was introduced in 1977



President Donald Trump has ordered the justice department to pause the enforcement of the Foreign Corrupt Practices Act © Bloomberg

Kieran Smith 3 HOURS AGO



President Donald Trump has ordered the Department of Justice to halt the enforcement of an anti-corruption law that bars companies operating in the US from bribing foreign government officials to win business.

The executive order from the White House [pauses the enforcement](#) of the Foreign Corrupt Practices Act, which has been a vital tool for US authorities in targeting corporate misconduct for almost 50 years.

When it was introduced in 1977, the law only applied to US persons, a legal definition that included companies, citizens and residents, before it was expanded in 1998 to also cover foreign companies operating in America.

Many high-profile companies have been prosecuted under the law. These are some of the most notable cases from recent years.

RTX, 2024

The US defence contractor [struck a more than \\$950mn settlement](#) over claims it bribed a Qatari official to facilitate arms sales to the Gulf country and defrauded the Pentagon into overpaying for weapons including the Patriot missile systems.

Trafigura, 2024

One of the world's largest commodities traders pleaded guilty to charges of bribing officials in Brazil, and agreed to [pay \\$127mn in fines](#) and forfeited profits. US prosecutors said Trafigura made the bribes to retain business with Petrobras, Brazil's state-owned oil company.

Goldman Sachs, 2020

The Wall Street investment bank's Malaysian subsidiary [pleaded guilty to a bribery charge](#) as the bank agreed a \$2.9bn settlement with multiple authorities, including the DoJ, over the 1Malaysia Development Berhad money-laundering scandal. US officials said the bank ignored red flags over fundraisings it arranged for state fund 1MDB.

Airbus, 2020

Europe's aerospace champion agreed to [pay €3.6bn in penalties](#) to authorities in the US, UK and France to settle a long-running bribery probe into the company's use of intermediaries to secure international sales.

Ericsson, 2019

The Swedish telecoms group [agreed to pay more than \\$1bn](#) after admitting to using agents and consultants to bribe officials in countries including Djibouti, China, Vietnam, Indonesia and Kuwait. Cash bribes disguised as sham contracts were among the offences Ericsson admitted to.

Odebrecht, 2016

Odebrecht, then Latin America's largest construction company, and its petrochemicals unit Braskem, [agreed to pay at least \\$3.5bn](#) in fines for its part in a conspiracy to bribe government officials.

BAE Systems, 2010

Britain's largest defence company was [fined \\$400mn](#) and pleaded guilty to one charge of conspiring to making false statements to the US government in connection with regulatory filings and undertakings.

Siemens, 2008

The Munich-based company [agreed to pay €1bn](#) as part of a settlement with US and German authorities over suspected payments to officials around the world to win contracts. At the time, the €600mn fine it agreed to pay US authorities was the largest for a company accused of overseas bribery.

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Feb. 11, 2025, 10:54AM PST

'Sugar High' of Hobbled CFPB Could Crash Into Industry Confusion

By [Evan Weinberger](#)

- **Trump administration taking major steps to eliminate CFPB**
- **Banks were seeking defanged consumer finance watchdog agency**

Banks and other financial companies were seeking a lighter touch and more certainty from the Consumer Financial Protection Bureau.

What they're getting is a sudden evisceration of the agency. And it's starting to cause industry jitters.

"Having this much uncertainty in the regulatory arena is of concern here at America's Credit Unions," Carrie Hunt, the credit union trade association's chief advocacy officer, said on a Monday call with reporters.

The CFPB's supervision, enforcement, rulemaking, and other operations are on hold while a team from Elon Musk's Department of Government Efficiency pores over the agency's internal documents—including confidential supervisory information from companies the CFPB oversees and customer information.

That might provide a "sugar high" for companies facing enforcement actions, examinations, and other CFPB requirements, said Laurel Loomis Rimón, a Jenner & Block LLP partner and a former CFPB enforcement attorney.

"In the short-term, it's going to feel good to a lot of companies," she said.

But like a sugar high, that good feeling is likely to fade for companies that want to abide by the law. "What you're going to see in more of the medium term is the effects of the chaos and the uncertainty," said Rimón, a former federal prosecutor.

The chaos at the CFPB has the potential to throw sand into the workings of the nearly \$12 trillion mortgage market as well as banks with \$10 billion in assets or more and other nonbank companies.

Vought at the Helm

Russell Vought, the CFPB's acting director and the Senate-confirmed director of the Office of Management and Budget, told all agency employees Monday to do nothing while the agency's Washington headquarters is shut for the week.

Vought, installed in his post at the CFPB on Feb. 7, also announced that he would draw no funds from the Federal Reserve in the coming quarter in a post on the X social media platform on Feb. 8.

The agency has \$711 million in reserves and is funded through disbursements from the Fed, not Congressional appropriations.

The CFPB didn't respond to a request for comment. Vought's order blocked the agency's external communications.

'What's the Plan?'

Banks and other companies had been hoping for new leadership to roll back Chopra's more aggressive guidance and regulations, do basic supervision and enforcement, and provide a level playing field where nonbanks get similar oversight on consumer issues as banks do, according to an industry source who was granted anonymity to discuss private conversations with financial institutions and trade groups.

With Vought and Musk seemingly following the playbook deployed to hobble USAID, companies may not get what they're hoping for.

"What's the plan? The plan just seems to be tear it down and there we go," said Brendan McKay, the owner of McKay Mortgage Co. LLC in Bethesda, Md., and the chief advocacy officer at the Broker Action Coalition, a mortgage broker industry group.

Lost Flexibility

Freezing the CFPB poses problems on the regulatory front, according to David Silberman, a lecturer at Yale Law School and the CFPB's former assistant director for research, markets, and regulations during the Obama and first Trump administrations.

The CFPB has authority over about 10 regulations that get adjusted annually for inflation. One exempts small banks from a requirement to create escrow accounts for high-priced mortgages.

If that rule isn't adjusted for inflation, the number of covered community banks will expand each year, Silberman said.

The CFPB's rule writers are also necessary in an emergency. During the Covid-19 pandemic, Congress made several changes to consumer finance laws, such as making it easier to get student loan and mortgage forbearance agreements.

But the CFPB had to implement them, Silberman said.

And where consumer finance is rapidly evolving, particularly outside the banking system, the CFPB can adapt old rules to new products, he said.

"You lose all that capacity for flexibility and adjustment, but also a source for clarity" if the CFPB isn't functioning and Congress doesn't assign those responsibilities to other agencies, Silberman said.

Force Multiplier

Companies may also rejoice at the idea of a CFPB enforcement unit cut off at the knees.

But enforcement would persist among state regulators, private attorneys, and prudential banking regulators.

"The idea that there is no regulation in consumer financial services is wrong," said Cathy Brennan, a Hudson Cook LLP partner whose practice focuses on fintech.

Unless Congress eliminates the CFPB through legislation, a future Democratic administration could go back and conduct retroactive enforcement, attorneys say.

Companies that want to follow the law may also be at a competitive disadvantage to those that don't.

"Without the CFPB being the big bad wolf out there, those companies could cause a great deal of harm in a very short period of time to consumers," said Mercedes Tunstall, a partner at Cadwalader Wickersham & Taft LLP who counsels companies overseen by the CFPB.

The cryptocurrency industry, such as Coinbase CEO Brian Armstrong, has been particularly vocal in applauding the Trump administration's moves against the CFPB.

"When you have industry cheering on the demise of a consumer protection agency, you have to wonder why are they cheering on a lack of enforcement," said Richard Horn, the co-managing partner of Garriss Horn LLP and a former top CFPB attorney.

Rule of Law

The wholesale hobbling of the CFPB is part of a broader question about the rule of law in the US.

On Feb. 9, Vice President JD Vance mused on X about not following court orders, and there are indications the administration is entertaining similar thoughts.

Vought's order seeks to block actions otherwise mandated by the 2010 Dodd-Frank Act.

If the rule of law is in question, the US financial system might fall apart, said Brennan, who has been critical of many CFPB policies, such as an interpretive rule applying some credit card regulations to buy now, pay later products.

"This is really not about defending the CFPB and its right to exist, it's more about defending the rule of law," she said.

To contact the reporter on this story: Evan Weinberger in New York at eweinberger@bloombergindustry.com

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

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Wall Street Banks Plot Their Crypto Future in Bet on IPO Boom

By Teresa Xie, Matthew Monks, Ryan Gould and Bailey Lipschultz

- Morgan Stanley is courting clients, RBC weighs more business
- Trump's crypto-friendly regime is expected to unleash deals

After staying on the sidelines, some of Wall Street's biggest banks are plotting how to win more crypto business, betting President Donald Trump's embrace of the industry unleashes a wave of IPOs, share sales and convertible bonds.

Morgan Stanley, which hadn't been a major presence in the space, is now courting potential clients for initial public offerings, according to people familiar with the matter. At Bank of America Corp., senior executives in the investment bank are discussing a potential push into facilitating deals for digital asset firms. Royal Bank of Canada is looking to do more business after working on its first crypto deal late last year, said one of the people, who asked not to be identified discussing private information.

Banks are seeking deeper ties with crypto companies to avoid missing out on deals spurred by a more relaxed regime under Trump, the self-proclaimed 'crypto president.' Gemini, the cryptocurrency firm backed by the billionaire Winklevoss twins, is the latest to consider an IPO as soon as this year along with Bullish, a cryptoasset exchange operator with backers including billionaire Peter Thiel. Circle Internet Financial Ltd. and crypto exchange Kraken have long-held aspirations of becoming publicly traded.

Representatives for Morgan Stanley, RBC and Bank of America declined to comment.

As a candidate, Trump pledged to make the US the "crypto capital of the planet" and since taking power, he's sought to overhaul rules that chilled activity under President Joe Biden. Within days, Trump issued an executive order on digital assets and the US Securities and Exchange Commission launched a task force on crypto headed by Hester Peirce, a longtime advocate for the industry. White House crypto czar David Sacks said he's studying the feasibility of the new president's ambitions to create a national Bitcoin reserve.

Delayed IPOs

That may help unlock a wave of IPOs delayed for years amid the government crackdown on companies in the industry. Banks were also deterred by the scrutiny, with some asked by regulators to pause or hold off on planned or ongoing crypto activities and to provide additional information.

Read More: Coinbase Urges US to Lift Barriers for Crypto Bank Services

To date, the capital raising business by crypto firms — from IPOs and equity offerings to convertible bonds — has gone to a fairly regular gamut of lenders, though the largest investment banks have been selective. The highest-profile publicly-traded company in crypto remains Coinbase Global Inc., with Goldman Sachs Group Inc., JPMorgan Chase & Co., Allen & Co. and Citigroup Inc. working on the much-hyped direct listing in 2021.

Jefferies Financial Group Inc. is also active on crypto deals, advising Bullish on its potential listing along with JPMorgan. It's also among banks working with Figure Technologies Inc. — the financial technology firm co-founded by former SoFi Technologies Inc. head Mike Cagney — on an IPO, Bloomberg reported in late 2023. Moelis & Co. and Cantor Fitzgerald are among firms active in the space as well.

While Morgan Stanley wasn't on the Coinbase transaction, the bank did help the cryptocurrency exchange sell convertible bonds last year. The company is eager to be part of any future IPO wave should it materialize, one of the people said.

In July, Morgan Stanley was hired by IREN to help it evaluate "monetization opportunities in the AI data market," it said at the time. IREN operates data centers that service Bitcoin mining and AI cloud services.

Late last year, RBC helped arrange a convertible bond sale by crypto mining firm Core Scientific Inc. The bank has seen an increase in Bitcoin and crypto issuers coming to market since the election, according to its website. The Canadian lender, which had taken a more conservative approach to crypto, is beginning to ramp up efforts but will be selective about the clients it picks up, one of the people said.

Read More: FDIC Releases Documents That Probe Banks' Crypto-Business Plans

Banks are drawing up their lists of potential crypto IPO candidates amid broad optimism for the sector, which drove the largest and oldest digital token Bitcoin to a record high earlier this year. And signs of lenders' renewed interest are cropping up elsewhere — in one case, an HSBC Holdings Plc senior FX strategist now has an expanded title of head of digital assets research as well.

At Bank of America, conversations about crypto in the firm's investment bank are heating up as it prepares for more deal activity, with the lender eager to grab a slice of the hundreds of millions in fees those deals could generate, according to some of the people. The bank's Chief Executive Officer **Brian Moynihan** said during a CNBC interview earlier this year that banks "will come in hard on the transactional side," if regulation is established.

"We know how to enter the field," Moynihan said. "From the transactional side, I think you'll see the bank industry make moves."

--With assistance from **David Pan**, **Christine Dobby** and Katherine Doherty.

To contact the reporters on this story:

Teresa Xie in New York at txie63@bloomberg.net;

Matthew Monks in New York at mmonks1@bloomberg.net;

Ryan Gould in New York at rgould21@bloomberg.net;

Bailey Lipschultz in New York at blipschultz@bloomberg.net

To contact the editors responsible for this story:

Sally Bakewell at sbakewell1@bloomberg.net

David Morris

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Trump's Pick for SEC Chair Likely to Stymie Shareholder Proposals From ESG Advocates

 [law.com/nationallawjournal/2025/02/10/trumps-pick-for-sec-chair-likely-to-stymie-shareholder-proposals-from-esg-advocates](https://www.law.com/nationallawjournal/2025/02/10/trumps-pick-for-sec-chair-likely-to-stymie-shareholder-proposals-from-esg-advocates)

Chris O'Malley

Credit: BillionPhotos.com/Adobe Stock

Analysis

Paul Atkins once called companies that cave in to environmental, social and governance activists "weenies."

February 10, 2025 at 03:23 PM

By Chris O'Malley



The original version of this story was published on Corporate Counsel

The lawyer nominated by President Donald Trump to lead the Securities and Exchange Commission once called companies "weenies," saying they "often cave" to activists bringing shareholder proposals on social and environmental issues.

The remarks made by Paul Atkins at a Heritage Foundation event a dozen years ago, surfaced in a 2016 Politico story, suggest that the SEC under Atkins would give public companies more leeway to keep shareholder proposals from being presented to investors at their annual meetings and put to a vote.

"Under the leadership of Paul Atkins, I think it's all but certain that the SEC will take some tough actions to curb shareholder proposals, particularly those concerning so-called ESG matters," said Mohsen Manesh, a professor of business law at the University of Oregon.

The sheer volume shareholder proposals on social and governance matters in recent years reflects broader political and cultural tensions.

While some companies have embraced environmental and social causes, others have grown weary of a torrent of demands they deem tangential and ultimately distracting to the business.

And companies are pushing back. Rather than giving submissions the benefit of the doubt as to whether the subject matter is relevant to its business operations, doesn't duplicate another proposal, and doesn't stray into micromanagement—the conditions proposals must meet—they're filing so-called no-action requests seeking the SEC's guidance. The number of no-

action requests filed by companies related to shareholder proposals totaled 259 from November 2023 to May 2024, a span that encompasses most company annual meetings. That compares with 167 in the same period a year earlier, according to a report by the Shareholder Rights Group.

Last year, proposals involving environmental and social topics amounted to 62% of the nearly 1,000 proposals. That compares with 44% in 2014, when most of the proposals involved governance matters, according to a study by Institutional Shareholder Services.

Environmental and social shareholder proposals cover a broad terrain. Many ask companies to disclose environmental impact, as measured by CO2 emissions, deforestation or another metric, or seek company audits on such topics as human rights or pay equity.

Activist groups "do it all over the Fortune 500, which then gives them a megaphone of free publicity through the process and through harassment of the corporations because then the management wants to negotiate with them to get rid of their proposal," Atkins said at the Heritage Foundation event.

At the time Atkins made those remarks, he was serving as the first Trump administration's transition team leader for financial regulatory agencies and was rumored to be under consideration for a top regulatory post.

Atkins—who was an SEC commissioner from 2002-2008 and since then has been CEO of his own financial services consultancy, Patomak Global Partners—awaits Senate confirmation as SEC chairman. He did not respond to requests for comment from Law.com.

But as recently as 2022, during a Practicing Law Institute program session, Atkins complained about the effects of a 2021 bulletin issued by the Biden administration's SEC.

It gave regulators more wiggle room to find that a shareholder proposal ought to be presented to shareholders and put to a vote.

"The staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal," reads the November 2021 bulletin from the SEC's Division of Corporate Finance.

"In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company."

During the Practicing Law Institute discussion Atkins inquired about the number of exclusions permitted under no-action responses, complaining that the SEC had "eviscerated the exclusions," wrote Cydney Posner, special counsel in Cooley's public companies group, in a December client advisory.

"Atkins has long been an outspoken critic of activists using the shareholder proposal process to advance progressive priorities like DEI, reproductive rights, gun safety and climate change," Manesh said.

During the first Trump administration, SEC Chair Jay Clayton made several changes to tighten eligibility to submit a proposal. The SEC released interpretive bulletins "making it clear that the agency would be more likely to grant no-action letters to companies seeking to exclude shareholder proposals that leaned into environmental, social and political causes," he added.

If the SEC returns to such a stance among those most likely to be affected is shareholder advocacy group As You Sow.

At last glance, the El Cerrito, California-based nonprofit had 58 shareholder proposals on deck for the 2025 proxy season.

CEO Andrew Behar said a change in regulators doesn't change the basic concept of shareholder rights.

"So I don't see him [Atkins] changing that fundamental tenant of capitalism and law," Behar said.

"Now he could nuance it in favor of excluding shareholder rights, but I don't see the fundamentals changing."

As You Sow already has been fighting attempts by companies to get the SEC's blessing to keep its proposals off the ballot.

In light of Deere & Co.'s recent pledge to walk back its diversity efforts, As You Sow filed a resolution with Deere requesting it report publicly the effectiveness of its efforts to create a "meritocratic" workplace, "where no one is excluded from contributing to the company's success because of an immutable characteristic, such as gender, race or ethnicity."

Meanwhile, the conservative National Legal and Policy Center also submitted a proposal to Deere seeking a study, but for different reasons. Noting that diversity programs risk litigation for discriminating against white people, its proposal asks Deere for statistics on diversity in hiring across race and gender to prove it does not practice discrimination.

Deere sought an exemption from the As You Sow proposal, arguing to the SEC that the proposals were duplicative. The SEC disagreed in a letter to Deere last month.

Behar noted that shareholders have the right to ask for information that they consider material and use what they learn to make investment decisions.

"Investors invest in management teams. So there's a really deep relationship. And that is going to continue" regardless of Atkins, he added.

The idea that Atkins may be less receptive to shareholder proposals could, ironically enough, hinder conservative groups that have opposed DEI proposals.

The National Center for Public Policy Research, which filed a shareholder proposal asking Costco to assess risks of its DEI programs, hasn't had much discussion internally about potential changes under Atkins, said Stefan Padfield, executive director of the center's Free Enterprise Project.

Even if the SEC became more inclined to exclude shareholder proposals "my view is we can just adjust."

That could range from stepping up meetings with companies to litigation to targeting companies with books and records requests, he said,

The group recently sought documents from United Airlines in response to the carrier's temporary suspension of flights to Israel. It accused the carrier of "acquiescing to the woke politics of United's union leaders instead of valid safety or business concerns" for suspending flights.

Earlier this month United said it would resume flights between New York and Tel Aviv on March 18.

Even before Trump took office, the SEC was becoming increasingly receptive to companies seeking to exclude shareholder proposals.

Data compiled by the Shareholder Rights Group showed the SEC supported company requests for exclusion 68.4% of the time in the 2024 proxy season—up from 56.3% in 2023.

"It is still early innings, but consistent with prior seasons, companies have been largely successful on procedural arguments, such as failure of proponents to timely provide sufficient proof of ownership or submitting proposals past the deadlines," said Marc Gerber, a partner at Skadden, Arps, Slate, Meagher & Flom.

Gerber added: "The hope is that under the SEC's new leadership, shareholder proposals that make it into company proxy statements actually have relevance to the particular companies and relate to issues that concern shareholder value."

Manesh noted that Delaware law governing most public companies gives companies freedom in the corporate contract to regulate shareholder governance rights. In an academic paper last year he makes the case that also includes the right to make or vote upon a proposal at the shareholders meeting.

"The opportunity to escape the SEC's unpredictable no-action process, in favor of adjudicating shareholder-proposal disputes before the sophisticated and politically insulated courts of Delaware, could prove tempting," he wrote.

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February 04, 2025

GOP Now Holds FTC Gavel, but Dems Signal They'll Be a Rowdy Minority

By Chris O'Malley

🕒 6 minute read

Securities Law

Feb. 11, 2025, 8:07AM PST

Proxy Adviser ISS Kills Diversity Criteria for Assessing Boards

By Jeff Green and Saijel Kishan

Institutional Shareholder Services, which advises investors on how to vote in company meetings, will stop considering diversity as a factor for US corporate boards, citing anti-DEI orders from President Donald Trump.

"ISS will no longer consider the gender and racial and/or ethnic diversity of a company's board when making vote recommendations with respect to the election or re-election of directors at US companies," the proxy adviser said in a statement on its website Tuesday. The new guidelines will apply to recommendations published on or after Feb. 25.

The decision comes as companies from Alphabet Inc.'s Google unit to Goldman Sachs Group Inc. [cut back](#) on DEI (diversity, equity and inclusion) initiatives that Trump's new administration is trying to dismantle from corporate America and the federal government.

ISS issues recommendations for investors on how they should vote in shareholder proposals and on other topics, including the election of board members, at annual meetings. Conservative activists have criticized ISS in the past for its significant influence on the outcome of shareholder votes.

The move follows BlackRock Inc.'s decision to walk away from board diversity targets. The investment giant said in its 2024 shareholder voting guidelines that corporate boards should aspire to at least 30% diversity – defining it as having at least two women and a director from an underrepresented group.

In its 2025 guidelines, BlackRock omitted that language and said the majority of companies in the S&P 500 already have "diverse representation."

Vanguard Group Inc., the world's second-largest asset manager, had 13 mentions of diversity in its US voting guidelines for 2024. That was reduced to two in its 2025 report.

To contact the reporters on this story:

Jeff Green in Southfield, Michigan at jgreen16@bloomberg.net;

Saijel Kishan in New York at skishan@bloomberg.net

To contact the editors responsible for this story:

Nabila Ahmed at nahmed54@bloomberg.net

Tim Quinson

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Starbucks sued by Missouri over DEI, race and gender bias

 [reuters.com/legal/starbucks-sued-by-missouri-over-dei-alleged-racial-bias-2025-02-11](https://www.reuters.com/legal/starbucks-sued-by-missouri-over-dei-alleged-racial-bias-2025-02-11)

Jonathan Stempel

The logo of the American coffee company Starbucks is seen in Mexico City, Mexico, June 15, 2024. REUTERS/Raquel Cunha/File Photo Purchase Licensing Rights , opens new tab

- Starbucks accused of violating civil rights law
- Missouri cites CEO Niccol's work at Chipotle
- Starbucks says programs are lawful, accusations inaccurate

NEW YORK, Feb 11 (Reuters) - Starbucks (SBUX.O) , opens new tab was sued on Tuesday by the U.S. state of Missouri, which accused the coffee chain of using a commitment to diversity, equity and inclusion as a pretext to systematically discriminate based on race, gender and sexual orientation.

In a complaint filed in St. Louis federal court, Missouri accused Starbucks of tying executive pay to the company's achieving racial and gender-based hiring quotas.

It also accused Starbucks of singling out preferred groups for additional training and job advancement prospects, and employing a quota system to ensure its own board of directors had a variety of racial and ethnic backgrounds.

"All of this is unlawful," and violates federal and state civil rights laws, according to the complaint from Missouri Attorney General Andrew Bailey.

Bailey, a Republican, also contended that Missouri consumers pay higher prices and wait longer for services at Starbucks than if the Seattle-based chain employed the most qualified workers.

"We disagree with the attorney general and these allegations are inaccurate," Starbucks said in a statement. "We are deeply committed to creating opportunity for every single one of our partners (employees). Our programs and benefits are open to everyone and lawful."

U.S. President Donald Trump, also a Republican, has tried to shut down policies promoting diversity, equity and inclusion inside and outside the federal government, and some companies have taken action.

For example, the Wall Street bank Goldman Sachs (GS.N) , opens new tab on Tuesday canceled a policy to take companies public only if they had two diverse board members, generally defined as people from underrepresented demographics.

Last week, meanwhile, Google (GOOGL.O) [opens new tab](#) scrapped diversity-based hiring targets, while Amazon.com (AMZN.O) [opens new tab](#) removed a reference to inclusion and diversity from its annual report.

Tuesday's lawsuit challenged Starbucks policies adopted since 2020, after the murder of George Floyd, a Black man, by a Minneapolis police officer triggered unrest nationwide and led many companies to rethink employment practices.

Missouri said Starbucks' alleged endorsement of quotas "should come as no surprise," citing new Chief Executive Brian Niccol's support of environmental, social and governance goals while leading the Chipotle (CMG.N) [opens new tab](#) burrito chain.

Starbucks employs about 211,000 people in the U.S. and 361,000 people worldwide.

In August 2023, a federal judge in Spokane, Washington dismissed a shareholder lawsuit challenging Starbucks' diversity policies, saying the case addressed public policy questions best decided by lawmakers and companies, not courts.

Missouri's lawsuit seeks to force Starbucks to end alleged discrimination based on race, gender and national origin; rehire and rescind discipline against employees affected by discrimination, and pay unspecified damages.

The case is Missouri ex rel Bailey v Starbucks Corp, U.S. District Court, Eastern District of Missouri, No. 25-00165.

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Reporting by Jonathan Stempel; Editing by Lisa Shumaker, David Gregorio and Marguerita Choy

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

Home Generator Maker Beats Suit Over COVID Sales Bust

By **Katryna Perera**

Law360 (February 10, 2025, 6:04 PM EST) -- Power generator maker Generac Holdings Inc. and its top brass have beaten for now a proposed shareholder class action over Generac's alleged failure to keep up with a surge in business during the COVID-19 pandemic, with a Wisconsin federal judge saying, "misfortune does not necessarily equate with fraud."

U.S. District Judge Brett H. Ludwig issued an **order** on Friday granting Generac's dismissal motion but allowing the shareholders — led by the City Pension Fund for Firefighters and Police Officers in the City of Tampa and the City of Miami Fire Fighters' and Police Officers' Retirement Trust — leave to amend their complaint.

According to the order, the operative complaint, filed in 2023, was nearly 140 pages long and alleged three different theories of securities fraud against Generac and its CEO and chief financial officer. Generac sells various energy-related products such as power generators, solar power storage systems and home electricity controls, the order states.

The shareholders alleged that the defendants failed to disclose weakening demand for Generac's generators as the pandemic continued; that the company was having trouble satisfying orders; that a defect in Generac's solar energy products had led to residential fires, product failures and increased warranty claims; and Generac's risk of loss due to its "highly consolidated" sales of solar energy products through a single distributor, Pink Energy, that later went bankrupt.

But Judge Ludwig said Friday that "despite the length of their pleading, lead plaintiffs do not identify any false statements of material fact made by defendants."

The defendants argued in their dismissal motion that the complaint contains "puzzle pleading," relies heavily on speculation, and is lengthy and repetitive in nature.

Judge Ludwig agreed that the complaint is "unnecessarily long and convoluted," but said the main reason for dismissal and the "fundamental problem" with the complaint is its failure to offer "specific plausible allegations of falsity, scienter, and materiality, all required elements of the securities fraud claims pleaded."

The alleged material disclosures highlighted in the complaint are all non-actionable, the judge said, and many statements the defendants made about their beliefs about demand were generalized and meaningless.

The judge also noted that to the extent the defendants did make specific statements about the basis for their beliefs about demand or production, they "affirmatively disclosed the metrics on which they were relying."

"Tellingly, lead plaintiffs do not allege that any of these statements about the underlying metrics were untrue," the order states. "This undercuts any plausible claim that defendants' statements concerning demand were false or misleading. It instead shows that defendants had a 'reasonable basis' for their beliefs about the strength of [home standby] generator demand when the statements were made."

The complaint also fails to plausibly plead scienter, or that the defendants were intentionally misleading investors about customer demand, the judge said.

"Much like their allegations as to falsity, lead plaintiffs' [scienter] pleading failure lies in the generalized and conclusory nature of their allegations," the order states. "The inferences lead plaintiffs ask this court to draw would undermine the high burden Congress placed on lead plaintiffs in the [Private Securities Litigation Reform Act.]"

According to the order, at the start of the COVID-19 pandemic, Generac reported increased product sales driven mainly by demand for its home generators.

"Demand for HSB generators surged amidst the stay-at-home orders and other anxieties associated with COVID-19 ... in response, investors eagerly drove up Generac's stock price," the order states. "As the pandemic continued, however, Generac had trouble keeping up with orders and, despite efforts to increase capacity, its sales stalled, its orders decreased, and demand for its HSB generators waned."

The company's stock price then dropped dramatically, losing almost 80% of its value, according to the order, prompting a series of securities fraud lawsuits that were consolidated into the current action.

The suit is on behalf of a proposed class of purchasers of Generac common stock between April 29, 2021, and Nov. 1, 2022.

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

The investors are represented by James E. Barz, Frank A. Richter, Michael J. Stramaglia, and Darren J. Robbins of Robbins Geller Rudman & Dowd LLP, Guri Ademi, Jesse Fruchter and John D. Blythin of Ademi LLP, K. Scott Wagner of Attolles Law SC and Robert D. Klausner of Klausner Kaufman Jensen & Levinson.

The defendants are represented by Glenn K. Vanzura, Jacqueline M. Vallette, Joseph De Simone and Andrew J. Spadafora of Mayer Brown LLP.

The case is City Pension Fund for Firefighters and Police Officers in the City of Tampa et al. v. Generac Holdings Inc et al., case number 2:22-cv-01436, in the U.S. District Court for the Eastern District of Wisconsin.

--Editing by Emily Kokoll.



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NY Funds Say Paramount 'Bound' To Mull \$13.5B Sale Option

By **Jeff Montgomery**

Law360 (February 10, 2025, 8:47 PM EST) -- Five big New York public pension funds argued in a newly unsealed Delaware court filing on Monday that a Paramount special committee breached its fiduciary duties by neglecting a \$13.5 billion company sale offer and called for a Court of Chancery order compelling evaluation of the deal.

The funds' 43-page complaint surfaced 12 days after Vice Chancellor J. Travis Laster reversed a court magistrate's dismissal of a Rhode Island state worker retirement fund's suit for books and records sought for a probe of Paramount's proposed \$8 billion deal with Skydance Media.

Both suits focus in part on allegations that the Skydance deal offers hundreds of millions in unfair and "egregious" benefits to Shari Redstone, who controls Paramount through her control of National Amusements Inc., which holds 77% of Paramount's voting Class A stock and 5% of its non-voting "B" shares.

Terms of the Skydance deal include a "no shop" provision barring Paramount from considering other buyer offers. Redstone-controlled NAI would get an allegedly inflated, \$2.4 billion in a first step of the merger, as well as a buyout of Redstone's Central Park apartment and payment for the lease on her private jet along with a \$200 million indemnification agreement covering any breach of fiduciary duty claim targeting the deal.

"Delaware law makes clear that the defendants' fiduciary duties do not end with the signing of the merger agreement; instead, the defendants owe these fiduciary duties to Paramount's public stockholders until the close of the proposed merger."

Failure to consider the alternative offer, from a group called Project Rise Partners, "unlawfully elevated the committee's contractual obligations above its fiduciary duties, and thus constituted a breach of fiduciary duty," the complaint said.

"PRP's offer is so facially superior, in fact, that any independent director should be duty-bound to consider it on the merits and in good faith. But Paramount's special committee did not," the lawsuit said.

Cited in the complaint was a 2014 Delaware Supreme Court decision in *C&J Energy Services Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust*. In that appeal, the court concluded that the court can enjoin a merger agreement, or portions of it, "where the transaction is a product of a breach of fiduciary duties," aided and abetted by counterparties.

"Presented with an offer that is billions of dollars superior — and that offers incremental value ten times the termination fee — the special committee's fiduciary duties obligated it to at least consider this offer on the merits and in good faith," the New York unions' complaint said.

Redstone, attorneys for the union argued, "would be left worse off," without the benefit of a Skydance provision for the alleged overpayment to NAI at the expense of public shareholders as well as payments for her apartment and jet and \$200 million worth of indemnification protection.

According to the complaint, "prior to and during negotiations, Redstone fired several directors that

opposed the merger, sending a clear message to those directors that remained available to serve on a special committee."

Paramount's special committee of independent directors and National Amusements, as Paramount's controlling shareholder, have approved the deal.

As currently proposed, the Skydance Investor Group, a consortium that includes Skydance CEO David Ellison's family and RedBird Capital Partners Management LLC, would buy Paramount's parent company, Shari Redstone's National Amusements Inc., for \$2.4 billion in cash. After that, Skydance would merge with Paramount. The deal included a 45-day "go-shop period" for other bidders to make offers.

As proposed, the merger would create a "New Paramount" from the all-stock merger of Skydance and Paramount, with Skydance valued at \$4.75 million.

A Skydance investor group led by Ellison's family and RedBird Capital Partners would pay \$2.4 billion in cash for National Amusements plus \$4.5 billion for the stock and cash merger consideration for Paramount's A and non-voting B shares, along with \$1.5 billion added to Paramount's balance sheet.

Funds pursuing the claims included the New York City Employees' Retirement System, the New York City Fire Department Pension Fund, the New York City Police Pension Fund, the New York City Board Of Education Retirement System, and the Teachers' Retirement System of the City of New York.

In a separate suit, Paramount stockholders Scott Baker and Mark Baerlocher, both holding thousands of Paramount shares, sued on behalf of Class B shareholders in July, alleging that the group would suffer nearly \$1.75 billion in damages at the time. Mario Gabelli, holder of about 12% of Paramount's stock, sought to intervene in the Baker suit and sought books and records on the deal on behalf of his Gabelli Value 25 Fund.

Counsel for the New York unions and Paramount did not immediately respond to requests for comment.

The New York labor groups that sued are represented by Michael J. Barry, Christine M. Mackintosh, Vivek Upadhy and William G. Pasannante II of Grant & Eisenhofer PA.

Counsel for the Paramount special committee have not yet been identified on the case docket.

The case is the New York City Employee Retirement System et al. v. Barbara M. Byrne et al., case number 2025-0126, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.



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9th Circ. Tosses Slack Investor Suit After High Court Battle

By **Jessica Corso**

Law360 (February 10, 2025, 1:49 PM EST) -- The Ninth Circuit on Monday released Slack Technologies Inc. from an investor dispute that was previously ruled on by the U.S. Supreme Court, with the circuit court going a step further than the high court in ruling that none of the suing investors' claims were salvageable due to the unique way that Slack went public.

A three-judge panel of the court dismissed a proposed class action brought by Slack investor Fiyaz Pirani, who accused the popular messaging service of failing to warn prospective investors that it could be on the hook for millions of dollars due to service outages that occurred in the weeks after it first listed its shares on the New York Stock Exchange.

The Supreme Court **weighed in** on Pirani's suit in 2023, ruling that the unique way in which Slack went public would make it difficult for Pirani to prove his claims under Section 11 of the Securities Act of 1933.

But the Ninth Circuit ruled on Monday that the ruling also necessitated the dismissal of Pirani's remaining claims under Section 12 of the same act, which the justices did not weigh in on. That's because Pirani could not prove any of the Slack shares he purchased were "traceable" to Slack itself, since a direct listing allows early investors to place their shares up for sale at the same time that newly created shares are listed by the corporation.

"Because the plaintiff previously conceded that he could not make the required showing of traceability, all of his claims failed," the Ninth Circuit said in its summary of the opinion. The **opinion** was written by Circuit Judge Eric Miller.

A typical initial public offering includes a lock-up period under which early investors are prevented from trading their shares on the market for a set period of time. In 2018, the U.S. Securities and Exchange Commission greenlighted the NYSE's request that it allow direct listings, in which companies go public without any underwriters or a lock-up period.

Slack is one of the few companies that took advantage of the new rules to go public in 2019. **Investors sued** shortly thereafter, arguing that the company omitted key details of its strategy for dealing with service outages in the registration statement filed after announcing plans to go public.

Although investors survived an attempt to dismiss the lawsuit in lower court and before the Ninth Circuit the first time around, the company was successful in getting its case before the justices.

Slack argued that Pirani couldn't prove any of the 30,000 shares he purchased were tied to the allegedly deceptive registration statement, rather than unregistered shares that may have been sold by early investors.

The justices agreed that there was a traceability requirement, at least where Section 11 was concerned. But the high court did not reach the question of Section 12 liability, saying that it was not necessary given that the Ninth Circuit failed to distinguish between the two provisions when it issued the **2021 ruling** that led to the Supreme Court appeal.

On remand, the Ninth Circuit said Section 12 also contained a tracing requirement and that Pirani could not waive earlier arguments that it was not possible to determine whether investors in a direct

listing had traded registered or unregistered shares.

He told the Ninth Circuit following the Supreme Court's decision that there was a good chance that at least one of the 30,000 shares he purchased was registered and that Slack should have to prove that the shares were not traceable.

But the circuit court said allowing Pirani to waive his earlier concessions that he couldn't trace the shares would be unfair to Slack.

"As a result of the way Pirani chose to present his claim, Slack was forced to spend years — in the district court, this court, and the Supreme Court — litigating a statutory issue that was relevant only because of Pirani's concession that he could not establish traceability," according to Monday's opinion.

"We see no reason that Pirani should be allowed to start over with a new theory, making that expenditure of party (and judicial) resources pointless," the court said. "It is far too late for Pirani to say he was only kidding."

Representatives for Slack declined to comment. Attorneys for Pirani didn't immediately respond to a request for comment Monday.

Circuit Judge Sidney Thomas and Judge Jane Restani of the U.S. Court of International Trade sat on the panel with Judge Miller.

Pirani is represented by Kevin Russell of Russell & Woofert LLC, and Lawrence Egel, Melissa Fortunato and Marion Passmore of Bragar Egel & Squire PC.

Slack is represented by Thomas Hungar, Jacob Spencer, Michael Celio, Matthew Kahn, Michael Kahn, Daniel Adler and Matt Aidan Getz of Gibson Dunn & Crutcher LLP.

The case is *Fiyyaz Pirani v. Slack Technologies Inc. et al.*, case number 20-16419, before the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Robert Rudinger.

Update: This article has been updated with additional information from Monday's opinion and background information on the case.



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Pharma Co. Misled Investors On Depression Drug, Suit Says

By **Sydney Price**

Law360 (February 10, 2025, 9:20 PM EST) -- Brain disease drugmaker Neumora Therapeutics Inc. has been hit with a proposed shareholder class action alleging that the company and its initial public offering underwriters failed to disclose prior to the \$250 million IPO that Neumora's clinical trial for a depression treatment was very unlikely to yield promising results.

According to a **complaint** filed Thursday by shareholder Annie Chang, Neumora's flagship therapeutic candidate Navacaprant is an oral treatment for major depressive disorder. Neumora acquired Navacaprant and other drug candidates through its acquisition of BlackThorn Therapeutics Inc. in September 2020, according to the suit.

The suit alleged that Neumora knew at the time of its 2023 IPO that its efficacy study of Navacaprant was "riddled with risks and uncertainties," which were revealed to the public last month.

In addition to Neumora, CEO Henry O. Gosebruch, Chief Financial Officer Joshua Pinto and several IPO registration signatories and underwriters, including JPMorgan Securities and Bank of America Securities, are defendants in the suit.

According to the complaint, Neumora sold over 14.7 million shares of common stock for \$17 per share during its September 2023 IPO, generating over \$250 million in gross proceeds. The offering documents provided phase two trial results that misleadingly represented the statistical significance and benefits of Navacaprant for the treatment of patients with moderate to severe major depressive disorder, which was the trial's primary endpoint, the suit claimed.

The suit alleged that Neumora knew its trial lacked adequate data, particularly with regard to the patient population size and the ratio of male to female patients within the patient population.

Over a year and a half after the IPO, on Jan. 2, 2025, Neumora announced that its study failed to "demonstrate a statistically significant improvement." Analysts at RBC Capital called the results "a worst-case scenario for the program," according to the suit.

Then, on Jan. 14, Neumora announced that the patient population size of the phase two trial may have been too small to predict the difference between the male and female patients.

Since the IPO, Neumora's share price has fallen over 88% from \$17 to \$1.91 on Feb. 5, 2025, according to the complaint.

"None of the defendants named herein made a reasonable investigation or possessed reasonable grounds to believe that the statements in the offering documents were true, complete, accurate, without omissions of any materials facts, or not misleading," the complaint said.

Counsel for Chang and a representative of Neumora did not immediately respond to requests for comment on Monday.

Chang is represented by Phillip Kim and Laurence M. Rosen of The Rosen Law Firm PA.

Counsel information for the defendants was not immediately available on Monday.

The case is Chang v. Neumora Therapeutics Inc. et al., case number 1:25-cv-01072, in the U.S. District Court for the Southern District of New York.

--Editing by Rich Mills.

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Tesla Seeks Chancery Toss Of Challenge Over Texas Move

By **Jeff Montgomery**

Law360 (February 10, 2025, 4:53 PM EST) -- Delaware's chancellor said Monday she would issue a "short" letter reply to calls for dismissal of a stockholder claim that Tesla Inc. failed to secure a required supermajority vote to move its charter to Texas, following arguments that the court recently approved a simple majority vote in a similar case.

Chancellor Kathaleen St. J. McCormick said she would issue a court letter rather than accept a request by stockholder attorneys to adopt Vice Chancellor Paul A. Fioravanti's reasoning in a Nov. 6 ruling that cleared the way for simple-majority stockholder approval of digital advertising company The Trade Desk Inc.'s Nevada reincorporation.

"Usually, if my colleagues issue a decision, I read it and decide whether I agree with the reasoning and want to apply it to the same facts," the chancellor said. "Here, we're skipping that and stipulating to the same facts. It was an odd step from my perspective."

Thomas A. Uebler of McCollom D'Emilio Smith Uebler LLP, counsel to stockholder Donald Ball, said his client had proposed withdrawal of the claim, with three others still pending. "The defendant came back with the idea of a judgment. It was our thinking that the claim was no longer worth pursuing," but Tesla would not oppose if the court was willing to accommodate the stockholder's request, he said.

Tesla argued the supermajority vote applies to charter changes rather than its corporate "redomestication" in Texas. The redomestication was approved in June 2024 by a 63% vote after the chancellor struck down company approval of a nearly \$56 billion stock-based compensation plan for CEO Elon Musk.

Brian T. Frawley of Sullivan & Cromwell LLP, counsel to Tesla Inc., told the chancellor it was "atypical" for the partial ruling to come up while summary judgment motions are fully briefed and awaiting a hearing.

"Given the vice chancellor's ruling in Trade Desk, we're all in agreement," Frawley said. "The logic of that ruling, if the court were to follow it, would result in the entry of a summary judgment in this case. We are simply seeking in this process to have the same outcome" that would have followed arguments now scheduled for later this year.

Frawley said the claims left behind seek a declaratory judgment that Tesla's ratification of Musk's pay was an unratifiable breach of fiduciary duty and "gift" to Musk, as well as the result of coercion by the billionaire. A fourth count accuses Tesla's directors of disclosure failures that include, among other objections, a reduction in Tesla profits that would accompany the pay approval.

In the background of the Tesla, Trade Desk and similar Delaware corporate charter debates are details outlined in an exhibit in The Trade Desk's vote to recharter in Nevada.

Steven Davidoff Solomon, Alexander F. and May T. Morrison Professor of Law at University of California Berkeley School of Law, said in an appendix entry in The Trade Desk's proxy statement that "[i]n recent years, companies have increasingly chosen to reincorporate in Nevada or other jurisdictions. My analysis of recent reincorporations shows that 41% of U.S. domestic reincorporations since 2021 have been to Nevada."

In part, Solomon wrote, the Delaware corporate charter "premium" might have diminished in recent years as capital markets "matured" and reduced differences among the states.

Tesla Inc. stockholder Donald Ball is represented by Thomas A. Uebler, Brian V. DeMott, Adam J. Waskie, Terisa A. Shoremount and Allison Neff of McCollom D'Emilio Smith Uebler LLC and D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC.

Tesla Inc. is represented by John L. Reed, Ronald N. Brown, Caleb G. Johnson and Daniel P. Klusman of DLA Piper and Brian T. Frawley, Matthew A. Schwartz, Christopher J. Dunne and Leslie B. Arffa of Sullivan & Cromwell LLP.

Tesla board members Elon Musk, Robyn Denholm, Ira Ehrenpreis, Joe Gebbia, James Murdoch, Kimbal Musk and JB Straubel are represented by Rudolf Koch, John D. Hendershot and Andrew L. Milam of Richards Layton & Finger PA.

Board member Kathleen Wilson-Thompson is represented by A. Thompson Bayliss and Adam K. Schulman of Abrams & Bayliss LLP and Kristen R. Seeger and John M. Skakun III of Sidley Austin LLP.

The case is Donald Ball v. Tesla Inc. et al., case number 2024-0622, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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EV Biz Faraday Future Wins Chancery Toss Of Go-Public Suit

By **Rae Ann Varona**

Law360 (February 10, 2025, 8:29 PM EST) -- Delaware's Court of Chancery on Monday tossed a proposed class action challenging electric vehicle maker Faraday Future's \$1 billion take-public deal, saying that a stipulation in a \$7.5 million settlement reached in a related case "unambiguously" precluded stockholders' claims against the California-based startup.

In granting Faraday Future Intelligent Electric Inc. a summary judgment win, Vice Chancellor Lori W. Will said that the plain language of the stipulation was binding on investor and lead plaintiff William Howard Cleveland, who claimed that a 2021 "de-SPAC" transaction was tainted by breaches of fiduciary duties by the sponsors and directors of a special-purpose acquisition company that took Faraday Future public.

Chancellor Will wrote that the purpose of the stipulation, "as reflected in the plain language of its releases, is to achieve global peace."

"It would be absurd for Faraday and its insurers to agree to pay \$7.5 million to a stockholder class while facing serial litigation on nuanced theories challenging the same events by the same class members in another court," Chancellor Will wrote.

The de-SPAC **merger** between New York-based Property Solutions Acquisition Corp. and FF Intelligent Mobility Global Holdings Ltd. closed in July 2021. But a Property Solutions stockholder filed suit five months later in California federal court, accusing Property Solutions of misrepresenting Faraday's value.

Investors in the case alleged that company leaders claimed to have received over 14,000 reservations for Faraday's EV FF 91 before the merger when, in reality, it only received a few hundred paid reservations.

Two other lawsuits were filed in Delaware, including the lawsuit Cleveland **lodged** in Sept. 2022, and were consolidated. Cleveland, who was appointed lead plaintiff, alleged that Property Solutions' sponsor and directors breached their fiduciary duties, with help from others, by impairing public stockholder's redemption rights. He alleged breach of contract, breach of fiduciary, aiding and abetting, and civil conspiracy.

Parties in the California case ended up **settling** their dispute, with Faraday Future agreeing to pay investors \$7.5 million in exchange for a release of claims.

But when the parties moved for final approval of the deal and for certification of the settlement class in February 2024, Cleveland objected and argued that the proposed deal seemingly released claims he was litigating in the Delaware action. The release, he asserted, was overbroad.

But the California federal court approved the settlement, prompting Faraday Future to move for summary judgment. Faraday Future had also told the court in a **motion to stay discovery** that Cleveland had tried for months to block judicial approval of the class settlement.

In granting summary judgment, Chancellor Will suggested Monday that Cleveland was trying to "manufacture a loophole to avoid enforcement" but that his efforts were "meritless."

Chancellor Will said that the plain language of the settlement's stipulation "binds Cleveland" and "unambiguously precludes further prosecution in this action."

Cleveland's claims arose from and related to the allegations and transactions raised in the California action, she said.

"Cleveland's claims are based on the same business combination," Chancellor Will wrote. "They assert harm from the same stockholder vote, the same proxy disclosures, and the same redemption rights provided by the same certificate of incorporation."

According to Chancellor Will's opinion, Cleveland had also argued that his claims fell outside a second clause of the release because he did not "acquire" and because they did not concern the acquisition of Faraday common stock. Cleveland asserted that his claims rather related to the "conversion" of Property Solutions shares into Faraday shares through the de-SPAC, Chancellor Will explained.

But Cleveland's "creative distinction places unjustified weight on the difference between shares being acquired and shares being converted into other shares," Chancellor Will said.

She turned to Black's Law Dictionary, which defines "acquire" as "to gain possession or control of; to get or obtain by any means."

She said that regardless of whether the cancellation of Property Solutions shares and the issuance of new Faraday shares, "Property Solutions' non-redeeming public stockholders 'gained' Faraday shares by some 'means.'"

Chancellor Will added that the "notion that the shares changed in name only rests on a fundamental misperception of the business combination."

"Before the merger, Cleveland and his putative class members owned shares in a blank check company," she wrote. "After the merger, they held shares in an operating company that manufactures and sells electric vehicles."

Counsel for Cleveland did not immediately respond to a request for comment on Monday, nor did Faraday.

Cleveland is represented by Michael Hanrahan, Corinne Elise Amato, Kevin H. Davenport, Eric J. Juray, and Seth T. Ford of Prickett Jones & Elliott PA.

Faraday Future Intelligent Electric Inc. (formerly known as Property Solution Acquisitions Corp.) is represented by Douglas D. Herrmann, Emily L. Wheatley, Alan Kessel, Jay A. Dubow, Erica Hall Dressler, and Mary Weeks of Troutman Pepper Hamilton Sanders LLP.

Property Solutions Acquisition Sponsor LLC is represented by Raymond J. DiCamillo and Kevin M. Gallagher of Richards Layton & Finger PA.

The case is In re: Faraday Future Intelligent Electric Inc. Stockholder Litigation, case number 2022-0845, in the Delaware Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery, Dorothy Atkins, and Benjamin Horney. Editing by Vaqas Asghar.



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Merrill Lynch Objects To New Discovery Bid In Stock Loan Suit

By **Sydney Price**

Law360 (February 10, 2025, 10:05 PM EST) -- Merrill Lynch told a New York federal court it should deny investors' request for supplemental transaction data in their suit alleging major banks colluded to avoid modernizing the stock loan market, arguing that the discovery period has closed, and there are no legitimate reasons to grant the "burdensome" request.

In a letter Friday, counsel for Bank of America unit Merrill Lynch says the investors waited until 18 months after fact discovery closed to mention their alleged need for supplemental data to the court. According to the letter, the plaintiffs are seeking, among other things, seven years of transactional data, an accounting of changes to Merrill Lynch's data systems and new data samples.

The plaintiffs also seek to issue a second subpoena to financial services company IHS Markit, which is not a party in the suit, for seven years of additional data, according to the letter.

"[I]t took Merrill Lynch approximately nine months to complete its data productions after the parties reached agreement on the end-date for transactional data," the letter states. "It is likely to take that long for Merrill Lynch to identify, query, collect, process, anonymize, verify and produce the supplemental transactional data currently being requested by plaintiffs."

The entire case dates back to 2017. It claims that large middlemen banks in the stock loan market worked to prevent the emergence of more competitive electronic exchanges that could have offered the investors better pricing.

Several major banks, including Goldman Sachs, Morgan Stanley and UBS, **settled in August 2023** for nearly \$500 million. Last September, class counsel from Quinn Emanuel Urquhart & Sullivan LLP and Cohen Milstein Sellers & Toll PLLC were **awarded \$102 million** in attorney fees in connection with that settlement.

Last December, U.S. District Judge Katherine Polk Failla **issued an order** overruling objections to certify the class of investors.

In the order, Judge Failla extended the end of the class period to Nov. 17, 2017, the date on which the amended, operative complaint was filed, saying the evidence presented by investors runs through that period.

She declined to grant the plaintiffs' request to have the class period extended even further, through 2021, because it would affect discovery, which has already taken place. The judge added that if the investors want to seek supplemental productions to update damage calculations to align with the new class period, they will have to submit a separate motion to the court. The plaintiffs filed a motion to compel supplemental discovery in January.

In the Friday letter opposing the motion, Merrill Lynch argues that the plaintiffs present "no intervening development that could legitimately excuse their delay" of seeking supplemental data while fact discovery was still open.

Merrill Lynch also says that if the court determines that fact discovery should be reopened, the company must be given the opportunity to seek discovery to support its defenses to avoid "enormously unfair prejudice, particularly as to plaintiffs' claims for damages beyond the class

period."

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

The investor plaintiffs are represented by Quinn Emanuel Urquhart & Sullivan LLP and Cohen Milstein Sellers & Toll PLLC.

Merrill Lynch is represented by Adam S. Hakki, Richard F. Schwed and Michael P. Mitchell of Allen Overy Shearman Sterling.

The case is Iowa Public Employees' Retirement System et al. v. Bank of America Corp. et al., case number 1:17-cv-06221, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Katryna Perera. Editing by Kristen Becker.

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PBMs Fight To Keep Mich. AG's Opioid Suit In Federal Court

By Carolyn Muyskens

Law360 (February 10, 2025, 6:09 PM EST) -- Pharmacy benefit managers' work on behalf of federal health insurance plans entitles them to keep Michigan's lawsuit over their role in the opioid crisis in federal court, the companies told a federal judge last week.

Express Scripts Inc. and OptumRx Inc., two of the country's largest pharmacy benefit managers, said the state's accusations that they helped fuel the opioid crisis in their role coordinating prescription drug coverage for insurers necessarily include work the PBMs performed for the government.

The PBMs' work on behalf of federal health plans, including contracts with the U.S. Department of Defense and U.S. Department of Veterans Affairs, entitles them to federal jurisdiction under the federal officer removal statute, Express Scripts and OptumRx said in **a filing Friday**.

Michigan Attorney General Dana Nessel, who filed the suit in Wayne County Circuit Court, **sought last month** to pull the case back into state court.

Nessel said she had specifically disavowed any claims or relief related to Express Scripts and OptumRx's federal contracts in the complaint and claimed the allegations had nothing to do with their work on behalf of the government.

In their response, the PBMs said Michigan's waiver of federal claims is "illusory and ineffective" because Michigan's allegations target work the PBMs performed on behalf of all their clients, federal and nonfederal.

Michigan's **October complaint** claims the PBMs colluded with manufacturers of opioids to boost sales by giving the painkillers favorable treatment on formularies, or lists of covered medications, in exchange for rebates, allegedly helping to flood the market with the drugs and contributed to widespread opioid abuse in the U.S.

The companies said they developed those formularies on behalf of all their clients, so it would not be "logically or factually possible to disentangle the removing defendants' work for federal officers from their challenged work for nonfederal clients."

"The state contends that the formularies the removing defendants developed were improperly influenced by rebates negotiated with prescription opioid manufacturers. These allegations necessarily implicate the removing defendants' work for federal health plans because they negotiated rebates and developed formularies across their books of business, which included federal and nonfederal plans," the PBMs said.

Express Scripts provides PBM services to the DOD's Tricare, a federal health insurance plan for military service members and their families, including running Tricare's mail-order pharmacy, and provides services for certain federal employee health plans under the Federal Employees Health Benefits Act of 1959, according to the response filing. The VA contracts with OptumRx to provide pharmacy benefit services to the Veterans Health Administration.

These federal contracts come with close oversight of the PBMs' work, which includes the government directing the specific coverage and services they provide, the PBMs said in arguing that they are "acting under the direction of a federal officer" for the purposes of the federal officer removal statute.

Additionally, many Michigan residents are federal employees or military service members who received prescription opioids through the federal health plans, the PBMs said.

Express Scripts, for example, handled more than 320,000 prescription opioid claims for Tricare beneficiaries in Michigan between 2014 and 2021, according to the filing.

The federal court should therefore reject Michigan's claim that it can sue on behalf of the people of Michigan generally while attempting to exclude residents covered by federal plans, Express Scripts and OptumRx said.

The First and Ninth circuits have recently found disclaimers of federal claims similar to Michigan's disclaimer to be ineffective in preventing federal officer removal in cases involving Express Scripts and another pharmacy benefit manager, Caremark, the PBMs said.

In [Gov't of Puerto Rico v. Express Scripts Inc.](#)  and [California v. CaremarkPCS Health LLC](#) , federal appeals courts **reversed district courts** that had remanded the cases to state court. Both circuits said the PBMs' work for their federal clients could not be separated from their private client work, the companies said.

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

The state is represented by Matthew L. Walker and Scott A. Mertens of the Michigan Department of Attorney General and Mark P. Pifko of Baron & Budd PC.

Express Scripts is represented by John F. Rhoades and Monique S. Eubanks of Dykema Gossett PLLC.

OptumRx Inc. is represented by Irina N. Kashcheyeva and Ki Lee Kilgore of Foley & Lardner LLP.

The case is Attorney General of the State of Michigan v. Evernorth Health, Inc. et al, case number 4:24-cv-13185, in the U.S. District Court for the Eastern District of Michigan.

--Editing by Stephen Berg.

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AI Copyright Plaintiffs Say Google Is Raising 'Marginal issues'

By **Andrew Karpan**

Law360 (February 10, 2025, 10:10 PM EST) -- Artists and authors suing over how Google trains its artificial intelligence software say that the tech giant is disputing "marginal issues" that other tech giants facing similar copyright lawsuits over similar technology haven't brought up.

In a series of filings dated Friday, the group behind two class actions, filed by photographer Jingna Zhang and writer Jill Leovy, shot back at various arguments **lodged** by Google in January, which is seeking to end both cases. The lawsuits target Google's text-to-image AI tool Imagen as well as Google's Bard AI platform and claimed those programs were trained on copyright-protected images and words. They were consolidated together in the Northern District of California in November.

"Defendants' motion to dismiss ... attacks marginal issues that will be resolved in discovery and raises arguments that courts have declined to accept," reads **one response**.

In its dismissal bid, Google said that the class action complaints don't specifically identify the copyrighted works that have allegedly been infringed. The tech company also said some of the infringed images cited in the case were previously published before registration and couldn't be covered by copyright law.

The plaintiffs, however, say that "other defendants facing similar claims elected not to seek ... dismissal" at this stage in litigation.

They singled out four other, similar ongoing lawsuits facing OpenAI, Meta Platforms, Anthropic and the generative AI platform MosaicML, **recently bought** for roughly \$1.3 billion by San Francisco-headquartered tech company Databricks. The group also pointed to rulings from "other courts in this district [that] have already considered and rejected quibbles with plaintiffs' registrations."

"None of defendants' arguments challenging plaintiffs' registrations or plaintiffs' infringement allegations against defendants' models are new," says the group.

They also **responded** to Google's efforts to prevent class certification in the case, arguing that it's too soon to do that.

"Defendants ask this court, at the pleading stage, to strike class allegations with prejudice before plaintiffs have any opportunity to develop a factual record to support their properly pleaded class allegations," the argument reads. "Defendants fail to cite a single copyright class action where the courts have granted a motion to strike at the pleadings stage outright."

There's also **a filing** from the group fighting Google on whether the tech company can introduce social media posts that challenge the publication date of at least one of the works cited in the case.

"This is plainly improper at the pleading stage, when plaintiffs are entitled to the benefit of all reasonable inferences," the group says.

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

The Zhang plaintiffs are represented by Joseph R. Saveri, Christopher K.L. Young, Elissa A. Buchanan and Evan Creutz of Joseph Saveri Law Firm LLP, Brian D. Clark, Laura M. Matson, Arielle Wagner and

Eura Chang of Lockridge Grindal Nauen PLLP and Matthew Butterick.

The Leovy plaintiffs are represented by Ryan J. Clarkson, Yana Hart, Mark Richards, Tiara Avanness and Tracey Cowan of Clarkson Law Firm PC and Lesley E. Weaver, Anne K. Davis, Joshua D. Samra and Gregory S. Mullens of Bleichmar Fonti & Auld LLP.

Google is represented by David H. Kramer, Maura L. Rees and Eric P. Tuttle of Wilson Sonsini Goodrich & Rosati PC.

The consolidated case is In re: Google Generative AI Copyright Litigation, case number 5:23-cv-03440, in the U.S. District Court for the Northern District of California.

--Additional reporting by Lauren Berg. Editing by Dave Trumbore.

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BREAKING: ROSS Intelligence Used Thomson Reuters' Notes For AI Tool

By **Ivan Moreno**

Law360 (February 11, 2025, 11:29 AM EST) -- Tech startup ROSS Intelligence used copyrighted material from Thomson Reuters' Westlaw database to create its own AI legal research tool, a Delaware federal court ruled Tuesday, finding that ROSS infringed more than 2,200 headnotes to make its product.

U.S. Circuit Judge Stephanos Bibas, sitting by designation on this case, granted partial summary judgment to Thomson Reuters Enterprise Centre GmbH on direct copyright infringement and determined that the headnotes and Westlaw's key number system are original enough to be protected by copyright.

The ruling is one of the most closely watched in copyright law this year, because it intersects with questions of fair use in the development of AI platforms, an issue that is at the center of dozens of pending lawsuits against AI developers including OpenAI Inc. and Meta Platforms.

Thomson Reuters Enterprise Centre GmbH and West Publishing Corp. sued ROSS in 2020, alleging that it copied large amounts of content from the Westlaw database, including a unique organizational system and headnotes, or short summaries of law from judicial opinions. ROSS is arguing that its allegedly infringing actions fall under fair use.

Judge Bibas, who normally sits on the Third Circuit, rejected ROSS's defenses, including fair use, innocence infringement and copyright misuse. Judge Bibas also concluded that ROSS's use of headnotes was commercial and not transformative, which weighed in favor of fair use.

There are remaining issues of fact regarding whether some copyrights have expired, and Judge Bibas said those should be up to a jury to decide.

"We are pleased that the court granted summary judgment in our favor and concluded that Westlaw's editorial content created and maintained by our attorney editors, is protected by copyright and cannot be used without our consent," Thomson Reuters said in a statement Tuesday to Law360. "The copying of our content was not 'fair use.'"

Counsel for ROSS did not immediately respond to a request for comment.

Thomson Reuters and West are represented by Michael J. Flynn and Jack B. Blumenfeld of Morris Nichols Arsht & Tunnell LLP and Dale M. Cendali, Joshua L. Simmons, Eric A. Loverro and Miranda D. Means of Kirkland & Ellis LLP.

ROSS is represented by David E. Moore, Bindu A. Palapura and Andrew L. Brown of Potter Anderson & Corroon LLP and Warrington S. Parker III, Joachim B. Steinberg, Jacob Canter and Crinesha B. Berry of Crowell & Moring LLP.

The case is Thomson Reuters Enterprise Centre GmbH et al. v. ROSS Intelligence Inc., case number 1:20-cv-00613, in U.S. District Court for the District of Delaware.

--Editing by Nicole Bleier.

Update: This story has been updated to add a statement from Thomson Reuters and correct that Judge Bibas is a circuit judge.



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Kratom Co. Says False Ad Addiction Suit Falls Short

By **Mike Curley**

Law360 (February 10, 2025, 4:45 PM EST) -- The company behind Kryptic Kratom and K-Chill branded supplements is urging a California federal court to throw out a suit alleging it concealed kratom's addictive qualities from consumers, saying the complaint fails to shore up its claims with factual allegations.

In a **motion** filed Friday, DBZ Enterprises LLC said the recent amended complaint doesn't allege what representations it made, or when and where any of the three plaintiffs saw and relied on them, but instead refers to "kratom sellers" and "the kratom industry," which isn't sufficient to pin a false advertising claim on DBZ.

The suit, **filed in November** by three people proceeding anonymously as D.B., R.L. and R.S., alleges that DBZ knew that the primary ingredients of its kratom products interact with the same receptors as opioids, making them "highly addictive." According to the suit, the company offers only a "bog-standard disclaimer" against taking the products with alcohol or while pregnant, breastfeeding or operating heavy machinery, but it does not warn about the addictive qualities.

In Friday's motion, DBZ argued that the plaintiffs don't even paraphrase the "design language" they allege they saw on the company's "glossy website" or explain how it's misleading. The company added that the plaintiffs can't rely on a fraudulent omission claim, because they don't allege that the company had any duty to disclose.

According to the motion, the plaintiffs don't allege they shared any fiduciary relationship with DBZ, nor do they identify any partial representations that they say created a duty. In addition, the allegation that DBZ had "exclusive knowledge" of kratom's alleged addictiveness is undermined by the complaint, which alleges that the kratom growers and Reddit users were well aware of the addictive qualities, the company argued.

The complaint also fails to allege presale knowledge, the company argued, saying that the complaint relies on vague and speculative allegations, as well as a U.S. Food and Drug Administration alert that was published weeks after the initial complaint was filed.

The company also took aim at R.S.'s claims in particular, saying as an Oregon resident, R.S.'s claims fail to establish any jurisdiction for the California federal court, particularly as the complaint contains only state law claims, and R.S.'s claims fall afoul of the state's one-year statute of limitations, given R.S.'s allegation that they first learned of the addictive qualities of kratom in 2019.

According to the motion, the plaintiffs are also not entitled to equitable relief, as they have only alleged that they "may" lack an adequate remedy at law, not that they do lack one, nor can they pursue injunctive relief as they don't allege they intend to purchase the products in the future, but instead they allege they may relapse if they believe the formula of the products has changed, despite not seeking a reformulation in their complaint.

The company also argued the breach of implied warranty claims must be dismissed, as the plaintiffs haven't alleged a special relationship with DBZ, or that they purchased directly from them, as each alleged they bought the products through third-party sellers. Likewise, the complaint does not allege that they conferred a direct benefit to DBZ, and, as such, the unjust enrichment claims are similarly doomed, according to the motion.

Finally, DBZ argued that any nationwide class claims must be dismissed because state laws for

implied warranty, unjust enrichment and fraudulent omissions claims diverge significantly, and each of the states has an interest in enforcing their own laws in their own courts.

An attorney for DBZ declined to comment Monday.

Representatives for the consumers could not immediately be reached for comment Monday.

The consumers are represented by Todd D. Carpenter and Scott G. Braden of Lynch Carpenter LLP.

DBZ is represented by Andrew P. Young, Dylan S. Burstein and Rachel A. McMains of Snell & Wilmer LLP.

The case is D.B. et al. v. DBZ Enterprises LLC, case number 8:24-cv-02405, in the U.S. District Court for the Central District of California.

--Additional reporting by Jonathan Capriel. Editing by Andrew Cohen.

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Xcel, Telecom Cos. Say Colo. Fire Plaintiffs Can't Opt Out Of Trial

By **Tom Lotshaw**

Law360 (February 10, 2025, 10:54 PM EST) -- Xcel Energy and two telecom companies being sued over the Marshall Fire in Colorado told a state judge that hundreds of plaintiffs pushing to opt out of a common liability trial should not be able to do so, at least until expert reports are shared.

More than 700 of the roughly 4,000 individual plaintiffs with claims related to the devastating 2021 fire in Boulder County urged the judge to let them out of the upcoming **September trial**, since they plan to rely on different causation evidence than the other individual plaintiffs.

In a **response** filed on Friday, Xcel said such matters shouldn't be determined until expert reports are exchanged later this month and "individualized issues about fire spread, if any, are fully identified and understood."

While the individual plaintiffs who moved to opt out of the trial said they will need to present some "individualized, property by property evidence" — even as the other individual plaintiffs intend to rely on a "single, expert-driven spread model," causing prejudice and likely jury confusion — Xcel called their motion rushed and premature.

"While it is theoretically possible that the expert reports will reveal that certain claims must be severed from the trial for fairness reasons — including claims not involving the proposed opt outs — this issue cannot be resolved comprehensively until all liability and spread theories have been disclosed," Xcel said.

"It makes no sense to cleave off a set of [individual plaintiffs] now without the benefit of the full record and an organized approach that will allow all parties — and the court — to propose and decide what combination of claims and parties can best be included in the trial," the company added.

Xcel faces a wave of litigation after the conflagration, fueled by dry grasses and powerful winds, killed two people and damaged or destroyed about 1,000 structures.

Suits have been brought by about 4,000 individual plaintiffs as well as insurers and various local governments, and were consolidated into a single case in the Boulder County District Court. Xcel and the individual plaintiffs have **previously clashed** over the trial structure.

Xcel questioned how many individual plaintiffs would seek to opt out of the trial. The pending motion seemed to be based on a belief that plaintiffs in some neighborhoods would, the company said, even though other plaintiffs in such areas were not on a proposed opt-out list, including some people who lived in the same homes and others who were neighbors.

"If that was intentional, it refutes the purported basis for the motion," Xcel told the court.

"If that was a mistake, it underscores the undue haste with which this motion is being presented to the court and demonstrates the scale of the requested relief," Xcel said, adding that by its calculation as many as 900 people could be seeking to opt out of the common liability trial.

Xcel also questioned the extent to which severing the individual plaintiffs would actually remove confusion from the trial.

All the parties' experts will share opinions in regard to where and when two fires burned, according to Xcel. That includes the so-called Twelve Tribes Fire that local officials **linked to a smoldering trash fire** on a religious group's property, and the so-called Trailhead Fire local officials linked to Xcel equipment.

Xcel said it intends to show that the homes of the plaintiffs moving to opt out were burning before the Trailhead Fire ignited, and that they "served as springboards" for the Twelve Tribes Fire to transition from a wildland fire into an urban fire that spread structure to structure.

"Thus, the 'complexity' that [individual plaintiffs] argue would be excluded from the trial if the motion were granted will exist anyway, and the jury will need to tackle the relevant spread issues," Xcel told the court.

While the plaintiffs argue that they stand to be prejudiced by the common liability trial if they are not allowed to opt out, Xcel said it will be prejudiced if it's forced to face multiple trials over liability.

"It is obvious that deferring the resolution of nearly 1,000 claims against defendants would be prejudicial, resulting in years of additional litigation and the risk of conflicting judgments," it said. "Given the stakes — and the lack of a reason to rush — this issue deserves a full and careful analysis."

Teleport Communications America LLC and Qwest Corp. also urged the judge to deny the individual plaintiffs' motion to opt out in a separate **response** filed on Friday. They noted that they are defendants in only three of several hundred pending cases as a potential alternative cause of the Trailhead Fire, and argued that the plaintiffs have provided no grounds to justify multiple trials.

The judge in January **rejected** Xcel's bid to have the trial moved out of Boulder County.

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

The individual plaintiffs are represented by Eve-Lynn Rapp of Edelson PC, Kevin Hannon and Gerald Singleton of Singleton Schreiber LLP, Amanda LoCurto of Robins Cloud LLP, Gregory P. Waters of Engstrom Lipscomb & Lack APC, Natasha Serino of Schack Law Group, and Matthew Preusch and Gretchen Freeman Cappio of Keller Rohrback LLP.

The subrogation plaintiffs are represented by Joel Radakovich of Grotefeld Hoffmann Gordon Ochoa & Evinger LLP, Cheri MacArthur of Cozen O'Connor, Matthew Delinko of Bauman Loewe Witt & Maxwell PLLC, and Glenn W. Mattar of Denenberg Tuffley PLLC.

The public entity plaintiffs are represented by Brian L. Williams, John Fiske, Torri Sherlin and Taylor O'Neal of Baron & Budd PC, and Robert J. Chambers II, Ed Diab and Kristen Barton of Diab Chambers LLP.

Xcel is represented by Michael J. Gallagher of Michael J. Gallagher Law PLLC, and Kevin J. Orsini, Lauren A. Moskowitz, Omid H. Nasab, Vanessa A. Lavelly, Brittany L. Sukiennik and Nicholas S. Medling of Cravath Swaine & Moore LLP.

Teleport is represented by Meshach Rhoades, Amber R. Gonzales, Thomas F. Koegel and Matthew C. Menezes of Crowell & Moring LLP, and Jeffrey M. Tillotson of Tillotson Johnson Patton.

Qwest is represented by Benton J. Barton and Jeffrey D. Clarke of Hall & Evans LLC, and A. David Bona and Matthew S. Sepuya of Carlson Calladine & Peterson LLP.

The case is In re: Marshall Wildfire Litigation, case number 2022CV30195, in the 20th Judicial District of Colorado.

--Additional reporting by Thy Vo. Editing by Adam LoBelia.