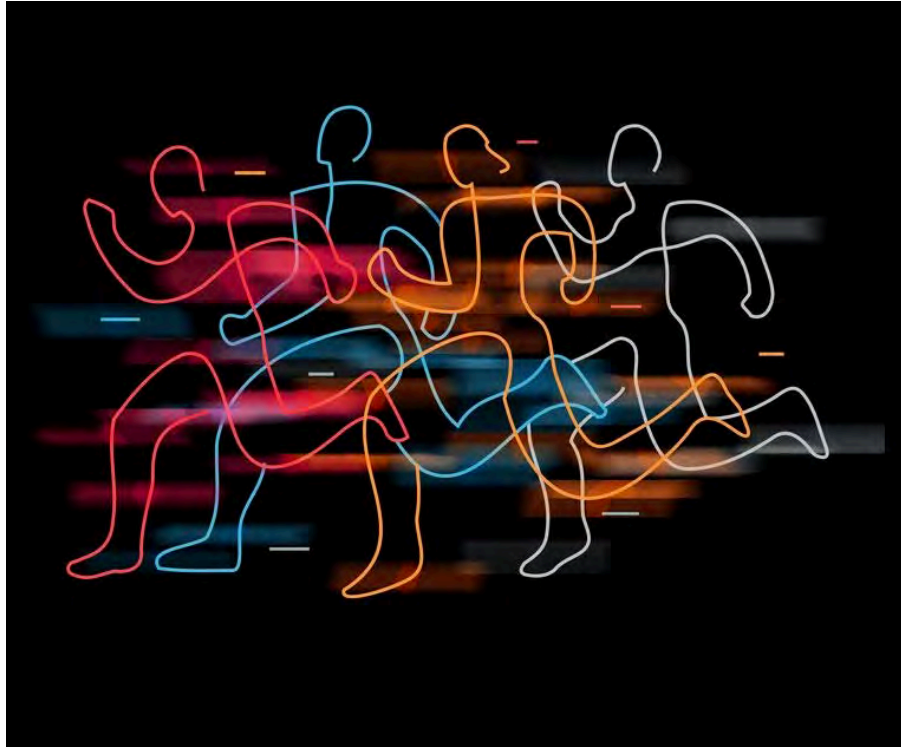


Litigator of the Week Runners-Up and Shout-Outs

 [law.com/litigationdaily/2025/02/14/litigator-of-the-week-runners-up-and-shout-outs](https://www.law.com/litigationdaily/2025/02/14/litigator-of-the-week-runners-up-and-shout-outs)

Ross Todd



First up this week is a **Hughes Hubbard & Reed** team led by lead trial counsel **Marc Weinstein** and partners **William Maguire** and **Neil Oxford** that secured a \$500 million verdict for Skatteforvaltningen or SKAT—the Danish tax authority—in a bellwether trial in multidistrict litigation seeking to recover funds from an international tax fraud scheme. After a five-week trial in Manhattan federal court, jurors found this week that the defendants—a group of investors and pension funds—filed thousands of fraudulent requests for tax rebates on dividends. Jurors also turned back the investors’ defense that SKAT was negligent in making the refund payments. Sanjay Shah, the British hedge fund trader convicted in Denmark of orchestrating the scheme, was sentenced to 12 years in prison in December.

Michael Lyons, **Chris Simmons** and a trial team at **Lyons & Simmons** secured a \$109 million damages award against natural gas utility CPS Energy stemming from the explosion of a rental property in San Antonio. In a 10-2 verdict, Bexar County jurors awarded Robert Rymers, who was cooking a pork chop when the rental house exploded on May 1, 2021, and suffered burns over more than 40% of his body. Jurors awarded Rymers \$103.5 million and his mother, who was also injured in the blast, about \$6 million. Under a high-low agreement, the Rymers are set to receive \$60 million. The Rymers’ legal team also included **Chris Carr**, **Michael Wozniak** and **P. Wes Black** of **Lyons & Simmons** and **Omar Alvarez** of the **Law Office of O.G. Alvarez & Associates**.

A team at **Robbins Geller Rudman & Dowd** secured an \$85 million settlement on behalf of EarthLink investors stemming from the company's \$1.1 billion stock-for-stock merger in 2017 with fellow network communications company Windstream. Even though both Windstream and EarthLink have undergone Chapter 11 reorganization while the case was pending, the settlement is the largest securities class action recovery in the Eighth Circuit in more than five years and the largest ever in the Eastern District of Arkansas. U.S. District Judge James Moody Jr. awarded 32% of the settlement, or \$27.2 million, in attorney fees to lead counsel. The Robbins Geller team included **David Knotts, Randall Baron, A. Rick Atwood Jr., Jonathan Zweig, Andrew Hutton, Lion Wintemute, Michaela Park and Cristelle Rabban.**

Shout-out to a pro bono team at **A&O Shearman** led by partners **Daniel Laguardia** and **John Nathanson** that paired with the **New York Civil Liberties Union** on litigation originally filed in 2012 on behalf of a class of individuals who have been and are incarcerated in jails run by Suffolk County, New York. The lawsuit claimed the plaintiffs faced unhealthy conditions including chronic overcrowding, sewage backups, rodent and insect infestations, mold and rust. This week, just before scheduled opening statements at trial, the county agreed to pay \$18 million and to develop and implement a plan to address maintenance issues at the jails as part of a proposed settlement. The A&O Shearman team on the matter also includes **Benjamin Klebanoff, Elizabeth Stewart, Stephen Janick, Carter Gantt, Aaron Weinmann, Petar Nalbantov, Christine Ding, Grace Sullivan, Naveed Hada, Alexis Foster, Will Henson, Leslie Bean, Audrey Felderman, Margie Murphy and Annabel Kelly.**

Shout-out to a **Davis Wright Tremaine** team led by partner **Vicky Slade** and associate **Darrah Hinton**. They helped the city of Seattle win summary judgment this week in a lawsuit where a white former city employee claimed that the city's diversity, equity and inclusion program created a hostile work environment based on race. U.S. District Judge Jamal Whitehead held that, despite the plaintiff's claims to the contrary, "DEI programs aimed at addressing racial inequalities against Black people and other minorities are not by their very nature discriminatory against whites." The judge further found that the plaintiff's claims regarding "race-based conduct" by his coworkers and supervisors "lack specificity and factual support." The team representing the city also included partner **Sheehan Sullivan.**

Shout-out to **Michael Celio, Matthew Kahn, Michael Kahn** and their team at **Gibson, Dunn & Crutcher**. They secured a ruling from the Ninth Circuit this week knocking out a securities class action against client Slack Technologies Inc., which went public via a direct listing. The ruling comes after the U.S. Supreme Court previously overturned a prior Ninth Circuit ruling allowing the suit to survive a motion to dismiss. The high court remanded the case to determine whether the plaintiff's purchase of shares was traceable to the allegedly misleading registration statement. On remand, the Ninth Circuit held that the plaintiff

effectively conceded that he could not trace his share purchase to the allegedly defective registration statement. The court further held that the traceability requirement for Section 11 claims also applied to the plaintiff's Section 12(a)(2) claims.

The Gibson Dunn team included **Daniel Adler**, **Tom Hungar**, **Jacob Spencer** and **Matt Aidan Getz**.

Shout-out to **Riley Safer Holmes & Cancila** partners **Ronald Safer**, **Robert Riley** and **Eli Litoff** and associate **Mary Laird**, who won a jury acquittal for former **Freeborn & Peters** partner **Edward Filer** in a federal fraud trial in Chicago. Federal prosecutors accused Filer of inappropriately moving the assets of his client Barsanti Woodwork to help evade creditors in the run-up to an anticipated bankruptcy filing. But after one hour of deliberations, jurors last week found Filer not guilty of two wire fraud charges. Filer's lawyers previously won a post-trial acquittal after a guilty verdict in an earlier trial in the case, but the Seventh Circuit reversed that earlier decision.

Shout-out to **Habib Nasrullah** and his team at **Wheeler Trigg O'Donnell** representing international polo star Adolfo Cambiaso in a dispute over the breeding and cloning of his horse Dolfina Cuartetera. After a South Florida federal jury sided with Cambiaso on his contract and trade secret claims against former business partner Alan Meeker in May, U.S. District Judge Aileen Cannon last week ordered Meeker to hand over all clones of the horse and their tissue in his custody. Cambiaso's legal team also included Wheeler Trigg O'Donnell of counsel **Miles Orton** and associate **Will Sowers**, **Francis McDonald Jr.** and **Sarah Long** of **McDonald Toole Richman & Correnti**, **Diego Bucking** of **Peisajovich & Bucking** in Buenos Aires, Argentina, and **Harry Dorcy** of **Hilgers Graben**.

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Latest

Trending

Slack Decision Likely to Impede Direct Listing Investor Lawsuits

By Martina Barash

Deep Dive

- Decision seen as a win for issuers on no-intent claims
- Investors expected to try to show shares were registered

Investors in companies that go public through a direct listing will have a harder time bringing cases after a Ninth Circuit decision this week, attorneys say.

The decision favoring Slack Technologies LLC highlights how the securities laws passed in the wake of the Great Depression don't fully account for alternative routes to public markets that have gained in popularity. Slack was at the forefront of a direct listing movement that has since included Warby Parker Inc., Coinbase Global Inc., and Roblox Corp.

When an investor said in a lawsuit that Slack's 2019 registration statement failed to disclose the extent to which the company would have to provide credits to customers over service disruptions, the messaging app company—now a subsidiary of Salesforce Inc.—argued he lacked legal standing to sue under the Securities Act of 1933 because he couldn't prove he bought registered shares. The US Supreme Court, hearing that argument, remanded the case to consider that issue.

The US Court of Appeals for the Ninth Circuit on Feb 10 ruled for Slack, saying the suit must be dismissed. The decision reinforced that investors must trace their shares to a registration statement in order to sue over that document under the Securities Act, without a showing of intent. And tracing shares is difficult to do in the context of a direct public offering, where there's no lockup period keeping previously issued shares off the market.

"This decision potentially gives companies a roadmap on how to evade the disclosure requirements of the Securities Act, which is really concerning," said John Rizio-Hamilton of Bernstein Litowitz Berger & Grossmann LLP, who represents investors.

Plaintiffs will likely try to prove they can trace their shares, Rizio-Hamilton said. "That will be a big battleground going forward, whether tracing is possible through expert methodologies" such as accounting techniques applied to trading data and account balances, he said.

The *Slack* appeals court rejected investor Fiyaz Pirani's use of statistics to show he must have purchased some registered shares.

'Hard to Satisfy'

"The Ninth Circuit decision, like the Supreme Court decision before it, doesn't say that tracing is impossible," said Boris Feldman of Freshfields US LLP. But that requirement of Section 11 of the Securities Act "will be very hard to satisfy in most direct listings," he said.

Investors still have securities fraud claims available under section 10(b) of the Securities Exchange Act, said Mark Foster of Skadden, Arps, Slate, Meagher & Flom LLP. "This isn't a situation where investors don't have recourse. It just means that the statute was designed to protect investors who actually bought their shares traceable to an offering," he said of the Securities Act. "There are very few of them who can do that."

"It's for those initial investors who take on the initial risk," he said.

The decision has implications outside the direct listing context as well, said Skadden's Winston Hsiao. "These tracing arguments come up in a situation of a secondary offering, where you have a similar dynamic," and where investors often make "a variation of the statistical probability argument that the plaintiffs made in this case," he said.

"All those arguments are going to be even more difficult to make in light of this decision, if not precluded altogether," he said.

Effect on Investment Decisions

Investors would never make investment decisions based on legal considerations like the *Slack* case, said Feldman. "If it's a company that you believe in, and if it's at a price that you think is a good price with some upside, I think very few investors will decline to invest" because of litigation rules, just as they haven't avoided companies with provisions that they can only be sued for breach of fiduciary duty in Delaware, he said.

And companies aren't likely to have concerns about investors avoiding their direct-listed stock for this reason, said Feldman, who participated in submitting an amicus brief when the case was before the Supreme Court. "From the standpoint of the company considering going public, there are many tradeoffs on an underwritten IPO versus a direct listing to think about," he said. "I do not think that one of the one of the negatives of going with the DPO is 'Investors will stay away from us because of the *Slack* tracing problem.'"

But according to Rizio-Hamilton, "It should raise a red flag for an investor if a company chooses to proceed by direct listing, because it's a signal that the company may not wish to fully comply with the disclosure requirements of the Securities Act."

The issue is getting attention among institutional investors, he said. "Whether we see an effect on investment decisions is an open question, but it's fair to say that investors have noticed this," the plaintiff-side lawyer said.

Investors, and their advocates, are likely to look for a regulatory or legislative solution to help direct-listed shares become traceable, but nothing is expected in the near term, he said.

Applying Law Narrowly

"For those on the issuer side and the side of investment banks and anybody who's involved in public offerings in the capital markets, this decision is good news," said Foster. It will be hard for plaintiffs in direct listing cases to trace shares to a public offering. And the decision benefits issuers because Section 11 claims—which bring the potential for strict liability, or liability regardless of intent—"are often difficult to have thrown out early in a case on a motion to dismiss," he said.

The decision supports the idea that other elements and components of claims under Section 11—and Section 12, governing prospectuses—should be applied narrowly as well, including who can be liable, Hsiao said.

"If there's a material misstatement in the registration statement, the company's on the hook, period, absent some affirmative defenses," Feldman said of Section 11.

"That's why I think the Supreme Court, in *Slack* and in other decisions, has cracked down on the jurisdictional requirements," he said. "This is a super-potent statute."

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Insecticide Firm FMC Hit With Investor Suit After 34% Stock Drop

By Isaiah Poritz

- **COURT:** E.D. Pa.
- **TRACK DOCKET:** [No. 2:25-cv-00771](#) (Bloomberg Law subscription)

FMC Corp. was sued by shareholders Thursday who allege the agriculture and insecticide firm made a number of false statements about its business ahead of an almost 34% drop in its stock price last week.

The company failed to disclose that its “channel management initiatives were not progressing as represented” and that it had started walking away from sales opportunities when faced with pricing pressure, the proposed class action filed in the US District Court for the Eastern District of Pennsylvania said.

As a result, the company “inflated inventory in the channels” in Brazil, Asia, Canada, and Eastern Europe, the suit said. The proposed class would include investors who purchased stock between Nov. 16, 2023 and Feb. 4 this year and could have hundreds of thousands of members.

FMC, which sells crop protection chemicals globally, released its fourth quarter 2024 financial results in Feb. 4 which said growth was below the company’s expectations after it learned that “customers in many countries sought to hold significantly less inventory than they have historically.”

FMC’s stock price fell \$18.12, or 33.5%, to close at \$35.92 per share on that news. The shareholder suit seeks compensatory damages for the losses.

The company was hit with a derivative shareholder suit in the same court on Jan. 24, which alleged similar claims about misleading statements. It said company directors misled investors about post-pandemic inventory levels and competition issues from low-cost generic products, and it claimed five executives engaged in insider trading.

FMC didn’t immediately respond a request for comment.

Glancy Prongay & Murray LLP represents the shareholders.

The case is Mohammed v. FMC Corp. , E.D. Pa., No. 2:25-cv-00771, 2/13/25 .

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[Litigation](#)

Feb. 14, 2025, 9:04 AM PST

Perion Leaders Sued Over Ad Traffic Quality, Bing Revenue LossBy [Martina Barash](#)

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- **COURT:** S.D.N.Y.
 - **TRACK DOCKET:** [No. 1:25-cv-01326](#) (Bloomberg Law subscription)

Perion Network Ltd. directors and executives breached their duties to the advertising technology company by scheming to provide Microsoft Corp. with low-quality traffic for its Bing search engine, an investor alleges.

Perion's Bing-related revenue evaporated after news outlets reported on the junk traffic and Microsoft excluded Perion's publisher clients from its search distribution marketplace, John Carr says on behalf of the company. The derivative suit was filed Thursday in the US District Court for the Southern District of New York.

Ten members of leadership sold \$19 million worth of stock at artificially inflated prices, engaging in insider trading, Carr also says.

Carr made a pre-suit demand that the company take action against the directors and officers, which the board rejected, according to the complaint. That removes a hurdle that some derivative suit plaintiffs face, where they must explain why such a demand would be futile.

Carr brings claims for breach of fiduciary duties, gross mismanagement, waste of corporate assets, unjust enrichment, and insider trading. He seeks damages, disgorgement, and corporate governance reforms.

Perion didn't immediately respond to requests for comment on behalf of itself and the individual defendants, sent by email and through its web portal.

Gainey McKenna & Egleston represents Carr.

The case is Carr v. Jacobson , S.D.N.Y., No. 1:25-cv-01326, complaint 2/13/25 .

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Sustainable Plastic Maker Trims Investor Suit on New Facility

By Gillian R. Brassil

- Origin Materials allegedly hid shift, delay before stock drop
- Judge tossed most claims, dismissed one co-CEO as defendant

Origin Materials Inc. and one of its executives must defend against some claims they misled investors about shifting plans and delayed construction for its new sustainable plastic manufacturing plant, a federal judge ruled.

Lead plaintiff Todd Frega adequately pled that a pair of powerpoints and a federal disclosure were misleading about the change in plans, said Judge William B. Shubb of the US District Court for the Eastern District of California. But allegations against co-CEO Rich Riley weren't up to snuff and multiple other optimistic company statements either weren't misleading or otherwise weren't actionable, the judge said Wednesday, granting partial dismissal.

Origin makes chemicals used to produce the plastics polyethylene terephthalate (PET) and polyethylene furanoate (PEF). In February 2021, the company announced plans to build a manufacturing plant called Origin 2 that focused on PET and was expected to up and running by mid-2025. But Origin encountered PET chemical engineering issues, causing it to shift Origin 2 plans toward PEF production which delayed construction several years, Frega said.

The day after Origin 2's new plans were announced in August 2023, the stock price fell over 66%—its worst day since it opened on the market, according to data compiled by Bloomberg.



Frega adequately alleged that Origin knew about this shift in plans much earlier, Shubb said. In a March 3, 2023 meeting, co-CEO John Bissell told employees that construction of the new plant would be broken up and it would no longer make PET, according to a confidential witness Frega cited in his most recent proposed class action complaint. Shubb previously dismissed allegations based on the confidential witness as “fatally vague,” but the second amended complaint offered more specificity, he said.

Powerpoints posted to Origin’s website later that year still claimed the plant would make PET and was expected to be operational in mid-2025, Frega said. And the investor plausibly claimed cautionary language in a May 2023 federal filing that mentioned “purely hypothetical engineering difficulties and construction delays was misleading, given that defendants allegedly knew such problems had already manifested with respect to Origin 2,” Shubb said.

Frega was also able to plead the necessary level of intent to bring securities fraud claims against Bissell and Origin, Shubb said.

He didn’t sufficiently allege statements made before March 3 and during Bissell’s virtual “fireside chats,” among others, were misleading—some were too vague to be actionable or not about PET plans for the plant, Shubb said. And Frega didn’t successfully plead Riley’s intent, he said.

The investor can file an amended complaint within 20 days to try to address the deficiencies.

Bernstein Liebhard LLP is lead counsel and Bragar, Eagel & Squire PC is liaison counsel for Frega and the proposed class, which would cover those who invested from Feb. 23, 2023 through Aug. 9, 2023, per the complaint. Neither firm immediately responded to an email seeking comment.

Freshfields US LLP represents Origin and executives. An attorney declined to comment in an email.

The case is In re Origin Materials Inc. Sec. Litig. , E.D. Cal., No. 2:23-cv-01816, 2/12/25 .

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Class Action

Feb. 14, 2025, 7:51 AM PST

Arrow Financial's \$850,000 Securities Settlement Gets Court Nod

By Gillian R. Brassil

Arrow Financial Corp. investors got final approval from a federal court for an \$850,000 settlement in a suit alleging securities law violations over the bank holding company's financial reporting practices.

The suit alleged Arrow hid paltry financial reporting controls that caused it to miss timely filings with the Securities and Exchange Commission, sending the stock down after the company told investors that risked it being delisted from the NASDAQ. Judge Anne M. Nardacci of the US District Court for the Northern District of New York on Thursday signed off on the deal, which includes \$283,900 in attorneys' fees, representing 33.4% of the settlement, plus about \$42,000 in litigation expenses.

- The two named plaintiffs Robert Ashe and Jeffrey Gohn will be awarded \$4,000 total
- The class covers people who got Arrow securities from Aug. 6, 2022 through May 12, 2023. As of Jan. 3, no member opted out or objected to the settlement, more than two weeks after the deadline, Nardacci said

Pomerantz LLP was lead counsel for plaintiffs. O'Melveny & Myers LLP represented Arrow and three former executives. Neither firm responded immediately to emails seeking comment.

The case is Ashe v. Arrow Fin. Corp. , N.D.N.Y., No. 1:23-cv-00764, 2/13/25 .

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Shareholder Suit Over Credit Suisse Note Crash Advances With Class Certification

 [law.com/newyorklawjournal/2025/02/13/shareholder-suit-over-credit-suisse-note-crash-advances-with-class-certification](https://www.law.com/newyorklawjournal/2025/02/13/shareholder-suit-over-credit-suisse-note-crash-advances-with-class-certification)

Alyssa Aquino

Investors who claim Credit Suisse dealt them a \$1.8 billion blow by manipulating the price of short-term notes were partly certified for class treatment, following failed attempts at getting the New York federal court to accept the class.

U.S. District Judge Analisa Torres allowed the investors to proceed as a class on the price manipulation claims over protests that the class representative—the Sudheera Tripuraneni Trust—was too closely linked to Cohen Milstein Sellers & Toll, one of the two firms that were appointed lead counsel in a consolidated shareholder case against Credit Suisse.

“Without more,” the facts that the trust received legal advice from Cohen Milstein between 2018 and 2022 and retained its Slarskey legal team based on Cohen Milstein’s referral don’t amount to a conflict of interest, the judge said on Tuesday.

“[That] does not compel the conclusion that there is a close personal relationship between the Trust and Cohen Milstein such that the Trust would agree to a settlement less favorable to the interests of absent class members,” Torres said.

The case stemmed from a period of market volatility in 2018 that saw 16 million Credit Suisse notes crashing in value, after which Credit Suisse was able to redeem the notes—which previously were worth \$108.37 each—for \$5.99 a note. Credit Suisse made between \$475 million and \$542 million after the 2018 crash, while noteholders lost \$1.8 billion, they said.

Shareholders sued and pressed the Manhattan federal court to certify three different types of claims for class treatment. The cases were later consolidated, with Cohen Milstein and Levi & Korsinsky being appointed lead counsel.

While Torres initially certified a group of investors who brought claims under the Securities Act, she refused to certify two other groups that accused Credit Suisse of misrepresentation and price manipulation claims. She took issue with the theories of liability, finding that members of the manipulation class were incentivized to argue that there were no alleged misstatements, while members of the misrepresentation class were incentivized to argue that there was no manipulation.

In an attempt to get both subclasses certified, the investors amended their proposed class definitions and proposed letting Sudheera Tripuraneni Trust and its Slarskey legal team represent the manipulation class.

Torres found the changes sufficient for the manipulation class, but not for the proposed misrepresentation class, rejecting the shareholders' arguments that there were no investors who only qualified for a misrepresentation class.

"The court need not decide whether there are any misrepresentation-only claimants, but only whether it is persuaded by lead plaintiffs' claim that there are none. The court is not so persuaded," she said.

Cohen Milstein's Michael Eisenkraft told the New York Law Journal on Thursday that he was pleased with the decision. Counsel for Credit Suisse didn't respond to a request for comment.

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Class Action

Feb. 13, 2025, 8:57AM PST

TripAdvisor Ruling Eases 'DExit' Path for Corporate Departures

By [Mike Leonard](#) and [Jennifer Kay](#)

Deep Dive

- **As Musk attacks Delaware law, controlled companies eye exits**
- **Decision makes leaving easier but likely won't cause stampede**

Delaware's top court magnified the "DExit" debate last week with a decision that makes it easier for businesses led by powerful corporate insiders to leave the state, which has seen a wave of high-profile exits.

The ruling—rejecting damages for investors over TripAdvisor Inc.'s move to Nevada—came days after Delaware's new governor floated legal reforms in response to revelations that Meta Platforms Inc., Dropbox Inc., and Bill Ackman's Pershing Square are eyeing the off-ramps after a year of heated attacks on the state's reach from Elon Musk.

Delaware remains home to nearly 70% of Fortune 500 companies, and at stake is whether the trickle of exits will become a torrent. Nevada is leveraging looser accountability rules to attract corporate bigwigs leery of Delaware's stance toward insider deals, while Texas is trying to lure startups with a business-friendly reputation and a brand-new commercial court.

But corporate leaders eager to leave—whether for mundane reasons or to curry favor with the increasingly powerful Musk—now have a more straightforward path than before the Feb. 5 ruling by Delaware's Supreme Court, according to University of Pennsylvania law professor Jill Fisch.

"My guess is that a lot of companies have been sitting on the sidelines watching how this case was going to be decided," Fisch said.

Controlling Stockholders

Musk's social media bullhorn has amped up the pressure on Delaware's Chancery Court, exposing its judges to months of crude smears after his \$56 billion court loss.

But most companies flirting with Nevada and Texas are thinking less about the world's richest man and more about the substantive evolution of Delaware law in recent years, said Berkeley Law professor Steven Davidoff Solomon. They view recent changes as "constricting their ability to act efficiently in dynamic situations," according to Solomon.

"Putting Elon Musk aside, the law has changed," he said. "The judges will say they're just applying old doctrine, but it has changed."

Many companies with controlling stockholders—like Meta and Dropbox—have become uneasy in Delaware, particularly after a decision last year in a case involving Match Group Inc. The state supreme court ruling suggested elevated scrutiny covers virtually all transactions involving corporate controllers with even the most technical conflicts of interest, even ordinary decisions on matters like executive compensation.

"You're forced to go into this arduous process where historically you didn't need to have a shareholder vote," and "it might be overturned anyway," Solomon said. "That's what's driving this. It's not that 'Elon Musk hates Delaware, so we're going to also hate Delaware.'"

TripAdvisor has a controlling stockholder, media executive Greg Maffei, although a proposed restructuring may soon change that.

In last week's unanimous decision, Justice Karen L. Valihura avoided the higher standard of scrutiny by ruling that moving to a friendlier jurisdiction without a conflicted transaction already pending didn't give Maffei a "material" benefit at the expense of shareholders. The standard requires judges to determine if a corporate action was "entirely fair" to minority investors, rather than deferring to a board's "business judgment."

Cutting Back on Conflicts

The focus on what it takes to make a significant conflict of interest meant the opinion was both narrower and broader than it could have been.

The court's discussion of "temporality," in particular—the idea that TripAdvisor opted to relocate on a clear day, without a deal on the horizon that could steer value to Maffei—underscored that judges shouldn't necessarily be taking a hard look at every decision "giving benefits to a controller that don't perfectly square up, percentage-by-percentage, to their holdings," according to Columbia University law professor Eric Talley.

"The temporality component is just part of the mix," Talley said. "The lower the magnitude of a potential benefit, the lower the probability it will occur, and now the further pushed out in time—that all cuts against materiality."

Conflicts stemming from disproportionate or "non-ratable" benefits comprise an important doctrine throughout corporate law, including in circumstances involving neither a reincorporation nor a controlling stockholder. The decision to cut back on scrutiny of some conflicts—or to clarify the concept's existing limits—likely reflects the fallout from the *Match* decision, according to Fisch.

"The court is trying to draw a workable line between things that are really conflicts and things that are not," she said. "This opinion could have been written to focus on reincorporation. It wasn't. My guess is the reason was because of concerns like: Is Match too broad? What exactly constitutes a non-ratable benefit? Are we going to see a flood of shareholder suits every time a company amends its charter?"

Corporate Federalism

It's unlikely companies without controlling stockholders are going to rush Delaware's exits, according to Joshua Newcomer, a Houston-based partner at McKool Smith, who called the broadsides against Delaware "overblown." There's no incentive for those types of businesses to seek friendlier pastures because public investors benefit from the crackdown on insiders, he said.

Still, the TripAdvisor decision creates opportunities. "It's going to be a dynamic environment where Delaware, Texas, Nevada, and potentially other states could step in to provide alternatives that may be better or worse given the type of business and the corporate structure," Newcomer said.

That tradition of corporate federalism explains the final part of the TripAdvisor opinion, stressing "comity" between different jurisdictions, according to Fisch. "We have a long history in this country of states taking different approaches to corporate law," she said. "The system works because corporations can choose."

Talley called the comity section "another stick in the bundle."

"It suggests that when the conflict involves a reincorporation, there's kind of an additional materiality hump you have to get over," he said. "While I do think it's secondary, it's not a nothingburger either. If we're about to enter this interesting period of reincorporations, defendants are going to be able to use that."

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Class Action

Feb. 14, 2025, 8:39 AM PST

Bed Bath & Beyond 401(k) Losses Suit Settles for \$1.95 Million

By Jacklyn Wille

- **Bankruptcy allegedly terminated 401(k) investment contract**
- **Workers say missteps caused plan to lose more than \$5 million**

Bed Bath & Beyond Inc.'s 401(k) committee agreed to pay \$1.95 million to settle with workers who allegedly lost out on retirement savings because the retailer mishandled their plan in the wake of its bankruptcy, according to a Friday court filing.

The proposed deal would benefit about 2,100 people who experienced adjustments to their 401(k) account balances in connection with the plan's termination in 2023. It represents about 30% of the alleged losses to the plan, which is a substantial recovery given the "novel claim" advanced by the lawsuit, according to a settlement motion filed in the US District Court for the District of New Jersey.

The proposed class action centers on a MassMutual guaranteed interest account offered by the retailer's retirement plan, which was aimed at preserving assets and providing a fixed rate of return. Bed Bath & Beyond's 2023 bankruptcy filing caused the company's contract with MassMutual to terminate, which workers say led to a market adjustment that wiped out about 10% of the investment's value and drove plan losses of more than \$5 million.

The 401(k) committee knew of the company's ongoing financial struggles and should have terminated the MassMutual account on better terms prior to the bankruptcy filing, the workers said. The Bed Bath & Beyond committee disputed the allegations in a 2024 court filing, saying that nothing in the Employee Retirement Income Security Act required it to "outsmart the market by assuming interest rates would rise, when the market consensus was that they would remain low."

The deal is subject to approval from Judge Claire C. Cecchi, who hasn't ruled on the merits of the dispute.

Morgan, Lewis & Bockius LLP represents the company. The employees are represented by Morgan & Morgan PA, Engstrom Lee LLC, and Wenzel Fenton Cabassa PA.

The case is Harvey v. Bed Bath & Beyond, Inc. 401(k) Sav. Plan Comm. , D.N.J., No. 2:23-cv-20376, settlement motion 2/14/25 .

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Class Action

Feb. 13, 2025, 11:34 AM PST

Meta's \$725 Million Deal Resolving Privacy Suit Upheld On Appeal

By [Mike Vilensky](#)

- **Lower court properly considered case's strength: 9th Cir.**
- **\$181 million to class attorneys also gets court's nod**

Meta Platforms Inc.'s \$725 million settlement over claims that Facebook shared user data with third parties including Cambridge Analytica was upheld by a federal appeals court Thursday.

The district court properly evaluated the strength of the plaintiffs' class action case and signed off on a fair settlement, the US Court of Appeals for the Ninth Circuit said.

The \$725 million agreement stems from Facebook users' claims that the social media giant shared their personal data with Cambridge Analytica, a research firm tied to Donald Trump's campaign, during the 2016 presidential-election cycle, among other third parties.

The Ninth Circuit rejected arguments from two objectors to the deal in Thursday's 6-page unpublished, per curiam, memorandum opinion.

The objectors said class members—estimated to include over 200 million people—would end up with less than \$3 each of the total. The objectors also challenged the \$181 million fee award to attorneys for the class.

The lower court's determination that the agreement is reasonable was affirmed, the appeals court said, because the lower court considered the case's strengths and weaknesses and the potential recovery amounts if the claims were tried.

"The district court considered all the objections to settlement and overruled them with a 'reasoned explanation,'" the Ninth Circuit said, citing circuit precedent.

The lower court didn't abuse its discretion by agreeing to the fee award for class attorneys—some 25% of the total settlement—the Ninth Circuit also ruled.

The lower court properly considered whether class counsel achieved "exceptional results for the class" and the market rate for their work, among other factors laid out by the appeals court's precedent, the opinion said.

Judges Danielle J. Forrest and Gabriel P. Sanchez were on the panel, joined by Judge David Alan Ezra, of the US District Court for the District of Hawaii, sitting by designation.

Keller Rohrbach LLP and Bleichmar Fonti & Auld LLP represented the class. Gibson Dunn & Crutcher LLP represented Facebook. Kendrick Jan, of San Diego, and John J. Pentz, of Oro Valley, Ariz., represented the objectors.

The case is Feldman v. Facebook, Inc. , 9th Cir., No. 23-3550, unpublished 2/13/25 .

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Ninth Circuit Signs Off On Facebook's \$725M Cambridge Analytica Settlement

 [law.com/therecorder/2025/02/13/ninth-circuit-signs-off-on-facebooks-725m-cambridge-analytica-settlement](https://www.law.com/therecorder/2025/02/13/ninth-circuit-signs-off-on-facebooks-725m-cambridge-analytica-settlement)

Amanda Bronstad

The U.S. Court of Appeals for the Ninth Circuit approved Facebook's \$725 million class action settlement, overruling objections to the damages and attorney fees.

In Thursday's order, the unanimous panel found that U.S. District Judge Vince Chhabria, of the Northern District of California, conducted a reasonable examination of the settlement, including potential statutory damages, before issuing final approval in 2023. The panel also approved 25% in fees, or about \$180 million.

In a statement, co-lead class counsel Lesley Weaver, of Bleichmar Fonti & Auld in Oakland, California, and Seattle-based Keller Rohrback's Derek Loeser, said, "We are pleased that the Ninth Circuit has overruled the two objections that have held up distribution of the settlement for over 15 months, and look forward to being able to move ahead with it. The settlement is an excellent result for the class that required an extraordinary amount of work by us, [Bleichmar partner] Anne Davis, [Keller Rohrback partner] Cari Laufenberg and our dedicated teams over seven grueling years."

A spokesperson for Meta Platforms Inc., which owns Facebook, said in a statement, "We are pleased to put this matter behind us and to continue focusing on building services people love and trust with privacy at the forefront."

Solo practitioners Kendrick Jan, of San Diego, and John Pentz, of Oro Valley, Arizona, who represented the objectors, did not respond, either.

'This Case Was A Battle'

Thursday's argument comes less than a week after the Ninth Circuit heard oral arguments in the case, which alleged that Facebook sold information about its users to third parties through an app called Cambridge Analytica.

After extensive discovery, which led to Chhabria sanctioning Facebook and its lawyers at Gibson, Dunn & Crutcher for what he considered to be stonewalling and gas-lighting the plaintiffs, the case settled in 2022. Chhabria, in granting final approval, said he was "blown away" by the nearly 18 million claims. He also granted \$180 million in attorney fees for what he called "unusually prolonged and contentious" litigation.

On appeal, objectors argued that 253 million class members were getting \$2.87 each -- less than 0.3% of their potential damages under the Video Protection Privacy Act and the Stored Communications Act. They cited the Ninth Circuit's 2022 ruling in *Wakefield v. ViSalus Inc.*, which reversed a \$925 million verdict in a case over 1.85 million unsolicited telephone calls alleged to have violated the U.S. Telephone Consumer Protection Act.

The panel, however, wrote in Thursday's decision that objectors' argument "mischaracterizes that decision."

Derek Loeser of Keller Rohrback.
Courtesy photo

"I don't read *Wakefield* to direct the district courts to calculate statutory damages," Circuit Judge Gabriel Patrick Sanchez told Jan during Feb. 7 oral arguments.

The Ninth Circuit rejected a similar argument from the same objecting lawyers in a \$90 million class action settlement with Facebook over the use of the "like" button to track user activity on other websites. The appellate court held off briefing in the *Cambridge Analytica* appeal until after oral arguments in the tracking case, in which the court held such damages would be "an unreasonable baseline that would violate due process."

Senior U.S. District Judge David Ezra, of the District of Hawaii, sitting by designation, questioned the large fee award to class counsel. But Loeser insisted Chhabria had evaluated the fees in light of the difficulties in the case, which was a "massive undertaking."

"This case was a battle," he said. "This court lived this case, breathed this case. As anyone who's ever been in front of Judge Chhabria knows, there's no easy or free pass on a class action settlement."

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Ninth Circuit upholds \$725M Facebook settlement in Cambridge Analytica case, rejects objectors' appeal

 [courthousenews.com/ninth-circuit-upholds-725m-facebook-settlement-in-cambridge-analytica-case-rejects-objectors-appeal](https://www.courthousenews.com/ninth-circuit-upholds-725m-facebook-settlement-in-cambridge-analytica-case-rejects-objectors-appeal)

Michael Gennaro

The Facebook logo is displayed on an iPad. (Matt Rourke/AP)

SAN FRANCISCO (CN) — The Ninth Circuit Court of Appeals ruled Thursday afternoon that a federal court did not abuse its discretion in 2023 when it approved a \$725 million settlement between Facebook, Inc. — now known as Meta — and a settlement class concerning the Cambridge Analytica scandal, an event in which Facebook misused personal data for political purposes.

Two objectors — Sarah Feldman and Jill Mahaney — appealed the approval of the settlement and the federal court's order approving attorneys' fees constituting 25% of the settlement fund, which amounts to about \$180 million.

The three-judge panel unanimously agreed that U.S. District Judge Vince Chhabria conducted a thorough, reasonable examination of the settlement before approving it and did not abuse any discretion when doing so.

"Objectors' arguments against settlement approval do not establish a clear abuse of discretion. Objectors' contention that the district court was required to conduct its fairness review using a probabilistic approach' similar to one favored in the Seventh Circuit, is not well taken, as we have previously rejected this approach as contrary to the weight we afford the 'product of an arms-length, noncollusive, negotiated resolution,'" the panel wrote. "Objectors do not contest the district court's factual finding that the settlement was the product of such a resolution."

The panel included U.S. Circuit Judges Danielle Forrest, a Donald Trump appointee, and Gabriel Sanchez, a Joe Biden appointee. The circuit judges were joined by Senior U.S. District Judge David Ezra from Hawaii, a Ronald Reagan appointee.

The appeals panel held that Chhabria did not abuse his discretion in approving the settlement's allocation plan, which awards allocation points to class members based on the number of months they had an activated Facebook account within the class period and divides the settlement pro rata based on those points.

"The district court was well within its discretion in finding this plan reasonable and equitable among class members after it determined that the record supported a correlation between the length of time users were on Facebook and the potential degree to which third parties

could access their information,” the panel wrote.

Lastly, the panel ruled that the 25% attorney fees, while large, were not unreasonable nor an abuse of discretion. The panel noted that Chhabria treated the attorneys’ fees with “heightened skepticism” because of how large the fees were, reviewing the fees against several factors, using a lodestar method cross-check and more to determine that they were reasonable.

“After considering these factors and overruling all objections, the district court was within its discretion in finding both that the 25% fee award was reasonable and that it was properly within the range of class action settlement awards of comparable size and complexity,” the panel wrote.

The settlement will resolve dozens of consolidated lawsuits that resulted from reports in March 2018 that Cambridge Analytica had harvested information from up to 87 million Facebook users. The case expanded to include broader data-sharing practices by Facebook, with claims the company had granted numerous third parties access to users’ Facebook content without their consent and had failed to monitor these third parties’ use of that information adequately.

The plaintiffs — all current and former Facebook users — claimed Cambridge Analytica was one of several to whom Facebook divulged their sensitive information to third parties without consent. Facebook argued users had no legitimate privacy interest because they willingly share their information through social media.

Chhabria shot that argument down, saying the law firmly establishes an individual's right to privacy when sharing certain information with a limited audience.

Counsel for the class plaintiffs and Facebook did not reply to requests for comment before the deadline. Counsel for the objectors did not reply to requests for comment before the deadline.

Categories / Appeals, Technology

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With numbers not on its side, Beasley Allen wants new client vote on J&J's \$9B talc fund



setexasrecord.com/stories/669779926-with-numbers-not-on-its-side-beasley-allen-wants-new-client-vote-on-j-j-s-9b-talc-fund

February 14, 2025

Asbestos

Jere Beasley | beasleyallen.com

HOUSTON - The two law firms opposing Johnson & Johnson's massive talcum powder settlement that would give \$9 billion to women blaming their ovarian cancer on Baby Powder wants a new vote.

Ahead of a trial set to begin next week in Houston federal bankruptcy court, the Coalition of Counsel for Justice for Talc Claimants, which is led by the firm Beasley Allen, wrote Feb. 13 that the voting process that led to 83% of plaintiffs approving the plan was inconsistent.

The Coalition's pre-trial brief says the settlement is the result of bad faith by J&J and the bankruptcy case should be dismissed for a multitude of reasons already laid out in its objection.

Judge Christopher Lopez will have to address the Coalition's call for a new vote. Currently, the plan has surpassed a 75% threshold of approval by clients of firms that support the agreement.

"Yes" votes increased last year when J&J promised to pump another \$1 billion into a trust that will handle ovarian and gynecological cancer claims.

"(T)he Coalition will demonstrate that the pre-petition solicitation and voting process was so rife with irregularities and inconsistent treatment of different law firms and the claimants they represent that it cannot be said that the vote accurately reflects the claimants' votes," the Coalition wrote.

"These irregularities further demonstrate the Debtor's bad faith, warranting dismissal or denial of confirmation. At a minimum, however, it requires resolicitation of votes through process approved by this Court with clear instructions and consistent treatment of all votes."

J&J is trying to use a spinoff company, Red River Talc, to absorb the company's liabilities in cases alleging its Baby Powder contained asbestos and caused ovarian cancer in tens of thousands of individuals. Rather than fight each case individually in various courts nationwide, J&J hopes to streamline the process through a \$9 billion bankruptcy.

If approved, ovarian cancer claims will be resolved through a bankruptcy trust in Houston federal court. Supporters say this will pay claimants quicker and easier, but law firms opposed say their clients won't get their day in court and lose the potential for a blockbuster, multimillion-dollar verdict from a jury.

Beasley Allen has been a vocal critic of J&J's repeated attempts to use the bankruptcy system to stay out of civil court, considering how much money the company has. The move to Texas bankruptcy court has been dubbed the "Texas Two-Step."

But opposition waned during the Texas bankruptcy. J&J says claimants will receive on average twice what they would in a court case, as firms like the Smith Law Firm had clients change their mind after the additional \$1 billion.

"Indeed," the Coalition wrote, "given the moving target that has been the Debtor's proposed plan and votes coming in at different times and based on different proposed plans, it is only fair that claimants be allowed to vote on the current iteration of the Debtor's plan."

"Ideally, whatever that iteration may be, the plan sent out for solicitation must cure the infirmities here and be accompanied by an accurate and complete disclosure statement."

Beasley Allen and the Smith Law Firm are fighting each other in Alabama federal court. Beasley Allen is accusing Smith of pushing approval of the settlement on its clients because it owes as much as \$240 million to a lender that funded its litigation.

Supporters of the plan say it's the only realistic way to settle some 40,000 claims by women who say their cancer was caused by asbestos-tainted talc. Johnson & Johnson has won most of the cases that have gone to trial so far and maintains there was never asbestos in its products.

But a few devastating losses, including a \$2.1 billion verdict in Missouri, forced the company to enter settlement negotiations. Defending the cases has cost J&J \$10-20 million a month and trying each one in court would take decades, with wildly different results for individual plaintiffs.

Proponents, including the Smith firm, say bankruptcy offers a faster and fairer process for compensating cancer plaintiffs. The latest bankruptcy plan, J&J's third after two failed efforts in New Jersey, includes \$650 million in a fund to cover a shared portion of plaintiff legal fees.

The Smith Law Firm took aim at Beasley Allen in its pre-trial brief. The two formerly worked together and submitted a joint master ballot before the extra money had Smith clients changing their minds.

"The time has come to cease the relentless litigation of the past several years and to finally permit recoveries to flow to the claimants who so richly deserve them," SLF wrote.

J&J has claimed there were voting irregularities by Beasley Allen's clients. When claimants who had their cases dismissed still declined to approve the bankruptcy plan that would pay them, it raised eyebrows.

There is evidence Beasley Allen lawyer Andy Birchfield cast negative votes for clients who approved the plan, J&J says.

Included were 5,500 gynecological cancer claimants rejecting the plan, even though Birchfield testified their claims had no value in the tort system.

"They have not - they have not sustained a legally cognizable injury that would allow us to file a claim in the tort system," he said at a deposition.

ORGANIZATIONS IN THIS STORY

U.S. Bankruptcy Court for the Southern District of Texas

Judge tosses youth climate suit against EPA's discounting policy

DJ [dailyjournal.com/articles/383571-judge-tosses-youth-climate-suit-against-epa-s-discounting-policy](https://www.dailyjournal.com/articles/383571-judge-tosses-youth-climate-suit-against-epa-s-discounting-policy)

Environmental & Energy

Feb. 14, 2025

A federal judge has rejected youth plaintiffs' challenge to the EPA's discount rate calculations used for assessing the economic impact of climate regulations, finding there was no constitutional rights violation.



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A federal judge on Wednesday dismissed claims by a group of minors who accused the U.S. Environmental Protection Agency of jeopardizing their future by using a discounting policy that allegedly allowed for higher greenhouse gas emissions.

The discounting policy in question is a regulatory planning method that allows the agency to calculate the present value of future environmental benefits and costs when evaluating the impact of regulations. The plaintiffs claimed that the policy gave less weight to future consequences in regulatory decisions, which was exacerbated by the fact that the discount rate compounded annually.

However, they were unable to convince U.S. District Judge Michael W. Fitzgerald that the policy unconstitutionally discriminated against children by prioritizing short-term economic gains over their long-term health.

"These climate related harms will be experienced relatively equally by all people - both in the United States and around the world - who are alive at the time of their impacts. ... In essence, this claim must fail because it is not about a stigmatic injury at all, but rather about displeasure with the EPA's economic analyses in assessing the impacts of future harms" Fitzgerald wrote in an order.

"The [first amended complaint] does not establish how a stigmatic harm is worked upon those who will soon reach the age of majority, including certain plaintiffs in this case who are very nearly 18 years of age, begging the question of how in particular the discounting policies work a discriminatory harm against an individual aged 17 years and 364 days and not an individual aged 18 years. The stigmatic harms here are therefore abstract in nature."

The plaintiffs are a group of 18 minors between the ages of 8 and 17 who sued the EPA and its management and budget office on claims the government violated the U.S. Constitution and Clean Air Act by administering the policies. They are led by Julia A. Olson, founder of Our Children's Trust, who said in a statement that she will continue working with her co-counsel to fight for their clients' constitutional rights despite the dismissal.

"By dismissing this case, the court is turning a blind eye to the real-world harms youth are enduring right now. Wildfires are ravaging these children's communities in California, but the court claims that their suffering is too 'indirect' to matter," Olson said. "This ruling is nothing short of judicial dereliction in the face of a climate emergency. The court refused to consider that the government's devaluation of children isn't just bad policy - it's a violation of fundamental equal rights."

The government was defended by Department of Justice attorneys Andrew S. Coghlan and Sean C. Duffy. A spokesperson for the department said it had no comment on Fitzgerald's order.

Following nearly two years of dismissal-related litigation, and after Fitzgerald allowed the complaint to be amended to demonstrate redressability, the judge finalized the case this week by granting the government's dismissal without leave to amend. He found the plaintiffs' contentions failed to show how their injuries were traceable to the policies. *G.B. et al. v. U.S. Environmental Protection Agency et al.*, 2:23-cv-10345 (C.D. Cal., filed Dec. 10, 2023).

"Plaintiffs fail to allege that Circular No. A-4 or the EPA Guidelines set out binding discount rates or practices. In fact, Circular No. A-4 takes pains to inform agencies that [benefit-cost analyses] should be context-sensitive in nature, and does not mandate a particular rate," Fitzgerald wrote. "Similarly, the EPA Guidelines do not establish that economic analysis controls agency decision-making, and in fact establish the opposite."

Fitzgerald quoted a portion of the guideline that states economic analysis is only one of many components in the EPA's decision-making process and cannot be used in setting standards. "In combination, therefore, the discounting policies establish that they are guidance documents for preparation of [benefit-cost analyses]," the judge wrote.

The plaintiffs' counsel contended Fitzgerald wrongfully ignored written expert testimony from doctors who told the judge that though both adults and children can be affected by climate change, children are distinctly more vulnerable to life-long consequences.

In Fitzgerald's order, he found the testimony was "irrelevant" to the resolution of the government's dismissal motion - whose defense counsel argued the entirety of the complaint lacked subject matter jurisdiction and failed to state a valid challenge against the policies.

"Plaintiffs argued that the declarations of their experts ... establish that the discounting policies impact the ultimate form that environmental regulations take, and therefore strengthen the casual connection between discounting policies and their alleged harmful effects," Fitzgerald wrote.

"[H]owever, the declaration does not address the central problem the court finds with plaintiffs' theory of standing - that the discounting policies have been utilized as a tool in ultimately issued regulations is not the same as credibly alleging that the EPA is bound to utilize the discounting policies."

#383571

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Judge weighs notice rules in Walmart contamination case

DJ [dailyjournal.com/articles/383573-judge-weighs-notice-rules-in-walmart-contamination-case](https://www.dailyjournal.com/articles/383573-judge-weighs-notice-rules-in-walmart-contamination-case)

Civil Procedure

Feb. 14, 2025

A Los Angeles judge is considering whether serving notice of lead contamination claims to outside counsel, rather than corporate officers, meets notification requirements in a case against Walmart and Bumble Bee Foods.



Judge Stephen P. Pfahler

A Los Angeles County judge will consider whether to dismiss claims of lead and cadmium contamination against Walmart Inc. and Bumble Bee Foods LLC after tentatively sustaining demurrers in the case without leave to amend for failure by the plaintiffs to meet notice requirements on Thursday.

"Plaintiff The Chemical Toxin Working Group, Inc. in both oppositions maintain full substantial compliance with the notice requirements, and notice was sufficiently provided via service on the 'agent' for Bumble Bee," Judge Stephen P. Pfahler wrote in his tentative ruling on Thursday.

"The court rejects any designation of outside counsel serving as an agent or identified executive, officer, authorized representative of the corporate entity for purposes of operational decisions," the tentative ruling continued.

The Chemical Toxic Working Group, which operates under the business name Healthy Living Foundation Inc., is represented by Poulsen Law PC Managing Attorney Aida Poulsen in New York City, New York and Peter T. Sato in Alhambra.

In response to requests for comment, Poulsen provided a statement from Healthy Living Foundation Chief Officer David Steinman.

"The judge in this case is very knowledgeable and his willingness to engage with this utmost important subject of public health is encouraging," Steinman's statement read in part. "Healthy Living Foundation hopes that the demurrers will be denied, allowing the case to proceed and ensuring that consumers are protected from these immediate harmful exposures".

Steinman's full statement can be found [here](#).

Walmart and Bumble Bee Foods are represented by Gregory S. Berlin, Samantha K. Burdick and Omar A. Morquecho of Alston & Bird LLP in Los Angeles. Berlin declined to comment without authorization from his clients in a phone call on Thursday.

Healthy Living Foundation sued in 2023 on claims that Walmart and Bumblebee continue to offer products containing potentially unsafe levels of lead and cadmium without proper warning labels. *The Chemical Toxic Working Group Inc. v. Bumble Bee Foods LLC et al.*, 23STCV17896 (L.A. Super. Ct., filed July 28, 2023).

The defendants filed demurrers in October 2024 on the grounds that pre-suit notices of violation sent by the plaintiffs failed to identify the individual party who filed the notices and failed to address some causes of action to Bumble Bee's chief executive officer, president or general counsel.

"Where a Proposition 65 private enforcer's claim is predicated on a defective pre-suit notice, it lacks standing to proceed, and the court must dismiss the complaint," read a demurrer filed by the Bumble Bee defendants.

In opposition, the plaintiffs argued they had met a standard of substantial compliance under California Code of Regulations Section 25903(b)(2).

"Defendants incorrectly argue that the court must use a 'strict compliance' standard to evaluate whether HLF's notice satisfies the regulations requirements," the plaintiffs' opposition to Bumble Bee's demurrer read. "This is incorrect. The law provides that 'substantial compliance' is the default standard."

Pfahler's tentative ruling rested on whether outside counsel for a defendant qualifies as a responsible individual "within" the corporate entity they represent as described by the Code of Regulations.

"Defendants takes specific issue with the representation of counsel as the responsible individual 'within' the corporate entity in that the Poulsen law firm is not the identified real party in interest, and in fact operates as outside counsel," he wrote. "Plaintiff in opposition concedes it does not operate as in-house counsel, and instead represents counsel appears as an 'agent' on behalf of client plaintiff, thereby complying with the 'within' requirement."

"Disregarding the term 'within' and eliminating any distinction between a corporate officer and outside counsel improperly undercuts the statutory scheme," Pfahler found, tentatively granting both demurrers.

In a hearing on Thursday, however, Pfahler elected to take the demurrers under submission, according to a minute order.

A final status conference in the case is scheduled for July 10.

#383573

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Federal judge trims AI denial lawsuit against UnitedHealth Group

 [courthousenews.com/federal-judge-dismisses-several-claims-in-ai-denial-lawsuit-against-uhg-but-case-will-proceed](https://www.courthousenews.com/federal-judge-dismisses-several-claims-in-ai-denial-lawsuit-against-uhg-but-case-will-proceed)

Mark Wasson

The UnitedHealth Group headquarters in Minneapolis. (AP Photo/Jim Mone, File)

ST. PAUL, Minn. (CN) — A federal judge has allowed a class action against UnitedHealth Group for denying coverage to its customers to proceed despite dismissing five out of seven counts in an opinion filed Thursday.

The case, brought by several of the health insurance company's customers who were denied benefit coverage and filed in the United States District Court of Minnesota, says UnitedHealth Group, UnitedHealthcare, and naviHealth Inc. routinely denied claims by using an artificial intelligence program instead of medical professionals for elderly patients under their Medicare Advantage plans.

Those denials led to worsening conditions for those covered by the Minnesota-based health insurers and, in some cases, were followed by the death of its customers, the plaintiffs allege, adding the AI program developed by naviHealth, which UHG owns, has a 90% error rate.

"Despite the high error rate, Defendants continue to systemically deny claims using their flawed AI model because they know that only a tiny minority of policyholders (roughly 0.2%) will appeal denied claims, and the vast majority will either pay out-of-pocket costs or forgo the remainder of their prescribed post-acute care," the plaintiffs wrote in their complaint, filed in 2023. "Defendants bank on the patients' impaired conditions, lack of knowledge, and lack of resources to appeal the erroneous AI-powered decisions."

UHG is the largest insurance company in the U.S., with UHC acting as its insurance arm. It provides coverage for 52.9 million Americans.

"The fraudulent scheme affords Defendants a clear financial windfall in the form of policy premiums without having to pay for promised care, while the elderly are prematurely kicked out of care facilities nationwide or forced to deplete family savings to continue receiving necessary medical care, all because an AI model 'disagrees' with their real live doctors' determinations," the plaintiffs wrote in their complaint.

The company has faced heightened criticism recently for its alleged denial rate, most notably the assassination of former UHC CEO Brian Thompson in New York late last year. Law enforcement said shell casings found at the scene had the words "deny," "defend," and

“depose” written on them, which references the company’s alleged practice of putting barriers in place to deny treatment to its policyholders.

The man charged with Thompson’s murder, 26-year-old Maryland native Luigi Mangione, has received about \$300,000 in crowdfunded donations for his legal defense. Mangione has pleaded not guilty.

UHG motioned to dismiss the lawsuit in May 2024, alleging that the court lacked jurisdiction in the case.

In a memorandum supporting its motion to dismiss, UHG argued that the plaintiffs had either not completed the appeals process or sought no further benefits after a denial or approval, meaning the court should be barred from hearing the case.

While Judge John Tunheim ordered several counts in the lawsuit to be dismissed Thursday under the preemption provision in the Medicare Act, including a claim of unfair and deceptive insurance practices, he allowed the lawsuit to proceed under its breach of contract and good faith and fair dealing claims.

Notably, Tunheim waived the requirement that the plaintiffs exhaust all administrative remedies before bringing an action against the insurers, describing UHG’s claim denial process as “futile” with the likelihood that it can cause “irreparable injury.”

While all of the plaintiffs submitted claims for benefits, Tunheim wrote in his opinion that none of them went through the entire appeals process and received a final decision, which forced the court to evaluate whether or not the appeals process was truly feasible considering the plaintiffs’ claims.

“First, UHC allegedly issues repeated denials any time a patient is successful on appeal. As a result, any time a patient gets a denial overturned, another denial is on its way. Second, for the very few appeals that reach the end of the appeals process, UHC allegedly pays the claims and terminates the process,” Tunheim wrote in his opinion. “As alleged in the Complaint, this practice would make it virtually impossible for any claim to progress through the entire four-step appeals process and be ripe for judicial review. Thus, the irreparable injury and futility of the appeals process suggests that waiver of administrative exhaustion is appropriate.”

In one case, outlined in the plaintiffs’ complaint, the health insurance company is accused of repeatedly denying post-acute care coverage to a 74-year-old man who suffered a stroke despite his doctor telling the defendants that he needed continued care.

This forced the man to pay for his medical expenses out of pocket, which amounted to over \$70,000 over 10 months before he was discharged from the hospital to an assisted living facility, where he died a little less than a year after he first filed his claim, his estate wrote in the initial class action complaint.

With the dismissal of the lawsuit's other claims under the broad preemption provision in the Medicare Act, the court will now need to evaluate compliance with the insurance agreements, essentially whether the insurers violated their own contracts with their insured.

Lawyers for both the plaintiffs and UHG did not respond to a request for comment before this story was published.

Categories / Courts, Health, Uncategorized

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'Legal Frankenstein' Led to PCB Verdict, Monsanto Tells Washington Supreme Court

 [law.com/2025/02/13/legal-frankenstein-led-to-pcb-verdict-monsanto-tells-washington-supreme-court-](https://www.law.com/2025/02/13/legal-frankenstein-led-to-pcb-verdict-monsanto-tells-washington-supreme-court-)

Amanda Bronstad

What You Need to Know

- At stake are \$1.6 billion in jury awards against Monsanto in the past three years over exposure to polychlorinated biphenyls, or PCBs.
- Deepak Gupta argued for the former students, parents and teachers of the Sky Valley Educational Center in Monroe, Washington.
- Last year, the Washington Court of Appeals gave Monsanto a big win by reversing the verdict and concluding that the jury should not have been allowed to award punitive damages for a failure-to-warn claim, which Missouri law does not recognize.

A lawyer for teachers, students and their parents exposed to toxic chemicals at a school near Seattle told the Washington Supreme Court on Tuesday that Monsanto was attempting to upend decades of precedent to wipe out a string of jury awards.

At stake are \$1.6 billion in jury awards, 80% of which are punitive damages, against Monsanto in the past three years over exposure to polychlorinated biphenyls, or PCBs, at the Sky Valley Educational Center in Monroe, Washington.

The case, which involves the first of those verdicts, a \$185 million jury award in 2021, presented a rarely debated issue before the Washington Supreme Court: Conflicts between two different state laws. Monsanto has argued that the trial court impermissibly allowed plaintiffs to pursue punitive damages under the law of Missouri, where it has its headquarters; Washington's Product Liability Act allows only compensatory damages. The court also failed to apply Washington statute of repose, Monsanto argues, which bars product liability claims after 12 years of use.'

"The threshold question here is whether Monsanto may invoke Washington's statute of repose to close the courthouse doors and immunize conduct that took place years ago in Missouri before the Washington statute was even enacted," Deepak Gupta, of Washington, D.C.'s Gupta Wessler, told the panel on Tuesday. "For decades, from its Missouri headquarters, Monsanto orchestrated an elaborate scheme to conceal that its PCBs not only last forever but are extremely toxic."

But Associate Justice Raquel Montoya-Lewis, noting that parsing the laws in this trial favored the plaintiffs, remarked, “I’m struggling to not see this as anything other than effectively a forum shopping approach on a smaller issue.”

Associate Justice Barbara Madsen also said she was cynical.

“It sort of opens the door to, I don’t know, perhaps, favoring or putting a thumb on the scale for one side or the other when you take issue by issue approach,” she told Gupta.

Last year, the Washington Court of Appeals gave Monsanto a big win by reversing the verdict and concluding that the jury should not have been allowed to award punitive damages for a failure-to-warn claim, which Missouri law does not recognize. The appeals court also agreed that the trial court should have applied the statute of repose, which is part of Washington’s Product Liability Act.

“Missouri has an interest in this case but not in the way the plaintiffs would think,” Monsanto lawyer Lauren Goldman, a New York partner at Gibson, Dunn & Crutcher, argued on Tuesday. Missouri, she said, “has a totally different bundle of policies” that, if unbundled, could lead to forum-shopping and a “legal Frankenstein” inviting challenges for the courts.

“When you have a tort claim that has multiple elements, those elements must travel together,” she said. “You can’t pick and choose.”

‘A Dramatic Shift in Washington Law’?

More than 200 plaintiffs have sued Monsanto alleging their PCB exposure in the school’s fluorescent light ballasts and caulk caused neurological problems.

Juries in King County Superior Court have awarded damages ranging from \$21.4 million to \$857 million, although one ended in a mistrial. Last month, a jury awarded \$100 million to four plaintiffs, but sided with Monsanto on the other 11. Dozens more jury trials are planned.

The appeal before the Washington Supreme Court has attracted amicus groups on both sides, many of whom are law professors or experts on conflict of laws or *dépeçage*—the selection of different state laws to govern different issues.

Erin O’Hara O’Connor.

“The trial court’s choice-of-law methodology reflected a basic misunderstanding of the choice-of-law exercise,” Erin O’Hara O’Connor, the dean of the Florida State University College of Law, wrote in one brief with two other law professors. “Through its unprincipled

use of dépeçage, the trial court cobbled together bits and pieces of Washington and Missouri law, and the resulting conglomeration failed to reflect the policies underlying either state's laws."

On the other side were six law professors, including Symeon Symeonides, former dean of Willamette University College of Law, and University of California, Berkeley School of Law, Professor Andrew Bradt.

And other former students, and their families, of the Sky Valley Educational Center weighed in.

"The jury verdicts in this case, and in several other parallel Sky Valley Cases, were issued in accord with settled precedent and legislative intent," wrote attorney Luke Garrett, of Seattle-based Schroeter, Goldmark & Bender. "Abandoning the settled framework would represent a dramatic shift in Washington law without legislative authorization."

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Class Action

Feb. 13, 2025, 3:48 PM PST

Adobe Defeats Consumers' Deceptive Subscriptions Suit, For Now

By [Isaiah Poritz](#)

- **Customers can file amended complaint within one month**
- **FTC pursuing similar renewal practice suit against Adobe**

Adobe Inc. escaped a proposed class action alleging it deceptively hides the terms of its automatic subscription renewals for its software products.

Judge Jacqueline Scott Corley on Thursday granted Adobe's motion to dismiss the suit from consumers, but allowed them to file an amended complaint within a month. Corley didn't provide a written opinion for the ruling.

The consumers, lead by plaintiff Vikram Singh, alleged the software company violated California's Automatic Renewal Law, which requires companies to get customers' affirmative consent before charging renewal payments, clearly state the terms of renewals, and provide an easy cancellation system.

The ruling comes as the US Federal Trade Commission is litigating a similar case against Adobe over its subscription practices.

Singh's complaint alleged Adobe's platforms employ "dark patterns," website design practices that manipulate consumers into buying its software subscriptions. A subscription to the Adobe suite of Creative Cloud apps, which include Photoshop and Premier Pro, can cost many hundreds of dollars a year in subscriptions.

The complaint said Adobe makes it unclear to customers how or when to cancel their subscriptions, noting that the company charges customers 50% of the remaining yearly subscription if they try to cancel after 14 days.

Adobe argued in its motion to dismiss that Singh's complaint lacked standing because there were a number of subscriptions that he never purchased. The complaint also fails to address Adobe's clear acknowledgment emails that "clearly and conspicuously reiterate Adobe's auto-renewal terms and how to cancel," the company said.

A hearing on Adobe's motion to dismiss the FTC's suit is set for Feb. 27.

Adobe and an attorney representing the plaintiffs didn't immediately return requests for comment.

Bursor & Fisher PA and Gucovschi Rozenshteyn PLLC represent the plaintiffs. Fenwick & West LLP represents Adobe.

The case is Singh v. Adobe Inc., N.D. Cal., No. 3:24-cv-03980, 2/13/25 .

Litigation

Feb. 14, 2025, 2:00AM PST

Solar Panel Bankruptcies Leave Frustrated Homeowners in Limbo

By [Angélica Serrano-Román](#)

Deep Dive

- **Clients left with unfinished work, stuck in equipment leases**
- **Solar bankruptcies have been rising in past two years**

Retiree Frank Deni wanted to cut expenses at his California home in 2023 by installing solar panels. He chose SunPower Corp., one of the largest US solar companies, which offered a 25-year “complete confidence” warranty.

He paid \$36,470. Six months after installation and inspections were completed, SunPower filed for Chapter 11 bankruptcy.

Deni, 76, contacted SunPower, the judge overseeing its bankruptcy, consumer protection agencies, and panel manufacturer Waaree for answers. Enphase Energy, Inc., the maker of microinverters used with the panels, said it will honor its warranty, but there’s no information about Waaree or SunPower’s SunVault battery.

“People are trying to help the environment and reduce energy costs, but once the deal is done, you’re forgotten,” Deni said. “If tomorrow the equipment doesn’t work, I don’t even know who to call.”

Thousands of homeowners are left without repair services or support for systems installed by solar companies that later went bankrupt. California alone has over 820,000 abandoned installations, according to Solar Insure data.

Many are stuck with leases for incomplete installations or systems that don’t function, according to interviews, letters to bankruptcy courts, and complaints filed with the Better Business Bureau.

Solar installers, heavily reliant on government subsidies and financing agreements, have struggled to stay afloat. In the past two years, rising interest rates, warranty obligations, and increased scrutiny have led to at least 10 solar bankruptcies.

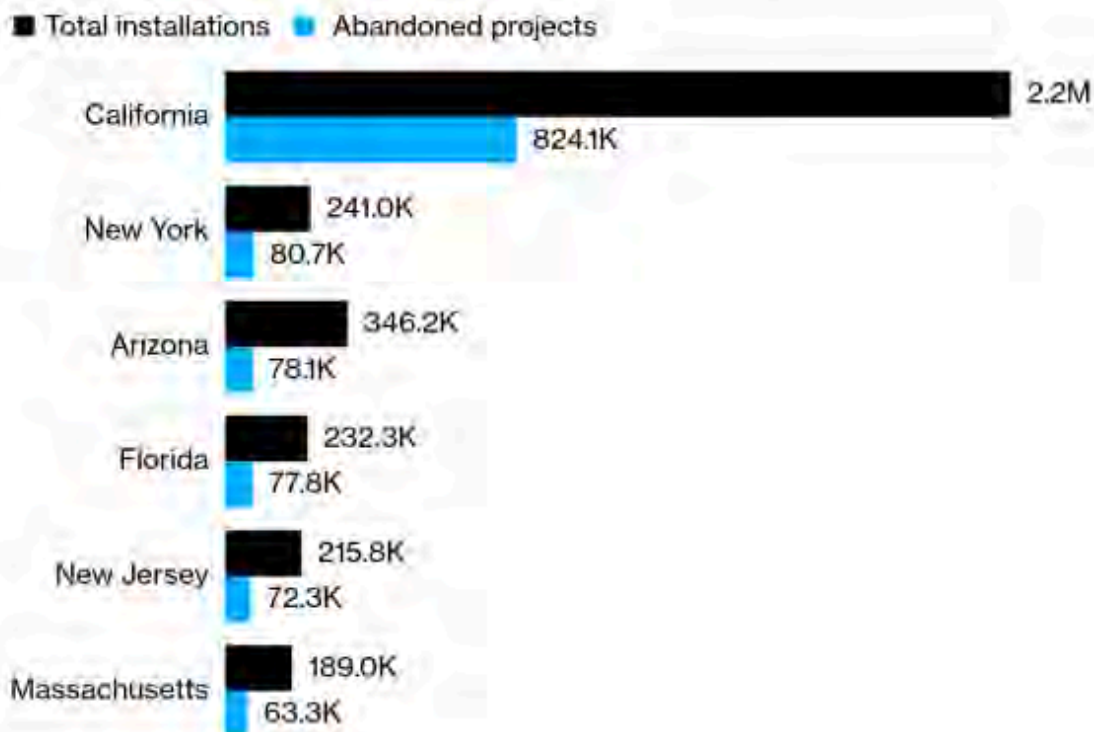
The industry may also face increasing costs due to President Donald Trump’s tariffs on steel and aluminum, and uncertainty over the continuation of credits for renewable projects.

Many solar firms buy panels and sell them to individuals who finance their purchases through loans, which are bundled and sold to joint ventures backed by investors. The funds are then circled back to the solar company, allowing them to perpetuate the cycle. If financing falters, the cycle is disrupted.

Meanwhile, customers of companies such as Vision Solar LLC and Titan Solar Power Inc., which liquidated under Chapter 7, have lost the warranty. Customers could file claims for compensation, but as unsecured creditors, they typically receive nothing.

Abandoned Solar Installations

Solar bankruptcies and closures have left thousands of projects abandoned, with systems improperly connected, unpermitted, or underperforming.



Source: Solar Insure
Note: Data as of Dec. 17, 2024

Bloomberg Law

SunPower clients are finding themselves in limbo as Complete Solaria Inc.—which purchased SunPower assets—works through the transition. Neither company responded to questions.

SunStrong Management, which also acquired assets, has around 100,000 leases. CEO Brendon Merkley said he “expects lease payments to continue,” although the company is “willing to provide deferrals and extensions.” He said they are working to provide repairs but recognized a “backlog.”

The company will manage SunPower’s monitoring system for all customers for a fee.

Waaree told Bloomberg Law it would honor the photovoltaic panel warranty and help customers with repairs or replacements.

Homeowners Hit

Clients say companies often either ignore their inquiries or advise continuing payments. Agencies say they can't intervene due to the bankruptcies.

Jack Bell, 26, a military officer based in California, said he's been paying unexpected electrical bills in addition to the \$189 monthly lease since his SunPower panels stopped working properly in June 2024.

"I've just been stuck in this loop of nobody being able to help me," Bell said.

Isabella Van Winkle, 63, said SunPower locked her husband's account after he died. Although she sent a death certificate and a document indicating she owned the property, the company sought documentation showing she was "authorized over the account."

Since Van Winkle, also from California, no longer receives statements on her 20-year lease, she photocopied her last statement 12 times and sends a \$195 monthly check to a PO Box for SunPower Financial. She receives no receipts, but she sees that the checks are cashed.

"I have to pay and be quiet," Van Winkle said.

A month after the bankruptcy filing, a customer representative told Van Winkle that SunPower was seeking a servicer to complete a "performance guarantee report," address "production shortfalls," and offer repairs, according to an email viewed by Bloomberg Law. She still hasn't received a resolution.

Bryant Dunivan Jr. at the Consumer Protection Attorney said consumers should contact the lender.

One of the lenders, Dividend Finance, said in a statement that when an installer ceases operations, it defers payments for completed installations and, "where feasible," helps find replacement installers. Dividend has financially supported "thousands of customers," it said.

Aggressive Growth

Vision Solar, in a push for growth, pressured consumers into loans they couldn't afford, Connecticut Attorney General William Tong said last year. Sometimes, they employed misleading sales tactics and promised tax rebates without verifying the customer's eligibility for such incentives.

"I think solar is one of the most unregulated industries we've seen," Dunivan said.

Sales representatives may make verbal promises of low prices, but their contracts often say those are mere estimates, he said.

Paul Krolkowski, 66, a Vision Solar customer, said the company initially mentioned a \$7,000 solar tax rebate but later required him to give it to the business.

He didn't give it to them, causing the monthly price that would've been \$77 to jump to \$111. He's now concerned about his warranty.

"At the end of the line, you just feel screwed," Krolikowski said.

Vision Solar clients made up 65% of the number of creditors in its bankruptcy, according to a Bloomberg Law analysis of the creditors register, with claims totaling around \$10.4 million.

Bankrupt solar companies often face claims from government entities.

In Vision Solar's case, the attorneys general of Arizona, Florida, and Connecticut accused Vision Solar of misrepresentations, delays, and unpermitted work.

"Sales were important because as soon as Vision Solar signed up a customer, it sold that contract to a financing entity and received cash," said Jeffrey Kurtzman, an attorney at Kurtzman Steady LLC, who represented the Chapter 7 trustee. However, "sales activity wasn't matched by its ability to execute."

Vision Solar didn't respond to questions.

Meanwhile, Deni has continued his quest for assurance that SunPower and suppliers would honor their warranties.

Most customers, he wrote in a January letter to the bankruptcy court, are in "no-man's land."

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Kraft Heinz Flags Anti-ESG Sentiment as Risk for Shareholders

By Clara Hudson

- Food company points to growing movement opposing ESG
- Language on diversity shifts to 'celebrating differences'

The Kraft Heinz Co. told shareholders in a filing Thursday that the movement opposing corporate environmental, social, and governance efforts could pose a risk to its business.

The warning comes as conservative attacks on ESG initiatives from greenhouse gas emissions reporting to diversity programs have mounted. Pushback is gathering speed under President Donald Trump, who directed federal agencies to target private-sector companies for potential investigations or litigation to root out what his administration describes as illegal diversity programs.

The food and beverage company said in its 10-K annual report that the anti-ESG sentiment could prompt "negative publicity, lawsuits, and other adverse impacts to our business from these stakeholders in response to our sustainability initiatives."

But there's scrutiny on both sides: The filing also said pressure over whether or not the company has effectively responded to climate change and other sustainability issues could pose a risk—a sentiment that also appeared in its report last year.

Kraft Heinz didn't immediately respond to a request for comment.

Separately, Kraft Heinz also pointed in its report Thursday to preparations for meeting pending state and international disclosure obligations. The company specifically noted the European Union's Corporate Sustainability Reporting Directive, which will require multinationals to report on a range of sustainability issues by 2029, and California's laws requiring large companies operating in the state to disclose their emissions beginning in 2026.

Kraft Heinz also flagged threats of new tariffs imposed by the US government as a possible risk to its performance. It's one of many companies to do so since Trump took office.

Reframing Diversity

The company's new report omitted a handful of references to its diversity efforts. Kraft Heinz used the term "diverse" or "diversity" about a dozen times in the workforce section of its annual report last year, but that went down to four this year.

Companies have been retooling their diversity language in the wake of conservative scrutiny and Trump's recent order, followed up by new Attorney General Pam Bondi.

"We demand diversity by focusing on three strategic areas: hiring and growing talent from diverse backgrounds and perspectives, developing inclusive leaders, and tracking and reporting our progress," Kraft Heinz's report said last year.

This year, the company said "celebrating differences" is important to its business and workforce.

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Powerful Shareholder-Advisory Firm Abandons Push to Diversify Corporate Boards

 [law.com/corpocounsel/2025/02/14/powerful-shareholder-advisory-firm-abandons-push-to-diversify-corporate-boards](https://www.law.com/corpocounsel/2025/02/14/powerful-shareholder-advisory-firm-abandons-push-to-diversify-corporate-boards)

Chris O'Malley

A powerful shareholder-advisory firm that for years has pressured companies to increase the representation of women and minorities on their boards is abandoning that effort.

Institutional Shareholder Services "will no longer consider the gender or 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 U.S. companies," ISS announced this week.

The Rockville, Maryland-based company cited the "increased attention" on DEI, including President Donald Trump's executive orders last month striking down DEI requirements for government contractors and subcontractors.

The orders also encouraged companies that aren't contractors to follow suit, and they called on federal agencies to investigate companies embracing DEI in search of practices and hiring-or-promotion preferences that might be illegal.

"The scope of enforcement could expand beyond federal contractors to purely private-sector companies, potentially reshaping DEI and employment practices across all industries," Cooley warned in a recent client advisory.

ISS said it will continue to evaluate directors under its remaining criteria, including independence, accountability and responsiveness.

Founded in 1985, ISS is the world's most influential proxy-advisory service. Each year, it analyzes proxy statements from more than 45,000 public companies and recommends how shareholders should cast their ballots on all matters put to a vote. It's funded by subscription revenue from its more than 2,000 investment-industry clients.

The company's announcement notes that investors and companies "will have a range of perspectives on DEI, including whether and how companies can or should adapt their specific policies and practices to the evolving market and government activity."

ISS' retreat from weighing in on board diversity came weeks after two of the nation's most influential investors, BlackRock and Vanguard, pulled back from the issue.

BlackRock's annual report in past years had stated that corporate boards should be at least 30% diverse, criteria it left out of its latest annual report. Similarly, Vanguard proxy voting guidelines removed a statement that a board should "represent diversity of personal characteristics, inclusive of at least diversity in gender, race, and ethnicity."

In a client note Thursday, Bryan Cave Leighton and Paisner advised clients to consider the expectations of all stakeholders before taking a stand on DEI.

"Boards and management will need to determine an appropriate balance, taking into account their particular circumstances, including the composition of their shareholder bases, and adjust their disclosures to reflect any changes in their priorities and policies," the note said.

A long list of major companies have scaled back or eliminated their DEI initiatives in recent months, including Boeing, John Deere, McDonald's, Meta, Target and Tractor Supply.

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[Securities Law News](#)

Feb. 13, 2025, 9:44 AM PST; Updated: Feb. 13, 2025, 1:57 PM PST

Goldstein Released After Casting Doubt on Crypto Transfers (2)

By Holly Barker

- Judge amends release conditions to limit computer access
- Court says it had concerns about use of cryptocurrency

Tom Goldstein is going to be released from custody following his Monday arrest for alleged bond violations.

Magistrate Judge Timothy J. Sullivan said the detention order had been based solely on the government's proffer.

Goldstein presented evidence to the court that casts doubt on the government's claim that he engaged in prohibited transfers using cryptocurrency accounts.

Goldstein denied owning the accounts, and Sullivan said his claim was "plausible" and "supported by evidence," casting sufficient doubt on the government's allegations that he violated bond.

"To be perfectly clear, I'm not convinced that Mr. Goldstein's version of events is completely accurate," Sullivan said. "There are ambiguities that haven't been clarified and some important details are missing."

Sullivan amended Goldstein's conditions of release to reduce his concerns about Goldstein's access to cryptocurrency.

Among other things, Goldstein's computer access will be restricted and monitored. He will also have to provide monthly financial records to pretrial services.

Sullivan said he was confident that Goldstein—after spending a little time in detention—wouldn't be back in front of him for any bond violations.

The government had also claimed to have probable cause that Goldstein violated 18 U.S.C. §1001 by failing to disclose certain cryptocurrency accounts. But Sullivan was incredulous, saying he'd never seen someone indicted for a false statement to pretrial services. It happens all the time, he said.

Assistant United States Attorney Patrick Kibbe said they'd cited some cases involving that very scenario.

But Sullivan said that if the prosecutors were serious, he would have expected them to file a criminal complaint. After Kibbe said they hadn't filed any related charge "at this time," Sullivan said that told him what he needed to know about the merits of the allegation.

"As anticipated, the government failed to meet its burden of proof, and we appreciate the fact that the Court has now released" Goldstein, a spokesperson for him told Bloomberg Law.

Goldstein is represented by Munger, Tolles & Olson LLP.

The case is United State v. Goldstein , D. Md., No. 8:25-cr-00006, 2/13/25 .

(Updates story with comment from a spokesperson for Goldstein in the 12th paragraph.)

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Supreme Court veteran Goldstein wins release again in tax crimes case

 [reuters.com/legal/government/supreme-court-veteran-goldstein-wins-release-again-tax-crimes-case-2025-02-13](https://www.reuters.com/legal/government/supreme-court-veteran-goldstein-wins-release-again-tax-crimes-case-2025-02-13)

David Thomas

By David Thomas

February 14, 2025 2:12 AM PST Updated 5 hours ago

Thomas Goldstein, a U.S. Supreme Court advocate and the co-founder of SCOTUSblog, delivers a lecture at the University of North Carolina School of Law on March 20, 2019. University of North Carolina/Handout via REUTERS Purchase Licensing Rights , opens new tab

Feb 13 (Reuters) - A federal judge on Thursday ordered Tom Goldstein's release from jail, three days after the prominent Washington lawyer and appellate law expert was arrested and detained for allegedly violating pretrial release terms in a tax prosecution tied to his high-stakes poker playing.

Chief U.S. Magistrate Judge Timothy Sullivan in Greenbelt, Maryland, said there was not enough evidence that Goldstein concealed recent cryptocurrency transactions from the court to keep him incarcerated, though the judge said he suspected that Goldstein engaged in such transfers.

The judge after a hearing imposed new release conditions , opens new tab on Goldstein, requiring his internet usage to be monitored and forbidding him from spending, receiving or transferring any cryptocurrency.

Sullivan said he found it likely that Goldstein may have access to unidentified funds that would allow him "to flee from prosecution in this case."

Goldstein, publisher of the website SCOTUSblog who has argued more than 40 U.S. Supreme Court cases, 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 January 27 and was granted pretrial release.

"As anticipated, the government failed to meet its burden of proof, and we appreciate the fact that the Court has now released Mr. Goldstein," a spokesperson for Goldstein said on Thursday. A spokesperson for the Maryland U.S. attorney's office declined to comment.

Prosecutors earlier this week alleged that Goldstein had transferred millions of dollars in cryptocurrency through concealed accounts in the days following his initial release, leading

to Goldstein's second arrest and detention on Monday.

Goldstein argued in court papers this week that the crypto transfers were made in 2023 and that he did not own the accounts in question.

Evidence supplied by Goldstein cast "sufficient doubt" on the government's allegations to warrant his release, Sullivan said in a six-page order [↗](#), opens new tab on Thursday, but he said Goldstein had not disproved the government's allegations.

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Reporting by David Thomas

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'Work There Will Dry Up': White-Collar Defense Practices Poised to See Slow Downs

 [law.com/nationallawjournal/2025/02/13/work-there-will-dry-up-white-collar-defense-practices-poised-to-see-slow-downs](https://www.law.com/nationallawjournal/2025/02/13/work-there-will-dry-up-white-collar-defense-practices-poised-to-see-slow-downs)

Abigail Adcox

What You Need to Know

- White-collar defense groups might take a hit as the DOJ shifts its priorities toward violent and drug crimes.
- Trump's recent executive order pauses enforcement under the Foreign Corrupt Practices Act.
- One firm practice leader emphasized that enforcement uncertainty has kept them engaged with clients.

White-collar defense and litigation partners throughout Big Law are bracing for potential disruptions to business, as the Trump administration signals changes in enforcement priorities, including through executive orders and memos from Attorney General Pam Bondi.

White-collar practices seem poised to see a slowdown from federal enforcement activity, particularly in light of President Donald Trump's executive order pausing enforcement under the Foreign Corrupt Practices Act (FCPA). Am Law 100 firms have spent the past two decades building up FCPA expertise to advise clients on foreign bribery issues.

Meanwhile, a stop-work order has shuttered operations at the Consumer Financial Protection Bureau, an agency that brought several lawsuits against big banks and corporations during the Biden term.

Now resources are shifting to focus on violent and drug crimes.

"We do know they're going to decrease attempts to prosecute under the Foreign Corrupt Practices Act, so the work there will dry up. Where it will go to—it's impossible to predict," said John Hasnas, a law professor at Georgetown University Law Center.

Trump's executive order, which was signed earlier this week, places a temporary halt on investigations or enforcement actions related to the Foreign Corrupt Practices Act for 180 days. It also calls for a review of ongoing investigations. However, the executive order is only directed at the Justice Department, not the U.S. Securities and Exchange Commission.

A number of law firms, including Kramer Levin Naftalis & Frankel, Sidley Austin, Hogan Lovells, and Akin Gump Strauss Hauer & Feld, among others, have already put out client alerts detailing the legal implications of the FCPA executive order.

"We're in an environment where there's so much uncertainty from an enforcement perspective," said Chuck Connolly, co-head of Akin's white-collar defense and global investigations practice group. "And conversely, even if that leads to a slowdown in cases, that often leads to an increase in our strategic counseling and engagement with our clients."

Law firms are advising clients to continue complying with the law as the statute of limitations for certain violations under the FCPA extends past four years—when another administration may reverse.

"There's going to be a lot of engagement with our clients on counseling as to what this means. We're going to still continue to do that to help counsel them with respect to ongoing transactions, ongoing potential issues, and how best to ameliorate those," said Connolly. "And I do think that not all white-collar enforcement is going to go away, it's just going to pop up in different places."

Aside from a pause on FCPA enforcement, Bondi's memos mark a department-wide shift away from white-collar enforcement to enforcement of violent and drug crimes. Bondi has directed the DOJ Fraud Section's FCPA Unit and Money Laundering and Asset Recovery Section to prioritize investigations and prosecutions into cartel and transnational criminal operations.

"The melody behind all this [is to] enforce only traditional criminal law, theft of money, embezzlement, misappropriation, probably insider trading to a limited degree, but I think Foreign Corrupt Practices [Act] will be seen as a symbol of what [Trump] does not want to see pursued," said John Coffee, professor at Columbia Law School.

It's unclear how much the shift in DOJ priorities will affect firms' top lines. White-collar defense and government investigations practices pull in at least tens of millions in client fees for the top firms.

In the short term, it could have an impact on firms' hiring decisions. Many government attorneys are already on the job market, including those looking to join firms' white-collar benches.

And the policy changes could have firms rethinking how much they want to invest in certain practices at the moment.

"The white-collar world will be quite a bit different based on the new DOJ," said Dan Binstock, a D.C.-based recruiter at Garrison. "There are some people who may have gotten offers over the past few years but are facing more headwinds now because of the crowded market."

However, firm leaders in D.C. have emphasized in recent months that hiring decisions aren't dependent on any four-term presidency.

Firms have already done quite a bit of hiring in their white-collar practices in the past month.

Earlier this week, Akin announced Abby Kohlman has joined the firm as senior counsel in the firm's white-collar defense and government investigations and congressional investigations practices in D.C. Kohlman most recently served as a federal prosecutor in the DOJ's Fraud Section.

White & Case hired Brent Wible as a partner in D.C. in its white-collar defense and investigations practice. Wible previously served as principal deputy assistant attorney general for the DOJ's Criminal Division. Meanwhile, Crowell hired Alexander Kramer, a former assistant chief in the DOJ's Criminal Division's Foreign Corrupt Practices Act Unit. Kramer joins the firm as a partner in D.C. within the firm's white-collar and regulatory enforcement group.

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Matt Levine's Money Stuff: Gold Is Worth More in New York

By Matt Levine

Opinion

Gold vaults

I think a lot about what I sometimes call “abstract commodity space.” Sometimes you want to buy nickel or aluminum or coffee or cocoa to make batteries or beer cans or cappuccino or chocolate bars, so you go to some supplier and negotiate a contract for the delivery of a useful amount of a particular grade of the commodity to your factory. Sometimes, though, you want to bet on the price of nickel or aluminum or coffee or cocoa, to hedge some risk to your business or just as a speculative bet. So you buy commodity *futures*, financial assets that reflect the price of a commodity but don’t require you to store it or worry about it spoiling.

The way these futures often work is that there are big warehouses full of the commodity, and people write futures contracts that essentially transfer the entitlements to the commodities in the warehouse, without ever having to take them out. Your futures represent a claim on some nickel or coffee in a warehouse in abstract commodity space, and you don’t have to think much about the physical properties of the actual thing. The warehouse system has put a layer of abstraction on the messy commodity business, and you can treat the commodity as just a number on your computer screen.

We mostly talk about this when it breaks down, though. Sometimes the physical world tears through the layer of abstraction. The coffee or cocoa beans are stale, or someone discovers that the nickel in the warehouse is actually a bag of rocks.

Or: Abstract commodity space is fairly global, and you can trade abstract commodities from a computer screen anywhere in the world. But the physical world is not so seamlessly globalized. Now, gold in a warehouse in New York is worth more than gold in a warehouse in London. Here’s a Wall Street Journal article on “Why Dealers Are Flying Gold Bars by Plane From London to New York”:

Gold is, for the moment, worth substantially more in Manhattan than in the U.K. capital, sparking the biggest trans-Atlantic movement of physical bars in years. Traders at major banks are racing to yank gold from vaults deep below London's medieval streets and from Swiss gold refineries and ferry them across the ocean. ...

Banks run big offsetting positions, owning gold bars in London, lending them out to earn a return and hedging the risk that prices fall by selling futures in New York. JPMorgan and HSBC, which clear gold transactions and store bullion for other banks in London, are the biggest players in this trans-Atlantic market.

The trade appears almost risk-free as long as prices on both sides of the Atlantic are close to each other. But when prices on the Comex surged above those in London late last year, baking in possible tariffs, contracts that the banks had sold in New York were suddenly underwater. ...

Banks could close the trade by buying futures in New York, but such a move would mean crystallizing those losses. Another alternative: flying the physical gold they owned in London to New York and delivering it to the futures contracts' owners instead, said Robert Gottlieb, a retired gold-trading executive whose LinkedIn posts on the disarray have become required reading in the market.

Once they covered their open positions, the banks had a chance to win big. How? Lock in higher prices in New York through futures and ship even more gold. JPMorgan alone said it planned to deliver \$4 billion of gold this month, according to Comex filings.

Gold no longer exists purely in abstract commodity space; there is New York gold and London gold, and New York gold is worth more. You can't move between them on your computer, but you can on an airplane. Though you also need to melt the gold:

Comex contracts require a different size of bar, so traders need to send gold to Swiss refiners to recast it before flying on to the U.S. Sometimes, they cut out the first European leg by handing the refiner gold in London in exchange for the right size of bar, or flying bullion in from Australia instead.

Even in abstract commodity space, the size of the bar matters.

Shareholder proposals

The traditional model is that chief executive officers of public companies care less about social, environmental and charitable concerns than, for instance, nuns. Nuns tend to think things like "give generously to the poor," while CEOs tend to think things like "maximize profits for shareholders." There is a ton of overlap: Nuns don't want companies to commit murder, because it is a sin, and CEOs don't want their companies to commit murder, because the regulatory and public-relations problems from murder would be bad for long-term risk-adjusted profitability. And more broadly being nice and treating employees and customers well is probably good for the long-term bottom line, so many CEOs will be interested in doing that. But, at the margin, would you expect the CEOs to be more ruthless than the nuns? I think so.

And the way that US corporate and securities law works is that small shareholders with a social perspective — often nuns, often climate groups, often just interested individuals — can buy some shares of public companies and then submit shareholder proposals asking the companies to do stuff. There are important limitations: The proposals are not *binding* (they can't force the companies to do anything), and they can't involve "a matter relating to the company's ordinary business operations," so a proposal like "pay your workers more" or "pollute less" probably wouldn't work. But these activists can submit proposals like "we would like the company to write a report describing what it is doing about climate change," and then the company will probably have to put the proposal in its proxy statement for shareholders to vote on. If it gets a majority of the votes, the company doesn't *have* to write the report — certainly it doesn't have to *do anything* about climate change — but it will feel some pressure to do so. Even if it gets a substantial minority of the votes, the company will be a little embarrassed. Companies tend not to like these proposals.

In the traditional model, these proposals tend to be, broadly speaking, "left-wing." The people submitting these proposals tend to be to the political left of the CEOs rolling their eyes at them. The nuns "demanding that large corporations give their workers health insurance or adopt climate-friendly policies" sound more progressive than the companies saying no.

But in 2025 that is not quite a given. Now there is a lot of social activism from the *right*, with conservative shareholder activists complaining that CEOs are too "woke" and demanding that they cut back on environmental and diversity initiatives.

Now, the US Securities and Exchange Commission has a lot of power over these proposals. The way it works is that the activists submit proposals to the company for inclusion in the proxy statement, and the company rolls its eyes and says "oh come on," and it writes to the SEC to say "we don't really have to include this, do we," and the SEC thinks about it and either (1) lets the company ignore the proposal or (2) makes it include the proposal in its proxy statement. The SEC has some rules — Rule 14a-8 — about what sorts of proposals can and can't be excluded, and then its staff interprets the rules to give the companies answers. (The answers are public; you can find them here.)

And broadly speaking you would expect a left-wing SEC to say "you gotta include everything" and a right-wing SEC to say "you can exclude everything," because traditionally these proposals have a left-wing slant. Traditionally corporate managers are the conservative-coded group, and social activists are the liberal-coded group. But have things changed? Are corporate managers now woke liberals, while the shareholder activists are conservatives? And if so, will the new right-wing SEC be more friendly to shareholder proposals?

No? Maybe? The Wall Street Journal reports:

The commission has put out new guidance that will make it harder for activists to demand shareholder votes on proposals that touch on charged social issues. The move, a reversal of Biden-era policy, comes as activist groups on the left and right turn to the corporate sphere to fight culture-war battles on topics such as climate, guns and abortion.

In the past year, for example, shareholders wanted bank JPMorgan Chase to audit the impacts of its climate policy, and questioned whether food-and-beverage maker PepsiCo had discriminated against white employees. Oil-and-gas company Exxon sued after shareholders used what it called a “Trojan horse” strategy to deliberately hurt its business with an allegedly bad faith proposal to slash carbon emissions.

The SEC operates as a gatekeeper of which proposals can go forward. Under the guidance released Wednesday, corporations will now be able to block more proposals on some socially and ethically charged issues from being included in proxy statements, effectively stopping them from being put to a general shareholder vote.

“Proposals that raise issues of social or ethical significance may be excludable, notwithstanding their importance in the abstract,” the SEC said.

Here is the guidance. I suppose what will actually matter is how the staff interprets it, and you could imagine the anti-woke proposals getting through while the climate change ones don’t, but the message here seems to be “leave CEOs alone to run their businesses.”

OpenAI

I’m actually a little disappointed that the core of OpenAI’s schtick didn’t work. It feels like it should have. The core of OpenAI’s schtick was that it raised billions of dollars from equity investors at eleven-digit valuations while telling them things like “we are a nonprofit organization” and “our product could bring about the end of human civilization” and “returns for our first round of investors are capped at 100x their investment” and “it would be wise to view any investment in OpenAI Global, LLC in the spirit of a donation” and “it may be difficult to know what role money will play in a post-[artificial general intelligence] world.” It conveys a certain confidence, to go around asking people for money while simultaneously saying “our duty is to humanity, not you” and “our product is too important for us to prioritize the interests of our investors” and “our product might make money, or for that matter humans, obsolete.” It’s a good pitch! “Business negging,” I once called it. The simplest investment heuristic is probably “if someone is desperate for my money, I shouldn’t give it to them,” and nobody has ever *seemed* less desperate for investor money than OpenAI.

The only problem is that OpenAI *is* desperate for investor money: It turns out that it costs a ton of money to build large-scale artificial intelligence models, so OpenAI has to keep raising huge piles of money. And at some point the investors want, not weird capped-profit interests in a complex waterfall of cash flows from a for-profit subsidiary of a nonprofit organization, but just normal equity stakes in a normal company that has normal obligations to them to maximize their profits. I kind of don’t know why? My mental model of *SoftBank*, in particular, is that if you go to Masayoshi Son and say “I am going to wipe out humanity and render money obsolete, give me \$40 billion and maybe you’ll get something out of it, no promises,” he will be like “finally I have found my soulmate” and give you all of his money. But, no, apparently even at SoftBank, they don’t like to view their investments in the spirit of a donation.

And so last year OpenAI decided to convert to a more normal for-profit company, saying:

The hundreds of billions of dollars that major companies are now investing into AI development show what it will really take for OpenAI to continue pursuing the mission. We once again need to raise more capital than we'd imagined. Investors want to back us but, at this scale of capital, need conventional equity and less structural bespokeness.

If I had Sam Altman as my salesperson I would try doubling down on structural bespokeness, but I guess I am wrong.

Anyway we discussed the odd fallout of this the other day. You can't really take the assets of a nonprofit and give them to a for-profit company, so OpenAI will essentially have to *sell* its assets to itself: The nonprofit will have to give up its control over (and residual profit interest in) the for-profit subsidiary to satisfy investors, but to satisfy charity law, it will have to get paid the fair value of what it is giving up. The natural way to do that would be for the nonprofit to get back *shares* — conventional equity — in the newly independent for-profit company.

How many shares? Well, intuitively, the nonprofit currently *controls* the business, so you might think it should get back a controlling stake in the for-profit business. (Like, 51% or more.) On the other hand, the majority of the business's profits for the foreseeable future have been promised to outside investors (in the form of a structurally bespoke profit waterfall), and OpenAI is looking to raise many billions more dollars before it becomes profitable, which suggests that the nonprofit should get a minority stake. (The number 25% has been thrown around.)

In any case, there is some plan for a separation, and some negotiation over how much the nonprofit will get. But this plan arguably *puts OpenAI in play*: If the nonprofit is looking to sell its stake in the for-profit business (to the for-profit business, for stock), then arguably it should entertain higher offers, for instance from Elon Musk. Who lobbed in a \$97.4 billion cash bid this week.

"In play" is a term from public-company mergers and acquisitions. There is a notion in M&A that a company is never obligated to sell itself — it can always reject an acquisition offer and decide to stay independent — but, if it *does* decide to sell itself, it has an obligation to shareholders to take the highest bid. I don't think that's quite true for a nonprofit like OpenAI, but you can see Musk's point: If the nonprofit is planning to sell its valuable asset, it shouldn't take *less* than fair value, and fair value is set by the market.

But if OpenAI is *not* in play, never mind:

Elon Musk said he would withdraw his \$97.4 billion bid for the nonprofit that controls OpenAI if the board stopped its conversion to a for-profit company.

"If [the] OpenAI board is prepared to preserve the charity's mission and stipulate to take the 'for sale' sign off its assets by halting its conversion, Musk will withdraw the bid," lawyers for Musk said in a court filing Wednesday.

Sure! In general you can't just lob in a hostile bid to buy a nonprofit's assets ; if OpenAI just stayed as a nonprofit, Musk would not have much leverage to buy it. (Though he could — and did — sue it for not being nonprofit *enough*.)

You can see the fairly obvious point here. Musk runs an artificial intelligence company, xAI. It started later and is smaller than OpenAI, but Musk has big ambitions. He has raised a lot of money for it. OpenAI is bigger and wants to raise more money, and investors want to give it that money, but only for "conventional equity and less structural bespokeness." xAI can offer conventional equity; OpenAI can't, yet, until it converts. If OpenAI fends off Musk by staying a nonprofit, that will cripple its ability to raise money and scale, and will put xAI in a better competitive position.

I mean, that's clearly how OpenAI sees the problem. I kind of want them to be wrong. Give it a try, you know? Tell Musk "sure, we'll stay a nonprofit," and then go back to SoftBank to be like "we still want your \$40 billion at a \$300 billion valuation but, small hitch, to fend off Elon Musk, you will have to view it in the spirit of a donation."

QRT

New Jane Street dropped:

Led by former Credit Suisse colleagues Pierre-Yves Morlat, or Pym to his friends, and Laurent Laizet, London-based [Qube Research & Technologies] has grown quietly into a \$23 billion trading powerhouse, all from modest origins as an \$800 million spinoff from the Swiss bank just seven years ago. The aim is for \$30 billion of assets.

A firm whose name can still be met with blank looks when you mention it to finance veterans, it's now arguably a part of this industry's aristocracy. ...

It has no staff in New York where most of the hedge fund big guns reside. It shuns star culture and the trigger-happy hiring and firing of employees, sharing out rewards instead. Only one in 10 of its 1,400 workforce is a traditional portfolio manager. Most would fit in just as easily at Google or Meta, and teamwork is prized in the hunt to solve complex market problems. ...

[It is] a firm where secrecy reigns. Morlat, 58, and Laizet, 53, avoid the media and have resisted hiring even a PR agency. When QRT marketers talk to potential clients, they show a printed presentation that's diligently taken away afterward.

I wrote last year that "I read a dozen articles a week about Jane Street Group, and they all mention how secretive and press-shy it is," and I am looking forward to QRT's turn in the media-shy limelight. There are other similarities. Like Jane Street, QRT is pretty techy:

As with many hedge funds of note, it leans heavily on "quants," the math prodigies who try to divine market moves. What's different is the number of techie whiz kids on the payroll. It's spending hundreds of millions of dollars on technology and data, 10 times more than when it spun out from Credit Suisse. Last year it recruited 232 IT staff, 157 researchers and just 48 traders.

And pretty levered:

Multistrats are notorious for leaning on vast amounts of borrowed money to juice their bets. QRT takes it to a whole new level. As a firm, Millennium's total amount of regulatory assets, which includes leverage, was 7.5 times its investor cash at the end of 2023; Citadel's was roughly 7.2 times. At Morlat and Laizet's outfit, it's been at least twice that.

And has some market-making DNA:

It runs a "market-making" unit where it matches buyers and sellers in shares, using algorithms to shave off hundreds of millions of dollars of profit from microscopic price differences. It also trades physical commodities just like billionaire Ken Griffin's Citadel, and it invests in early-stage tech companies like a venture-capital firm.

More generally, I think sometimes that there has been a convergence between a class of firms that are usually called "multistrategy hedge funds" and the ones that are called "proprietary trading firms." In the olden days you could distinguish between two sorts of firms:

1. A hedge fund run by a charismatic genius boss, with nice offices in Greenwich or Mayfair, which made relatively long-term fundamental bets on asset prices using money from outside investors (as well as the boss's own money).
- 2. A proprietary trading partnership run by a group of pit traders, with a spot on the trading floor of an exchange, which collected the spread on relatively short-term market-making-type trades using the partners' own money.

But those models have moved toward each other. The exchange floors closed, and the market makers got their own nice offices, got bigger, and became more willing to take on longer-term, less liquid and more complicated risks. The hedge funds also got bigger, hired more managers, and became more obsessive about controlling risk, leading them to trade more quickly and earn more profits from trades that look a lot like liquidity provision. And so it is natural for trading teams to move between the Jane Streets of the world and the Millennials of the world, because those firms do broadly similar things and serve broadly similar functions.

Well, they serve broadly similar functions in financial markets. (Doing big levered arbitrage-ish or liquidity-provision-ish trades.) There is one important function that multistrategy hedge fund firms serve that prop firms don't: Hedge fund firms *run hedge funds*, and you can invest in them. (Well, probably not you, but endowments, pensions, etc. can invest.) The prop firms run their own money, and mostly don't have an offering for outside investors. But this sort of exposure — tech-enabled, quantitative, risk-controlled bets on stocks and bonds — is attractive enough that multistrategy hedge funds can charge huge fees to outside investors.

Actually it's attractive enough that many of them have *stopped* taking outside investor money, which is another service QRT provides:

Its fat returns and distinct approach let it charge eye-popping fees of 25% to 30% plus add ons, well above the norm for other “multistrategy” hedge funds, the leviathans who stake teams running lots of different trades. ...

Its rise has come as investors have withdrawn funds from smaller firms and piled into multistrats. Unable to keep up with demand, the biggest have been mostly closed to new money, forcing backers to go elsewhere. QRT has been a major beneficiary. [Two of its funds,] Torus and Qube have also had to stop taking client cash.

There's a lot of demand for multistrategy funds, so it's a good trade to supply one.

A picture of a house?

Uh:

For all of artificial intelligence's advantages, it still has a long way to go, according to Bank of America Corp. Chief Executive Officer Brian Moynihan.

“I was trying to get a mortgage-amortization schedule. I pounded in it three times, got stuff you couldn't read. Finally I just got a picture of a house,” Moynihan said Wednesday at the BofA Securities Financial Services Conference. “That's not right or wrong. It's just still learning how to do this stuff. And I'm learning how to do the stuff with it.”

Okay? I mean ... what? How did he ... what prompt did he type in? For fun I asked ChatGPT to give me an amortization schedule for a 30-year fixed-rate mortgage with an initial amount of \$800,000, and it gave me a table that (1) ties to what I got in Excel but (2) was expressed with 12 digits after the decimal point. If your human financial analyst gave you that answer, you would *make fun of her*, absolutely, but not like you would if she drew you a picture of a house. “The monthly payment is \$4,925.737603411156” is a correct-ish but contextually inappropriate response; “it's just still learning how to do this stuff.” A picture of a house is a real Dada non sequitur, I love it, but I don't quite believe it.

Things happen

Wall Street nears sale of \$3bn of debt tied to Elon Musk's Twitter buyout. Trump Advisers Eye Bank Regulator Consolidation After Targeting CFPB. UK Mulls Merging Financial Regulators to Ease Barriers to Growth. Trump Deregulation to Speed Bank Consolidation, Bob Diamond Says. Long-term investors split with asset managers over climate risk. America's Most Exclusive Suburbs Are Finally Building More Housing. SharkNinja CEO Says There's No Supply Chain for US-Made Blenders. “He was doing stuff like, ‘OK Steve, would you be totally opposed to trying this out?’ and ‘Steve, I'm hearing from you it sounds like you're worried.’” NYSE Plans Texas Exchange as Financial Firms Flock to State. Donald Trump Jr invests in ‘steroid Olympics.’

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- 1. This is oversimplified: The futures are just futures, and if you take *delivery* on the futures what you get is, in the first instance, a “warrant” for some of the commodity in the warehouse.
- 2. As Musk’s lawyer put it: “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.”
- 3. This is not quite accurate on either count: Companies can feel significant obligation to take a high bid if they think that remaining independent would offer less value (as Twitter Inc. did), and the “Revlon duty” to maximize price is complicated in the case of stock deals. But this is roughly how people think about things.
- 4. Several readers have pointed out that many hospitals are nonprofits, and sometimes they convert or sell to for-profits, and it *is* possible to lob in a bid for nonprofit hospital assets.

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Litigation

Feb. 13, 2025, 2:15 PM PST

Boeing, DOJ Seek More Time for Plea Deal Tied to 737 Max Crashes

By Madlin Mekelburg

Boeing Co. and US prosecutors said they need more time to revise a plea deal for the planemaker in the criminal case tied to two fatal 737 Max crashes, after an earlier plan was blocked by a judge because it included a provision related to diversity, equity and inclusion.

The Justice Department said prosecutors continue to negotiate with Boeing officials on a new agreement, according to a court filing Thursday in Texas federal court. The government sought a similar extension in January, citing leadership changes within the Justice Department under the new Trump administration.

"The parties have not reached agreement but continue to work in good faith toward that end," lawyers for the government told the judge. They promised another update on the talks no later than March 14.

In December, US District Judge Reed O'Connor rejected the first attempt at a plea agreement because he said it minimized his role in the process and invoked government DEI policies that would improperly require race to be factored into the selection of an independent monitor to oversee the company's compliance.

The original deal was crafted by the Biden administration's Justice Department, which claimed it was standard practice to include language related to DEI policies. Since taking office Jan. 20, President Donald Trump has been eradicating diversity programs within the federal government.

Under the rejected agreement, Boeing had agreed to plead guilty to criminal conspiracy, pay a fine and install a corporate monitor. It also required the planemaker to spend at least \$455 million to bolster its safety and compliance programs.

Some family members of the 346 people killed in the crashes said they met with Justice Department officials after the judge's ruling in December. The relatives urged the government to seek a more aggressive deal to hold Boeing to account for the deaths, or to consider taking the case to trial.

The case is US v. Boeing, 21-cr-005 , US District Court, Northern District of Texas (Fort Worth).

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Trump's World Liberty Is Almost Finished With Token Sale

By Olga Kharif

- The project has sold more than 24 billion tokens so far
- Chinese crypto entrepreneur Justin Sun is a project investor

World Liberty Financial, the yet-to-launch crypto platform promoted by US President Donald Trump and his sons, appears to have sold more than 96% of its tokens after an initial slow start about four months ago.

World Liberty has sold more than 24 billion of its WLFI governance token, which owners will be able to use to propose changes to the platform or vote on others' proposals, a chart on its website shows. It has fewer than 1 billion of the token yet to sell.

The project's tokens went on sale in mid-October, with plans to raise \$300 million at a \$1.5 billion valuation through the initial token sale.

Each WLFI token costs 5 cents, per World Liberty's site, which makes the total sale come to \$1.25 billion. World Liberty representatives didn't return requests for comment.

Chinese crypto entrepreneur Justin Sun, who is listed on LinkedIn as currently based in Geneva, invested \$30 million in World Liberty Financial and became an adviser in November. The project, which is planning to create a "strategic reserve" with various tokens it's purchasing, bought tokens associated with Sun as well.

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Crypto scams likely set new record in 2024 helped by AI, Chainalysis says

 [reuters.com/technology/crypto-scams-likely-set-new-record-2024-helped-by-ai-chainalysis-says-2025-02-14](https://www.reuters.com/technology/crypto-scams-likely-set-new-record-2024-helped-by-ai-chainalysis-says-2025-02-14)

Lisa Mattackal

Representations of cryptocurrencies are seen in this illustration, August 10, 2022.

REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

Feb 14 (Reuters) - The rise of "pig butchering" scams and the increasing use of generative artificial intelligence likely lifted revenues from crypto scams to a record high in 2024, according to blockchain analytics firm Chainalysis.

Revenue from pig butchering scams, where perpetrators cultivate relationships with individuals and convince them to participate in fraudulent schemes, increased nearly 40% in 2024 from the previous year, the firm estimated in a report published on Thursday.

Revenue in 2024 from crypto scams was at least \$9.9 billion, although the figure could rise to a record high of \$12.4 billion once more data becomes available, it said.

"Crypto fraud and scams have continued to increase in sophistication," Chainalysis researchers said.

The company pointed to marketplaces that support pig butchering operations and the use of GenAI as factors making it easier and cheaper for scammers to expand operations.

Indeed, GenAI technology could potentially "exponentially scale crypto scams", Chainalysis said.

The company, which tracks publicly available transaction data on the blockchain to identify scam revenue, said crypto fraud activity grew 24% each year on average since 2020.

Cryptocurrencies, most notably bitcoin, have soared in price and popularity over the past few years as investors chased banner returns and interest in blockchain technology soared.

The sector has jumped significantly since U.S. President Donald Trump's victory in the November election on hopes of an easier regulatory environment.

Other particularly lucrative scams included crypto drainers, where scammers pose as blockchain projects and take control of victims' crypto wallets, and high-yield investment scams that promised outsized returns, according to Chainalysis.

In January 2024, a crypto drainer posed as the U.S. Securities and Exchange Commission after the regulator's X account was compromised.

Cryptocurrency ATMs have also been key hotspots for scams, according to Chainalysis, with perpetrators often impersonating government officials or customer support agents to convince victims to deposit cash into the machines.

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Reporting by Lisa Mattackal in Bengaluru; Editing by Pooja Desai

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

Reposted by Alison Frankel



Julie Zebrak @juliezebrak.bsky.social · 32m

Making sure folks realize that Alex Spiro is both Musk's attorney and Eric Adams' attorney.

8

160

356

...

Reposted by Alison Frankel



Phil Lewis @phillewis.bsky.social · 59m

The White House says it will bar the Associated Press from the Oval Office and Air Force One indefinitely due to the news outlet's use of Gulf of Mexico

144

604

985

...

Reposted by Alison Frankel



Brad Heath @bradheath.bsky.social · 52m

Reply to Brad Heath

Acting deputy attorney general Emil Bove assembled DOJ's remaining public corruption prosecutors this morning and gave them an hour to find someone to sign the Eric Adams dismissal.

One of them agreed to do it, to spare the others from potentially being fired.

www.reuters.com/world/us/fed...

WASHINGTON, Feb 14 (Reuters) - A federal prosecutor agreed on Friday to file a motion to dismiss the criminal corruption charges against New York City Mayor Eric Adams, in a bid to spare other career staff from potentially being fired by the acting deputy attorney general, sources briefed on the matter told Reuters.

The decision came amid pressure from Acting Deputy Attorney General Emil Bove, who imposed a one-hour deadline on all public integrity attorneys on Friday to decide among themselves who would file the motion.

151

448

476

...



Alison Frankel @alisonfrankel.bsky.social · 1h

"I expect you will find someone who is enough of a fool, or enough of a coward, to file your motion. But it was never going to be me."



southpaw @nycsouthpaw.bsky.social · 3h

AUSA Hagan Scotten, former clerk for John Roberts, really put some mustard on his resignation letter.

BY EMAIL

Re: United States v. Eric Adams, 24 Cr. 556 (DEH)

Mr. Bove,

I have received correspondence indicating that I refused your order to move to dismiss the indictment against Eric Adams without prejudice, subject to certain conditions, including the express possibility of reinstatement of the indictment. That is not exactly correct. The U.S. Attorney, Danielle R. Sassoon, never asked me to file such a motion, and I therefore never had an opportunity to refuse. But I am entirely in agreement with her decision not to do so, for the reasons stated in her February 12, 2025 letter to the Attorney General.

In short, the first justification for the motion—that Damian Williams's role in the case somehow tainted a valid indictment supported by ample evidence, and pursued under four different U.S. attorneys—is so weak as to be transparently pretextual. The second justification is worse. No system of ordered liberty can allow the Government to use the carrot of dismissing charges, or the stick of threatening to bring them again, to induce an elected official to support its policy objectives.

There is a tradition in public service of resigning in a last-ditch effort to head off a serious mistake. Some will view the mistake you are committing here in the light of their generally negative views of the new Administration. I do not share those views. I can even understand how a Chief Executive whose background is in business and politics might see the contemplated dismissal-with-leverage as a good, if distasteful, deal. But any assistant U.S. attorney would know that our laws and traditions do not allow using the prosecutorial power to influence other citizens, much less elected officials, in this way. If no lawyer within earshot of the President is willing to give him that advice, then I expect you will eventually find someone who is enough of a fool, or enough of a coward, to file your motion. But it was never going to be me.

Please consider this my resignation. It has been an honor to serve as a prosecutor in the Southern District of New York.

Yours truly,

Hagan Scotten
Assistant United States Attorney
Southern District of New York

Ben & Jerry's says parent Unilever mandating silence on Trump

 [reuters.com/business/retail-consumer/ben-jerrys-says-parent-unilever-mandating-silence-trump-2025-02-14](https://www.reuters.com/business/retail-consumer/ben-jerrys-says-parent-unilever-mandating-silence-trump-2025-02-14)

Jonathan Stempel

Signs of Ben & Jerry's, a Unilever brand, are seen in London, Britain, October 5, 2020. REUTERS/Hannah McKay/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, Feb 14 (Reuters) - Ben & Jerry's accused its parent Unilever (ULVR.L) , opens new tab of demanding its silence toward U.S. President Donald Trump, as it prepares to spin off the ice cream brand later this year.

In a Thursday night filing in Manhattan federal court, Ben & Jerry's said Unilever ice cream chief Peter ter Kulve earlier in the day unilaterally banned it from "issuing any posts criticizing President Trump" pending further review.

Ben & Jerry's said ter Kulve cited Unilever's restructuring in defending his actions, saying it created a "new dynamic" in an "unprecedented time."

Ter Kulve previously banned a planned post on hot-button issues when Trump was inaugurated on January 20 because the post mentioned Trump, Ben & Jerry's has said. Unilever did not immediately respond on Friday to requests for comment. Ben & Jerry's did not immediately respond to a similar request.

Ben & Jerry's accusations came in its lawsuit seeking to stop Unilever's alleged efforts to dismantle its independent board and end its social activism.

Many companies have altered social policies, including on diversity, or appeared to show deference toward Trump since he began his second White House term.

Ben & Jerry's has had a socially conscious mission since being founded by Ben Cohen and Jerry Greenfield in 1978.

Unilever bought Ben & Jerry's in 2000. They have battled publicly since 2021, when Ben & Jerry's halted sales in the Israeli-occupied West Bank. Its business there was later sold.

The planned spinoff comes as Unilever simplifies its product portfolio, which has dozens of brands including Dove, Hellmann's, Knorr, Surf and Vaseline.

Unilever on Thursday chose Amsterdam over London and New York for the primary listing when it spins off Ben & Jerry's, Breyers, Magnum and other ice cream brands as a standalone company. Ice cream revenue totaled 8.3 billion euros (\$8.72 billion) in 2024.

The case is Ben & Jerry's Homemade Inc v Unilever et al, U.S. District Court, Southern District of New York, No. 24-08641.

(\$1 = 0.9519 euros)

Reporting by Jonathan Stempel in New York; Editing by Bill Berkrot

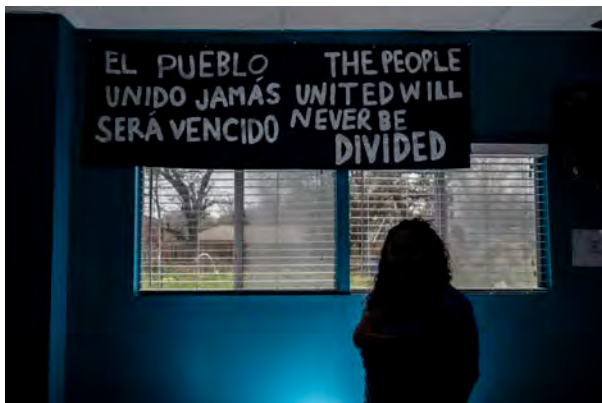
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Elon Musk's Tesla, SpaceX Relied on Undocumented Immigrant Workers

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By Julia Love

(Bloomberg Businessweek) --



Cristy, who worked as a cleaner on Tesla's site in Austin, at the Workers Defense Project office.

Photographer: Sergio Flores for Bloomberg Businessweek

Cristy was in her early 50s when she took a job with a cleaning subcontractor on a construction project, reporting for 12-hour shifts vacuuming, mopping floors and scrubbing toilets. Despite her exposure to dust and other debris, most days she wasn't provided with gloves, face masks or other personal protective gear, and she had only limited access to water. The shifts included two 15-minute breaks and a half-hour lunch, with managers keeping strict watch on the time. Workers who were tempted to complain had to mind the threat of deportation.

Omny Studio: The Undocumented Workers Who Helped B...

Conditions such as these are commonplace for the nation's vast undocumented workforce, which underpins pillars of the American economy—construction, agriculture, manufacturing, meatpacking. What made Cristy's stint as a cleaner remarkable was the figure atop the operation where she worked: the richest man in the world, Elon Musk, who over the past year has stoked and harnessed anti-immigrant sentiment to vault himself to political power alongside President Donald Trump.

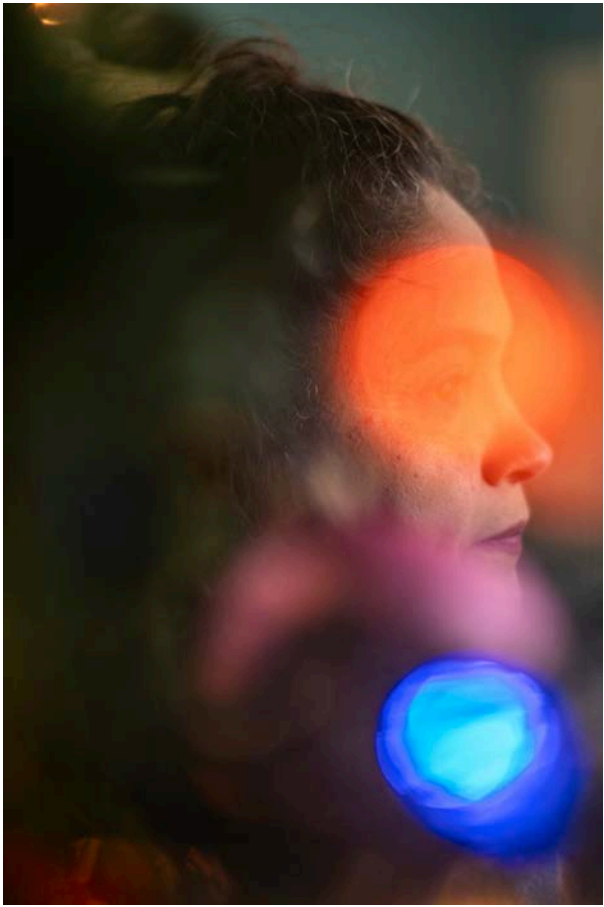
Cristy was one of many undocumented workers who powered the rapid expansion of Musk's business empire on the outskirts of Austin, according to interviews with labor advocates, contract construction managers, and unauthorized laborers themselves. *Bloomberg Businessweek* spoke with 10 undocumented immigrant workers who said they'd been

employed by outside companies to work at Tesla and SpaceX facilities in the Austin area. (Cristy asked that *Businessweek* withhold her last name, while other unauthorized workers quoted in this story have been identified only by a pseudonym to shield them from reprisal. Several other sources were granted anonymity to protect professional relationships.) To verify workers' ties to Tesla, *Businessweek* reviewed photos and videos some had taken on the job; a few people spoke alongside friends and family members who confirmed details of their stories. Nine of the sources worked on Tesla's massive site in Austin. Another helped build a SpaceX outpost. Sweeping debris, laying plumbing and pouring concrete, these workers built facilities that helped make Musk's roughly \$400 billion fortune, sometimes at great personal sacrifice.

Bloomberg reporters will be discussing this investigation and answering reader questions in a Live Q&A today at 11:45am EST. Join us here.

Tesla has undergone unprecedented growth in Austin over the past four-and-a-half years, the centerpiece of which is a 10-million-square-foot "gigafactory," by some measures the world's second-largest building. Undocumented workers have been a regular presence at the site since shortly after ground broke in 2020, a time when Musk was a largely apolitical figure. They were there in 2023, the year Musk traveled to Eagle Pass, Texas, and surveyed the US-Mexico border in a black cowboy hat. They continued reporting to work in 2024 as he threw his weight, including nearly \$300 million in donations, behind Trump's election campaign. Some unauthorized workers interviewed by *Businessweek* said they'd started on the project within the past few months, while Musk was laying plans for the Department of Government Efficiency, which he now leads from Washington, DC.

Cristy, who's now 55, started working for a Tesla subcontractor in late 2021, shortly after coming to the US from her native Honduras. She made \$16 an hour, logging as many as 30,000 steps a day as she crisscrossed the site to fulfill her duties in heat that could reach 98F. Her managers discouraged the crew from using the water stations, she says, to keep bathroom breaks to a minimum. She snuck sips when she could, but one day while vacuuming a poorly ventilated staircase, she suffered heatstroke and fainted. Afterward, she had a dispute with her supervisor about the incident and was fired.



Cristy at the Workers Defense office.

Photographer: Sergio Flores for Bloomberg Businessweek

“You come to this country yearning to work to be able to help your family. So sometimes, you keep your head down and you put up with situations that you shouldn’t put up with,” Cristy says. But over time, “you start realizing that you have rights.” She ultimately decided to file complaints with the Occupational Safety and Health Administration (OSHA), accusing her employer of unsafe working conditions and retaliation. She’s being represented by the Workers Defense Project, a Texas nonprofit that advocates for immigrant laborers.

Undocumented workers are the lifeblood of construction, especially in border states such as Texas, where almost a quarter of the state’s construction workers lack authorization to work, according to the American Immigration Council. One unauthorized worker says he accessed the Tesla site by presenting fake identification, which is readily available online and at flea markets, while another presented a family member’s documentation. Others say they simply showed passports from their home countries.

Sean Forkner, who represented members of the United Brotherhood of Carpenters & Joiners of America on the Tesla project in its early days, thought the proportion of undocumented workers there was typical of the industry—no better, no worse. He went to the site at least

once a month, and members of his team visited at least weekly. “There wasn’t anything unique going on out there, it was just the sheer scale of it,” Forkner says. “It was just a magnifying glass of the practices of the industry.”

In his many social media posts on immigration last year, Musk criticized local and federal officials for not doing enough to vet the migrants they take in. He himself worked without authorization in the US while he was launching his first companies after immigrating from South Africa, according to ex-colleagues and documents cited in a *Washington Post* report. (Musk denied on X that he’d worked in the US illegally.) In recent months, Musk has argued for the importance of issuing visas to highly skilled foreign workers, whom he relies on to fill his engineering ranks.

His undocumented workers say their labor helped his companies a lot, too. The Austin gigafactory is now busy churning out Cybertrucks, and construction never really stopped; Tesla recently embarked on an expansion. Neighboring Bastrop is fast becoming a Musk company town, with the Boring Company testing its tunneling technology and facilities for X and SpaceX in the works or undergoing expansion. Tesla and SpaceX didn’t respond to interview requests or detailed questions for this story. Musk didn’t respond to requests for comment sent to him and his lawyer prior to publication.

As Musk ratcheted up his anti-immigrant rhetoric last year, Samuel, an undocumented laborer who helped to build SpaceX’s factory in Bastrop, found himself returning again and again to the same question: “Why are we here if he doesn’t want us?”

He pauses, then answers his own question. “He accepts it because he’s charged less for the work.”

In 2020, after years of escalating tension with officials in California, Musk began expanding his operations in Texas. His footprint there includes SpaceX facilities outside Austin and just north of the Mexican border, a lithium plant on the Gulf Coast and the sprawling gigafactory outside the state capital. Spanning 2,500 acres on the banks of the Colorado River, the plant dwarfs the Pentagon. Under normal construction timetables, the plant might have taken seven years to complete, according to one former Tesla employee, but the company began limited production of vehicles in 2021, just one year after breaking ground.

To sustain this pace, Tesla took workers from wherever it could find them, using contractors that coordinated with local affiliates of plumbing, carpentry and electrical unions, among others. This was despite past tussles Musk had with the National Labor Relations Board over allegedly illegally firing a union activist and using Twitter to threaten employees. (An initial ruling in favor of the NLRB was ultimately overturned by the US Court of Appeals for the 5th Circuit.) The need was so great that the company’s contractors also tapped labor brokers who bused in workers from the Rio Grande Valley, a cluster of counties nestled along the

border where undocumented workers and US citizens alike are paid lower wages, according to Forkner and Joseph Hernandez, a lead organizer for the International Brotherhood of Electrical Workers. It soon became clear that unauthorized workers were playing a pivotal role on the project.



The Tesla gigafactory in Austin in 2022.
Photographer: Jordan Vonderhaar/Bloomberg

Working conditions varied greatly among the dozens of contractors and subcontractors on the Tesla site. Some, like the primary contractor for framing and drywall, MK Marlow Co., ran their employees' credentials through E-Verify, a federal system employers can use to check eligibility. But that requirement didn't extend to subcontractors, according to Forkner and two contract construction managers who worked on the site in recent years. Forkner recalls being approached by crews of 20 to 30 people at a time who worked for other Tesla subcontractors but wanted to join the union, whose members received overtime pay and had strong safety protections built into their contracts. He had to turn many of them away, because they didn't have documentation showing they were authorized to work in the US. Some presented papers that were obviously fake; others had nothing at all. Forkner estimates he and his team interacted with hundreds of workers who were in this position.

Hernandez remembers being approached at his union office by workers who presented pay stubs showing they'd been working for a subcontractor affiliated with the Tesla site. He estimates there were 20 in all. They expressed an interest in joining the union but demurred upon learning that the union contractor would run their records through E-Verify.

The construction industry has grappled with a tight labor market for years, with an estimated shortfall of more than half a million workers in 2024, according to Associated Builders and Contractors, a trade group. That leaves companies increasingly reliant on immigrant workers.

On projects the scale of Tesla's Austin expansion, three or four layers of contractors distance the owner of the property from the workers on the ground. This arrangement can expand the pool of potential workers, bring expertise in particular trades and insulate the owner from risk

in case of negligence. But it can also help shield owners from accountability, giving them plausible deniability about issues on-site, according to several industry experts.

“Construction is about contracting out the risk,” says Cristina Tzintzún Ramirez, who founded Workers Defense Project and is now the executive director of the youth voting organization NextGen America.

Business owners who want to ensure that a project is built with authorized labor can insist that contractors and subcontractors run all workers through E-Verify. On some projects with strict security requirements, such as military facilities, builders do just this, or even insist that only US citizens do the work. (E-Verify isn't foolproof; it won't necessarily catch a worker using someone else's Social Security number.) But a strict E-Verify policy wouldn't be practical on a job the size of the Tesla factory, Forkner and others say.

Tesla instructed its construction contractors to check for authorization and perform drug testing, according to a former employee on the site. But the automaker didn't monitor to guarantee contractors complied with its wishes, which the ex-employee says reflects a construction-industry culture in which owners avoid meddling in the affairs of firms working on-site. Maintaining an adequate labor supply was hard enough; if just a few workers were injured or out sick, teams risked running behind schedule. “That was always a challenge,” the former employee says. “Many times we were short-staffed.”

To receive a site ID badge, workers visited a booth where security guards would inspect their identity documents. One of them was known for rejecting fake papers—a former contract manager on the site says the guard “maybe took it a little too seriously,” whereas it was relatively easy to pass muster with others.

Another contract manager who worked at the Tesla site in recent years says undocumented members would simply present passports from their home countries. “Honestly, if you had a Mexican passport, you were allowed to get this badge,” the manager says. “That was the only requirement.”

At the SpaceX site in Bastrop, midway through last year, Samuel spotted a sign that gave him pause: Workers would soon be required to present IDs issued by the state of Texas to enter. The news troubled him; the only people on his crew who could meet that bar were three who'd been born in the US. As of late last year, SpaceX had yet to follow through with the requirement.

In its dealings with contractors, Tesla stressed that speed was paramount. Construction crews worked 24 hours a day, split into two 12-hour shifts. Some best practices fell to the wayside, according to eight current and former construction workers or union representatives on the job, including the past Tesla employee. Three of the former workers say dangerous areas of the site were left unbarricaded, amplifying the risk of injury. One who's a US citizen

recalls that once, following heavy rains, a laborer stumbled into a pit and found himself up to his neck in murky water. To prevent others from falling, the former worker ended up shepherding others across the site with a piece of metallic tubing to test for unsteady ground.

Matthew Gonzales, a business manager for Laborers' Local 1095, says his members have described the site to him as a "chaotic mess," with materials in disarray, forcing workers to "climb over, across or around the clutter" to perform their duties. Andrew Fortin, a former electrician on the project, calls it "a giant factory of near-misses."

In 2021, after receiving a series of troubling tips, Workers Defense mounted a campaign known internally as Red Apple to illuminate working conditions on the Tesla construction project. The organization spoke with about 40 people who'd worked at the site, finding that construction workers grappled with a lack of personal protective gear, extreme heat and a high injury rate. The group also received reports that contractors were circulating fake OSHA cards, which certify that workers have received necessary compliance training. Roughly half of the workers surveyed said they'd experienced wage theft, either not being paid for some work or not getting what they were promised, according to Sean Goldhammer, director of employment legal services at Workers Defense.

As the campaign intensified, the organization discovered that Antelmo Ramirez, a 57-year-old US citizen employed by contractor Belcan Services Group LP, had died of hyperthermia, or abnormally high body temperature, at Tesla; the *Texas Observer* later reported that Tesla hadn't informed local authorities of the fatality, in violation of the terms of the tax incentive agreement it signed with Travis County when it agreed to build in Austin. Workers Defense filed a complaint with OSHA on behalf of one worker over the alleged safety-training-card fraud, in addition to the complaints against Cristy's employer on her behalf. The group also referred cases to the US Department of Labor over contractors' alleged failure to pay workers the wages they were owed. (Workers Defense says it can't comment on the ultimate outcome of the referrals.) Worries about safety persisted at the site afterward; a contract electrician, also employed by Belcan, died at the plant this past August. A spokesperson for Cognizant Technology Solutions Corp., which recently acquired Belcan, says the incidents predated its purchase of the firm. Belcan denied allegations made by the electrician's family in a suit following his death, according to court papers.

After leaving her job with the Tesla subcontractor, Cristy sometimes awoke at night with a start, having dreamed that she was back at the factory. The bout of heatstroke left her still struggling to breathe in hot weather. Her managers at the cleaning company, who she says made fun of her and her colleagues for their inability to speak English, didn't seem to appreciate the work's toll. "They didn't see the emotional, mental and physical damage," Cristy says. "I didn't matter to them, because they fire one person and hire five more."



Cristy at the Workers Defense office.

Photographer: Sergio Flores for Bloomberg Businessweek

Back in 2020, when news broke of Musk's plans to make Austin the home of Tesla's next auto plant, Workers Defense and other labor groups feared that cases like Cristy's might be the result. Musk's team made it known he was in talks with other cities as well, prompting the county to seal the deal with the tax incentive agreement. Concerns raised by advocates and politicians spurred the deal's safety protections, including the requirement that a Tesla affiliate submit reports detailing on-site injuries and deaths. The agreement also required the Tesla affiliate to apply to OSHA's Voluntary Protection Program and to ensure that employees and contract workers received OSHA training. But there were no provisions for independent monitoring, leaving compliance largely up to the company.

Third-party scrutiny would likely have improved some of the more troubling labor conditions at the site, according to Goldhammer. "These issues of wage theft, unsafe working conditions and general lack of oversight is something that's prevalent in the construction industry, and there was no reason to think that would not occur in this development project," he says.

People who worked on the site say safety conditions did improve after Ramirez's death hit the news. And the Tesla ex-employee says cutting corners on safety went from being treated as a "forgivable mistake" to a "fireable offense" across his tenure with the company. But he adds that even when safety became a top priority, it was in tension with the imperative to move fast. He sometimes sensed his contractors were pushing their workers harder than they normally would to make a good impression. "Everybody was in a way appreciative or in awe of being there, just being at Tesla," he says. "People would set these expectations for themselves to try to impress the company, and they would jeopardize the situation."



Musk walks to the Eisenhower Executive Office Building near the White House on Feb. 13.

Photographer: Stefani Reynolds/Bloomberg

Construction at the Tesla factory was sometimes interrupted by visits from Musk himself. Crews would be told to step away from their work areas. The disruptions were brief, and one contract manager says he thinks they were primarily due to security and noise considerations while Musk was touring guests. But Fortin, the electrician who spent time on the site, got the impression Musk didn't want to see the crews: "He never wanted to hear power tools, he never wanted to see anyone in construction PPE."

Over hundreds of posts on X last year, Musk advanced a series of nativist narratives about the border, claiming with little to no evidence that Democrats were weaponizing immigration to import voters, that migrants pose a danger to public safety and that newcomers receive special treatment. In one February missive that was reposted about 86,000 times, he complained about the financial and government services "illegals" could supposedly access. "What's the point of being a citizen if an illegal gets all the benefits, but doesn't pay taxes or do jury duty?" he asked. (Many undocumented immigrants do, in fact, pay some forms of tax without receiving some benefits reserved for citizens, according to the Bipartisan Policy Center.)

It's hard, if not impossible, to find examples in Musk's posts of him talking about the importance of immigrant labor in manufacturing and construction, or about the forces that compel many migrants to abandon their homes in the first place. The current and former Tesla construction workers interviewed by *Businessweek* were predominantly parents who'd come to the US to support their children. Their sole aim was to keep their heads down and work. Two of them described how they'd paid into Social Security despite having little hope of collecting.

Following a shift one afternoon in November, a half-dozen workers on local construction projects gathered around the bed of a pickup truck in a gas station parking lot in the Austin area, cracking open Coronas and passing a bag of chicharrones. Meetings like this let the men savor a rare taste of community in a place they said felt unsafe to them lately. As the sun hovered low in the sky, they spoke of the harrowing experience of crossing the US-

Mexico border and the pain of not being able to go back. “No one is here for pleasure—it’s pure necessity,” one man said, as his companions nodded in agreement. One said it felt like they “don’t exist.”

The group included one former worker on a Musk site: Joaquin, who’d spent much of 2023 working at the automaker’s facility, making \$30 an hour as a contract welder. He’d jumped at the chance to work on the Tesla site, because it was among the best-paying construction jobs in the area. He had few complaints about his working conditions, though he did say he made less than his peers. He suspected it was “simply because of the papers.”

Joaquin’s friends regarded him as the hardest-working among them. He’d been saving to help pay for his daughter’s quinceañera, though he almost certainly wouldn’t be able to attend. He hadn’t seen his only child since he left Mexico nearly a decade ago. “It’s the price one has to pay for being in this country,” he said.

Other undocumented workers who spent time on the Tesla site said that, in addition to the superior pay, it had opened doors for them. One, Ricardo, says he’d been unable to get a specialized plumbing license that would have let him land well-paying commercial gigs, because he’d been deported once before. That didn’t stop him from securing a job at the site, though, and while making \$20 an hour there, he’d gained skills he deployed on later projects. He says he received two to three texts a month last year, beckoning him to return.

Ricardo is a single father with two teenage daughters, both US citizens, to support. He says he’s concerned Trump’s attempts to end birthright citizenship will strip them of that protection, but he’s skeptical that mass deportations will take place. Those in power—including Musk—are simply too reliant on immigrant labor. “These people who come to invest, how are they going to make their money?” he asks. “They need someone who doubles it, redoubles it. That’s what each of us migrants do.”

Juan, who’s from Colombia, spent nearly a year working for a subcontractor on the Tesla project. As an asylum seeker, he was entitled to a work permit. But applicants must wait months for their documents to arrive, so he started work at Tesla with fake papers. After going to great lengths to begin life in the US the right way, waiting months in Mexico to request asylum and meticulously documenting the threats he faced back home, he says it pained him to break the rules. He felt he had no choice.

“I didn’t want to do it illegally,” he says. “But if I don’t work, I starve.” —*With Polly Mosendz and Kara Carlson*

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Merck Investor Sues Over Gardasil China Market Projections

By **Sydney Price**

Law360 (February 13, 2025, 5:57 PM EST) -- Pharmaceutical giant Merck & Co. Inc. has been hit with a proposed shareholder class action alleging it overstated global demand for its human papillomavirus vaccine Gardasil, damaging investors when it revealed earlier this month it would not meet its revenue projections for the vaccine and paused shipments to China.

According to the suit filed by shareholder Michael Cronin on Wednesday, Gardasil protects against certain types of HPV that cause cancer. As of 2022, Gardasil had only reached about 9% of the population eligible to receive the treatment, and Merck continually praised Gardasil's global demand and growth potential, particularly with women in China, the complaint states. However, Merck concealed risks associated with competition and macroeconomic fluctuations, which resulted in Merck's Chinese distributor holding onto high levels of Gardasil inventory, the suit alleges.

In addition to Merck, the suit's individual defendants include Merck CEO Robert M. Davis, Chief Financial Officer Caroline Litchfield and President of Merck Research Laboratories Dean Y. Li.

The suit's class period begins Feb. 3, 2022, the day Merck announced its full-year 2021 financial results. On that day, the company forecasted \$11 billion in Gardasil sales by 2030, which was nearly double the sales it had at the time.

Throughout the class period, Merck detailed its plans to increase the supply of Gardasil by building more facilities, and it told investors that growth in China remained strong, the suit states. For example, on April 27, 2023, Merck told investors that its contracts with Chinese distributors for vaccine purchases represented only minimum supply agreements, and that it was likely that sales would be higher than the numbers agreed to in the contracts, according to the complaint.

The truth began to emerge, the suit alleges, on July 30, 2024, when Merck announced a significant reduction in Gardasil vaccinations, resulting in inventory levels at Merck's Chinese distributor rising above normal levels. As a result, Merck announced that its shipments of Gardasil to China may fall below contracted levels for 2024, the suit states.

On this news, shares of Merck fell \$12.53, or about 10%, to close at \$115.25 per share on July 30, according to the complaint.

Several months later, on Feb. 4, 2025, Merck announced it would no longer achieve the long-forecasted \$11 billion in sales of Gardasil by 2030, as it would cease shipments of Gardasil to China "through at least midyear" to facilitate a "rapid reduction of inventory." Merck said its channel inventories were inflated and demand in China for Gardasil had not recovered to the level it had expected, according to the suit.

On this news, shares of Merck fell \$9.05, or about 9%, to close at \$90.74 per share on Feb. 4, 2025, according to the complaint.

The suit accuses Merck and the individual defendants of acting with scienter, or actual knowledge of wrongdoing or reckless disregard, and violating the Exchange Act.

Representatives for Merck did not immediately respond to a request for comment.

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

Counsel information for Merck and the individual defendants was not immediately available on Thursday.

The case is Cronin v. Merck & Co. et al., case number 2:25-cv-01208, in the U.S. District Court for the District of New Jersey.

--Editing by Emily Kokoll.

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Tesla, Objector Appeal \$730M Chancery Board Pay Deal

By **Katryna Perera**

Law360 (February 13, 2025, 9:05 PM EST) -- Tesla Inc. and a stockholder objector have appealed a Delaware Court of Chancery approval of the return of more than \$730 million in director stock, option and grant awards to the company that would resolve a suit accusing the electric-car maker's board of raking in "outrageous" compensation packages that cost the company hundreds of millions of dollars.

Tesla, the nominal defendant in the suit, and Michael Levin, a Tesla shareholder from Illinois who objected to the proposed settlement over a year ago, **officially appealed** on Thursday to the Delaware Supreme Court.

Thursday's filings were simply notices of appeal and did not include the legal rationale behind the appeals.

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

Levin first **objected to the deal** in 2023, saying it was unfair in part because it didn't specify how much each director would pay.

The appeals come after Chancellor Kathaleen St. J. McCormick approved last month a \$176.16 million Tesla stockholder class **attorney fee award** to the three firms — McCarter & English LLP, Fields Kupka & Shukurov LLP and Bleichmar Fonti & Auld LLP — that led the suit. She also awarded a \$50,000 incentive fee to the lead plaintiff, a public pension fund in Detroit.

The settlement would apply to current and former board members, including Elon Musk's brother Kimbal Musk, media mogul James Murdoch, Tesla board chair Robyn Denholm, Ira Ehrenpreis, Lawrence J. Ellison, Antonio J. Gracias, Stephen T. Jurvetson, Linda Johnson Rice, Kathleen Wilson-Thompson and Hiromichi Mizuno.

The deal would resolve the suit, filed in 2020, that accused the company of giving directors compensation packages worth an average of \$8.7 million in 2018 alone — more than 29 times higher than the average for S&P 500 index company boards.

Tesla's board in July 2023 agreed to return more than \$730 million to the company through a combination of stocks, options and cash to settle the litigation. The total value of the settlement, when combined with the elimination of compensation for 2021-2023 and governance reforms, is approximately \$919 million.

The lawsuit is separate from another Chancery Court suit that challenged the fairness of Elon Musk's \$56 billion, 10-year pay package, in which **appeals have also been filed**.

Last month, Elon Musk and other top Tesla executives officially appealed several rulings to the Delaware Supreme Court: Chancellor McCormick's September 2019 decision denying their motion to dismiss; her January 2024 posttrial opinion voiding Musk's pay package; a December ruling ordering the company to pay in cash or post sufficient bond for a \$345 million stockholder attorney fee, and "all other rulings and interlocutory orders made appealable through the judgment."

Following a weeklong November 2022 trial, Chancellor McCormick **struck down** the pay package, which she noted would be the largest compensation plan in the history of public markets. She ruled

that disclosure failures, murky terms, a conflicted board and Musk's own hand on the tiller warranted an order to roll back the award.

The same day as the ruling, Musk posted on the social media platform X, "Never incorporate your company in the state of Delaware," and he officially moved the company to Texas before putting another similar pay package **to an investor vote** last summer — which **most investors approved**.

Following the chancellor's ruling, counsel for the investors **made an unusual move** and **asked** the court to award them more than 11% of the 266,947,208 Tesla shares freed up by the ruling as attorney fees. The value of the stock-based fee request was estimated to initially be \$5.6 billion.

However, in December, the chancellor approved a **\$345 million attorney fee award**, rejecting the plaintiff's bid for \$5.6 billion in freely tradable company shares while also **declining to reinstate** Musk's proposed pay despite the most recent investor vote. Later that month, the chancellor issued a **judgment** in the case, teeing up the dispute for an appeal.

The investors are represented by Andrew S. Dupre of Akerman LLP, and Derrick B. Farrell and Robert B. Lackey of Bleichmar Fonti & Auld LLP.

The board member defendants are represented by Sarah T. Andrade and Jason C. Jowers of Bayard PA, Kevin M. Gallagher and Kyle H. Lachmund of Richards Layton & Finger PA and by Nicholas Mastria of Abrams & Bayliss LLP.

Tesla Inc. is represented by John L. Reed and Ronald N. Brown III of DLA Piper, Jason C. Jowers, Brett M. McCartney and Sarah T. Andrade of Bayard PA, and Brian T. Frawley, Matthew A. Schwartz, Jeffrey B. Wall and Morgan L. Ratner of Sullivan & Cromwell LLP.

Michael Levin is represented pro se.

The case is Police and Fire Retirement System of the City of Detroit v. Elon Musk et al., case number 2020-0477, in the Court of Chancery of the State of Delaware.

--Editing by Michael Watanabe.



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Origin Investors Fixed 'Fatally Vague' Fraud Claim, Judge Says

By **Katryna Perera**

Law360 (February 13, 2025, 6:13 PM EST) -- A California federal judge has ruled that investors' fraud claims against sustainable materials-maker Origin Materials and its co-CEO can move forward, saying the plaintiffs have provided additional details from a confidential witness the judge previously found to be "fatally vague."

U.S. District Judge William B. Shubb issued an **order** on Wednesday saying the investors' second amended complaint, filed in November, has partially cured the defects he identified in October when he tossed the suit, finding that statements of a former Origin employee identified as "Confidential Witness 1" were **not specific enough** for the claims to survive.

The suit alleges that Origin Materials and its co-CEOs failed to disclose a change in direction in the company's manufacturing plans and a delay in building a new plant.

According to Wednesday's order, the operative complaint "rehashes" several of the allegations from the prior complaint but "goes further and also provides new details" concerning a key March 2023 meeting attended by the defendants and CW1.

Investors claim that during this meeting, CW1 "learned" that Origin Materials was changing directions and delaying the construction of a new plant months before it was disclosed to investors. In October, Judge Shubb said the details of what CW1 learned during the meeting were too vague to state a claim.

On Wednesday, however, Judge Shubb said the operative complaint elaborates that Origin Materials co-CEO John Bissell stated during the meeting that the company would be moving in a new direction and would no longer make paraxylene, a chemical used to produce a type of plastic called polyethylene terephthalate, at its Origin 2 commercial plant as initially planned. Bissell also allegedly presented a detailed plan of action on moving forward with the changes to production and the plant's construction.

Judge Shubb said Wednesday that the operative complaint shows that CW1 has "sufficient indicia of personal knowledge and reliability."

"CW1 was an engineer working on Origin 2's development process, and it is 'probab[le] that a person in the position occupied by [CW1] would possess the information alleged,'" the order states. "The statements explain how, when, and from whom CW1 obtained the information and provide detail concerning the information he learned regarding Origin 2's development. Further, CW1's allegations are plausible given that the changed plans he describes were later confirmed by the company."

The judge also stated that the additional information provided by CW1 establishes scienter, or knowledge of wrongdoing, on the part of Origin Materials and Bissell but not by the company's co-CEO, Richard Riley.

The details of Bissell at the March meeting support a strong inference that he knew of the changed plans, the judge said, and his position as co-CEO further supports this claim and allows scienter to be imputed onto Origin Materials through the core operations doctrine.

However, Judge Shubb noted that allegations about whether or when Riley knew of the changes to

the Origin 2 plant are "noticeably absent" from the operative complaint.

"Although Riley was co-CEO, the core operations doctrine does not suffice to establish a strong inference of scienter in the absence of allegations concerning Riley's access to information concerning the final changes," the order states. "For instance, it is possible that Riley was less involved in or knowledgeable about the technological aspects of the company than Bissell."

In addition to the March meeting, the operative complaint also identified several statements made in press releases, investor calls or other filings that were allegedly false and misleading.

Judge Shubb said, however, that none of the challenged statements made before the March 3rd meeting can proceed and he tossed many others as inactionable statements of opinion.

However, the judge kept alive three statements made in PowerPoint presentations and a filing with the U.S. Securities and Exchange Commission.

According to the order, in May 2023, Origin Materials filed a Form 10-Q with the SEC that included cautionary statements suggesting that construction on the company's plans may not be completed within the expected time frame or that its operations and cash flows could be impacted by delays or increased costs, among other things.

Judge Shubb said the complaint plausibly alleges that this cautionary language was misleading because the defendants knew such issues had already materialized.

"Defendants cannot rely on boilerplate language describing hypothetical risks to avoid liability for the failure to disclose that the company already had information' indicating that the risk spoken of had already occurred," the order states.

There were also two misleading statements included in PowerPoint presentations posted to the company's website in March and May 2023, according to the order, stating that the Origin 2 plant "expected" to use sustainable materials in its production of polyethylene terephthalate and other information about the plant's construction timeline.

Judge Shubb said these statements "affirmatively created an impression of a state of affairs that differed in a material way from the one that actually existed."

"That the representations concerning Origin 2 were couched in terms of subjective 'expectations' makes no difference," the order states. "Even if defendants 'sincerely believed' that Origin 2 would be completed as originally planned, that expectation did not 'fairly align with the information in [defendants'] possession at the time' — i.e., that Origin would not be proceeding as planned, but would instead produce [furandicarboxylic acid/polyethylene furanoate] and would not be completed in 2025."

The judge also found that the operative complaint adequately pleads loss causation.

According to the suit, Origin specializes in converting "the carbon found in biomass into carbon negative materials that can replace the petroleum-based substances typically used in various end products."

Investors allege that on Aug. 9, 2023, Origin announced after the market closed that it was significantly delaying construction on its Origin 2 commercial plant and changing the focus products to be made at the plant from paraxylene to furandicarboxylic acid. The company also said the construction would be more expensive than planned and "yield less capacity than previously announced," according to the suit.

The announcement caused the company's stock to decline \$2.88 per share, or 66.5%, to close at \$1.45 per share on Aug. 10, 2023, the suit alleges.

Counsel for the defendants declined to comment on Thursday, and counsel for the investors did not immediately respond to requests for comment.

The investors are represented by Marion C. Passmore of Bragar Egel & Squire PC, and Stanley D. Bernstein, Michael S. Bigin and Stephanie M. Beige of Bernstein Liebhard LLP.

The defendants are represented by Boris Feldman, Doru Gavril, Carl Hudson and Rebecca Lockert of Freshfields US LLP.

The case is Soto v. Origin Materials Inc. et al., case number 2:23-cv-01816, in the U.S. District Court for the Eastern District of California.

–Additional reporting by Craig Clough. Editing by Emily Kokoll.

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Chancery OKs Appraisal Suit Fix For Sears Damage Ruling

By **Jeff Montgomery**

Law360 (February 13, 2025, 8:01 PM EST) -- A Sears Hometown Stores investor that saw its Delaware Court of Chancery share appraisal suit tanked by the company's bankruptcy in 2019 won a \$4.06 per share payout ruling Thursday in a Court of Chancery decision focused on fair price and full and incremental damage claims.

Vice Chancellor J. Travis Laster found that Cannon Square LLC should receive the same total per-share amount received by stockholders who had previously received a \$3.21 per share post-merger payment from Sears and then won a right to 85 cents more in a post-trial ruling last year.

Cannon Square, in contrast, sued for a post-deal court appraisal of its stock and then saw its entire case and potential recovery vaporize when Sears pursued bankruptcy in 2019. The investor then joined the stockholders' suit and sought the same consideration as the class: the \$3.21 awarded to stockholders at the time of the 2019 deal and the additional 85 cents.

Cannon Square "has the same entitlement to damages as the plenary class. In this case, that means the judicially determined fair price of \$4.06 per share," the vice chancellor wrote. "The fund has not received any amounts that could be offset, so the fund is entitled to the full measure of the judicially determined fair price."

Prompting Thursday's decisions were disputes that arose from the merger of Sears Holdings Corp. and Sears Hometown and Outlet Stores in 2019 that triggered a right to \$3.21 for each SHOS share. Stockholders sued for more and eventually received an additional award of 85 cents per share.

The court already had awarded stockholders \$3.1 million in November 2023 from three Sears directors said to have breached their duties in approving the deal. The decision on Wednesday resolved the liability of Edward S. Lampert, billionaire and former CEO of Sears Holdco, although at a number well below the \$70.2 million that minority shareholders argued in a May 2023 post-trial brief was their loss in an unfair, Lampert-orchestrated cash-out.

In January 2024, the vice chancellor found that minority stockholders of Sears Hometown and Outlet Stores were initially due an extra \$1.78 per share for their 10.58 million shares, but later reduced that to 85 cents, in a first-of-its-kind court finding that controllers of a company can owe duties of good faith and care to a company and minority stockholders.

Lampert argued that the court's failure to address damages sought by those who initially sought appraisal "is dispositive" regarding the amount owed to that group, the vice chancellor wrote. "The court admittedly failed to address the offset issue. The court candidly acknowledged its error when the fund sought to intervene" in the class case.

Although an earlier court decision left the issue unaddressed, the vice chancellor found that the appraisal parties never waived their right, as Lampert argued, to the full amount despite their absence from the initial suit filed by stockholders who won the additional 85 cents.

"Waiver is not a basis for Lampert to avoid paying a damages award equal to the fair price of the shares," the vice chancellor said.

Since Cannon Square was unaware of Lampert's fiduciary breaches in the SHOS merger, the ruling

said, "the fund can therefore opt out of the appraisal" and share in the class recovery.

The two stockholder groups "properly preserved the question" of whether the appraisal seekers "should face an offset for consideration it never received," the vice chancellor wrote. "The court's failure to address that issue as part of an exceedingly long decision merely confirms that this judge is neither infallible nor omniscient."

Under the ruling, which still must go to a hearing, Canon Square would receive an individual \$829,168.68 payment for its 258,308 shares, with the entire group sharing in the remaining nearly \$9.2 million.

"The court could offer its thoughts on the settlement now to provide guidance to the parties, but the settlement is scheduled for its own hearing at a later date," the vice chancellor wrote. "In the interim, the parties should have the first crack at responding to this decision."

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

Cannon Square LLP is represented by Thomas A. Uebler, Brian V. DeMott and Terisa A. Shoremount of McCollom D'Emilio Smith Uebler LLC.

The stockholder class is represented by Ned Weinberger, Mark Richardson, Michael C. Wagner, Jiahui (Rose) Wang, David Schwartz and John Vielandi of Labaton Keller Sucharow LLP, Peter B. Andrews, Craig J. Springer, David M. Sborz and Christopher P. Quinn of Andrews & Springer LLC, Samuel L. Closic, Seth T. Ford and Robert B. Lackey of Prickett Jones & Elliott PA, Carl L. Stine and Adam J. Blander of Wolf Popper LLP and Donald J. Enright and Elizabeth Tripodi of Levi & Korsinsky LLP.

Edward S. Lampert, ESL Investments Inc., ESL Partners LP, RBS Partners LP, Transform Holdco LLC and Hometown Midco LLC are represented by Michael A. Pittenger, Matthew E. Fischer, Jacqueline A. Rogers, Nicholas D. Mozal and Charles P. Wood of Potter Anderson & Corroon LLP.

The case is In re Sears Hometown and Outlet Stores Inc. Stockholder Litigation, case number 2019-0798, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.



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Arrow Financial Investors Get Final OK For \$850K Deal

By **Sydney Price**

Law360 (February 13, 2025, 8:47 PM EST) -- Investors suing multibank holding company Arrow Financial Corp. received final approval from a New York federal judge Thursday for an \$850,000 deal settling claims the company concealed defective internal controls that led to missed financial filings.

The parties agreed to the proposed settlement in April 2024, and the deal was preliminarily approved in August 2024, according to the order signed by U.S. District Judge Anne M. Nardacci.

"As of Jan. 3, 2025, over two weeks after the relevant deadline, there was not one settlement class member who had opted out of the settlement or objected," the order stated. "As such, this factor favors final approval."

The court granted lead counsel's request for \$283,900, or about one-third of the settlement fund, in fees, and \$41,850 in expenses. Named plaintiffs Robert C. Ashe and Jeffrey S. Gohn will also receive a \$4,000 reward to share.

The court previously preliminarily certified a class in the suit, which includes all persons or entities that purchased or otherwise acquired Arrow securities between Aug. 6, 2022, and May 12, 2023, according to the order.

The suit, which was most recently amended in December 2023, accuses Arrow of downplaying the severity of the risks associated with its insufficient internal controls. During the class period, Arrow published "generic, boilerplate" risk warnings regarding its internal controls and a new core banking system implemented in September 2022, the suit claims.

Information about Arrow's internal control deficiencies began to emerge on March 16, 2023, when Arrow told investors about its inability to file its 2022 annual report on time, according to the suit. Arrow's shares fell 99 cents on the news, nearly 4%, to close at \$26.21 per share on March 17, 2023, according to the suit.

Several months later, on May 11, 2023, after being granted an extension by the U.S. Securities and Exchange Commission, Arrow disclosed that its first quarter report would also be filed late. The company's shares fell 33 cents, nearly 2%, to close at \$19.59 per share on May 12, 2023, according to the suit.

When Arrow announced a few days later that it had received a second notice of noncompliance from Nasdaq, and that Thomas J. Murphy had stepped down as president, CEO and director, Arrow's shares fell 53 cents, nearly 3%, to close at \$19.06, according to the suit.

Considering the timing of the second notice of noncompliance, the CEO's self-termination "left no doubt that his departure was a direct result of the core banking system disaster which led to defective disclosure controls and procedures and internal controls over financial reporting," the suit states.

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

The investors are represented by Jeremy A. Lieberman, Brenda Szydlo, Dean P. Ferrogari and Joseph A. Hood II of Pomerantz LLP.

Arrow is represented by William Sushon and Javed S. Yunus of O'Melveny & Myers LLP.

The case is Ashe v. Arrow Financial Corp. et al., case number 1:23-cv-00764, in the U.S. District Court for the Northern District of New York.

--Editing by Kristen Becker.

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Del. Lawmakers Told Admin Response To Biz Unrest Looms

By **Jeff Montgomery**

Law360 (February 13, 2025, 9:26 PM EST) -- Delaware's new secretary of state told lawmakers Thursday that news is imminent regarding the state's responses to reports that companies are considering moving their charters following purportedly negative rulings in high-profile corporate lawsuits.

Reacting to questions on the issue during a hearing before the state's budget-writing Joint Finance Committee, Secretary of State Charuni Patibanda-Sanchez said "the urgency is very much real. We are acting quickly."

The focus follows months of increasingly sharp public questioning in some circles regarding the state's business-friendly reputation, driven in part by corporate law rulings in Delaware's Court of Chancery that were described as being out of character for the nation's top corporate domicile.

Although Elon Musk — Tesla founder and head of the Trump administration's new U.S. DOGE Service Temporary Organization, which is more commonly known as the Department of Government Efficiency and is not a cabinet-level agency — has remained the most widely known source of the criticism, private unrest has become increasingly public, as well. The responses have included warnings from the state's corporate and commercial law bar about uncertainty created by ordinarily predictable and precedent-focused court rulings.

"We understand it," Patibanda-Sanchez told the lawmakers, noting separately that "it's not going to be much longer until you start to hear some news."

Delaware Gov. Matt Meyer, who took office in January, confirmed his administration's focus in recent weeks, in efforts that included a round of appearances and interviews with prominent business news outlets, among them being CNBC, Business Insider and Bloomberg.

"There is nothing extra we have to say right now that hasn't already been reported. Changes are being considered. That's all we can say," Mila Myles, Meyer's director of communications, said Thursday afternoon.

Musk's pique has been especially open, particularly after Court of Chancery decisions that knocked down his \$56 billion, 10-year, stock-based Tesla compensation plan in January 2024 and later awarded a \$345 million attorney fee to stockholder lawyers who pursued the case.

By June, public criticism of the court spilled into the Legislature, after the corporate bar drew up a high-speed amendment of Delaware's General Corporation Law to authorize corporate boards to cede some governance rights to chosen stockholders.

The legislation, supported by blunt testimony from the corporate bar, was drawn up in a matter of weeks. During the drafting, Chancellor Kathaleen St. J. McCormick submitted a letter saying that "there is no justification for the rushed nature of the proposal, nor the unfair decision now being foisted" upon the Delaware State Bar Association committee involved.

On Thursday, central Delaware Republican Sen. Eric Buckson asked Patibanda-Sanchez, "Are the concerns legitimate? Would the concerns be that others follow Musk's tweets, at a magnitude that begins to impact our budget?"

"I think the concern is that we must be responsive to our customer's concerns," Patibanda-Sanchez said. "We can never kind of sit on our franchise and take it for granted."

The nation's more than 2 million Delaware-chartered corporations include 68% of companies in the Fortune 500. As of May, those entities account for 28.3% of state general fund revenue — through corporate franchise taxes — a number second only to the 40.3% generated by personal income taxes.

"These things don't happen with a lot of notice," Patibanda-Sanchez said of corporate exits. "Many times, there's no outreach to the state before a company decides to make a change, so it's important to stay ahead of it. If you're reacting, you're losing."

--Editing by Melissa Treolo.

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9th Circ. Won't Undo Meta's \$725M Privacy Suit

By **Lauren Berg**

Law360 (February 13, 2025, 10:28 PM EST) -- The Ninth Circuit on Thursday affirmed Meta Platforms Inc.'s \$725 million settlement resolving privacy claims over the Cambridge Analytica data harvesting scandal, finding that the California district court conducted a full review of the deal's terms before approving it.

The three-judge panel, in an unpublished opinion, rejected objectors Sarah Feldman and Jill Mahaney's argument that U.S. District Judge Vince Chhabria failed to conduct his own detailed analysis of the potential minimum recoveries allowed under federal privacy statutes in analyzing whether Meta's nine-figure settlement, which covers a class of roughly 253 million Facebook users, is fair.

"The district court conducted a comprehensive review of the settlement's terms before approving it," the panel said, adding that the lower court "compared the settlement's benefits to the class against the strengths and weaknesses, potential and likely recovery, and possible litigation risks on a claim-by-claim basis."

The panel determined that the objects have not established a clear abuse of discretion by Judge Chhabria, according to the opinion.

The panel also found that the district court's approval of an attorney fee award of 25% of the settlement fund was "large," but it was not an abuse of discretion, the opinion stated. Judge Chhabria used a percentage-of-recovery method for calculating the fees and found the award to be reasonable after conducting a review of the record, the panel said.

The settlement, which has been **stalled** by the objections, aims to resolve consolidated consumer multidistrict litigation stemming from the March 2018 **revelation** that a third-party app developer had taken personal data from roughly 87 million unsuspecting Facebook users and sold the data to now-bankrupt Cambridge Analytica, a U.K.-based political consulting firm hired by President Donald Trump's 2016 campaign.

The consumers accuse Facebook of violating a host of privacy statutes, as well as its own user contracts, by more broadly disclosing their sensitive information — including their photos, religious preferences, video-watching habits, relationships, private messages and location data — to tens of thousands of app developers and business partners without user consent.

After Judge Chhabria **refused to toss** the MDL at the pleading stage, the parties struck the \$725 million deal, which seeks to pay out \$180 million in **attorney fees**, or 25% of the settlement fund, and nearly \$4 million in costs. Around that time, Judge Chhabria also ordered Meta and its attorneys at Gibson Dunn & Crutcher LLP to pay **\$925,000 in sanctions** due to their "unusually egregious and persistent" misconduct delaying discovery and gaslighting opponents.

Before approving the deal, Judge Chhabria said he was "**blown away**" by the more than 17.7 million valid claims that were submitted early in the claims process.

But the objectors appealed the deal's approval, telling the Ninth Circuit in their opening brief that the Stored Communications Act and the Video Privacy Protection Act provide for minimum statutory damages amounts of no less than \$1,000 and \$2,500 per class member, respectively.

The objectors argue that Judge Chhabria ultimately abused his discretion by **approving the deal** in

2023, which divvies out roughly \$3 per class member — less than 0.3% of those minimum statutory damages amounts.

During **oral argument** last week, the objectors' counsel argued that Judge Chhabria was wrong to conclude that a much larger \$250 billion award would likely be unconstitutionally excessive and violate Meta's due process rights.

But counsel for the class defended the deal, slamming the objectors' argument that the settlement reflects a "99.7% discount" in total recovery as "not remotely true."

The class contends that Judge Chhabria properly concluded "a quantitative analysis" that the maximum \$625 billion statutory damages would violate Meta's due process rights, and that Ninth Circuit case law has made clear that courts do not have to consider such large damages awards that would "surely be speculative."

In its opinion Thursday, the appellate panel affirmed Judge Chhabria's approval, agreeing that he conducted a comprehensive review of the deal.

In a statement to Law360 on Thursday, class counsel Derek W. Loeser of Keller Rohrbach LLP and Lesley E. Weaver of Bleichmar Fonti & Auld LLP said, "We are pleased that the Ninth Circuit has rejected the objections that have held up distribution of the settlement for over 15 months, and affirmed Judge Chhabria's thorough orders approving the settlement."

"We look forward to being able to move ahead with the distribution to the class," the attorneys said. "The settlement is an excellent result for the class that required an extraordinary amount of work by our dedicated team of lawyers and professionals."

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

U.S. Circuit Judges Danielle J. Forrest and Gabriel P. Sanchez and U.S. District Judge David Alan Ezra sat on the panel for the Ninth Circuit.

The objectors are represented by Kendrick Jan of Kendrick Jan APC and John Pentz.

The class is represented by Derek W. Loeser, Benjamin Gould and Cari Campen Laufenberg of Keller Rohrbach LLP, and Lesley E. Weaver, Anne K. Davis, Benjamin F. Burry and Joseph W. Baier of Bleichmar Fonti & Auld LLP.

Meta is represented by Christopher Chorba, Daniel R. Adler, Martie Kutscher Clark, Brian M. Lutz, Joshua S. Lipshutz, Kristin A. Linsley, Orin Snyder, Rose Ring, Amanda C. Machin, Austin Schwing, Deborah L. Stein, Heather L. Richardson, Russ Falconer and Timothy W. Loose of Gibson Dunn & Crutcher LLP.

The case is Sarah Feldman et al. v. Facebook Inc., case number 23-3550, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dorothy Atkins, Allison Grande, Ben Kochman and Bonnie Eslinger. Editing by Kristen Becker.



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Family Ties Could DQ Judge From Hawaii Wildfire Litigation

By **Emily Sawicki**

Law360 (February 13, 2025, 4:50 PM EST) -- The federal judge overseeing a proposed class action brought against Maui County, Hawaii, departments by Lahaina residents whose homes were destroyed in a devastating August 2023 wildfire has indicated she is "inclined" to grant a recusal bid.

U.S. District Judge Jill A. Otake indicated in a docket entry on Wednesday that she would be willing to step back from the case, one day after the plaintiffs filed a motion to disqualify her. Her brother Thomas M. Otake is an attorney representing individual plaintiffs in a separate suit that could soon be subject to a global settlement.

Named plaintiffs Sean Stover, Cassandra Fairall, Mark Prevot, Eva Marie Adam and Randy Brock said in their Tuesday motion that Judge Otake must be disqualified from the case under the U.S. Code, which states the judge must step away because Thomas Otake "is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding."

The named plaintiffs said that if the proposed global settlement pending before the state Supreme Court is approved, they intend to challenge it in their federal suit, which could affect attorney fees paid to Otake's brother in his clients' individual suit against the defendants. Whether such a challenge would be permitted is not clear.

In her brief docket entry, Judge Otake asked the defendants to bring forward any objections to her recusal by Feb. 18, noting that "because the question of whether Judge Otake has the power to review the state court settlement would also warrant her recusal, any objections should not address that question."

The proposed class of Lahaina residents sued Maui County officials and several entities in July 2024, alleging the defendants variously failed to deenergize power lines, did not post fire watches and committed other negligence that led to wrongful forcible displacement of up to 12,000 local residents. Those named include the county itself, its emergency management agency and fire and public safety department, trustees of a massive land trust called the Estate of Bernice Pauahi Bishop, and local telecommunications and electric companies.

In their second amended complaint, filed in November, the proposed class brought a total of nine claims including for willful misconduct and gross negligence, negligent failure to post fire watch, private and public nuisance, and trespass.

In the suit, the plaintiffs asserted the named defendants must be made to pay for residents' displacement, relocation, homelessness, lost income and other alleged damages, which they estimate could range from a "conservative estimate" of \$1.2 billion to a "more realistic" \$3.6 billion, or \$300,000 per fire survivor.

The Stover class action is just one of reportedly hundreds of similar suits that have been filed in the fallout from the fire, which killed more than **100 people** and destroyed more than 2,000 structures. The suits include the one Thomas Otake is involved with, *Saribay v. Defendants*, filed in April 2024.

The *Saribay* suit is also part of a proposed global settlement agreement now before the Hawaii Supreme Court, which would involve defendants paying slightly more than **\$4 billion** to settle all tort claims brought by both the class plaintiffs and individuals. Hawaii Gov. Josh Green said at the time

the settlement was announced that it would resolve about 450 state and federal suits related to the fire.

Insurance carriers have said the proposed settlement is "wholly inadequate," according to the Tuesday motion, and unfairly blocks insurers from pursuing claims against the defendants, potentially violating their **subrogation rights**.

The plaintiffs told Judge Otake in their motion that her brother's clients could soon be implicated, if the federal suit causes the global settlement to be nullified.

"It is obvious that, if the [global settlement agreement] is approved in state court, there will be a challenge by us in federal court to the GSA on the procedures involved in state court in adopting the GSA and the adequacy of representation of absent class members by the [class plaintiffs'] attorneys in state court," the proposed class told Judge Otake in the motion.

"If our challenge to the GSA succeeds, under the terms of the GSA, defendants will probably declare the GSA to be null and void because of the substantial monetary claims of the Stover class plaintiffs," they added. "If the GSA is declared null and void, attorney Otake stands to lose his attorney's fees in the state court proceeding as part of the GSA. On the other hand, attorney Otake's fee is protected if our attack on the GSA in federal district court fails (although the GSA may fail if we prevail on appeal)."

The fires have set off other litigation.

In October, a **California judge tossed** a shareholders' suit against Hawaiian Electric Industries Inc., one of the defendants in the Stover class action, but granted leave to amend claims.

A landowner sued Maui County last April over its alleged mishandling of a **debris removal site** in the aftermath of the fire, and Maui County itself filed suit shortly after the fire, **bringing claims** against Hawaiian Electric over allegations that downed power lines started the blaze.

Victoria J. Takayesu, counsel for Maui County and other government entities, said her office could not comment on pending litigation. The attorney for the proposed class, Sam King, declined to comment. Counsel for other parties did not immediately respond to requests for comment Thursday.

The proposed class is represented by Samuel P. King Jr. of King & King.

The County of Maui, Maui Emergency Management Agency, Maui Department of Fire and Public Safety and Maui officials are represented by Victoria J. Takayesu and Thomas W. Kolbe of the Department of the Corporation Counsel for Maui County, and David J. Minkin, Jordan K. Inafuku, Micah Masahide Miyasato and Sabrina Naomi Marie Gouveia of McCorriston Miller Mukai MacKinnon LLP.

Hawaiian Electric Industries Inc., Hawaiian Electric Company Inc., Hawaii Electric Light Company Inc. and Maui Electric Company Limited are represented by Brad D. Brian, Jacob Rosen and Nicholas Fram of Munger Tolles & Olson LLP, and Joachim P. Cox and Randall C. Whattoff of Cox Fricke LLP.

Hawaiian Telcom Inc. and Hawaiian Telcom Communications Inc. are represented by Christine Y. Wong, Julie Y. Park and Tiffany Cheung of Morrison & Foerster LLP, and Alan K. Lau, Eric H. Tsugawa and Tedson H. Kojia of Tsugawa Lau Muzzi LLLC.

Spectrum Oceanic LLC is represented by Bronwyn F. Pollock, Jillian C. Joseph, Matthew C. Sostrin and Michael H. Bornhorst of Mayer Brown LLP, and Gregory K. Markham and Keith K. Kato of Chee Markham & Kato.

Various trustees of the Estate of Bernice Pauahi Bishop are represented by Nathan P. Shimodoi, Nickolas A. Kacprowski, Paul Alston and Wendy F. Hanakahi of Dentons US LLP.

The case is Stover et al. v. County of Maui et al., case number 1:24-cv-00307 in the U.S. District Court for the District of Hawaii.

--Additional reporting by Madeline Lyskawa, Craig Clough, Eli Flesch, Rae Ann Varona, Lauren Berg and Sydney Price. Editing by Robert Rudinger.

Update: This article has been updated with a response from Maui County and counsel for the proposed class.

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Profs Back Hotel Guests In 3rd Circ. Algorithmic Pricing Case

By **Carla Baranauckas**

Law360 (February 13, 2025, 6:15 PM EST) -- A group of academics has joined antimonopoly groups to support hotel guests accusing several Atlantic City casino hotels of using shared software to fix room rates in their Third Circuit fight to revive their suit.

Four professors of law or economics who specialize in antitrust law — Christine Bartholomew of the University at State University of New York at Buffalo Law School, Peter C. Carstensen of the University of Wisconsin Law School, Robert H. Lande of the University of Baltimore School of Law and John L. Solow of the University of Central Florida — argued in their **amicus brief** filed Tuesday that U.S. District Judge Karen M. Williams, who **dismissed** the case in October, completely overlooked the antitrust risks of algorithmic pricing.

The hotel guests showed that the hotels have been using the same algorithm to set their prices and have acted in parallel to set room rates, the professors said.

"These two allegations, paired together, are strongly suggestive of the existence of a horizontal price-fixing conspiracy and, thus, should have easily survived a motion to dismiss," the professors said. "The district court's contrary ruling flies in the face of established doctrine and basic economic theory."

The professors said the plaintiffs had adequately pled that the hotels coordinated price increases for rooms and that they had exchanged nonpublic information via a pricing algorithm.

"Such use of a price algorithm — like any information exchange — is strong circumstantial evidence of an illicit agreement," the professors argued. "The exchange of price information is against each hotel defendant's individual self-interest. And exchange of such information makes it much easier for the hotel defendants to begin and to maintain a collusive agreement."

The professors also quoted Maureen Ohlhausen, former chair of the Federal Trade Commission, who said that "if a third-party algorithm is used as 'a clearing house for confidential price information' — if, say, the various competitor firms 'themselves don't directly share' pricing data with each other, but instead relay their data 'to a common, outside agent that provides algorithmic pricing strategies' — such an arrangement should be treated the same as a direct 'exchange [of] competitively sensitive information.'"

In her October opinion, Judge Williams said the proposed class of hotel guests did not adequately allege that the major Atlantic City hotels — including Caesars Entertainment, MGM, Hard Rock and others — exchanged nonpublic pricing information when they used Cendyn Group's algorithmic pricing software known as Rainmaker.

In January, three groups — the American Antitrust Institute, the Open Markets Institute and the Committee to Support the Antitrust Laws — **urged the circuit court** in separate amicus briefs to **reverse** the dismissal of the case, claiming that the lower court was effectively paving the way for algorithmic price-fixers to conspire while avoiding the "hallmarks of human collusion."

Pricing software, like Rainmaker, can replace traditional, and clearly unlawful, price-fixing communication between competitors, the groups argued. The software acts as a technological middle man to carry out the dirty work of comparing prices and making recommendations for the highest

prices the market will bear. Meanwhile, the companies keep themselves out of a direct conspiracy.

Cendyn Group, a defendant in the New Jersey case along with the hotel owners, has dodged two hotel price-fixing suits, after getting similar allegations against Las Vegas casino hotels **dismissed** in May.

The algorithmic pricing software encouraged owners to keep room rates high or raise them even as occupancy rates fell, according to plaintiffs in both suits.

Both the Atlantic City and Las Vegas suits failed at the district court level partly because the hotel guests have been unable to allege that the hotel owners were not required to use Rainmaker's recommendations and because the defendants began using the software at different times.

The parties did not immediately respond to requests for comment Thursday.

Christine Bartholomew, Peter C. Carstensen, Robert H. Lande and John L. Solow are represented by Isaac Park of New York University School of Law.

The plaintiffs are represented by Joseph J. DePalma and Catherine B. Derenze of Lite DePalma Greenberg & Afanador LLC, Christopher J. Cormier and Matt Strauser of Burns Charest LLP, Shawn L. Raymond and Zach Fields of Susman Godfrey LLP, Stanley O. King of King & King and William G. Caldes, Jeffrey L. Spector and Icee N. Etheridge of Spector Roseman & Kodroff PC.

Caesars Entertainment Inc., Boardwalk Regency LLC, Harrah's Atlantic City Operating Co. LLC and Tropicana Atlantic City Corp. are represented by Andrew Muscato, Boris Bershteyn, Ken Schwartz, Michael Menitove, Tansy Woan and Sam Auld of Skadden Arps Slate Meagher & Flom LLP.

MGM Resorts International and Marina District Development Co. LLC are represented by Harry H. Rimm of Womble Bond Dickinson LLP and Bethany W. Kristovich and Justin R. Raphael of Munger Tolles & Olson LLP.

Hard Rock International Inc. and Seminole Hard Rock Support Services LLC are represented by Jennifer L. Del Medico, Laura W. Sawyer, David C. Kiernan and Matthew Silveira of Jones Day.

Hard Rock Hotel & Casino Atlantic City is represented by Craig Carpenito, Thomas J. Scrivo and David S. Lesser of King & Spalding LLP.

Cendyn Group LLC is represented by Lawrence Buterman, Sadik Huseny, Brendan McShane, Anna M. Rathbun, Christopher J. Brown, Melissa Arbus Sherry, Graham B. Haviland and Kevin M. McDonough of Latham & Watkins LLP.

The Open Markets Institute is represented in-house by Tara Pincock and Sandeep Vaheesan, and Jason Rathod of Migliaccio & Rathod LLP.

The American Antitrust Institute is represented in-house by David O. Fisher and Randy Stutz, and Joshua P. Davis and Matthew Summers of Berger Montague PC.

The Committee to Support the Antitrust Laws is represented by Gregory S. Asciolla of DiCello Levitt LLP, Gary I. Smith Jr. and Joanne Bui of Hausfeld LLP, Anthony J. Stauber of Gustafson Gluek PLLC and Kristie LaSalle of Lockridge Grindal Nauen PLLP.

The case is Karen Cornish-Adebiyi et al. v. Caesars Entertainment Inc. et al., case number 24-3006, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Jared Foretek, Matthew Perlman and Bryan Koenig. Editing by Rich Mills.



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UnitedHealth Can't Escape All Claims In AI Denial Suit

By **Craig Clough**

Law360 (February 13, 2025, 9:51 PM EST) -- A Minnesota federal judge Thursday allowed Medicare Advantage patients and the estates of deceased enrollees to pursue breach of contract claims against UnitedHealth over its alleged use of AI to override physician recommendations, finding they are not preempted by the Medicare Act, but tossed others by holding they are preempted.

The order from U.S. District Judge John R. Tunheim tossed five of the seven state law causes of action, saying those claims seek to regulate the same subject matter as the Medicare Act, but the breach of contract and breach of the implied covenant of good faith and fair dealing claims raise issues that do not collide with federal standards.

"Because ruling on these two claims would require the court to only apply basic contract principles, the breach of contract and breach of the implied covenant of good faith and fair dealing claims do not regulate the same subject matter as the Medicare Act, and thus are not preempted," the judge stated.

The 2023 proposed class action **claims** UnitedHealth knowingly uses an artificial intelligence service with a high error rate to override physician recommendations and deny elderly patients care owed to them through Medicare plans.

The AI model determines patients' coverage criteria for post-acute care settings with "rigid and unrealistic predictions for recovery," the complaint says. The model reports a prediction of recovery time a patient should require, but overrides what an actual physician recommends, which results in the denial of recommended necessary care, the complaint contends.

Furthermore, UnitedHealth intentionally limits its employees' discretion by setting up targets to keep stays at care facilities within 1% of the AI model recommendations, the suit claims. Employees who deviate from the projections are allegedly disciplined and terminated.

UnitedHealth is the largest insurance company in the United States and provides health insurance plans for 52.9 million Americans.

The healthcare provider filed a motion to dismiss the claims on the grounds of preemption and exhaustion, with the latter arguing any claim that arises out of the Medicare Act is subject to administrative exhaustion.

Judge Tunheim said the exhaustion requirement can be waived on the claims because, among other reasons, the plaintiffs successfully argue they will be irreparably harmed by everything "up to and including death," and the administrative process is futile because "UHC allegedly issues repeated denials any time a patient is successful on appeal. As a result, any time a patient gets a denial overturned, another denial is on its way."

On preemption, the judge found that the claims are "expressly preempted by the Medicare Act if they regulate the same subject matter as the Medicare standards or otherwise frustrate the purpose of a Medicare standard," citing the standard established in the Eighth Circuit's **2021 ruling** in **PCMA v. Wehbi**.

Only the contract-related claims survive under this analysis, the judge said, because the others deal with issues regulated by the Medicare Act. Those claims are unjust enrichment, insurance bad faith, and violations of Oregon's Unfair Claims Settlement Practices Act, the Minnesota Unfair Claims

Practices Act and California's Unfair Competition Law and Insurance Code.

In the breach claims, the plaintiffs "allege that UHC explicitly described claim decisions as being made by 'clinical services staff' and 'physicians,' without mention of any artificial intelligence."

"These claims thus effectively arise out of UHC's evidence of coverage documents because the question would be whether UHC complied with its statement that claim decisions would be made by 'clinical services staff' and 'physicians' when it allegedly used artificial intelligence," the judge continued. "Thus, in analyzing these claims the Court would only be required to investigate whether UHC complied with its own written documents."

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

The plaintiffs are represented by Karen Hanson Riebel, David W. Asp, Kristen G. Marttila and Derek C. Waller of Lockridge Grindal Nauen PLLP.

Tetzloff is represented by Glenn A. Danas, Ryan Clarkson and Zarrina Ozari of Clarkson Law Firm.

UHC is represented by Michelle S Grant, Nicholas Pappas, Nicole A Engisch and Shannon L Bjorklund of Dorsey & Whitney LLP.

The case is Estate of Gene B. Lokken et al. v. UnitedHealth Group Inc. et al., case number 0:23-cv-03514, in the U.S. District Court for the District of Minnesota.

--Additional reporting by Ken Downey Jr. Editing by Kristen Becker.

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Kimberly-Clark, P&G Dodge Tampon Fraud Claims, For Now

By **Rae Ann Varona**

Law360 (February 13, 2025, 11:16 PM EST) -- A California federal judge on Thursday dismissed a woman's fraud claims accusing Kimberly-Clark and Procter & Gamble of touting their Tampax and Kotex tampons as safe despite containing toxic levels of lead, saying that the putative class actions she filed lacked details on tests she asserted discovered the lead.

U.S. District Judge Gonzalo P. Curiel wrote in two separate orders that California resident Allison Barton failed to meet a heightened pleading standard required for claims "sound in fraud" when alleging that Kimberly-Clark Corp. and the Procter & Gamble Co. each misrepresented the safety of their tampons.

Judge Curiel wrote that Barton was required to allege the "who, what, when, where, and how" of the companies' alleged fraudulent conduct. Yet her operative complaint relied on "unidentified independent testing" that failed to analyze certain tampons, as well as on extrapolations from other tampons "without any explanation as to why extrapolation is appropriate," he wrote.

He wrote in both orders that while Barton's complaints alleged that independent lab testing and analysis detected certain amounts of lead per gram of product for the companies' tampons, the complaints, for instance, provide "no further information as to the laboratory that performed the testing."

While granting the companies' motions to dismiss Barton's claims, Judge Curiel did so "without prejudice," saying that the deficiencies are ones she "can correct."

He gave Barton 25 days to file second amended complaints against the companies.

Barton **sued** Kimberly-Clark and P&G in July 2024, accusing the consumer goods giants of failing to disclose and materially omitting that their tampons — particularly P&G's Tampax Pearl tampons and Kimberly-Clark's U by KOTEX Click compact tampons — contain unsafe amounts of lead.

In amended complaints filed in September, Barton said that while California's Proposition 65 sets a maximum allowable dose level for reproductive toxicity at 0.5 micrograms of lead per day, independent scientific testing and analysis of the tampons revealed that ordinary and expected use of the tampons "exposes consumers to far more" than that.

Barton alleged that testing found 0.189 micrograms of lead per gram of the Kotex tampons, 0.181 micrograms of lead per gram of the Tampax Pearl tampons, and 0.123 micrograms of lead per gram of Tampax radiant tampons. She said that based on the average number of tampons consumers use per day, consumers are exposed to lead in excess of the maximum allowable dose level.

Barton seeks to represent California residents who purchased the tampons in the state in the four years prior to her initial complaints and who don't claim any personal injury from using the tampons.

She asserted unfair and unlawful business acts and practices and deceptive advertising practices in violation of California law.

Kimberly-Clark and P&G each moved to dismiss Barton's complaints last fall. Kimberly-Clark **asserted** in October that Barton's theory of harm relied on testing of tampons she didn't purchase.

Barton also didn't attach the testing results or provide any details about the "who, when, and how the testing was conducted," Kimberly-Clark argued.

P&G, meanwhile, had **argued** in a September motion that Barton's claims lacked "the necessary details about their testing methods or the nature of the tested tampons to render these claims plausible."

Judge Curiel said in his orders Thursday that even assuming Barton's latest complaints satisfied the heightened pleading standard, her Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act claims based on the companies' alleged fraudulent omissions — but not misrepresentations — also failed.

Judge Curiel said that a reasonable consumer could be misled into believing that the companies' tampons were free of lead based on the companies' representations that they are, for instance, free of harsh ingredients or gynecologist tested or recommended. He thus denied the companies' motions to dismiss Barton's claims based on affirmative misrepresentations.

But under an omissions theory, Judge Curiel said that Barton failed to sufficiently allege that the presence of lead amounted to an unreasonable safety hazard.

"There is no allegation that the tampons even release lead," Judge Curiel wrote in the orders, adding that a June 2024 study Barton had relied on "cautions that future research is needed."

"Additionally, the FDA announced in December 2024 that its literature review 'did not identify safety concerns associated with tampon use and contaminant exposure,'" Judge Curiel wrote.

But like with the pleading standard, Judge Curiel allowed Barton to amend her claims.

Among other rulings Judge Curiel made in the two orders was on Barton's bid for restitution and injunctive relief. He tossed claims to the extent she sought restitution, saying that she pled "no allegations that legal remedies are inadequate" for the restitution and disgorgement remedies she was seeking.

He, however, ruled that Barton had standing to seek injunctive relief, saying that her allegations that she will have no idea of determining whether the tampons contain lead or not constitutes a "threatened injury certainly impending."

Judge Curiel also ruled that California's Proposition 65 didn't bar Barton's lawsuits. The proposition requires businesses to warn consumers about chemicals that may cause cancer or reproductive toxicity. Parties trying to sue to enforce Proposition 65 must first give a notice of an alleged violation to an alleged violator, and then wait 60 days before suing, Judge Curiel's orders noted.

Allegations of misleading statements and affirmative misrepresentations, however, "fall outside Proposition 65's ambit," he said.

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

Barton is represented by Naomi B. Spector of KamberLaw LLP.

Kimberly-Clark is represented by Timothy W. Loose of Gibson Dunn & Crutcher LLP.

P&G is represented by Megan L. Rodgers, Andrew Soukup, and David N. Sneed of Covington & Burling LLP.

The cases are Allison Barton v. The Procter & Gamble Company, case number 3:24-cv-01332, and Allison Barton v. Kimberly-Clark Corporation, case number 3:24-cv-01337, both in the U.S. District Court for the Southern District of California.

--Additional reporting by Bonnie Eslinger and Jonathan Capriel. Editing by Michael Watanabe.



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Musk Must Pay Up For Illegal Access To Data, Class Suit Says

By **Anna Scott Farrell**

Law360 (February 13, 2025, 5:04 PM EST) -- Elon Musk should be forced to compensate taxpayers and recipients of government benefits after gaining access to federal databases housing their data, a proposed class told a D.C. federal court, saying the billionaire violated the Computer Fraud and Abuse Act.

A **complaint** filed Wednesday by taxpayers and beneficiaries claims they have lost time and money buying credit monitoring and identity theft protection services since Musk and members of his Department of Government Efficiency team gained access to federal computers containing their Social Security numbers and other private information.

They also face potential lost employment opportunities for positions with higher security clearances and the ability to borrow money because of their compromised data, according to the complaint, which was brought by six people from separate states.

The suit targets Musk personally under Section 1030 of the criminal code, which bars unauthorized access to protected computers to defraud and obtain anything valuable. It also accuses the U.S. Treasury Department, Treasury Secretary Scott Bessent and the Office of Personnel Management of violating the Privacy Act in allowing Musk access to government systems. The suit further accuses Bessent of violating tax privacy laws that bar him from handing taxpayer records to Musk.

Musk has maintained his leadership of private companies including Tesla since being tapped by President Donald Trump to help lead DOGE, which is formally called the U.S. DOGE Service Temporary Organization and is not a Cabinet-level agency. The suit claims he does not hold an official government position that would allow him to legally have access to the databases.

"People who must share information with the federal government should not be forced to share information with Elon Musk or his 'DOGE,'" the complaint said. "And federal law says they do not have to."

The suit is one of a rising number **challenging access** to federal systems by Musk and DOGE, which **has been blocked**, for now, to varying degrees by federal judges in D.C. and New York as litigation ensues.

Wednesday's complaint is unique not only in accusing Musk of violating the computer fraud law but in asking the court to certify a class in the tens of millions of people that would encompass all U.S. taxpayers. Two of the named plaintiffs do not claim to receive federal benefits but say they revealed sensitive information in the regular course of filing tax returns. The suit also seeks to force the defendants "to extend free lifetime identity theft and fraud protection services" to potential class members.

According to the allegations, Musk breached three government computer systems: the U.S. Treasury Department's core payment system and **databases at** the Office of Personnel Management and the U.S. Department of Education.

One of the six people to bring the suit, Lynn Boisrond of New York, received student loans from the government and provided her Social Security number and other personal details in applying for aid, according to the suit. On Feb. 1, she was alerted to an unauthorized attempt to charge \$35 to her

bank account and told that her email address, birth date and other information had been found on the dark web.

Another plaintiff in the case, Dennis Titko of Oregon, claimed that he, too, had experienced a fraud notification since Musk gained access to government computers. He was told Feb. 11 by a bank that an account there had been opened in his name, according to the complaint.

The attorney behind the suit, Gary Mason of Mason LLP, told Law360 the complaint grew organically after dozens of people called his office — which specializes in cybersecurity — to say they were worried about Musk's access to their financial and personal information.

The complaint "just shows a diversity of ways people's sensitive information ends up in these databases and the kinds of things Musk and DOGE have access to," Mason said.

"We're getting dozens of calls from people deeply concerned about how their data will be used and exploited," Mason said. "There's also a concern about what's going to happen in the future, particularly for people dependent on government benefits. They're really, really concerned that there's going to be an issue with DOGE with payments being made to them that would severely impact their ability to even survive."

The OPM declined to comment.

The U.S. Treasury Department did not respond to a request for comment. Musk did not respond to attempts to contact him through Tesla.

Boisrond, Titko and the four other plaintiffs — Andrea Gribbon of Washington state, Cherice Prater of Florida, Helga Hertlein of Indiana and Donald Custer of Colorado — are represented by Gary E. Mason of Mason LLP.

Counsel information for Musk, Bessent, Treasury and the OPM was unavailable.

The case is Gribbon et al. v. Musk et al., case number 1:25-cv-00422, in the U.S. District Court for the District of Columbia.

--Editing by Roy LeBlanc.



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Wells Fargo Followed Seminoles' Orders For Trust, Jury Hears

By **Cara Salvatore**

Law360 (February 13, 2025, 10:43 PM EST) -- Wells Fargo told a Florida state jury Thursday its stewardship of a major trust for the Seminole tribe was sound, saying that the tribe asked for and received a "keep-it-safe trust" and there was no missing \$800 million.

Tom Melsheimer of Winston & Strawn LLP, in opening statements for the bank, pushed back hard on the notion in plaintiffs' openings Wednesday that the bank followed unsound investment practices. The individual plaintiffs come from a pool of over 2,000 and claim Wells Fargo and predecessor Wachovia cheated minors out of \$818 million by secretly hiking fees and mismanaging investments in a multibillion-dollar trust fed by gambling revenue. The bank kept the trust's assets in very-low-risk investments.

"This trust was not set up for highs and lows. It was not set up for big risks. This was a keep-it-safe trust," Melsheimer said. "Wells Fargo was legally bound to follow, and did follow, the intent of the Seminole tribe when it set up and established this trust ... choosing conservative investments that have almost no risk at all."

Melsheimer said there was important context as to why the tribe set up the trust with the goals that it chose. A few years before the trust was created, the tribe's investments with Raymond James had lost \$20 million, Melsheimer said. That made the tribe extremely financially conservative, and their goal was to keep the money they already had, more than growing it.

Melsheimer also said the completely separate issue of supposedly overcharged fees was so dwarfed by the mismanagement claim — there are about \$15 million of fee overcharges being claimed over the life of the trust with Wells Fargo and predecessor Wachovia from 2006 to 2016 — that it was almost a red herring.

"It should have become clear to you during the plaintiffs' presentation that this case is not really about fees," Melsheimer said. "Those two issues are totally and completely separate."

He also said that over the bank's stewardship, the fund kept \$1.5 billion and earned an additional \$120 million through investing. The trust succeeded, he said.

The plaintiffs said in their own openings on Wednesday that the trust created in 2005 set Wachovia's fee at 10 basis points, but the bank surreptitiously more than tripled the fee rate and said nothing. The bank allegedly charged two types of fees that were never agreed on: "revenue share" fees and recordkeeping fees, plaintiffs' lawyer Steve Osber said.

"Instead of 8 basis points, they're charging over three times the basis points. They tripled their fee," said Osber, of Conrad & Scherer LLP.

He said the tribe found out in 2015. Its then-chief financial officer, Suresh Geer, emailed Wells Fargo relationship manager Kim Scott, and it was "unsettling" that Scott could find no documentation supporting \$2 million in annual fees after Scott looked back through the entire file back to 2005, Osber said.

The plaintiffs also said the bank had complete, unilateral control over the trust's investments, and the tribe could not give any direction as to what investments should be made. The trust's investments

performed below the rate of inflation in 2008 and 2011-2014, the tribe said. The trust did not hold equities, and the plaintiffs believe it should have, under Florida's prudent-investor law.

The plaintiffs said their expert damages witness, Max Schanzenbach, will testify that the trust would have earned \$818 million more if it had been invested in a higher-risk portfolio appropriate for children, with a long investment horizon, and if it had used longer-term bonds. Schanzenbach's other investment scenarios came out with a minimum damages level of \$404 million, plaintiffs' lawyer Irwin Gilbert told the jury.

The trust and the three individual plaintiffs in this trial are represented by William Scherer, Steve Osber and Irwin Gilbert of Conrad & Scherer LLP.

Wells Fargo is represented by Thomas Melsheimer of Winston & Strawn LLP.

The case is Gopher v. Wells Fargo, case number not immediately available, in the Seventeenth Judicial Circuit Court of the State of Florida.

--Editing by Linda Voorhis.

For more of this trial, see Courtroom View Network.

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