

SunPower Escapes Investor Lawsuit Over Product Defect Claims

By Gillian R. Brassil

- Court said third amended complaint failed to state claim
- Won't let plaintiffs re-plead claims over product defects

SunPower Corp. beat an investor suit alleging the solar energy company concealed product defect issues, a federal judge ruled.

The third amended consolidated class action complaint from lead plaintiff, Steamfitters Local 449 Pension & Retirement Security Funds, failed to state a claim to bring Securities Exchange Act violations, said Judge Araceli Martínez-Olguín for the US District Court for the Northern District of California. The judge dismissed the suit without letting the group re-plead, the judge said on Feb. 14 following a third amended complaint.

"Plaintiff again fails to proffer anything that supports Defendants' knowledge of the cracking defect in 2021 and thus the falsity of their risk statements," Martínez-Olguín said.

She said that the problem with plaintiff's "risk disclosure allegations remains an issue in this round of pleading," and that the plaintiff tried to get around "crucial shortcomings" by introducing issues with SunPower's master agreement "with Tigo, a component supplier, including that SunPower maintained rights to test and inspect the component products."

But, said the judge, the plaintiff wasn't able to allege SunPower knew about cracking defects when it was manufactured, and both the first and third amended complaints "concede the problem developed 'over time,'" she said.

She dismissed a first amended complaint last year, finding none of the statements false or misleading when made, or that they were otherwise puffery, Martínez-Olguín said. This was mainly because the suit didn't allege when SunPower learned of the cracking issue, decided to replace units, or needed to absorb a \$27 million charge, she said. The third amended complaint was the next one ruled on.

And in it, the plaintiff aimed to contextualize using recent litigation and other issues—but still didn't allege false or misleading statements, Martínez-Olguín said. She denied an extension of time to serve another company from a similar shareholder derivative complaint as moot.

Investors had sued after the company said in January 2022 it expected to record up to \$31 million in charges to replace connectors that cracked.

Robbins Geller Rudman & Dowd LLP represented the lead plaintiff. Wilson Sonsini Goodrich & Rosati represented SunPower and the two top executives. Neither firm immediately responded to emails seeking comment.

The case is *Jaszczyszyn v. Sunpower Corp.*, N.D. Cal., No. 3:22-cv-00956, dismissed 2/14/25 .

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

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

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Alarum Sued Over Decline in Web Data Collection Revenue, Selloff

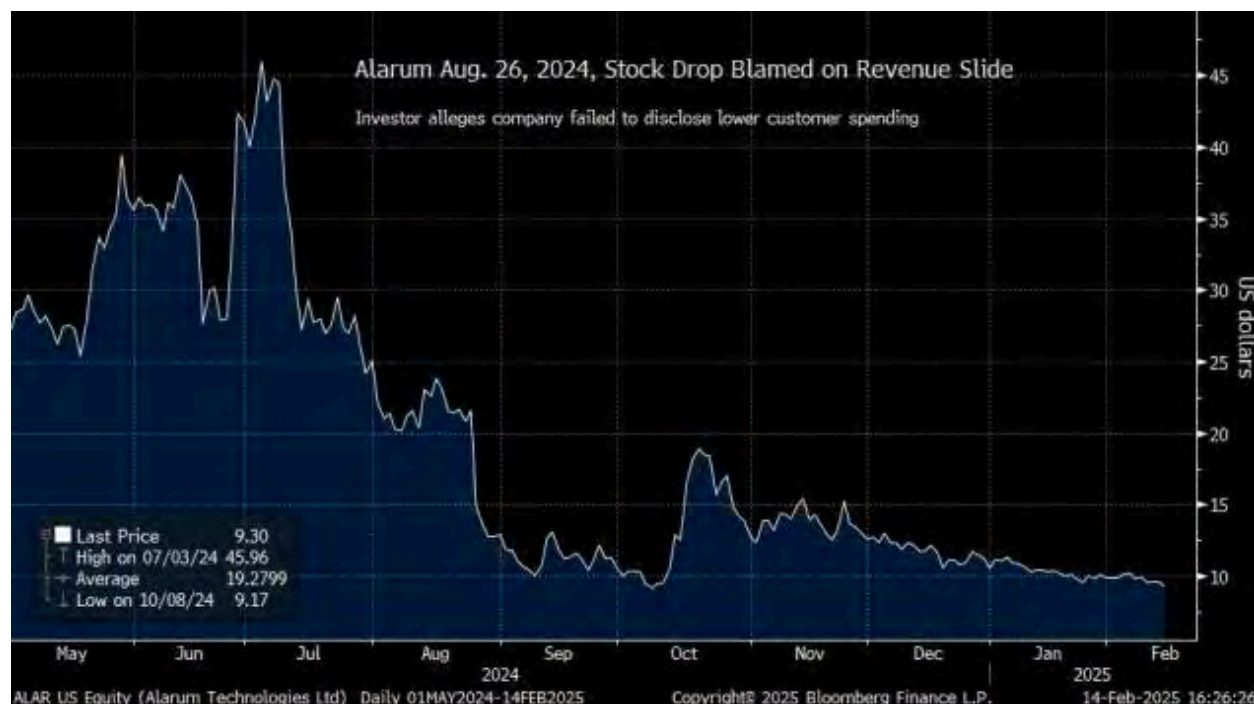
By Martina Barash

- **COURT:** D.N.J.
- **TRACK DOCKET:** [No. 1:25-cv-01263](#) (Bloomberg Law subscription)

Alarum Technologies Ltd. failed to disclose falling customer spending on its web data collection services, an investor says in a suit filed Friday over a 31% stock drop.

The company touted its ability to retain and expand customer subscriptions and paid service packages, Niv Velvart says in a proposed class action filed in the US District Court for the District of New Jersey. But by “June 2024 Alarum began seeing reduced customer spending that ultimately resulted in a 20% revenue decrease from the prior month,” Velvart says.

Tel Aviv-based Alarum released financials showing the decline on Aug. 26, 2024, causing its American depositary receipt price to drop 31% that day to close at \$14.83 per ADR, Velvart says.



The proposed class consists of hundreds or thousands of members, the complaint estimates.

Velvart brings securities fraud claims and seeks damages.

Alarum didn't immediately respond to an emailed request for comment.

Pomerantz LLP and Jacob Sabo, who practices in Tel Aviv, represented Velvart.

The case is Velvart v. Alarum Techs. Ltd. , D.N.J., No. 1:25-cv-01263, complaint 2/14/25 .

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

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

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Class Action

Feb. 18, 2025, 8:33 AM PST; Updated: Feb. 18, 2025, 9:36 AM PST

Venture Global Sued For IPO, Contract News Stock Flop (Correct)

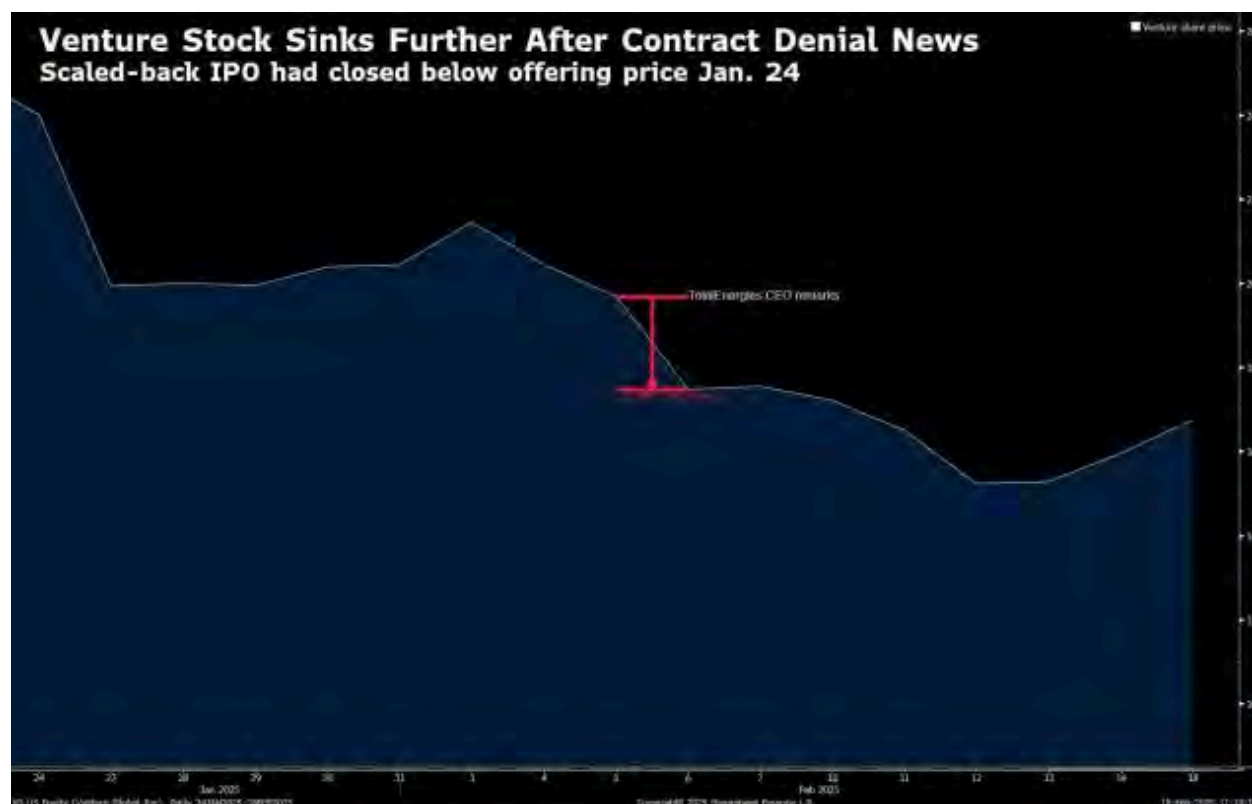
By Gillian R. Brassil

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** No. [1:25-cv-01364](#) (Bloomberg Law subscription)

Venture Global Inc. overhyped its business prospects in initial public offering documents, only to have its stock stumble on a major contract loss amid legal challenges from large clients, a proposed class action said.

The liquefied natural gas exporter misrepresented customer backing to bring “LNG to the global market years faster and at a lower cost,” Gerald Bowes said in a complaint filed in the US District Court for the Southern District of New York Monday. The filings discussed the development of five projects near Louisiana’s gulf coast, including an LNG facility and pipelines connecting to interstate and intrastate systems, Bowes said.

TotalEnergies SE’s CEO Patrick Pouyanné on Feb. 5 said that he had declined an offer from Venture for a long-term supply contract from its Louisiana LNG plant Calcasieu Pass, citing a lack of trust in the company, Bowes’ complaint said. The next day, the stock slid over 11% to close at \$17.48 a share, according to data compiled by Bloomberg.



Venture priced its Jan. 24 market debut of 70 million shares at \$25 after slashing its target, but share prices closed at \$24 that day, according to Bloomberg terminal data. Share prices closed at \$15.96 Feb. 14, the last full trading day, according to Bloomberg.

Venture faces multiple arbitration claims from existing clients, including Shell Plc. and BP Plc., due to delays in contracted gas deliveries.

Venture's IPO registration statement was misleading given it failed to account for and address those contract issues, Bowes said. His proposed class would include shareholders who bought stock traceable to the registration statement for the IPO, which ended Jan. 27.

Levi & Korsinsky LLP represents Bowes, who seeks damages for alleged violations of the Securities Act of 1933 by the company and certain executives.

Venture didn't immediately respond to an email seeking comment.

The case is Bowes v. Venture Glob. Inc. , S.D.N.Y., No. 1:25-cv-01364, complaint filed 2/17/25 .

(Corrects spelling of plaintiff's surname throughout.)

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

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

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AstraZeneca PLC

AstraZeneca hit with US class action lawsuit over China regulatory probes

Lawsuit claims UK pharma giant understated the risk of government investigations



An AstraZeneca research and development facility in Shanghai: it said in its annual report that it was 'aware of a number of investigations by Chinese authorities' © Qilai Shen/Bloomberg

Hannah Kuchler in London 11 MINUTES AGO



AstraZeneca has been hit with a US class action lawsuit that claims the UK's largest listed company misled shareholders in connection with investigations by [Chinese authorities](#).

The lawsuit, which AstraZeneca detailed in its annual report on Tuesday, alleges that the company, its chief executive Pascal Soriot, and chief financial officer Aradhana Sarin, made “materially false and misleading statements”, related to the probes.

The lawsuit was filed in December in California, after it had emerged the previous month that [Leon Wang, the company's former top executive in China, had been detained in the country](#).

AstraZeneca said in its annual report that it was “aware of a number of investigations by Chinese authorities which, to the best of AstraZeneca’s knowledge, relate to allegations of medical insurance fraud, illegal drug importation, and personal information breaches by current and former AstraZeneca employees”.

In the legal complaint, lawyers for the plaintiffs write that risk factors in the company’s 2021 annual report understated the potential for government investigations, fines, and criminal prosecutions, given the situation in China.

“Defendants’ statements about its business, operations, and prospects, were materially false and misleading and/or lacked a reasonable basis at all relevant times,” they wrote.

They added that the plaintiffs have “suffered significant losses and damages” as a result of the “wrongful acts and omissions, and the precipitous decline in the market value of the company’s common shares”.

Shares in AstraZeneca fell about 15 per cent in late October and early November, after news of the Chinese investigation and Leon Wang’s detention was published. But they have since made up their losses.

The plaintiffs’ lawyers also cited a Financial Times story that reported that AstraZeneca executives expected [a dip in sales](#) in China after the investigation.

[In full-year results this month](#), AstraZeneca reported a 3 per cent drop in sales in China in the last quarter of 2024, which it said was mainly because the mild winter had led a fall in sales of drugs used to treat respiratory infections, and a budget cap at Chinese hospitals.

The company also said it was being investigated in China over suspected unpaid import taxes of \$900,000, which could result in a fine of up to \$4.5mn. It said the unpaid taxes were probably related to sales of cancer drugs Imfinzi and Imjudo, and possibly also to sales of breast cancer drug Enhertu.

The annual report also shows that Soriot's pay fell from £16.9mn in 2023 to £14.7mn in 2024, primarily because of lower share price appreciation. According to data compiled by UK think-tank the High Pay Centre, he was the highest-paid FTSE 100 CEO in 2023, with the chief executive of data and analytics company RELX in second place on £13.6mn.

Sarin's pay increased from £4.4mn in 2023 to £6.8mn in 2024, as her two year performance share plan paid out.

AstraZeneca said that the pay of its directors and workforce reflected the company's performance, pointing to a total shareholder return of 33 per cent over the past three years.

In the annual report, it said Soriot had "led AstraZeneca to deliver strong results in 2024, with another year of robust top line growth and impressive results from the pipeline".

Additional reporting by Robert Wright in London

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Hannah Kuchler

Dick's Sporting Goods Leaders Sued Over Post-Pandemic Financials

By Gillian R. Brassil

- **COURT:** W.D. Pa.
- **TRACK DOCKET:** No. [2:25-cv-00209](#) (Bloomberg Law subscription)

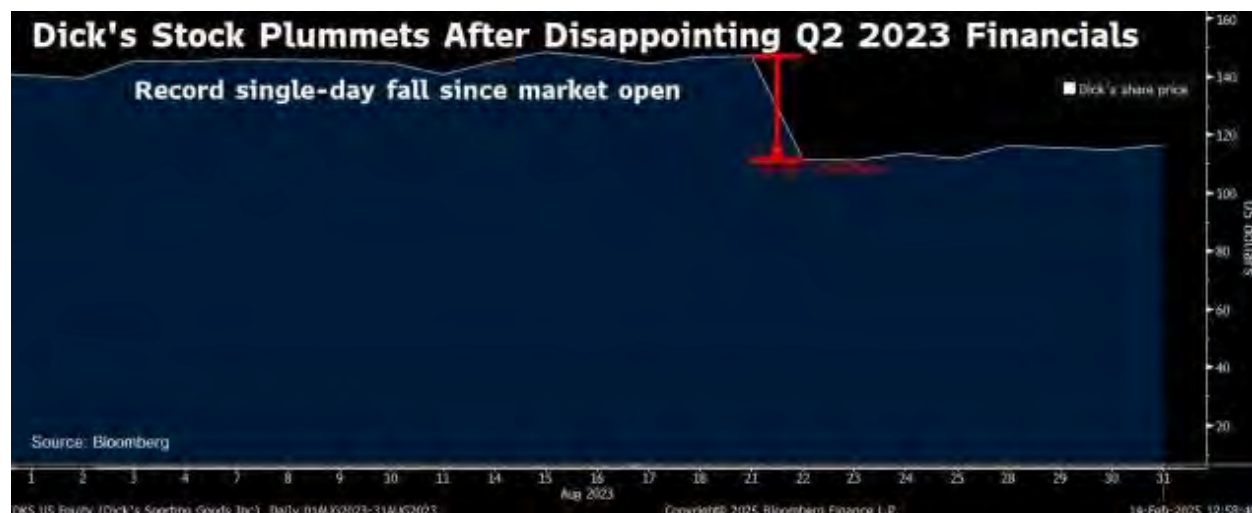
Dick's Sporting Goods Inc. executives concealed the retailer was dealing with low post-pandemic demand and theft, exposing the company to litigation and stock plummet losses, a shareholder derivative lawsuit said.

On Aug. 22, 2023, the day Dick's revealed disappointing second quarter of fiscal year 2023 results attributed mainly to markdowns to push excess product and inventory shrinkage, the stock price plunged more than 24%, "erasing nearly \$2.2 billion in market capitalization," investor Donel Davidson told the US District Court for the Western District of Pennsylvania in a complaint filed Thursday.

Share prices closed at \$111.53 that day. The 24% single-day decline was the stock's most significant tumble since it opened on the market, according to data compiled by Bloomberg.

Dick's had overstocked to meet heightened pandemic demand for home fitness and outdoor goods, but that momentum waned in 2022 as lockdown orders lifted as the company was losing "millions of dollars each year" from retail theft, said the complaint.

The stock price had been artificially high until that day when the company said its gross margin was more than 5% below analyst consensus estimates and earnings per diluted share were 26% short of analysts estimates for its second quarter, he said. Leadership said on an earnings call issues were expected to continue hurting Dick's margins through 2023, the complaint said.



Executives also wrongly profited off of insider trading when the stock price was artificially inflated, Davidson said, selling nearly \$39 million combined. And directors approved Dick's buying back almost 2.7 million overly-expensive, costing it \$356 million, he said.

Davidson said leadership exposed Dick's to harms that included a consolidated proposed class action over similar issues filed in the same court.

Pribanic & Pribanic and Robbins LLP represent Davidson, who alleged violations of securities law, breaches of fiduciary duties, and unjust enrichment. Davidson seeks corporate reform, restitution awarded to Dick's, and executives to return any ill-gotten gains and be barred from trading so that he can get an effective remedy for the company.

Dick's didn't immediately respond to an email seeking comment. Neither did its counsel in the proposed class action, Jones Day and Wachtell, Lipton, Rosen & Katz.

The case is Davidson v. Hobart , W.D. Pa., No. 2:25-cv-00209, complaint filed 2/13/25 .

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

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

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GitLab Executives' Ill-Advised AI Push Harmed Company, Says Suit

By Eric Heisig

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [No. 4:25-cv-01597](#)

A US software developer facing securities fraud allegations was hit with a derivative lawsuit that said executives made false and misleading statements about its ability to create AI features and the boon they would be for the company.

GitLab Inc.'s executives, from June 2023 to June 2024, publicly pushed the company's AI capabilities claiming it was responding to demand, provided an opportunity to make more money through an add-on to its software, and supported an increase to the price of its premium offering, according to the lawsuit filed Feb. 14 in the US District Court for the Northern District of California.

During this time, the company issued statements that said customers accepted the new price structure and use of AI in its offerings, the lawsuit filed by a shareholder on behalf of the company states.

This "was far from the truth" as demand was impacted by "concerns from potential customers about security and data privacy, the Company's AI not featuring the capabilities advertised, delayed deployment, and largely negative customer feedback," the lawsuit says.

The problems were made public in June 2024, when GitLab issued a news release that said its initial estimates were off and revenue for that quarter was five points below expectations and "significantly less" than the year-over-year growth of the previous quarter. The stock price fell 4.9% the next day, according to the lawsuit.

The executives breached their duties through the statements they made about the company's business and prospects, the lawsuit says, which also contains allegations of insider trading while GitLab's stock was "artificially inflated," leading them to make more than \$220 million.

In addition, due to the misconduct—which led to a securities lawsuit filed in September—GitLab will have to pay millions of dollars to address it, the suit states.

The executives are accused of violating the Exchange Act and breaching their fiduciary duties, among other claims.

The shareholder is represented by Brown Law Firm PC.

The case is Preciado v. Sijbradnij , N.D. Cal., No. 3:25-cv-0159, complaint filed 2/14/25 .

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

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

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Organ Transplant Logistics Firm TransMedics Sued by Investor

By Martina Barash

- **COURT:** D. Mass.
- **TRACK DOCKET:** [No. 1:25-cv-10385](#) (Bloomberg Law subscription)

TransMedics Group Inc. engaged in improper and unsafe practices in its organ procurement and transportation business, causing two sets of stock drops, an investor alleges in a proposed class action filed Friday.

TransMedics failed to disclose that it “used kickbacks, fraudulent overbilling, and coercive tactics to generate business and revenue,” Merly Jewik says in a complaint filed in the US District Court for the District of Massachusetts.

The company also “engaged in unsafe practices and hid safety issues and generally lacked safety oversight,” Jewik says.

A letter by Rep. Paul Gosar (R-Ariz.) in February 2024 and a report by short-seller Scorpion Capital in January 2025 alleged coercive and fraudulent activities by the companies, leading to two-day stock tumbles after each was made public, Jewik says.

The stock fell 3%, to close at \$84.81 on Feb. 22, 2024, and 2% to close at \$83.14 per share the following day. It fell 5% to close at \$68.81 on Jan. 10, 2025, and 7% to close at \$64.05 on Jan. 13.

The proposed class consists of hundreds or thousands of members, according to the complaint.

Jewik seeks damages on securities fraud claims.

TransMedics didn’t immediately respond to an emailed request for comment.

The Rosen Law Firm PA represents TransMedics.

The case is Jewik v. TransMedics Group, Inc. , D. Mass., No. 1:25-cv-10385, complaint 2/14/25 .

Equinix Leaders Sued by Shareholder Over Accounting Fraud Claims

By Gillian R. Brassil

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. [3:25-cv-01642](#) (Bloomberg Law subscription)

Equinix Inc. executives misclassified recurring capital expenditures, misleading stockholders on a key metric of the real estate investment trust's value, a shareholder derivative lawsuit said.

Several current and former leaders harmed Equinix by causing it to issue misleading financial results and proxy statements that exposed it to an ongoing proposed securities fraud class action, shareholder Boris Benkovski told the US District Court for the Northern District of California.

The data-center operator inflated its adjusted funds from operation, which propped up the stock price before it slid on a short-seller Hindenburg Research report that claimed accounting manipulation had boosted its metric for years, said Benkovski's derivative complaint filed Feb. 14. Share prices took more hits after subsequent disclosures, the complaint said.

Executives had claimed that Equinix's high AFFO came from a "strong operating performance" when certain expenditures, such as battery replacements, should have been noted as recurring and deducted from the value under company guidelines and federal regulations, Benkovski said. A recurring capital expenditure decreases AFFO while a non-recurring one wouldn't affect it.

Five days after the report published, Equinix said its audit committee was reviewing issues and that it had been subpoenaed by the US attorney's office for the Northern District of California, Benkovski said. A month after announcing the audit, Equinix reported its accounting office found no issues, that it was adding a new non-recurring category to its capital expenditure accounting methodology, and it had been subpoenaed by the SEC, Benkovski said.

During this time, Equinix's former CEO Charles Meyers, now executive chairman, and current CFO Keith Taylor benefited from insider sales, Benkovski said. Meyers sold 149,933 shares for more than \$107 million while Taylor sold 54,287 shares for over \$39.5 million.

Equinix and those two officers are defending themselves against AFFO-inflation allegations in the proposed class action before the same court, which recently granted and denied in part their motion to dismiss.

Wolf Haldenstein Adler Freeman & Herz LLP, Rigrodsky Law, PA, and Grabar Law Office represent Benkovski, who seeks damages awarded against the officers for the company.

The shareholder alleged breaches of securities law and fiduciary duties, among other wrongdoing, from at least May 3, 2019, through March 24, 2024.

Equinix didn't immediately respond to an email seeking comment. Neither did its counsel in the proposed class action, Davis Polk & Wardwell LLP.

The case is Benkovski v. Meyers , N.D. Cal., No. 3:25-cv-01642, complaint filed 2/14/25 .

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

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

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Peloton Beats Investors' Lawsuit on Bike Safety Recall For Now

By Gillian R. Brassil

- Investors didn't sufficiently allege Peloton misled on recall
- Judge said statements forward-looking, letting re-plead

Peloton Interactive Inc. escaped a stockholder lawsuit alleging the fitness giant disguised safety issues with its bike seat that would lead to an expensive 2023 recall and subscriber losses, a federal judge ruled.

Peloton's initial statements on the potential cost of the recall of about 2.2 million bikes were forward-looking and not actionable, and a reasonable investor would've understood the move was voluntary in congruence with federal agency oversight, said Judge Margo K. Brodie for the US District Court for the Eastern District of New York.

Shareholders failed to allege any misleading statements in risk disclosures in the years leading up to the recall of bikes sold since 2018, she said in her Feb. 14 order granting Peloton and current and former executives' motion to dismiss. Investors didn't state a claim that the fitness company violated disclosure duties because they did share the risk of defects and recalls, Brodie said. And Peloton's statements about its corporate values and bike's prowess were nonactionable corporate puffery, she said, also dismissing other allegations she found insufficient.

Lead plaintiffs Jia Tian and David Feigelman failed to plead defendants acted with fraudulent intent required to bring securities fraud claims, Brodie said. The fact that other companies had issued stationary bike recalls, Peloton had already recalled its premium treadmill, or customers had complained about the bike's seat post wasn't sufficient to support the allegations, she said.

"Even assuming Plaintiffs are correct that Defendants knew about those complaints, they do not support Plaintiffs' argument that those reports would lead to a recall of every Bike Peloton sold between 2018 and 2023," she said.

Brodie is letting them amend the lawsuit.

Investors sued in 2023 following a May recall of Peloton's flagship bikes sold since 2018, leading to a series of stock drops. The stock fell almost 23% the day Peloton revealed subscription losses and an additional accrual of \$40 million in costs and future expenses that August, Brodie said.

The proposed class would include people who bought shares from May 6, 2021 through Aug. 22, 2023, according to the amended complaint.

The suit is one of multiple securities-related cases brought against Peloton over safety issues in recent years. Peloton agreed to pay \$14 million to settle a securities fraud class action related to treadmill safety in 2024. Senior leaders also agreed to settle shareholder allegations over insider trading while those safety issues bubbled.

Levi & Korsinsky LLP and Pomerantz LLP represent lead plaintiffs. Covington & Burling LLP represents Peloton and current and former executives. None of the firms nor Peloton immediately responded to emails seeking comment.

The case is Tian v. Peloton Interactive, Inc. , E.D.N.Y., No. 23-CV-4279, 2/14/25 .

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

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

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Peloton wins dismissal of shareholder lawsuit over seat post recall

 [reuters.com/business/retail-consumer/peloton-wins-dismissal-shareholder-lawsuit-over-seat-post-recall-2025-02-14](https://www.reuters.com/business/retail-consumer/peloton-wins-dismissal-shareholder-lawsuit-over-seat-post-recall-2025-02-14)

Reuters

By Reuters

February 14, 2025 5:43 PM PST Updated 4 days ago

A stationary bicycle inside of a Peloton store is pictured in the Manhattan borough of New York City, U.S., January 25, 2022. REUTERS/Carlo Allegri/File Photo Purchase Licensing Rights [↗](#), opens new tab

NEW YORK, Feb 14 (Reuters) - Peloton Interactive (PTON.O) [↗](#), opens new tab on Friday won the dismissal of a proposed shareholder class action lawsuit accusing the fitness equipment maker of concealing safety-related problems that led to a May 2023 recall of 2.2 million bikes following reports of defective seat posts.

U.S. District Judge Margo Brodie in Brooklyn, New York, found no proof that Peloton intended to mislead investors by initially projecting that the recall would cost \$8.4 million, before setting aside an additional \$40 million three months later.

She also said Peloton's risk disclosures were not materially misleading, in part because they explicitly warned that recalls were possible.

Reporting by Jonathan Stempel in New York; Editing by Leslie Adler

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

- Suggested Topics:
- Boards, Policy & Regulation

King & Spalding Steps In to Defend Cardlytics in Securities Class Action

 [law.com/dailyreportonline/2025/02/18/king--spalding-steps-in-to-defend-cardlytics-in-securities-class-action-](https://www.law.com/dailyreportonline/2025/02/18/king--spalding-steps-in-to-defend-cardlytics-in-securities-class-action-/)

Mason Lawlor

King & Spalding has stepped in to represent Cardlytics, an advertising platform, hit with a securities class action in January by investors who purchased shares of the company in 2024, alleging it covered up losses in revenues that caused its stock price to fall 80% within five months.

Takeaway: King & Spalding, headquartered in Atlanta, has typically been involved in filing suits on behalf of plaintiffs harmed by alleged under-reporting, misrepresentation, and breach of contract or fraud. Now, the firm will defend Cardlytics and its CEO, Alexis Desieno, and its chief financial officer, Karim Tamsamani, in a case alleging the company made false and misleading statements that masked the truth about the strength of its securities.

Court: Georgia, U.S. District Court for the Northern District

Case Type: Class Action

Industry: Securities and Exchanges

Lawyers: Lisa Bugni and Josh Kamin of King & Spalding for Cardlytics, Desieno and Tamsamani. The plaintiffs are represented by Robert V. Prongay and Charles H. Linehan of Glancy Prongay & Murray in Los Angeles along with Corey D. Holzer and Joshua A. Karr of Holzer & Holzer in Atlanta.

Law.com Radar

Liability Arguments: Cardlytics is an advertising platform operating in the U.S. and U.K. Its proprietary channel analyzes purchase data from financial institutions to help marketers sell to buyers, building incentives for consumers. Cardlytics funds the incentives using portions of fees collected from marketers advertising on its platform.

Lead plaintiff Darien Froess and others bought Cardlytics securities from March 14 to Aug. 7 and are suing under the Securities Exchange Act of 1934. According to the complaint, Cardlytics made false statements regarding its year-over-year revenue, billings and consumer incentives numbers that covered up its declining business.

The plaintiffs alleged it was not until Aug. 7 that Cardlytics revealed a 9% year-over-year decrease in revenue compared to an 8% year-over-year increase announced in May. The company also saw an over 20% increase in consumer incentives, which reportedly explained

the "underdelivery" of budgets and customers' billing estimates. Cardlytics could not keep up with the increased consumer engagement on its platform but tried to hide it through misleading statements, the suit alleged.

Cardlytics' stock price decreased from \$20.25 in late March to \$3.94 in August, marking an over 80% drop that investors alleged they were not privy to based on the misrepresentations.

Damages Arguments: The plaintiffs filed under Section 20(a) of The Exchange Act and are seeking compensatory damages against all the defendants, jointly and severally, in an amount to be decided at trial. They are also seeking interest, costs and expenses, as well as attorney fees.

What the lawyers are saying: In a statement provided to Law.com, King & Spalding said Cardlytics "believes the allegations are meritless as set forth in the motion to dismiss."

Neither Prongay, Linehan, Holzer, nor Karr returned a request for comment.

Radar scan: Since Feb. 7, King & Spalding has filed cases in several federal district courts against companies, such as Amzak Capital Management, Entrada Therapeutics and Mastec Industrial Corp., for misreported revenues or breached contracts that caused economic damages.

Caption: *Froess v. Cardlytics*.

Date filed: Jan. 22

Judge: U.S. District Judge Mark H. Cohen

Read the complaint here.

This action was surfaced by Law.com Radar, which delivers real-time alerting on new litigation across more than 2,600 state and federal courts. Click here to get started and be first to act on opportunities in your region, practice area or client sector.

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Myovant Investor Claiming Skadden Conflict Seeks Appellate Redo

By Gillian R. Brassil

A Myovant Sciences Ltd. investor wants an appellate court to rehear allegations of a conflict of interest that warranted disclosure when Skadden, Arps, Slate, Meagher & Flom LLP advised on its 2022 buyout deal.

The US Court of Appeals for the Second Circuit last month affirmed dismissal with prejudice of Joseph Zappia's lawsuit, finding alleged ties between the acquirer Sumitovant Biopharma Ltd. and Sumitomo Mitsui Banking Corp., which Skadden represented in other matters, "too attenuated." The plaintiff petitioned Thursday for reconsideration of the court's opinion denying his request for leave to amend, claiming the panel overlooked information from January oral arguments that could remedy pleading deficiencies.

- Zappia claims the court didn't account for his attorney saying that Sumitomo Group members consider themselves "siblings," which could bolster allegations about its connection
- Zappia's lawyer had argued that small equity connections across members didn't diminish "family-like ties" in Japanese law, answering the panel's skepticism on low-ownership stakes, he said
- And his petition said his attorney had argued that Sumitomo Banking—which financed the deal—didn't have a typical lender-borrower relationship with its business network due to "numerous collaborations"

Wohl & Fruchter LLP and Weiss Law LLP represent Zappia. The firms didn't immediately respond to an email seeking comment. Freshfields US LLP represented the defendants-appellees—Myovant, then-executives, and Sumitomo Pharma America Inc. An attorney declined to comment in an email. Skadden, which isn't party to the suit, didn't immediately respond to an email seeking comment.

The case is Zappia v. Myovant Scis. Ltd. , 2d Cir., No. 24-253, petition filed 2/13/25 .

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

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

Trade Desk's Jeff Green Beats Challenge to Compensation Package

By Mike Vilensky

- Green could gain \$5 billion without proper vote, suit said
- Shareholders needed to make pre-suit demand: Del. Ch.

Trade Desk Inc. and its CEO Jeff Green persuaded Delaware's Chancery Court to toss claims from shareholders challenging a compensation award for Green that the shareholders say could top \$5 billion.

The Trade Desk shareholders—individuals and a pension fund—failed to show they could bring the lawsuit on behalf of the company without first demanding the company directors bring the claims, Vice Chancellor Paul A. Fioravanti, Jr. said in a Feb. 14 decision.

The shareholders allege the eight-member board of directors improperly bypassed a stockholder vote in 2021 when it awarded Green a "mega-grant" as part of his compensation. If Trade Desk achieves its stock price goals, Green would gain between \$3.5 billion and \$5.2 billion from the award, the consolidated complaint says.

The shareholders didn't show the board was so conflicted that making a pre-suit demand on its members would be futile, Fioravanti said, granting motions to dismiss from Trade Desk, Green, and board members.

Under Delaware law, shareholders must demand the board bring suit before filing a derivative complaint or show a reasonable doubt that a majority of board members are too conflicted to consider the demand, the court said.

Fioravanti rejected arguments that the board members are too financially intertwined with Green or have known him too long to be independent.

The shareholders also failed to show that the board members faced a likelihood of liability from the litigation and a pre-suit demand on them would therefore be futile, the court said.

Simply reciting facts showing past business or personal relationships between a chief executive and board members won't make the court question the members' independence, Fioravanti said, citing Chancery Court precedent.

The complaint also doesn't show that a pre-suit demand would be futile because the directors are likely liable, Fioravanti said. The allegations don't include the kind of "extreme" facts and "pervasively flawed process" where the court has made such a finding, the judge wrote.

"Plaintiffs' contention that the members of the Compensation Committee face a substantial likelihood of liability because they engaged in an 'unfair process' misapprehends the governing standard, and Plaintiffs' allegations fall far short of impugning the Compensation Committee's ability to consider demand," the judge wrote.

Ashby & Geddes PA and Hach Rose Schirripa & Cheverie LLP represented plaintiff International Union of Operating Engineers Local 137, 137A, 137B, 137C & 137R Pension & Annuity Funds. Levi & Korsinsky represented plaintiff Milton Pfeiffer. Smith, Katzenstein & Jenkins LLP and Purcell & Lefkowitz LLP represented plaintiff Leroy Huizenga. Potter Anderson & Corroon LLP and Latham & Watkins LLP represented The Trade Desk and its directors. Wilson Sonsini Goodrich & Rosati represented Green.

The case is In Re The Trade Desk Inc. Derivative Litig. , Del. Ch., No. 2022-0461, 2/14/25 .

To contact the reporter on this story: Mike Vilensky at mvilensky@bloombergindustry.com

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

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T-Mobile's Win in Data Aggregation Lawsuit Affirmed in Delaware

By Jennifer Kay

- Investor sought special review under *Caremark* standards
- State justices affirm lower court ruling in one-page order

The Delaware Supreme Court on Monday rejected a T-Mobile US Inc. investor's attempt to revive her claims that data centralization to benefit its corporate parent, Deutsche Telekom AG, led to a series of cyberattacks.

After careful consideration of the parties' briefs, the record below, and oral argument, the court finds it "evident that the judgment" of the Delaware Chancery Court must be affirmed, said Justice Abigail M. LeGrow, writing for the court's full five-member panel. The Delaware Chancery Court ruling dismissed the investor's lawsuit alleging that centralizing T-Mobile's data for Deutsche Telekom's AI and machine learning segments compromised data security.

During oral arguments in January, the high court had echoed the Chancery Court's concerns about the investor's reliance on information found in videos posted to social media instead of requesting internal books and records from T-Mobile's board. The investor argued that seeking T-Mobile board records was futile because of the control exerted by directors who also are Deutsche Telekom executives. Deutsche Telekom wasn't party to the litigation.

The investor sought special review of her claims under the standards for a *Caremark* claim, named for the Chancery Court's 1996 ruling in *In re Caremark International Inc. Derivative Litigation* setting the parameters for oversight liability under Delaware law.

The investor is represented by Bathaee Dunne LLP and Christensen Law LLC. The T-Mobile board is represented by Cleary Gottlieb Steen & Hamilton LLP and Abrams & Bayliss LLP.

The case is Harper v. Sievert , Del., No. 253,2024, opinion 2/17/25 .

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

KY settlement with hedge funds delayed as judge orders mediation in state workers' lawsuit

kentucky Lantern.com/2025/02/17/ky-settlement-with-hedge-funds-delayed-as-judge-orders-mediation-in-state-workers-separate-suit/

By Tom Loftus

February 17, 2025



Franklin Circuit Judge Thomas Wingate has ordered hedge fund defendants into mediation with a group of Kentucky state employees who allege mismanagement of state pension funds. Wingate sits in the Franklin County Courthouse in Frankfort. (Kentucky Lantern photo by McKenna Horsley)

FRANKFORT — A Friday afternoon court order will delay and possibly jeopardize final approval of the recently announced settlement of a long-running lawsuit over controversial investments by Kentucky Retirement Systems in hedge funds more than a decade ago.

That high profile case alleged that some former officials of the retirement systems (since restructured as the Kentucky Public Pensions Authority or KPPA) and four big investment firms violated their fiduciary duties beginning in 2011 by gambling more than \$1 billion of Kentucky pension money on hedge fund investments that carried high risk, high fees and low transparency.



Franklin Circuit Judge Thomas
Wingate

Early last month Kentucky Attorney General Russell Coleman, who is pressing the case for the state, announced that he had reached a settlement in which the investment firms agreed to pay \$227.5 million to the state's pension system, but admit no wrongdoing.

A key part of the settlement required dismissal of other lawsuits related to the same claims.

However, attorneys representing four Kentucky public employees who filed a separate case against the same defendants have objected to the proposed settlement in motions filed with Franklin Circuit Judge Thomas Wingate, who must approve the settlement before it becomes final.

These attorneys, led by Michelle Ciccarelli Lerach, said the settlement would recover only a "pittance" for the state but result in a "bonanza" of as much as \$45.5 million from the settlement for private attorneys hired under contract by the attorney general's office to represent the state.

But the main objection by Lerach was that the proposed settlement of the original suit would dismiss her separate case.

Judge orders mediation by mid-March

Wingate heard arguments Wednesday on Lerach's motions, and late on Friday he granted Lerach's request that the separate case be referred for resolution to a mediator.

Wingate directed that parties in this separate case agree on a mediator. He said if they do not agree on a mediator they must give him a list of three mediators and he would pick one.

"The mediation shall be conducted by March 14," Wingate ordered.



Attorney General Russell Coleman

The judge had previously scheduled a hearing on whether to approve the proposed settlement of the original case for Feb. 26. Because of his order directing mediation in the separate case, Wingate postponed that hearing until March 26.

In response to Kentucky Lantern's request for comment on the impact of Wingate's order, Coleman released this statement: "The Commonwealth's proposed settlement remains in place for Kentucky workers and retirees. We will continue reviewing the court's order to determine the path forward for the Commonwealth, KPPA, and all beneficiaries."

But Lerach said the order was a "complete victory" for her clients in the separate case.

"In light of Judge Wingate's order, it is extremely unlikely that the Attorney General's settlement will go forward as currently attempted — if at all," Lerach said in a statement. "The Court ordered our case to mediation and we intend to mediate with the hedge fund sellers to reach a real settlement. If that cannot be done, we will be able to go ahead and litigate our claims without any further interference from the Attorney General."

Grahmn Morgan, an attorney representing three investment firms (KKR & Co., Prisma Capital Partners, Pacific Alternative Asset Management) who are defendants in the original case as well as Lerach's separate case, said he had no immediate comment on Wingate's order.

Vanessa Cantley, one of the Louisville attorneys working under contract with Coleman's office in the original case, also declined comment.

Cameron revived case after Supreme Court ruling

The original case was brought by a group of eight state pensioners in late 2017 alleging that the financially troubled Kentucky Retirement Systems gambled with the hedge fund investments that resulted in big losses. The defendants said there was no wrongdoing, that the actions were all legitimate investments.



Daniel Cameron took the stage to speak on behalf of the Trump campaign, Aug. 3, 2024, in Fancy Farm. (Kentucky Lantern photo by Austin Anthony)

A major development in the case happened in July 2020 when the Kentucky Supreme Court ruled that the plaintiffs — whose pensions had not been reduced and were protected in law by a legal doctrine called an “inviolable contract” — did not have standing to file their claims. The high court sent the case back to Franklin Circuit for dismissal.

But then-Attorney General Daniel Cameron intervened and the court allowed him to take over as the plaintiff to recover damages to the pension system.

His office contracted with two of the attorneys for the plaintiffs in the original case — Ann Oldfather and Cantley, of Louisville — to handle the case for the state.

But in 2021 Lerach and some other attorneys who originally worked with Oldfather and Cantley in representing plaintiffs in the original case filed a new separate case on behalf of our state employees. These new plaintiffs had standing because they were hired after a 2013 pension reform law put them into a new hybrid cash balance pension plan whose state pensions do not enjoy the same security as the plaintiffs in the original case who were hired before 2013.

On Jan. 8 Coleman put out a statement announcing the original case had been settled and that boards of the KPPA had voted to approve the settlement. He said the big investment firms had agreed to pay \$227.5 million, money he said would go to Kentucky's pension funds. Coleman's statement noted that this total included the return of about \$145 million that had been held in reserve by Prisma, one of the defendants.

Lerach's objections to the settlement say that this \$145 million is not a recovery by the state because it always has been the property of Kentucky's pension system. Lerach said the proposed settlement involves just \$82.5 million in "fresh money" to the state. Moreover, Lerach said that under terms of contracts with the attorney general's office, the attorneys representing Coleman in the original case can claim \$46.5 million in legal fees if the settlement is approved by Franklin Circuit Court.

Among other things, Lerach's separate case argues that Prisma must return the \$145 million to Kentucky's pension system with penalty and interest — a total of about \$807 million.

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A Win in Long-Running Kentucky Retirement Systems Pension Case: Attorney General Thwarted in Scheme to Settle Claims Against KKR and Blackstone on the Cheap

 [nakedcapitalism.com/2025/02/a-win-in-long-running-kentucky-retirement-systems-pension-case-attorney-general-thwarted-in-scheme-to-settle-claims-against-krk-and-blackstone-on-the-cheap.html](https://www.nakedcapitalism.com/2025/02/a-win-in-long-running-kentucky-retirement-systems-pension-case-attorney-general-thwarted-in-scheme-to-settle-claims-against-krk-and-blackstone-on-the-cheap.html)

By Yves Smith

February 17, 2025

In a step forward for long-suffering Kentucky Retirement Systems (now Kentucky Public Pension Authority) beneficiaries, attorneys for so-called Tier 3 Plaintiffs beat back a scheme by Attorney General Russell Coleman to settle claims against private equity kingpins KKR and Blackstone on the cheap...oh, and completely drop claims against their top partners, here the famed Henry Kravis, George Roberts, Steve Schwarzman, and Tomlinson Hill.

This “settlement” was brazen since the Attorney General intended to extinguish claims by plaintiffs he did not represent, here the so-called “Tier 3 Plaintiffs” who have what amounts to hybrid defined benefit and defined contribution plans. Even though they may seem to represent a small portion of total fund assets, their lack of a state guarantee (unlike those in the defined benefit plans) puts them in a first loss position. And demonstrating the seriousness of their claims, their attorneys have filed for what on a current basis (as in with updated interest) would be \$807 million of damages, penalties and interest on a single violation by one of the four hedge funds targeted in this case.

In a show of cheekiness, Coleman presented the settlement as \$227.5 million, when that figure included \$145 million of monies owned by the KRS pension funds that were improperly seized by KKR. The local press wised up to what was going on, including the possibility of a grotesque payout to crooked attorney Ann Oldfather, who after being fired by the original plaintiffs in the case, took their records and information to get hired by the Attorney General. What makes this situation even more offensive is that the earlier Attorney General and protege of Mitch McConnell, Daniel Cameron, who engaged Oldfather, was widely seen as taking up the case at such a late juncture solely to settle it cheaply so as to curry favor with these powerful Republican donors.

The Courier-Journal recapped the meager returns to pensioners and the possibility of an egregious payout to Oldfather:

The deal Cameron's office signed with Louisville lawyer Ann Oldfather's office after the initial case was dismissed set terms for fees those attorneys could collect once the lawsuit was settled: 20% of the gross recovery's first \$250 million; 15% of the gross recovery between \$250 million to \$1 billion; and 10% of the gross recovery past \$1 billion.

If the gross recovery is \$227.5 million — a figure that includes the \$145 million Kentucky had given to KKR (one of the four hedge funds in the case) that has been withheld as the litigation moved forward — then attorney fees would rise to \$45.5 million, a higher sum than the \$37 million in new money the state would receive. If the gross recovery does not include that \$145 million, attorney fees would reach \$16.5 million, with \$66 million in new funds going to the state,

The Attorney General had asked for the court to approve the settlement, with a hearing date of February 26. The Tier 3 Plaintiffs had asked either for a stay on their case to be lifted (appeals, which look unlikely to succeed, are pending) or to have their case go to mediation. As you can see from the short order below, Judge Wingate approved of the motion to proceed to mediation.

This development is fatal to the settlement. Recall that the moneybags had refused to come to terms with Daniel Cameron earlier because they were unduly confident that their big building, white shoe lawyers had the upper hand against the tenacious plaintiffs attorneys headed by Michelle Lerach. But their big fear is not simply the possibility of having to make a big payout, but of discovery confirming the depth of deceptiveness of their business practices, not just damaging their reputation but also potentially leading to other lawsuits.

Confirming our assessment, Michelle Lerach said in a statement:

In light of Judge Wingate's order, it is extremely unlikely that the Attorney General's settlement will go forward as currently attempted — if at all. The Court ordered our case to mediation and we intend to mediate with the hedge fund sellers to reach a real settlement. If that cannot be done, we will be able to go ahead and litigate our claims without any further interference from the Attorney General.

Another contact confirmed that this ruling represented a "crushing defeat" for Attorney General Coleman.

So a toast to the victors. May they continue to clear the considerable legal obstacles thrown in their path since 2017 to prevent this case from moving forward and the long-suffering Kentucky pensioners getting a measure of justice.

Update 8:15 AM EST: The Kentucky Lantern posted on Judge Thomas Wingate's order below. Because our recent posts on the settlement controversy covered the long and tortured history of the case, we skipped over much of that above. Those wanting more of a background will find a good high level overview in KY settlement with hedge funds delayed as judge orders mediation in state workers' lawsuit. This article did not clarify the point we stressed above, that the Tier 3 Plaintiffs were differently situated, among other reasons by virtue of not having a state guarantee, and Judge Wingate had ruled against the attorney general's attempt to include the Tier 3 Plaintiffs in his "occupy the field" plan (that ruling is being appealed, hence the stay mentioned in the order below).

Key bits from the Kentucky Lantern:

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Friday afternoon court order will delay and possibly jeopardize final approval of the recently announced settlement of a long-running lawsuit over controversial investments by Kentucky Retirement Systems in hedge funds more than a decade ago.

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COMMONWEALTH OF KENTUCKY

FRANKLIN CIRCUIT COURT

DIVISION II

CIVIL ACTION No. 21-CI-00645

TIA TAYLOR, et al.

PLAINTIFFS

v.

KKR & CO., L.P., et al.

DEFENDANTS

ORDER

This matter is before the Court upon Plaintiffs’ *Motion to Modify the January 3 Order to Permit Consideration of their Motion Directing the KKR-Prisma Defendants to Return KRS Trust Funds, Plus Interest and Penalty, in a Total Exceeding \$807 Million; Plaintiffs’ Motion to Refer their Breach-of-Trust Case to Mediation; and Commonwealth of Kentucky ex rel. Attorney General Russell Coleman’s Motion for Leave to be Heard Pursuant to KRS 15.020 in Opposition to the Taylor Four Plaintiffs’ Motion to Reconsider January 3, 2025 Order Denying Request to Lift Stay.* This matter was called before the Court on Wednesday, February 12, 2025, at 10:00 a.m. Upon review of the parties’ briefs and papers, and after being sufficiently advised, the Court hereby **DENIES** Plaintiffs’ *Motion to Modify the January 3 Order to Permit Consideration of their Motion Directing the KKR-Prisma Defendants to Return KRS Trust Funds, Plus Interest and Penalty, in a Total Exceeding \$807 Million; GRANTS* Plaintiffs’ *Motion to Refer their Breach-of-Trust Case to Mediation; and DENIES* Commonwealth of Kentucky *ex rel. Attorney General Russell Coleman’s Motion for Leave to be Heard Pursuant to KRS 15.020 in Opposition*

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Order Denying

to the Taylor Four Plaintiffs' Motion to Reconsider January 3, 2025 Order Denying Request to Lift Stay.

I. Plaintiffs' Motion to Modify the January 3 Order to Permit Consideration of their Motion Directing the KKR-Prisma Defendants to Return KRS Trust Funds, Plus Interest and Penalty, in a Total Exceeding \$807 Million

By Order entered January 7, 2025, the Court denied Plaintiffs' Motion to Lift the Stay and to Set Hearing and Briefing Schedule. Essentially, the Court found because there are a litany of appeals pending before the Kentucky Court of Appeals and the Kentucky Supreme Court directly related to the validity of Plaintiffs' claims, lifting the stay would not be prudent. Sometime after the January 7, 2025, Order was entered, the Court was notified that the Commonwealth and certain Defendants had reached a settlement in Franklin Circuit Court Civil Action No. 20-CI-00590 *Commonwealth v. KKR & Co., Inc., et al.* and Franklin Circuit Court Civil Action No. 24-CI-00354 *Commonwealth v. KKR & Co., Inc., et al.* Upon request of the Commonwealth and settling Defendants in those actions, the Court entered an Order setting a briefing schedule for objections to the settlement, and responses, to be filed. Plaintiffs have filed an objection in those actions. Nonetheless, Plaintiffs urge the Court to lift the stay given the contents of the settlement, which they believe (and the settling Defendants appear to agree) extinguishes their claims in this action. Certain Defendants¹ have filed an response in opposition to lifting the stay, specifically mentioning the "Global Settlement," which is set to come before the Court on a separate date. The Court understands the urgency Plaintiffs have to prosecute their action

¹ PAAMCO Prisma, LLC (formerly Pacific Alternative Asset Management Company, LLC), Prisma Capital Partners LP, and Blackstone Alternative Asset Management L.P., KKR Group Co. Inc. (formerly KKR & Co. L.P.), Henry Kravis, George Roberts, Jane Buchan, Girish Reddy, Michael Rudzik, Blackstone, Inc. (formerly The Blackstone Group Inc.), Stephen A. Schwartzman, and J. Tomilson Hill.

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and appreciate Plaintiffs abiding by the Court's stay. However, the stay must remain in place. There are still multiple appeals ongoing that require the Court to halt the prosecution of this action.² Accordingly, the Court must stand by its January 7, 2025, Order.

II. Plaintiffs' Motion to Refer their Breach-of-Trust Case to Mediation

Plaintiffs have requested the Court refer this matter to mediation. Defendants PAAMCO Prisma, LLC (formerly Pacific Alternative Asset Management Company, LLC), Prisma Capital Partners LP, and Blackstone Alternative Asset Management L.P., KKR Group Co. Inc. (formerly KKR & Co. L.P.), Henry Kravis, George Roberts, Jane Buchan, Girish Reddy, Michael Rudzik, Blackstone, Inc. (formerly The Blackstone Group Inc.), Stephen A. Schwartzman, and J. Tomilson Hill object to mediation believing there is nothing to mediate given the pending "Global Settlement" in Franklin Circuit Court Civil Action Nos. 20-CI-00590 and 24-CI-00354. Despite Defendants' stance that there is nothing to mediate, the Court disagrees, so the Court will grant Plaintiffs' request for mediation.

Accordingly, the parties are directed to agree on a mediator and schedule mediation within fifteen (15) days from entry of this Order. If the parties are unable to agree on a mediator, the parties shall tender to the Court three (3) suggested mediators and the Court will select the mediator. The mediation shall be conducted by March 14, 2025, unless an extension is granted by the Court. Counsel and each party (or designated representative with full settlement authority) are directed to participate in the mediation process in good

² The Court's January 7, 2025, Order noted that Plaintiffs' have the option of seeking a writ with the Kentucky Court of Appeals based on the Court's decision to stay this action. That option remains.

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faith, attending all session(s) scheduled with the mediator. The Court expects prompt notice of the mediation results.

Given the referral of this action to mediation, the Court notifies the parties that it will enter an Order in Franklin Circuit Court Civil Action Nos. 20-CI-00590 and 24-CI-00354 canceling the February 26, 2025, hearing and moving the hearing in that matter to March 26, 2025, at 10:00 a.m.

III. Commonwealth of Kentucky *ex rel.* Attorney General Russell Coleman's Motion for Leave to be Heard Pursuant to KRS 15.020 in Opposition to the Taylor Four Plaintiffs' Motion to Reconsider January 3, 2025 Order Denying Request to Lift Stay

On February 9, 2025, the Commonwealth filed the above motion seeking to share its opinion on lifting the stay in this action. Plaintiffs oppose the filing of the Commonwealth's motion and assert that it was not timely filed, the Attorney General does not have the right to intervene in private actions, and the motion is legally and substantively baseless.

Plaintiffs have correctly noted that Franklin Circuit Court Local Rule 4.01 provides, in relevant part, "[p]arties shall file notice, motions, and copies with the Clerk at least five (5) business days before the date of a hearing." FRANKLIN CIR. CT. R. 4.01. The Commonwealth's motion was filed on February 9, 2025, which was not five (5) business days before the February 12, 2025, hearing. Although the Rule permits the Court "discretion to grant a party leave to file memoranda later than the date for filing," the Court declines to exercise its discretion in this instance. *Id.* The Court has consistently invited the Commonwealth to move to intervene in this action, and the Commonwealth has declined the invitation. The underlying motion again does not seek intervention but still wishes to raise issues such as lack of standing—something Defendants have already raised, and this

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Delaware bill would limit investor lawsuits as companies threaten to leave the state

 [reuters.com/legal/delaware-bill-would-limit-investor-lawsuits-companies-threaten-leave-state-2025-02-18](https://www.reuters.com/legal/delaware-bill-would-limit-investor-lawsuits-companies-threaten-leave-state-2025-02-18)

Tom Hals

Elon Musk reacts, on the day he meets with Indian Prime Minister Narendra Modi at Blair House, in Washington, D.C., U.S., February 13, 2025. REUTERS/Nathan Howard/File Photo
Purchase Licensing Rights , opens new tab

- Bill limits shareholder lawsuits, access to internal records
- Companies consider leaving Delaware due to legal concerns
- State's corporate court has come under attack by Musk

WILMINGTON, Delaware, Feb 17 (Reuters) - Delaware lawmakers on Monday proposed changes to the U.S. state's widely used corporate law that would limit shareholder lawsuits after several high-profile companies said they might move their legal home to another state.

The bill sets out steps that corporate boards could take to insulate directors and controlling shareholders from litigation over alleged conflicts. The bill would also limit the kinds of internal records that shareholders can access, which they need to build their cases. The bill is sponsored by leaders of both parties in both houses of Delaware's state assembly.

Delaware's corporate law governs relations between company boards and their investors for around two-thirds of the S&P500 index. Companies tend to charter their businesses in the state for its stable law and well-respected courts and the fees those companies pay to the state generate around a third of Delaware's general budget revenue.

But several companies, including Meta Platforms (META.O) , opens new tab, Dropbox (DBX.O) , opens new tab and Bill Ackman's management company, recently have said they were moving or considering moving their incorporation out of Delaware, which prompted the bill, according to the sponsor, Delaware state Senator Bryan Townsend, a Democrat and senate majority leader.

"And it also comes at a time when you have a couple other jurisdictions in particular that are seeming to gain some traction with being viewed as legitimate alternatives to Delaware," Townsend told Reuters.

Texas has established a business court that is meant to rival Delaware's Court of Chancery for specializing in business and investor disputes. Elon Musk's Tesla (TSLA.O) , opens new tab and SpaceX moved their state of incorporation to Texas from Delaware after a Chancery judge last year ordered Musk's \$56 billion pay package from Tesla to be rescinded.

Townsend said he'd like to move quickly on the bill, which he said was drafted with input from the state's recently elected Governor Matt Meyer, a Democrat. The bill was not drafted by the state's bar association, which typically oversees changes to the state's corporate law.

Townsend said the bill would not change the case challenging Musk's pay, which is on appeal before the Delaware Supreme Court. "This has nothing to do with Elon Musk. And I'll note that this legislation is not retroactive," Townsend said.

Townsend also introduced a bill that asked the state bar association to prepare a report on awarding attorneys fees. Delaware judges have awarded several fees that were among the largest ever in the past two years.

In recent years, several corporate leaders who lost costly cases in the Court of Chancery have attacked the state's judiciary, most notably Musk. Another outspoken critic was Phil Shawe, who was embroiled in a long-running case over control of TransPerfect, a translation provider. Shawe has run ad campaigns in local media criticizing Chancery judges and was a leading proponent of Meyer's campaign for governor.

Several rulings in recent years have held controlling shareholders liable over deals that corporate lawyers thought were properly structured, fueling criticism that the state was becoming too favorable to shareholder lawyers.

State lawmakers took the unusual step last year of amending the corporate law in response to three rulings before those cases had even been appealed, which was widely criticized by academics.

Ann Lipton, a professor of corporate law at Tulane Law School, said Monday's bill would make shareholder litigation in Delaware "dramatically less successful."

The exact impact of that is unclear. Some experts argue shareholder lawsuits prevent the worst board room abuses and self-dealing. But others say litigation acts as kind of tax on companies that rarely results in much benefit for shareholders and that the real policing of corporate boards comes from institutional investors such as large pension funds.

However, the administration of Republican President Donald Trump may loosen federal securities regulations and place constraints on the ability of institutional investors to apply pressure to corporate boards. "That mechanism is failing at exactly the same time," Lipton said.

Reporting by Tom Hals in Wilmington, Delaware, Editing by Alexia Garamfalvi and Nick Zieminski

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

Delaware Decides Delaware Law Has No Value

 [businesslawprofessors.com/2025/02/delaware-decides-delaware-law-has-no-value](https://www.businesslawprofessors.com/2025/02/delaware-decides-delaware-law-has-no-value)

February 18, 2025



By Ann Lipton on February 17, 2025

I suppose it's gratifying that the proposed changes to Delaware law support the thesis of my new paper, *The Legitimation of Shareholder Primacy*. There, I argue, among other things, that Delaware imposes procedural limitations on managerial behavior that function more as a performance to the general public, to grant corporations a social license to operate, than as real constraints. So, of course, as soon as those limitations started to have even the tiniest bit of actual bite – and in an environment where the prospect of federal preemption is largely nil, and corporate power has reached the point where a social license to operate may no longer be necessary – managers threaten to depart the state, and Delaware proposes of package of statutory changes that undo certainly the last 10 years of Delaware jurisprudence, if not the last 50, in favor of a model of corporate self-policing.

The story actually begins last year, when, in response to the *Moelis* decision, Delaware rushed to amend its corporate code to add Section 122(18), permitting corporate-governance-by-contract. At the time, I asked – quite seriously – what is the value of the corporate form?

This is very much a debate that's been raging in academic circles for decades: is there value to the state-imposed rigidity of the corporate form, or should business forms be endlessly malleable according to the desires of corporate participants, so that really everything is reducible to an LLC?

Whatever the correct answer to that debate as a theoretical matter, with Section 122(18), Delaware came down firmly in favor of the argument that the corporate form *has no* inherent value; private ordering is everything, and we are, in fact, all LLCs now.

That said, one of the key distinctions between LLCs and corporations is fiduciary obligation: in LLCs they are waivable, in corporations they are not. Fiduciary obligations are, like the rigidity of the corporate form itself, a type of state regulation: They are a judicially-imposed limit on exploitative conduct by managers.

But Delaware's been eroding that form of regulation for quite some time, first with the adoption of 102(b)(7), then with 122(17), then with *Corwin* and *MFW*, and then with the expansion of 102(b)(7).

Still, fiduciary obligations seemed to make something of a comeback, when then-Vice Chancellor Strine set upon a multi-year project, culminating in *Marchand v. Barnhill*, to seriously examine the social and professional ties among directors as part of the independence inquiry.

So I suppose it was inevitable that the Delaware legislature would seek to undo that last vestige of regulation, as well as all other remainders.

In sum, the proposed amendments to Delaware law would:

1) Impose single trigger (disinterested director approval, *or* disinterested shareholder approval) cleansing for conflicted controller transactions *except* for going private ones, which would continue to require both sets (overrule *Match*)

2) Eliminate the "ab initio" requirement for cleansing (meaning, a controller could negotiate substantively before the protections are put into place)

As I have said in various spaces, given the demand requirement for derivative claims, I believe controlling shareholder transactions already have a single trigger cleansing requirement in most scenarios (as VC Fioravanti just demonstrated in *Trade Desk*); the only transactions where double trigger requirements do much work are for the very largest kinds of deals. So, these first two changes, would, as far as I can tell, have the effect of insulating transactions like the Paramount merger with Skydance.

3) Overrule *Match*'s requirement that special committees be completely independent; majority independence suffices

4) Redefine independence/disinterest to incorporate federal stock exchange standards, so that if the board certifies a particular director as independent under exchange listing standards, that determination presumptively controls, unless a plaintiff shareholder offers "substantial and particularized facts that such director has a material interest in such act or transaction or has a material relationship with a person with a material interest in such act or transaction."

5) Redefine the "entire fairness" inquiry to mean "the act or transaction at issue, as a whole, is beneficial to the corporation, or its stockholders in their capacity, as such given the consideration paid to or received by the corporation or its stockholders or other benefit conferred on the corporation or its stockholders and taking into appropriate account whether the act or transaction meets both of the following:

- a. It is fair in terms of the fiduciary's dealings with the corporation.
- b. It is comparable to what might have been obtained in an arm's length transaction available to the corporation"

6) Define controlling shareholder to mean someone with a majority of the voting power entitled to vote in director elections, *or* someone who has one-third of the voting power in a general director election, or power to elect directors who have a majority of board voting power, *and* has "power to exercise managerial authority over the business and affairs of the corporation."

Which translated means, you must at least have 1/3 of the voting power in a general election of directors before you can even be considered a controller, so, presumably, someone with a 122(18) contract to control almost all corporate functioning *other than* director selection would *not* be a controlling shareholder, so that's a roadmap for future 122(18) agreements;

7) Overrule *Sears Hometown* by providing that controlling shareholders can only be liable for loyalty violations

8) Limit Section 220 to cover only formal board materials, rather than emails and other documents where business may be conducted

9) Separately ask the Delaware Council of the Corporation Law Section to propose a bill to cap plaintiffs' attorneys fees.

Collectively, the changes represent a wholesale repudiation of Delaware's common law approach to lawmaking; instead, they most closely resemble the MBCA's rule-bound approach. Moreover, the changes, if adopted, mean it will be laughably easy, with a few incantations of magic words, to create the appearance of procedural regularity, while shareholder plaintiffs will be denied access to the information necessary to establish any procedural *irregularity*. At the same time, because fees will be capped for successful claims, plaintiffs' attorneys will be deterred from taking on the enormous risks associated with stockholder litigation.

What stands out for me is that Delaware could have proposed to eliminate shareholder litigation altogether. It would have been simpler, and more honest: a straightforward declaration that litigation does little to substantively protect shareholder value. That's not even a crazy position; it's certainly a vibrant debate among academics.

But rather than be so forthright, the proposal retains the *vener* of governance, to create the *appearance* that conflicts are being policed – but, with no actual substance to back it up. That is, of course, the thesis of my article. The law itself isn't doing any work except to launder managerial power.

One final point, for now: The proposed legislation says nothing about whether it applies to pending cases. If it *does* apply to pending cases, it could conceivably upend the *Tornetta* appeal, regarding Musk's compensation package.

Update: Reuters reports that Delaware state Senator Bryan Townsend says the bill is not retroactive, and so would not apply to *Tornetta*. I don't see that in the text, but we may get clarification along those lines. The analysis below was written before I saw the Reuters report.

Under the new legislation, Musk could not be considered a controlling shareholder, because he never had 1/3 of the vote. That alone wouldn't be enough to overturn McCormick's findings, though; she also concluded that the board was not independent, and shareholders were not fully informed, which meant a judicial determination of "fairness" was necessary.

The statute redefines independence, but again, I'm not sure that would matter to the *Tornetta* appeal: Under the new statute, listing standards presumptively control, but plaintiffs can rebut with specific facts demonstrating a lack of independence – and they may have those in *Tornetta* (I would say they surely do, but I can't be sure whether a "material relationship" under the statute means something different than it does at common law).

The proposed statute also explicitly contemplates that transactions may be *ratified* by a fully informed shareholder vote, which would seem to validate the *Tornetta* revote. But then again, the statute doesn't say anything about the *procedural stage* at which such a vote must be taken; what sunk Musk's "ratification" was, among other things, the fact that it occurred *post trial*. (A point I discussed at length in a *Shareholder Primacy* podcast).

But what I think has the most bite for *Tornetta* is the redefinition of "fairness." If *that* applies to the appeal – coupled with the unmistakable rebuke the statute is offering to the entire Delaware judiciary (and no, not just "two judges," but all of them, including Strine and his reinvigoration of the independence inquiry, and the Delaware Supreme Court's *Match* opinion) – *that* could change the *Tornetta* outcome.

That said, as I warned in my article, "The more freedom Delaware accords corporate managers, and the less scrutiny it applies to their transactions, the less there is for Delaware to, well, actually do." Delaware could wind up deregulating itself out of relevance entirely.

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Compare and Contrast

 10b5daily.com/2025/02/18/compare-and-contrast-9

February 18, 2025

NERA Economic Consulting and Cornerstone Research have released their respective 2024 annual reports on federal securities class action filings. As usual, the different methodologies employed by the two organizations have led to slightly different numbers, although they both identify the same general trends.

The findings for 2024 include:

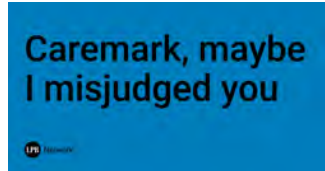
1. The reports agree that overall filings have stayed steady. NERA finds that there were 229 filings (matching the number of filings in 2023), while Cornerstone finds that there were 225 filings (compared with 215 filings in 2023). Filings involving *only* Section 10(b)/Rule 10b-5 claims for securities fraud are an increasing percentage of the overall filings. Cornerstone found that 198 of the 225 filings fit this description, the highest level on record. Relatedly, Cornerstone found that the number of federal and state 1933 Act filings decreased from 64 filings in 2022 to 32 filings in 2023 to 21 filings in 2024.
2. NERA found that filings against companies in the technology and healthcare sectors combined accounted for more than half of all filings, and the Second and Ninth Circuits accounted for 61% of filings (excluding merger objections and crypto unregistered securities cases).
3. Both reports agree that filings involving artificial intelligence (AI) claims are the fastest growing category. NERA and Cornerstone found that filings with AI-related claims more than doubled from 2023 to 2024 (NERA – 13 filings, Cornerstone – 15 filings).
4. NERA found that after excluding cases involving merger objections, crypto unregistered securities, or settlements of \$0 to the class, around 42% of settlements had a recovery of less than \$10 million, another 40% had a settlement between \$10 million and \$49.9 million, and 18% settled for \$50 million or more, largely mirroring the distribution of settlement values from 2023. The average settlement value in 2024 was \$43 million, a roughly 7% decline relative to the 2023 inflation-adjusted average settlement value of \$46 million.

The NERA report can be found [here](#). The Cornerstone report can be found [here](#).

Caremark, maybe I misjudged you

 [businesslawprofessors.com/2025/02/caremark-maybe-i-misjudged-you](https://www.businesslawprofessors.com/2025/02/caremark-maybe-i-misjudged-you)

February 15, 2025



By Ann Lipton on February 14, 2025

Lately, several media and news organizations have “settled” somewhat frivolous lawsuits filed by President Trump, raising suspicions in at least some minds that the settlements were a rather unsubtle form of bribery, intended to win Trump’s favor with respect to other aspects of their businesses.

I am not particularly knowledgeable about bribery laws but let us assume, for the moment, that if these settlements were, in fact, shams to funnel money to Trump in exchange for regulatory favors, that would be illegal under some law somewhere. And, given that Trump is, you know, president, I also assume that, to the extent those laws are *federal*, charges are unlikely to be pursued by federal authorities.

But Disney/ABC, and Meta – not X – are incorporated in *Delaware*. And Delaware makes it a breach of fiduciary duty for corporate managers to intentionally break the law. I’ve blogged about the doctrinal difficulties that *Caremark* creates for Delaware (and they’re discussed extensively in my new paper, *The Legitimation of Shareholder Primacy*, now forthcoming in the *Journal of Corporation Law*), but whatever the doctrine’s flaws, there remains the intriguing possibility that an enterprising shareholder might bring a lawsuit – or even just a books and records action – alleging that these corporate boards transferred valuable assets out of their companies for a corrupt purpose, in violation of their obligations to shareholders.

Now, that might be a tough claim to make, and there wouldn’t be much in it for the shareholders because the dollar figures themselves, at least in the Disney and Meta cases, are relatively small.

But now we have reporting that *Paramount* executives are angsty over whether to settle another one of Trump’s suits, and this situation has a little more meat. The claims are, to put it mildly, weak (that CBS deceptively edited an interview with Kamala Harris, which somehow caused \$20 billion of damages to Trump in Texas, in part because of a diversion of attention from Truth Social. In 2023, Truth Social reported \$300 million in assets, with a \$21 million loss, so man, that interview did a number on it).

(I will also point out that Trump is currently arguing that he cannot be named as a *defendant* in lawsuits involving Truth Social, because it would distract him from his duties as President. Being a plaintiff, apparently, poses no such threat).

Anyhoo, Trump brings these claims right as Paramount is seeking FCC permission to be bought out by Skydance, and, reportedly, Paramount has been mulling a settlement just to get the deal done. But this settlement might be a large one, and the merger itself contemplates leaving a number of public shareholders in place. Several such shareholders have already expressed dissatisfaction with the merger, and at least two are suing for books and records. For these shareholders, it would certainly be a sweetener if they could demonstrate that executives *violated the law* in connection with the transaction, and, in so doing, transferred money out the door that might otherwise have increased the company's valuation.

That possibility is, according to *WSJ*, weighing heavily on the minds of Paramount executives, who fear insurance might not cover their liability.

But may I venture an alternative interpretation? Many, both inside and outside of Paramount, have warned that settling this type of claim erodes press freedom. The prospect of *Caremark* liability – however dim – may actually function as an *excuse* for executives to reject a settlement they *don't want anyway*. That's a point that was made when Trump announced he'd be pulling back on FCPA enforcement: executives doing business abroad may *like being able to say* that American law prohibits bribery because it gives them an excuse not to bend to extortion. Right now, *Caremark* could serve a similar function for Delaware-incorporated firms.

(Trump could, I suppose, *pardon* everyone, which does raise the question whether *Caremark* liability attaches for pardoned criminal acts.)

And another thing: New *Shareholder Primacy* podcast is up! This week, Mike Levin and I talk about companies staying private longer, and about rational shareholder apathy. Available here at Spotify, here at Apple, and here at YouTube.

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Ann M. Lipton @annmlipton.bsky.social
guys i hate to disappoint a good narrative but the article is wrong, the shareholder lawsuit that was filed alleges that target misled investors about the risks of conservative backlash from overly liberal policies, not the other way around

James @takktakngames.bsky.social · 1d
Target's shareholders lost \$15 billion of net worth in their holdings of Target common stock when Target announced they were dropping DEI initiatives.



Target drops DEI initiatives and learns there are harsh consequences
The retailer is being sued after removing its diversity programs after President Donald Trump was elected.
@financymoo.com

February 17, 2025 at 3:49 PM · Everybody can reply

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Jake @jakesaiterego.bsky.social · 10h
This has been driving me nuts. The Florida police pension fund is not out here being like "actually we love DEI programs"

Cathy Gellis @cathygellis.bsky.social · 19h
That would explain the Florida plaintiff...

kevinwilliams @kevinwilliams.bsky.social · 18h
The article is also a mess. There is no financial data yet available that tracks the effect of the boycott for dropping DEI, which began end of January, when the retailer announced it was ending DEI initiatives.

Justin Haugens @justinhaugens.bsky.social · 14h
Plus the stock value drop was due to a sales call in November and the price has been slightly up since then.

Michael @mike4must.bsky.social · 18h
????????? What

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EXCLUSIVE MEDIA

Paramount Executives Ask: Could They Be Sued for Settling Trump's \$20 Billion CBS Lawsuit?

Media company executives fear liability from potential settlement paid before Skydance merger

By [Jessica Toonkel](#) [Follow](#)

Feb. 14, 2025 3:33 pm ET



The lawsuit focuses on how CBS edited a '60 Minutes' interview with former Vice President Kamala Harris. PHOTO: CBS NEWS/60 MINUTES

Paramount Global **PARA 4.53%** ▲ is wrestling with whether to settle President Trump's lawsuit against its CBS News unit, and how it might do so without exposing executives to future legal threats, such as accusations of bribery.

Company executives in recent weeks have talked about the risk that paying such a settlement could expose directors and officers to liability in potential future shareholder litigation or criminal charges for bribing a public official, according to people familiar with the conversations. Some executives have expressed an additional concern that such litigation may not be protected by director and officer insurance, some of the people with knowledge of the discussions said.

Paramount is awaiting regulatory approval for its merger with Skydance Media. Some executives have flagged the potential risk that if the company settles and the deal is approved in short order, the payment could be construed as a bribe, the people familiar with the matter said.

Some executives involved in the merger see settling the lawsuit, which is focused on how CBS edited a “60 Minutes” interview with former Vice President Kamala Harris, as a way to alleviate tensions with the Trump administration, people close to them said. At Paramount, some executives oppose the settlement and the precedent it might establish.

People involved in the merger have floated the possibility of Larry Ellison, who is close to Trump, and is the father of Skydance owner David Ellison, negotiating a deal with the administration that would allow the merger to go through in the near term, some of the people familiar with the discussions said.

A person close to the Ellisons said they are hesitant to close the deal with Paramount unless a settlement is reached.

The Paramount-Skydance deal has cleared other regulatory hurdles. On Thursday, the Securities and Exchange Commission approved Paramount’s information statement in connection to its registration filing for the merger, a key disclosure for investors. The European Commission also approved the proposed merger this week.

Trump’s lawsuit and the regulatory review of Paramount’s merger with Skydance are proceeding on different tracks. Federal Communications Commission Chairman Brendan Carr has said that a third-party news distortion complaint about the way “60 Minutes” edited the Harris interview could factor into the agency’s review of the merger. The FCC has authority over the Paramount-Skydance deal because it would involve the transfer of broadcast television licenses held by CBS.

Based on the third-party complaint, Carr is pursuing an inquiry into how CBS News handled the interview edit and demanded the company release the full transcript and raw footage, as part of the agency’s review of the merger. CBS last week published a full transcript of the Harris interview and said it showed the broadcast wasn’t doctored or deceitful.

Trump's lawsuit against CBS alleges that the network committed election interference by favorably editing portions of an interview with Harris, giving her an edge in her campaign for president. The president recently amended the suit to seek \$20 billion in damages, up from \$10 billion when he first filed it in the fall.

Trump alleges that CBS aired one version of the interview on "60 Minutes" and another version on its show "Face the Nation," each containing different answers about Israel. CBS has said it aired a more succinct version of Harris's interview on "60 Minutes."

Insurance policies for company directors and officers typically cover legal costs for individuals accused of "bad acts," such as criminal acts or bribery, unless they are found guilty or liable ultimately, said Bill Passannante, co-chair of the insurance recovery group at Anderson Kill. This would be the case for both criminal charges and civil shareholder lawsuits.

Still, he said, there is always the risk of an "unusual unicorn" case—in which the directors and officers are found liable or guilty in a final appeal, and thus aren't covered.

The consideration is different for Paramount than for other companies without major pending deals. Several media and technology companies have resolved outstanding lawsuits with Trump since the election, paying millions in legal settlements.

Disney in December settled a defamation suit Trump had filed against ABC News and anchor George Stephanopoulos over comments he made on air stating that Trump had been found civilly liable for raping writer E. Jean Carroll. A federal jury determined Trump was liable for sexual abuse.

Disney agreed to contribute \$15 million to Trump's presidential foundation or museum as part of the settlement, and to pay \$1 million in legal fees to Trump's lawyer.

Write to Jessica Toonkel at jessica.toonkel@wsj.com

Appeared in the February 15, 2025, print edition as 'Bribery Worries Shadow Trump, CBS Deal'.

Videos

J&J begins crucial battle over \$10 billion baby powder settlement

 [reuters.com/legal/jj-begins-crucial-battle-over-10-billion-baby-powder-settlement-2025-02-18](https://www.reuters.com/legal/jj-begins-crucial-battle-over-10-billion-baby-powder-settlement-2025-02-18)

Dietrich Knauth

By Dietrich Knauth

February 18, 2025 3:46 AM PST Updated 3 hours ago

A Johnson & Johnson banner is displayed on the front of the New York Stock Exchange (NYSE) in New York City, in New York City, U.S., December 5, 2023. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

- J&J seeks to resolve tens of thousands of lawsuits linking baby powder to ovarian cancer
- Judge to decide whether to approve deal or end J&J unit's bankruptcy
- J&J says deal has enough support to succeed after two previous failures

NEW YORK, Feb 18 (Reuters) - Johnson & Johnson (JNJ.N) , opens new tab faces a critical test on Tuesday over its \$10 billion proposal to end litigation alleging that its baby powder caused ovarian cancer, as it tries to convince a judge to sign off on its third attempt to resolve thousands of lawsuits through a subsidiary's bankruptcy.

U.S. Bankruptcy Judge Christopher Lopez in Houston will decide the fate of the company's latest Chapter 11 during a weeks-long court hearing weighing competing demands to approve the settlement or end the bankruptcy altogether.

J&J is attempting to use a subsidiary's bankruptcy to resolve lawsuits from more than 62,000 plaintiffs alleging its baby powder and other talc products were contaminated with asbestos and caused ovarian and other cancers, a claim that J&J denies.

Courts have rejected J&J's two previous efforts to resolve the talc litigation through a subsidiary's bankruptcy, but the company is trying again in a different bankruptcy court. It says the third effort can succeed where the others faltered because it now has votes showing a broad level of support for its settlement proposal.

The judge will listen to supporters and opponents of J&J's bankruptcy proposal in a marathon court hearing that will last until the end of February.

Lopez will consider evidence on a wide range of topics, including the validity of the votes that J&J gathered last year and whether such a wealthy company should be able to use a subsidiary's bankruptcy to protect itself from lawsuits.

J&J argues that bankruptcy offers a faster and fairer way to put money into the hands of cancer victims, who would otherwise face lengthy legal battles in a "lottery-like" court system that results in large verdicts for some plaintiffs and nothing for others.

Erik Haas, J&J's vice president for litigation, said in a statement that the bankruptcy proposal has "overwhelming support" from cancer victims and "affords claimants a far better recovery than they stand to recover at trial."

Opponents of the deal argue that the bankruptcy settlement should not bind those who do not like the terms and would prefer to take their chances in court.

By pushing the deal through a subsidiary's bankruptcy, J&J is trying to force women with ovarian cancer to accept lower settlement payments based on a deeply flawed vote, according to opponents.

The key witnesses in the hearing will include plaintiffs' lawyers who support and oppose the deal.

J&J has turned to bankruptcy to end the litigation, because U.S. bankruptcy law allows such a deal to bind claimants who would prefer to litigate their cases. A bankruptcy settlement would also prevent new talc lawsuits from being filed against J&J in the future.

Reporting by Dietrich Knauth, Editing by Alexia Garamfalvi and Bill Berkrot

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Class Action

Feb. 17, 2025, 9:50 AM PST

Costco Sheds PFAS Safety False-Ad Suit Over Kirkland Baby Wipes

By [Shweta Watwe](#)

Costco Wholesale Corp. convinced a federal judge to dismiss a proposed class action alleging its Kirkland Signature Baby Wipes were deceptively advertised as safe despite containing excessive per- and polyfluoroalkyl substances.

“‘PFAS’ is not a magic word that can be invoked to open automatically the doors to federal litigation,” Judge Richard Seeborg of the US District Court for the Northern District of California said Feb. 14.

- Seeborg said the complaint didn’t include enough of a basis to support a conclusion that the baby wipes have the kind of PFAS or enough of them to cause the alleged harms
- He dismissed the complaint without prejudice and gave the plaintiffs until Feb. 28 to file again
- Consumer product makers are facing an onslaught of litigation alleging they knew their products contained dangerous PFAS

The consumers are represented by Bursor & Fisher PA. Costco is represented by Arnold & Porter Kaye Scholer LLP.

The case is Bullard v. Costco Wholesale Corp. , N.D. Cal., No. 3:24-cv-03714, 2/14/25 .

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

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

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Class Action

Feb. 17, 2025, 11:43 AM PST

Bigelow Tea Buyers Get Class Status in USA-Made Deception Suit

By [Shweta Watwe](#)

- **Magistrate recommends two consumer classes based on tea type**
- **Warranty, fraud, misrepresentation claims won't get certified**

Consumers alleging R.C. Bigelow Inc. deceptively advertised its teas as "Manufactured in the USA 100% American Family Owned" should get class status for most of their claims, a magistrate judge recommended.

Classes should be certified for two groups of consumers for consumer protection claims, the judge recommended to the US District Court for the Eastern District of New York on Feb. 14.

The consumers alleged the label was false because part of the manufacturing process involves harvesting tea leaves outside of the US.

Magistrate Judge Steven I. Locke recommended that two classes of consumers, based on the type of tea purchased, should be certified for New York buyers who bought products between September 2019 and May 2022. The two groups are divided by whether the tea is based on *camellia sinensis* or an herbal varietal.

Locke rejected Bigelow's argument that determining who's in the proposed classes isn't possible because the labels were introduced in an ad hoc manner.

The disjointed label rollout "does not preclude a finding of ascertainability" because the class periods reflect the earliest date products with the label were shipped to New York and the last date on which products with the label were shipped, he said.

But Locke said the warranty, fraud, and misrepresentation claims shouldn't get certified as class actions because they require individualized proof.

The consumers are represented by Glancy Prongay & Murray LLP, Schneider Wallace Cottrell Konecky LLP, and The Wand Law Firm PC.

Bigelow is represented by Gordon Rees Scully Mansukhani LLP.

The case is *Newton v. R.C. Bigelow Inc.*, E.D.N.Y., No. 2:22-cv-05660, 2/14/25 .

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

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

Litigation

Feb. 18, 2025, 2:00 AM PST

Youth Climate Battle Seeks Alternative Path After Legal Setbacks

By Taylor Mills

- Youth climate case faces uncertain future after dismissal
- States with environmental rights offer more promising venues

The youth-led climate litigation, which once promised to break ground for environmental rights, is hitting judicial hurdles that have raised skepticism that the plaintiffs can make the case that federal climate policy is unconstitutional.

A federal judge in California earlier this week tossed one of the major cases alleging that the Environmental Protection Agency engaged in climate discrimination, calling the allegations made by nonprofit Our Children's Trust "simply not judicially cognizable."

The ruling indefinitely delayed the plaintiffs' hopes that the federal judiciary could stymie what they say is a worsening climate outlook that their expert witnesses said will disproportionately affect the legally protected class of minors.

As the legal battle enters its 10th year, court watchers say it's increasingly doubtful the nonprofit can convince a federal court that the short-term focus of energy, resources, and climate policy infringes on young people's future right to life, liberty, and the pursuit of happiness.

"Even the Obama and Biden administrations did not want the courts to be making climate policy in the way that these plaintiffs are seeking," said Michael Gerrard, executive director of the Sabin Center for Climate Change Law at Columbia University. "Under Trump, it'll probably move from opposition to ferocious opposition."

That's leading at least some groups to shift their focus to states that have codified environmental rights, like New York and Illinois.

"Where there was an environmental provision in the state constitution, these cases remain quite viable," Gerrard said.

Trump Hurdles

Julia Olsen, chief legal counsel for Our Children's Trust, maintains that the injuries her clients allege have stemmed from policies like emissions discount rates and natural gas export approvals that are provable and can be redressed by the court.

"It is fully within the power of a federal court to hear the evidence and look at that policy and say whether it's constitutional or not," Olsen said. "Some may say we will lose. I say we will win."

Our Children's Trust is considering appealing to the US Court of Appeals for the Ninth Circuit and plans to bring due process suits challenging the regulatory action set to unfold under President Donald Trump's "Unleashing American Energy" executive order.

The order directs agency leaders to expedite the permitting process for interstate energy infrastructure and eliminate the "social cost of carbon" calculations for greenhouse gas emissions.

The administration also is taking a stance opposing the youth climate litigation specifically.

The matter is "far beyond the type of matter traditionally resolved by American courts," the administration said in a brief urging the US Supreme Court not to take up one of the other major youth climate cases—*Juliana v. United States*—calling it "wholly meritless."

Washington attorney Sean Donahue of Donahue, Goldberg & Herzog said now isn't the time for ambitious climate initiatives, especially as the Trump administration focuses on scaling back the reach of bedrock environmental laws like the Clean Air Act and National Environmental Policy Act.

"The courts are more reactive," Donahue said. "Some of the skepticism that a lot of people have about the kind of ambitious federal suit that you see in *Juliana* is that it's asking federal courts to do something they don't traditionally do."

More Success in States

Lower federal courts tossed the youth climate group's cases, stating that future generations' climate injuries were too far removed from specific policy consequences.

In the face of those setbacks, states with environmental protection clauses in their laws and constitutions have become a hotbed for climate activism, as codified rights to clean air, water, and resources offer streamlined routes for lawsuits while federal courts wrestle over standing issues.

In December, the Montana Supreme Court handed a rare win to group of young plaintiffs, ruling that the state's constitutional right to a healthy environment includes upholding a stable climate when considering greenhouse gas emissions in project permitting.

Hawaii's top court also recognized a "life sustaining climate system" as a human right in upholding the state's rejection of a biomass power plant development in 2023.

And several other states—including Illinois, Massachusetts, Pennsylvania, and New York—have amended their constitutions to guarantee the right to a clean environment.

With the Trump administration expected to reduce or eliminate environmental justice initiatives, advocates see states as the new testing grounds for pushing climate rights language.

"At the state level where you have more flexibility, you have very different judiciaries, there's room for more experimentation and development," Donahue said.

The case is Genesis v. EPA , C.D. Cal., No. 2:23-cv-10345, 2/11/25 .

To contact the reporter on this story: Taylor Mills in Washington at tmills@bloombergindustry.com

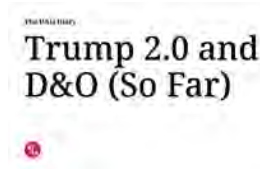
To contact the editors responsible for this story: Laura D. Francis at lfrancis@bloombergindustry.com;
Nicholas Datlowe at ndatlowe@bloombergindustry.com

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Trump 2.0 and D&O (So Far)

K [dandodiary.com/2025/02/articles/director-and-officer-liability/trump-2-0-and-do-so-far](https://www.dandodiary.com/2025/02/articles/director-and-officer-liability/trump-2-0-and-do-so-far)

February 17, 2025



By Kevin LaCroix on February 17, 2025

Posted in Director and Officer Liability



Last month, when I assembled my list of the Top D&O Stories of 2024, I not only designated the November 2024 election of Donald Trump to a second Presidential term as last year's top story but I also suggested that the advent of his second administration would likely be the top story of 2025 as well. We are now just four weeks into the Trump's second term, and it is clear that my prognostication about the impact of the new Trump administration is truer than I ever imagined and in ways that I never foresaw.

The purpose of this post is to try to compile in one place a list of the ways in which – at least so far and at least as far as we know – the early actions of the new Trump administration has already impacted or will impact the world of D&O liability and insurance.

I note at the outset that this list is almost certainly incomplete, because there have been so many changes and because the possible impacts from the changes are potentially so far reaching, it might not be possible to assemble a complete list in one place, at least given the constraints of the blogging format.

I also note at the outset that one challenge in trying to assemble this list is the problem of organization. Even arguably obvious ways to try to structure the various developments – such as, for example, in chronological order, or in order of importance – present their own difficulties. So rather than trying to impose order or structure that the circumstances may not support, I have tried to assemble the list in a way that makes sense to me.

DEI: Among President Trump's first acts of his second presidency was his issuance of two Executive Orders (here and here) designed to restrict diversity, equity, and inclusion (DEI) initiatives, particularly with respect to federal agencies, programs, contracts, and hiring. The executive orders, by their own terms, aim to target "illegal DEI." Among other things, the first of the two executive orders directs the Attorney General to compile a report within 120 days recommending actions to enforce "Federal civil-rights laws" and "encourage the private sector to end illegal discrimination and preferences, including DEI." (The two Executive Orders, it should be noted, are the subject of a court challenge.)

The anti-DEI actions have not been limited just to the White House itself. Among the many new policy statements issued by new Attorney General Pam Bondi after taking office was a February 5, 2025 memoranda in which the AG directed the Department of Justice's Civil Rights Division to "investigate, eliminate, or penalize companies in the private sector and educational institutions that receive federal funds" that maintain "illegal DEI preferences." (I think her use of the word "eliminate" was with reference to the supposed preference, not with respect to the companies themselves.) Other federal agencies have gotten into the act; indeed, the FCC has advised Comcast, the parent company of NBC News and Universal studios, that the agency is investigating DEI programs at the company. (The FCC has also broadly indicated that it intends to investigate DEI practices at other companies it regulates.)

Many companies appear to be acting in response to the administration's messages on DEI. To be sure, a host of companies – including Ford, Harley Davidson, and Walmart – had already announced they were dialing back their DEI programs even before last November's election. But now companies that had not previously acted are taking the initiative. Last week, Goldman Sachs announced it was dropping its DEI requirements for IPO company boards. Other firms that have recently announced a pullback on DEI initiatives include Disney and PBS.

The change in direction on DEI not only creates PR and political risks for companies. It also creates regulatory, investigative, and potential claims risks as well. The AG's anti-DEI statements were not just intended to send a message; her statements were also clearly meant as a threat — she specifically said that the DOJ's Civil Rights Division will "investigate" and "penalize" companies that maintain "illegal" DEI preferences. Private litigants undoubtedly will not be far behind; even in advance of the new Trump administration, activists had been bringing anti-DEI lawsuits, as discussed, for example, here. In light of the new climate under the Trump administration, these activists are likely to be further emboldened.

As detailed in the February 10, 2025, *New York Times* article entitled "Alarmed, Companies Ask: What is 'Illegal DEI?'" (here), these developments create uncertainty and risk. Companies, worried that their hiring, training, and advancement policies might be characterized as "illegal DEI" and attract regulatory actions or lawsuits, are resorting to "rainbow hushing" – that is, quietly dropping or rebranding their prior workplace efforts. One lawyer who counsels companies on employment issues is quoted in the article as saying "People are freaking out." Among other concerns, companies and their advisors are concerned that if companies pull back too far, it could look bad if the company is later sued for discrimination by protected minorities.

The bottom line is that the issues surrounding DEI have become perilous and uncertain. It seems probable that there will be regulatory and enforcement activity, and further litigation as well.

The SEC: Even before Trump took his oath of office for his second administration, it was apparent that there would be changes coming at the SEC. As I noted in my year-end roundup of D&O stories, Trump's designee as SEC Chair, Paul Atkins, is seen as likely to change many of the policies under of the agency's immediate past Chair, Gary Gensler. Indeed, Atkins has been called the "Anti-Gensler."

But even though Atkins's nomination has not yet been confirmed, changes are already afoot at the SEC. It is relevant that among President Trump's actions upon taking office for the second time was the issuance of yet another Executive Order (here), aimed at promoting the growth of cryptocurrencies and "eliminating regulatory overreach."

Consistent with the approach outlined in the Executive Order, the SEC has scaled back its Cryptocurrency Enforcement Unit, which had been staffed by 50 lawyers and other personnel. The agency has also formed a new Crypto Task Force, to be chaired by Commissioner Hester Pierce, to develop a crypto regulatory structure. Pierce's February 4, 2025 position paper on crypto (here) makes for interesting reading.

In addition, the agency's Republican commissioners have told lawyers at the agency that they need to seek permission from the politically appointed leadership before formally launching probes. Under the prior administration, the authority to launch formal investigations had been delegated to lower-level staff. The Commission had the right of refusal — something that it didn't always exercise.

There are a host of areas in which commentators have suggested that the SEC under the new administration will take a more restrained approach, as discussed in detail, for example, here. Many of these developments, to the extent likely to happen and all, seem likely to await Atkins's confirmation as the SEC's Chair.

But in the meantime, there have already been other developments in other contexts that also seem likely to affect the SEC's regulatory and enforcement approach, as discussed below.

Climate Change: Among other changes that commentators had predicted that the SEC might take under the new administration would be that it would either withdraw or non-enforce the SEC's new climate change disclosure guidelines, which were finalized in March 2024. The new guidelines are the subject of a court challenge in the Eighth Circuit. The SEC had previously stayed the effectiveness of the rules pending the outcome of the challenge.

Now, as discussed here, the SEC's litigation team has asked the Eighth Circuit to hold off scheduling oral argument in the court challenge. The SEC's action in the case comes in the wake of a February 11, 2025 directive from Acting Chair Mark Uyeda. Uyeda's statement summarized the objections to the guidelines that he and Commissioner Pierce had

previously stated in their dissents to the adoption of the guidelines. Among other things, Uyeda stated that he believes the guidelines are “deeply flawed and could inflict significant harm on the capital markets and our economy.”

In his February 11 directive, Uyeda went on to state that in light of changes in the composition of the commission, as well as the new administration’s action on regulations, the agency was requesting that the Eighth Circuit not schedule oral argument in the case, until such time as the agency can advise the court of its determination about its position in the litigation. (The sole remaining Democratic Commissioner, Caroline Crenshaw, dissented from this action.)

While it remains to be seen what will happen next, it seems likely that Uyeda’s interim action foretells the death knell for the SEC’s climate change disclosure guidelines. Many companies may welcome this development, as the guidelines were seen in many quarters as burdensome and as expensive to comply with.

However, the end of the SEC guidelines will not necessarily mean that companies will be entirely free of climate change disclosure obligations. Companies doing sufficient levels of business in the EU will be subject to the EU’s sustainability disclosure guidelines, and company’s subject to California’s disclosure requirements will also have to comply with the California disclosure guidelines. Not uncoincidentally, and as discussed in detail here, a federal district court recently dismissed two of the claims challenging California’s climate change disclosure requirements.

The Foreign Corrupt Practices Act: In yet another Executive Order issued on February 10, 2025 (here), President Trump has announced that, in order to “advance American economic and national security by eliminating excessive barriers to American commerce abroad,” his administration is “pausing” the enforcement of the Foreign Corrupt Practices Act (FCPA).

The Executive Order directs that during the 180 days following the order, the Attorney General is to cease any new FCPA enforcement actions, as well as to review existing actions in order to take “appropriate actions,” while at the same time the AG is to be reviewing policies governing investigations and enforcement of the Act. Future FCPA enforcement actions are to be governed by guidelines to be established by the AG after the 180-day period.

There are several things that are worth thinking about in connection with the administration’s action to pause the enforcement of the Act. The first, from the perspective of potentially targeted companies, FCPA enforcement actions are enormously costly to defend and can be expensive to settle. The second is that in recent years, FCPA actions have frequently targeted companies domiciled outside the U.S. but otherwise subject to jurisdiction in the U.S. On this latter point, the administration’s action could potentially be as beneficial to non-

U.S. companies – if not more so – than to U.S. companies. Another point that should not be overlooked in this context is that FCPA actions frequently trigger follow-on civil litigation, which can also be expensive to defend and settle.

All of that said, it should also not be overlooked, as pointed out in a post by Liz Dunshee on *TheCorporateCounsel.net* blog ([here](#)), that the Department of Justice is not the only agency with authority to bring enforcement actions under the FCPA. The SEC still has power to bring civil enforcement actions under the FCPA. In particular, the SEC enforces the books and records provisions of the FCPA, which are codified in the Securities and Exchange Act. It remains to be seen how the SEC's policies will align with those of the DOJ, particularly of the SEC's obligation to protect the interests of investors and markets.

For now, it is uncertain what will happen at the end of the 180-day period. The outcome of the pause is unlikely to be a return to the approach to FCPA enforcement in place prior to the current Trump administration. The approach the administration adopts at the end of the 180-day period could have significant impact on an important area of corporate risk and exposure.

The Department of Justice: As noted above, shortly after taking office, the new AG Pam Bondi issued a slew of statements in which she established a number of policy directives. Among other things, she set up a task force to investigate the “weaponization” of the Department of Justice. A complete list of Bondi's statements can be found [here](#).

Perhaps more importantly for purposes of this blog post, the AG also redirected DOJ resources to further the President's goals of attacking cartels and transnational criminal organizations by shifting the DOJ's priorities away from corporate enforcement to illegal immigration; transnational organized crime; cartels and gangs; human trafficking and smuggling; and protecting law enforcement personnel.

This shift in priorities toward the investigation of cartel and transnational criminal activity likely signals a shift away from corporate investigations – among other things with respect to FCPA investigations and enforcement. While all of this has yet to play out, it does seem as if white collar crime and financial crimes (at least if unrelated to cartel or criminal organizations) will figure less in DOJ investigation and enforcement under the current AG.

Other Regulatory and Administrative Changes: While the new guard at the SEC and at the DOJ has already signaled changes, with respect to some other federal agencies, the new administration has brought in the wrecking ball. Among other agencies that the Trump administration has moved to shut down the Consumer Finance Protection Bureau (CFPB), an agency that undoubtedly was unpopular with certain financial services companies, whether or not it was helpful in protecting the interests of consumers.

As detailed in a February 13, 2025 *New York Times* article (here), the administration has also moved to cut staff at the Equal Employment Opportunity Commission, the National Labor Relations Board, and the Small Business Administration, in ways that arguably may hobble these agencies ongoing and future activities. Other agencies that the administration has already signaled it may target include the Department of Education and the National Oceanic and Atmospheric Administration. Agencies that may be targeted next include the National Science Foundation, the Corporation for Public Broadcasting, the National Endowment for the Humanities, the National Endowment for the Arts, and the Federal Emergency Management Administration.

The Wall Street Journal has also reported last week that the new administration is considering consolidating the FDIC within the Department of Treasury and combining some of its regulatory functions with the Office of the Comptroller of the Currency.

While at this point some agencies that have been or may be targeted can be separately identified, the likelihood is that many if not most agencies will feel the impact of workforce reductions and other activities pursued the administration's new Department of Government Efficiency led by Elon Musk. Among the agencies already affected by these workforce reductions include the Energy Department, the Environmental Protection Agency, and the Agriculture Department.

All of these developments will not only significantly affect the functioning of the executive branch of the federal government, but it will also have a significant impact on everyone that interacts with the government, including businesses and their executives. Many companies have significant operations or other business dealings that involve or even depend on the federal government. The ongoing and likely future changes across the federal government could have a huge impact on many companies' business, operations, and financial results. To be sure, for many companies, these changes will be positive, as the changes could mean reduced regulatory oversight or diminished regulatory burdens – that is certainly one of the administration's aims. But for now at least the extent and impact of the change is uncertain. In this case, present change may represent both opportunity and risk.

Discussion

By any measure, there is a lot going on here. About the only thing that is certain is that there is more to come.

For companies trying to make sense of all of this, as well as everything else that is going on, these circumstances can be challenging – although, to be sure, there are a number of things here for companies to like. For example, the likely withdrawal of the SEC's climate change disclosure guidelines is likely to be popular in the C-suites of many companies (even if it turns out not to be a complete reprieve, owing to the applicability of other climate change

disclosure requirements). The FCPA enforcement pause will also be likely be welcome, as the threat of FCPA enforcement has long been criticized among company-oriented commentators.

The problem for many companies is that the various changes discussed above are only part of what is going on and perhaps even the least important part of the many changes that companies are having to deal with. For example, rapidly changing tariff and trade policies are creating a great deal of uncertainty for many companies, particularly those with significant multinational operations.

As the *Wall Street Journal* put it in a February 10, 2025 article discussing the impact on companies of the Trump administration's moves (here), while businesses were optimistic at the very beginning of the new administration, events since that time have "dented that optimism." As one commentator noted in the article, "there is just so much turmoil." In particular, tariffs (or the threat of tariffs) make it more difficult for some companies to operate and may be discouraging companies from making longer term investments.

I recognize that efforts to roll back regulation and free up businesses could have a positive impact on business and on the economy. That is certainly the intent. Anticipated tax cuts, which are yet to be announced, could have a further positive effect. We are after all only four weeks into the new administration and the full story has yet to emerge, much less to be told.

But whatever else you want to say, there is, at least for now, a lot of uncertainty. And with uncertainty comes risk. More importantly for purposes of this blog post, the kinds of macroeconomic factors involved can not only affect company's operations and financial performance, but they can also lead directly to corporate and securities litigation. We saw during and in the aftermath of the pandemic that factors such as supply chain and labor supply disruption, changing interest rates, and inflation led to securities lawsuits against a number of companies. Many of these same factors are or could be in play now.

The one thing that is sure is that for the immediately foreseeable future, things are going to continue to change, and to do so rapidly. For professionals whose job it is to keep a handle on the liability exposures of companies and their executives, that means that we are all going to have to be checking in regularly and assessing what has changed. Buckle up, it is going to be quite a ride.

'Biggest Breach' Since 'Watergate'?: Elon Musk Among Defendants Named in New Privacy Suits Targeting DOGE

 [law.com/nationallawjournal/2025/02/14/biggest-breach-since-watergate-elon-musk-among-defendants-named-in-new-privacy-suits-targeting-doge-](https://www.law.com/nationallawjournal/2025/02/14/biggest-breach-since-watergate-elon-musk-among-defendants-named-in-new-privacy-suits-targeting-doge-)

Kat Black

What You Need to Know

- Two new privacy lawsuits targeting Elon Musk and the government taskforce he leads, DOGE, were filed against the OPM and the Treasury Department this week.
- At least 15 cases involving DOGE have been documented by The New York Times.
- The two privacy complaints, filed by federal workers and government beneficiaries, are the only DOGE-related claims on record that are seeking damages in addition to injunctive relief.

Two new privacy class actions targeting the newly minted Department of Government Efficiency (DOGE), the Elon Musk-led executive branch task force tasked with slashing federal spending, were filed in Washington, D.C. federal court this week.

The plaintiffs contend that Musk, the Tesla CEO and billionaire at DOGE's helm, and other DOGE representatives illegally obtained access to the personal sensitive information—including names, addresses, Social Security numbers and health insurance details—of "millions" of federal workers and government beneficiaries from the U.S. Office of Personnel Management (OPM) and the U.S. Department of the Treasury.

Federal workers backed by Tycko & Zavareei and McGillivray Steele Elki sued the OPM, three OPM executives, the Treasury Department, Treasury Secretary Scott Bessent and U.S. Federal Chief Information Officer Gregory Barbaccia under the Privacy Act of 1974 on Feb. 11. The firms referred to Musk and other DOGE representatives as "hackers" and declared that the defendants' "failure to protect government employees' privacy is the biggest breach of American trust by political actors since Watergate."

A day later, Washington, D.C.-based firm Mason brought a claim on behalf of all Americans "who receive money from the federal government" against Elon Musk, Bessent, the OPM and the Treasury Department under both the Privacy Act and, against Musk, the Computer Fraud and Abuse Act, a cybersecurity bill that prohibits unauthorized computer access.

According to the complaints, Elon Musk was granted access to data maintained by the Treasury Department, the Bureau of the Fiscal Service and OPM in late January. The suit accused DOGE of using "sensitive agency information" in "ways that suggest Defendants'

willful, intentional, and flagrant disregard of Plaintiffs' rights and basic security best practices," alleging that DOGE has "fed sensitive data from across the U.S. Department of Education into artificial intelligence software to probe the agency's programs and spending." On Feb. 8, shortly before the suits were filed, U.S. District Judge Paul A. Engelmayer issued a preliminary injunction to prevent DOGE from accessing the Treasury Department's central payment system after 19 state attorneys general sued Donald Trump in New York federal court.

"Frankly, we have never seen such blatant and purposeful sharing of protected information," said Sara Faulman, partner at McGillivray Steele Elkin, in an interview.

"Every federal worker trusted the government to keep their private information safe and secure. And instead, the government simply handed over access to that information to people without training, without proper security clearance and without legal authority to access the data."

She added that the plaintiff class—which includes "every single federal worker, past, present and those that applied and provided OPM with information covered by the [Privacy Act] statute"—is entitled to the actual damages lost as a result of the "breach" or a minimum of \$1,000 in statutory penalties, "whichever is greater."

A litigation tracker published by The New York Times documented at least 15 DOGE-related actions filed shortly after the inauguration of President Donald Trump, whose administration launched DOGE with an executive order on Jan. 20.

The two privacy class actions, filed in the U.S. District Court for the District of Columbia, number among the few DOGE-related complaints that were not brought on behalf of labor unions and are the only two seeking damages in addition to injunctive relief.

Gary Mason, founding partner at Mason, noted in an interview that the Computer Fraud and Abuse Act allegation against Musk was a novel claim in the privacy actions against DOGE.

"The other thing that's different about our case ... is that we have a much broader class" that applies to "basically every taxpayer who's had a financial interaction with the federal government," he said.

According to the White House executive order, the "U.S. DOGE Service Temporary Organization," which is not an official government agency, was contracted to "[modernize] Federal technology and software to maximize governmental efficiency and productivity" and will be dissolved effective July 4, 2026.

Musk and biotech entrepreneur Vivek Ramaswamy, who helped develop the task force and was originally slated to co-lead DOGE before withdrawing from it in January, pledged in a Nov. 2024 op-ed for The Wall Street Journal to cut \$500 billion in annual government spending.

In a joint media appearance with Trump this Tuesday, Musk claimed that DOGE was already addressing "billions and billions of dollars in waste, fraud and abuse" in the government but provided few other details. On Thursday, Musk demanded in a speech to the World Governments Summit in Dubai that the U.S. "delete entire agencies" from the federal government. Per its official website, the agency said it will provide "receipts" of the savings achieved by DOGE's cost-cutting measures "no later than Valentine's Day."

On Thursday, 14 state attorneys general sued Musk, DOGE and Trump in D.C. federal court, alleging that the creation of DOGE and Musk's appointment violated the Constitution. U.S. District Judge Jeannette Vargas, who presides in the U.S. District Court for the Southern District of New York, is scheduled to weigh a potential extension of the preliminary injunction against DOGE and Musk on Friday.

"We don't know what we don't know," said Mason. "Nobody knows what's going on with Elon Musk and DOGE and, exactly, to what extent the data has already been abused and misused and made more vulnerable. And that's kind of thing that we're going to find out during discovery. That's what people are absolutely terror-stricken about—just having unauthorized parties get access to the confidential information that they're not supposed to have access to."

Representatives for Musk, the White House, OPM and the Treasury Department did not immediately respond to requests for comment.

This action was surfaced by Law.com Radar, which delivers real-time alerting on new litigation across more than 2,600 state and federal courts. Click here to get started and be first to act on opportunities in your region, practice area or client sector.

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The Big Law Firms Litigating Against the Trump Administration

 [law.com/nationallawjournal/2025/02/14/the-big-law-firms-litigating-against-the-trump-administration/](https://www.law.com/nationallawjournal/2025/02/14/the-big-law-firms-litigating-against-the-trump-administration/)

Abigail Adcox

What You Need to Know

- At least seven Big Law firms are involved in litigation against the Trump administration.
- Lawsuits are challenging funding cuts to health research, gender-affirming medical care, immigration services and the USAID.
- In a lawsuit filed this week, Wilmer is representing a group of fired inspectors general.

A group of more than a half-dozen Big Law law firms have emerged in recent weeks in leading litigation against the Trump administration, including in lawsuits over the firing of top government officials and cuts to federal funding.

Wilmer Cutler Pickering Hale and Dorr; Hogan Lovells; Jenner & Block; Ropes & Gray; Gibson, Dunn & Crutcher; Arnold & Porter Kaye Scholer; and Perkins Coie are among the law firms that have signed on to represent plaintiffs in ongoing suits against the administration in recent weeks.

All the firms have strong litigation or policy practices, some of which have litigated prior White House administrations. Some firms are pursuing the cases pro bono, while others are not.

The appearance of private law firms in cases against the Trump administration has drawn scrutiny from Trump adviser Elon Musk this week. "Which law firms are pushing these anti-democratic cases to impede the will of the people?" the Tesla CEO wrote Tuesday on X, without naming any firm.

Wilmer was one of the latest firms to join litigation, representing eight former inspectors general who were fired by Trump last month in a lawsuit filed this week. The lawsuit argues that their firings were illegal and they should be reinstated, according to a complaint.

The complaint was filed by Seth Waxman, co-chair of Wilmer's appellate and supreme court litigation practice. Waxman was previously the solicitor general in the Clinton administration.

Jenner & Block and Hogan Lovells, alongside the ACLU and Lambda Legal, has filed a lawsuit in Maryland federal court seeking to block Trump's executive orders ceasing federal funding for gender-affirming medical care to children and 18-year-olds. On Friday, a Maryland district judge granted the plaintiff's request for a temporary restraining order.

Meanwhile, three separate lawsuits have been filed against the Department of Health and Human Services and the National Institutes of Health's cuts to research funding. One of the suits was brought by Democratic attorneys general from 22 states, while the other two were filed by groups represented by Clement & Murphy and Jenner & Block and Ropes & Gray, respectively. Paul Clement from Clement & Murphy is serving as lead counsel along with Jenner & Block in representing the Association of American Universities and two other associations in one of the suits.

A Massachusetts district judge has granted a temporary restraining order blocking the research funding cuts.

For its part, Gibson Dunn filed a lawsuit this month on behalf of several organizations who provide legal services to immigrants, including D.C.-based Amica Center for Immigrants Rights, after the Justice Department cut funding for their programs in response to an executive order.

Separately, Arnold & Porter has filed a lawsuit on behalf of a coalition of global health and international business groups, challenging the Trump administration's shuttering of the U.S. Agency for International Development. Plaintiffs in the case include the Global Health Council, Management Sciences for Health and the Small Business Association for International Companies. On Thursday, a district judge in Washington, D.C., partially granted a request for a temporary restraining order.

Perkins Coie, meanwhile, is backing a suit seeking to overturn Trump's executive order banning military service by transgender persons. Perkins Coie, which is working on the case pro bono alongside the Human Rights Campaign Foundation and Lambda Legal, filed the suit on behalf of a group of openly transgender service members and one would-be service member whose plan to enlist in the Marine Corps is blocked by the ban.

The firms involved in ongoing litigation against the Trump administration either did not respond to a request seeking comment or declined to comment.

In total, dozens of lawsuits have been filed against the Trump administration since last month. Big Law firms, small firms and legal organizations are all involved in the legal fights.

Democracy Forward, Citizens for Responsibility and Ethics in Washington, and the National Security Counselors law firm are among the legal organizations that have spearheaded lawsuits against the Trump administration.

However, it's not the first time, and it won't be the last, that large law firms join suits against the White House. For instance, in 2018 during the first Trump administration, Gibson Dunn sued the U.S. State Department on behalf of the Center for Reproductive Rights as part of

the group's effort to unearth details of the Trump administration's alleged changes to regularly issued government human rights reports.

During the Obama administration, Jones Day was involved in constitutional challenges to the Affordable Care Act.

While a group of big law firms is litigating against the Trump administration, some law firms have cozied up to it or are gaining influence in Washington through newly nominated partners.

Sullivan & Cromwell has been hired to represent President Donald Trump in his appeal of his New York criminal conviction. And at least 11 Big Law partners, including those at Wilmer and Gibson Dunn, have been nominated by President Trump to work in the executive branch—pending Senate confirmation.

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Trending

Corporate Deal

EasyPark Group, a provider of digital parking and mobility solutions, has acquired Parkopedia, a company for connected car services and mobility data aggregation. Financial terms were not disclosed. Vitruvian Partners, Verdane and Searchlight Capital Partners supported the acquisition. A Paul, Weiss, Rifkind, Wharton & Garrison team advised Vitruvian with a team led by partners Roger Johnson and Andreas Philipson. Counsel information was not available for EasyPark. Counsel information for London-based Parkopedia was not immediately available.

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Trump's Exiting Government Lawyers Swamp DC Firms With Resumes

By Tatyana Monnay

- Resumes flowing to firms from IRS, FTC, CFPB attorneys
- 'Supply is already outweighing demand,' one recruiter said

Big Law firms in Washington, D.C., are being inundated with resumes from lawyers frozen out of their government jobs.

"We're seeing probably at least double the amount of usual applicants," said Haley Lelah, global director of talent acquisition and integration at McDermott Will & Emery. "This is definitely a unique situation."

Resumes are flowing from lawyers who have worked at the Federal Trade Commission, the Consumer Financial Protection Bureau, and Internal Revenue Service, said Kristin Koehler, managing partner of Sidley Austin's DC office. "There's high numbers of them and really extraordinary talent that's out on the market right now," she said.

President Donald Trump's ousting of federal employees, including agency attorneys, has created the pool of talent turning to the private sector. Lawyers are leaving US agencies in droves by force or voluntarily after the new administration shifted agency priorities, froze hiring and slashed spending.

The Trump administration's firings in the early weeks of his return to the White House span the federal government, from the CFPB to the Department of Housing and Urban Development and the US Forest Service. They include Biden-era Justice Department holdouts in top prosecutor roles in Baltimore and Seattle to DOJ officials who worked on investigations into Trump's actions following his 2020 election loss.

Around 500 employees at the Federal Deposit Insurance Corp. accepted the administration's deferred resignation offer. "So many people are feeling so unsettled," said Dan Binstock, a partner at recruiting firm Garrison & Sisson, who's been a legal recruiter for over 20 years. "It's like nothing we've ever seen before and we're still trying to wrap our heads around it too."

Justine Donahue, a partner at recruiting firm Macrae, said many of her clients are looking to leave government because of job insecurity or fear they may soon be targeted by Trump. "Every recruiter, every networking person, every firm is seeing exponentially more," she said.

The unprecedented number of people hitting the job market at one time is advantageous for law firms, said Stephen Springer, managing partner of legal recruiter Major Lindsey Africa's DC office. But the legal operations have limited needs for lawyers straight out of government, he said.

"There's only so many dollars that they can put forward to people that are highly skilled, and will probably be very successful in the private sector, but don't carry an immediate book of business with them," Springer said.

Prominent firms have already begun making additions to their DC outposts. McGuireWoods added four Washington partners before the election and Latham & Watkins picked up the US co-head of A&O Shearman's energy practice, Scott Cockerham, in Washington in September.

But many DC law firms lack positions for many of the lower-profile career attorneys leaving their government gigs. "Supply is already outweighing demand," Macrae's Donahue said.

Washington is known as the lawyer capital of the country. Only the New York metropolitan area has more attorneys than the 48,000 lawyers working in the DC region, according to US Bureau of Labor Statistics.

Law firms are looking to be strategic in their recruitment from the pool of federal candidates. They want people who hold valuable experience that is difficult to cultivate in the private sector.

McDermott is looking to scoop up talent in areas including healthcare, white collar, and privacy work, Lelah said. The wave of increased job interest has prompted the firm to take a go-slow approach to make sure it doesn't miss anything, she said.

"Making sure—because it's constantly evolving—that we're not making a short-term decision when we don't have all the information," Lelah said.

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

To contact the editors responsible for this story: John Hughes at jhughes@bloombergindustry.com; Chris Opfer at copfer@bloombergindustry.com;

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As Trump shakes Justice Department, deeply conservative prosecutors head for exits

 [reuters.com/world/us/trump-shakes-justice-department-deeply-conservative-prosecutors-head-exits-2025-02-15](https://www.reuters.com/world/us/trump-shakes-justice-department-deeply-conservative-prosecutors-head-exits-2025-02-15)

Jack Queen, Mike Spector, Luc Cohen, Sarah N. Lynch

Item 1 of 2 Donald Trump in the Oval Office, Washington, D.C., February 12, 2025.

REUTERS/Nathan Howard

[1/2] Donald Trump in the Oval Office, Washington, D.C., February 12, 2025.

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- Prosecutor Sassoon quit rather than drop case against NYC mayor
- Sassoon is member of conservative Federalist Society
- Her exit illustrates tensions between traditional Republican legal movement and Trump

NEW YORK, Feb 15 (Reuters) - President Donald Trump's drive to shake up the U.S. government drove out a rising star in conservative legal circles: A career federal prosecutor who once clerked for the late Supreme Court Justice Antonin Scalia.

Danielle Sassoon, tapped to lead the Manhattan federal prosecutor's office on Trump's second day in office, quit on Thursday rather than go along with a Justice Department order to drop a criminal corruption case against Democratic New York Mayor Eric Adams.

The department ordered the case dropped, citing the city's approaching November mayoral election and saying that prosecuting Adams could interfere with his ability to assist with a crackdown on immigration, a top Trump priority. Trump has said he did not personally order the charges against Adams dropped.

The resignation illustrated the tensions between the traditional U.S. conservative Republican legal movement and Trump's desire to exert far more direct control of the federal government, challenging standards of prosecutorial independence that have stood for a half century.

Beyond shaking up the criminal justice system that Trump believes was turned against him during his years out of power, he has vowed to shutter Cabinet departments, succeeded in installing a defense secretary through the narrowest possible Senate margin and challenged constitutional rights that have stood for more than 150 years.

Trump's sweeping assertions of executive power during his first weeks back in office appear headed for showdowns at the U.S. Supreme Court where conservatives hold a majority, but it remains an open question whether or how much the justices might act to check his authority.

Sassoon, 38, a member of the deeply conservative Federalist Society who was installed as acting U.S. Attorney in Manhattan on January 21, was one of at least a half-dozen Justice Department employees to resign over the Adams order.

Another who stepped down, according to a source familiar with the matter, Assistant U.S. Attorney Hagan Scotten, also had a conservative legal pedigree, having clerked for Supreme Court Chief Justice John Roberts and Justice Brett Kavanaugh, prior to his elevation to the high court during Trump's first term.

Ilya Somin, a libertarian legal scholar who is also a member of the Federalist Society, said Acting Deputy Attorney General Emil Bove's directive to drop the Adams case was reflective of a shift in the nature of U.S. conservatism over the past decade that has shown less regard for the Constitution.

"There are disagreements between those who care about rule of law values, and those who are willing to subordinate themselves to other considerations," said Somin, a law professor at George Mason University. "This sets a dangerous precedent."

Trump's pick for attorney general, Pam Bondi, in her first day in office said that Justice Department lawyers who refuse to advance the administration's legal arguments could be fired.

Bove, Trump's former personal criminal defense lawyer who once served in the U.S. attorney's office in Manhattan, wrote that Sassoon and the other prosecutors had violated their oaths of office in failing to follow instructions.

"In no valid sense do you uphold the Constitution by disobeying direct orders implementing the policy of a duly elected President," Bove wrote.

REJECTING 'POLITICALLY ADVANTAGEOUS' MOVES

Sassoon wrote in a letter to Bondi that her responsibility as a prosecutor was to enforce the law impartially.

"That includes prosecuting a validly returned indictment regardless whether its dismissal would be politically advantageous, to the defendant or to those who appointed me," Sassoon wrote.

Scotten, who also resigned, did not respond to a request for comment.

The resignations evoked comparisons to the "Saturday Night Massacre" in 1973, when senior Justice Department officials resigned after refusing President Richard Nixon's order to fire the special counsel investigating the 1972 break-in by Republican operatives at the Democratic headquarters at the Watergate complex in Washington.

Randy Barnett, a professor at the Georgetown University Law Center, said Bove's concern that the corruption case was hindering Adams' ability to address public safety was adequately explained.

Sassoon "was refusing to execute a lawful command by her superior in the DOJ as required by DOJ procedures. This is what happens when you do that," Barnett said. "It's perfectly reasonable for Main Justice to take control of their subordinates."

Adams, a Democrat who has pleaded not guilty to charges he accepted bribes from Turkish officials, has leaned toward Trump in recent months.

In her letter to Bondi, Sassoon criticized Bove for suggesting the indictment be dismissed while leaving open the possibility of reviving it later. She said that amounted to an implicit threat of future prosecution if Adams did not help Trump on immigration enforcement.

Alex Spiro, a lawyer for Adams, has denied any "quid pro quo."

In accepting Sassoon's resignation, Bove wrote that he was taking the extraordinary step of referring her, Scotten and another prosecutor on the case for investigations into possible misconduct.

'UNDER THE THUMB'

The Justice Department under Trump has also suggested it would seek to criminally prosecute city and state officials who try to interfere with the administration's immigration crackdown.

Paul Tuchmann, a former federal prosecutor who handled public corruption cases, said Bove's referrals for investigation sent a signal that everyone at the Justice Department is "under the thumb" of Bove.

"If you do anything that's not exactly what he wants, you're going to be punished regardless of whether or not what he wants is appropriate or ethical," said Tuchmann, now a partner at law firm Wiggin and Dana.

The fallout from the Adams case is far from over.

In his letter to Sassoon, Bove wrote that the Justice Department in Washington, D.C., was taking over the case from the Southern District of New York, long known for its autonomy. During Trump's first term, the office brought criminal cases against people in Trump's orbit.

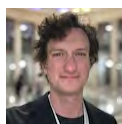
For now, Sassoon's former deputy, Matthew Podolsky, has taken over her former role. Further interventions by Trump appointees could spark more resignations at the office, legal experts said.

"This is a moment of truth for career prosecutors inside SDNY," said former federal prosecutor Michael Weinstein. "I'm not so sure we've seen the end of resignations or protests just yet."

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Reporting by Jack Queen, Mike Spector and Luc Cohen in New York and Sarah N. Lynch in Washington; Editing by Scott Malone and Alistair Bell

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Jack Queen
Thomson Reuters

Legal correspondent specializing in politically charged cases.



Mike Spector
Thomson Reuters

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

Luc Cohen



Brad Heath
@bradheath.bsky.social

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The top criminal prosecutor in the U.S. attorney's office in Washington quit today, citing pressure by the Trump administration to open what she viewed as an improper criminal probe of a federal contract.

ca.news.yahoo.com/senior-u-pro...

By Sarah N. Lynch

WASHINGTON (Reuters) - The top federal prosecutor who supervised criminal cases at the Washington D.C. U.S. Attorney's office resigned on Tuesday, citing what she described as an improper demand by Trump-appointed officials to launch a criminal probe and pursue an asset freeze.

In a letter to the interim U.S. Attorney Ed Martin reviewed by Reuters, the office's criminal chief Denise Cheung wrote that President Donald Trump's administration had ordered her to investigate a government contract awarded during Joe Biden's administration and pursue a freeze of the recipient's assets.

(Reporting by Sarah N. Lynch; Editing by Chizu Nomiya)

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The prosecutor said the evidence the Trump administration wanted to use to open the investigation came from the deputy attorney general's office, which is unusual.

She said that neither request was supported by the evidence, which she said she was provided with by the Deputy Attorney General's office.

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528





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The request that prompted the prosecutor to resign came from D.C.'s interim U.S. attorney, Edward Martin. He's already facing bar complaints over his role in dismissing criminal charges against a Jan. 6 rioter he also represented as a defense lawyer.

[www.reuters.com/world/us/top...](https://www.reuters.com/world/us/top-trump-prosecutor-in-dc-dropped-federal-case-against-capitol-rioter-he-represented/)



Top Trump prosecutor in DC dropped federal case against Capitol rioter he represented

As President Donald Trump moved last month to free the people who stormed the U.S. Capitol, his newly appointed top prosecutor in Washington put his ...

www.reuters.com

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Class Action

Feb. 18, 2025, 2:15 AM PST

Trump's Pick for Top Benefits Cop Viewed as Plaintiffs' Bar Foe

By [Austin R. Ramsey](#) and [Lauren Clason](#)

Deep Dive

- **Outspoken insurance executive a critic of plaintiffs' bar**
- **Industry sees friend, trial attorneys fear a corporate shield**

President Donald Trump's nominee to lead the government's private-sector benefits enforcer is a fierce critic of "frivolous" class-action litigation against employers, and he wants regulators to take a side by reigning in the plaintiffs' bar.

Management liability insurance executive Daniel Aronowitz has been selected to head up the US Labor Department's Employee Benefits Security Administration, according to a White House document obtained by Bloomberg Law. If confirmed by the Senate, he would take charge of an agency overseeing millions of workplace health, retirement, and welfare plans covering nearly 153 million employees.

Aronowitz has made his career insuring plan administrators against legal threats filed by workers and retirees. That could come in use as the Trump administration charts a new, unconventional course for EBSA to serve as a regulatory backstop in the courts, protecting businesses against threats from the inside, benefits attorneys and industry leaders told Bloomberg Law.

"I hope his nomination indicates a shift in thinking that the DOL is the appropriate body to police these programs and assist in reining in some of the more problematic actions that are simply encouraging employers to avoid certain benefits," said Allison Wilkerson, a partner representing employee benefit plans at McDermott Will & Emery LLP in Dallas.

The number of class actions charging employers with violating strict fiduciary conduct standards under federal benefits law has snowballed over the last decade, reaching an all-time post-pandemic high in 2020 and remaining elevated ever since. Recent novel legal strategies advanced by trial attorneys have targeted companies for the way they use plan forfeitures, allegedly risky pension de-risking, and supposedly excessive fees paid by health and retirement plan sponsors.

Regulators have struck a largely impartial stance on rising private-sector litigation, despite calls from the regulated community to "take seriously the existential threat that these class-action lawsuits represent," said Michael Hadley, a partner at Davis & Harman LLP who lobbies on behalf of plan sponsor industry groups, insurance companies, and major institutional asset managers.

"We desperately need their help to get the courts to enforce appropriate pleading standards and reduce the pressure on plan sponsors to settle and pay off the class action lawyers," Hadley said. "What the Trump administration is saying with this pick is that the era of class-action abuse is coming to an end."

Unusual Background

Aronowitz's insurance background is a departure from recent EBSA chief resumes, which have been filled almost exclusively with substantial Washington experience or direct involvement in employee benefit plan operations.

Despite a short stint representing insurance companies for an Am-Law 100 firm, Aronowitz has spent most of his career carving out a niche market uniquely focused on the Employee Retirement Income Security Act. He currently serves as president of ENCORE Fiduciary, a Virginia-based insurer specializing in ERISA fiduciary liability insurance.

Colleagues say his background has shaped him into a proud advocate for plan sponsors who feel isolated against growing legal threats. Among a pool of tight-lipped, white-shoe firm partners and lobbyists usually nominated for the top spot at EBSA, Aronowitz's experience has made him an uncharacteristically outspoken critic of the plaintiffs' bar in routine blog posts and court filings.

"The Department of Labor is missing in action," he wrote in a post on his "Fid Guru" blog in September. "By not focusing on the key issues where they actually have legislative authority, they are allowing plaintiff lawyers to regulate the key fiduciary duties for retirement and health plans in America. With the DOL abdicating its role to regulate the fiduciary standard of care for ERISA-covered plans, we are at the mercy of profit-seeking plaintiff lawyers."

That approach would better recognize EBSA's authority that it can act as an arbiter in private-sector disputes, said Brad Campbell, a partner at Faegre Drinker Biddle & Reath LLP who served as the nation's top benefits regulator at EBSA under former President George W. Bush.

EBSA has substantial leeway to pull regulatory controls that would more clearly outline fiduciary responsibilities and lay out a defense plans can use to protect themselves, Campbell said. A more robust amicus program could also aid courts in determining what normal plan operations look like.

In addition to the blog post, Aronowitz penned a US Supreme Court amicus brief urging the justices to establish clearer pleading standards in a case examining the ease with which private-sector plaintiffs can bring lawsuits.

Concerns Over Pick

Aronowitz's background also gives some attorneys for multiemployer plans pause, given the rifts that exist between employers and third-party administrators like insurance companies. Aronowitz entered the plan benefits insurance world by specializing in multiemployer, government, and union-brokered plans, said John Colis, president of Euclid Program Managers, the managing general agency that helped Aronowitz set up his first fiduciary liability insurance company in 2011.

Plaintiffs' firms are concerned that Aronowitz would exclusively shield corporate interests to the detriment of plan participants and beneficiaries the agency is designed to protect. He declined to comment directly on his nomination pending Senate confirmation.

"ERISA stands for the Employee Retirement Income Security Act," said Cassie Springer Ayeni, who represents plaintiffs in ERISA benefits challenges as president of Springer Ayeni. "It's in the preamble that it's designed to protect employees and employee benefits, not employers."

Aronowitz has used his blog to level attacks against trial lawyers as "copycat minions" of well-known plaintiffs' attorney Jerome Schlichter, who pioneered a successful series of retirement fees lawsuits. He's argued that excessive litigation has chilled new plan adoption and stifled innovation.

EBSA's leader during the Biden administration, Lisa M. Gomez, said she understands Aronowitz's focus on protecting plans, but hopes he will be open-minded.

"There are definitely, many, many true examples of where things are going wrong and where participants need to be protected," she said.

To contact the reporters on this story: Austin R. Ramsey in Washington at aramsey@bloombergindustry.com; Lauren Clason in Washington at lclason@bloombergindustry.com

To contact the editors responsible for this story: Genevieve Douglas at gdouglas@bloomberglaw.com; Jay-Anne B. Casuga at jcasuga@bloomberglaw.com

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Abandoning FCPA Would Endanger Ethical Shield for US Companies

- *Cadwalader attorney says Trump order could harm companies*
- *Companies will be less protected from unscrupulous practices*

With an executive order halting enforcement of the Foreign Corrupt Practices Act, the Trump administration suspended a law that long regulated corporate corruption and imposed significant penalties on bribery.

The modern FCPA leveled the playing field by instituting an effective tariff on foreign corporations engaged in corruption. With its global reach, the FCPA helped facilitate billions of dollars in settlements for the Treasury while bringing to heel foreign corporations that engage in bribery—enforcement that significantly benefits US corporations.

Beyond its financial advantages, the FCPA has served as a shield for corporations and their employees that want to conduct business ethically. Before the FCPA's enactment, corporations may have been strong-armed into corruption to stay competitive. That landscape changed significantly over the last couple of decades.

In 1992, as a young federal prosecutor in Atlanta, I handled my first FCPA case involving an informant from the Lockheed Corp. reporting alleged corruption related to the Egyptian parliament. At the time, the FCPA was rarely enforced, with modest sanctions that pale in comparison to today's standards. Even the federal agent by my side and I were only vaguely familiar with the statute. Lockheed eventually pleaded guilty to one count of conspiring to violate the FCPA, agreeing to the biggest FCPA fine of that time: \$21.8 million in criminal fines and \$3 million in civil penalties.

The FCPA was truly isolated regarding anti-corruption laws in those days, with no equivalent statute in any other country. US companies were placed at a competitive disadvantage because they faced legal and financial consequences for engaging in bribery, while their foreign competitors could continue to pay their way into securing contracts.

The 1995 Lockheed settlement heightened international awareness of the FCPA's power and global reach, likely contributing to the adoption of the Anti-Bribery Convention by the Organization for Economic Cooperation and Development two years later. With this, the FCPA was no longer an isolated initiative in corporate accountability—it had prompted other countries to establish their own anti-corruption frameworks and look to the US to pave the way for a coordinated global fight against corporate corruption.

The early 2000s ushered in a new era of global anti-corruption enforcement, with the UK, France, and Germany, among others, establishing their own anti-bribery laws. But they looked to the US to spearhead enforcement on a transnational scale.

In the 2008 case, Siemens, the German conglomerate and a competitor of US companies, agreed to pay a record-breaking \$800 million to US authorities for conduct that took place mainly in Germany and other foreign nations.

The Department of Justice and Securities and Exchange Commission worked with the Munich public prosecutor's office. The collaboration demonstrated that using the FCPA in conjunction with the cooperation of foreign nations—motivated by a combination of legal obligations, diplomatic pressure, and domestic anti-corruption efforts—could help hold foreign companies accountable and deliver significant financial penalties to the Treasury.

The FCPA compelled German authorities to investigate and prosecute one of their own corporations, but it also proved that no major foreign corporation was beyond reach regardless of its home country's enforcement posture.

In the last 20 years, the FCPA has evolved from an obscure US statute focused on US corporations to a dominant force in global corporate accountability, holding foreign corporations to the same standard as their US competitors. Through amendment and aggressive enforcement, the FCPA has become an inescapable statute for any corporation seeking to operate in the global economy. The jurisdiction of DOJ prosecutors, by virtue of corporations availing themselves of US capital markets, can reach nearly any major corporation regardless of its home country.

The world's largest foreign companies—most of them competitors of US corporations—adjusted to the FCPA's standards. Those that didn't found themselves on the hook for massive penalties.

Nine out of the 10 largest FCPA sanctions in history have involved foreign corporations—including Airbus SE (\$3.9 billion), Odebrecht SA (\$3.5 billion), Petrobras (\$1.8 billion), Siemens (\$1.6 billion), Ericsson (\$1 billion), Telia Company (\$965 million), Mobile Telesystems (\$850 million), VimpelCom Ltd. (\$795 million), and Alstom (\$772 million)—with billions of those dollars being paid directly to the Treasury. The lucrative settlements from foreign corporations that engaged in corruption make the statute more than just an anti-corruption tool and government revenue generator. It's essentially a tax or tariff on foreign corporations that seek to do business corruptly to the disadvantage of their US competitors.

The FCPA has provided a bulwark against the pressure of corruption and incentivized corporations to refuse bribery without fear of losing contracts to less scrupulous competitors. The leveling of the playing field allows US corporations to win based on merit. Without such safeguards as the FCPA, US businesses will be left to compete in a global marketplace where bribery, not merit, could dictate success. How can they say no when our president signals yes?

It's entirely appropriate for President Donald Trump to reflect on the utility and impact of the FCPA on US corporations. However, by halting FCPA enforcement, employees of US corporations will be less protected from unscrupulous foreign government officials pressuring them to make payments, and US taxpayers deprived of potentially billions of dollars in fines.

As an effective instrument of US power and global influence, the FCPA has ensured that foreign corporations may not avail themselves of US capital markets without fear of prosecution for corrupt practices that harm US competitors. Abandoning the FCPA would harm rather than help US companies, leaving them in a Wild West of competition-by-bribery.

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Author Information

Martin Weinstein is partner in Cadwalader's global litigation group where he leads global compliance, investigations, and enforcement. He was previously a Department of Justice trial attorney and an Assistant US Attorney for the Northern District of Georgia.

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To contact the editors responsible for this story: Melanie Cohen at mcohen@bloombergindustry.com; Jessie Kokrda Kamens at jkamens@bloomberglaw.com

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Feb. 14, 2025, 2:00 AM PST

By Katie Roof

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Photographer: Patrick T. Fallon/Bloomberg

A reckoning that has been looming for years is becoming painfully tangible. In 2021 more than 354 companies received billion-dollar valuations, thus achieving unicorn status. Only six of them have since held IPOs, says Ilya Strebulaev, a professor at Stanford Graduate School of Business. Four others have gone public through SPACs, and another 10 have been acquired, several for less than \$1 billion. Others, such as the indoor farming company Bowery Farming and AI health-care startup Forward Health, have gone under. Convoy, the freight business valued at \$3.8 billion in 2022, collapsed the following year; the supply chain startup Flexport bought its assets for scraps.

Some startups feel like the “rug has been pulled out from under them,” says Sam Angus, a partner at the law firm Fenwick & West. “The fundraising reality has shifted.”

Welcome to the era of the zombie unicorn. There are a record 1,200 venture-backed unicorns that have yet to go public or get acquired, according to CB Insights, a researcher that tracks the venture capital industry. Startups that raised large sums of money are beginning to take desperate measures. Startups in later stages are in a particularly difficult position, because they generally need more money to operate—and the investors who’d write checks at billion-dollar-plus valuations have gotten more selective. For some, accepting unfavorable fundraising terms or selling at a steep discount are the only ways to avoid collapsing completely, leaving behind nothing but a unicorpse.

The fundraising market for startups began to sour in 2022 when, among other things, the Federal Reserve raised interest rates seven times after a decade of historically cheap money. These rate increases led to cost-cutting and industrywide layoffs, a trend that peaked in the first quarter of 2023, according to data provider Statista. Some companies that had been focused on growth shifted their goal to near-term profitability to reduce their reliance on venture capital.

The remaining optimists can hope that something will spark a new round of techno-enthusiasm, or that a Lina Khan-less Trump administration will goose the acquisition and IPO markets. But Greg Martin, founder and managing director at Archer Venture Capital, says that for many unicorns the only—albeit unlikely—hope is for the market to go crazy again. “Unless we have another irrational valuation environment created by zero interest rates” like we had in the pandemic, he says, many of these zombie unicorns are “going to wind up in the graveyard.”

To contact the author of this story:

Katie Roof in Los Angeles at kroof1@bloomberg.net

To contact the editor responsible for this story:

Joshua Brustein at jbrustein@bloomberg.net

Anne Riley Moffat

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Securities Law

Feb. 18, 2025, 10:03 AM PST

Matt Levine's Money Stuff: The Unicorns Are Zombies

By Matt Levine

Zombie unicorns

Somewhat surprisingly, the phrase “zombie unicorn” does not appear in the Money Stuff archive. “Blood unicorn,” [sure](#), in [Greek even](#). “Vampire unicorn,” [once](#). “Ghost unicorn” [too](#). “Decacorn,” [absolutely](#). “Centicorn,” [yes](#). “Double eagle unicorn,” [for some reason](#). But here’s the first “zombie unicorn,” [from Bloomberg’s Katie Roof](#):

A reckoning that has been looming for years is becoming painfully tangible. In 2021 more than 354 companies received billion-dollar valuations, thus achieving unicorn status. Only six of them have since held IPOs, says Ilya Strebulaev, a professor at Stanford Graduate School of Business. Four others have gone public through SPACs, and another 10 have been acquired, several for less than \$1 billion. ...

Welcome to the era of the zombie unicorn. There are a record 1,200 venture-backed unicorns that have yet to go public or get acquired, according to CB Insights, a researcher that tracks the venture capital industry. Startups that raised large sums of money are beginning to take desperate measures. Startups in later stages are in a particularly difficult position, because they generally need more money to operate—and the investors who’d write checks at billion-dollar-plus valuations have gotten more selective. For some, accepting unfavorable fundraising terms or selling at a steep discount are the only ways to avoid collapsing completely, leaving behind nothing but a unicorpse.

Also a first for “unicorpse.”

“Private markets are the new public markets,” I like to say around here, and this does fit with that thesis. Here are some things that used to be approximately true of US public companies:

1. Sometimes they needed to raise money from investors, by selling stock, to invest in building their businesses.

- 2. Sometimes their stocks went up; other times, though, they went down.
- 3. While obviously companies would *rather* sell stock at a high price than a low price, they had a tendency to do the opposite: When things were good and the money was rolling in, they had no need to raise money, so they didn’t sell stock (and in fact would buy it back); when things were rough, they needed money and had to sell stock at low prices.

Over time, though, US public markets shrank, and public companies now tend to be bigger, more mature and more steadily profitable than they used to be. Meanwhile private markets grew, and it became easier for companies to raise large quantities of capital while remaining private. Now they mostly go public, not to raise money, but to let their early investors and employees cash out their stock, and even that is [negotiable](#) . Companies used to go public to raise capital, and then periodically returned to the market to raise more capital, at fluctuating stock prices. Now companies raise capital privately, and then go public mostly to [do stock buybacks](#) .

But even in private markets, the same basic business realities apply:

1. Companies sometimes need to raise more money.

- 2. Sometimes their stocks are up, and other times they are down. Oh their stocks don't necessarily *trade* in public markets with real-time prices but, you know, sometimes the business looks more valuable and sometimes it looks less valuable. Sometimes the quarterly results aren't as good as the company expected, or investors have lost enthusiasm for its sector, or interest rates are up so valuations are down.

"The stock market went down so companies have stopped raising money" would be an odd thing to think about public markets, and it's an odd thing to think about private markets. Though private companies and investors do think it. Roof:

Many startups, though, were built to chase growth with little concern for near-term profitability in their early years, assuming they could continue fundraising at increasing valuations. In many cases, that formula no longer works. Fewer than 30% of the unicorns from 2021 have raised financing in the past three years, according to data provided by Carta Inc., a financial technology company working with startups. Of those, almost half have done so-called down rounds, where investors value their companies at lower levels than they'd received in the past.

Celebrity video greeting service Cameo, for example, once had a valuation of \$1 billion, but it raised money last year at a 90% discount, according to a person familiar with the matter who asked not to be named when discussing confidential information. Financial tech company Ramp has raised two sizable rounds since early 2022 at valuations below the \$8 billion it got three years ago.

In the best-case scenarios, startups can use capital from down rounds to recover their footing. Contractor software business ServiceTitan Inc., for example, raised money with unfavorable financial terms in 2022, only to exceed that value when it went public in 2024. It now has a market cap of \$9.4 billion, in line with its peak private valuation of \$9.5 billion in 2021.

But job cuts and down rounds can also kick off a vicious cycle. Startups are generally selling investors on stories about momentum, which becomes harder to do once they've decided to trade their ambition for fiscal discipline. For employees, a major financial upside of a startup gig is the chance to earn equity; once a company's value starts dropping, workers with other options tend to start leaving.

"Private stocks only go up" can't be true, but it is the foundation on which a lot of private-market fundraising and recruiting is built, and when it breaks down it causes trouble.

Robot unicorns

You know where startup fundraising is still good? [Artificial intelligence](#) :

OpenAI co-founder Ilya Sutskever is raising more than \$1 billion for his startup at a valuation of over \$30 billion, according to a person familiar with the matter – vaulting the nascent venture into the ranks of the world's most valuable private technology companies. ...

[Safe Superintelligence] focuses on developing safe AI systems. It isn't generating revenue yet and doesn't intend to sell AI products in the near future.

"This company is special in that its first product will be the safe superintelligence, and it will not do anything else up until then," Sutskever told Bloomberg in June. "It will be fully insulated from the outside pressures of having to deal with a large and complicated product and having to be stuck in a competitive rat race."

A very stylized version of Sutskever's story is that he left OpenAI after losing \$86 billion. Oh, not really, but (1) Sutskever played a key role in briefly [firing](#) OpenAI Chief Executive Officer Sam Altman, (2) OpenAI's valuation, immediately before Altman was fired, was apparently \$86 billion and (3) OpenAI's valuation, during the brief period during which Altman was fired (he was quickly unfired), was [arguably zero dollars](#) . So you could make the case that Sutskever destroyed \$86 billion of corporate value, at which point he had to leave.

You know what I think about that! I have [often argued that](#) it is good for your career to lose a billion dollars: You'll lose your *job*, sure, but you'll have an easy time getting your next job, because people will think things like "you must be good if someone trusted you with \$1 billion" and "you must take big swings if you lost \$1 billion" and "you must have learned something from losing \$1 billion." I think of this mainly in terms of *traders* at financial firms, but it also seems to be true of tech founders; people still love giving Adam Neumann money.

And it is possibly *most* true in AI? OpenAI is constantly spinning out lavishly funded startups whose main promise to investors is "we will be less commercial than OpenAI." OpenAI's valuation *now* is something like \$260 billion, and some [portion of that](#) comes from Altman running around worrying about how his company will bring about the end of human civilization or render money obsolete. If you invest in OpenAI, you get the thrill of danger: Anyone can lose your money, but Altman offers you a small exciting chance of *wiping out money entirely*. Sutskever's pitch is obviously different – unlike Altman, he's explicitly promising *not* to make any money before he gets to superintelligence – but if you like Altman's pitch, this is in some ways the more extreme form.

Speaking of OpenAI

OpenAI is, right now, a nonprofit organization that controls a for-profit subsidiary that has outside investors. The outside investors have been promised various shares of the future profits of the subsidiary, but the nonprofit's board controls the business and has no fiduciary obligations to the investors. OpenAI would [like to reorganize itself](#) as a more normal company, so that it can raise more money from outside investors. The outside investors, OpenAI has said, want "conventional equity and less structural bespokeness," and converting to a normal company would give them that. There seem to be two aims here:

1. OpenAI would like to stop selling weird capped interests in future profits, and start selling normal *stock*. There is a bigger and deeper market for normal stock than there is for weird capped profit interests, and OpenAI would like to tap that. To do this, it wants to convert all of its existing ownership to stock: Existing investors would convert their weird capped profit interests into X% of OpenAI's stock, for some X, and the remaining (100 - X)% of the stock would be held by the OpenAI nonprofit. And then the company could sell more stock, diluting the existing shareholders, including the nonprofit.

- 2. OpenAI arguably spooked investors a bit when its nonprofit board briefly fired Altman. Or not; I mean, the valuation pretty quickly recovered. But investors arguably *should* be a little spooked by the idea of investing tens of billions of dollars in a company at a \$300 billion valuation when the board of directors (1) has no fiduciary duties to the investors and (2) could somewhat whimsically crater the value of the company. "Our current structure does not allow the Board to directly consider the interests of those who would finance the mission," says OpenAI, in a way that suggests that that's *bad*. It is trying to change that.

The simple fix is to make X less than 50: You give the nonprofit a stake in the newly reorganized company that is less than 50%, and then the company is no longer controlled by the nonprofit board. It is controlled by some normal corporate board with fiduciary duties to investors. The nonprofit has some economic ownership in the business, but not control.

There are problems with this approach. One problem is that the nonprofit can't just *give up* its control of the business; it has to receive fair compensation for it. The compensation can be in the form of stock in the for-profit company, and OpenAI and its investors and advisers all seem to think that the fair compensation here is in fact less than 50% of the stock. (I have seen the number 25% reported.) After all, OpenAI has already promised the bulk of its medium-term profits to outside investors, so arguably the nonprofit's residual claim is worth less than 50%. Still there is an intuitive objection to this calculation, summed up by [Elon Musk's lawyer](#): "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?" Going from absolute control over OpenAI to a 25% stake seems wrong.

The other problem with this approach also involves Elon Musk: He [wants to buy the company](#), or at least, he has lobbed in a bid to buy the company, or at least, he has lobbed in a bid to buy the nonprofit's stake in the company. (It's all a little murky.) If the nonprofit board (1) wants to advance its mission of building safe artificial intelligence for the benefit of humanity and (2) uh, worries about Elon Musk, it will want to maintain the power to say no to Musk. It won't want a for-profit corporate board saying "Musk is offering more money than we'd get elsewhere, we'd better take the deal." But with only a 25% ownership stake, the nonprofit won't be able to stop a deal.

And so the Financial Times reports:

OpenAI is considering granting special voting rights to its non-profit board in order to preserve the power of its directors, as the \$157bn start-up fends off an unsolicited takeover bid from Elon Musk.

Chief executive Sam Altman and other board members are weighing a range of new governance mechanisms after OpenAI converts into a more conventional for-profit company, according to people with direct knowledge of the discussions.

Giving the non-profit's board outsized voting power would ensure it retained control of the restructured company and was able to over-rule other investors including existing backers such as Microsoft and SoftBank.

While no firm decisions have been made, special voting rights would also ensure OpenAI can fight off hostile bids from outsiders such as Musk. The billionaire made a surprise \$97.4bn cash bid for the assets held by the non-profit, including its controlling stake in the start-up's for-profit subsidiary.

Special voting rights could keep power in the hands of its non-profit arm in future and so address the Tesla chief's criticisms that Altman and OpenAI have moved away from their original mission of creating powerful AI for the benefit of humanity.

I mean, right, obviously you could give the nonprofit a special share class that carries, say, 25% of the economic ownership but 75% of the votes. That solves many of the problems: It allows OpenAI to issue normal shares and have a normal board with normal fiduciary duties to investors, but it leaves final control in the hands of the nonprofit board whose duty is to humanity, and who can say no to Musk.

On the other hand, a nonprofit board having ultimate control over the business is one of the problems that this conversion was meant to *solve*? The investors, I would have thought, were nervous about a nonprofit board having too much ability to vaporize the value of their investment; giving the nonprofit a minority stake would reassure investors. Giving it voting control is marginally less reassuring. OpenAI wants to signal to investors that, when it takes their money, it will try to make more money for them. But not if it means selling to Elon Musk.

More egg buyers than egg sellers

If you are a farmer selling eggs to a grocery store, you probably have some sort of long-term supply contract specifying the eggs you will supply and the price you'll get paid. But if you happen to have some extra uncontracted eggs, you can sell them in the egg spot market. Similarly, if you are a grocery store, you probably get your eggs from a farmer under a long-term contract, but if you need some extra eggs you can go to the spot market. Or if you're a farmer who owes a lot of eggs under a long-term contract, but you don't have enough eggs to deliver (for instance because bird flu has wiped out some of your flock), you can buy eggs in the spot market to fulfill your contract.

These days the price of eggs is up and the spot market is pretty one-sided. The Wall Street Journal reports on the Egg Clearinghouse:

The Egg Clearinghouse, or ECI, is little known outside the industry: It operates an online marketplace that allows participants to place bids on eggs listed for sale and see the results of trades. Only ECI members—farmers and egg buyers—are allowed to trade.

Lately, there are a lot more buyers than sellers using the “Wall Street of Eggs” with bird flu roiling the poultry market. And that is after last year marked the company's busiest, trading over 2.6 billion shell eggs and 39 million pounds of egg product valued at more than \$600 million.

ECI represents a sliver of the broader egg market—less than 5%—but plays a crucial role in providing eggs for those in need or having trouble getting them, and how they are priced. ...

Most of the roughly 110 billion eggs laid by U.S. hens are contracted to commercial customers, ending up in places such as a Kroger supermarket, a Waffle House or a hotel breakfast buffet. Terms of those contracts aren't public. ...

[Alan] Munroe said when he became ECI president three years ago, the egg market was relatively balanced. On any day, there were about 50 farmers offering eggs and around 60 bids for them.

One day in early February, Munroe said there were roughly 10 suppliers offering eggs and 200 bids from buyers.

“I think some people run off and think that everyone's price gouging,” said Munroe.

I have to say. We have [talked a few times](#) about Venture Global LNG Inc., a hilarious liquefied natural gas company that (1) raised a lot of money to build its plant by entering into long-term fixed-price supply contracts with customers, promising them its output once its plant was operational, (2) built the plant, (3) started producing LNG, (4) noticed that LNG prices had spiked because of among other things Russia's invasion of Ukraine, (5) said "oh no the plant is not *quite* finished yet, it's not really operational, a few bugs to work out," (6) did not deliver LNG on those long-term contracts and (7) instead sold the LNG that it produced on the spot market at much higher prices. The customers complained and sued but, man, that's a funny and lucrative trade. (Apparently shipments will [start in April](#) .) Anyway if you are a farmer who promised eggs to Waffle House under a long-term contract and are now trying to get out of that contract to sell the eggs on the lucrative spot market, do let me know.

Libra

We [talked last week](#) about a memecoin issued by the Central African Republic. I wrote:

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

But that can't really be right, can it? A memecoin is an electronic token that you sell to people for money and that carries no promises: It's not redeemable for anything, it has no cash flows, it's not legal tender, it's just a token that people can buy if they want and not if they don't. There is a tendency for memecoins to be issued in a burst of excitement, trade up, and then crash. If you're the issuer or promoter of the memecoin, you can make a lot of money in the initial burst of excitement – you gave yourself a lot of free memecoins and then sold them – but that money comes pretty directly at the expense of the buyers.

A memecoin is thus a way to directly monetize celebrity or notoriety or just attention, but there is *some* cost. You are *spending* your celebrity or notoriety or attention. After you sell your memecoin and "rug" the early buyers (that is, cash out and let the price crash), they will think less of you. You are transforming attention into money, but in a way that probably leaves you with less attention, or worse attention. So we have talked about "[Hawk Tuah Girl](#)," who became famous on the internet, sold a memecoin to cash in, and thereby became *less* beloved by fans (and [got sued](#)). Even in crypto, the lunches are not exactly free.

And so, sure, a national memecoin is not exactly *money* (and so not inflationary), and not exactly *debt* (and so does not have to be paid back), but you are taking on some sort of obligation when you issue one. I am not sure what that obligation is, but certainly [you can mess it up](#) :

Late Friday night, prolific social media user Javier Milei directed followers to a site that purported to raise money for small businesses in Argentina using crypto.

Half a world away, digital currency entrepreneur Hayden Davis saw the value of the Libra token, a so-called memecoin he helped launch, begin to surge. Its market value flew past \$1 billion, \$2 billion, all the way over \$4 billion.

When it collapsed, as such tokens often do, Milei's presidency in Argentina was in crisis mode. Investors like Barstool Sports founder Dave Portnoy suffered steep losses and dubbed the token "the biggest rug pull of all time" – a reference to the crypto lexicon for a scam. Davis himself, in a later post on social media, acknowledged holding some profits despite the declines.

The events are now the subject of an internal government probe. Prominent members of the crypto world are pointing fingers at each other as Milei tries to recover from a political black eye.

"The Libra saga is a travesty," said Henry Elder at UTXO Management. "It's a stark illustration that the current crop of crypto leaders lack any moral compass whatsoever."

Investors in Buenos Aires took stock of the situation by dumping shares in some of the largest local companies. The benchmark S&P Merval Index saw its biggest intraday drop in roughly three weeks, falling as much as 5.8%, before trimming the decline.

The market capitalization of the S&P Merval is about \$63 billion, so a 5.8% decline is about \$3.6 billion, roughly comparable to the memecoin's peak market value. It's not quite the case that "every dollar of Libra speculation takes a dollar off the value of the Argentine stock market," and there is no *mechanism* by which that would happen, but it is also kind of true.

Meet Kevin

If you are a financial influencer, what is the best way to monetize that? Not, like, *best best*, just like, what is the most efficient way to turn your influence into money for you? I'm sorry but the answer is "memecoin." Maybe "pumping meme stocks," but that's tricky. "Special purpose acquisition company" was the answer for a little while, but [now it isn't](#).

I expect that for some people, at some point, the answer will be "exchange-traded fund": Even now someone will do most of the administrative and technical work of setting up an ETF for you, and the administrative costs will come down over time, and "follow along with my stock picks on YouTube and also own them in ETF form" is a natural way to monetize your YouTube fame, possibly a more lucrative one than, like, selling ads.

Not yet though :

A popular YouTuber is closing down his actively-managed exchange-traded fund after it underperformed the market and ran up against the costs of doing business in the competitive ETF industry.

Kevin Paffrath, a financial influencer who goes by the online moniker "Meet Kevin," said in a video on his channel that his fund, the Meet Kevin Pricing Power ETF, would be closing at the end of this month some two years after its inception and with just \$32 million in assets.

Paffrath, who has more than 2 million followers on YouTube alone, sells courses on his website promising to teach people how to grow their wealth and "master stocks." But Paffrath struggled to pick stocks that would make his fund grow. ...

Paffrath's ETF charged a relatively high management fee of 0.76%, which is above the industry average of 0.69% for all actively managed US ETFs. But in a YouTube video announcing the closure, Paffrath estimated that he had lost \$1 million running his fund.

"All the bankers, the suits, the lawyers, they all get their hands in the cookie jar, and basically you're left feeding the kitty," he said in the video. "Almost every month, you're paying them – the lawyers and whatever – their fees."

If you didn't read that story, and I told you "a guy on YouTube got people to invest \$32 million with him," how much of that \$32 million would you have guessed that he *kept*? I feel like a reasonable over/under would be like ... \$8 million? A guy on YouTube? But the actual gross answer seems to be under \$500,000, and the net answer is negative \$1 million.

Things happen

Hedge funds target quick profit from obscure corporate bond clause. JPMorgan Set to Relive 'Huge Mistake' at [Javice Fraud Trial](#) . Musk Debuts [Grok-3 AI Chatbot](#) to Rival OpenAI, DeepSeek. Broadcom, TSMC Weigh Possible Intel Deals That Would Split Storied Chip Maker. Investors Haven't Been This Pessimistic About Stocks Since 2023. BofA Survey Shows Investors Haven't Been This [Risk-On](#) Since 2010. US companies falling behind on loans at fastest pace in almost a decade. [Shein](#) Is Said to Face Investor Pressure to Slash Valuation to \$30 Billion. Venture Capital's Latest Strategy: Private Equity-Style Roll-Ups. Deutsche Bank went on hiring spree while failing to deliver on costs. Big Banks Are Scrubbing Their Public Mentions of DEI Efforts. Slot Machine Maker Light & Wonder Buys [Charitable Gaming Business](#) for \$850 Million. One of Britain's Most Dominant Sportsmen Has Stiff Joints and Works in Finance. Inside the mind of a meme coin trader.

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To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Michael Newman at mnewman43@bloomberg.net

- 1. No "werewolf unicorn" or "mummy unicorn," and now I want that to happen.
- 2. Here's a 2020 Morgan Stanley note on the phenomenon by Michael Mauboussin and Dan Callahan: "From the end of World War II through the early 1970s, many companies went public to raise capital to fund their growth. Today, young companies often rely more on intangible assets and have a less voracious appetite for capital. They also have unprecedented access to capital through the private markets. Consequently, many young companies have elected to stay private longer than did the companies of prior generations."
- 3. Not a [first](#) .

- 4. OpenAI proposes “to transform our existing for-profit into a Delaware Public Benefit Corporation (PBC) with ordinary shares of stock and the OpenAI mission as its public benefit interest. The PBC is a structure used by many others that requires the company to balance shareholder interests, stakeholder interests, and a public benefit interest in its decisionmaking.” So the board wouldn’t be answerable **purely** to shareholders.
- 5. “Email newsletter”?
- 6. That’s just \$32 million times 0.76% times roughly two years (“since its November 2022 inception”), and I’m sure it’s not accurate, but it seems like a good upper bound.

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Milei Stumbles Into Crypto Memecoin Scandal Before US Trip (3)

By Jonathan Gilbert and Patrick Gillespie

- Argentine government launches probe after Libra debacle
- Libertarian hoping to meet Trump, secure fresh IMF funds

Late Friday night, prolific social media user **Javier Milei** directed followers to a site that purported to raise money for small businesses in Argentina using crypto.

Half a world away, digital currency entrepreneur Hayden Davis saw the value of the Libra token, a so-called memecoin he helped launch, begin to surge. Its market value flew past \$1 billion, \$2 billion, all the way over \$4 billion.

When it collapsed, as such tokens often do, Milei's presidency in Argentina was in crisis mode. Investors like Barstool Sports founder **Dave Portnoy** suffered steep losses and dubbed the token "the biggest rug pull of all time" — a reference to the crypto lexicon for a scam. Davis himself, in a later post on social media, acknowledged holding some profits despite the declines.



Javier Milei speaks at the World Economic Forum in Davos, Switzerland, on Jan. 23.

Photographer: Stefan Wermuth/Bloomberg

The events are now the subject of an internal government probe. Prominent members of the crypto world are pointing fingers at each other as Milei tries to recover from a political black eye.

"The Libra saga is a travesty," said Henry Elder at UTXO Management. "It's a stark illustration that the current crop of crypto leaders lack any moral compass whatsoever."

Investors in Buenos Aires took stock of the situation by dumping shares in some of the country's largest local companies. The benchmark S&P Merval Index saw its biggest one-day drop since July, falling some 5.6% on Monday.

Milei, meanwhile, is heading to Washington this week in hopes of meeting Donald Trump. The Argentine leader wants to secure the US president's support for his country to receive more money from the International Monetary Fund in a new program that's still under negotiation, as well as possible exemptions from Trump's tariffs.

Milei won Argentina's election in late 2023 by a landslide with supporters desperate for a swift economic overhaul after several years of crisis. He's increasingly aligned himself with right-leaning leaders worldwide, and his crypto hype was reminiscent of the token Trump himself launched just days before his inauguration.

The Libra token launched on Solana, a blockchain with fast transaction speeds and low fees that's made it popular with memecoin traders.

Compounding the confusion over the weekend were the contradicting tales. After Libra crashed, Davis — the chief executive officer of Kelsier Ventures — said Saturday in a video posted to X that he was Milei's adviser, "working with him and his team on much bigger tokenization and really cool stuff in Argentina." Milei's office then issued a statement saying Davis "didn't have nor has any connection to the Argentine government."

Initial Intro

Milei said he met Davis last month at the presidential palace in Buenos Aires because the crypto executive would be involved in providing the digital infrastructure for Libra. The Argentine president had gotten wind of the project months earlier, when a trader he knew from before his time in office introduced him to Julian Peh, the head of KIP Protocol, the company that first proposed the token.

By early Saturday, Milei denied having any detailed knowledge about Libra, saying he was supporting a private initiative that appeared to have good intentions but with which he had no ties. Davis said the Argentine president had endorsed and actively promoted the token, but then unexpectedly backtracked.

Davis said Saturday he planned to return the profits he'd collected back to the token in a bid to reassure crypto buyers.

Neither Milei's office, Davis nor Peh immediately responded to requests for comment.

In a statement released Monday, KIP Protocol said the only time Peh or any other member of its team had met Milei was in October last year, where Libra was not mentioned. The firm added that KIP wasn't in charge of the token launch process, that Davis wasn't employed by or affiliated with the protocol and that it hadn't profited from the launch.



Dave Portnoy

Photographer: Michael Hickey/Getty Images

Among the investors left in the wake of the crash was Portnoy, who said Sunday night in an X stream that Davis invited him to participate in the token's launch. The two first met at Portnoy's house a few weeks ago and then Davis spoke to him by phone when the crypto entrepreneur was in Buenos Aires meeting Argentina's leader. According to Portnoy, Davis added him to the Libra's "marketing ledger" and even pitched Portnoy on interviewing Milei in Argentina just as he interviewed Trump years ago.

Things started going awry Friday when Portnoy — who described Milei as "a mini-Trump-ish type guy" — said Davis gifted him Libra coins before the launch. Portnoy said he told Davis he was going to disclose the gift to his social media followers when he promoted the token, but Davis immediately told him to remove that detail from the unpublished post. Portnoy said he returned the gifted coins, but independently bought Libra after Milei's initial post Friday night, betting on the Argentine leader's credibility.

As the coin crashed, Portnoy stewed in the crowd listening to Miley Cyrus perform at Radio City Music Hall in New York for the *Saturday Night Live* 50th anniversary special, texting Davis to demand answers.

"I was buying like every other fool," Portnoy said, blaming Milei for misleading Davis and for the token's failure in profanity-laden remarks. "I didn't buy any on my own until after Milei tweeted."

Political Fallout

The episode has been an embarrassment for Milei. The libertarian economist, who is trying to rebuild Argentina's crisis-prone economy, has earned rockstar status among leading global capitalists, wowing crowds for two consecutive years at the World Economic Forum in Davos, Switzerland.

It's unclear what the repercussions will be for Milei 10 months before Argentina's midterm elections. Political opponents quickly threatened legal action and an impeachment trial that's unlikely to move forward since it requires a two-thirds majority in Congress. The major center-right party of former market-friendly President **Mauricio Macri** that's backed Milei's reforms has so far expressed disappointment, but rejected the Peronist opposition's attempt to oust him.

Pollsters say Milei may still avoid paying a major political price since inflation is coming down, wages are up and the economy is growing. His approval ratings have hovered near 47% for months, while all other political parties in Argentina are less popular and more fragmented. But it revives concerns about the president's sometimes erratic persona and decisions.

"Macroeconomic balance needs to come along with emotional balance," said **Alejandro Catterberg**, director of Buenos Aires-based consulting firm Poliarquia. "These types of things create a lot of unnecessary uncertainty."

(Updates with market close in 6th paragraph.)

--With assistance from **Muyao Shen, Olga Kharif, Suvashree Ghosh, Emily Nicolle, Kevin Simauchi and Philip Sanders**.

To contact the reporters on this story:

Jonathan Gilbert in Buenos Aires at jgilbert63@bloomberg.net;

Patrick Gillespie in Buenos Aires at pgillespie29@bloomberg.net

To contact the editors responsible for this story:

Crayton Harrison at tharrison5@bloomberg.net

Stephen Wicary, [stacy-marie.ishmael](mailto:stacy-marie.ishmael@bloomberg.net)

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Fannie Mae Stung By Multifamily Fraud, Makes Loss Provision (1)

By Neil Callanan and Scott Carpenter

- Fannie Mae sets aside \$752 million partly for suspected fraud
- Government-sponsored lender has previously cautioned investors

Fannie Mae set aside \$752 million for credit losses in its apartment complex lending business in part because of fraud or suspected fraud, denting profits amid an industrywide scrutiny of borrowers.

"We have discovered instances of multifamily lending transactions in which one or more of the parties involved engaged in mortgage fraud or possible mortgage fraud," the firm said in its annual report released Friday. The \$752 million credit loss provision was for the year ended Dec. 31, following \$495 million and \$1.25 billion in 2023 and 2022, respectively, according to the report.

Fannie Mae said it's continuing to investigate more transactions in which fraud may have occurred and may "discover additional multifamily loans we have purchased that were affected by fraud."

The provision for losses was also driven by declining multifamily values and an increase in delinquencies, the firm said in its fourth-quarter earnings. That left Fannie Mae with \$2.5 billion net income in its multifamily business last year, against net revenue of \$4.7 billion.

Fannie Mae, short for the Federal National Mortgage Association, and its sister organization Freddie Mac, have each previously highlighted concern over potentially fraudulent loans in their multifamily business. In October, Fannie Mae cautioned investors of uncertainty due to an ongoing investigation of transactions with suspected fraud.

Freddie Mac had earlier imposed a ban on business with one of its top broker partners as part of an industrywide crackdown on fraud. It's since lifted those restrictions.

Lending against multifamily properties, which are typically apartment buildings, accelerated during the pandemic when interest rates plunged but then slowed as rates backed up. Combined with rising insurance costs, credit conditions for the multifamily sector have steadily worsened as delinquencies and defaults rose.

Single-family lending makes up a larger portion of Fannie Mae's business. Last year, the segment generated \$14.4 billion in net income, against \$24.4 billion in net revenue.

(Updates to include further detail about credit loss provision in second paragraph.)

To contact the reporters on this story:

Neil Callanan in London at ncallanan@bloomberg.net;

Scott Carpenter in New York at scarpenter60@bloomberg.net

To contact the editors responsible for this story:

Shannon D. Harrington at sharrington6@bloomberg.net

Isabella Farr

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Ozy Media CEO Hit With \$96 Million Restitution, Forfeiture Order

By Christopher Brown

- Record supported causal link between fraud and investor losses
- Evidence showed victims invested based on misrepresentations

Ozy Media chief executive Carlos Watson and his company must pay nearly \$37 million in restitution for a “brazen and audacious” securities fraud scheme involving a fake call to Goldman Sachs Group Inc. bankers from Watson’s cofounder impersonating a YouTube executive.

Watson was also subjected to a more than \$59 million forfeiture judgment to the federal government in a post-trial order filed Sunday by Judge Eric Komitee. A jury found Watson guilty in July 2024 of conspiracy to commit wire fraud and securities fraud and aggravated identity theft. Oz Media was also convicted of the conspiracy counts.

Komitee sentenced Watson to almost 10 years in prison for the scheme, which numbered former New York Yankees star Alex Rodriguez and an investment firm founded by Laurene Powell Jobs among its victims.

Ozy collapsed in 2021 shortly after the New York Times reported on the fake call. Prosecutors said he told one investor that Google CEO Sundar Pichai had offered to buy Ozy for hundreds of millions of dollars. Pichai testified that he never discussed a purchase.

Watson appealed the judgment before the entry of restitution and forfeiture.

Restitution

Watson didn’t dispute the government’s calculations of the victims’ losses but argued the government failed to establish a causal link between the losses and the misrepresentations at issue.

But the record “robustly supports” the finding that the fraud was a necessary factor in causing the victims’ losses, Komitee said for the US District Court for the Eastern District of New York.

Beset with cash-flow problems and needing capital to stay afloat, Watson and the company lied to investors about Ozy's revenue, profitability, partnerships, and the identity of other investors, Komitee said.

The government presented evidence showing how each listed victim invested because of the misrepresentations, which provided "compelling evidence as to causation-in-fact," he said.

Watson's argument that the indictment, not the fraud, was the proximate cause of the investors' losses fared no better.

Based on the company's precarious finances, it was "eminently foreseeable" to Watson and the company that victims who relied on their misrepresentations were in danger of losing their entire investment, he said.

It was also reasonably foreseeable to the defendants that their conduct would result in an indictment, he said.

"Given the verdicts, the defendants can hardly claim that the indictment was an unforeseeable event, entirely the work of a third party, that severed the chain of proximate causation between their misrepresentations and their victims' losses," Komitee said.

Komitee also agreed to order forfeiture in the amount sought by the government, rejecting Watson's argument that the amount should be reduced by the value of the company's "direct costs."

Under the most obvious reading of the governing statute, the "cost" to Watson and Ozy was the fair-market value of what they gave up in the transactions—the value of the stock sold to investors.

That value was zero, given the company's lack of assets and the absence of evidence that third parties were interested in the company's content library, the judge said.

Ronald Sullivan Law PLLC, Frison Law Firm PC, and Andrew J. Frisch of New York represent Watson and Ozy Media.

The case is US v. Watson , E.D.N.Y., No. 1:23-cr-00082, 2/16/25 .

To contact the reporter on this story: Christopher Brown in St. Louis at ChrisBrown@bloombergindustry.com

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

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

Solar Tech Co. SunPower Beats Investor Suit Over Defects

By **Sydney Price**

Law360 (February 14, 2025, 9:49 PM EST) -- A California federal court has permanently dismissed an investor's suit alleging solar power equipment company SunPower concealed product defects in order to maintain artificially high share prices, saying the investor has not established SunPower knew or could have known its statements were false when made.

The suit, which was amended for the third time in August, alleges SunPower's risk factors and statements regarding its commercial business were materially false and misleading in the months before it announced it was taking a \$27 million warranty charge due to a "cracking issue that developed over time in certain factory-installed connectors within third-party commercial equipment" in January 2022.

When SunPower announced replacing and repairing defective products would negatively impact its 2021 financial results, its stock price dropped nearly 17%, according to the suit.

But U.S. District Judge Araceli Martinez-Olguin said on Thursday that the plaintiff's latest version of the suit failed to address the lack of knowing falsity sufficient to support a claim for securities fraud, and that granting further leave to amend "would prove futile."

According to the order, the latest version of the suit challenges the same risk factors identified in previous versions of the complaint, none of which are actionable.

"The Ninth Circuit has found risk disclosures actionable only where the complaint alleged the disclosed theoretical risks had ripened into 'actual harm,'" the order states.

The suit alleges SunPower's master supply agreement with its component supplier gave SunPower the rights to test and inspect the component products. But Judge Martinez-Olguin said knowledge of cracking by the defendants cannot be inferred by the theoretical access to sources.

"Plaintiff fails to offer allegations about what inspection or testing defendants conducted, that the cracking was actually discovered in that context, or even that defendants themselves were made aware. Plaintiff also cites to unproven allegations from a shareholder derivative complaint," the order states.

The investor suit also alleges that SunPower's statements that it maintained reserves for expected warranty expenses in 2021, as well as numbers reported for warranty accruals and reserves and net income, were false and misleading because SunPower later took additional warranty charges "to the tune of at least \$32.3 million."

But Judge Martinez-Olguin said even if additional subsequent charges related to the cracking had been taken, that does not establish that previous estimates were inadequate at the time they were made.

Additionally, Judge Martinez-Olguin said the defendants' statements about SunPower's internal controls, including the standard certifications under the Sarbanes-Oxley Act, do not support securities fraud.

"Though plaintiff contends these certifications were false, each SOX Certification contains important

language qualifying that the declarants only certified the financial reporting to the extent of his or her knowledge on the date of the certification," Judge Martinez-Olguin said.

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

The investors are represented by Shawn A. Williams, Willow E. Radcliffe, Kenneth J. Black and Snehee Khandeshi of Robbins Geller Rudman & Dowd LLP.

SunPower is represented by Katherine Leigh Henderson, Ava K. Mehta, Dylan Grace Savage and John Charles Roberts Jr. of Wilson Sonsini Goodrich & Rosati PC.

The case is Jaszczyszyn v. SunPower Corp. et al., case number 3:22-cv-00956, in the U.S. District Court for the Northern District of California.

--Editing by Linda Voorhis.

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Chemical Co.'s Inventory Issues Led To Losses, Investor Says

By **Sydney Price**

Law360 (February 14, 2025, 10:24 PM EST) -- Agricultural sciences company FMC Corp. has been hit with a proposed shareholder class action in Pennsylvania federal court alleging it misled investors about its high inventory levels across its global channels, causing significant losses when its issues were revealed earlier this month.

According to the **suit filed Thursday** by shareholder Mushtaq Mohammed, FMC develops crop protection chemicals, including insecticides, herbicides and fungicides, which it sells globally. The complaint alleges that when FMC was faced with pricing pressure from its competitors, FMC decided not to compete on prices and instead forwent sales opportunities, leading to an inflated inventory.

In addition to FMC, its CEO Pierre R. Brondeau, former CEO Mark Douglas and Chief Financial Officer Andrew D. Sandifer are individual defendants in the suit.

The class period begins Nov. 16, 2023, the day FMC released its full-year 2024 outlook. The company said it expected revenue between \$4.65 billion and \$4.85 billion, and that it was "utilizing variable pricing based on local market dynamics," according to the suit.

For the next several months, FMC reiterated its commitment to its "Project Focus," a global restructuring plan intended to drive cost improvement and productivity, the suit states.

Mohammed alleged, however, that FMC's channel management initiatives were not progressing as represented.

The company's omissions were revealed to the market on Feb. 4, 2025, Mohammed said, when FMC announced its growth for fourth-quarter 2024 was below its expectations as it had learned that customers in many countries sought to hold significantly less inventory than they historically had.

FMC also revealed it had missed its previously announced full fiscal year revenue guidance as well as consensus estimates, the complaint states. FMC said it expected revenue to remain flat for 2025 due to "weaker demand in the channel as customers in many countries prioritize holding lower-than-historical levels of inventory," according to the complaint.

During an earnings call Feb. 4, Brondeau said FMC "need[s] to significantly lower FMC inventory in the channel much beyond what we were expecting," and that FMC needs a strong "reset," according to the complaint.

Brondeau also explained FMC had faced pricing competition which it was "unwilling to meet" or adjust to, which led FMC to "walk away" from "sales opportunities," the complaint states.

"This strategy had backfired as the company was met with 'lower-than-expected demand across most regions as customers lowered the amount of inventory they are willing to hold' to a historical low," Mohammed said.

On this news, shares of FMC fell by \$18.12, or about 34%, to close at \$35.92 per share on Feb. 5.

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

Counsel for Mohammed and a representative of FMC did not immediately respond to requests for comment on Friday.

Mohammed is represented by Lee Albert and Charles H. Linehan of Glancy Prongay & Murray LLP, and Frank R. Cruz of The Law Office of Frank R. Cruz.

Counsel information for FMC and the individual defendants was not available on Friday.

The case is Mohammed v. FMC Corp. et al., case number 2:25-cv-00771, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Lakshna Mehta.

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Judge Slams The Brakes On Peloton Bike Recall Claims

By **Hailey Konnath**

Law360 (February 14, 2025, 11:47 PM EST) -- A New York federal judge threw out, for now, a proposed investor action alleging Peloton overstated the safety of its bikes before 2.2 million products were recalled over a bike seat defect, ruling that the shareholders haven't adequately alleged the exercise company made any misleading statements.

U.S. District Judge Margo K. Brodie on Friday granted Peloton Interactive Inc.'s motion to dismiss, though she gave the investors 30 days to file an amended version of their complaint. In particular, the judge said the investors hadn't pointed to any materially misleading statements or omissions made by Peloton's top brass, nor have they pled any facts establishing that Peloton leaders acted with fraudulent intent.

"Because plaintiffs do not allege that defendants knew a seat post recall would happen when they made the risk disclosures, plaintiffs' claims ... fail because defendants cannot be held liable for statements that are only false in hindsight," Judge Brodie said.

In May 2023, the U.S. Consumer Product Safety Commission recalled nearly 2.2 million Peloton bikes, stating that "the bike's seat post assembly can break during use, posing fall and injury hazards to the user," according to the shareholders' complaint.

The suit was filed in 2023, with investors **claiming** the recall caused the company's stock to decline by nearly 9% and that Peloton downplayed the need for additional reserves for future product recall expenses.

Peloton attributed recall expenses to its treadmills, saying in May 2022 that voluntary recalls of its Tread and Tread+ products from the prior year reduced revenue for actual and estimated future returns for the quarter, according to the complaint. But the investors contend the company knew its bike seats were prone to break or detach during use, which would likely lead to another recall of millions of products.

In its **motion to dismiss** filed last year, Peloton says the investors were trying to "manufacture" a case from a voluntary recall. Their complaint fails to allege a single actionable misrepresentation or omission and fails to show that any of the individual defendants acted with knowledge of wrongdoing, the company argues. Rather, the complaint relies on inactionable statements that were accurate when they were made, it adds.

Judge Brodie on Friday agreed, finding that Peloton's risk disclosures weren't materially misleading "because they explicitly warned investors that their products 'may be affected from time to time by design and manufacturing defects' that could 'adversely affect our business.'"

Although the investors note that Peloton's leadership had learned about some issues with the bike seat post, they don't allege that Peloton knew, at the time of the risk disclosures, that five customer complaints would later lead to recall of every bike sold between 2018 and 2023, according to the opinion.

"Plaintiffs do not sufficiently allege that the risk disclosures' failure to identify either the seat post issue or predict the Bike recall were materially misleading," the judge said.

Similarly, Peloton's statements about the "voluntary" nature of the recall were not false or misleading, the judge found.

"Contrary to plaintiffs' argument, a reasonable investor would have understood the difference between a 'mandatory' recall that is legally required by the CPSC, and a 'voluntary' recall that a company conducts in consultation with the CPSC," Judge Brodie said.

And statements Peloton's officers made about the quality of their bike are corporate puffery and not actionable, the judge held.

According to the suit, Peloton stopped attributing product recall expenses to its treadmill products as it had done in prior quarters shortly before the bike recall was announced. The company instead attributed product recall expenses to adjustments and charges associated with more generalized "product recall related matters" while failing to tell investors what charges were associated with its bikes, the complaint says.

The suit is on behalf of a proposed class of Peloton investors who purchased or otherwise acquired Peloton securities between May 10, 2022, and May 10, 2023.

Peloton and counsel for the investors didn't immediately respond to requests for comment late Friday.

The investors are represented by Shannon L. Hopkins, Gregory M. Potrepka and Amanda D. Foley of Levi & Korsinsky LLP, and Jeremy A. Lieberman, Emma Gilmore, Justin D. D'Aloia and Villi Shteyn of Pomerantz LLP.

Peloton and the individual defendants are represented by Mark P. Gimbel and Jordan S. Joachim of Covington & Burling LLP.

The case is Jia Tian et al. v. Peloton Interactive Inc. et al., case number 1:23-cv-04279, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Sydney Price and Katryna Perera. Editing by Kristen Becker.



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Digital Health Co. Beats Some Claims In SPAC Investor Suit

By **Katryna Perera**

Law360 (February 14, 2025, 10:15 PM EST) -- A New Jersey federal judge has dismissed, with leave to amend, claims in an investor suit against a blank check company that took digital health equipment venture Butterfly Network Inc. public, finding that some of the shares the plaintiffs purchased are not traceable to the registration statement at issue in the suit.

U.S. District Judge Michael E. Farbiarz issued an **opinion and order** on Thursday saying the investors' allegation that they purchased or acquired Butterfly's stock pursuant to the allegedly misleading registration statement issued in 2021 in connection with the SPAC merger is not sufficient to state a claim under Section 11 of the Securities Act of 1933. The 2021 merger is referred to in the complaint as "Time 2."

The judge added that the "traceable" bar has not been cleared by certifications of stock buys the plaintiffs attached to the operative complaint because, according to the certifications, some of the shares were purchased before the registration statement was issued.

"This is common sense. A plaintiff could not have been damaged by a '[misleading] registration statement' if the shares she bought were issued before the registration statement came out in the first place," the order states.

Therefore, the judge said the dismissal motion is granted to the extent that the investors allege standing for shares bought before Time 2.

The judge also found that the investors have not plausibly alleged that the remaining shares, bought after the registration statement was issued, can actually be traced back.

According to the order, the traceability in this action is tricky because another registration statement was issued in 2020, or "Time 1," when the SPAC first went public.

Judge Farbiarz said Thursday that if the remaining shares trace back to Time 2, there is standing, but if they trace back to Time 1, their Section 11 claim fails.

"It is for the plaintiffs, who carry the burden, to connect the dots — to show that the shares in play trace back to the complained-of registration statement. If they do not, there is no Section 11 standing," the order states.

According to the order, the plaintiffs assert two arguments to back up their assertion that the shares are traceable to Time 2. First, they argue that "statistical tracing" makes it most plausible that the shares were issued under Time 2. However, the judge noted that this argument is not based on details within the complaint but on "information gleaned from other parts of the docket."

"And here, the court will not look to the statistical tracing information that is on the docket (but not in the complaint or integrated into it) as a basis for Section 11 standing," he added. "The reason why: traceability is an element of a Section 11 claim, and when it comes to the information that is said to directly check the box as to an element — that information should not generally be available to the court only in post-complaint filings on the court's docket. It should be drawn from the complaint, materials integrated into it, or information that can be judicially noticed."

The plaintiffs' second argument as to why the shares are traceable to Time 2 is that any shares that may have been issued under the Time 1 registration statement were allegedly converted at the merger, and therefore, all shares, post-merger, must be viewed as being issued under Time 2.

However, Judge Farbiarz said this argument does not work because information put before the court suggests that some shares issued under Time 1 were actually "exchanged" at the merger and not converted.

"And if that is the case, it leaves things as they were: with no way to know whether a given share ... can be traced to the Time 2 registration statement or the Time 1 statement," the order states.

In dismissing the suit's Section 11 claims, the judge also tossed the complaint's control person liability claims.

Additionally, on Friday, Judge Farbiarz, in a text order on the docket, kept alive the suit's claim that the proxy statement issued in connection with the 2021 merger was defective "in light of the court's prior rulings," and due to other factual arguments put forth by the plaintiffs in a January letter to the court.

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

Butterfly went public at a \$1.5 billion valuation but saw its stock price begin a steep dive soon after, allegedly caused in part by "underdeveloped" technology and inadequate marketing and sales capabilities — problems that investors argue were offered to allegedly under-informed investors at an inflated price.

A parallel suit in Delaware's Chancery Court challenging the merger asserts proxy-related claims under state-law fiduciary duty principles.

Last year, attorneys for Longview Investors LLC, the sponsor that took Butterfly public, asked for a stay of the case, but the request was denied, according to the court docket.

The investors are represented by Eduard Korsinsky, Shannon L. Hopkins, Gregory M. Potrepka and David C. Jaynes of Levi & Korsinsky LLP.

Butterfly is represented by Seth R. Goldman, John F. Sylvia, Patrick E. McDonough and Evelyn Limon of Mintz Levin Cohn Ferris Glovsky and Popeo PC, and by Jim Walden of Walden Macht & Haran LLP.

The case is *Rose v. Butterfly Network Inc. et al.*, case number 2:22-cv-00854, in the U.S. District Court for New Jersey.

--Additional reporting by Jeff Montgomery. Editing by Vaqas Asghar.



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'New Facts' Improper In Penny Stock Action, 2nd Circ. Told

By **Brian Steele**

Law360 (February 14, 2025, 6:17 PM EST) -- A Connecticut federal judge violated controlling case law and the constitutional rights of a penny stock CEO when imposing a judgment in a U.S. Securities & Exchange Commission enforcement action, defense counsel told the Second Circuit, arguing that the SEC admitted post-trial that it could not find any victims of the allegedly false public statements at issue.

Counsel for Bernard Findley and the holding company Halitron Inc. told a three-judge panel on Friday that U.S. District Judge Stefan R. Underhill was wrong to rely on "critical new facts" when deciding on a \$473,000 disgorgement and civil penalty in February 2024, more than a year after the defendants partially lost a **jury verdict**. Joseph M. Pastore III of Pastore LLC said the judge also violated Findley's Seventh Amendment rights when he imposed a permanent injunction against future securities law violations and a four-year ban from the industry without the jury's consideration.

At a hearing ahead of the ruling, the SEC said that it would be "virtually impossible" to identify harmed investors, but after a Second Circuit decision conditioned disgorgement on investor loss, the agency quickly furnished a declaration that 2,967 retail traders had lost about \$1.69 million, the defense said in its appeal brief. But the SEC did not link those losses to the charged conduct, and the judge's award was actually based on the amounts of loans from financiers who received discounted shares and were not harmed, the brief said.

"With respect to disgorgement, we believe the district court clearly made an error after the SEC admitted that it could not locate any victims," Pastore told the panel.

Pastore pointed to the Second Circuit's 2023 decision in [SEC v. Govil](#), which vacated a disgorgement order and held that a "defrauded investor is not a 'victim' for equitable purposes if he suffers no pecuniary harm." That decision spurred the SEC to track down the unnamed Halitron investors, he said.

"But what is the legal relevance of, they went back and changed their mind?" U.S. Circuit Judge Alison J. Nathan asked. "Like, would we have them, if they figured out they were wrong, would we have them stick with the same position?"

Pastore said that the Govil decision forced the SEC to meet a developing new standard, which is "not their fault," but Judge Underhill did not follow the Govil standard or give the defendants due process.

"None of those facts were ever presented to the jury" or subject to cross-examination, he said. "I do not blame the SEC for realizing they could not proceed the way they wanted to once this court issued the Govil decision. They couldn't. They had to do something different, but I don't think what was done was sufficient, both from a legal perspective and a process perspective."

SEC attorney William Shirey told the panel that the district court agreed to let the agency conduct a "feasibility analysis" for locating harmed investors and gave the parties 30 days to make additional submissions. The defense could have responded to the SEC's analysis and its statement that distribution of funds was "feasible," but they did not, so they waived any challenge to it, he said.

"The process was laid out. They didn't avail themselves of it," Shirey said.

The SEC's brief said that one of its financial economists gathered the information by analyzing broker-dealers' trade execution records.

The defendants ran "essentially a modified pump and dump scheme" meant to "promote liquidity" and drive up investor interest, he said, so that the financiers who provided debt-conversion loans in exchange for discounted shares could sell them. The loans were ill-gotten gains and the judge's disgorgement ruling was reasonable, he said.

Newtown-based Halitron is a holding company that trades on the over-the-counter markets and owns businesses in the display signage and scrapbooking industries, according to the SEC's complaint.

A jury found that Findley and Halitron made false statements in violation of federal securities laws. The SEC had alleged the defendants issued numerous false press releases, including statements about an audit and a stock buyback program, but the jury returned mixed results regarding statements made in 2016 and 2018 about financing Halitron allegedly received.

The jury found a 2016 statement was not proven false or misleading and that the defendants were negligent in making a 2018 statement. The agency accused Findley and Halitron of running a scheme to defraud investors by misstating the company's financial condition and overvaluing its assets, but dropped allegations of an overarching scheme just before the jury began deliberations.

The defendants' brief to the Second Circuit faulted the trial court for allowing the scheme liability claim to drop without explaining it to the jury, alleging that it was "actually confusing" to jurors who heard about an alleged scheme throughout the trial.

Judge Underhill initially **ordered** an award of \$473,000 that included \$223,000 in disgorgement based on the theory that the press releases had helped Halitron secure financing between May 2017 and April 2018, but upon entering the final judgment in March 2024, he agreed with the defendants that he had miscalculated an offset, trial court records show.

The original order had reduced the SEC's **proposed** disgorgement amount by \$75,000, but it was supposed to be cut by \$157,000 to reflect the amount that one financier had provided, which had not been causally linked to the alleged fraud, the defendants told the judge. The new award provided \$141,000 in disgorgement, about \$50,000 in prejudgment interest and a \$250,000 civil penalty for which Findley was solely liable, totaling around \$441,000.

The SEC's appellate brief said that from 2017 to 2018, "Findley diluted the value of Halitron's shares when he caused Halitron to issue billions of deeply discounted, new shares in exchange for loans." The brief described Halitron as a shell company that generated almost no revenue and said the press releases at issue were designed to create an active market for its stock.

"The district court acted well within its discretion in ordering defendants to disgorge the proceeds of the loans that they received because those loans were the motivation for, and were made possible by, the fraud," the brief said. "The district court also reasonably determined that the disgorged funds could be distributed to Halitron investors who were harmed by the defendants' fraud."

Findley's statements about the stock buyback program — which was limited to about \$3,500 — was meant to mislead investors into thinking that Halitron was trying to increase its share price to one penny, when he knew that was not possible because of stock dilution and dire finances, the agency said.

"Many of these press releases addressed Halitron's plan to 'uplist' from Pink Basic to a higher tier trading platform called OTCQB Market," which would inspire investor confidence, the brief said. "Seven of the press releases contained false and misleading statements about the progress of the financial audit required for the uplist."

U.S. Circuit Judges Michael H. Park, Myrna Pérez and Alison J. Nathan sat on the panel for the Second Circuit.

Findley and Halitron are represented by Joseph M. Pastore III and Leanne M. Shofi of Pastore LLC.

The SEC is represented by its own Michael A. Conley and William Shirey.

The case is SEC v. Halitron Inc. et al., case number 24-1052-cv, in the U.S. Circuit Court of Appeals for the Second Circuit.

--Additional reporting by Jessica Corso. Editing by Andrew Cohen.

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4th Circ. To Hear Deloitte Appeal Of SCANA Class Cert. Ruling

By **Jessica Corso**

Law360 (February 14, 2025, 10:43 PM EST) -- The Fourth Circuit has agreed to hear a case that could overturn the class status of SCANA Corp. investors accusing Deloitte of issuing misleading audit reports about the progress being made on a failed \$9 billion nuclear energy project, saying it would hear arguments over whether a U.S. Supreme Court model on damages was properly applied to the class certification order.

The court agreed to take up the appeal at Deloitte's behest and against the will of the investor class, which argued that interlocutory review of the **class certification decision** was not warranted.

"Upon consideration of submissions relative to the petition for permission to appeal, the court grants the petition," according to Thursday's decision.

The single-page order said that the court would only consider questions raised by the damages model relied upon to grant class status, turning away questions that Deloitte brought before it on the timeliness of the suit and the standing of the lead pension fund that filed it.

Neither attorneys for Deloitte nor for the investors immediately responded to a request for comment Friday.

The International Brotherhood of Electrical Workers Local 98 Pension Fund is leading a class of SCANA shareholders who claim that Deloitte helped SCANA hide problems with a \$9 billion nuclear energy project by providing it with a pair of clean audits in 2015 and 2016.

After SCANA abandoned the project because its partner, Westinghouse Electric Co., went bankrupt, suing investors say the company's stock price fell from \$76.12 to \$37.39.

But Deloitte told the Fourth Circuit that investors failed to distinguish between the alleged misstatements tied to the accounting firms' audits and those made by SCANA and its executives outside the portion of the utility company's annual report, or 10-K, that Deloitte was responsible for auditing.

"Plaintiff's damages can only be predicated on the two statements Deloitte made: the audit opinions on SCANA's 2015 and 2016 financial statements," Deloitte told the Fourth Circuit in its November petition for review. "The financial statements themselves, as well as the rest of the 10-Ks and myriad other allegedly false statements, were the statements of SCANA and its management — not of Deloitte."

The failure to develop a damages model that can calculate the alleged harm caused by Deloitte's alleged actions violates the Supreme Court's 2013 decision in **Comcast Corp. v. Behrend** and the class should be decertified, the accounting firm argued.

In a December response opposing interlocutory review, the investor class argued that Deloitte's view of Comcast is wrong and has been rejected by a number of courts, including the Fourth Circuit.

They said that separating out the damages caused by a defendant's actions from those that may have been caused by others goes to loss causation, which does not need to be analyzed at the class certification stage.

"Deloitte's claims rest on the same misinterpretation of Comcast that has been rejected by courts nationwide time and time again," the class argued.

SCANA itself has faced multiple suits over the nuclear power work. It was part of a \$520 million **settlement** with utility customers that was granted preliminary approval in March 2020. Its investors in January 2020 **asked a federal judge** to sign off on a \$192 million settlement resolving allegations the company and its executives misled the public about project delays.

The class is represented by Laura Posner, Steven Toll, Jan Messerschmidt and Emmy Wydman of Cohen Milstein Sellers & Toll PLLC and William Tinkler of Tinkler Law Firm LLC.

Deloitte is represented by Scott Edelman, Atara Miller, Jed Schwartz, Andrew Lichtenberg and Katrin Cassidy-Ginsberg of Milbank LLP and Christopher Ogiba of Moore & Van Allen PLLC.

The case is International Brotherhood of Electrical Workers v. Deloitte & Touche LLP, case number 25-1146, before the U.S. Court of Appeals for the Fourth Circuit.

--Additional reporting by Lauren Berg. Editing by Vaqas Asghar.

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HuffPost Sends User Data To Microsoft For Ads, Reader Says

By **Gina Kim**

Law360 (February 14, 2025, 10:09 PM EST) -- Huffington Post flouts privacy laws by selling and sharing its readers' personal information without prior consent through trackers made by Microsoft, OpenX and Connatix that are installed on their web browsers for targeted advertising and real-time digital ad auctions, alleges a proposed class action filed Thursday in California federal court.

San Francisco resident and Huffington Post reader Barton Golub brought the proposed class action accusing the news platform of violating the California Invasion of Privacy Act by installing tracking software on its users' web browsers and tracing their devices without getting permission or obtaining a court order to do so.

Golub accused Huffington Post of monetizing its website by installing trackers created by Connatix, OpenX and Microsoft that gather website visitors' IP addresses and device information, or "fingerprints." Microsoft's tracker is known as ADNXS.

"To summarize the proceeding allegations, defendant monetizes its website (in part) by installing the Connatix and ADNXS trackers on its users' browsers, and therefore enabling Connatix and Microsoft to collect website users' IP addresses and device fingerprints," the suit said.

That data is subsequently presented by Microsoft to advertisers interested in displaying their ads to website users, and Microsoft would then provide those advertisement bids to Huffington Post via a real-time auction.

"Connatix likewise offers up defendant's users for sale to advertisers on the Advertising Exchange" — a platform that allows the exchange of data, the ability to set prices and ultimately serve an ad — "and thus collects this information from users as well when defendant installs the Connatix tracker on browsers," the suit alleged. "The winning bidder ultimately has their advertisement displayed to website users, but all interested advertisers receive website users' information regardless."

According to the suit, Golub said he's been visiting Huffington Post's website since 2018 and as recently as Jan. 13. Every time he visits the site, a software code has caused the trackers to be installed onto his web browser, snatching up his IP addresses, unique identifier, web browser information, operating system and the type of browser — be it Mozilla or Safari — or computer device used, such as a Macintosh.

Huffington Post and the third parties, OpenX, Connatix and Microsoft — which are not named as defendants, utilize visitors' data through the trackers to identify Golub and either drum up a new profile about him in a database kept by OpenX, which acts as a data broker, or match him to an already-existing profile, the suit alleged.

Data brokers like OpenX typically offer pre-packaged databases to interested buyers, which includes information gleaned from public sites like Facebook, but can also include their residential addresses, dates of birth, political leanings and other inferences that can be surmised through the combined data, the suit alleged.

The companies could then turn over Golub's data to advertisers for hyper-focused targeted advertising, partially based on where he lives, while bolstering Huffington Post's revenues — all without Golub's permission, he alleged.

"The allegations here are made more invasive by the entities operating the trackers and collecting plaintiff's and class members' IP addresses and device fingerprints," Golub alleged.

Connatix and Microsoft, which are software-as-a-service providers, also known as SaaS, develop their own trackers and provide them to Huffington Post in return for a fee. The companies operate as advertising exchanges, and use their trackers to gather, store and analyze information about Huffington Post's visitors for targeted advertising, Golub alleged.

Microsoft additionally facilitates sales of website users to potential advertisers, who will place bids to display certain ads to them, tailored to their identities and locations, Golub's suit said.

Golub's complaint further explained the real-time bidding process for digital advertisements, noting that data brokers like OpenX can utilize visitors' device fingerprints and IP addresses to create or link that information to users' profiles and facilitate the process to decide which ad will be displayed to a website visitor. This helps Huffington Post monetize its users' information, Golub alleged.

Connatix, which operates as a supply side platform, purports to work with publishers or website operators to help participate in these real-time auctions, while Microsoft's tracker, ADNXS, acts as a demand side platform, which works with advertisers to help evaluate the value of user impressions or enhance the bidding process, the suit alleged.

Connatix and Microsoft also allow publishers and advertisers to use the same platform and services to trade user data, set prices, and ultimately feature the ads to users, Golub alleged.

"In other words, SSPs like the Connatix Tracker provide user information to advertisers that might be interested in those users, DSPs like the ADNXS tracker help advertisers select which users to advertise and target, and an Advertising Exchange is the platform on which all of this happens."

Furthermore, Microsoft, as a DSP, could gather and share user data through its ADNXS tracker to all potential advertisers, even if they don't ultimately get their ad shown to a user, Golub alleged.

"This greatly diminishes the ability of users to control their personal information," the suit said.

The conduct of Huffington Post and these third parties are invasive, considering their surreptitious collection of the plaintiff's personally identifying, non-anonymized information through the trackers, Golub argued.

Golub brings his complaint asserting a single count of a violation of the California Invasion of Privacy Act on behalf of a proposed class of all those in California who accessed the Huffington Post website in the Golden State and had their IP addresses and device fingerprints collected through the trackers.

Golub asks the court to certify the class, appoint his attorneys from Bursor & Fisher PA as class counsel, find that Huffington Post's conduct violates the CIPA and to order the company to pay statutory damages of \$5,000 for each CIPA violation, along with restitution, interest, attorney fees and costs.

Representatives for the parties did not immediately return inquiries seeking comment Friday.

Golub is represented by L. Timothy Fisher and Emily A. Horne of Bursor & Fisher PA.

Counsel information for Huffington Post was not immediately available.

The case is Barton Golub v. TheHuffingtonPost.com Inc., case number 4:25-cv-01514, in the U.S. District Court for the Northern District of California.

--Editing by Michael Watanabe.



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In-House Counsel Pointers For Preserving Atty-Client Privilege

By **Daniel Garrie** (February 13, 2025, 5:47 PM EST)

The attorney-client privilege is a cornerstone of legal practice, designed to foster open and honest communication between clients and their attorneys. However, for in-house counsel, navigating the complexities of this privilege can present significant challenges.

Unlike external legal advisers, in-house attorneys often operate at the intersection of legal and business functions, complicating their ability to assert privilege over communications. Recent rulings — such as the U.S. District Court for the Western District of Washington's September 2024 **ruling** in *Garner v. Amazon.com Inc.*,^[1] and the U.S. District Court for the Northern District of California's December **ruling** in *Epic Games Inc. v. Apple Inc.*^[2] — illustrate the challenge and dispute of attaching attorney-client privilege for in-house attorneys.



Daniel Garrie

This article explores the intricate landscape of attorney-client privilege as it pertains to in-house counsel, examining key considerations such as the definition of the client, the distinction between legal and business advice, and the imperative of confidentiality.

Further, it provides practical best practices to help in-house attorneys safeguard their communications and effectively assert their privileges in an increasingly scrutinized corporate environment.

The Elements and Considerations of Attorney-Client Privilege for In-House Counsel

Generally, the attorney-client privilege only protects (1) communications made in confidence; (2) between privileged persons, i.e., the attorney, client, or in some cases, an agent; and (3) for the purpose of obtaining or providing legal assistance for the client.

Who is the client?

The first requirement of attorney-client privilege is that a relationship exists in the first place between an attorney and a client. In the context of in-house counsel, the client is the corporation itself, not the individual employees within it.

However, because corporations act through people, a critical question arises: Which individuals within the organization can be considered clients for the purposes of applying the attorney-client privilege?

Courts typically utilize two primary tests to define the client in this context.

Subject-Matter Test

This test allows the privilege to apply if "[t]he communications concern[] matters within the scope of the employees' corporate duties," and the employees understand the discussions with counsel occurred so "the corporation could obtain legal advice," as articulated by the U.S. Supreme Court in its 1981 *Upjohn Co. v. U.S.* decision.^[3]

It is especially important to note here that the test is focused on the employee's understanding of the

discussions. In-house counsel is responsible for making sure employees understand when the lawyer is providing legal advice for the corporation.

Control Group Test

Under this test, the privilege is extended to communications by "decisionmakers or [those] who substantially influence corporate decisions," as noted by the Illinois Supreme Court's 1982 decision in Consolidation Coal Co. v. Bucyrus-Erie Co.[4]

Thus, the privilege typically covers only the corporation's controlling executives and key managers.

Is it legal advice, business advice or both?

Not all communications with a corporation's attorneys are privileged. As the Texas Court of Appeals for the 14th District held in its 2009 decision in Head v. State, for a communication to be protected, it must be "made in furtherance of the rendition of professional legal services to the client." [5]

When a lawyer performs nonlegal services, such as supplying business advice, the privilege does not attach. In its 2001 U.S. v. Chevron Texaco Corp. decision, the U.S. District Court for the Northern District of California noted that in-house counsel may serve a "dual role of legal and business advisor." [6]

This dual function can complicate the determination of whether a communication is protected under the attorney-client privilege. When communications serve dual purposes — both legal and business — two tests have emerged in courts to evaluate the nature of such communications: the "primary purpose" test and the "because of" test.

"Because of" Test

In its 2022 In re: Grand Jury decision, the U.S. Court of Appeals for the Ninth Circuit applied this test in the work-product context. It noted that the because-of test "considers the totality of the circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation." [7]

Notably, the Ninth Circuit continued, this test "does not consider whether litigation was a primary or secondary motive behind the creation of a document." [8]

Primary-Purpose Test

In contrast to the "because of" test, the primary-purpose test focuses on whether the communication's primary purpose is to give or receive legal advice. [9]

The U.S. Courts of Appeals for the Second, Fifth, Sixth and Ninth Circuits adhere to this test, whereas the U.S. Court of Appeals for the D.C. Circuit allows for privilege if one significant purpose of the communication is legal in nature.

In 2023, the U.S. Supreme Court **dismissed** In Re: Grand Jury, which had asked the court to expand the scope of attorney-client privilege protection for dual-purpose communications. The unresolved circuit split has continued to create uncertainty for attorneys regarding which standard should apply to mixed-purpose communications. [10]

Is the communication confidential?

The attorney-client communication must also be intended to be confidential. Even when a communication occurs between an attorney acting as a legal adviser and an individual within the corporate client group, it will not be privileged if the parties do not act in a manner that indicates they intend the communication to be confidential. [11]

Courts have made it clear that a corporation cannot insulate its files from discovery simply by CCing in-house counsel. [12] This is exemplified by the U.S. District Court for the District of Columbia's

August 2024 antitrust ruling in U.S. v. Google LLC.

In addition to the antitrust issues at the heart of the case, the court also addressed the plaintiff's arguments for sanctions against Google for "(1) 'its systemic destruction of documents' and (2) its 'flagrant misuse of the attorney-client privilege.'"[13]

The misuse charge stemmed from "Google's 'Communicate with Care' initiative," wherein the company instructed employees to include in-house attorneys on certain emails relating to antitrust issues, marking those emails as "Attorney/Client Privileged."

While the court declined to impose sanctions on Google, the court warned that Google needed to take rigorous steps to ensure that documents labeled as privileged were, in fact, substantively privileged.

Practical Tips for In-House Counsel To Avoid Forfeiting Privilege

Below are some practical guidelines for in-house attorneys that can help avoid some of the common pitfalls of asserting privilege.

Separate legal advice and business advice.

Whenever feasible, keep legal and business communications in distinct emails. When legal and business discussions are intermixed, counsel should explicitly identify legal theories and conclusions, differentiating them from general business advice.

Control the copying.

Train employees to avoid indiscriminately copying attorneys on emails. They should understand that simply CCing an in-house attorney on communications does not confer privilege.

In the Google case, various emails were originally withheld. They were primarily nonprivileged emails containing only one line: "cc'ed to [attorney name]" for "legal advice" or "privilege."

Take clear steps to indicate when a communication is privileged.

All documents should be properly labeled to reflect their confidential nature and privileged status, and indicate that their authors are acting in their capacity as legal counsel for the client.

Educate clients.

It is essential to educate clients about the distinction between legal advice and business advice. Instruct employees to use headers like "Privileged and Confidential" judiciously to avoid overuse, which may dilute their significance.

In-house counsel should also strive to clarify that they represent the corporation and not any particular individual whenever there is doubt or if the individual begins disclosing what appears to be sensitive information.

Conclusion

In conclusion, asserting attorney-client privilege poses unique challenges for in-house counsel, given the interplay between legal and business roles within corporations.

Understanding the nuances is crucial for protecting privileged communications. By implementing best practices, counsel can better navigate the complexities of privilege in corporate settings.

Daniel B. Garrie is the founder and managing partner of Law & Forensics LLC.

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- [1] [Garner v. Amazon.com](#) , No. C21-0750RSL (W.D. Wash. Sep. 23, 2024).
- [2] [Epic Games Inc. v. Apple Inc.](#) , No. 4:20-cv-05640-YGR (N.D. Cal. Dec. 2, 2024).
- [3] [Upjohn Co. v. United States](#) , 449 U.S. 383, 394 (1981).
- [4] [Consolidation Coal Co. v. Bucyrus-Erie Co.](#) , 432 N.E.2d 250, 257 (Ill. 1982).
- [5] [Head v. State](#) , 299 S.W.3d 414, 444–45 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).
- [6] [United States v. Chevron Texaco Corp.](#) , 241 F. Supp. 2d 1065, 1073 (N.D. Cal. 2002).
- [7] Id.
- [8] [In re: Grand Jury](#) , 23 F.4th 1088, 1091 (9th Cir. 2021) citing [In re: Grand Jury Subpoena](#) (Mark Torf/Torf Env't Mgmt.), 357 F.3d 900, 908 (9th Cir. 2004).
- [9] [In re: Grand Jury](#), 23 F.4th 1088, 1091 (9th Cir. 2021) citing [In re: County of Erie](#) , 473 F.3d 413, 420 (2d Cir. 2007).
- [10] [In re: Grand Jury](#), 23 F.4th 1088 (9th Cir. 2021), cert. dismissed, 143 S. Ct. 543 (2023).
- [11] [John Doe Co. v. United States](#) , 79 F. App'x 476, 477 (2d Cir. 2003) (finding privilege did not exist where documents in question were not intended by the parties to be confidential at the time of their creation).
- [12] See [Phillips v. C.R. Bard Inc.](#) , 290 F.R.D. 615, 630 (D. Nev. 2013).
- [13] [U.S. v. Google LLC](#) , Dist. Court for Dist. Of Columbia, Case No. 20-CV-3010 (APM) (Aug. 5, 2024).