Kessler Topaz named lead counsel in suit against Wells Fargo execs | Secondary Sources | National

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Kessler Topaz named lead counsel in suit against Wells Fargo execs

2024 SECDBRF 0003

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By Nicole Banas

WESTLAW Securities Enforcement & Litigation Daily Briefing

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January 5, 2024

(January 5, 2024) - A California federal judge has tapped Kessler Topaz Meltzer & Check LLP to lead a consolidated shareholder lawsuit claiming Wells Fargo & Co. directors and officers ignored regulatory lapses that led to nearly $4 billion in penalties.

City of Hollywood Firefighters' Pension System et al. v. Wells Fargo & Co. et al., No. 23-cv-2445; *Martin et al. v. Black et al.*, No. 23-cv-3564; *Fire & Police Pension Association of Colorado v. Barker et al.*, No. 23-cv-5112, 2024 WL 24332 (N.D. Cal. Jan. 2, 2024).
U.S. District Judge Jon S. Tigar of the Northern District of California chose Kessler as lead counsel in a Jan. 2 order that also named City of Hollywood Firefighters' Pension System as lead plaintiff over two other candidates.

The pension system can assert timely claims based on conduct dating back to September 2018, which is at least 18 months longer than the period applicable to the other two candidates, the judge said.

'Egregious' failures

Hollywood Firefighters filed a derivative complaint in the District Court in May 2023 claiming that nine Wells Fargo directors are liable for "egregious behavior" that cost the bank billions of dollars in fines.

Between 2016 and 2018, Wells Fargo Bank NA entered into consent orders with the Office of the Comptroller of the Currency, the Federal Reserve Board of Governors and the Consumer Financial Protection Bureau that required the bank to improve its compliance and risk management practices, the suit says.

The OCC matter stemmed from Wells Fargo's practice of opening banking and credit accounts for customers without their authorization, according to the complaint.

The defendants failed to hold management accountable for complying with the consent orders and ignored warnings from regulators that Wells Fargo's performance was unsatisfactory, the suit says.

The directors also allowed illegal conduct to persist, including widespread mismanagement of auto loans, mortgages and deposit accounts, the complaint says.

The OCC imposed a $250 million penalty against the bank in 2021, which was followed by a historically large $3.7 billion fine from the CFPB in 2022, the suit says.

Hollywood Firefighters asserted a claim for breach of fiduciary duty against the directors, alleging a "sustained and systematic failure" to ensure compliance with the consent orders and applicable laws.

Trustees of Sheet Metal Workers Local No. 33 (Cleveland District) Pension Fund filed a similar lawsuit against Wells Fargo insiders in July, and Fire and Police Pension Association of Colorado brought a third action in October.

The plaintiffs in each suit moved for consolidation and lead plaintiff appointment.

Demands considered

Judge Tigar said the three movants are all capable of adequately representing the interests of Wells Fargo shareholders.

The distinguishing factor is that Hollywood Firefighters served a books-and-records demand on Wells Fargo's board in September 2021 and could bring timely claims based on conduct up to three years before that date, the judge said.

FPPA brought a demand to the board in March 2023 and Local No. 33 never made a demand, so they have a substantially shorter "actionable period," Judge Tigar said.

Other considerations, such as the size of each movant's financial stake in Wells Fargo, will "translate into little difference, if any, in the vigor of representation," the judge said.

He consolidated the three lawsuits, granted Hollywood Firefighters' motion for lead plaintiff and denied the two others.

Eric L. Zagar of Kessler Topaz Meltzer & Check LLP represent Hollywood Firefighters.

Shawn A. Williams of Robbins Geller Rudman & Dowd LLP represent Local No. 33, and Richard M. Heimann and Katherine Lubin Benson of Lieff Cabraser Heimann & Bernstein LLP represent FPPA.
By Nicole Banas

LG Breached Contract in Firing Founders of Startup It Acquired

B bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/X3UNEH48000000

Two of ad tech firm Alphonso Inc.'s founders shouldn't have been terminated under the terms of an agreement with an LG Electronics Inc. affiliate that acquired it, the Delaware Court of Chancery ruled Thursday.

The interim CEO of Alphonso, put in place by a board of directors controlled by LG, was nevertheless bound by a stockholders' agreement to use "reasonable efforts" to protect the rights of the founders, Vice Chancellor Nathan A. Cook said, and he breached that clause of the agreement when the founders were terminated.

Although the interim CEO, Adam Sexton, was an employee of Alphonso and permitted more flexibility in deciding to terminate the company's founders, he acted "at LGE's and the LG-Affiliated Directors' behest"—but for Alphonso—in deciding to terminate the founders, Cook found.

The interim CEO "exercised a power that he believed to be within the scope of the authority held by Alphonso's CEO," the judge said. "But he overlooked the express bargained-for contractual efforts obligation that Alphonso agreed to as a party to the Stockholders' Agreement."

As a result, "the non-executive-officer employee founders are entitled to designate directors under the terms of the stockholders' agreement."

The suit, filed in April, accused LG affiliate Zenith Electronics LLC and its affiliated board members of fabricating a reason to fire Alphonso's senior management in a scheme to eliminate veto rights held by the board's minority bloc so they could rewrite an "advertising inventory" agreement to "siphon value" to LG by extracting above-market prices from the captive partial subsidiary.

After "trying to bully and intimidate Alphonso's management into renegotiating," the LG-linked board members ambushed and ousted them, citing "a host of meaningless platitudes and pretextual excuses," according to the complaint.

LG Electronics Inc. defended the ousting of Alphonso's senior leaders and board members as necessary changes to cleanse a toxic partnership.

"The Alphonso board was a hot mess," an attorney for Zenith, William Savitt of Wachtell, Lipton, Rosen & Katz, argued during a December hearing. "No one got along. There was cursing and screaming and disrespect."

Ross Aronstam & Moritz LLP and Davis Polk & Wardwell LLP represented the plaintiffs. Morris, Nichols, Arsht & Tunnell LLP and Wilmer Cutler Hale Pickering & Dorr LLP represented the individual defendants. Morris Nichols and Freidman Kaplan Seiler Adelman & Robbins LLP also represented Zenith. Heyman Enerio Gattuso & Hirzel LLP represented Alphonso.

The case is Chordia v. Lee , Del. Ch., 2023-0382, opinion 1/4/24 .

— With assistance from Jennifer Kay.

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Litigation
Jan. 4, 2024, 1:56 PM PST

Onsemi Execs, Board Sued Over Alleged Demand Misrepresentations

By Ben Miller

- **COURT:** D. Del.
- **TRACK DOCKET:** 1:24-cv-00007

Bloomberg Law News 2024-01-05T10:08:47966788407-05:00

Onsemi Execs, Board Sued Over Alleged Demand Misrepresentations

By Ben Miller 2024-01-04T16:56:03000-05:00

- **COURT:** D. Del.
- **TRACK DOCKET:** 1:24-cv-00007

ON Semiconductor Corp.'s current and former directors and executives misled investors about the stability of demand and revenue growth, overstating the impact of the company's long-term supply agreements, a shareholder derivative suit says.

Executives for the semiconductor maker also known as Onsemi misrepresented those growth prospects for nearly six months, starting with a May 2023 statement that the company would reach $1 billion in revenue last year, according to the complaint filed Wednesday in US District Court for the District of Delaware.

In subsequent disclosures and statements, the company's executives and directors touted the long-term supply agreements as a way to drive revenue, but overstated the demand and attainability of growth targets. By November, the public began to learn that the company's strategy wasn't prepared to handle weakening demand in its automotive business segment, when Onsemi cut its $1 billion revenue target by approximately $200 million, the complaint says.

CEO Hassane El-Khoury argued at the time that the 20% reduction in revenue was attributable solely to one customer, but CFO Thad Trent noted that the company expected greater declines in industrial and other markets as well, according to the complaint.

Onsemi's stock price fell nearly 22% after that to close at $65.34 on Oct. 30, according to the complaint. That was the company's biggest decline in share price since March 2020, according to data compiled by Bloomberg.

Before the alleged misrepresentations took place, Onsemi acquired GT Advanced Technologies in 2021, a company that produces silicon carbide, a key material for semiconductors. The directors and executives allegedly spoke extensively on the growth of the company's silicon carbide business, focusing on their ability to drive revenue up to $9 billion through long-term supply agreements within three to five years.

Shareholder Nathan Silva seeks to recover damages on behalf of the company for the directors' and executives' alleged violations of the Securities Exchange Act. He also seeks legal fees, the complaint says.

The company and its top executives face a separate shareholder class action, which is currently pending in the same district court.

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

Rigrodsky Law PA and Joshua Grabar, who practices in Philadelphia, Penn., represent the plaintiff.

The case is Silva v. El-Khoury , D. Del., No. 1:24-cv-00007, complaint filed 1/3/24 .

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Class Action
Jan. 5, 2024, 9:01 AM PST
Maison Solutions Allegedly Hid Visa Fraud and Other ‘Red Flags’
By Ben Miller

Documents

- Complaint
- Docket
- Judge Sherilyn Peace Garnett

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** 2:24-cv-00063

Bloomberg Law News 2024-01-05T12:52:0114925873-05:00
Maison Solutions Allegedly Hid Visa Fraud and Other ‘Red Flags’

By Ben Miller 2024-01-05T12:01:34000-05:00
COURT: C.D. Cal.
TRACK DOCKET: 2:24-cv-00063

Maison Solutions Inc. misled investors about the company’s relationship with a vendor and concealed a scheme to defraud the EB-5 visa program before a research firm sparked a selloff by alleging “red flags,” a shareholder class action complaint says.

The specialty grocery retailer failed to disclose to investors that vendor XHJC is a related party controlled by its CEO, John Xu, who also runs a company that supports immigration services for high-net worth Chinese investors and used the supermarkets as a front for visa fraud, according to the complaint filed Thursday in US District Court for the Central District of California. Top executives, director nominees, and underwriters behind its October IPO were also named as defendants.

Maison made the alleged misrepresentations between its IPO and last month, when a report by Hindenburg Research alleged numerous “red flags” concerning potential illegal activity at the company. The report revealed Xu’s alleged scheme to defraud the EB-5 program and that the company may have used WhatsApp chat rooms to inflate its stock price with coordinated trading plans.

The company’s stock price fell 84% the day the Hindenburg report was published to $2.50 on Dec. 15. That was the stock’s biggest drop since its market debut, according to data compiled by Bloomberg.

Since then, Maison stock has traded as low as $1.12 per share as of Thursday, representing a 72% decline from its $4 IPO price. The $10 million IPO was underwritten by Joseph Stone Capital LLC and AC Sunshine Securities LLC.

The company allegedly didn’t name XHJC among the companies that were associated with related party transactions, and told investors in its registration statement that its executives weren’t subject to litigation. But Xu was named as a defendant in a 2020 lawsuit alleging that he used supermarkets as a front to defraud the EB-5 visa program, forging visa applications and listing fake employees. That case is currently scheduled for trial, according to the complaint.

A separate 2018 lawsuit alleged that Xu and his other company J&C International Group engaged in a scheme to loot a company and turn it into an illegal visa mill, the complaint says.

Shareholders Rick Green and Evgenia Nikitina seek to recover damages for a class of investors who acquired Maison stock between Oct. 5 and Dec. 15 alleging that the company, executives, director nominees, and IPO underwriters violated the Securities Exchange Act. They also seek to recover legal fees, the complaint says.

Maison didn’t immediately respond to a request for comment.

Frank Cruz, who practices in Los Angeles, and Glancy Prongay and Murray LLP represent the plaintiffs and the proposed class.

The case is Green et al v. Maison Solutions , C.D. Cal., No. 2:24-cv-00063, complaint filed 1/4/24

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New York District Courts Split on Whether Cryptocurrency Is a Security

law.com/newyorklawjournal/2024/01/05/new-york-district-courts-split-on-whether-cryptocurrency-is-a-security

By Alice K. Jump and Ethan Krasnoo

ANALYSIS
The rapid expansion of cryptocurrency markets—currently topping $3 billion—has drawn the ire of regulators who have issued a raft of confusing and complicated guidance and regulations. Two recent federal district court decisions illustrate the complexity of the debate and provide guidance to companies looking to understand how to classify their cryptocurrency offerings.

January 05, 2024 at 10:00 AM

Securities Litigation

By Benjamin Daniels, Jenna Scoville and Ileana Polanco Cavazos | January 05, 2024 at 10:00 AM

The rapid expansion of cryptocurrency markets—currently topping $3 billion—has drawn the ire of regulators who have issued a raft of confusing and complicated guidance and regulations. The most heated debate is whether these assets are currencies (with lighter regulation) or securities (with heavy regulation).

The debate is simple when the asset is being offered as a standalone product. After all, most agree that cryptocurrencies are not securities in that circumstance. The crux of the debate focuses on the precise circumstances that transform these assets from currency into a security subject to regulation by the U.S. Securities and Exchange Commission (SEC). The central question is whether certain statements from the company or intent from investors creates an “investment contract,” a type of security that has a broad definition and inconsistent application.

Two recent federal district court decisions illustrate the complexity of the debate and provide guidance to companies looking to understand how to classify their cryptocurrency offerings. *See SEC v. Ripple Labs*, 2023 WL 4507900 (S.D.N.Y. July 13, 2023); *SEC v. Terraform Labs Pte. Ltd.*, 2023 WL 4858299 (S.D.N.Y. July 31, 2023).

‘SEC v. Ripple’

In *Ripple*, the SEC charged a blockchain company (Ripple) and two of its executives with offering an unregistered security. Ripple marketed its native token, XRP, as a product that would provide faster and more efficient cross-border transactions. The parties agreed that XRP was not a security when offered as a standalone token. They disagreed, however, whether the circumstances surrounding two types of transactions—institutional sales and programmatic sales—transformed XRP into a security.

Institutional Sales Were Securities

The district court first held that Ripple’s institutional sales were securities. These sales involved written contracts to sell XRP to institutional buyers, such as hedge funds, market makers and similar customers. Ripple marketed these investments as tied to the company’s success, stating that the XRP value would increase as Ripple’s footprint increased. The contracts themselves had specific lock-up provisions or resale restrictions based on XRP trading volume.

The court found that these sales were “investment contracts,” a catchall category of securities. To qualify as an “investment contract,” there must be: (1) an investment of money, (2) in a common enterprise, (3) with a reasonable expectation of profit derived primarily from the efforts of another.

The *Ripple* court’s analysis turned on the third prong—a reasonable expectation of profit derived from the efforts of another. The court focused on statements on social media and marketing materials sent to investors.

For example, a Ripple executive asked institutional investors to be patient and give the company more time because “for Ripple…to do well, we have to do a very good job in protecting the value of XRP and the value of the network.” On another social media platform, Ripple’s then-chief cryptographer said that XRP’s value derived from an “amazing team of dedicated professionals” who focus on developing an ecosystem around XRP.

The court found that these (and similar statements in marketing brochures) created an expectation that XRP’s value was linked to Ripple’s performance as a company.

The *Ripple* court also focused on the structure of the Institutional Sales, finding that they suggested there was a “reasonable expectation of profit derived primarily from the efforts of another.” The institutional sales contracts included clauses that indemnified Ripple and had resale restrictions and lock-up provisions based on XRP’s trading volume.

The court found these types of clauses showed that this was an investment and not a currency—no rational economic actor would willingly freeze millions of dollars in a currency and indemnify the issuer of the currency.

Programmatic Sales Were Not Securities

By contrast, the district court concluded that Ripple's programmatic sales were not securities. These sales of XRP occurred on a digital exchange through a "blind bid" process. This meant that neither the buyer nor the seller knew the identity of their counterparties.

The court held that programmatic sales were not "investment contracts" because there was no reasonable expectation of profits based on the efforts of another. It reasoned that the "blind bid" process meant that investors did not know they were buying XRP from Ripple, let alone believe they were investing in the company.

'SEC v. Terraform Labs'

A few months later, in *Terraform Labs,* another district court in the Southern District of New York addressed whether a cryptocurrency had transformed into a currency. In deciding the assets were "investment contracts," the court assessed similar evidence as had been presented in *Ripple,* but expressly rejected the *Ripple* court's analysis.

Terraform had made four relevant cryptocurrencies, all of which the court found were "investment contracts." The coins were divided into two categories. First, there were "stable coins," which are cryptocurrencies designed to have a stable price, typically through being pegged to a commodity or currency. Second, there were non-stable coins, which were more complex investments. One non-stable coin mirrored the price of securities exchanged on stock exchanges, another allowed investors to share fees in certain underlying projects of the company, and yet another allowed for transactions outside the blockchain.

Like *Ripple*, the *Terraform* court focused its "investment contracts" analysis on whether the coins showed an intent to profit on the efforts of another. The stable coins fit that definition because they conferred a right to purchase another security (the LUNA tokens) and because nearly 75% of the tokens were deposited in an investment pool that promised returns of up to 20%. The non-stable coins likewise met the definition—they provided a yield to holders in line with the growth of the Terraform ecosystem.

And like *Ripple*, the *Terraform* court based its conclusion on the defendants' marketing—they used social media posts, investor conferences, monthly investor reports, and one-on-one meetings to promise that any profits would be fed back into the Terraform blockchain and generate additional profits for all crypto asset holders.

Despite these similarities, *Terraform* rejected *Ripple*'s core analysis. The *Terraform* court believed that *Ripple* injected unnecessary formalism into the analysis of "investment contracts," in particular, questioning *Ripple's* distinction between purchasing investments from the company or on the secondary market.

This was needless formalism in the court's opinion, and distracted from the core analysis of whether a reasonable person would believe they were investing with the intent to gain a profit from the efforts of another. It was this intent—and not the form of the transaction—which should drive the applicable analysis.

Takeaways

Terraform and *Ripple* underscore the SEC's renewed focus on cryptocurrency and the unsettled nature of the law in this area. While *Terraform* announced that the decisions are at odds, both looked at the circumstances surrounding the transactions to determine what a reasonable investor would believe. While *Ripple* focused on the issuer's statements and the form of the transactions, *Terraform* employed a totality of the circumstances test. Neither decision, however, binds future courts and will not be the last cases to address the issues.

As these issues work their way through the judicial system, companies should closely evaluate all statements made to investors about cryptocurrencies. Further, courts might be more likely to view these assets as securities if their value is tied to the company's growth. Companies should focus on whether they are portraying crypto assets as investments through the nature of transactions, statements to investors, or any other representations.

Benjamin Daniels *is a partner at Robinson & Cole and a member of its Business Litigation Group. He advises financial institutions and global corporations about litigation and dispute resolution.* **Jenna Scoville** *is an associate at the firm and a member of its Business Litigation Group.* **Ileana Polanco Cavazos** *is a law clerk at the firm and focuses on business litigation.*

Business Law Prof Blog

Friday, January 5, 2024

Litigation-limiting constitutive documents – off to the California Supreme Court

By Ann Lipton

Looking back, it's funny how the issue of litigation limits in corporate constitutive documents has really been a throughline throughout my academic career; my first paper on the subject, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, was written when I was still a VAP. So now it's like a theme.

Anyhoo, as you all know, the latest set of developments occurred when the Delaware Supreme Court decided *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020), and approved the use of litigation limiting bylaws and charter provisions even for *non Delaware* claims, specifically, federal securities and antitrust claims.

That was part of what inspired my latest paper on the subject, *Inside Out (or, One State to Rule them All): New Challenges to the Internal Affairs Doctrine*, arguing, among other things, that other states pay too much deference to Delaware by automatically treating these provisions as contracts governed by Delaware law, rather than asking which law to apply, and whether the elements of contract are met.

Well, a new case has come up, EpicentRx, Inc. v. Superior Court, 95 Cal.App.5th 890.

EpicentRx is private, organized in Delaware but headquartered in California. Its charter and bylaws require that shareholder claims be filed in Delaware Chancery. Well, one shareholder is suing, not only for breach of fiduciary duty under Delaware law, but also for fraud under *California* law. In *EpicentRx, Inc. v. Superior Court*, the California appellate court held that the corporate constitutive documents are, in fact, a contract – governed by the internal affairs doctrine, which, by the way, is not what *Salzberg* held, there was a diagram and everything – but that in this case, a trial in Delaware Chancery would require the shareholder to forfeit its jury rights under California law, and therefore the contract is unenforceable. (Yes, that's an issue I mention briefly in my paper, by the way)

The California Supreme Court recently agreed to hear the case, *Epicentrx, Inc. v. Superior Court*, 2023 Cal. LEXIS 6991 (Cal., Dec. 13, 2023).

Now, I gather that a lot of the action will be about whether the particular claims advanced by the plaintiff are, in fact, jury claims under California law. But I *desperately* hope the California Supreme Court will spend *some time* asking whether there's even a contract here in the first place, including which state's law applies (since, I say again, Delaware did *not* hold this question was governed by the internal affairs doctrine). Now, since EpicentRx is private, these may be more difficult questions than in the context of publicly traded corporations. The plaintiff presumably bought stock directly from the company, for all I know the investment contract incorporated the bylaw and charter provisions by reference, although – and I think this is key – one factor that makes constitutive documents *noncontractual* is that, as *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) recognized, Delaware managers are subject to fiduciary duties when they enforce them, and I don't even know how you ask whether it's a violation of fiduciary duty to enforce a bylaw that causes a shareholder to forfeit a jury right. In any event, all I really want is for the California Supreme Court to *take these questions seriously*.

MOVEit Lawyers Clash Over How To Manage Breach Lawsuits With 90+ Defendants

law.com/2024/01/04/moveit-lawyers-clash-how-to-manage-breach-lawsuits-with-90-defendants

What You Need to Know

- About 270 lawsuits over the May 31 breach of Progress Software, which makes the MOVEit file transfer software, are in multidistrict litigation in Massachusetts.
- Dozens of plaintiffs' lawyers have applied for leadership, but they are split on how best to structure the leadership team.
- Lawyers for more than 30 defendants, many of whom had opposed multidistrict litigation, hhave their own proposal that would put the cases on separate 'tracks.'

Dozens of plaintiffs' lawyers are contesting the size and structure of the leadership team that should steer the sprawling MOVEit data breach lawsuits, which now name more than 90 defendants.

In separate proposals submitted to U.S. District Judge Allison Burroughs, who is overseeing about 270 lawsuits in multidistrict litigation in Massachusetts, plaintiffs' lawyers submitted potential structures that would attempt to organize various groups of defendants, which includes customers of Progress Software Corp., maker of the MOVEit file transfer software. A Russian hacker's breach of the software on May 31 affected more than 1,000 organizations.

Among the leading firms submitting proposals are Hagens Berman Sobol Shapiro, Scott + Scott and Milberg Coleman Bryson Phillips Grossman.

Even the defense attorneys, who normally stay out of the plaintiffs' leadership process, weighed in with a proposed structure of their own.

Burroughs hasn't yet ruled on the applications, but, on Dec. 21, said she would schedule 20-minute interviews in person or via Zoom of plaintiffs' lawyers seeking leadership posts.

The leadership fight comes as cyberattacks have become increasingly prevalent and sophisticated, and as lawyers have sued not just the company that was hacked, but others impacted by the breach. So-called cluster breaches are particularly prevalent in financial services and insurance, and Johns Hopkins University, Prudential Insurance Co. and TD Ameritrade are among the defendants in the MOVEit cases.

'Scores of Defendants'

One of the proposals, filed by Kristen Johnson, a Hagens Berman partner in Boston, on behalf of the "majority" of the plaintiffs, would involve a plaintiffs' steering committee of nine lawyers, including notable data breach attorneys Amy Keller, of Chicago's DiCello Levitt, and John Yanchunis, of Morgan & Morgan in Tampa, Florida. The members of that committee represent 122 of the cases in the multidistrict litigation.

"Unlike typical data breach MDLs that focus on a single defendant (or at most, a few defendants), the involvement here of scores of defendants (which could grow to potentially hundreds more) presents unique case management challenges that are best addressed by a flat PSC structure managing the litigation as proposed in this application," Johnson wrote in a Dec. 15 filing.

The committee would oversee various subcommittees and defendant-specific group litigation teams.

Competing leadership proposals focused on a "track" or "tranche" approach.

One proposal would have three tracks: claims against Progress Software; claims against companies that used MOVEit software, like TD Ameritrade and Charles Schwab; and claims involving vendors like Pension Benefit Information. Four co-lead counsel would oversee an executive committee of eight attorneys, plus three subcommittees and a leadership development committee designed to give opportunities to younger or less experienced lawyers.

"Allowing these attorneys to participate in this case at a high level will help to break down some of the barriers to entry at the leadership level due to the 'repeat player' dynamic and the natural tendency of courts to give appointments to attorneys who can already demonstrate prior experience leading MDLs and other big cases," wrote proposed co-lead

Joseph Guglielmo, Scott & Scott, NewYork. Courtesy Photo

counsel Gary Lynch, of Lynch Carpenter in Pittsburgh; Joseph Guglielmo, of Scott + Scott in New York; Seth Lesser, of Klafter Lesser in Rye Brook, New York; Karen Riebel of Lockridge Grindal Nauen in Minneapolis.

Defense lawyers for more than 30 companies, many of whom had opposed multidistrict litigation, submitted their own proposal at a Nov. 30 case management conference that also would have separate "tracks."

"An MDL is a case management tool," Johnson wrote in her filing, opposing the defense's proposal. "It is not to be used to dictate the substantive nature of the claims that can be asserted."

In a Dec. 29 response, defense lawyers disagreed with the characterization of their proposal. They took no position on which plaintiffs' leadership team was best, but suggested that many of them "have little explanation as to how the proposed structures will beneficially impact the administration of this MDL."

In particular, they wrote, Johnson's "majority" plaintiffs' proposal, which includes defendant specific groups, could create more than 90 "mini-MDLs."

Orrick's Data Breach Was Bigger Than Previously Reported

law.com/therecorder/2024/01/05/orricks-data-breach-was-bigger-than-previously-reported

By Amanda Bronstad

What You Need to Know

- Orrick Herrington & Sutcliffe revised a data breach report in late December to include more than 630,000 affected individuals.
- Orrick settled four class action lawsuits regarding the breach in December.
- A class action lawsuit against Bryan Cave Leighton Paisner over a 2023 data breach is ongoing.

Orrick, Herrington & Sutcliffe's data breach last year involved more people than previously reported, according to a late December update the firm filed with the offices of multiple state attorneys general.

Meanwhile, several other firms also reported data breaches around the end of 2023.

California boutique Knox Ricksen reported a data breach to the state's Office of the Attorney General on Dec. 29 to note that Allstate customers' data had been accessed during a breach in October. And in Irvine, 29-lawyer Brown & Streza was breached.

Also in late December, White Plains, New York, boutique McCarthy Fingar reported an April data breach to the Office of the Maine Attorney General in late December, noting that the names and Social Security numbers of more than 1,000 were accessed.

For Orrick, a Dec. 29 update to the law firm's data breach notification filed to the Maine attorney general noted that 637,620 people were affected by the breach last spring, an increase from previous reports. Orrick reported 152,818 people were affected in its initial July report and upped that figure to 461,100 in August.

Between late February and mid-March last year, an intruder gained access to file share used to store client information. The firm hired a cybersecurity consultant, informed affected individuals and offered two years of free credit monitoring, according to its breach notifications.

That explanation hadn't fully satisfied some of those impacted, including plaintiffs in four separate lawsuits who provided data to Orrick clients and subsequently had it accessed by the intruder. In December, the parties agreed to consolidate the lawsuits and settle the matters out of court, per a Northern District of California court filing.

In a statement, an Orrick spokesperson said the firm was pleased to have reached a settlement within a year of the incident, and will "continue our ongoing focus on protecting our systems and the information of our clients and our firm."

Last year not only saw a rise in law firm data breaches, but also class action litigation tied to the events. Bryan Cave Leighton Paisner, Cadwalader, Wickersham & Taft and Smith, Gambrell & Russell were all sued over data breaches last year. Cadwalader and Smith Gambrell had their suits dismissed; Bryan Cave was dismissed as a defendant in one lawsuit as another is ongoing.

Multiple firms have also been targeted by the same hacking groups. Kirkland & Ellis, K&L Gates and Proskauer Rose were all compromised in a breach by global ransomware group CL0P last year.

Not all data breaches have drawn litigation. International law firm Butler Snow reported a data breach in September involving the personal information, including Social Security numbers, of 824 people. In a data breach notice, the law firm said an unauthorized actor accessed its systems in May.

Davis Polk & Wardwell saw its employees' personal data exposed to hackers when a third-party vendor, a health care concierge service provider, was compromised in September. In a November report, Davis Polk stated it was advising affected employees on fraud prevention measures.

This story was updated with a statement from Orrick.

Internet immunity shield gets another dent in fentanyl victims' case against Snap

reuters.com/legal/transactional/column-internet-immunity-shield-gets-another-dent-fentanyl-victims-case-against-2024-01-04

Alison Frankel

Snapchat logo is seen in this illustration taken July 28, 2022. REUTERS/Dado Ruvic/Illustration Acquire Licensing Rights

Jan 4 (Reuters) - It's been a tough few months for social media platforms that have long relied on the federal law immunizing them from liability for content posted by their users.

In October, a Los Angeles state court judge refused to toss a consolidated case accusing Facebook, Instagram, Snap, TikTok and YouTube of designing and engineering their platforms to "addict" children and teens, causing an array of mental and physical health problems.

ruled that Snap (SNAP.N), Facebook and Instagram parent Meta Platforms (META.O), YouTube parent Alphabet (GOOGL.O), and TikTok parent ByteDance could not use the federal immunity law – Section 230 of the Communications Decency Act – to squelch hundreds of individual lawsuits accusing the websites of causing mental and emotional health problems in children.

Then last month, as I told you, seven judges from the 5th U.S. Circuit Court of Appeals called on the U.S. Supreme Court to clarify the scope of protection that Section 230 provides to online publishers. The seven judges failed to persuade eight of their colleagues on the 5th Circuit to reconsider an appellate panel's holding that Snap was shielded under Section 230 from claims by a Texas teen who used Snapchat to correspond with a teacher later convicted of sexual assault. But lawyers for the plaintiff told me they intend to follow up on the dissenting judges' advice and will ask the Supreme Court to take up the issue.

On Tuesday, yet another judge weighed in against social media companies. Los Angeles Superior Court Judge Lawrence Riff ruled that Snap must face claims by the parents of 11 children who allegedly used Snapchat to obtain drugs containing fentanyl. (Ten of the children died from fentanyl poisoning. The other survived a fentanyl overdose.) Riff's opinion, which provides a comprehensive tour through the history of Section 230 and judicial attempts to define the scope of statutory immunity, concluded that Snap is not shielded from claims that it exposed underage users to drug traffickers.

I should pause here to note that Snap said in an email statement that the plaintiffs' allegations are "both legally and factually flawed." The company said it remains committed to its efforts, including cooperation with law enforcement officials and the use of technology to "identify and shut down dealers," to stop criminals from abusing its platform.

The through line in all of the recent cases I mentioned is their framing: Instead of alleging that social media sites are responsible for injuries arising from users' posts, plaintiffs have instead asserted that the sites are liable for their own allegedly defective designs. The still-emerging plaintiffs' theory is that Section 230 immunity does not protect online publishers from product liability or negligence claims based on the way their platforms operate, even if those operations involve user-created content.

It's not easy to pin down that distinction. As Riff noted in Tuesday's Snap ruling, the law is "unsettled and in a state of development," not just on the outer bounds of Section 230 immunity but also on whether social media platforms are even products.

Take a look, for example, at the dismissal brief by Snap's lawyers at Shook Hardy & Bacon and Morrison & Foerster. Snap argued that despite the product liability cloak, plaintiffs' claims actually all arose from content posted by drug dealers who, despite Snap's best efforts to combat illegal activity on its platform, used Snap to communicate with the fentanyl victims.

The plaintiffs' children would not have suffered harm if it hadn't been for dealers' posts, Snap said, so lawsuit's claims are all barred by Section 230. The 9th Circuit, Snap said, has already said as much in a squarely analogous case. The federal appeals court ruled in 2019's Dyroff v. Ultimate Software Group that Section 230 shielded the now-defunct social networking site Experience Project from claims that its design allowed the plaintiff's son, a heroin addict, to connect with a dealer who sold him drugs laced with deadly fentanyl. The 9th Circuit held that Ultimate's algorithmic recommendations and email notifications were not themselves content that could trigger liability for the site but only a means to communicate content created by users.

Plaintiffs' lawyers in the Snap case, from the Social Media Victims Law Center and the C.A. Goldberg firm, argued in their opposition brief that their case was different. Unlike the heroin user's mother in Dyroff, the said, their complaint expressly disavowed claims that Snap was liable for failing to remove or moderate posts by drug sellers. Instead, plaintiffs' lawyers argued, they alleged that more than 20 unreasonably dangerous Snap design features left underage users vulnerable to adult predators.

Those arguments prevailed with Riff, who said Snap's features, as portrayed in the plaintiffs' complaint, "crossed the line into content." The judge did not specifically explain his rationale for distinguishing the fentanyl victims' assertions from the allegedly defective design features examined by the 9th Circuit in the Dyroff case but said plaintiffs' claims against Snap were independent of the drug seller's posts.

"The allegations," Riff wrote, "assert conduct beyond 'incidental editorial functions' for which a publisher may still enjoy Section 230 immunity."

Clearly, plaintiffs suing social media platforms are getting better at crafting their pleadings to emphasize allegedly defective design features. One of the lead lawyers in the fentanyl case, Matthew Bergman of the Social Media Victims Law Center, said his group has been pushing this strategy for two years in its cases against Snap and other platforms.

"Our approach seems to have legs," Bergman told me.

Bergman acknowledged that plaintiffs still have a long way to go to hold social media sites liable. He's anticipating defense requests to appeal dismissal decisions and waiting to see whether the U.S. Supreme Court – after sidestepping Section 230 last year in a case against YouTube – re-enters the debate over the scope of the shield. We know for sure that Justice Clarence Thomas is champing for that opportunity.

But even as plaintiffs brace for potential appellate developments, the recent spate of wins shows that Section 230 is not impregnable. Said Bergman: "We're in the game."

Read more:

Abused teen's case against Snap could be headed to the US Supreme Court

Social media companies must face youth addiction lawsuits, US judge rules

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Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

Amazon says federal law bars consumers' 'social casino' lawsuit

reuters.com/legal/transactional/amazon-says-federal-law-bars-consumers-social-casino-lawsuit-2024-01-05

Mike Scarcella

The logo of giant online retailer Amazon AMZN.O is displayed at a logistics centre in Trapagaran, Spain, December 18, 2023. REUTERS/Vincent West Acquire Licensing Rights

Jan 5 (Reuters) - Amazon.com (AMZN.O) said a U.S. law immunizing internet platforms from claims over third-party content on their websites should block a new consumer lawsuit accusing the company of profiting from unlawful casino-style apps.

Amazon in a filing on Thursday asked a federal judge in Seattle to freeze the consumers' case while an appeals court weighs whether to allow similar lawsuits against Alphabet's Google (GOOGL.O), Apple (AAPL.O) and Meta's Facebook (META.O).

The San Francisco-based 9th U.S. Circuit Court of Appeals is poised to take up the casino-app cases in April or May, and a ruling is expected by the end of the year, lawyers for Amazon at Perkins Coie told U.S. District Judge Robert Lasnik.

Hundreds of millions of dollars or more in alleged damages could be at stake in the cases. A California federal judge in 2022 said consumers could pursue claims against Google, Apple and Facebook over their roles in processing payments for in-app transactions.

The litigation could set new precedent on the scope of Section 230 of the federal Communications Decency Act of 1996. The provision offers some protections to tech companies that host content on their websites that they did not create.

Amazon did not immediately respond to a request for comment.

The plaintiffs' law firm Edelson, which is leading the cases against Amazon and other platforms, did not immediately respond to a similar request.

The firm, which is representing a prospective class of "tens of thousands of consumers," opposed putting the case on hold, according to Amazon.

The virtual casino apps are free to play and do not generate cash prizes. Users win digital chips, and they can buy more to keep playing.

A 9th Circuit ruling in 2018 said casino-style apps violate a Washington state gambling law.

Many of the casino games themselves have settled consumer lawsuits in recent years, leaving the platforms to fight claims that they facilitated unlawful gambling enterprises.

The lawsuit against Amazon, filed in November, accused it of offering more than 30 illegal casino apps in a "dangerous partnership" with virtual casinos. The named plaintiff is a Nevada resident who said he has been addicted to "illegal slots."

The lawsuit said Amazon was "acting as the bank" for social casinos apps that the company knew to be illegal.

Amazon's Thursday filing said moving the case forward now "will likely impose hardship on everyone." The company said it would make other arguments against the claims at a later time.

The case is Steve Horn v. Amazon.com Inc, U.S. District Court, Western District of Washington, 2:23-cv-01727.

For plaintiff: Todd Logan of Edelson; and Cecily Jordan of Tousley Brain Stephens

For defendant: Charles Sipos and Mallory Webster of Perkins Coie

Read more:

Amazon sued over 'dangerous partnership' with virtual casino apps

Apple, Meta, Google argue they're not 'bookies' in casino app appeal

US court approves 'social casino' $415 million class settlement

Reporting by Mike Scarcella

New Class Action: Stone Academy Students Sue State for Invalidating Credits

law.com/ctlawtribune/2024/01/05/new-class-action-stone-academy-students-sue-state-for-invalidating-credits

By Stephanie Wilkins

NEWS
"There's no other program that has accepted a single credit to Stone Academy for this group of students," David Slossberg said. "So anyone that is trying to complete a practical nursing program has to start all over. Or they are in limbo because they can't afford to start over, either because of money or time."

January 05, 2024 at 12:44 PM

News

Emily Cousins
Litigation Reporter

Stone Academy students filed another class action, this time against government officials who invalidated academic credits earned at the former for-profit nursing school.

On Feb. 14, 2023, Stone Academy abruptly closed, changing the lives of hundreds of practical nursing students. In a class action against the school and its officials, the court awarded $5 million in prejudgment remedy to the plaintiffs.

In the court's order, it concluded that Stone Academy lacked approved in-person clinicals required for certification, had unqualified faculty and a low passing rate for the test to receive a license as a registered nurse, and the students were "given no warning of the closure."

The second class action, filed by Hurwitz, Sagarin, Slossberg & Knuff in Connecticut federal court, includes the same plaintiffs plus one additional plaintiff. It was filed against the commissioner of the Connecticut Office of Higher Education, Timothy Larson, the division director of academic affairs, Sean Seepersad, the commissioner of the Connecticut Department of Public Health, Manisha Juthani, and the section chief for practitioner licensing and investigations, Chris Andresen.

After Stone Academy closed its doors, the defendants assumed an allegedly "unauthorized auditing process" of students' transcripts who were enrolled after Nov. 1, 2021, the complaint said.

"In a report of its findings issued in July, 2023, Defendants declared approximately 76% of the Plaintiffs' earned and awarded credits to be 'invalid,'" the complaint said. "Plaintiffs had no involvement in, and no ability to appeal the audit. Defendants thereby denied Plaintiffs, and members of the putative class, their property rights in these credits, including their ability to use them in pursuit of becoming licensed practical nurses."

One of the attorneys for the plaintiffs, David Slossberg of Hurwitz Sagarin, said whether it was Stone Academy or the state, the people "in positions of trust" failed the students.

Stone Academy had agreed to an audit before its closure, and the purpose of the audit would have been to "identify any deficiencies in the program for trying to remediate it," Slossberg said. However, the defendants overstepped when they declared "invalid credits that were issued while the program was authorized to operate," he said.

As a result, Slossberg said the plaintiffs are "stuck."

"There's no other program that has accepted a single credit to Stone Academy for this group of students," Slossberg said. "So anyone that is trying to complete a practical nursing program has to start all over. Or they are in limbo because they can't afford to start over, either because of money or time."

Slossberg said most of the class members are certified nursing assistants, and the program at Stone Academy was a way to advance their careers to become a practical nurse and, eventually, a registered nurse.

"We're going to try to see if we can, through money damages and, perhaps, crafting some other solutions, try to help them move on with their careers," Slossberg said.

In addition, some former students who completed their degrees and passed the nursing license exam were pressured to take a refresher course, and those who did not agree to sign a stipulation were subject to investigations, the complaint said.

"These supposed investigations have sat fallow, with nothing having been actually investigated in the many months that the files have been open," the complaint said. "They hang over the heads of these licensed practical nurses despite having earned their [practical nursing] licenses."

Even the students who signed the stipulation had to wait seven months to receive their license, "significantly more time than the forty-eight-hour refresher course [by the Department of Public Health] implied," the complaint said.

The plaintiffs claimed the defendants violated the procedural due process, liberty interest, and substantive due process sections of the Fourteenth Amendment of the U.S. Constitution, the complaint said.

Counsel for the defendants has not appeared yet. But Noele Kindey, a spokesperson for the Office of Higher Education, said, “The Office of Higher Education denies the allegations and will defend its actions in court.”

In addition, Christopher Boyle, director of communications at the Connecticut Department of Public Health, declined to comment on behalf of the department.

Read the complaint:

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- **New Suit**

  Microsoft and OpenAI Inc., the developer of the ChatGPT AI language generator and DALL-E AI image generator, were slapped with a copyright class action on Jan. 5 in New York Southern District Court. The complaint was brought by Grant Herrmann Schwartz & Klinger on behalf of a class of journalists and authors, including Nicholas Basbanes and Nicholas Gage, whose copyrighted works were allegedly used to train the language learning model of the AI platform. Counsel have not yet appeared for the defendants. The case is 1:24-cv-00084, Basbanes v. Microsoft Corporation.

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Lawyers Seek $10 Million for Family Dollar Pest Infestation Deal

B bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X4VDD6N0000000

Plaintiffs' attorneys want a $10 million fee for their work negotiating a class settlement that gives $25 Family Dollar gift cards to consumers who bought products at stores that were shut because of a rodent infestation at a warehouse.

The request is reasonable given the value of the settlement, the benefit to the class, and the risks involved in the litigation, the lawyers said Thursday in a filing to Judge Sheryl H. Lipman of the US District Court for the Western District of Tennessee.

Lawsuits followed the February 2022 closing of hundreds of Family Dollar stores in six states and recalling numerus products after a Food and Drug Administration investigation of an Arkansas distribution center found live and decaying rodents, rodent feces and urine, and dead birds and bird droppings.

The suits, alleging plaintiffs overpaid for potentially contaminated items, were combined in multidistrict litigation before Lipman, who preliminarily approved the deal last October.

The deal covers Arkansas, Alabama, Louisiana, Mississippi, Missouri, and Tennessee residents who bought any product at an affected Family Dollar store from Jan. 1, 2020, through Feb. 18, 2022. Class members are entitled to one $25 Family Dollar gift card per household. The card don't expire and can be transferred.

Because the settlement didn't create a common fund, the fee request is measured by the lodestar—their time on the case multiplied by their hourly rates, they said.

The lodestar so far is roughly $4.9 million, the filing said. The fee request includes a multiplier of 2, which falls well within the range of those approved by courts in this circuit, the attorneys said.

And the final multiplier "will be well below 2" after the lawyers' additional expected time, such as preparing for the April 5 final approval hearing, is included, they said.

More than 800,000 claims have been filed in advance of the Jan. 9 deadline, the attorneys said. The deal's total value can't be assessed until the deadline passes and the claims are vetted, they said.

Stranch, Jennings & Garvey PLLC; Barrett Law Group PA; and Cuneo Gilbert & LaDuca LLP represent the plaintiffs. Gibson, Dunn & Crutcher LLP represents Family Dollar LLC and related companies.

The case is Whitney v. Family Dollar, Inc. , W.D. Tenn., No. 2:22-cv-02138, motion 1/4/24 .

To contact the reporter on this story: Julie Steinberg in Washington at jsteinberg@bloombergindustry.com

Law firm Quinn Emanuel formally enters Delaware market with new partner hire

reuters.com/legal/legalindustry/law-firm-quinn-emanuel-formally-enters-delaware-market-with-new-partner-hire-2024-01-04

David Thomas

Jan 4 (Reuters) - U.S. law firm Quinn Emanuel Urquhart & Sullivan on Thursday said it has hired a new partner in Wilmington, Delaware to lead a new office in the state, which hosts one of the country's most important courts for corporate litigation.

Michael Barlow has joined Quinn Emanuel as a partner and the leader of its new Delaware office. A former partner at Wilmington-based Abrams & Bayliss, Barlow said he has worked alongside Quinn Emanuel lawyers for years on cases in the Delaware Court of Chancery.

"Our need for experienced Delaware practitioners has expanded dramatically. And Mike has worked on so many cases with us over the years, we consider him part of the Quinn family," Andrew Rossman, who leads the M&A litigation practice at Quinn Emanuel, said in an email.

Rossman said the firm's Delaware caseload has grown "exponentially," noting its lawyers handled three simultaneous trials there in July 2023.

Barlow, who previously served as chief of staff and chief legal counsel to former Delaware Governor Jack Markell, described the firm's new office as a "a formalization of a commitment" to the state's legal community.

As its sole member for now, Barlow said he wants to grow the new office.

Thompson Bayliss, the managing partner of Abrams & Bayliss, said in a statement released by Quinn Emanuel that Barlow would be missed but that "we are thrilled" about his move to Quinn, whose 1,000 lawyers are nearly all focused on litigation. The firms will continue to collaborate on cases, he said.

Quinn Emanuel is currently defending a $267 million fee award before the Delaware Supreme Court. Quinn Emanuel was among the plaintiffs firms that secured a $1 billion settlement on behalf of shareholders of Dell Technologies in the case in Delaware Chancery Court.

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Reporting by David Thomas

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Mergers & Acquisitions
Jan. 4, 2024, 11:11 AM PST

Matt Levine's Money Stuff: Put the Bitcoins in the Box

By Matt Levine

Opinion

Bloomberg Law News 2024-01-05T10:00:3528827049-05:00

Matt Levine's Money Stuff: Put the Bitcoins in the Box

By Matt Levine 2024-01-04T14:11:26697-05:00

Programming note: *Money Stuff will be off tomorrow, back on Monday.*

BDR

I began yesterday's column by saying that I used to write a lot about crypto, but I am trying to do less of it these days. The main reason, I wrote, is that crypto used to be a laboratory for rediscovering central intuitions about finance: Crypto was building a brand-new alternative financial system from scratch, and crypto enthusiasts were discovering solutions to financial problems for themselves. Sometimes those solutions were better than the traditional solutions, and sometimes they were worse, and sometimes they just used new terminology to re-describe solutions that traditional finance discovered years ago, but in any case they were *fun to write about*. Better, or worse, or the same, they provided a lens through which to see traditional finance; seeing why crypto did something, and why it did or didn't work, could help you understand why traditional finance does things the way it does.

This worked because, in 2020 and 2021, crypto's *financial system* was developing at a much more rapid pace than, you know, its underlying real-world utility. People were using crypto to build lots of clever and exciting new ways to trade crypto, or trade crypto derivatives, or front-run crypto trades, or build infinitely leveraged crypto shadow banks, or steal money from customers; all of that was interesting if you were interested in financial systems. If you were interested in useful consumer products crypto was maybe less exciting, but that's not my beat so I couldn't tell you.

And then in 2022 and 2023, the crypto financial system was *fascinating* to write about, because many of its big institutions — culminating in FTX Trading Ltd. — collapsed in clouds of smoke and there were tons of even better stories about, like, why leverage is dangerous and how bankruptcy works and so forth. (I got my start as a financial journalist a few years after the 2008 financial crisis, which was a great time, because there were tons of court cases that brought to light both how the 2000s shadow-banking boom developed and how it collapsed; 2022 was crypto's 2008, and 2023 was its 2013.)

But after that collapse, the crypto financial system does seem to have gotten more boring, or at least if it's still doing fun stuff it is quieter about it. (This, too, is reminiscent of the banking industry after 2008: Banking was supposed to be boring, and mostly it was boring, and when it was interesting it didn't pay to brag about that.)

To the point that if you have read a story about crypto so far in 2024, it is overwhelmingly likely to be about the following topic: "People want to be able to put Bitcoins into a box and then sell shares of the box to regular investors in the regular financial system using their regular brokerage accounts." *The* big innovation in crypto in early 2024, the thing that has driven up prices, is anticipation that the US Securities and Exchange Commission will approve a spot Bitcoin exchange-traded fund this month. Then ETF providers — including traditional financial firms like BlackRock and Fidelity — will be able to hold Bitcoins in a pot, and institutional and retail investors will be able to buy and sell shares of that pot to get exposure to Bitcoin's price without actually owning Bitcoin. This, it is thought, will increase the price of Bitcoin.

If your interest in crypto is "number go up," this is good. If your interest in crypto is "this is the financial system of the future and will increasingly be adopted by big institutions and ordinary people," this is a mixed bag: On the one hand, there is a lot of optimism about ETF approval driving retail and institutional adoption; on the other hand, "everyone owns Bitcoin through a BlackRock ETF in their Fidelity brokerage account" is not quite proof that crypto is the financial system of the future. If your interest in crypto is "crypto keeps coming up with fun new ways to do finance," though, this is pretty boring. Crypto's fun new way to do finance is to put Bitcoin in a box and sell you shares of the box; the goal is to transmute Bitcoin — this decentralized disintermediated trustless novel form of money that was meant to replace the banks and brokerages — into regular stocks.

Anyway while you wait for the ETF, here's Bloomberg's Muyao Shen:

As speculation about the upcoming approval or denial of spot-Bitcoin ETFs reaches a fever pitch, a group of former Citigroup Inc. executives is starting to offer securities backed by the oldest cryptocurrency that they say don't need the blessing of US regulators.

The new offering, called Bitcoin depositary receipts, will be similar to American depositary receipts that represent foreign stocks. The startup, called Receipts Depositary Corporation, or RDC, said it plans to issue the first Bitcoin depositary receipts to qualified global institutional investors in transactions exempt from registration under the Securities Act of 1933.

Known as BTC DRs, the offering will give institutions access to Bitcoin securities through US regulated market infrastructure and cleared through the Depository Trust Co., according to a release from the company. …

Broadridge Corporate Issuer Solutions will serve as the transfer agent and Anchorage Digital Bank National Association will handle custody of the underlying Bitcoin. RDC is backed by investors including Franklin Templeton, BTIG and Broadhaven Ventures, according to its press release. …

Compared with Bitcoin ETFs that will be redeemed for cash, Mehta said that depositary receipts offer direct ownership of Bitcoin for qualified institutions. Buying Bitcoin directly isn't the most-preferred option for some regulated institutions, he added, since crypto markets face challenges including security risks and regulatory uncertainty. Some of the challenges are similar to those once seen for Americans investing in foreign companies, which were mitigated by American depositary receipts.

A spot ETF is probably the most broadly convenient way to put Bitcoins in a box and sell shares of the box, but the basic concept is very simple and obvious and can be implemented in a lot of ways. The ETF implementation has the two advantages that (1) anyone can buy and sell shares of the box and (2) the *box* can easily create or redeem shares for Bitcoins, meaning that the share price of the box really should track the price of Bitcoin. Whereas the leading existing box of Bitcoins, the Grayscale Bitcoin Trust, has the first advantage — it is pretty freely tradeable by anyone — but not the second: For securities law reasons, it can't freely redeem its shares for Bitcoins, so its share price has diverged widely from the price of Bitcoin. (Grayscale also intends to convert into an ETF, when the SEC allows it to.)

Meanwhile this box — BTC DRs — has the second advantage (easy convertibility and price tracking) but not the first: To avoid the need for SEC approval and registration, it will only sell its shares to institutional investors in private transactions. This box is just "if you are an institutional investor, we will give you Bitcoin wrapped up in a security, so you can hold it in your ordinary custody account and transfer it through the Depository Trust Co. and generally have the experience of holding a stock or bond, not a weird crypto thing, except the stock's price happens to be the price of Bitcoin."

And that strikes me as genuinely useful. Some investors want to be crypto investors, but a lot of institutional investors very much do *not* — they do not want to spend time or money on understanding blockchains or keeping track of private keys or complying with SEC requirements about crypto custody — but still want to own Bitcoin. Owning regular shares of stock that happen to be Bitcoins is, for them, very useful; it domesticates Bitcoin into the regular financial system. It's just that that's boring. In 2021, as FTX was heading toward a $32 billion valuation, its ambition was to tokenize all the stocks, become the next Goldman Sachs, rebuild all of the traditional financial system on crypto rails. In 2024, the ambition for crypto is to make Bitcoin a stock, to finally get crypto onto traditional rails.

This particular innovation is so old that I wrote about it back in 2018, when these former Citigroup executives were just Citigroup executives, and Citi was going to do the depository receipts:

Here is Citigroup Inc. looking at investor demand and concluding: Yes, sure, Bitcoin is great, but what Bitcoin investors really want is to hold Bitcoins in the form of *receipts issued by a giant bank and registered at DTCC*. That's where the real innovation is! That's what the people want! "Take this blockchain away from me," they cry, "and give me the old system that I know!"

In 2024 that is *obviously* what they want.

A DAO

A lot of innovations in crypto have two separate but related rationales:

- 1. This thing is the future of human society!
- 2. This thing avoids securities law!

I remember when blockchains were touted both as a new way to keep track of all of the world's information and also, somehow, a way around securities law: If you put stock on the blockchain, the theory went, the US Securities and Exchange Commission couldn't regulate it. (This theory has fallen out of favor, but not entirely.)

Or people in crypto have spent years arguing that decentralized autonomous organizations are a new and better way to organize economic activity, never seen before. (This is wrong and they are general partnerships, but never mind.) But there are also sometimes arguments that DAOs are a way around securities regulation: If some crypto project (a decentralized exchange, a lending platform, whatever) is run by a DAO rather than by a company, then it is more robust to regulation; regulators can't fine the DAO or arrest its leaders, because it is decentralized and computerized and thus resistant to government interference.

My guess is that this is partly correct: Some decentralized crypto projects really do run as more or less autonomous code on distributed blockchains and really *can't* be shut down by an SEC order. But there do seem to be a lot of $5 wrench vulnerabilities in crypto, where "decentralized autonomous organization" is a fancy way of saying "Discord page for voting on stuff," and the SEC can find the Discord's administrator and say "hey we can make your life bad if you don't shut down this DAO" and the administrator shuts it down and everything was a lot less decentralized and autonomous and organized than people thought.

Last month the SEC shut down a DAO:

The Securities and Exchange Commission [Dec. 22] announced that BarnBridge DAO, a purportedly decentralized autonomous organization, and its two founders, Tyler Ward and Troy Murray, will pay more than $1.7 million to settle charges that they failed to register BarnBridge's offer and sale of structured crypto asset securities known as SMART Yield bonds. The Commission also charged the respondents with violations stemming from operating BarnBridge's SMART Yield pools as unregistered investment companies. To settle the SEC's charges, BarnBridge agreed to disgorge nearly $1.5 million of proceeds from the sales, and Ward and Murray each agreed to pay a $125,000 civil penalties.

"The use of blockchain technology for the unregistered offer and sale of structured finance products to retail investors runs afoul of the securities laws," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement. "This case serves as an important reminder that those laws apply to all who wish to access our capital markets, regardless of whether they are, or purport to be, incorporated, decentralized or autonomous."

Reading the SEC order, it is a little puzzling how BarnBridge could have settled the case. It's a DAO? Did it, like, take a vote? Apparently not; apparently the SEC got to the founders and the founders shut it down:

In July 2023, Ward and Murray took steps to close investments in a second version of SMART Yield that had launched in January 2023, after BarnBridge DAO had stopped offering investments in SMART Yield Pools described in this Order. Ward and Murray also canceled a new product launch, limited access to Discord, Github, and other platforms used by BarnBridge DAO, and stopped development of further securities using the BarnBridge protocol.

So not *that* decentralized or autonomous.

Portable credit

We talked a while back about assumable mortgages. A lot of homeowners in the US have mortgages with 3%-ish interest rates that they got a few years ago, but if you try to get a mortgage today, it will have a 7%-ish interest rate. If I own a house and have a 3% mortgage, and I want to sell it to you and you want to buy it, you will go to a bank and get a 7% mortgage, and your bank will give you the money, and you will give me the money, and I will give the money to my bank to pay off my 3% mortgage. This seems very inefficient. You are borrowing expensive money to give to me to pay off a cheap mortgage early.

It would be better for me, and for you, if you could just *assume* my mortgage — if you could move into my house and keep making the 3% payments on my mortgage, instead of making the new 7% payments. (It would arguably be worse *for our banks:* My bank would rather get its below-market 3% mortgage paid off early at par, and your bank would rather originate a new market-rate mortgage.)

In the US, some mortgages are, with some contortions and hoop-jumping, assumable: Their terms provide that, if we recite exactly the right incantations, you can take over my mortgage and keep paying 3%. But most aren't. And a problem in the US housing market now is that everyone who has a 3% mortgage can't move, because they'd need to get a 7% mortgage somewhere else, which constrains supply.

Private equity buyouts also work that way? Like the way a private equity buyout works is that a fund borrows a lot of money from lenders to pay some of the purchase price for the company, and then it pays down those loans over time. And if it sells the company to another private equity firm while the loans are still outstanding, then ordinarily the loans come due immediately, so the new private equity buyer has to go to *its* lenders to get new loans to pay the old private equity owner the money to hand over to *its* lenders. And just as with mortgages, if the old owner got its loans during a period of low rates and easy credit, and the new buyer has to get its loans during a period of high rates and more difficult credit, some trades won't get done: The company is worth more to the old owner, with its cheap debt, than it will be to a new owner with expensive debt.

The analogy is not perfect: A lot of the private-equity loans will be floating-rate, so the difference is not so much "3% rates versus 7% rates" as it is "relatively easy credit versus more nervous credit." And "the loans come due immediately" can mean less "the loans come due immediately" and more "the loans *technically* come due immediately, which gives the lenders negotiating leverage to extract fees and concessions for agreeing to roll them over for the new buyer." But the basic idea is that if private-equity buyout loans were assumable, then more deals would get done, because buyers wouldn't have to worry about going out and getting new loans in tougher credit environments.

Here are Bloomberg's John Sage and Ellen Schneider on assumable private equity loans:

Private equity firms, eager to sell debt-laden businesses, are finding private credit firms increasingly willing to keep outstanding loans intact, even for companies that may soon have new owners.

The trend, known as portability, describes loans that remain essentially unchanged when a company gets new ownership. It carries rewards and risks for businesses and especially for lenders. Usually a change of control would allow lenders to renegotiate terms to cover potential risks from a new parent, such as different plans for growth or profitability of a business.

After two years of rising interest costs hindering asset sales, owners are seizing on recent rate stability to push for portability to get deals done. Keeping the existing loan package in place removes the need for any new buyer to find financing, making the purchase a lot more alluring.

"The market has pivoted to include a portability feature," said Bill Eckmann, head of principal finance in the Americas and senior managing director at Macquarie Capital. "We're seeing more of this because sponsors are looking at near-term maturities and thinking about their exits."

For direct lenders facing rising competition in a market that's tripled to $1.6 trillion since 2015, portability provisions allow them to stay invested in assets they've already vetted and endorsed.

"If you've found an attractive business then you may be willing to let the debt travel to another owner," said Jon Bock, senior managing director at Blackstone Credit. "From a self-selection standpoint, this is an opportunity for managers to extend the lives of the loan."

Part of the pitch for private credit, as an alternative to traditional syndicated loans, has been along the lines of "if you borrow from a private credit firm instead of from a syndicate of banks and hedge funds and collateralized loan obligations, your lender will be one person with whom you have a good relationship, and if things change in your business you can call her up and discuss things rationally instead of having to go get waivers from a dozen anonymous CLOs." You might think that this pitch would argue against automatic portability: "Don't worry about it," the private-credit firm could tell its borrowers, "if you want to sell, we will be very reasonable about rolling over the loans, you just need to call us and talk about it." But, no, the borrowers want portability.

Money for votes

Someone sent this to me and I can't not share it with you:

Shareholder Vote Exchange enables investors to trade shareholder voting rights. Passive investors can sell their votes to raise returns and provide additional yield. Reinvesting your earnings can also boost your portfolio's long-term growth rate. ...

Achieve your governance or strategic initiatives by acquiring proxy votes on Shareholder Vote Exchange. Leveraging proxies is a cost-effective way to drive change and maximize capital efficiency while also rewarding other shareholders.

As a former corporate equity derivatives structurer I have, over the years, thought about ways to separate shareholder voting from economic ownership, and to trade the votes separately. One obvious set of solutions is: You are an activist hedge fund, you buy 10 million shares of stock (which gives you the votes and the economic ownership), and then you sell 9 million shares through a derivative (which reduces your economic ownership but *not*, generally, your voting rights). So, like, buy 10 million shares in the cash market, and then write a 9-million-share total return swap or put/call combo or whatever. Then you own 1 million shares economically, but you have 10 million votes.

I think that this occasionally happens, but my impression is that US activist hedge funds are more likely to do the *opposite* , acquiring economic exposure to more shares than they actually own. (By *buying* total return swaps or call options or whatever.) This is partly for regulatory reasons (buying a bunch of actual shares triggers disclosure and antitrust obligations that derivatives can avoid) and partly for leverage reasons (buying a lot of shares for cash takes a lot of cash, while buying/selling with derivatives doesn't take/generate as much cash.) If you are going to spend money on research and lawyers and proxy fights to do an activist campaign, you want a lot of economic exposure, not just a lot of votes.

There is another set of quasi-solutions around stock lending: If you do not value shareholder voting at all, you can just lend out your shares to short sellers and not recall them for votes, which is a way of exchanging your voting rights (which you don't care about) for money (in the form of stock lending fees).

But I guess the most obvious solution is just, like, go around paying retail shareholders for their votes? With some intermediary to aggregate them and take care of the mechanics? The Shareholder Vote Exchange people are not wrong that, if someone is willing to pay you $5 to control all your votes on all your shares for all of this proxy season, you should take the money, because $5 is more than zero and voting your shares is (1) worthless to you and (2) surprisingly annoying. Retail investors stereotypically don't vote, and that is normally rational, so paying them any amount of money for their votes seems like a win for them.

On the other hand, who would pay? If it is irrational to vote your own shares, it is even more irrational to pay to vote someone else's, virtually all of the time. You could imagine some sorts of activist campaigns in which it would be expressively valuable to buy some votes: If you submitted a nonbinding shareholder proposal asking some company to have more, or less, diversity, then presumably you care about sending a message, and you might feel good about spending some of your own money to buy votes to make your proposal look more popular.

But surely the real high-dollar case for buying shareholder votes is in *contested proxy fights*, where some activist investor has millions of dollars on the line and wants to get its own slate of directors elected. (Also in contested takeovers.) And there I just have trouble imagining big activist shareholders buying votes in proxy fights this way, in part because the disclosure and reputational issues seem like they'd be a mess. The distinguishing feature of proxy fights and hostile takeovers is that everyone sues everyone else about everything, and also "bedbugs" them to the US Securities and Exchange Commission, calling up the SEC to say "hey did you notice our opponents doing something illegal?" Can you imagine the hay that some corporate managers would make out of an evil activist hedge fund *buying votes*?

And in fact Shareholder Vote Exchange's current list of auctions seems to be headed by pretty routine annual meetings for companies like Visa Inc. and Intuit Inc., none of which have proxy fights ongoing. Still, fun idea!

Things happen

Silicon Valley Startups Had Their Worst Funding Year Since 2019. Wall Street's Ambitions in China Run Into a Rising Firewall. Bridgewater's Flagship Pure Alpha Fund Lost 7.6% Last Year. AQR Capital's Longest-Running Strategy Gained 18.5% in 2023. The Hidden Force Pushing Mortgage Rates Down. How the Push for Diversity at Colleges and Companies Came Under Siege. Eli Lilly Warns Against ' Cosmetic' Use of Popular Weight-Loss Drugs. Prosecutors Pursue Affinity-Fraud Cases in Which Scammers Target Their Own. Confidential Jeffrey Epstein Documents Unsealed by New York Court. China, Saudi Arabia Top Countries That Spent Millions at Trump Properties During His Presidency. Chief executive of collapsed crypto fund HyperVerse does not appear to exist.

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- 1. Please do not email me about the useful consumer crypto product you built in 2021.
- 2. It is publicly traded but not listed on an exchange, which does limit its trading.
- 3. Another important existing box of Bitcoins is MicroStrategy Inc., which is even more freely tradeable than GBTC but tracks Bitcoin even less closely.
- 4. You can caveat this. People sometimes worry that proof-of-stake Ethereum, in which staking is dominated by a few large intermediaries, creates vulnerability to censorship: If Coinbase Global Inc. runs a big staking service, and the SEC tells it not to recognize certain transactions by actors the SEC dislikes, will Coinbase have to go along? Of course in the real world the SEC just thinks Coinbase’s whole staking service is illegal and wants to shut it down, so Coinbase doesn’t have much incentive to help out the SEC.
- 5. I’m implicitly assuming that the home’s price hasn’t changed, my mortgage is pretty fresh, and the mortgage principal amounts would be about the same. Those assumptions are not super-realistic, but I’m not sure they’re always that far off either.
- 6. Only arguably worse, though; it sort of depends on the counterfactual. If the counterfactual is “you don’t buy my house, I stay there for 30 years paying 3%, and you keep renting,” the banks might prefer some activity even if it crystallizes some losses.
- 7. I have no idea what the mechanics are here — like, how do they make sure that the vote sellers actually vote the way they are supposed to? — though I suspect it’s not too hard. They say they work with a bunch of brokers’ systems.

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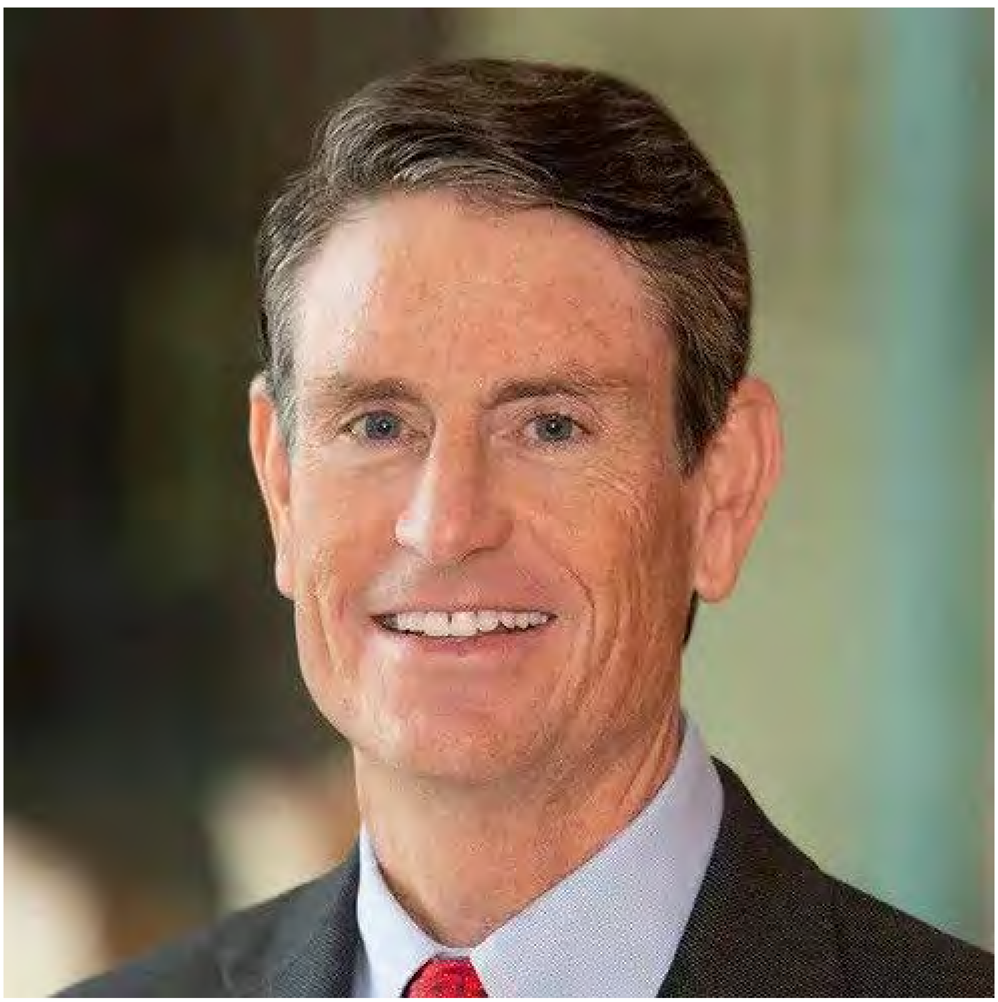
What Del.'s Legal Leaders Are Keeping An Eye On For '24

By **Rose Krebs**

Law360 (January 4, 2024, 10:02 AM EST) -- Figuring out the best ways to integrate generative tools into the practice of law, having enough staffing to keep up with hectic workloads, and properly balancing remote and in-person work are among issues firm leaders in Delaware are focused on as 2024 kicks off.

Here, some firm leaders in Delaware offer reflections to Law360 Pulse on things they're keeping an eye on and concerns heading into the new year.



Peter J. Walsh Jr.

Potter Anderson

Walsh, who **took over as chair** of Potter Anderson & Corroon LLP on Jan. 1, told Law360 Pulse that how so-called artificial intelligence will be used in the legal profession moving forward will continue to be contentious in 2024.

The firm already has certain policies relating to the use of AI in day-to-day operations, but he expects it will certainly have to address the issues more extensively in 2024.

"There's no question it is going to be something clients demand as a cost-savings measure," he said.

The generative tools, which look for patterns in large data sets and generate text that appears to be human-made, are already being used to handle research that is done by associates, Walsh told Law360 Pulse, but things aren't at the point where he expects it will affect hiring.

But Walsh said he has no doubt clients will demand AI be used more as the technology advances.

Walsh, who is an experienced corporate lawyer, told Law360 Pulse he expects things will remain busy in Delaware's Chancery Court in the year ahead.

"Our corporate litigation group has been busy this year to the point of not having enough help," he said. "One of my challenges is finding enough staffing."

Although Walsh said Delaware is a great place to practice law, it can be difficult to attract and keep associates for a variety of reasons, including young attorneys often being drawn to bigger markets. The First State's legal community remains a "best kept secret" of sorts, which Walsh said has its benefits and drawbacks.

Another issue he will tackle as he helms the 100-attorney Potter Anderson is balancing workplace flexibility, Walsh said.

More firms are starting to require attorneys to work back in the office full-time, but younger attorneys often want a hybrid work model, he said.

"Younger lawyers like the flexibility," he said, and not offering that can affect a firm's ability to compete for talent.

Potter Anderson's attorneys now work in-office three days a week, he said.

"It's going to continue to be a struggle for firm leaders to find the right balance," Walsh told Law360 Pulse.

Sarah B. Cole

Marshall Dennehey

Cole, who took over as managing partner of Marshall Dennehey's Delaware office **at the start of 2023**, told Law360 Pulse that her main focus in the year ahead will be bolstering the firm's attorney roster in Wilmington.

Adding more attorneys, especially in the firm's casualty department, is a major goal for 2024, Cole said. And the demand will be there, she added, as there is an influx of insurance litigation from the pandemic.

"A lot of insurance companies tried to resolve [matters] in-house and not through litigation" because they were concerned about COVID-19-related court delays, Cole told Law360 Pulse.

But now, "we're really seeing a return of work into our firm, particularly in insurance defense," she said, and insurance companies are looking to firms to offer skilled litigators.

Marshall Dennehey already has an established relationship with many insurance companies, Cole said. The firm's practice areas include casualty including mass tort litigation, product liability, property litigation, professional liability, healthcare and workers' compensation, its website says.

Hirings are expected in early 2024, and the Delaware office will continue to focus on bolstering its roster to meet client needs, Cole said.

Cole said some pandemic-related business interruption and insurance coverage-related disputes are slated for trial in the months ahead.

Also, Cole said the plaintiffs' bar is taking more types of cases, including an influx of nursing home claims.

"I expect the amount of work we're seeing to continue on its upward trend," she said. "I don't see anything that indicates it will slow down."

She said she will also continue to build on the "cohesion" of Marshall Dennehey's Delaware office.

Cole took over a year ago as Delaware managing partner from Kevin J. Conners, who had led **the office** since it opened in 1995. She told Law360 Pulse she will continue to plan activities aimed at unifying the office.

Christopher H. Lyons

Robbins Geller

Robbins Geller Rudman & Dowd LLP **launched its office** in Delaware in October with Lyons at the helm, and he told Law360 Pulse his main focus in 2024 will be to ensure the firm continues to have a strong presence in Delaware.

"The firm has been practicing in Delaware for decades," Lyons said. "We've been open for a couple of months now, and we're off to a good start."

Many folks were "kind of surprised" Robbins Geller didn't already have an office in Wilmington, he added, so the addition "makes perfect sense."

"Robbins Geller is one of the more active plaintiff firms in Chancery Court," he said.

Along with Lyons, its Delaware practice group is led by partners Randall J. Baron, Travis E. Downs III, Chad Johnson and Noam Mandel, the firm has said. The other partners are based in offices outside Delaware.

Having an office in Wilmington will give Robbins Geller more opportunity to bring in more corporate attorneys and build its client base, Lyons told Law360 Pulse.

The office will continue to focus on plaintiff-side work in class actions and derivative suits, he said.

Lyons told Law360 Pulse he has been watching with interest certain large settlements in Chancery Court of late such as the billion-dollar settlement of Dell stockholder suit over a stock swap that resulted in a **$266.7 million fee award** for attorneys, as well as some big defense-side post-trial wins such as **Elon Musk's escape** of a Tesla shareholder suit over the electric car company's purchase of rooftop solar company Solar City and Oracle founder Larry Ellison's **win in a suit** over the company's $9.3 billion acquisition of NetSuite.

Given those huge settlements and high-profile defense-side wins, Lyons told Law360 Pulse he is keeping an eye on whether nine-figure settlements in Chancery will continue, or if defendants may be more likely to take their chances at trial.

Robbins Geller also has some high-profile cases churning along in Chancery Court, Lyons said, including **a stockholder suit** accusing GoDaddy Inc. directors and executives of breaching their fiduciary duty to the company by letting it pay $850 million to buy its founders out of tax assets that had been reported to be worth just $175.3 million in company filings.

Also, Lyons told Law360 Pulse that as a frequent Chancery Court litigator, he has heard loud and clear the message that its judges are overburdened, including calls for attorneys to **take a more constructive approach** to litigation to help ease the strain.

Members of the bar should do their part to ensure that the caseload is more sustainable for the Chancery Court's judges, he said. For instance, Robbins Geller often uses records suits filed under Section 220 of Delaware General Corporation Law to help "weed out" strong litigation versus weaker claims it won't pursue on behalf of clients, he said.

Under Section 220, an investor can ask the Chancery Court to compel a company to turn over records if they can show a proper purpose such as investigating wrongdoing. Those records can then support claims in litigation.

"We have a great bench in Delaware, and we want to keep it," Lyons told Law360 Pulse.

Jennifer R. Hoover

Benesch

Benesch Friedlander Coplan & Aronoff LLP's continued lateral growth in Delaware and beyond and the expansion of the state court litigation practice in Delaware are key aims for 2024, Hoover told Law360 Pulse.

"It's really an exciting time to be at Benesch," she said, as the firm has seen much growth since she started there in 2007. "Delaware was the first foothold to the East Coast for us."

The Cleveland-based firm opened its Wilmington office in 2007, and Hoover is its partner-in-charge. The Delaware office now has 26 employees, with 10 attorneys and more hirings expected in early 2024, she said.

For 2024, Benesch's Delaware office will continue to serve clients in its core practice areas of commercial bankruptcy and litigation, and expand its Chancery Court practice and its intellectual property group, Hoover told Law360 Pulse.

Also, Benesch is "engaged in some of the most high-profile litigation cases in the country right now — including representing Smartmatic in defamation lawsuits against Fox News, Newsmax and other defendants — as well as representing one of the country's largest oral care companies in a multi-billion-dollar defamation claim against NBC," Hoover told Law360 Pulse.

Faiz Ahmad

Skadden

Skadden Arps Slate Meagher & Flom LLP opened its Delaware office 45 years ago, and Ahmad, its current leader, told Law360 Pulse that continuing to "nurture and develop" its "deep talent pool" is a main goal for the year ahead.

"We've become a part of the town," Ahmad said of Skadden's Wilmington office. "We're part of the community here."

Skadden wants to continue developing its "clerkship pipeline" in Delaware and maintain its consistency in the First State's competitive legal market, Ahmad said.

"Generally, the market has continued to grow here in Delaware," with mergers and acquisition case work picking up again in the second half of 2023, Ahmad said.

"Our corporate litigation practice has picked up as well, I don't see that slowing any time soon," he said.

He said things will likely stay busy in 2024 in those practice groups, as businesses continue to try to come up with "creative ways" to do transactions that minimize liability.

Also, as the number of alternative entities like limited liability companies in Delaware has exploded, so has litigation involving them, Ahmad said. Other core litigation areas in Delaware, such as corporate securities litigation and bankruptcy also show no signs of slowing down, he said.

Ahmad said that, like many other firm leaders, he is keeping a close eye on advancements with AI and how they will affect the practice of law and the legal industry.

"We don't know what the future of AI will be," he said, but "we are all watching and paying close attention."

--Editing by Alex Hubbard and Brian Baresch.

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2nd Circ. Won't Rethink Revival Of Nine West Fraud Claims

By **Emlyn Cameron**

Law360 (January 4, 2024, 8:28 PM EST) -- The Second Circuit has declined to revisit a panel's decision to restore claims against Nine West in a Chapter 11 lawsuit brought by bankruptcy trustees alleging the women's clothing retailer initiated $78 million in fraudulent payroll transfers.

The appellate court **refused to review** the decision in an order Wednesday. In November, a panel reinvigorated claims regarding the payroll transfers, saying they weren't covered by a safe harbor in the U.S. Bankruptcy Code. The panel dismissed claims concerning payments to public shareholders in the same ruling.

Nine West filed for Chapter 11 in 2018, confirming a plan to re-emerge early the next year. In 2020, the trustees for the company appointed under the plan **brought** 13 fraudulent transfer cases against officers, directors and shareholders of Nine West's parent company, and these were then bundled in multidistrict litigation.

The trustees alleged the company lost over $1.1 billion via fraudulent transfers connected to a private equity firm's 2014 leveraged buyout of Nine West and its parent, Jones Group.

In November 2020, a New York federal judge **dismissed claims** seeking to avoid payroll transfers to executives and employees of Jones Group for restricted shares in the buyout as well as payments to public shareholders; the judge retained other claims.

In 2021, Nine West's bankruptcy case was terminated.

Then, in November 2023, a split Second Circuit panel undid some of the New York federal judge's dismissals. According to the majority opinion, the judge made his dismissals in part based on a safe harbor in the Bankruptcy Code that protects transfers by or to financial institutions to avoid endangering financial markets.

The panel majority said it disagreed with dismissing the payroll transfer claims under this safe harbor because Wells Fargo hadn't acted as Nine West's agent in making them. But the panel affirmed the dismissal of claims about payments to public shareholders because Nine West had used Wells Fargo as an agent for those, satisfying the safe harbor.

"Our clients are disappointed with the Second Circuit's order and are reviewing their legal options," Y. David Scharf of Morrison Cohen LLP, who represents three of the appellees who sought rehearing, told Law360.

Lawyers for the other defendants and appellees did not respond to requests for comment.

A lawyer for Marc S. Kirschner and Wilmington Savings Fund Society FSB, the plaintiff-appellants in the case, did not provide comment.

U.S. Circuit Judges Denny Chin, Joseph F. Bianco and Richard J. Sullivan sat on the Second Circuit panel.

The defendants and appellees are variously represented by Y. David Scharf and Danielle C. Lesser of Morrison Cohen LLP, Stuart Kagen of Kagen Caspersen & Bogart PLLC, Howard Seife of Norton Rose

Fulbright US LLP, Harlan M. Lazarus and Jared H. Louzon of Lazarus and Lazarus PC, and Michael B. Reynolds of Snell & Wilmer LLP.

Marc S. Kirschner and Wilmington Savings Fund Society FSB are represented by Edward A. Friedman, Robert J. Lack and Stan Chieuh of Friedman Kaplan Seiler Adelman & Robbins LLP.

The case is In Re: Nine West LBO Securities Litigation, case number 20-3257, in the United States Court of Appeals for the Second Circuit.

The bankruptcy case is In re: Nine West Holdings Inc. et al., case number 1:18-bk-10947, in the U.S. Bankruptcy Court for the Southern District of New York.

--Additional reporting by Alex Wittenberg, Vince Sullivan and Rick Archer. Editing by Philip Shea.

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Assisted Living Brass May Have Caused Late Suit, Judge Says

By **Katryna Perera**

Law360 (January 4, 2024, 5:16 PM EST) -- A Tennessee federal judge refused to toss a stockholder's derivative suit over staffing problems at the country's largest assisted living company, saying the investor has plausibly shown directors employed tactics to purposefully delay the filing of the suit outside the relevant statute of limitations.

U.S. District Judge Aleta A. Trauger issued a memo Wednesday saying Brookdale Senior Living Inc.'s directors seem to have purposefully misled shareholder Patricia Templin with false assurances about both the company's staffing issues and the board's intent to investigate her demands in order to make her miss the filing window for her derivative suit.

According to the complaint, Templin first sent a demand letter to Brookdale's board in November 2020, a few months after reporting in Nashville Business Journal revealed several issues at Brookdale-run facilities, including "chronically insufficient staffing."

Templin demanded the board take action to remedy alleged breaches of fiduciary duty committed by certain directors and executives, but the board deferred consideration of the demands while a similar investor class action against the company, Posey v. Brookdale Senior Living Inc. , was ongoing.

Nonetheless, Templin filed her derivative suit in May 2021, alleging Brookdale's board "abdicated" its responsibility to investigate her demand by electing, "without any investigation, to defer consideration of the demand indefinitely."

In September 2021, Brookdale defeated the Posey case, but Brookdale's board again deferred consideration of Templin's demands, this time citing a different lawsuit with similar allegations, which was pending when Templin first sent her demand letter.

On Wednesday, Judge Trauger ruled Templin has "clear documentary evidence" that the defendants directly impeded the timely filing of her suit, and therefore, the "nexus" between the board's actions and the timing of the suit is "extraordinarily strong."

The evidence in the record also points to a "plausible basis" that the board knowingly deceived Templin with false assurances and "shifting rationales" to make sure her claims expired, the judge said.

"If the board had told Templin what now seems potentially to have been the truth — that it had no intention of investigating the demand, regardless of what happened with the Posey litigation — then Templin could have taken that refusal in hand and filed a timely stockholder derivative action on that very day," the memo states. "Instead, the company gave her an answer that a reasonable finder of fact could conclude was a pretextual attempt to force her — and Brookdale — into a fatal delay."

Judge Trauger also rejected the defendants' arguments that the board's delay could not have influenced Templin since she was, on her own, already suspicious the delay was not genuine.

"The claims that Templin filed based on that initial suspicion, however, have already been dismissed. What remains are claims whose timing was unambiguously a result of the board's delay, because they were filed, supplementally, only after the board's delay became sufficiently questionable to permit Templin to proceed," the memo states. "The record, therefore, strongly supports the inference that the timing of the filing of those claims was, in fact, directly induced by the board."

In a motion for judgment on the pleadings filed last February, the individual defendants had argued Templin's claims were subject to a one-year statute of limitations under Tennessee law, which began running when the Nashville Business Journal article was published in April 2020.

But Templin pushed back, saying her claims are timely because the board blocked her derivative claims for the entirety of the one-year filing window and, therefore, she is entitled to equitable relief from the statute of limitations.

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

Templin is represented by Michael I. Fistel Jr. and Mary Ellen Conner of Johnson Fistel LLP, James M. Ficaro of The Weiser Law Firm PC, Wade B. Cowan of Wade B. Cowan Attorney At Law and Richard A. Maniskas of RM Law PC.

The individual defendants are represented by Britt K. Latham of Bass Berry & Sims PLC and Geoffrey J. Ritts, Ashley F. Heintz and John Heron IV of Jones Day.

Brookdale is represented by L. Webb Campbell II and John L. Farringer IV of Sherrard Roe Voigt & Harbison PLC.

The case is Anders v. Baier et al., case number 3:21-cv-00373, in the U.S. District Court for the Middle District of Tennessee.

--Editing by Caitlin Wolper.

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CS Disco, Investors Agree To Move Securities Case To Texas

By **Matt Perez**

Law360 (January 4, 2024, 12:28 PM EST) -- CS Disco Inc. investors have reached an agreement with the e-discovery provider to transfer their proposed securities class action from New York federal court to Austin, Texas.

In a joint stipulation filed Tuesday, lead plaintiff Bert W. Pluymen and defendants CS Disco, its founder Kiwi Camara and Chief Financial Officer Michael LaFair sought the court's approval to shift to the Texas district court, as the company is based in Austin, the named executives live there and most of the relevant documents and witnesses are there.

An Austin investor, Lynn Gambrill, **filed the suit** against CS Disco in September, accusing the company of proffering false statements to investors during and after its initial public offering in 2021.

The company frequently touted its rapid revenue growth during this period, the complaint says, but was "aware of, or recklessly disregarded, the fact that the handful of customers that drove this explosive growth had already decided to end their projects with the company by the end of 2021." Although the company saw this, it didn't tell investors for months.

Pluymen, who last month was **appointed lead plaintiff** as the investor with the largest financial interest in the case, did not object to the transfer. He has until Feb. 23 or two weeks after the court agrees to the transfer to file an amended complaint.

After **raising $100 million** in 2020, CS Disco became one of the few legal technology companies to enter the public markets when it filed an IPO in 2021. As of Friday, CS Disco's stock price is down nearly 83% since going public. It **laid off 9%** of its employees in January 2023 and **another 8%** in May.

The Rosen Law Firm, Pluymen's choice of counsel, secured the lead counsel role last month.

The parties did not immediately respond to a request for comment.

Pluyman is represented by Phillip C. Kim and Jonathan Stern of the Rosen Law Firm.

CS Disco, Camara and LaFair are represented by Aric Hugo Wu of Cooley LLP.

The case is Gambrill v. CS Disco Inc. et al., case number 1:23-cv-8270, in the U.S. District Court for the Southern District of New York.

--Editing by Brian Baresch.

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Onsemi Board Downplayed Sales Vulnerability, Suit Claims

By **Sydney Price**

Law360 (January 4, 2024, 4:46 PM EST) -- Top brass at semiconductor manufacturing company Onsemi have been hit with a shareholder derivative suit alleging they made false statements to investors about the demand for its products from electric-vehicle manufacturers, which resulted in losses when the company failed to meet its 2022 revenue target.

From May through October of last year, the Onsemi defendants touted the sales of the company's silicon carbide products, which are critical for electrical vehicle manufacturing, according to the complaint filed by Nathan C. Silva on Wednesday in Delaware federal court. But in its third-quarter earnings call, Onsemi finally revealed that it would begin "taking a very cautious approach" with its silicon carbide products due to signs of slowing demand in the automotive segment.

Throughout the class period, Onsemi falsely assured the public that sales of its silicon carbide products, particularly to electric vehicle manufacturers, were strong, the suit alleges. The defendants told investors Onsemi's long-term supply agreements provided "predictable" and "sustainable" performance to drive sales growth, even in tough macroeconomic conditions, which was not true, the complaint alleges.

"Defendants consistently disclosed increasing expected revenue figures for every new [long-term supply agreement] the Company had signed with customers and assured investors that the LTSAs built 'a more strategic relationship and partnership' with the Company's customers," the complaint states.

On May 1, for example, Onsemi told investors that it had "more and more confidence" that it would reach $1 billion in annual revenue for its silicon carbide products in 2023.

But on Oct.30, during Onsemi's third-quarter 2023 earnings call, the company told investors that it would miss its $1 billion 2023 silicon carbide revenue target by approximately $200 million, citing "a mid-single digit decline in automotive given the softness in Europe."

On this news, the price of Onsemi shares fell $18.18, or nearly 22%, from a close of $83.52 on Oct. 27, to close at $65.34 on Oct. 30.

In addition to nominal defendant Onsemi, the suit names 12 individual defendants, including Onsemi President and CEO Hasssane El-Khoury.

Onsemi is facing a related federal securities class action in Delaware based on alleged damage to the company's share price due to the firm's claimed omissions, according to the complaint.

"As a direct and proximate result of the Individual Defendants' breach of their fiduciary duties, the Company has suffered damage, not only monetarily, but also to its corporate image and goodwill," the suit states. "Such damage includes, among other things, costs incurred in defending itself in the Securities Class Action."

The suit accuses the defendants of violating the Exchange Act, breaching fiduciary duties, wasting corporate assets, unjust enrichment, abuse of control and gross mismanagement. Silva seeks an order that would require Onsemi to take action to improve internal controls and board oversight, and the individual defendants to pay restitution to Onsemi and disgorge any ill-gotten gains.

Counsel for Silva and a representative of Onsemi did not immediately respond to requests for comment Thursday.

Silva is represented by Seth D. Rigrodsky, Gina M. Serra and Herbert W. Mondros of Rigrodsky Law Firm PA and Joshua H. Grabar of Grabar Law Office.

Counsel information for the Onsemi defendants was not immediately available Thursday.

The case is Silva v. El-Khoury et al., case number 1:24-cv-00007, in the U.S. District Court for the District of Delaware.

--Editing by Jeremy Abrams.

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Wells Fargo Board Failed To Monitor DEI Initiatives, Suit Says

By **Sarah Jarvis**

Law360 (January 4, 2024, 8:55 PM EST) -- A Wells Fargo & Co. pension fund stockholder that sued the bank for documents tied to purportedly bogus interview records used to hide failed diversity hiring obligations followed up with a derivative complaint against the bank's board Thursday for not having proper diversity, equity and inclusion monitoring systems.

The suit by the Pompano Beach General Employees' Retirement System, which names Wells Fargo's board and three of its officers as defendants, alleges that the bank was "severely harmed" by the board's failure to implement a reasonable reporting and monitoring system on compliance risks tied to a company initiative aimed at redressing past discrimination and increasing diversity. The complaint was filed under seal on Dec. 29, and a redacted version was filed Thursday.

Wells Fargo allegedly launched its "Diverse Slates Guidelines" initiative in March 2020, aiming to repair its reputation after findings of discrimination within the company. In 2017, the bank agreed to a **$35.5 million settlement** in the Northern District of Illinois with financial advisers who accused the company of systematically limiting pay and advancement opportunities for African Americans.

The deal included systemic changes designed to promote workforce diversity, obliging Wells Fargo to "implement extensive corporate governance to forestall discriminatory practices and improve its diversity, including specified efforts to recruit African Americans to financial advisor positions."

The New York Times reported in May 2022 that Wells Fargo routinely circumvented the guidelines by conducting sham interviews for jobs that were already filled, the subject of an **investor suit** the bank is facing in a California federal court.

According to the current suit, Wells Fargo's board was not informed about the fake interviews because there was no reporting system in place that covered compliance issues related to the Diverse Slate Guidelines, despite an executive's reference to the practice as an "open secret" at the company.

"The board's failure to have a reporting and information system in place that would inform the board of wrongdoing and compliance issues relating to the guidelines was not only a breach of its fiduciary duties, but it was also in direct violation of a February 2, 2018, cease and desist order imposed by the Board of Governors of the Federal Reserve System," the recently unsealed suit reads.

That consent order required the board to overhaul its risk management processes and included an asset cap that prevented Wells Fargo from growing beyond $1.9 trillion in assets unless the company complied with the order, per the suit.

The Pompano Beach General Employees' Retirement System alleged that after the sham interviews became public and the Justice Department announced an investigation of the bank for alleged violation of federal anti-discrimination laws, Wells Fargo's reputation was "severely harmed."

"In addition to litigation costs and potential fines associated with the wrongdoing, the sham interview allegations have worsened Wells Fargo's chances of having the asset cap lifted," the shareholder said.

The retirement system urged Delaware's Chancery Court to order the defendants to indemnify Wells Fargo for "all harm flowing from their breaches of fiduciary duty from March 1, 2020, through the present."

Wells Fargo said in a statement that it is "deeply dedicated to diversity, equity, and inclusion."

"Wells Fargo disagrees with the claims, and we will continue to defend ourselves against them," the bank said.

The Pompano Beach General Employees' Retirement System **sued** the bank over documents tied to the purported sham interviews in June as part of an investigation into the company's purported flouting of DEI requirements. That suit also seeks records involving alleged retaliation against whistleblowers who called attention to the problem, which the fund intends to use in considering action against the company, its officers or its directors.

Counsel for the Pompano Beach General Employees' Retirement System did not immediately respond to a request for comment Thursday.

The Pompano Beach General Employees' Retirement System is represented by P. Bradford deLeeuw of deLeeuw Law LLC, Stephanie M. Beige and Joseph R. Seidman Jr. of Bernstein Liebhard LLP, and Ronald J. Cohen of Lorium Law.

Counsel information for the defendants was not immediately available Thursday.

The case is Pompano Beach General Employees Retirement System v. Charles Scharf et al., case number 2023-1297, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery and Emilie Ruscoe. Editing by Peter Rozovsky.

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Del. Court OKs $30M Guess Settlement, Trims Fees To $5.3M

By **Leslie A. Pappas**

Law360, Wilmington, Del. (January 4, 2024, 3:38 PM EST) -- Guess Inc. shareholders got court approval Thursday of a $30 million cash settlement to end Delaware litigation over decades of alleged sexual misconduct by one of the company's co-founders, but the state's Court of Chancery trimmed a suggested $6.6 million fee award for shareholder attorneys to $5.3 million.

At a bench ruling after a hearing in Wilmington, Vice Chancellor Lori W. Will said various aspects of the settlement were "valuable," "creative and thoughtful," and "quite positive" for the company and its shareholders, but the proposed $3,555.89 hourly rate that attorneys had asked to recover was "a high rate overall."

"This is troubling to me," she said, given that the suit involved alleged victims of sexual assault. "I need to take great care to think about incentives."

The settlement, announced in September 2023, includes both governance reforms and a $30 million cash award to the company, of which shareholders so far have secured $22 million.

The vice chancellor concluded that shareholder attorneys deserved $3 million for securing the governance reforms — down from the $3.5 million they sought — and just $2.3 million for the cash award, given that $8 million of it is still tied up in litigation. Attorneys had requested $3.12 million for their work on the cash portion of the settlement.

The vice chancellor also approved an expense reimbursement of $147,212.52.

The settlement resolves a proposed class action, **filed in September 2022** by stockholder Employees' Retirement System of Rhode Island, against the company's chief creative officer, director and co-founder Paul Marciano, his brother and company co-founder Maurice Marciano, and board directors Alex Yemenidjian, Carlos Alberini, Cynthia Livingston, Anthony Chidoni and Deborah Weinswig.

The suit accused the fashion company and its board of "continually ignoring an ongoing stream" of reports of "predatory behavior" and sexual misconduct by Paul Marciano. The derivative suit detailed numerous alleged incidents of sexual harassment and physical assaults against Guess employees and models, including Kate Upton.

Paul Marciano established Guess in 1981 with his brothers George Marciano, Maurice Marciano and Armand Marciano.

At the hearing Thursday, shareholder attorney Ned Weinberger of Labaton Sucharow LLP said that Guess has been founder-controlled and family-controlled for more than four decades. That family control helped foster an environment in which inappropriate behavior could occur and continue, he said.

The reforms in the settlement directly address the family's control and will "change the rules" in ways that will help mitigate similar problems in the future, he said.

Shareholders have secured $22 million of the $30 million cash settlement from insurers and the Marciano family, and $8 million is still being litigated with insurance companies in California state court, California, Weinberger said.

Of the $22 million that shareholders have secured so far, $10 million has come from insurance and $12 million has come from Paul and Maurice Marciano, Weinberger said.

The governance reforms that the settlement achieved are "very significant," Rebecca Boon of Bernstein Litowitz Berger & Grossmann LLP, another of the shareholders' attorneys, told the court Thursday.

"The money is obviously important, but the governance is even more important because that is what allows us to fix the problem," Boon said.

As part of the "therapeutic" reforms under the settlement, the company will add two independent directors to its board, one of which will have expertise in combatting sexual harassment. The company will also create an independent diversity, equity and inclusion council with the ability to investigate sexual misconduct allegations and implement changes or discipline offenders -- including termination for cause, Boon said.

Also, among other reforms, the company's top human resource officer will report directly to the CEO, rather than the Marcianos.

Attorneys for the defendants did not make a presentation at the hearing.

Employees' Retirement System of Rhode Island is represented by Eric Belfi, Carol Villegas, John Vielandi, Joshua M. Glasser, Ned Weinberger, Mark Richardson, and Jiahui (Rose) Wang of Labaton Sucharow LLP, Rebecca E. Boon, Gregory V. Varallo, Mae Oberste and Daniel E. Meyer of Bernstein Litowitz Berger & Grossmann LLP, and Jeremy S. Friedman, David F.E. Tejtel, Sarah Kleinman, and Lindsay La Marca of Friedman Oster & Tejtel PLLC.

Guess Inc. is represented by D. McKinley Measley, Alexandra M. Cuming and Courtney Kurz of Morris Nichols Arsht & Tunnell LLP.

Alex Yemenidjian, Anthony Chidoni and Carlos Alberini are represented by Ryan P. Newell, Lauren Dunkle Fortunato and Michael A. Laukaitis II of Young Conaway Stargatt & Taylor LLP. Yemendijian and Chidoni are additionally represented by Tariq Mundiya of Willkie Farr & Gallagher LLP.

Cynthia Livingston and Deborah Weinswig are represented by Catherine G. Dearlove, Brock E. Czeschin and Nicole M. Henry of Richards Layton & Finger PA.

Paul Marciano and Maurice Marciano are represented by Kevin R. Shannon and J. Matthew Belger of Potter Anderson & Corroon LLP.

The case is Employees' Retirement System of Rhode Island v. Paul Marciano, et al., case number 2022-0839, in the Court of Chancery of the State of Delaware.

--Editing by Alex Hubbard.

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Viacom Investors Win Class Cert. In Archegos Suit

By **Emilie Ruscoe**

Law360 (January 4, 2024, 10:06 PM EST) -- Viacom investors suing Morgan Stanley, Goldman Sachs and other banks over the 2021 collapse of Archegos Capital Management were granted class certification Thursday by a Manhattan state court judge.

In a Thursday **opinion**, New York County Supreme Court Justice Andrew Borrok granted the investors' request to certify a class of those who bought Viacom stock in its March 2021 secondary public offering or in an initial public offering of preferred stock it held at the same time.

In so doing, Justice Borrok rejected a bid by underwriter defendants to see the class definition narrowed, finding that while it may be appropriate to narrow the class definition later in the litigation, it didn't make sense to do so at the current stage.

The judge also found that named plaintiff Camelot Event Driven Fund was an appropriate party class representative, disagreeing with the underwriters who'd argued that Camelot was atypical among members of the proposed class and was therefore inadequate. Camelot's legal team, comprising attorneys from Glancy Prongay & Murrary LLP and Bernstein Litowitz Berger & Grossman LLP, was also deemed fair class counsel by the Thursday order.

The latest decision comes as the investors pursue discovery against financial institutions they blame for "massive losses" after the heavily leveraged Archegos, a limited partnership family office, failed to meet margin calls in March 2021 and saw sudden losses estimated to be in the billions.

Camelot's suit alleges the financial institutions, which underwrote $3 billion in Viacom stock, did not tell investors their brokerage arms were poised to dump millions of shares of the same stock on the market in connection with Archegos' trades.

As a result of these actions, the investors claim, they saw trading prices for their shares fall by 50%, and they seek to hold the underwriters liable for their losses.

Because of a New York state appellate court **decision lifting the discovery stay** — a ruling of first impression — the underwriters must face document and deposition requests despite an ongoing effort to appeal a decision denying dismissal of the matter.

On Thursday, John Rizio-Hamilton, who represents the investors, said, "we're gratified by the court's decision and look forward to continuing to prosecute our case on behalf of the class."

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

The lead plaintiff is represented by Bernstein Litowitz Berger & Grossmann LLP and Glancy Prongay & Murrary LLP.

Morgan Stanley and Goldman Sachs are represented by Skadden Arps Slate Meagher & Flom LLP.

The case is Camelot Event v. Morgan Stanley, case number 2023-03270, in the Supreme Court of the State of New York Appellate Division, First Judicial Department.

--Additional reporting by Jessica Corso.

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Google Users Nab Class Cert. In Mobile App Privacy Row

By **Allison Grande**

Law360 (January 4, 2024, 11:04 PM EST) -- A California federal court has granted class certification to millions of mobile app users in a suit accusing Google of secretly tracking their browsing activity, rejecting the tech giant's argument that the plaintiffs' privacy intrusion claims are "inherently personal" and inappropriate for class treatment.

In an order issued Wednesday, U.S. District Judge Richard Seeborg found that the plaintiffs had met the requirements for certifying two nationwide classes of more than 100 million Google account holders who seek to hold the company liable for falsely telling them that they could control whether the company saves data about their activity on non-Google apps through a "Web & App Activity" button. The first class covers Android users, while the second class covers non-Android users who claim to have had their browsing activities transmitted to Google despite having the WAA setting turned off on their mobile devices.

Google had contended in opposing class certification that the plaintiffs had failed to identify a single California mass torts case that certified a class for the allegations at issue in the dispute — invasion of privacy, intrusion upon seclusion, and violation of the Comprehensive Computer Data Access and Fraud Act — because "these claims are inherently personal, and the nature, extent, and frequency of injury and damage are highly individualized issues that are typically unsuitable for class treatment."

But Judge Seeborg shot down this assertion, finding instead that while the question of whether putative class members had a reasonable expectation of privacy was an "objective" one, that didn't mean it wasn't "a question capable of resolution class-wide."

"Despite Google's insistence otherwise, whether the amount or nature of data collected is a fact-specific inquiry does not by itself defeat predominance, because the relevant question is whether the members, who shared common conduct, had an objective, reasonable expectation of privacy based on Google's representation about the WAA button to all members under these claims," Judge Seeborg ruled.

"While analysis of surrounding circumstances may sometimes be necessary to determine whether a user maintained their reasonable expectation of privacy, here, that question is eclipsed by the undisputed fact that all class members switched off their [supplemental Web & App Activity] settings," the judge added.

Judge Seeborg distinguished the dispute before him from the California district court's March decision in Hart v. TWC, where **plaintiffs accusing** The Weather Channel of secretly collecting their data to sell to third parties were denied certification due to individualized issues over whether they had consented to the alleged data practices. Unlike the prior case, the Google dispute centers on the users' decision to affirmatively switch off their tracking settings rather than, as Google argues, the fact that they continued to use these third-party apps, according to Judge Seeborg.

"It is unreasonable for Google to expect, as it does, that users must also stop using the many apps on their phone, after selecting WAA to be off, to show a lack of consent," the judge found. "Google's argument places an impossible burden on Plaintiffs that would preclude injunctive relief altogether: they must stop using the many apps on their phones to avoid consenting to the wrongful conduct, unfairly undercutting standing to seek injunctive relief."

Judge Seeborg also concluded that Google had fallen short in its arguments that the additional element of whether these privacy intrusions were highly offensive and whether the company's conduct had violated the CDAFA demanded individual inquiries, rejecting Google's argument that it wasn't possible that all app users had suffered "damage or loss," given that their information was collected for "run-of-the-mill record-keeping" and was not "sensitive, confidential, or even meaningful to users."

"Even if Google is right, and the 'vast majority' of class members' data was only exposed to record-keeping 'not tied to a person's identity or used by Google for any purpose other than to perform accounting for the apps that generated the data or advertising in the first place,' then surely that can be proven by common evidence of Google's record-keeping practices," the judge found. "It is unclear why Google would need to take discovery 'from the 100 million privacy plaintiffs' if it engaged in a uniform policy of record-keeping."

Judge Seeborg also cleared the way for the certified classes to pursue both damages and injunctive relief, such as requiring Google to cease collecting data from app users who had the tracking settings turned off and to delete any data it had already collected from these users.

Google argued that individual issues predominated concerning damages and took specific issue with the opinion by plaintiffs' damages expert Michael J. Lasinski. The company moved to exclude Laskinski's calculation of either $558.8 million or $664.3 million in classwide unjust enrichment damages and $486 million, or $3, per class member, in actual damages for the two proposed classes.

But Judge Seeborg denied this motion while finding that Lasinski's damages models were properly based on Google's alleged classwide conduct and that questions about what class members understood about how the activity tracking settings worked didn't doom class certification.

"While it is possible that individual class members learned about the WAA feature from a panoply of sources, it is left unexplained why that necessarily means Google's explanations were inconsistent, warranting defeat of predominance," the judge ruled. "Google's representations about the WAA feature, unambiguous and persistent by its own admission, outweigh these individual questions about where class members learned about the WAA feature."

Wednesday's ruling largely echoes comments made by Judge Seeborg at an October hearing on the class certification motion, where he declined to issue a former ruling but voiced his belief that the plaintiffs had sufficiently demonstrated that common issues predominate with respect to the two classes.

In pressing the dispute, named plaintiffs Anibal Rodriguez, Sal Cataldo, Julian Santiago and Susan Lynn Harvey have claimed Google secretly tracks users' activity across the web as the company's Google Analytics for Firebase software is quietly integrated into hundreds of thousands of third-party smartphone apps. Their suit, filed in July 2020, seeks to represent millions of affected users, and it is requested in the complaint that the court award monetary compensation where applicable, force Google to disgorge revenues as well as profits from the data collection, and prevent Google from continuing the tracking.

In 2022, Google received a partial win in the mobile app privacy case when Judge Seeborg **threw out** several claims while preserving their allegations that Google breached California's state computer abuse and invasion of privacy law.

Counsel for the plaintiffs and Google couldn't be reached for comment Thursday.

The users are represented by Mark C. Mao, M. Logan Wright, James Lee and Rossana Baeza of Boies Schiller Flexner LLP, John A. Yanchunis of Morgan & Morgan PA and Ryan Sila of Susman Godfrey LLP.

Google is represented by Benedict Y. Hur, Simona Agnolucci, Eduardo E. Santacana, Noorjahan Rahman, Argemira Flórez and Harris Mateen of Willkie Farr & Gallagher LLP.

The case is Rodriguez et al. v. Google LLC et al., case number 3:20-cv-04688, in the U.S. District Court for the Northern District of California.