Assertio Allegedly Overstated Impact of Spectrum Acquisition

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- **COURT:** N.D. Ill.
- **TRACK DOCKET:** 1:24-cv-00169

Assertio Holdings Inc. and two top executives oversold the impact the company's acquisition of Spectrum Pharmaceuticals Inc. would have on profitability, according to a shareholder class action complaint.

The alleged misrepresentations took place over eight months and included disclosures that the company issued before and after the deal to buy Spectrum closed in July 2023. The company misled investors about the sustainability of its income strategy relying on single category of products, as well as the value of the acquisition, according to the complaint filed Jan. 5 in US District Court for the Northern District of Illinois.

Assertio allegedly overstated the positive impact that the sale of Indocin products and the acquisition would have on profitability, the complaint says.

After a generic drugmaker competitor got approval to manufacture and market indomethacin suppositories on Aug. 3, 2023, Assertio withdrew its previous financial outlook. The following day, Assertio's stock price fell 46% to $2.91 on Aug. 4. That was the stock's biggest drop in nearly four years, according to data compiled by Bloomberg.

Then on Nov. 8, Assertio issued a press release with financial results for the third quarter of 2023, which included a revenue figure $14.8 million below consensus estimates. CEO Daniel Peisert called the results disappointing and cited the loss of Indocin exclusivity, also noting that certain aspects of the Spectrum acquisition "may not be everything we initially expected," the complaint says.

Assertio's stock price 43% the following day to $1.21 on Nov. 9 2023.

Last week, Assertio issued another press release announcing Peisert would step down from his role as CEO. The company's share price fell nearly 11% that day to close at $1.01 per share on Jan. 4, according to the complaint.

Shareholder Perry Shapiro seeks to recover damages for investors who acquired Assertio stock between Mar. 9 and Nov. 8 2023, alleging that the company and executives violated the Securities Exchange Act. He also seeks legal fees, the complaint says.

An Assertio spokesman declined to comment.

Pomerantz LLP represents Shapiro and the proposed class.

The case is Shapiro v. Assertio Holdings, Inc. , N.D. Ill., No. 1:24-cv-00169, complaint filed 1/5/24

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3D Systems, Investors Get Sign-Off for $4 Million Settlement

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Litigation

3D Systems Corp. is approved to pay a class of shareholders $4 million to resolve claims that it misled investors about “righting the ship” after a “reckless acquisition strategy” that led to operational chaos.

The deal merits final approval, Judge Nicholas G. Garaufis said for the US District Court for the Eastern District of New York. Garaufis also approved attorneys’ fees of 33% of the settlement.

- Investors said 3D Systems, one of the oldest companies in the 3D printer and supplies business, delayed disclosing that it still suffered from problems stemming from its “too rapid expansion years earlier”
- “The Settlement equates to approximately 1% of the total maximum potential damages calculated by Plaintiffs’ expert, an estimated $414.1 million,” the investors said in their brief seeking preliminary approval of the deal
- Earlier class suit over acquisition strategy settled for $50 million in 2018

The Rosen Law Firm PA served as class counsel. Alston & Bird LLP represented 3D Systems.

The case is In re 3D Sys. Sec. Litig. , E.D.N.Y., No. 1:21-cv-01920, 1/4/24 .

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Netflix beats shareholder lawsuit over account-sharing disclosures

reuters.com/legal/netflix-beats-shareholder-lawsuit-over-account-sharing-disclosures-2024-01-08

Reuters

Toy figures of people are seen in front of the displayed Netflix logo, in this illustration taken January 20, 2022. REUTERS/Dado Ruvic/Illustration/File Photo Acquire Licensing Rights

Jan 8 (Reuters) - Netflix (NFLX.O) has defeated a lawsuit filed by shareholders in a federal court in California that accused the streaming entertainment company of hiding the extent to which account-sharing was hindering its growth.

A Texas-based investment trust sued in May 2022, after Netflix shares lost a third of their value when the company said subscribers were decreasing for the first time in a decade. The lawsuit sought damages on behalf of investors who bought Netflix shares between January 2021 and April 2022.

U.S. District Judge Jon Tigar ruled on Friday that the lawsuit included no evidence that the company was aware of the extent of the problem for as long as the investors alleged.

The judge said the investor can refile the lawsuit if it adds facts to bolster the claims.

A spokesperson for Netflix and attorneys for the trust did not immediately respond to requests for comment on Monday.

Netflix lost around half of its value between January 2022, when it warned of weak subscriber growth, and April, when shares plunged after the company said account-sharing and competition had hampered new subscriptions. Netflix's then-CEO, Reed Hastings, said at the time that the COVID-19 pandemic had made it difficult for the company to interpret subscription trends.

Netflix shares were up 1.1% at $479.09 at midday on Monday.

Reporting by Jody Godoy in New York Editing by Matthew Lewis

Argentina Requests Relief From Burford's Intent to Seize Assets

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThjLWVhYWEtZDNmYS1hYmJlLWZiZmEzNmRhMDAwMSIsImN0eHQiOiJTTE5XIiwidXVpZCI6IlNrMHErRkxGZ1hZOHZyTmN4a1JLUmc9PXNDTDRIK1VFTU5CRVdnbWNlSjhLOHc9PSIsInRpbWUiOiIxNzA0ODAyNDg0MzQ5Iiwic2lnIjoickd0aIIxaXNmV1pIYk9rci9lNVhCNGhJb3JRPSIsInYiOiIxIn0=

- Argentina says seizing assets after Jan. 10 would be premature
- Ruling this week stems from $16.1 billion YPF lawsuit

Argentina has asked a Manhattan court to stop Burford Capital from immediately trying to seize its foreign assets as the hedge fund seeks to collect on billions of dollars that a judge ruled it is owed by the South American country.

In a filing on Monday to US District Judge Loretta Preska Argentina opposed Burford's intention to start the process to seize assets straight after Jan. 10, calling the timing "unnecessary and premature." In several other cases, the country's lawyers wrote, "courts have found much longer periods to be 'reasonable.'" Preska, who is expected to rule on the timing of this issue Tuesday, has already granted multiple delays on enforcing the case.

Read More: Perpetual Bonds Unlikely to Be the Answer for Indebted Argentina

Burford had moved in its own filing for the day after Jan. 10 to be determined as a "reasonable period of time" for it to begin trying to seize foreign assets. That's the deadline by which Argentina has to pledge a guarantee to plaintiffs — one of two requirements it must meet in order for Preska to extend a stay of enforcement on her $16.1 billion ruling pending the country's appeal to a higher court.

In court, Argentina has said it has no intention of pledging the guarantee — YPF shares and receivables from a hydroelectric plant — and it isn't on track either to meet the second requirement of requesting an expedited appeals process. President **Javier Milei**, who took office Dec. 10, reiterated in December Argentina doesn't have the money to pay and floated the idea of paying plaintiffs with a perpetual bond, a proposal met with swift skepticism by analysts.

The case against Argentina was brought by companies that didn't receive a tender offer when the nation's biggest oil producer, YPF SA, was nationalized in 2012 — a violation of YPF's statute at the time. Burford is financing their case and is entitled to a big portion of the $16.1 billion ruling.

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Securities Law Prof Blog

lawprofessors.typepad.com/securities/2024/01/new-securities-law-articles-in-print.html

Tuesday, January 9, 2024

New Securities Law Articles in Print

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

Lauren Au, Note, *Fractionalization to Securitization: How the SEC May Regulate the Emerging Asset of NFTs*, 96 S. Cal. L. Rev. 253 (2022).

Patrick Dunbar, Comment, *The SEC's Ice-Cold Take on Climate Disclosure: Is the 2010 Interpretive Climate Guidance Working?*, 33 Vill. Env't L.J. 37 (2022).

Adi Grinapell, *What Drives the Use of Dual-Class Structures in Technology IPOs?*, 17 J.L. Econ. & Pol'y 28 (2022).

Mohsen Manesh & Joseph A. Grundfest, *The Corporate Contract and Shareholder Arbitration*, 98 N.Y.U. L. Rev. 1106 (2023).

Robel Tsegu, Casenote, *Cryptocurrency and Security Issues: The Tide Awaiting Ripple's Decision*, 25 SMU Sci. & Tech. L. Rev. 95 (2022).

Centerra Workers' $4.5 Million Deal With Aon Rejected by Court

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThjLWU5NDEtZDJmMi1hOWNkLWZmNWYzMGE4MDAwMSIsImN0eHQiOiJTTE5XIiwidXVpZCI6IjRRWkRRd3ZhbW1mSkROc0IyTDBGSUE9PVVyL0J1c0lUck5EaTM2ZzlNK28yT0E9PSIsInRpbWUiOiIxNzA0ODAyNDg0MzUzIiwic2lnIjoiYU9EV0Y4S1lyVlh3a3Z3V1ZkaVorT1dIbnJjPSIsInYiOiIxIn0=

- Suit challenges Centerra 401(k) plan's move to Aon funds
- Class action is currently scheduled to go to trial in March

A $4.5 million class settlement between an Aon PLC unit and Centerra Group LLC employees challenging the Aon funds in their 401(k) plan failed to secure court approval because it improperly limits Centerra's rights.

The deal includes a bar order blocking Centerra from raising claims against Aon, along with a "credit" reducing any potential judgment against Centerra by the amount it would be entitled to receive from Aon, Judge Sherri A. Lydon of the US District Court for the District of South Carolina said. But the deal also provides that the plan participants won't pursue any claims against Centerra that are premised on the idea that Aon engaged in wrongdoing, Lydon said in the Jan. 5 opinion.

Centerra said these provisions work together to eliminate rights it bargained for in its contract with Aon—specifically, the right to be indemnified for any losses related to Aon's misdeeds.

But the settlement "appears only to protect Aon and Plaintiffs" by blocking Centerra from bringing its own claims while ensuring that any judgment it could face won't be reduced to account for Aon's potential liability, the judge said.

"Aon gets the benefit of settling Plaintiffs' claims without fear of having to indemnify the Centerra Defendants, while Plaintiffs get the benefit of a settlement with Aon and have a mechanism for arguing around the applicability of the judgment or indemnity credit," Lydon said. "The fairness of this bar order as to the Centerra Defendants—which the court must consider in determining whether to adopt it—is suspect."

The judge therefore rejected the settlement without blocking the parties from trying again, saying she "does not make this decision lightly."

The class action, which is scheduled to go to trial on March 4, says Centerra moved most of its 401(k) plan assets into funds offered by Aon, which served as the plan's discretionary investment manager. These untested funds underperformed their benchmarks and allowed Aon to earn substantial revenue at the expense of workers' retirement savings, according to the lawsuit, which largely survived dismissal in 2021.

Centerra is a subsidiary of security and risk management company Constellis Group. The Centerra plan was merged into the Constellis 401(k) plan in 2019, causing the Aon funds to be liquidated and ending the company's tenure as investment manager, according to the lawsuit.

Schlichter Bogard LLP and Robinson Gray Stepp & Laffitte LLC represent the class. Jackson Lewis PC represents Centerra. Parker Poe Adams & Bernstein LLP and O'Melveny & Myers LLP represent Aon.

The case is Williams v. Centerra Grp., LLC , D.S.C., No. 1:20-cv-04220, 1/5/24 .

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Big banks tried to exclude states from a rate-rigging class action. They flopped, for now.

reuters.com/legal/transactional/column-big-banks-tried-exclude-states-rate-rigging-class-action-they-flopped-now-2024-01-08

Alison Frankel

A Bank of America logo is pictured in the Manhattan borough of New York City, New York, U.S., January 30, 2019. REUTERS/Carlo Allegri/File Photo Acquire Licensing Rights

Jan 8 (Reuters) - Bank of America (BAC.N) and several other big banks named as defendants in a rate-rigging lawsuit asserted a radical theory last month that might have fundamentally altered class action litigation in federal court, especially in securities fraud cases involving state pension funds.

The banks got a chilly reception for their 11th-hour theory, and they have only themselves to blame for asserting it late in the process. But I would not be surprised to see the same arguments crop up again. And if the theory gains traction, according to plaintiffs' lawyers in the rate-rigging case, the implications could be "immense and far reaching."

In other words: Pay attention.

BofA and the other banks, including Citigroup (C.N), Wells Fargo (WFC.N) and JP Morgan Chase (JPM.N) are defendants in a antitrust class action alleging that they conspired to rig interest rates for bonds known as variable rate demand obligations, for which interest rates are typically reset every week. Last September, U.S. District Judge Jesse Furman of Manhattan certified a class of bond managers that paid the banks to act as resetting agents. The class includes at least 14 states and a plethora of state agencies.

The banks initially tried to block class certification by challenging plaintiffs' economic models. But after Furman rejected those arguments and certified the class, the defendants signed off on a class notice.

They did so over protests by Edelweiss Fund, which is a whistleblower in four state qui tam suits asserting allegations that overlap with some of the claims in the class action. Edelweiss' lawyers at McKool Smith said they were worried (among other things) that the proposed class notice did not provide enough notice to states about the rights they would be giving up unless they opted out of the class. In a letter brief last October, Edelweiss noted that some courts have questioned whether the 11th Amendment of the U.S. Constitution, which establishes states' sovereign immunity from federal jurisdiction, even permits states to be members of a class in federal court.

At the time, the bank defendants said that Edelweiss' fears were speculative. States were capable of making an informed decision about whether to participate in the case, they said, and Furman could deal at the conclusion of the case with any disputes about the preclusive effect of his rulings.

But then the banks changed their minds, according to a Dec. 22 letter brief from bank lawyers at Wilmer Cutler Pickering Hale and Dorr. Prompted by Texas' assertion of sovereign immunity to block a subpoena from the banks, defense lawyers conducted additional research on Edelweiss' sovereignty theory, the banks said. That research, they told Furman, convinced defense lawyers that state sovereignty could be a big problem.

Furman, they said, might not even have jurisdiction over states participating in the case as absent class members because it's not at all clear that states have waived sovereign immunity when they have received a class action notice and have failed to opt out. States might subsequently contend that under the 11th Amendment, they are not bound by Furman's decision in the class action.

“There is a real risk that if the class [is] not modified, then states and state entities with sovereign immunity could sit on the sidelines and if they do not like the results (e.g., summary judgment), decide then to assert sovereign immunity,” the banks said. That prospect, they said, undermines the whole point of class actions, so they urged Furman to hold up class notification until he revisited the question of whether states can even be class members.

You can imagine how that proposition went over with class counsel from Quinn Emanuel Urquhart & Sullivan, Susman Godfrey and Wollmuth Maher & Deutsch. They argued in a Dec. 28 letter brief that the banks' theory “poses [a] real threat to states' autonomy and legal rights” — but that Furman need not even engage with the banks' arguments because they should have been raised at the class certification stage, not after the class has been certified and notice has been approved.

The banks' theory, moreover, would upend class actions in federal court, plaintiffs said. States and state entities, class counsel argued, are routinely class members in big commercial class actions — especially in shareholder fraud cases against companies in which state pension funds have invested.

It simply cannot be, class counsel said, that states and state entities must be barred from class membership even when they have received class action notifications and have opted to stay in the class.

“Defendants' arguments — including their (inaccurate) assertion that their so-called immunity issues implicate the court's Article III jurisdiction — would be tantamount to holding that virtually every federal court has for decades neglected its duty to ensure it has jurisdiction,” plaintiffs' lawyers warned. “That is plainly not the case.”

Last week, Furman denied the banks’ request to delay or reopen the class notification process. He agreed with class counsel that the defendants blew their chance by failing to challenge states’ membership before the class was certified and by initially arguing in response to Edelweiss’ letter last October that the court should wait until the conclusion of the case to resolve any hypothetical preclusion issues.

But the judge expressly reserved judgment on the merits of the banks’ sovereign immunity arguments, which he called “interesting and complex.”

Furman is a notably thoughtful, scholarly judge. If he thinks the banks’ theory is worth future consideration, it’s a good bet that we will see it again.

Noah Levine of WilmerHale, who signed the defendants’ letter briefs on the state sovereignty issue, did not respond to my request for comment. (WilmerHale represents Bank of America but Levine’s letters were on behalf of all of the banks.) Edelweiss counsel Daniel Levy of McKool, who was the first lawyer to raise the state sovereign immunity issue, also did not respond.

Class counsel Daniel Brockett of Quinn Emanuel declined to comment, citing the ongoing rate-rigging litigation.

Reporting By Alison Frankel

Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World’s Most Valuable Coin.

Uber’s email retention policy may stand, magistrate judge says

DJ dailyjournal.com/articles/376502-uber-s-email-retention-policy-may-stand-magistrate-judge-says

Jan. 9, 2024

Last month, several plaintiffs’ attorneys informed U.S. District Judge Charles R. Breyer that Uber refused to provide them with information about its litigation holds.

A federal jurist overseeing multidistrict sexual assault litigation against Uber Technologies Inc. said in a hearing Monday that she was not inclined to suspend the ride-share company’s email retention policy, explaining that the move may be unnecessary to evaluate the claims.

U.S. Magistrate Judge Lisa J. Cisneros in San Francisco heard the plaintiffs’ motion to compel Uber to stay discovery and follow a pretrial order requiring the defendant to preserve relevant electronic records. “It does feel a bit premature to me,” Cisneros told the parties via Zoom and took the motion under submission.

Last month, several plaintiffs’ attorneys informed U.S. District Judge Charles R. Breyer that Uber refused to provide them with information about its litigation holds. The ride-share company has been accused in several lawsuits of intentionally ignoring the issue of its drivers sexually assaulting passengers for a decade and failing to implement adequate safety measures.

Chaffin Luhana LLP partner Roopal P. Luhana told Cisneros that Uber produced some documents hours before Monday’s hearing but “the plaintiffs don’t believe this is any substitute for the information we’re seeking.” Lieff Cabraser Heimann & Bernstein LLP partner Sarah R. London and Peiffer Wolf Carr Kane Conway & Wise LLP partner Rachel B. Abrams also appeared on behalf of the plaintiffs.

Robert A. Atkins and Kyle N. Smith of Paul Weiss Rifkind Wharton & Garrison LLP represented Uber at the hearing. Atkins said their client turned over a corporate representative deposition regarding document preservation, email retention policies, the names of 143 custodians, and a list of 15,700 jobs placed under a litigation hold.

Luhana responded that her team wanted to know employment dates, when the litigation hold was placed, the range of electronic files preserved, and what litigation the files related to. “We ask that Uber suspend its auto deletion policy, just temporarily, until we get to the bottom of this and Uber provides assurances,” the attorney continued.

Uber was deleting emails every six months from September 2015 to January 2023 and deleted all Slack messages over 90 days old in 2020, said Luhana. She added that Uber now has a two-year email retention policy. In re: Uber Technologies Inc. Passenger Sexual Assault Litigation, 3:23-md-03084-CRB (N.D. Cal., filed Oct. 4, 2023).

“We have put in place what in my experience is an unprecedented preservation hold,” said Atkins, maintaining that Uber had followed Breyer’s pretrial order and had not destroyed any relevant evidence. “We threw as wide a net as we could imagine.”

There was no legal precedent supporting the plaintiffs’ request to suspend the retention policy companywide, added Atkins.

The passenger sexual assault cases against Uber were consolidated in the Northern District of California in October and include more than 10,000 plaintiffs. Breyer granted a protective order on Dec. 28 and a trial date has not yet been scheduled.

#376502

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HP hit with consumer lawsuit over third-party ink replacement

reuters.com/legal/government/hp-hit-with-consumer-lawsuit-over-third-party-ink-replacement-2024-01-08

Mike Scarcella

A Hewlett-Packard logo is seen at the company's Executive Briefing Center in Palo Alto, California January 16, 2013. REUTERS/Stephen Lam (UNITED STATES - Tags: BUSINESS SCIENCE TECHNOLOGY LOGO) Acquire Licensing Rights

Jan 8 (Reuters) - HP Inc (HPQ.N) has been sued in federal court in Chicago by consumers who claim the company's printers would not accept replacement ink cartridges made by other manufacturers, forcing them to pay artificially high prices for HP-branded cartridges.

In a proposed federal class action filed on Friday, 11 consumers from Illinois, New York, Missouri and other states accused HP of violating U.S. and state antitrust laws in a bid to monopolize the market for replacement ink.

The plaintiffs said they were not told automatic software updates from HP would disable some printers unless HP-branded ink was used.

“Faced with non-functional printers, the plaintiffs were forced to purchase HP-branded ink that they would not otherwise have purchased,” the lawsuit said.

A representative for HP did not immediately respond on Monday to a request for comment.

Attorneys for the plaintiffs at the law firm Milberg Coleman Bryson Phillips Grossman also did not immediately respond to a similar request.

The lawsuit builds on prior or pending cases accusing HP of deceptive practices involving its ink cartridges.

HP in 2019 agreed to resolve related consumer claims in a California case, settling for a payment of $1.5 million. HP did not admit any wrongdoing as part of the settlement.

Last August, a U.S. judge in California said HP must face claims that it designed some all-in-one printers to stop scanning and faxing when the machine was low on ink, compelling consumers to buy cartridges.

A different California federal judge in December in another lawsuit said the plaintiffs could sue HP in a class-action over allegedly failing to warn them about its “Dynamic Security” policy of updates that bar consumers from using some third-party cartridges.

The court in that case narrowed the scope of proposed classes, and said they could only sue for an injunction against HP's practices and not monetary damages. The lawsuit is over disclosure practices, and not the policy itself.

In the Chicago case, the plaintiffs said they are seeking an injunction barring HP from disabling printers unless they use HP-branded ink, and monetary damages of greater than $5 million.

The case is Renee Robinson et al v. HP Inc, U.S. District Court, Northern District of Illinois, No. 1:24-cv-00164.

For plaintiffs: S. Jarret Raab and Peggy Wedgworth of Milberg Coleman Bryson Phillips Grossman

For HP: No appearance yet

Read more:

Lawsuit claiming HP all-in-one printers are defective can proceed

HP must face shareholder lawsuit over sales, appeals court rules

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US Supreme Court rejects appeal over chicken suppliers' defense pact

reuters.com/legal/government/us-supreme-court-rejects-appeal-over-chicken-suppliers-defense-pact-2024-01-08

Mike Scarcella

REUTERS/Jonathan Ernst Acquire Licensing Rights

Jan 4 (Reuters) - The U.S. Supreme Court on Monday declined to hear an appeal targeting an agreement among major U.S. meat suppliers to apportion potential liability for price-fixing claims brought by chicken purchasers Target, Campbell Soup and others.

The justices' order, issued without comment, left in place a decision by the 7th U.S. Circuit Court of Appeals in June that blocked the chicken purchasers' pre-trial challenge against the suppliers' “judgment sharing agreement.”

The chicken producers had defended their agreement and urged the Supreme Court not to take up the case at this stage.

An attorney for the chicken purchasers at law firm Boies Schiller Flexner had no immediate comment on Monday.

Representatives from meat suppliers Tyson Foods and Perdue did not immediately respond to requests for comment.

Target, Campbell's and the others, including an affiliate of litigation funder Burford Capital, are among companies asserting they’ve paid artificially high prices for chicken products, in violation of U.S. antitrust law.

Their lawsuits are part of coordinated litigation in federal court in Chicago that has involved other claims from consumers, restaurants and other plaintiffs. Other related antitrust cases have been filed against suppliers of turkey, pork and beef.

Plaintiffs in the chicken and other cases have sought tens of millions or hundreds of millions of dollars in alleged damages, and many claims have settled. Damages in antitrust cases are automatically tripled.

More than a dozen defendants in the chicken litigation entered into a defense agreement that spreads out potential monetary liability.

The pact set up a plan for how a "settling plaintiff agrees to reduce the dollar amount collectible from non-settling parties."

Plaintiffs alleged in 2021 that the agreement was unlawful and interfered with private enforcement of antitrust laws.

U.S. District Judge Thomas Durkin in May 2022 rejected the plaintiffs’ challenge to the defense agreement. He ruled that nothing in the agreement “destroys plaintiffs’ entitlement to the full remedies under the law for a trial verdict in their favor.”

Target and the other plaintiffs lost their appeal of Durkin’s order in the 7th Circuit. The appeals panel in a brief order said it had no “jurisdiction” to hear the dispute as litigation was ongoing.

The plaintiffs argued in the Supreme Court that enforcement of the defense agreement should be decided apart from the merits of the claims against the chicken producers.

The case is Amory Investments LLC et al v. Tyson Foods et al, U.S. Supreme Court, No.

For petitioners: Scott Gant of Boies Schiller Flexner

For respondents: Danielle Foley of Venable

Read more:

Jury sides with chicken producer Sanderson in US price-fixing trial

US chicken producers ordered to face price-fixing claims

'Nothing unlawful' about defense pact in chicken antitrust case - U.S. judge

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US Supreme Court declines to hear Exxon, Koch Industries appeal on venue in climate case

reuters.com/legal/us-supreme-court-declines-hear-exxon-koch-industries-appeal-climate-case-2024-01-08

Clark Mindock

The U.S. Supreme Court is seeni n Washington, U.S., June 29, 2023. REUTERS/Evelyn Hockstein/File Photo Acquire Licensing Rights

Jan 8 (Reuters) - The U.S. Supreme Court on Monday declined to hear a bid by major fossil fuel companies and an industry trade group to move a lawsuit filed by Minnesota accusing them of worsening climate change out of state court and into federal court, the energy industry's favored venue.

Exxon Mobil Corp (XOM.N), Koch Industries and the American Petroleum Institute had asked the justices to review a March decision by the St. Louis-based 8th U.S. Circuit Court of Appeals. That court found that Minnesota's lawsuit accusing the energy industry of engaging in decades of deceptive marketing to undermine climate science and the public's understanding of the dangers of burning fossil fuels belonged in state court, where it was originally filed.

Last year, the justices declined to consider several similar appeals, effectively sending cases filed in California, Colorado, Rhode Island, Hawaii, Maryland and elsewhere back to state court, a venue often seen as more favorable to plaintiffs than federal court.

Minnesota Attorney General Keith Ellison said in a statement Monday that the decision will now allow the case to proceed toward trial in state court, and that the decision aligns with similar decisions in courts across the country.

Representatives for the American Petroleum Institute, Koch and Exxon did not immediately respond to requests for comment.

Eight U.S. appeals courts have affirmed lower court decisions remanding similar climate cases to state courts, finding generally that the lawsuits exclusively raise state law claims and thus federal courts do not have jurisdiction.

The American Petroleum Institute, the oil and gas lobby group that has been accused of helping to coordinate the industry's alleged deception, and energy companies have said federal jurisdiction is appropriate because climate change is an issue of national and global importance.

The fossil fuel industry has said the lawsuits effectively try to regulate federal energy policy through state law, and that the federal court system is the appropriate place to litigate harms allegedly caused by greenhouse gas emissions, which are produced across the globe and cannot be contained within state lines.

Minnesota's 2020 lawsuit accused the energy companies and the American Petroleum Institute of knowing since the 1970s and 1980s that the fossil fuels they sold would cause climate change, but that the companies did not disclose that risk to the Minnesota public and instead actively sought to undermine climate change science. The state said the coordinated efforts to downplay the risks of fossil fuels violated state consumer protection and fraud laws, and has caused the state billions of dollars in economic damages tied to climate change.

"Taken together, the defendants’ behavior has delayed the transition to alternative energy sources and a lower carbon economy, resulting in dire impacts on Minnesota’s environment and enormous costs to Minnesotans and the world," Ellison said Monday.

The companies and the institute have denied those allegations, and told the Supreme Court in August that the case deserved to be in federal court given the state's apparent aim to seek a remedy for the impacts of a global phenomenon such as climate change.

Reporting by Clark Mindock in New York; Editing by Alexia Garamfalvi, Daniel Wallis, Will Dunham and Jonathan Oatis

Monsanto's 'Cancer Index', an Alleged Conspiracy, and New PCB-Related Complaints

nakedcapitalism.com/2024/01/monsantos-cancer-index-an-alleged-conspiracy-and-new-pcb-related-complaints.html

By Yves Smith January 9, 2024

Yves here. We've reported on a major lawsuit against Bayer officials and advisers over its colossal-value destroying acquisition of Monsanto. Monsanto should have been recognized as a garbage barge due to looming liability for glyphosate, but as the case explains in gory detail, key actors had bad personal incentives plus a track record of acquisition incompetence. Here the issue is again Monsanto making and selling cancer-implicated products, but this is the tail end of its role as the only US producer of PCBs for decades.

This case of Monsanto trying to wriggle out of PCB-related liability from decades ago, and a tiny community fighting against being made a toxic waste dump for PCB contamination cleanup, is noteworthy. First is the appeal of a David versus Goliath struggle where residents of a low income area are not standing pat in the face of health risks. Second is the role of documentary evidence. Here the Town of Lee has found evidence that Monsanto knew it was selling a highly dangerous product and allegedly illegally colluded with its customer GE in how Monsanto indemnified its customer GE.

Needless to say, the use of a "cancer index" as part of a Monsanto-GE deal will hopefully cut through a lot of Monsanto attempts to obfuscate.

By Dana Drugmand. Originally published at The New Lede

(By National Ocean Service.)

The former Monsanto company – now owned by Bayer AG – illegally cut a secret deal with General Electric Co. decades ago to try to shield itself from liability related to PCB contamination in western Massachusetts, engaging in a conspiracy that continues to wreak harm on the region, according to new complaints from local officials.

In a January 2 letter sent to several local, state, and federal officials, including President Joe Biden and Environmental Protection Agency (EPA) Administrator Michael Regan, officials from the town of Lee, Mass., said they believe a 1970s-era deal between Monsanto and GE in which GE agreed to release Monsanto from liability for PCB contamination violated the Massachusetts Civil Conspiracy Law. The town plans to file charges against Monsanto this month, the letter states. Lee officials also accuse the EPA of failing to "adequately investigate" the arrangement between the two companies.

Attached to the letter are internal corporate documents, including a "cancer index" detailing a long list of Monsanto employees diagnosed with cancer dating back to 1949. The company spreadsheet notes where the employee worked, what type of cancer they suffered and – for many of the workers– dates of death. Monsanto was the sole manufacturer of PCBs in the United States from the 1930s through the 1970s.

The move in Massachusetts comes amid mounting community outrage over the construction of a new toxic waste dump in Lee in Berkshire County near a location where GE used polychlorinated biphenyls (PCBS) for decades in manufacturing electrical transformers. GE discharged the chemical waste into the nearby Housatonic River.

PCBs have long been linked to an array of human health concerns, including leukemia and other cancers. In one studyof nearly 400 children, researchers found that detection of PCBs in the home was associated with a 2-fold increase in risk for acute lymphocytic leukemia. PCBs are also known to be harmful to fish and wildlife. They do not easily break down, making eradication difficult.

Monsanto manufactured PCBs for use in coolants and lubricators in electrical equipment. Internal corporate records revealed through litigation show the company continued to sell PCBs for years while knowing they posed health risks and publicly downplaying the risks. One such document cited by Lee officials shows that Monsanto specifically warned some customers about threats from PCBs to animal and marine life and the fact that they did not easily break down in the environment. The United States banned PCBs in 1979 but PCB pollution remains pervasive.

And though Monsanto had agreed to stop selling PCBs for most uses by the early 1970s, it continued selling them for some uses under the condition of indemnification with its industrial customers, including GE. According to a Bayer webpage on PCB litigation, the indemnity agreements involved Monsanto and six former customers that accounted for approximately 93% of PCB sales.

Under the federal Superfund law, the EPA is overseeing GE's removal of PCB-contaminated sediment from the Housatonic river and allowing GE to deposit over 1 million cubic yards of the lower-concentration toxic material into a lined landfill to be built near the river in the town of Lee. Legal challenges to the 2020 agreement, which was negotiated behind closed doors, have been unsuccessful.

In their letter, Lee officials cite expert guidance warning the health risks from the landfill could be "catastrophic" to the residents of Lee, and they note that the small community, which has a population of roughly 5,800 people, is generally a low-income area. Locating the landfill in Lee is an "environmental injustice," the letter states.

According to Lee officials, the internal documents from Monsanto and GE are relevant to the river cleanup plan because the indemnification agreement between the companies was never disclosed to EPA nor to the First Circuit Court of Appeals, which upheld a dismissal of environmental groups' lawsuit over the cleanup plan last year.

Tim Gray, a resident of Lee and founder and executive director of the Housatonic River Initiative, one of the groups that challenged the EPA-approved plan, said he is hopeful about the town's new attempt to hold Monsanto accountable in court.

"I think we have a chance," Gray said.

Several communities across the United States have sued Monsanto over PCB contamination and related health and environmental impacts. Last month, a jury in Washington state found Monsanto liable for $857 million in damages owed to former students sickened by PCB exposure from leaking light fixtures at a school. In western Massachusetts, a series of lawsuits have been filed against GE and Bayer/Monsanto on behalf of Pittsfield-area residents and families suffering cancers and other diseases they blame on PCB exposure at an elementary school.

The Town of Lee initially filed a lawsuit against Monsanto last spring for knowingly selling a harmful product; the case was dismissed in May 2023 without prejudice, meaning the town could refile.

Bayer issued a statement in response to the Lee letter and allegations, stating, in part:

"This potential case has no merit. Monsanto continues to believe it reflects an unprecedented attempt by the Town of Lee to impose environmental liability on a manufacturer that did not dispose of PCBs in or near the Town and is not a party to a PCB-related settlement under which the Town agreed to create a PCB disposal site. After accepting a share of a $55 million settlement payment to host a PCB disposal site, the Town now moves to sue Monsanto, which was not a party to its agreement, attempting to hold the Company liable for the environmental nuisance and trespass created by its own decision to host a Town dump."

"The Monsanto-GE agreement was a routine commercial agreement between two sophisticated companies that were doing business together, and we deny that it was improper in any way. The agreement is only between GE and Monsanto, it did not (and could not) release any party from liability to third parties. The agreement had (and has) no impact on any legal liability adjudged by courts or assigned through administrative agencies like the EPA.

"We stand by our statement as Monsanto manufactured bulk industrial PCBs and sold them to sophisticated third party companies, including GE, who used them in the manufacture of building materials like transformers and fluorescent lights which they, in turn, sold to customers. Monsanto provided information to its own customers about the risks and benefits of these products – which the Town itself acknowledges."

Lee Select Board Chair Bob Jones said the company's narrative is false.

"Quite frankly we've got a multibillion corporation walking slipshod over the communities in the Housatonic River corridor," Jones said. "We hear every day in the press about the threat of the demise of democracy in America. This is it, case in point, Main Street America, small towns like Lee being forced to have a dump.

'That's Going to Lead to a Lot More Lawsuits': New Litigation Trend Emerging

law.com/2024/01/08/thats-going-to-lead-to-a-lot-more-lawsuits-new-litigation-trend-emerging

NEWS

A growing reliance on electronic messages is causing an unexpected outcome.

January 08, 2024 at 05:04 PM

Financial Services and Banking

Charles Toutant

The original version of this story was published on New Jersey Law Journal

Bill collectors who contact debtors via email could fall into a new litigation trap, as some debtors are filing suits claiming that emailed collection notices sent at night are in violation of federal law.

The emerging conflict over electronic communications sent at the wrong time could bring new opportunities for lawyers representing debtors, and new headaches for collection agencies. But guidance from the courts about whether such cases violate the Fair Debt Collection Practices Act appears to be lacking so far.

Quentin Howard of Warren County, Pennsylvania, is one such debtor. He was the plaintiff in a suit filed in the Western District of Pennsylvania in March 2023 on behalf of a class of people who were sent emailed notices between 9 p.m. and 8 a.m. or on weekends from TrueAccord, a debt collector.

Howard claims the company sent his email at 10:13 p.m. on Saturday, Nov. 12, 2022, in violation of the FDCPA. Howard allegedly experienced emotional distress, including anger, restlessness and increased heart rate, as a result of the improper email, not to mention wasted time and annoyance, according to his suit.

Old Policy, New Practices

The Consumer Financial Protection Bureau clarified its rules in 2021 to allow collection agencies to use email, text messages or social media to seek repayment of outstanding debts.

And the collections field is increasingly relying on electronic messages to reach debtors because the cost is less than letters or phone calls, according to industry observers.

But can plaintiffs prevail based on rules about timing of communications concerning collections from the FDCPA, which dates to 1977, when email and text messages didn't exist?

The outcome of Howard's suit is unclear, since it was sent to arbitration and then listed as dismissed.

Howard was represented by two New Jersey lawyers—Scott H. Bernstein of the law offices of Scott H. Bernstein in Roseland, and Yaakov Saks of Stein Saks in Hackensack. They did not return calls about the case; nor did Lauren M. Burnette of Messer Strickler Burnette in Jacksonville, Florida, the lawyer for defendant TrueAccord.

'Their First Avenue'

Richard Perr, chair of the Consumer Financial Services Practice Group at Kaufman Dolowich in Philadelphia, expects to see such suits become more common as the collection industry abandons phone calls and postal mail in favor of less costly methods of contacting debtors.

"The industry is heavily turning towards electronic communication. Anyone who's engaging in any sort of credit transaction today is including an email address or a cellphone with their applications. So when that file has been transferred to a debt collector because something hasn't been paid, their first avenue of communication is going to be utilizing those, because that's the easiest and least expensive way to communicate," Perr said.

Fort Lauderdale attorney Jibrael S. Hindi of the Law Offices of Jibrael S. Hindi. Courtesy photo

"So what that will lead to is those people that become delinquent and deficient are going to be communicated with in the way that they have preference for. And that's going to lead to a lot more of these lawsuits," Perr said.

Most operators in the collections field are sophisticated and aware of the email timing issue and take pains to send emails only in noninfringing time periods, Perr said. Still, he has seen a handful of suits over the timing of collections emails.

The critical question is not what time the message arrives in the recipient's mailbox, but what time the sender transmits it, he said.

Florida has seen a steady stream of suits over emailed collection notices that are sent at night or on weekends.

Jibrael S. Hindi of the Law Offices of Jibrael S. Hindi in Fort Lauderdale, Florida, said he filed more than 1,000 suits on behalf of individuals who received emails sent by creditors at night or on weekends. But Hindi's suits are largely filed based on the Florida Consumer Collection Practices Act, rather than the FDCPA.

That's because the Florida law covers creditors, such as local electric companies, as well as debt collectors, whereas the federal law only applies to debt collectors, which is a much smaller group, Hindi said. His cases over emails tend to settle, often through what he calls mass arbitrations, and some defendants continue to engage in the offending conduct after settling, Hindi said.

Manuel Newburger, who represents consumers in suits at Barron & Newburger in Austin, Texas, has been following the Florida litigation over emailed collection messages. He is not sold, however, on their merits: a consumer is free to ignore an email, just as the consumer can open a letter, or not. He is not convinced that emails sent before 8 a.m. or after 9 p.m. are inconvenient.

"It is ironic that these suits all appear to undermine what appears to be the general preference of consumers to receive emails which, like letters, they can read at their convenience, rather than phone calls from debt collectors," Newburger said. "I would argue that unless they are excessive, emails are also more convenient than snail mail as they can be deleted with a keystroke and don't have to be recycled or shredded."

South Florida Heavy Hitters Gather for $528 Million Class Action

law.com/dailybusinessreview/2024/01/08/south-florida-heavy-hitters-gather-for-528-million-class-action

By Habiba Cullen-Jafar

Lawrence Kellogg, Levine Kellogg Lehman Schneider + Grossman, left, and William R. Scherer, co-founder and managing partner at Conrad & Scherer, right. Courtesy photos

NEWS
"We are anxious to team up on this thing to try to find the bad guys," one of the attorneys said.

January 08, 2024 at 05:29 PM

Class Actions

Lisa Willis

While the infamous South Florida attorney Scott Rothstein netted billions in fraudulent takings from unwitting financial participants in his 2009 Ponzi scheme, one prominent Miami trial attorney involved in getting a large portion of investor money back is taking another swing at the next Ponzi-like scheme to rock the area.

“Four thousand people were involved in this scheme putting over half a billion dollars into this operation that was run by these ‘used-car’ salesman-type people,” said William R. Scherer, co-founder and managing partner at Conrad & Scherer.

Scherer was lead counsel for Rothstein's victims.

Scherer has teamed with Lawrence "Larry" Kellogg, partner at Levine Kellogg Lehman Schneider + Grossman.

Together, the attorneys are taking on the latest class action over a $528 million scheme against hundreds of unwitting investors.

The litigation emerged after the Securities and Exchange Commission alleged Raymond J. Pirrello Jr. and others perpetrated the scam through New Jersey- or New York-based companies Prior 2 IPO Inc., Late Stage Asset Management LLC, Pre IPO Marketing Inc. and JL Rivera Enterprises Ltd.

Read the SEC Allegations

Through a nationwide network of unregistered sales agents, Pirrello allegedly raised hundreds of millions of dollars from more than 4,000 investors by soliciting unregistered offerings of pre-IPO securities.

Attorneys say the agents allegedly told investors there would be no upfront fees on the pre-IPO offerings and that agents would only make a profit after the initial public offerings.

Instead, the SEC alleges, investors were charged undisclosed markups approaching 150%, allowing Pirrello and the sales agents to pocket tens of millions of dollars.

"We are anxious to team up on this thing to try to find the bad guys, and then try to recover and really even find out where in the world we are with respect to the interest in these companies that have yet to go public," Scherer said.

The attorneys, on behalf of their clients, said they are dealing with unregistered, unlicensed players, some of whom were prohibited from these actions because of their past frauds involved with sales and security.

Related Story: No Reduced Sentence for Disbarred Lawyer Scott Rothstein, 11th Circuit Rules

"This is a securities fraud with a couple of levels of potential loss," Kellogg said. "It's a situation where these characters, the primary one who had been barred from the securities industry and remains silent, would market the ability to purchase shares in companies that may go public at some point, and if they go public, then the value of those shares go way up."

The trial attorneys said it's hard to pull something off of this magnitude without having a lot of enablers, and that's what they are looking for.

Kellogg said there is still much investigating to do on this case.

“There’s about $80 to $100 million of undisclosed commissions that were taken from the investors and distributed to these New Jersey Boys—and that’s a loss—but there’s also the potential that since there was a half a billion dollars worth of investments made, do they actually have the shares?” Kellogg said. “Are there going to be shares issued that eventually go public, or was all the money taken and used for other purposes that we don’t know about?”

Another Class Action Emerges

Jeffrey C. Schneider, a high-stakes litigator at Levine Kellogg in Miami, is familiar with another recently announced SEC fraud complaint filed in the U.S. District Court for the Southern District of Florida, which has led to class action activity.

While not associated with the litigation or class action surrounding this new fraud involving a Miami-based real estate developer, Schneider offers his perspective based on his years of experience working to recover money for investors who have been defrauded.

Jeffery C. Schneider of Levine Kellogg Lehman Schneider + Grossman in Miami.
Courtesy photo

“South Florida real estate is hot, right?” Schneider said. “Even the way interest rates rose for the last 18 months, you would think that would stabilize prices or maybe even bring them down, but in South Florida, it didn’t. So whenever there is hot investment, there are people who will take advantage of that situation in some sinister, nefarious way, and that’s what we’re looking at right here.”

Florida real estate developer Rishi Kapoor, who on Wednesday was charged by the SEC with perpetuating a $93 million fraud scheme, is alleged to have been the mastermind behind the Ponzi scheme.

“As alleged in our complaint, Kapoor was the architect of a multipronged real estate offering fraud that misappropriated millions from more than 50 investors,” said Eric I. Bustillo, director of the SEC’s Miami Regional Office. “This emergency action reflects our commitment to protecting investors and holding those who defraud them accountable for their actions.”

The SEC got emergency relief for investors by obtaining an asset freeze.

The SEC also charged Location Ventures LLC, Urbin LLC, and 20 other related entities in connection with the fraud scheme.

Why Is This Happening?

“When the real estate market is doing well, people put money there. When the stock market is doing well, people put money there,” Schneider said. “When they both do poorly, that’s when the fraudsters are able to attract investors who might typically be putting their money into more conventional, legitimate places.”

Schneider is often appointed as a receiver in such cases.

“The good news is to my understanding, there are different lawsuits pending regarding various projects,” Schneider said. “There’s a foreclosure action. There’s a boat that has been taken by the lender or is being taken by the lender. There are investor lawsuits.”

Schnieder said retired Miami-Dade circuit court Judge Alan Fine has also been appointed to the case.

“What this will do is streamline all of those proceedings into the one receivership case,” Schneider said. “So that means if you hired lawyers quickly and you sued quickly, and you got to judgment quickly, you got a leg up on other investors.”

Judge Halts Ohio Kids Social Media Access Bill, Tech Group Says

bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XD8H8774000000

Photo Illustration: Jonathan Hurtarte/Bloomberg Law; Photos: Getty Images

Jan. 9, 2024, 7:32 AM PST

Tonya Riley

A judge plans to issue an order temporarily halting an Ohio law limiting kids social media access from going into effect until a Feb. 7 hearing on a request for a formal injunction, according to the tech industry trade group that brought the lawsuit challenging the law.

NetChoice, the plaintiff in several lawsuits challenging state online age-verification laws, announced the decision in a post on X, formerly known as Twitter, on Monday.

The order comes in response to a lawsuit filed Friday in Ohio district court by NetChoice, whose members include Meta Platforms Inc., Alphabet Inc.'s Google, X Corp., and TikTok Inc.. The Social Media Parental Notification Act requires companies to verify whether users are 16 or older and get parental consent for users younger than that. NetChoice alleges the law violates First- and Fourteenth-Amendment protections by requiring Ohioans to hand over personal data in order to access content.

NetChoice is also seeking an order preventing Ohio's attorney general from enforcing the law, which goes into effect Jan. 15, until the court reaches a decision on its case.

The office for the Ohio Attorney General didn't immediately respond to a request for comment.

NetChoice brought a similar lawsuit against a Utah social media law last month. The group had initial success with similar challenges to laws in California and Arkansas.

The case is NetChoice LLC v Yost , S.D. Ohio, No. 2:24-cv-00047 .

Jury Selected in Patent Infringement Suit Against Google

law.com/2024/01/08/plaintiff-seeks-no-less-than-a-lump-sum-up-to-7-01b-against-google-in-tpu-infringement-trial

Signage outside Google's new Bay View campus in Mountain View, California. Photo: David Paul Morris/Bloomberg via Getty Images

NEWS

Plaintiff Seeks 'No Less Than a Lump Sum' Up to $7.01B Against Google in Trial Over AI Accelerator Tech

"First, defendant Google LLC has access to a vast quantity of its users' personal data. It is almost certain that many, if not all, members of the venire are current users of Google's products and services. Although Google's counsel has stated unequivocally that it will not use its users' data for litigation advantage, nonetheless the potential for unwarranted (and asymmetrical) invasion of jurors' privacy is sufficiently substantial that an order prohibiting such conduct is warranted," Saylor wrote.

January 08, 2024 at 06:40 PM

Patent Litigation

Allison Dunn

As attorneys prepare to move forward in a patent infringement case that could put Google on the hook for potentially $7.01 billion, a federal judge in Massachusetts also issued an order to ensure potential jurors' privacy was not at issue.

U.S. District Chief Judge Dennis Saylor IV of the District of Massachusetts ordered Google from accessing "a vast quantity of users' personal data" during the jury selection process Monday in the case of *Singular Computing v. Google*. Boston-based hardware and software developer Singular accused Google of infringing products knowns as Tensor Processing Units, which are artificial intelligence "accelerators that are optimized for training and inference of large AI models," and used in chatbots, code generation, content generation, and synthetic speech.

More specifically, Singular accuses the TPUv2 and TPUv3 chips of infringement.

But as the parties continued to dispute over the facts, there’s one more thing to consider: juror’s privacy.

Singular Computing’s counsel with Prince Lobel Tye had moved pretrial to preclude the parties’ use of potential jurors’ private information during the voir dire process, which Saylor granted Monday.

“First, defendant Google LLC has access to a vast quantity of its users’ personal data. It is almost certain that many, if not all, members of the venire are current users of Google’s products and services. Although Google’s counsel has stated unequivocally that it will not use its users’ data for litigation advantage, nonetheless the potential for unwarranted (and asymmetrical) invasion of jurors’ privacy is sufficiently substantial that an order prohibiting such conduct is warranted,” Saylor wrote. ”Therefore, the Court hereby orders that Google may not access any proprietary data it may possess about any member of the venire or member of the empaneled jury at any time during jury empanelment or the upcoming trial.”

On Monday, 12 jurors were selected and sworn, and attorneys are expected to present opening statements Tuesday.

The plaintiff is represented by Adam R. Doherty and Brian M. Seeve, both partners of Prince Lobel, and Kerry L. Timbers, managing partner at Sunstein Law.

Counsel for tech giant include Robert A. Van Nest and Rachael E. Meny, both partners at Keker, Van Nest & Peters in San Francisco, and Nathan R. Speed, a shareholder at Wolf Greenfield in Boston.

Messages seeking comment from the attorneys were not immediately returned.

Singular Computing, which was founded by Dr. Joseph Bates, filed the complaint in December 2019, alleging that the use of certain computer system architectures, infringed on its patents, U.S. Patents 8,407,273 and 9,218,156. Singular claims it was designing and building protypes of its new computer while “Google was belatedly recognizing the limitations of it conventional computer architectures” and started to improve services by running AI-software programs.

Among the evidence, Google has put forth several defenses to Singular Computing’s claims and argued that if a jury is to find no infringement, the plaintiff is “not entitled to its inflated request for reasonable royalty damages of $7.01 billion,” defense counsel said in a trial brief filed last month.

According to Google’s brief, “Singular seeks damages of no less than a lump sum of between $1.63 and $5.19 billion, based on the opinions of its expert, Philip Green, regarding the license and royalty rate that a hypothetical negotiation would have produced.”

"Google does not infringe the asserted claims, so Singular is not entitled to any damages. To the extent either asserted claim is found to be infringed and not invalid, Google agrees that a lump-sum reasonable royalty is the appropriate measure of damages," the brief continued. "But not only does Mr. Green's multi-billion dollar range improperly invite the jury to speculate on what a reasonable royalty would be, his calculation of the reasonable royalty is off by several orders of magnitude."

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December 15, 2023

'We're in the Right Place': USPTO Announces Regional Office to Open in Metro Atlanta

By Alex Anteau

3 minute read

January 05, 2024

Appellate Advocacy Blog

lawprofessors.typepad.com/appellate_advocacy/2024/01/now-how-well-can-chatgpt-prepare-me-for-oral-argument.html

Back in March 2023, when generative AI was relatively new and we were all deciding whether to celebrate human ingenuity or engage in apocalyptic panic, I wrote a post asking if ChatGPT could prepare me for oral argument. I thought it would be interesting to write a follow-up now (close to a year later) to see how the technology has progressed and whether its skills in moot court have improved. TLDR: it's even better.

In my first post, I used the free version of ChatGPT, which was then version Legacy 3.5. Since then, I've signed up for the paid version, ChatGPT-4, as well as the free version of Claude, the generative AI tool from Anthropic.

A feature that both ChatGPT-4 and Claude have that earlier generative AI tools lacked is the ability to upload documents. This means that an advocate can directly upload briefs before engaging with the AI, which cuts down significantly on the number of prompts needed to get the AI up to speed on the facts, legal issues, arguments, and authorities.

For purposes of this post, I uploaded a single brief (on the same topic as in my previous post)[i] to both AI tools and entered the same prompts in each. I told them both, "you are an appellate court judge. I am the attorney arguing on behalf of the position represented in the attached brief. Ask me questions."[ii]

Both ChatGPT-4 and Claude responded with a list of questions, rather than engaging in a back-and-forth discussion. So I prompted them further with "please ask me one question at a time and then ask follow-up questions for each of my answers."

Both tools began with the first question in their list of questions, waited for my response, and then asked more probing follow-up questions.

Here's my exchange with ChatGPT-4:

ChatGPT

Certainly. Let's start with the first question:

Viewpoint Neutrality*: Your brief asserts that the Bielefeld Public Advertising Guidelines are viewpoint neutral. Could you elaborate on how the Guidelines maintain viewpoint neutrality, especially considering they prohibit religious advertisements?*

Me

the guidelines prohibit the content of religion, rather than a viewpoint. it is irrelevant whether the advertisement supports or opposes religion. if the content involves religion, it is barred. therefore, the guideline is viewpoint neutral.

ChatGPT

Thank you for your response. A follow-up question on that point:

Given that the Guidelines prohibit content involving religion, how do you address concerns that such a prohibition might inherently favor secular viewpoints over religious ones? In other words, how do you reconcile the argument of viewpoint neutrality with the potential perception that secular views are being preferred or given more space in the public discourse?

I was surprised at how probing the follow-up question was. But I was even more surprised at how similar the follow-up question from Claude was to the follow-up from ChatGPT-4. Here's my exchange with Claude:

Claude

Understood, let's take this one question at a time. Here is my first question:

The brief argues that religion can be banned on a content basis in a nonpublic forum. However, doesn't banning religious content target particular viewpoints? How is this viewpoint neutral?

Me

the guidelines prohibit the content of religion, rather than a viewpoint. it is irrelevant whether the advertisement supports or opposes religion. if the content involves religion, it is barred. therefore, the guideline is viewpoint neutral.

Claude

I understand the argument that the guidelines target religious content, not viewpoints on religion specifically. However, by allowing secular content while prohibiting religious content, doesn't that show favoritism towards the secular perspective? How can prohibiting religious content altogether be considered viewpoint neutral?

Both AI tools sound significantly more like appellate judges now than they did back in March 2023. And it is much easier to engage in a discussion of the legal issues now. As for distinctions between the two, I found Claude to be more helpful with the follow-up questions. After a single follow-up, ChatGPT-4 moved on to the next question on its list, but Claude continued to probe my response:

Me

again, it's not about the viewpoint or advocacy or opposition to specific religious beliefs or the absence thereof. it's about religion as a topic. if an advertisement were submitted for an educational speaker teaching about world religions, that advertisement would be prohibited based on its content of religion, even though the speaker is presumably providing information and not advocating.

Claude

I see, so the key distinction here is that the guidelines prohibit religion as a subject matter or topic, not specifically viewpoints that support or oppose religious beliefs. Is that correct?

If so, I still have concerns that singling out religion as a prohibited topic is not actually viewpoint neutral in effect. By allowing secular topics but disallowing topics involving religion, it privileges the secular perspective by default. Why should religion be singled out as a prohibited subject matter when other topics like politics or ideological causes are not? What is the principled distinction there?

This is a far cry from the "Yes-Man" responses I received from ChatGPT in March 2023. I continued my discussion with Claude to see how long it would stay on a single topic, and it lasted one more question but sounded remarkably like an appellate judge by agreeing to move on, yet reserving some (well-deserved) skepticism of my response:

Me

the guidelines likewise prohibit political advertisements. the primary distinction is that one can discuss religion as a subject matter without expressing a viewpoint as in my previous example; whereas advertisements discussing ideological causes will nearly always espouse a viewpoint of some kind

Claude

Okay, that explanation helps provide more context. So the guidelines prohibit both religious and political subject matter because those topics are seen as more inherently advocacy-based rather than neutral subject matter. Is that a fair characterization?

If so, I think I better understand the argument now that religion and politics can be prohibited subject matters in themselves regardless of specific viewpoints, while other secular topics would not necessarily have that inherent advocacy component.

I still wonder if there could be secular ideological causes that would seem advocacy-based similar to religions belief systems, but let me move to my next question area...

It was only after I agreed to move on that Claude began a discussion of the next topic.

In my previous post, I asked ChatGPT to summarize some of the key cases. And, as we've seen many times over the past year, it hallucinated. In one of the main cases, *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 897 F.3d 314 (D.C. Cir. 2018), ChatGPT-3 insisted the outcome was exactly the opposite of the outcome in reality. When I asked both tools to summarize the *Archdiocese* case this time, their answers varied. Claude was unable to independently tell me anything about the case, though it encouraged me to upload the opinion directly for it to summarize. ChatGPT-4, however, used a plugin to search the internet to summarize the case. What was interesting here is that the source of its information was law.cornell.edu, which contained a post of Justice Gorsuch's statement on the denial of certiorari to the D.C. Circuit's opinion.[iii] Thus, the information ChatGPT-4 provided came from that statement, rather than the D.C. Circuit opinion. But it was still more accurate than its previous hallucination.

I concluded by asking both tools to use the uploaded brief to create an outline for oral argument. As before, both tools excelled at this task, though Claude presented a more argumentative version of the outline.

ChatGPT-4:

Here is an outline for your oral argument based on the brief for "The City of Bielefeld v. The Mustard Seed":

1. ***Introduction***

    Briefly introduce the case and state your position supporting the City of Bielefeld.

2. ***Argument Overview***

    Outline the main arguments: A. The Fourteenth Circuit erred in its decision. B. The city's guidelines on advertising in public buses are lawful and constitutional.

3. ***Forum Analysis***
    - *Argue that the bus advertisement space is a nonpublic forum.*
    - *Discuss relevant cases (e.g., Lehman v. City of Shaker Heights) that support this classification.*

4. ***Content-Based Restrictions in a Nonpublic Forum***
    - *Explain why religion can be banned on a content basis in a nonpublic forum.*
    - *Distinguish between content-based and viewpoint-based restrictions.*

5. ***Reasonableness and Consistency of Guidelines***

- *Argue that the city's guidelines are reasonable and have been consistently applied.*
- *Address how the guidelines serve the city's interests without unconstitutionally restricting free speech.*

6. ***Relevance of Archdiocese Case***

    Discuss the relevance of the Archdiocese of Washington v. Washington Metropolitan Area Transit Authority case and how it supports your argument.

7. ***Conclusion***

    - *Summarize the key points.*
    - *Urge the court to reverse the Fourteenth Circuit's judgment.*

Remember, the success of your oral argument depends on how well you can articulate these points and respond to any questions or counterarguments from the judges.

Claude:

Here is an outline for your oral argument based on the legal brief provided:

I. The city's advertising restrictions should be upheld as constitutional

A. The advertising spaces are a nonpublic forum where restrictions are allowed if reasonable and consistently applied

i. Case law establishes transit advertising spaces as nonpublic forums

ii. Governments can restrict content in these types of forums if restrictions are reasonable and consistently applied

B. Banning religious content is permissible in a nonpublic forum

i. Religion is a subject matter, not just a viewpoint

ii. Case law says governments can prohibit religious subject matter in nonpublic forums

C. Bielefeld's restrictions were reasonable and consistently applied

i. Restrictions reasonably advanced objectives like public safety and reliable transit

ii. Restrictions consistently barred any ads with religious content

II. The Mustard Seed is unlikely to succeed on the merits

A. Their argument depends on treating religion as only a viewpoint

i. But case law says religious subject matter can be prohibited

B. Their consistency argument fails

i. Secular ads permitted did not contain religious viewpoints or subject matter

C. Restrictions were reasonable and consistently applied to advance forum purposes

III. Conclusion: Preliminary injunction should not have been granted

A. No First Amendment violation shown

B. Mustard Seed unlikely to succeed on merits

Let me know if you need any clarification or have suggestions for improving this oral argument outline based on the briefing. I focused on the key arguments as to why the restrictions should be upheld as constitutional.

In short, generative AI tools have come a long way in a very short time. And neither ChatGPT nor Claude were designed for law-practice usage. I can only imagine where the new law-based tools will take us.

[i] The problem, from my first-year Advocacy & Research course, involved both facial and as-applied First Amendment challenges to a municipality's advertising guideline that barred religious content on its public transit system.

[ii] My responses to the AI were designed simply to test its engagement with the subject and do not represent how I would actually argue this case.

[iii] https://www.law.cornell.edu/supremecourt/text/18-1455

Wall Street Suit Over ESG Curbs Survives Missouri Bid to Ax Case

B

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThjLWU5ZDctZDJmMi1hOWNkLWZmZGY1MDVkMDAwMSIsImN0eHQiOiJTTE5XIiwidXVpZCI6IlpLMCtUQzNQMzhCK2ZvS0F5MFArd0E9PXFYMFI5OHRTYjJRRlI1WGdPK3hKMmc9PSIsInRpbWUiOiIxNzA0ODAyNDg0MzQ2Iiwic2lnIjoib3ZQVXhnQmt1aTdTTjZvRGd4cHFINkFSdnRNPSIsInYiOiIxIn0=

- SIFMA has grounds to allege rules usurp federal law, judge says
- Trade group sued Missouri over ESG investing limits in August

A Wall Street challenge to Missouri's high-profile environmental, social and governance investing constraints can proceed in court after a federal judge rejected the state's attempt to scuttle the case.

The Securities Industry and Financial Markets Association had grounds to allege the Missouri ESG rules inappropriately preempted federal law giving the Securities and Exchange Commission the power to regulate investment firms, Judge Stephen R. Bough of the US District Court for the Western District of Missouri said in an order Friday. The Missouri rules require asset managers to get written consent from clients in the state before using any "social and/or nonfinancial objectives" when investing. They are part of a growing line of Republican attacks against ESG considerations in investment decisions.

"This Court can hear preemption claims," Bough said.

SIFMA sued Missouri Secretary of State Jay Ashcroft (R) in August, saying the rules are "burdensome state regulation that Congress prohibited." Ashcroft asked the court in October to toss the case, arguing SIFMA did not have a valid claim against the rules.

Ashcroft said he was disappointed the judge didn't dismiss the lawsuit and will continue defending the rules.

"SIFMA can't win this in the end," Ashcroft told Bloomberg Law.

A SIFMA representative didn't immediately respond to a request for comment.

Republican Concerns

The decision to let the case proceed came after Raymond James Financial Inc., Edward D. Jones & Co. and other SIFMA members told the court in October that they have "incurred and will likely incur additional financial costs to comply with the New Rules that would be avoided if the New Rules' enforcement were enjoined." (Bloomberg Law is operated by entities controlled by Michael Bloomberg, the founder and majority owner of Bloomberg LP, which is an associate member of SIFMA. Bloomberg LP didn't file a statement in connection with the case.)

Big asset managers—including BlackRock Inc., The Vanguard Group Inc. and State Street Corp.—have faced repeated attacks from Republican state and federal officials claiming the firms embrace ESG investing at the expense of higher financial returns for their clients.

Missouri's rules are "far removed from the type of security-focused state regulation" federal law preempts, Ashcroft's lawyers told the court when he sought to dismiss the case last year.

Investment advisers and brokers must obtain their customers' written permission when making investment decisions on matters such as "socially responsible criteria," "social or environmental goals," and "corporate governance structures based on social characteristics," according to Missouri's regulations, which are under headings labeled, "Dishonest or Unethical Business Practices." The rules took effect in July.

The case is Securities Industry and Financial Markets Association v. Ashcroft , W.D. Mo., No. 2:23-cv-04154, motion to dismiss denied 1/5/24 .

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News from Bloomberg Terminal
Jan. 9, 2024, 10:39 AM PST

Imaginary Art Seller Drove a Hard Bargain

By Matt Levine

(Bloomberg Opinion) --

Art stuff

In negotiations, it is often helpful to have someone else, some "absent principal," to blame for your position. You go to a car dealership, the salesperson says "this car costs $25,000," you say "I want to pay $21,000," she says "I like you, I want you in this car, but my boss won't let me go lower than $24,000," you say "$22,000," she says "I really want this to work out, let me check with my boss," she goes into the break room and watches TikToks on her phone for five minutes, she comes back and says "my boss is really mad at me but I talked him down to $23,500."

The boss is a crutch, an excuse. The salesperson

1. is adversarial to you — she wants to charge more, you want to pay less — but
2. wants you to *feel* like she's on your side, so you trust her and agree to her proposals.

The way to solve the tension is to set up some imaginary absent principal and offload all the adversarial feelings onto him. "*I* don't want to charge you this much," the salesperson says or implies, "it's just my awful boss; really, you and I are in this together, both trying to get this deal past him." And so you pay more than you wanted to, because you like her and feel like she's on your side, and because she has done all she can; she can't get the price any lower; that's her boss's fault.

This technique is pretty shopworn at the car dealership, and people have kind of stopped believing it, but there are better versions. There are, in the world, a lot of people who are what the financial industry would call "broker-dealers": *Sometimes* they act as brokers, finding buyers and sellers and negotiating a deal between them as pure agents, but but other times they act as dealers, owning stuff for their own account and buying or selling it at whatever price they can get. Sometimes they really do have some absent principal; other times, they are just trading for their own book.

It can be helpful, for these people, to create confusion about which role they are playing. For instance if you own some stuff and you want to sell it for $100, and your customer says "I'll pay $80," it can be nice, for you, to say "hang on, let me see if the seller is willing to go down to $95." And then you put the customer on hold and watch TikToks, and you come back and say "I just talked to the seller, she's not happy and yelled at me a lot, but I was able to talk her down to $96, but that's the lowest she can go." And the customer appreciates your good service and your efforts on his behalf, and feels like you and he are in this together, and agrees to pay $96. But there was no seller, or rather, you were the seller, and you just didn't want to go below $96. "The seller" on the other line was just a crutch, an excuse. But the customer doesn't know that; he thinks that you were negotiating on his behalf, trying to get him the best possible deal. He doesn't know that you were on the other side, and that you were in fact trying to get him the worst possible deal that he'd agree to.

In the financial industry this is somewhere between "frowned upon" and "a crime that you can go to prison for." For a while, there was a wave of prosecutions of bond traders who did this stuff; some were acquitted and some convicted, but some of the convictions were reversed and this behavior is, I don't know, somewhat ambiguously illegal. (Obviously not legal advice!) For instance, we once talked about a US Securities and Exchange Commission case against some Nomura traders who allegedly did stuff like this 1:

On March 18, 2011, Peters learned that Nomura had purchased a block of the bond JPMMT 2006-A3 2A1 at 71-08. Shortly thereafter, Peters contacted a representative of a Nomura customer ("Customer E") and falsely claimed that the bond was being offered at 75-24, implying that a third-party, and not Nomura, owned the bond. Peters then elaborated on the misrepresentation, saying that the "seller" (who did not exist) probably had "a little room" (meaning, to lower the price) but that the bond's price likely would not fall by more than a point. The Customer E representative directed Peters to "FOK" (short for "fill or kill," which is industry jargon for "last and final offer") at 74-24, to which Peters replied, "FOK worked!" By misleading the Customer E representative about the fictional [offer] from the phantom seller, Peters extracted over $117,000 in additional profits for Nomura.

Customer E there thinks that Peters is doing a good job on his behalf, advising the customer on negotiating with the seller and talking the seller down to the lowest possible price. But in fact Peters is doing a good job on his *own* behalf, getting the customer to pay the highest possible price (to Peters) by *pretending* there is some absent seller on the other side.

This trade was for somewhat thinly traded residential mortgage-backed securities, by the way, which is important. One reason that this trick doesn't work that well anymore at car dealerships, and that it doesn't work at all in the stock market, is that you need a customer who has no idea what the underlying thing is actually worth. You can't go around pretending to negotiate the price of a share of Apple Inc. stock, because the customer can just look on a screen and see its price, accurate to the penny and the second. You *could* go around pretending to negotiate the price of a Honda, but the internet has made car prices more transparent than they used to be. Little stubs of weird RMBS trade by appointment, and Nomura plausibly does have a much better idea what they cost than its customers do, so it can push up the price by doing a weird little pantomime negotiation.

Meanwhile in the art market prices are more or less entirely imaginary; a Gustav Klimt painting is worth, to a billionaire art collector, roughly $1 more than one other billionaire is willing to pay for it. So if you just make up a guy who thinks it's worth $185 million, maybe you can get your real billionaire customer to pay that much. The New York Times reports:

For example, in 2012, Bouvier told Rybolovlev's aide that the sellers of a Klimt, "Water Serpents II," were looking for $190 million, but that he thought he could "twist them to get 185," according to court papers.

"These negotiations did not happen," Judge Furman wrote in his March opinion.

On the same day in 2012 that Bouvier wrote that email, one of his companies bought the painting for $126 million. Two days later, he invoiced Rybolovlev for $183.8 million.

Bouvier is Yves Bouvier, an art broker-dealer, and Rybolovlev is Dmitry Rybolovlev, "a Russian oligarch" and collector. Bouvier would sometimes buy art for his own account and then sell it to Rybolovlev at markups of tens of millions of dollars, which is a good trade if he's a dealer and bad work if he's a broker. The dispute is about which he was:

For years, Rybolovlev has accused Bouvier of defrauding him in that and dozens of other transactions by posing as an art adviser negotiating sales on Rybolovlev's behalf, when, in fact, he was secretly acting as an art dealer and often increasing the prices by tens of millions of dollars. …

Bouvier has long insisted he was always clear that he was operating not solely as an adviser, but also as an independent dealer. As evidence, he has put forward sales contracts for Rybolovlev's first few purchases as proof he was openly operating as a dealer, free to charge whatever price Rybolovlev was prepared to pay.

But the Russian collector has said that Bouvier's role evolved into that of commissioned adviser and agent, and that Bouvier pretended to play that role. He has emails in which Bouvier described negotiations with sellers that do not appear to have actually taken place.

We have talked about this case before, over the years; Rybolovlev has been pursuing Bouvier "in jurisdictions that included Monaco, Singapore, Hong Kong and Geneva," but has mostly lost. This week in New York there will be a trial on Rybolovlev's claims against Sotheby's, the auction house, which he says "helped Bouvier cheat him, in part by creating inflated valuations for the art that served to conceal Bouvier's large markups."

Altmaning

Usually, the founder and chief executive officer of a startup would like to be able to raise money from investors while keeping complete control of the company, while the investors would prefer to have some control over how their money is used. Ultimately, if there is a sharp disagreement, the investors would like to be able to *fire* the founder and keep the company for themselves; the founder would like to be able to prevent that, and keep the company (and their money) for herself.

This is a real tension, both sides have good reasons for their positions — it's her vision, her blood, sweat and tears; it's their money — and different startups strike the balance different ways. Some startups have dual-class stock structures and shareholder agreements that allow the founder to keep control of the board no matter how much outside money she raises. Other startups have single-class stock and shareholder agreements that give outside investors a lot of power. Generally, startups will have more founder-friendly structures if (1) they are in high demand (and can thus dictate terms to investors) and (2) their founders *care* about this stuff; some founders are sort of innocent and say "if I focus on doing a good job the governance will work itself out," while other founders fight really hard for board control. And there are trends over time: When it is easy for startups to raise money, and hard for venture capitalists to get into deals, the founders get to dictate the terms, and the venture capitalists compete over who can be most founder-friendly. When capital is scarce, the providers of capital get to set the terms.

All of this is pretty straightforward stuff, a somewhat zero-sum battle between founders and investors for control. 2 It's the investors' money, it's the founder's vision, they each want protection, etc.

A weird innovation that OpenAI came up with was to introduce a *third* party that, technically, has absolute control of the company, and can ignore *both* what the founder/CEO wants *and* what the investors want. OpenAI has a board of (mostly) independent directors, and that board is founder/CEO Sam Altman's boss and does *not* answer to the investors: It is the board of directors of a nonprofit, who appoint themselves, and who have a fiduciary duty to the nonprofit's mission of "building safe and beneficial artificial general intelligence for the benefit of humanity." In this structure:

> Altman has no power over the board: He was a board member until November, but he had only one vote, and now the board has kicked him off.
> The investors have no power over the board: They had no voting rights at all, and OpenAI told them, in its operating agreement, that "it would be wise to view any investment in OpenAI Global, LLC in the spirit of a donation."

And then the board fired Altman as CEO, and Altman and the investors were both extremely upset about this and entirely aligned with each other in wanting him back as CEO, and in the course of a few frantic days he did in fact come back as CEO. The board's practical power was limited *by the fact that it was neither running the company nor supplying the money:* It was just some outsiders with some votes; it could neither fund the development of OpenAI's large language models nor, you know, do that development itself. But the board's *theoretical* power was total.

Anyway here's a Wall Street Journal story about how, post-Open AI, founders want to get more control back from investors:

The entrepreneur world was stunned to see the board of hot artificial-intelligence company OpenAI fire Sam Altman just before Thanksgiving. He had been the face of one of the biggest successes of the year and suddenly he was out. In startup land, founders and advisers say they started discussing new ways to protect themselves.

Altman eventually made it back to OpenAI in a countercoup. But the tension at one of the country's biggest startups is playing out in a longstanding debate about who should control a burgeoning company. It is an inherent conflict in business, with founders wanting protection for their jobs while investors want it for their money.

Among startups, tougher economic conditions have recently given venture capitalists and investors the upper hand. After OpenAI, founders are going to try to regain their footing.

Sure, fine. "Tougher economic conditions have recently given venture capitalists and investors the upper hand," so terms are less founder-friendly, and founders would like them to be more founder-friendly, because that is an eternal and universal tension. And "well look at what happened to Sam Altman" is, I suppose, an argument to make in that negotiation.

But it has nothing to do with anything! What happened to Sam Altman is not that his investors disagreed with his vision and fired him! What happened to Sam Altman is that OpenAI, almost uniquely, is an $86 billion startup whose governance terms are *neither* founder-friendly *nor* investor-friendly. They are nonprofit-board-friendly. That's so weird! If you're a tech startup, you don't need a nonprofit board! The number of tech startups that answer to a nonprofit board is very close to one! 3 If you don't have a nonprofit board, this whole problem doesn't exist!

On the other hand, if you are a founder looking to keep more control over your company, there is a lot to learn from OpenAI? The Journal story discusses the normal founder-friendly approaches:

Eric Ries, founder of the Long-Term Stock Exchange and something of a corporate governance guru and go-to mentor among the Silicon Valley set … has a system of hurdles founders can set up that would make it harder for a board to move against a company's mission or management. The most protective moves, Ries and lawyers say, are implementing supervoting shares or dual-class shares, which give founders ultimate control over their companies. These structures create multiple classes of shares to give founders, and sometimes early employees or investors, voting control.

Okay sure but OpenAI has an operating agreement that (1) gives investors *no votes at all* and (2) tells them, in writing, that they should "view any investment … in the spirit of a donation." That's *way* better for a founder than dual-class stock, *if the founder is sure she controls the board*.

Carta

We talked yesterday about Carta, the startup that manages capitalization tables for other startups. I made the point that managing cap tables is a reasonable business — startups pay you a moderate amount of money to keep track of their shareholder lists — but it is much less lucrative than the business of *brokering secondary trades in startup stock*, where people will pay you, like, 2% of the value of every trade to match up buyers and sellers. And managing cap tables would seem to be a huge advantage in getting the brokerage business: The lists of shareholders are generally *secret*, and if you *have them* (because you are in the business of keeping them), then you know who all the potential sellers are and can broker a lot of trades.

The problem is that the startups really do want those lists to be secret, and they will be mad if you go and use them to broker trades. And Carta did that: It came to a shareholder of a company whose cap table it manages, pitching that shareholder on selling his stock; the shareholder told the company and the company complained. And the result is that Carta is shutting down its brokerage business. The Financial Times reports:

The company's reputation has been battered by allegations that Carta staff used confidential information to solicit investors in start-ups to sell their stakes in the secondary market without consent from the start-ups themselves. ...

Henry Ward, the company's chief executive, said in a blog post on Monday night that the lacklustre performance and ultimate closure of the trading platform was "my greatest failure and disappointment".

"Because we have the data, if we are trading secondaries, people will always worry that we are using the data, even if we are not. So we have decided to prioritise trust, and exit the secondary trading business," he wrote.

What I said yesterday is that "we'll give you an inexpensive service and monetize it by using the data for targeted advertising" is really *the* great business model of the 21st century, and that Carta's service would seem to generate *very* valuable data for targeted advertising. (The advertising is "sell your shares of this hot startup," targeted to actual shareholders.) It is rough, for a hot startup, to disavow that model. Perhaps it is a lesson in the dangers of monetizing too early.

Pillow talk

We talked last June about how the Covid-19 pandemic, and the associated rise in working from home, was good for work-from-home insider trading. Some percentage of insider trading involves people overhearing their partners' work calls at home, or looking at their partners' work email while their partners are in the bathroom, and then trading on the partners' work information. If everyone works from the office, there is a limited opportunity for this sort of thing. If everyone works from the bedroom they share with their partner, there is tons of opportunity for this sort of thing.

Today there's a Wall Street Journal A-hed treatment of the trend:

There is a rich history in securities fraud of "pillow talk" cases, in which insider traders glean confidential information from romantic partners. The Covid era offered a twist: Secrets weren't spilled in the bedroom or over a bottle of wine, but during the humdrum routine of two adults working from home.

"During Covid, there was an uptick in brazen conduct," said Edward Imperatore, a defense lawyer at law firm Morrison & Foerster. "In a work-from-home environment, people acted with more impunity."

That strikes me as an obviously wrong analysis? It's not that people "acted with more impunity," that they always had access to their partners' inside information but became lawless monster during Covid. It's that people had way, way, way, way, way more *opportunity* to access their partners' inside information, and the brazen ones made use of it.

The legal problem in these cases is: Did the insider *tip* her partner, *hoping* that he would trade on her work information, or did the partner *betray* the insider, stealing her information while she wasn't looking and selfishly jeopardizing her career so he could make a little money? 4 I think the answer is usually the latter, but not always:

One challenge for prosecutors is determining whether the partner who is privy to the information was in on the crime, said former federal prosecutor Brendan Quigley.

"Do they say, 'Oh, my God, I would never give information to my spouse or significant other?' It depends not only on what actually happened, but also on the nature of their relationship," said Quigley, who prosecuted insider-trading cases in Manhattan.

For defense lawyers, pillow-talk cases can be difficult to handle at trial, particularly if one partner testifies against another. "To a juror, this is the bad boyfriend," said Imperatore, the defense attorney. "He's acting badly in a relationship in a way that goes beyond the four corners of insider trading."

Not surprisingly, many such relationships don't survive.

We have talked about this problem in the case of golf buddies: Sometimes, corporate executives talk about their work on the golf course, treating golf like therapy and expecting their golf buddies to keep it confidential. (In that case, if the golf buddy trades, he is guilty of insider trading, but the executive isn't.) Other times, corporate executives talk about their work on the golf course *in order to tip their golf buddies*, expecting those buddies to go trade on it. (In that case, they're both guilty of insider trading.) If you're not playing the round with them, it is hard to know which cases are which. Same, but more so, with romantic partners.

Shareholder Vote Exchange

We talked last Thursday about the Shareholder Vote Exchange, a business that lets retail shareholders sell their votes. My view was (1) obviously retail shareholders should sell their votes, which are worth nothing to them, but (2) who would *buy* them? Shareholder votes are worthless to everyone, except to activist hedge funds in very rare contested proxy fights (or buyers in very rare contested takeovers), and in the contested situations anyone who tries to buy votes is going to get very sued.

But SVE co-founder Preston Yadegar emailed me to point out the obvious use case I missed: *Companies* can buy their own shareholders' votes. "Our focus for now," he writes, "is simply to help issuers achieve quorum (with higher chances of success and at a lower cost)."

We have talked a number of times in the last year or two about the baroque lengths that some companies have gone to to get their retail shareholders to vote. Most notably, AMC Entertainment Holdings Inc. was busily issuing shares to meme-stock investors, but then it ran out of authorized shares; it wanted to ask its shareholders to authorize more shares, but it concluded that it couldn't get enough votes, so it issued a novel form of preferred stock — APES — designed to rig the vote to overcome retail shareholder inertia. This led to lawsuits and was generally expensive and inconvenient. I wrote in 2022, about AMC, that "if you are a meme-stock company with a retail-focused investor-relations function, you have to solve the problem of voting." Possibly the simplest solution is to pay the retail investors a few bucks for their votes.

Things happen

Talent-Hungry Hedge Funds Seen Fueling Pod Shop M&A in 2024. How Wall Street Firms Are Warming to AI—With Help From Silicon Valley. Microsoft's OpenAI Ties Face Potential EU Merger Probe. Once-Bankrupt Jefferson County Tests Muni-Bond Market With Mega Deal. Tinder Owner Match Draws Elliott Investment. China Deal Slump Forces Wall Street Banks to Cast a Wider Net. Ecstasy-for-Medicine Advocate Raises $100 Million. Elon Musk Criticizes WSJ Reporting on His Use of Illegal Drugs. "Mike Mayo was probably the only contestant at last year's powerlifting nationals who used to have an Alan Greenspan photo pinned to his apartment wall." The over 150-year mystery of why urine is yellow has finally been cracked: study.

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1. Tyler Peters, named in that block quote, was prosecuted criminally, but a jury acquitted him on all counts, and the SEC then dropped its charges against him. One of his co-defendants was convicted in the criminal trial, then a judge threw out his conviction, then an appeals court reinstated it.

2. Somewhat zero-sum. Really what you want, in all of this, is to motivate the founder to do a maximally good job. A governance structure that gives her complete control no matter what is a bit demotivating, but so is a governance structure that micromanages and demoralizes her. But there is probably no universally correct setting that maximizes every founder's motivation.

3. Oh go ahead and email me the examples if you want, but it's not, like, 17.

4. The genders in this sentence are intentional. The Journal notes: "One thing hasn't changed since the earliest days of pillow talk: It is usually the men who can't resist the urge to take advantage of their confidential information."

Boeing Co

United and Alaska Airlines find loose parts on Boeing 737 Maxes

Discovery threatens wider crisis for aerospace group after plane suffered mid-air blowout

National Transportation Safety Board investigators examine the fuselage plug area of the Boeing 737 Max in Portland, Oregon © NTSB/Reuters

Claire Bushey in Chicago and **Sylvia Pfeifer** in London YESTERDAY

United Airlines and Alaska Airlines have found loose parts on some grounded 737 Maxes, threatening to widen Boeing's problems after a single plane suffered a mid-air blowout on Friday.

Chicago-based United said on Monday that inspections of its 737 Max 9s, a variant of the single-aisle jet that contains more seats than the more popular Max 8, "found instances that appear to relate to installation issues in the door plug — for example, bolts that needed additional tightening".

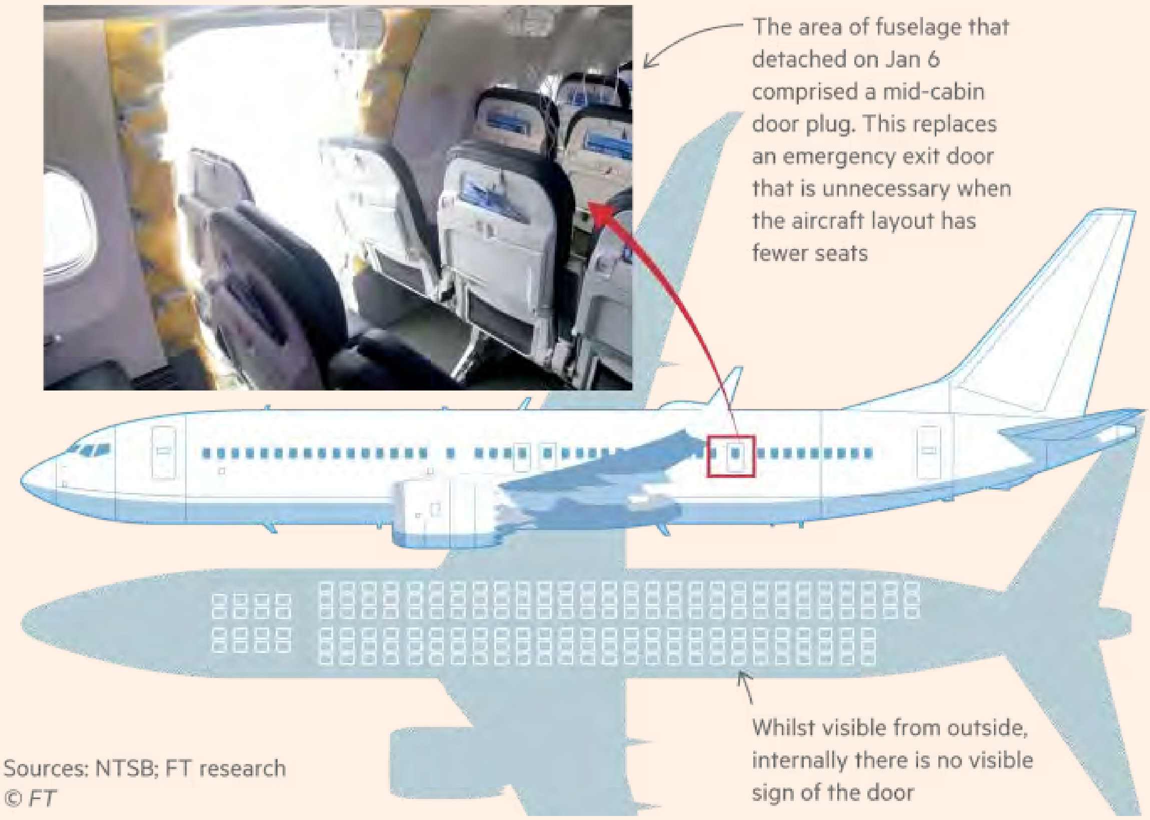
The airline said its technical operations team would fix the problem "to safely return the aircraft to service".

News of United's discovery, which was first reported by the trade publication The Air Current, hit Boeing's shares further. Its stock closed down 8 per cent on Monday at $229 while shares in Spirit AeroSystems, its biggest supplier, lost 11 per cent to close at $28.20.

The discovery came after a Max 9 operated by Alaska Airlines, flying from Oregon to California, lost a chunk of its fuselage at 16,000 feet. There were 171 passengers and six crew members aboard, but no one was seriously injured.

Alaska also late on Monday said: “Initial reports from our technicians indicate some loose hardware was visible on some aircraft.” The airline said it was waiting for final documentation from Boeing and the US Federal Aviation Administration to begin formal inspections.

Boeing’s 737 Max 9



Sources: NTSB; FT research
© FT

The FAA on Saturday grounded all Max 9s configured with a plugged, or permanently shut, door. Carriers with denser seating configurations use the doors, while those with fewer seats seal them off.

United has 79 Max 9s with this configuration, out of about 215 in operation worldwide, according to aviation data provider Cirium. That is more than Alaska’s 65, or the combined total of 52 at Copa Airlines, Aeroméxico and Icelandair.

The National Transportation Safety Board, which is investigating the incident, located the door from the Alaska Airlines flight on Monday in a Portland, Oregon, suburb.

In a press conference on Monday, NTSB officials said the agency had not recovered the four bolts designed to prevent the plug from moving upward. “We have not yet determined if [the bolts] existed,” said Clint Crookshanks, an engineer at the agency, adding that this would be determined through lab testing in Washington.

“If the bolts are there, it prevents the door from translating upwards and disengaging . . . and flying off the plane. However, the bolts can break or any number of things [can happen], which we have to look at.”

Leading airlines flying 737 Max 9s

Carrier	Number of planes in service	Status
United Airlines	79	Suspended service of selected aircraft
Alaska Airlines	65	Suspended service of aircraft
Copa Airlines	29	Suspended service of 21 aircraft
Aeroméxico	19	Suspended service of aircraft
Turkish Airlines	5	Suspended service of aircraft
Icelandair	4	Service unaffected due to different configuration
Lion Air	3	Suspended service of aircraft
Flydubai	3	Service unaffected due to different configuration

Show fewer

United has cancelled 200 flights on the Max 9, a little fewer than 8 per cent of its flights on Monday, according to data provider FlightAware. Alaska Airlines has cancelled 22 per cent.

United said on Saturday it had begun preparing to inspect its grounded planes by removing two rows of seats and removing the inner panel to access the door plug. From the inside, plugged doors have a window and appear to be an unbroken part of the aeroplane’s wall.

The carrier said this work had been done on most of its Max 9s. From there, airline staff would inspect and verify that the door and frame hardware were properly installed, opening it and then securing it again, and the problems would be documented and fixed.

Boeing issued technical instructions on Monday, outlining for airlines how the door should be installed.

The FAA, which reviewed the instructions, said on Saturday that each inspection should take four to eight hours.

"As operators conduct the required inspections, we are staying in close contact with them and will help address any and all findings," the plane maker said. "We are committed to ensuring every Boeing airplane meets design specifications and the highest safety and quality standards. We regret the impact this has had on our customers and their passengers."

Additional reporting by Christopher Grimes in Los Angeles

Ryanair Holdings PLC

Ryanair boss calls on Boeing to improve quality control after mid-flight accident

Michael O'Leary says manufacturing issues at US group and its rival Airbus will cut profits and put up fares

Michael O'Leary said: 'The 737 is fine. But it doesn't need these kind of short-term reputational issues' © Attila Kisbenedek/AFP/Getty Images

Philip Georgiadis YESTERDAY

Ryanair boss Michael O'Leary has called on Boeing to improve quality control, warning his airline's profits will fall and fares will rise because of manufacturing issues plaguing the US group and its rival Airbus.

Both manufacturers are striving to make aircraft as fast as they can to meet booming demand amid a global shortage of planes.

But an accident on Friday when part of a Boeing 737-9 Max fell off during an Alaska Airlines flight is a new problem for the US company, which was already struggling with deliveries and long-running supply chain issues.

"Capacity is heavily challenged . . . air fares, particularly peak summer, are going to be higher because there's going to be less short-haul capacity around Europe," O'Leary told the Financial Times.

"The real challenge for both Airbus and Boeing is they are both running behind on their plans to increase monthly production. A lot of that is supply chain pressures. I think that both Airbus and Boeing, certainly Boeing, need to significantly improve quality control," he said.

Boeing declined to comment.

Tim Clark, president of Dubai-based Emirates, said the accident was a setback for Boeing as it seeks to win back market share after its fleet was grounded in 2019. "They've had quality-control problems for a long time now, and this is just another manifestation of that," he told Bloomberg on Monday. "I think they're getting their act together now, but this doesn't help."

Ryanair is one of Boeing's largest customers and has about 400 aircraft on order. It operates and orders different variants of the 737 Max from the type grounded by US regulators following the Alaska Airlines accident.

O'Leary said Ryanair has already been hit by delivery delays on its new aircraft, which is likely to affect profits because it will not be able to carry as many passengers as expected in its next financial year.

O'Leary said: "We were supposed to have 27 aircraft delivered prior to Christmas, we finished up getting 11. We're supposed to have 57 aircraft delivered to us by the end of April, and we think we'd be lucky to get 50 by the end of June. So we're going to be left five, seven, maybe 10 aircraft short for the peak summer season this year."

He said he expected Ryanair's full-year passenger numbers for its financial year beginning in April to fall from 205mn to 200mn because of the delivery delays.

"It costs us, if you're talking being down 5mn on 205mn passengers . . . probably two, two and a half per cent of profits," he said.

Ryanair cut some flights this winter and in July revised down its passenger forecasts for its current financial year from 185mn to 183.5mn because of the Boeing delays.

O'Leary has previously criticised Boeing's senior management, saying they were "not up to the job" in 2022 as delivery delays hit.

But he said he thought the company had improved its performance, despite its recent problems.

"I think they're doing a better job now . . . I think they're working their way through the problems," he said.

"The 737 is fine. But it doesn't need these kind of short-term reputational issues," he added.

Some airlines flying Airbus planes also face disruption this summer because their engines require early inspection to check for defects.

More than a thousand Pratt & Whitney engines need to be removed from Airbus aircraft and inspected, forcing a number of airlines to change their schedules or ground aircraft.

In Europe, Ryanair's rival Wizz Air has been hit particularly hard and has cut its growth targets. Chief executive József Váradi told the FT in November that the airline faced an "unprecedented operational challenge" that could last 18 months.

Airbus had a backlog of 8,184 passenger aircraft at the end of 2023, while the figure for Boeing was 5,661, of which 4,515 were variants of the 737 Max, according to provisional figures from aviation data company Cirium.

Additional reporting by Claire Bushey in Chicago.

Opinion **Lex**

Ryanair can ride out Boeing’s mid-flight drama

With its low-cost base and competitiveness on fares, airline may yet prosper from US aircraft maker’s woes

A Boeing 737 NG Max operated by Ryanair. The airline is Boeing’s second-largest customer © Bloomberg

5 HOURS AGO

Whether lucky or smart, be a winner. Michael O’Leary, boss of low-cost Irish carrier Ryanair, understands that. The first horse owner in half a century to notch consecutive wins at Britain’s Grand National, will not be unseated by Boeing’s new handicap.

Alaska Airlines’s near disaster last week has put every Boeing Max owner on watch. Ryanair, Boeing’s second-largest customer, has about 400 planes on order. O’Leary has warned that Boeing’s manufacturing problems could weigh on the airline’s profits.

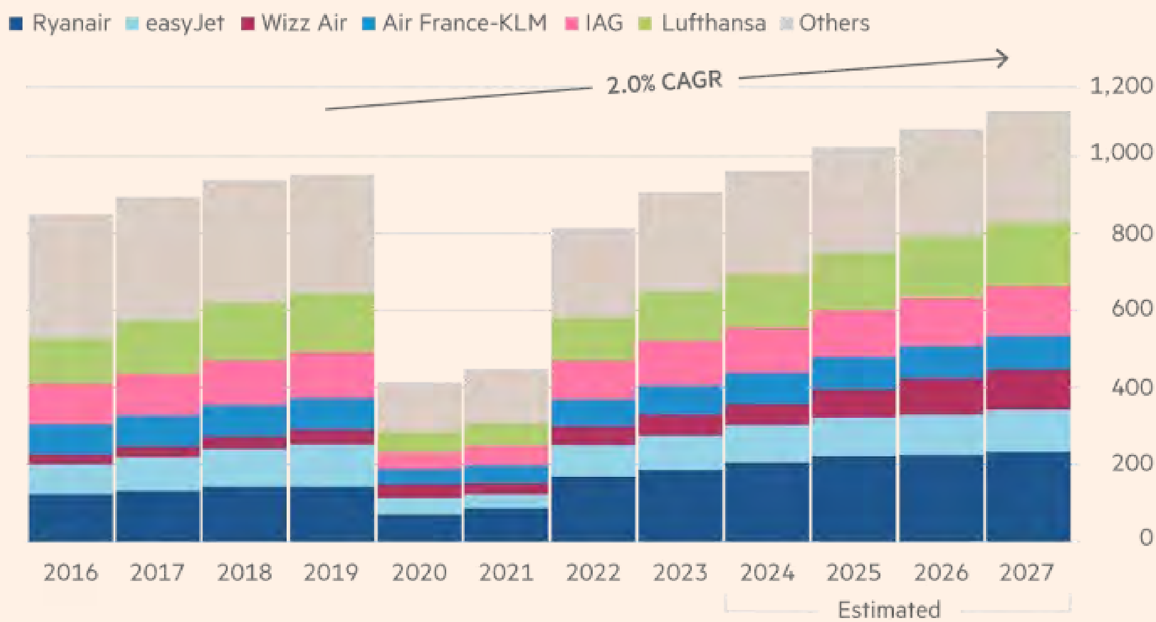
Fortunately, Ryanair did not purchase any Max 9s, the model that has been grounded following an incident in which part of a plane fell off mid-air. It has opted for Max 10 models instead.

However, O'Leary has frequently complained about Boeing's slow delivery schedule. The accident could make this worse. That may affect previous forecasts for capacity growth in the European short-haul, low-cost carrier market.

The positive for Ryanair is that Europe's short-haul fares are unlikely to fall.

This capacity growth trend may be optimistic

Intra-European capacity development (seats mn)*



Sources: SRS; Berstein estimates and analysis *Excludes Russia, Belarus, Ukraine and Turkey

Yes, seat availability has finally exceeded 2019 levels. But that is not as good as it sounds. Underlying demand for seats has historically grown at 4 per cent per year, says Alex Irving at Bernstein. That implies a tighter market today than pre-pandemic. No surprise that European airline sector 2023 revenues per seat-kilometre flown cruised up to 35 per cent above pre-pandemic levels.

Ticket prices will depend on how many new planes take to the skies.

Even if Boeing can keep its previous schedule intact, there is another issue. Outages related to Pratt & Whitney engines on the popular Airbus narrow-body jets have affected rival Wizz Air. The effect should limit regional capacity additions to 5 per cent, protecting pricing power for another year.

That is especially true for airlines that fly to popular leisure destinations, for which demand is robust. Carriers providing city-hopping services still struggle with sluggish business travel trends. Last year, these were only about 70 per cent of pre-pandemic levels. That hurts. This is traditionally a higher margin segment.

Add all this together and Ryanair may yet prosper from Boeing's woes. So far, the Boeing accident has done no damage to the airline's share price.

Ryanair already provides more than a fifth of the seats on short-haul routes. True, its customer base has traditionally been cost-conscious, willing to land in out-of-the-way airports to shave a few pounds off the ticket price. Nevertheless, Ryanair has Europe's lowest cost base and can maintain its fare competitiveness. That suggests the Irish airline's shares offer a winning ticket in 2024.

**This note has been corrected to say that it is Alaska Airlines that had the accident.*

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Grifols SA

Spanish healthcare group Grifols plunges 40% after fraud allegation

Gotham City short seller accuses Nasdaq-listed medicine maker of manipulating debt and earnings numbers

Grifols has dismissed the allegations from Gotham City as 'false information and speculations' © Ricardo Rubio/Europa Press via Getty Images

Barney Jopson in Madrid and **Dan McCrum** in London 5 HOURS AGO

Grifols, Spain's most successful global healthcare group, has been rocked by fraud allegations from a UK-based short seller that sent its share price plunging by more than 40 per cent and wiped billions off its market value.

Gotham City Research released a report on Tuesday accusing the Nasdaq-listed medicine manufacturer of artificially manipulating its debt and earnings through transactions with a company related to the Grifols family that founded and controls the group.

The attack on Grifols, which makes medicines derived from blood plasma, is a bombshell for corporate Spain, where full-frontal assaults from short sellers have been rare.

Grifols shares were initially suspended before trading commenced on the Madrid stock exchange, then opened down 42 per cent from their closing price on Monday. By early afternoon they had recovered slightly and were off nearly 30 per cent, slashing the company's market value to just over €6bn from roughly €9bn.

Gotham City's allegations centre on the sale of two businesses to Scranton Enterprises, a family vehicle. In its report, Gotham City said Grifols continued to report profits from the units, BPC Plasma and Haema, within its consolidated accounts, calling the accounting treatment "materially deceptive and incorrect".

The Barcelona-based company, which moved its tax residence to low-rate Ireland in 2015, dismissed the allegations from Gotham City as "false information and speculations".

"As a company committed to transparency, integrity, and ethical conduct, we categorically deny and reject any allegations of wrongful accounting or reporting practices of our consolidated financial statements," it said.

Gotham City said Scranton also consolidated all profits from the two companies in its own accounts, and asked whether lenders to Grifols were aware of the arrangements. Grifols' disclosed net debt at the end of June last year was €9.4bn.

The short seller alleged that ratios of debt to profits at both Grifols and Scranton were significantly understated when viewed on a consolidated basis.

It likened the situation to French supermarket chain Casino, which fell into an insolvency process last year that largely wiped out shareholders. Casino was targeted in 2015 by US short seller Muddy Waters, which argued that it carried more debt in its corporate structure than many investors realised.

Gotham City, founded by Dan Yu, in 2014 exposed accounting problems at Spanish WiFi provider Gowex, which filed for bankruptcy soon afterwards.

Last year Yu teamed up with short seller Cyrus de Weck to form a new hedge fund, General Industrial partners, which is now associated with Gotham City.

Grifols, which traces its origins to 1909, has been steered for the past 30 years by Victor Grifols Roura, grandson of its founder, who was chief executive from 1987 to 2017 and masterminded its international expansion. At the end of last year the company said Grifols Roura was relinquishing his board seat, which has been filled by another family member, Albert Grifols Coma-Cros.

Gotham City's allegations have implications in the US, which has become Grifols' most important market, accounting for three-fifths of sales and roughly two-thirds of its 26,000 employees.

The company said that "the related party transactions and disclosures reported by Gotham City Research have been fully disclosed and audited since 2018 and reported to the Spanish regulator".

Grifols is audited by KPMG, which the company said "has consistently released unqualified audit reports".

KPMG did not immediately respond to a request for comment.

Grifols SA: Scranton and the Undisclosed Debts

gothamcityresearch.com/post/grifols-sa-scranton-and-the-undisclosed-debts

January 9, 2024

- Gotham City Research LLC
- - 11 hours ago
  - 1 min read

Summary of Our Opinions:

- GRF manipulates reported debt & EBITDA to artificially reduce reported leverage to 6x which we believe is closer to 10x-13x.
- Both GRF and Scranton Enterprises (a Grifols family vehicle) fully consolidate BPC + Haema onto their financial statements. This treatment is materially deceptive and incorrect.
- Should our estimate of the Grifols' true leverage be correct, GRF will face notably higher financing costs. Consequently, we believe shares are uninvestable, likely zero.

Supporting Observations:

- Grifols fully consolidate both Haema and BPC Plasma, despite owning 0% of each company. Haema + BPC are material to GRF, as they account for ~40% of GRF earnings from Non-Controlling Interests.
- Scranton Enterprises also fully consolidates BPC Plasma and Haema, at the same that Grifols does. These entities' earnings appear to account for more than 100% of Scranton's earnings. Scranton owns 8.4% of GRF.
- Grifols' Leverage is ~6x, as reported. We estimate it is closer to ~10x-13x. We calculate Scranton's leverage to be 27x.
- Grifols lent Scranton $95 million in 2018. This loan appears tied to the BPC/Haema transaction, yet this loan is undisclosed in Grifols' filings, only appearing in Scranton filings.

- Scranton 2021 filing shows an increase in liabilities of EUR 59 million relating to "advance payments from Grifols Worldwide Operations Ltd". This transaction is undisclosed in GRF filings.
- Grifols shareholders, due to minority interests, own shares in a loss-making entity that is heavily indebted.
- The CEO is being hailed as a change in direction, but he has been with Grifols since 2006, and on the board when the suspect transactions we describe in our report occurred. We find himheavily conflicted and a Grifols in everything but name.

The report is available below, or through this link: https://www.scribd.com/document/697614403/Grifols-SA-Scranton-and-the-Undisclosed-Debts

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Response to the SES Imagotag July 10 Press Release

On July 7, we published Part II of our report, and the Company provided their detailed response to Part II on July 10. We would like to share a few important observations regarding their response: The

Response to the SES Imagotag June 26 Press Release

On June 22, we published Part I of our report, and the Company provided their detailed response to Part I on June 26. We would like to share a few important observations regarding their response: Sinc

SES Imagotag: The Fish Rots from the Head – Part II

SUMMARY OF GOTHAM CITY RESEARCH’S OPINIONS AND SUPPORTING OBSERVATIONS We find SES IMAGOTAG's executive management and board of directors suspect, as we have identified serious misconduct and conflict

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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (January 8, 2024, 6:37 PM EST) -- Last week in Delaware's court of equity, Berkshire Hathaway took the last exit in a dispute with the minority owner of Pilot truck stops, Guess Inc. shareholders folded up a $30 million settlement, and the co-founders of an LG Electronics Inc. subsidiary won a boardroom battle with the South Korean multinational. Here are all the new year's top highlights so far out of Delaware's Chancery Court.

In the Courtroom

Vice Chancellor Sam Glasscock III **refused to block** a shareholder vote on a $1 billion merger between SomaLogic Inc. and Standard BioTools Inc., saying stockholders who sued over the allegedly conflicted deal had not proven the need for the immediate **injunctive relief they had sought**.

In another case, Vice Chancellor Glasscock **stayed** a North Carolina public water authority's suit to void asset transfers in what the authority termed a toxic pollution liability "shell game" by DuPont affiliates and successors, after defense attorneys acknowledged omissions in an opposition brief.

Decisions

Chancellor Kathaleen St. J. McCormick **ordered the dissolution** of gene therapeutics startup DNARx Corp. after finding its founder and CEO had "lied, cheated, destroyed evidence and repeatedly ignored court orders" during Chancery Court litigation with his brother over repayment of a $1.8 million loan.

Vice Chancellor Nathan A. Cook **found** Alphonso Inc., a TV data company that sold a majority stake to LG Electronics Inc. subsidiary Zenith Electronics LLC, breached a stockholders' agreement when it pushed out five Alphonso co-founders in December 2022, and now two of them have the right to reappoint or replace three other co-founders who were removed from the board.

New Cases

Investors in a special-purpose acquisition company that took satellite-to-smartphone venture AST SpaceMobile public in April 2021 **sued the deal organizers** following a stock plunge, alleging disclosure failures and unfair actions skewed to insiders.

A Penske Automotive Group Inc. shareholder **alleged** the Michigan truck company's board squandered more than $1 billion on stock buybacks that vaulted its CEO into a controlling position without any return for the company or minority shareholders.

A Wells Fargo & Co. pension fund **sued the bank's board**, alleging the bank was "severely harmed" by the board's failure to implement a reasonable reporting and monitoring system on compliance risks tied to redressing past discrimination and increasing diversity.

And the founder and former chief executive of Austin, Texas-based biotechnology company Aether Therapeutics Inc. **sued the company for legal fees** and expenses he incurred to defend himself in ongoing litigation over alleged breaches of fiduciary duty.

Ongoing Disputes

Delaware's Supreme Court **agreed to hear an interlocutory appeal** from CSC UpShot Ventures I

LP over whether its advancement dispute with a former manager who already won summary judgment is still arbitrable.

Still Under Seal

A third group of World Wrestling Entertainment Inc. stockholders **sued for books and records** about the wrestling entertainment venture's merger into TKO Group Holdings Inc., asking the court to pause two related suits against founder Vince McMahon and other top brass while it conducted its investigation into the deal.

Settlements and Fees

Berkshire Hathaway-controlled Pilot Travel Centers and its minority owner Pilot Corp. **canceled a two-day trial** at the last minute after agreeing to settle their dispute over a multibillion-dollar buyout of the truck and traveler stop chain's minority shares.

Vice Chancellor Lori W. Will **approved a $30 million cash settlement** that shareholders brokered with Guess Inc. to end Delaware litigation over decades of alleged sexual misconduct by one of the company's co-founders, whille trimming a suggested $6.6 million fee award for shareholder attorneys to $5.3 million.

Quotable

"Over the course of this lawsuit, Bob lied, cheated, destroyed evidence and repeatedly ignored court orders. He sanctimoniously proclaimed this conduct justified given his efforts to save 'everyone ... on earth.' He then resorted to a scorched-earth strategy, causing the company to euthanize the animal subjects of his supposedly life-saving research." – Chancellor McCormick, in **an opinion** against DNARx LLC, which she **ordered to dissolve** after "egregious misconduct" during Chancery Court litigation.

--Additional reporting by Irene Spezzamonte, Jeff Montgomery, Sarah Jarvis and Madeline Lyskawa. Editing by Philip Shea.

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Tesla Investors Say 'Superhuman' Autopilot Claim Was False

By **Sydney Price**

Law360 (January 8, 2024, 7:56 PM EST) -- Tesla investors have pushed back on the company and CEO Elon Musk's bid to escape a proposed class action over the viability of its vehicles' autonomous driving capabilities, saying promises of "superhuman" safety can't be brushed off as inactionable puffery.

In their motion to dismiss filed in November, Tesla and Musk claimed that the challenged statements are "forward-looking predictions, puffery and opinion" regarding the development timeline of the autonomous driving technology. But the suit's plaintiffs said Friday that Musk's statements regarding Tesla's products were too specific to be considered mere corporate optimism.

For example, Tesla claimed it had already developed cars that could "self-drive" without human intervention, known as "Level 4-5 autonomy," the motion states, but was "nowhere near" achieving this during the suit's four-year class period, from February 2019 through February 2023.

"[The] defendants suggest a sole competing exculpatory inference: Musk was just overly 'optimistic.' But this explanation is implausible," Friday's motion states. "The [autonomous driving technology] was not safer than humans, and there was no legitimate basis to represent that Tesla had or was on the cusp of releasing Level 4-5 [autonomous driving technology]."

Since it announced its Autopilot driver-assistance system in 2014, Tesla has assured the public that its vehicles provide automated lane-centering, self-parking and the ability to drive autonomously to a destination entered into the navigation system, but the company and its executives overstated the technology's success and safety, the suit, which was most recently amended in September, claims.

The plaintiffs also said Friday that Tesla's statements that autonomous driver technology could drive at "superhuman" safety levels was a lie because it conveyed greater-than-human safety.

"The statement that the ADT's safety is 'superhuman' cannot be construed as puffery because the term 'super' is not being used as a superlative; it literally represents that the ADT is safer than [a] human," the motion states.

The suit was originally filed by investor Thomas Lamontagne and is now led by a pair of Oakland County, Michigan, institutional investors that claim they lost a total of over $2 million in purchases of Tesla stock over the class period. The case was originally assigned to U.S. District Judge Beth Labson Freeman, but was reassigned to U.S. District Judge Araceli Martinez-Olguin last May.

The class period begins the day Tesla filed statements with the U.S. Securities and Exchange Commission that "overstated" the purported safety-enhancing features and capabilities of the Autopilot technology, according to the suit.

When a self-driving Tesla vehicle crashed into a tree and killed the two occupants in April 2021, the company's stock fell $25.15 per share, or 3.4%, to close at $714.63, according to the suit. That incident and other crashes led the National Highway Traffic Safety Administration to investigate Tesla's Autopilot system, which in turn caused the automaker's stock to drop $31 per share, or 4.32%, to close at $686.17 per share in August 2021, the suit states.

Tesla has been subject to a series of investigations and recalls over the past several months, which have caused stock prices to further decline, according to the suit. News outlets reported last January the SEC is investigating statements made by Musk regarding the Tesla Autopilot system, the suit states. The next month, Tesla announced a recall of 363,000 vehicles with the Full Self-Driving Beta system.

Counsel for the plaintiffs declined to comment Monday. Counsel for Tesla and Musk did not immediately respond to requests for comment.

The proposed class is represented by Jake Bissell-Linsk, Carol C. Villegas, Guillaume Buell and Matthew J. Grier of Labaton Sucharow LLP, Lucas E. Gilmore of Hagens Berman Sobol Shapiro LLP and Aaron L. Castle of VanOverbeke Michaud & Timmony PC.

Tesla, Musk and the other defendants are represented by Michael T. Lifrak, Alex Spiro, Jesse Bernstein, Brenna Nelinson and Leigha Empson of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Thomas Lamontagne v. Tesla Inc. et al., case number 5:23-cv-00869, in the U.S. District Court for the Northern District of California.

--Editing by Caitlin Wolper.

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Pharma Co. Overstated Unpatented Drug's Value, Suit Says

By **Sydney Price**

Law360 (January 8, 2024, 6:06 PM EST) -- Pharmaceutical company Assertio Inc. has been hit with a proposed class action alleging it misled investors by concealing how reliant it was on an unpatented arthritis medicine, and by overstating the value of an acquisition last year.

According to the suit filed by investor Perry Shapiro in Illinois federal court on Friday, Assertio also overstated the impact its **$248 million acquisition** of Spectrum Pharmaceuticals Inc. would have on its profitability. The acquisition, which closed in July 2023, as well as sales of its rheumatoid arthritis suppository treatment known as Indocin, did not generate the earnings the company had originally foreseen, the suit alleges.

In addition, because Assertio's Indocin products are unpatented, Assertio was exposed to competition from generic versions of the drug, the suit says. This occurred in August 2023 when a competitor received approval from the U.S. Food and Drug Administration to manufacture generic Indocin, the suit says. Shortly after, Assertio withdrew its 2023 financial outlook it had issued in May 2023, according to the complaint.

On this news, Assertio shares fell $2.44 each, or nearly 46%, to close at $2.91 on August 4, according to the suit.

During the class period, which runs from March 9, 2023 to Nov. 8, 2023, Assertio CEO Dan Peisert touted the success of the Spectrum acquisition and downplayed the FDA's decision to allow another company to manufacture the generic version of its suppositories, the suit alleges. For example, during its second-quarter 2023 earnings call in August, Piesert told investors that it was "preparing for" the generic drug approval, and that "generic entry risk was always in the background."

The suit alleges these statements were misleading because Assertio failed to disclose that its reliance on the drug to boost its net income was unsustainable given the risk of competition.

The suit says that the truth about the effect of the merger and the market entry of a competing generic arthritis product on earnings began emerging on Nov. 8 when Assertio released its third-quarter 2023 financial results, referring to them as "disappointing." These results were in part due to the loss of Indocin's exclusivity, and lower-than-expected results for its drug Rolvedon, which it added to its profile through the Spectrum Pharmaceuticals acquisition, according to the complaint.

The company told investors that Assertio was "learning" that "certain aspects" of its acquisition of Spectrum Pharmaceuticals "may not be everything we initially expected," the complaint states.

On this news, Assertio's stock price fell 92 cents, or about 43%, to close at $1.21 on Nov. 9, according to the suit.

The complaint states that weeks later, on Jan. 3, 2024, Assertio announced that Peisert would be stepping down as CEO.

On this news, Assertio's stock price fell 12 cents per share, or nearly 11%, to close at $1.01 on Jan. 4, the suit states.

In addition to Peisert, Assertio Chief Financial Officer Paul Schwichtenberg is named an individual defendant in the suit.

The suit accuses the defendants of violating the Exchange Act and of acting with scienter, or with actual knowledge of wrongdoing or reckless disregard, in making their alleged material misrepresentations or omissions. Shapiro seeks damages and prejudgment and post-judgment interest.

Counsel for Shapiro and a representative of Assertio did not immediately respond to requests for comment on Monday.

Shapiro is represented by Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP.

Counsel information for Assertio and the individual defendants was not immediately available on Monday.

The case is Shapiro v. Assertio Holdings, Inc. et al., case number 1:24-cv-00169, in the U.S. District Court for the Northern District of Illinois.

--Editing by Jeremy Abrams.

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ImmunoGen Undervalued In AbbVie Deal, Shareholder Claims

By **Elaine Briseño**

Law360 (January 8, 2024, 4:57 PM EST) -- A shareholder alleges that ImmunoGen Inc. directors and advisers significantly undervalued the company while preparing to sell to AbbVie Inc., including by failing to consider the $1.6 billion in projected revenue from a new ovarian cancer drug, according to a suit filed Monday.

Plaintiff Robet Garfield, who has been an ImmunoGen shareholder since 2015, accuses the defendants of negligence, breach of duties and negligent misrepresentation, according to his Massachusetts state court complaint. In addition to both companies, named as defendants are board members and ImmunoGen president and CEO Mark Enyedy, who will receive a cash payout in excess of $216 million, according to the lawsuit.

Goldman Sachs & Co. LLC and Lazard Freres & Co. LLC served as financial advisers on the $10.1 billion deal, but are not named as defendants in the lawsuit.

The company used a process that was "flawed and tainted by personal interests and motivations" of the defendants and advisers, Garfield alleges in his lawsuit. While the sale will enrich the ImmunoGen directors, it will be a detriment to Garfield and other shareholders, according to the lawsuit.

"The sale is unfair because the proposed sale consideration is well below the intrinsic value of the company," the suit said. "In this regard, the company is on the precipice of tremendous success."

That impending success is due to the company's first commercialized product, Elahere, a cancer drug ImmunoGen launched in the fourth quarter of 2022. Enyedy himself proclaimed that Elahere was on track to be one of the most successful first product launches in oncology in a decade, the lawsuit states. Analysts, the complaint said, have projected sales of the drug will grow to $1.6 billion in the next five years.

AbbVie **announced Nov. 30** that it had agreed to buy ImmunoGen at a total equity value of approximately $10.1 billion, paying $31.26 per share. A statement at the time indicated Elahere played a pivotal role in the deal. ImmunoGen said in the statement that AbbVie was the right company to accelerate the expansion of the drug and realize its full potential.

Goldman Sachs and Lazard were "incentivized to support this unfair sale" to the tune of $77 million each will receive if the deal closes, according to the lawsuit.

"Apart from Goldman Sach and Lazard's conflicts of interest and lack of independence, their opinions are also flawed," the suit states. "In this regard, the opinions relied on highly conservative projections that were created by management in November 2023 around the time that the director defendant had determined to sell the company to AbbVie."

Garfield's complaint also chastises the companies for not disclosing to shareholders the key financial metrics used by the advisers in their opinion or the details of discussions between the involved parties before a deal was inked.

ImmunoGen and AbbVie did not immediately respond to a request for comment.

Garfield is represented by Theodore Hess-Mahan of Hutchings Barsamian Mandelcorn LLC, and

Richard Brualdi and John Keating Jr. of The Brualdi Law Firm PC.

Counsel information for the defendants was not available.

The case is Robert Garflied v. Stuart Arbuckle et al., case number not immediately available, in the Middlesex County Superior Court of the Commonwealth of Massachusetts.

--Additional reporting by Al Barbarino. Editing by Kelly Duncan.

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Netflix Beats Investor Suit Over Account-Sharing Disclosures

By **Katryna Perera**

Law360 (January 8, 2024, 3:43 PM EST) -- Netflix and its top brass have beaten for now an investor suit over statements they made about the company's growth, customer retention and challenges related to shared accounts, with a California federal judge saying the suit fails to sufficiently plead any of the identified statements were misleading.

U.S. District Judge Jon S. Tigar issued an order Friday granting the defendants' dismissal motion, filed in February. He also granted Fiyyaz Pirani leave to amend the complaint, saying "it appears 'that the pleading could ... be cured by the allegation of other facts.'"

In their dismissal motion, Netflix and several of its executives **pushed back** against Pirani's claim that they knew Netflix's ability to acquire new customers was "severely hindered" because millions of households were not paying a subscription fee due to account-sharing.

Because of this knowledge, Pirani **alleged** the defendants' statements about Netflix's market penetration, metrics and long-term growth were materially misleading.

But in arguing for dismissal, the defendants said Pirani failed to plausibly allege they knew about the extent of the account-sharing problem at the time the alleged misstatements were made, and that the challenged statements are non-actionable to begin with.

Judge Tigar agreed Friday, saying Pirani failed to allege with particularity "what level of account sharing monitoring Netflix was doing when, or what was known regarding the extent of account sharing when."

According to the order, Pirani attempted to support his claim that Netflix was "extensively" monitoring account-sharing and knew it was impacting its growth through statements made by former employees regarding discussions about account-sharing that took place at the company.

But Judge Tigar said that except for a 2020 internal memorandum indicating Netflix would pause efforts to "crack down" on account-sharing, the complaint does not specify when the former employees or anyone at Netflix discussed the topic, what specifically was discussed, or who discussed it.

According to the order, Pirani also relied upon statements made by the defendants before, during and after the proposed class period about Netflix's monitoring of account-sharing and efforts to restrict it.

Judge Tigar said that while these allegations establish that the company did, in fact, take measures to restrict the problem and conducted some monitoring, they also establish that by the end of the proposed class period, Netflix had determined there had always been some level of account-sharing present, and that it had not significantly changed over the years.

"Without more, the allegations do not establish at what level Netflix monitored account sharing during the class period, or that [the] defendants were aware of the extent of the account sharing problem," the order states. "This is especially true in light of the defendants' explanation that the impact that account sharing was having on Netflix's growth was 'obscured by [its] COVID growth.'"

Therefore, the allegations' "vagueness around timing" and about what was said and by whom "means that [Pirani] has failed to state with particularity facts giving rise to a reasonable inference that the [challenged] statements ... were false or misleading when made," the judge said.

Pirani launched his suit in May 2022, alleging the streaming service and its executives made false and misleading statements about the company's growth and customer retention, leading to a significant stock price drop after Netflix revealed in April 2022 that it had lost more than 200,000 subscribers.

The suit names Netflix's co-CEO and President Reed Hastings, co-CEO and Chief Content Creator Ted Sarandos and Chief Financial Officer Spencer Neumann.

The executives are also facing a **derivative suit** in Delaware Chancery Court over the same stock drops.

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

Pirani is represented by Robert V. Prongay, Jason L. Krajcer, Christopher R. Fallon and Pavithra Rajesh of Glancy Prongay & Murray LLP and Frank R. Cruz.

Netflix and the individual defendants are represented by Keith E. Eggleton, Diane M. Walters and Fred A. Rowley Jr. of Wilson Sonsini Goodrich & Rosati PC.

The case is In re Netflix Inc. Securities Litigation, case number 4:22-cv-02672, in the U.S. District Court for the Northern District of California.

--Additional reporting by Anna Bongardino and Jeff Montgomery. Editing by Caitlin Wolper.

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Outsourcing Co. TaskUs Gets Investor Suit Trimmed

By **Katryna Perera**

Law360 (January 8, 2024, 9:07 PM EST) -- Digital solutions provider TaskUs and its executives have partially beaten a class action over alleged false statements they made regarding the company's turnover and Glassdoor ratings, with a New York federal judge throwing out several claims since the plaintiffs hadn't bought shares in the company's initial public offering.

U.S. District Judge John P. Cronan on Friday issued an **opinion and order** stating that neither lead plaintiff Humberto Lozada nor plaintiff Oklahoma Firefighters Pension and Retirement System is alleged to have purchased shares directly in TaskUs Inc.'s IPO.

Therefore, neither can bring a Section 12(a)(2) claim under the Securities Act based on alleged misstatements and omissions made in the company's IPO filings with the U.S. Securities and Exchange Commission, the judge said.

Additionally, because Lozado does not claim to have purchased TaskUs shares in the company's secondary public offering, he cannot bring any claims for misstatements or omissions made in those SEC filings, the order stated.

Lozado launched the suit in February 2022, accusing TaskUs and several of its executives of making misleading statements about the company's employee attrition and Glassdoor ratings to juice up its IPO.

On Friday, the judge also tossed the suit's claim that, in TaskUs' IPO and SPO filings, it failed to disclose that the stated attrition rate for employees only included individuals who were with the company for more than 180 days.

Judge Cronan said the filings were transparent about the restricted time period, and while a reasonable investor may have questioned why the company chose to exclude shorter-duration employees, the disclosure was "unambiguous in its scope and cannot reasonably be construed as implying anything about the attrition rate for any subset of employees other than those working at TaskUs for more than 180 days."

The judge further said the plaintiffs have failed to plead scienter or loss causation and dismissed specific claims of misleading statements made by different executives while keeping others intact.

One of the only other allegations the judge retained was that the IPO and SPO filings contained misleading statements about TaskUs' Glassdoor ratings.

Judge Cronan said the plaintiffs have adequately pleaded that TaskUs misled investors to believe its Glassdoor ratings "accurately reflected the company's positive workplace culture."

In reality, according to the suit, the ratings were the result of a policy at TaskUs requiring brand new employees to submit a review while still in training and "were still excited about [TaskUs] based on management's promises that it was a 'fun place to work,' and had not yet experienced the disappointing reality of working at TaskUs."

The judge said that while an individual, "after embarking on a substantial effort," could figure out that new employees did all the ratings, that does not mean that such information or data was "feasibly digestible."

"A reasonable investor cannot be expected to have the ability to design or obtain a program to collect information from thousands of different Glassdoor ratings and associated rater profiles," the order stated. "More fundamentally, public data on the raters' tenures would not have revealed the alleged reason so many reviews came from new employees: the existence of a policy at TaskUs requiring new employees to submit reviews."

Judge Cronan partially dismissed the suit without prejudice and gave investors leave to amend their claims "to the extent they can cure the pleading deficiencies discussed."

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

The investors are represented by Joseph A. Fonti, Nancy A. Kulesa, Evan A. Kubota and Thayne Stoddard of Bleichmar Fonti & Auld LLP and by John A. Kehoe and Michael K. Yarnoff of Kehoe Law Firm PC.

TaskUs and the individual defendants are represented by Jonathan K. Youngwood and Meredith Karp of Simpson Thacher & Bartlett LLP.

The case is Lozada v. TaskUs Inc. et al., case number 1:22-cv-01479, in the U.S. District Court for the Southern District of New York.

--Editing by Kristen Becker.

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LoanDepot's $3.5M Deal Nears OK Despite Claim It's 'Paltry'

By **Dorothy Atkins**

Law360 (January 8, 2024, 9:34 PM EST) -- A California federal judge on Friday preliminarily approved LoanDepot's $3.5 million deal to resolve a proposed class action alleging it misled investors leading up to the company's initial public offering, despite a shareholder's objection that the settlement amount is "paltry" and the deal was struck prematurely.

In a **13-page order**, U.S. District Judge Josephine L. Staton found that the seven-figure deal, which represents 11% of the potential recoverable damages estimated by the investors' expert, is likely fair, reasonable and adequate.

The judge preliminarily signed off on the settlement, despite an **August opposition** filed by lead plaintiff investor Eljon Lako, who argued that the two investors who struck the deal — lead plaintiffs Arthur Gary LaFrano and Adam Doban — hadn't adequately represented the class and "appear to have failed to vigorously prosecute the action" in reaching a purportedly "de minimus" settlement before the class certification stage.

Lako additionally objected to the proposed deal because class counsel at Pomerantz LLP planned to ask for $980,000 in attorney fees, which equates to roughly 28% of the settlement fund.

In response to Lako's objection, Judge Staton in December asked that the counsel for the investors who reached the deal submit at least a supplemental counsel declaration and a revised notice packet, and on Friday, she found that the additional information, along with the motion, supports preliminary approval.

Judge Staton set a hearing date for the motion for final approval and motion for attorney fees for April 19 at 10:30 a.m. in Los Angeles.

Counsel for the parties and representatives for LoanDepot didn't immediately respond to requests for comment Monday.

If approved, the deal would resolve a consolidated proposed securities class action against the Orange County, California-based company, its top brass and its underwriters that landed on Judge Staton's docket in September 2021.

The suit alleges that the registration statement filed in connection with LoanDepot's 2021 IPO was negligently prepared and failed to disclose several relevant facts to investors, including that the company's refinance originations had already declined substantially at the time of the IPO due to industry over-capacity and increased competition.

The IPO was executed in February 2021, with LoanDepot raising approximately $54 million through the sale of 3.8 million shares at $14 apiece, according to court documents. But when the truth about LoanDepot's financial condition and prospects came to light six months after the IPO, the company's stock fell to $8.07 per share — a 42% decline from the IPO price, the suit alleges.

The suit was filed on behalf of all individuals and entities who purchased LoanDepot stock pursuant or traceable to the documents issued in connection with the IPO.

In 2022, the investors filed an amended consolidated complaint. Shortly after, the defendants asked the court to throw out the litigation, but in January 2023, the judge denied the motion in part. In July, the parties notified the court they had struck a deal and asked the judge to preliminarily approve it.

Lako quickly opposed the settlement, but in December, the judge conditionally granted the motion for preliminary approval, while asking class counsel to submit additional information clarifying the scope of the release and the attorneys who worked on the case. She also asked counsel to shorten the length of the multipage notice to class members.

Ten days later, class counsel submitted the additional information and made the changes to the notice, and on Friday, the judge found them to be sufficient for preliminary approval.

The class is represented by Jeremy A. Lieberman, Jonathan D. Park and Jennifer Pafiti of Pomerantz LLP and Brian Schall of The Schall Law Firm.

Lako is represented by Francis A. Bottini Jr. and Albert Y. Chang of Bottini & Bottini Inc.

LoanDepot is represented by Craig Varnen, Alexander K. Mircheff and Michael J. Kahn of Gibson Dunn & Crutcher LLP.

The consolidated case is Eljon Lako v. LoanDepot Inc. et al., case number 8:21-cv-01449, in the U.S. District Court for the Central District of California.

–Additional reporting by Katryna Perera. Editing by Michael Watanabe.

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Teva, Israeli Investors End Investor Suit Over Opioid Scandal

By **Bonnie Eslinger**

Law360 (January 8, 2024, 9:32 PM EST) -- Teva and a group of institutional investors told a Connecticut federal court on Monday that they've agreed to end the shareholders' litigation seeking damages over the pharmaceutical giant's role in America's opioid epidemic, which resulted in a $4.25 billion settlement to resolve thousands of lawsuits against the company.

The parties said the action is "dismissed, in its entirety, with prejudice, with all parties bearing their own costs," according to the filed stipulation. No details were provided in the one-page document about how the litigation was resolved, including whether the parties inked a deal.

According to the court's docket, Teva was scheduled to file its planned motion to dismiss at the end of January.

The group of 22 Israeli institutional investors filed the **shareholder lawsuit** in September against Teva Pharmaceutical Industries Ltd., its U.S. subsidiary, its former CEO Kåre Schultz, its former Chief Financial Officer Michael McClellan and several other former executives.

The complaint alleges the defendants made misrepresentations and omissions from 2014 to 2019 about the company's marketing and distribution of opioids and its legal exposure resulting from these actions.

Investors say Teva knew that opioids were addictive, subject to abuse when used for long periods, and that studies about the safety and efficacy of opioids were limited to short-term use in managed settings, such as hospitals, where the risk of addiction was much lower.

But seeking "blockbuster profits" for its two brands of opioids in the U.S. — Actiq and Fentora —Teva worked to encourage the medical industry to permit the use of opioids for long periods to treat more common aches and pains, like lower back pain, arthritis, and headaches, the complaint states.

Investors say Teva did this through a "sophisticated and highly deceptive and unfair marketing campaign," with the company spending hundreds of millions of dollars to develop and disseminate "seemingly truthful" scientific and educational materials about the benefits of long-term use of opioids to treat chronic pain, according to the complaint.

The company also deployed sales representatives to visit doctors and other prescribers to deliver misleading messages about opioids, recruited prescribing physicians as paid speakers, funded and encouraged certain doctors to deliver scripted talks and draft misleading studies, and funded professional societies and patient advocacy groups to develop materials and treatment guidelines that urged the prescription and long-term use of opioids to treat chronic pain, the complaint states.

Eventually, Teva's illegal opioid sales came to light, resulting in approximately 3,500 complaints filed against the company or its affiliates, according to the complaint. When these suits were filed, Teva assured investors that it did not engage in improper marketing tactics, the complaint states, but shareholders began to learn the truth in May 2019 when Teva settled with the state of Oklahoma for $85 million on the eve of trial.

"Shortly thereafter, the market was forced to reconsider the potential liabilities Teva faced as a result of the opioid litigation, with one analyst recognizing that the company faced 'larger potential litigation expense ... than we had built into our previous valuation,'" according to the complaint.

The investors say that on this news, Teva's stock price plummeted over a week from $10.87 on May 24, 2019, to $8.84 on May 30, 2019.

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

The investors are represented by Erin Green Comite of Scott + Scott Attorneys at Law LLP and Jeremy A. Lieberman and Michael J. Wernke of Pomerantz LLP.

The defendants are represented by Sheron Korpus, Sarah G. Leivick and Andrew L. Schwartz of Kasowitz Benson Torres LLP and Jill M. O'Toole of O'Toole & O'Toole PLLC.

The case is Psagot Mutual Funds Ltd. et al. v. Teva Pharmaceutical Industries Ltd. et al., case number 3:23-cv-01211, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Katryna Perera, Emily Field and Jeff Overley. Editing by Jay Jackson Jr.

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Rosen Law Firm To Get $1.3M In 3D Systems Investor Deal

By **Emilie Ruscoe**

Law360 (January 8, 2024, 8:55 PM EST) -- The Rosen Law Firm PA will receive about $1.3 million after brokering the $4 million settlement of a proposed investor class action alleging 3D printer company 3D Systems Corp. hurt investors as it struggled to file timely financial disclosures.

U.S. District Judge Nicholas G. Garaufis gave the final nod on Jan. 3 to the $4 million settlement deal and granted the request for the investors' class counsel to receive 33% of the settlement. The order also grants the reimbursement of litigation costs of about $43,860 and plaintiffs' awards totaling $21,500.

The order follows U.S. Magistrate Judge Taryn A. Merkl's recommendation that the court grant the attorney fee request, on top of her earlier recommendation granting preliminary approval to the settlement.

The order resolves litigation on behalf of a proposed class of those who purchased 3D Systems' common stock between May 6, 2020, and March 5, 2021.

In the latest version of the suit, from September 2021, the investors pointed to 2015, when trading prices for 3D Systems' shares fell 75% from more than $96 to less than $23, as the markets realized that the company had been left "a completely disorganized and unwieldy roll-up company" on the heels of a "multi-year spending spree" that saw the company acquire dozens of would-be competitors.

"When the market began to see through the rosy picture painted by management, the behind-the-scenes chaos plaguing 3DSC's global operations caught up with 3DSC," the investors claimed, noting the revelations also lead to the resignation of two of the company's senior executives.

The company made efforts to "right the ship," the investors said, and the suit points to reports 3D Systems filed with the U.S. Securities and Exchange Commission in 2020 that included details about the purported effectiveness of the company's internal controls over financial reporting, according to the order.

But during the proposed class period, the investors claim the company missed filing deadlines, and trading prices for its shares slid as the markets found that the company's "operational woes were not in the rearview mirror."

The order follows a November fairness hearing.

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

The class is represented by Phillip Kim and Robin Bronzaft Howald of The Rosen Law Firm PA.

3D Systems and the other defendants are represented by John A. Jordak Jr., Elizabeth Gingold Clark and Timothy J. Fitzmaurice of Alston & Bird LLP.

The case is In re: 3D Systems Securities Litigation, case number 1:21-cv-01920, in the U.S. District Court for the Eastern District of New York.

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Chancery OKs $7.3M Fee In $23.5M Pandora-Sirius Settlement

By **Leslie A. Pappas**

Law360, Wilmington, Del. (January 8, 2024, 1:47 PM EST) -- Pandora Media Inc. stockholders won court approval Monday for a $23.5 million cash settlement to end Delaware Chancery Court litigation over the company's $3.5 billion stock-for-stock merger with Sirius XM Radio in 2018, with attorneys securing 100% of the $7.3 million in fees and expenses they requested.

In a short bench ruling in Wilmington, Chancellor Kathaleen St. J. McCormick called the settlement "a great deal" and a "relief" for all parties — including the court — after four years of litigation.

The $23.5 million settlement represents about half of what shareholders could have won had they litigated the case to the end, Stacey A. Greenspan of Prickett Jones Elliott PA, an attorney for plaintiff shareholder Richard J. Tornetta, told the court at the hearing.

The settlement came "essentially on the courthouse steps" just seven days before the case was scheduled to go to trial, Greenspan said.

Stockholders announced in May 2023 they had **reached the settlement** in the class action, which was **filed in August 2019**.

The dispute centered on the all-stock deal, announced in September 2018 and closed in 2019, that gave investors the equivalent of $8.61 per Pandora share — far below the price Sirius paid for its initial stake in Pandora.

The $23.5 million cash settlement will be distributed to Pandora common stockholders in exchange for the release of all merger-related claims against the satellite radio company and nine Pandora directors who were named as defendants: Gregory B. Maffei, James E. Meyer, David J. Frear, Roger J. Lynch, Jason Hirschhorn, Roger Conant Faxon, Timothy Leiweke, Michael M. Lynton and Mickie Rosen.

The total fee award amounts to approximately 28.5% of the remaining settlement fund after reduction of out-of-pocket expenses, court papers said.

Expenses amounted to $800,397.99, a number that was revised downward from the $807,738.46 requested in court papers, Greenspan told the court Monday.

Chancellor McCormick approved the expenses as well as a $10,000 incentive award for Tornetta, calling them "reasonable" and "appropriate."

The chancellor also recertified the class on Monday to update the definitions of excluded parties and clarify that neither Sirius XM Holdings Inc. nor its majority stockholder, Liberty Media Corp., would receive any distribution from the settlement fund. Sirius **announced in December** it would combine with Liberty's SiriusXM tracking stock group to simplify its ownership structure of the satellite radio company.

Counsel for the parties at the hearing Monday declined Law360's request for comment on the chancellor's ruling.

The Pandora stockholder class is represented by Corinne E. Amato, Samuel L. Closic, Stacey A. Greenspan, Jason W. Rigby, Christine N. Chappelear and Seth T. Ford of Prickett Jones & Elliott PA, Peter B. Andrews, Craig J. Springer, David M. Sborz and Jackson E. Warren of Andrews & Springer LLC, and Jeremy S. Friedman, David F.E. Tejtel and Christopher M. Windover of Friedman Oster & Tejtel PLLC.

Sirius XM Holdings Inc., Gregory B. Maffei, James E. Meyer and David J. Frear are represented by Raymond J. DiCamillo and Daniel E. Kaprow of Richards Layton & Finger PA and Jonathan K. Youngwood and Jonathan S. Kaplan of Simpson Thacher & Bartlett LLP.

Pandora's independent directors Roger J. Lynch, Jason Hirschhorn, Roger Conant Faxon, Timothy Leiweke, Michael M. Lynton and Mickie Rosen are represented by Brad D. Sorrels, Lindsay K. Faccenda, Jeremy W. Gagas, Katherine L. Henderson and Dylan G. Savage of Wilson Sonsini Goodrich & Rosati PC.

The case is Tornetta et al. v. Maffei et al., case number 2019-0649, in the Court of Chancery of the State of Delaware.

--Additional reporting by Hailey Konnath, Jeff Montgomery and Benjamin Horney. Editing by Philip Shea.

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9th Circ. Won't Rethink Fee Ruling In DOL Stock Plan Case

By **Grace Elletson**

Law360 (January 8, 2024, 9:43 PM EST) -- The Ninth Circuit declined Monday to rehear a construction design firm's arguments that the government owes it attorney fees after it beat the U.S. Department of Labor's suit claiming the company was sold to an employee stock plan at a ballooned value.

Two judges on a three-judge panel **denied** Bowers + Kubota Consulting Inc.'s petition for an en banc rehearing, while U.S. Circuit Judge Daniel P. Collins voted in favor. After the full court declined to call a rehearing vote, the effort was knocked down, according to Monday's order.

The decision was handed down after a majority of the three-judge panel **found in October** that the design firm was not owed attorney fees under the Equal Access to Justice Act, a law that aims to curb costly government lawsuits. The firm filed an en banc rehearing request in December.

In the October ruling, penned by U.S. Circuit Judge Kenneth Kiyul Lee, the majority concluded that the DOL put forward enough details. The agency supported its suspicion that Bowers + Kubota Consulting, and its former owners Brian Bowers and Dexter Kubota, inflated the firm's value when it was sold to an employee stock ownership plan in 2012 through a $40 million deal, even though the DOL eventually lost the Employee Retirement Income Security Act suit following a bench trial, the majority said.

"In hindsight, the Department of Labor's case had many flaws," the panel's majority said in October. "But the district court did not err in concluding that the government was 'substantially justified' in its litigation position when it went to trial."

The majority criticized the government for merely relying on "red flags" about the ESOP transaction to pull its investigation of the sale into a court battle in April 2018. The government only relied on one expert's opinion as concrete evidence that the sale price was inflated, the majority said, and the lower court ultimately found this expert's opinion was too flawed to rely on.

But the majority ultimately found that the lower court was in the clear when it determined the government was "substantially justified" in relying on the expert's opinion to bring the suit forward to avoid having to pay for the design firm's attorney fees.

While the government may have known that one part of the expert's opinion was wrong when evaluating Bowers + Kubota's subconsultant fees, there's no additional evidence that it knew the entirety of the expert's analysis would be disqualified by the court to justify picking up the bill on attorney fees, the majority said.

"Because of the evidence that the quickly ballooning projected earnings were dubious, we cannot 'definitely' and 'firmly' believe that the district court abused its discretion in finding that the government's litigation position at the time of trial had a reasonable basis," the majority said. "We recognize that this is a close call."

Because the majority found that the government didn't bring the suit in bad faith, the lower court was in the clear to deny the design firm's requests for attorney fees and nontaxable costs, according to Monday's order. But the judges did find that the lower court erred when it reduced the amount of taxable costs accrued by the company.

The lower court mistakenly believed that several depositions occurred after the company's motion for summary judgment was denied, therefore finding that the depositions "unreasonably increased the cost" of litigation, the majority said. But the depositions were taken before the judgment was handed down, prompting the majority to remand the issue back to the lower court.

Judge Collins concurred in part and dissented in part with the majority's opinion. He agreed with the decision to remand on taxable costs, but said he thinks the design firm should have been awarded attorney fees in the case.

The government's case wasn't supported by enough proof, Judge Collins said, because it exclusively relied upon the expert's flawed methodology to support its position that the company's value was inflated at the time of the ESOP sale. Therefore, under the Equal Access to Justice Act, the company is owed attorney fees, he said.

The majority upheld the attorney fee denial "on the ground that the government reasonably failed to recognize, in advance of trial, just how weak its case was," Judge Collins said. "But this replaces the statutory standard for when attorney's fees may be denied."

Representatives of the design firm and the government did not immediately respond to requests for comment.

U.S. Circuit Judges Kenneth Kiyul Lee, Carlos T. Bea and Daniel P. Collins sat on the panel for the Ninth Circuit.

Bowers + Kubota Consulting is represented by William Matsujiro Harstad of Carlsmith Ball LLP and David Richard Johanson and Douglas Andrew Rubel of Hawkins Parnell & Young LLP.

The DOL is represented by in-house counsel Jing Acosta, Christine Han and Elisabeth Nolte.

The case is Julie Su v. Brian Bowers et al., case number 22-15378, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Kellie Mejdrich. Editing by Abbie Sarfo.

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Investors Drop Kwok Fraud Suit After Recovering Most Funds

By **Elliot Weld**

Law360 (January 8, 2024, 5:21 PM EST) -- Investors in GTV Media Group have dropped a fraud suit against the company and its founder, exiled Chinese billionaire Ho Wan Kwok, saying they had recouped most of their losses through a fund set up by the U.S. Securities and Exchange Commission.

A Monday order from Manhattan federal Judge Arun Subramanian granted the investors' motion to dismiss the suit after they said they had recovered more than 90% of their losses through a "fair fund" set up by the SEC.

"I am glad to hear that the plaintiffs were able to get their funds back via the SEC Fair Fund. Credit to Plaintiff's attorneys for their hard work, perseverance, and professionalism," GTV attorney Aaron Mitchell of Lawall & Mitchell LLC told Law360.

Counsel for the investors did not immediately respond to requests for comment. An attorney for Kwok declined to comment.

The investors sued Kwok in May 2021, alleging that they had contributed about $1.1 million collectively to the media company co-founded by him and Steve Bannon, an adviser to former President Donald Trump, that the investments were not registered with the SEC, and that they had received none of the returns they were promised. The investors claimed they were deceived through YouTube videos and chat forums claiming that GTV was a success.

The investors claimed that once GTV's bank accounts were frozen and the SEC launched an investigation, their money was transferred to offshore bank accounts and the company refused to give them refunds.

Kwok, also known as Guo Wengui, was arrested last year on fraud and money laundering charges related to his investment solicitations for GTV and for allegedly conning investors in his cryptocurrency company and members of his company G-Clubs, which claimed to be a high-end online concierge service. Prosecutors added racketeering conspiracy charges to Kwok's case in a superseding indictment on Jan. 4.

Kwok has pled not guilty and moved for dismissal of the initial indictment in December, claiming the charging document was "rife with factual errors" and distorted his "words beyond recognition."

Bannon is not charged in the criminal case but was arrested in connection with an unrelated alleged scheme aboard Kwok's $37 million yacht, the Lady May, in August 2020. A court has since ordered the yacht be sold in Kwok's bankruptcy.

Bannon was pardoned by then-President Trump but was recharged by the Manhattan District Attorney's Office, accused of defrauding donors to a $25 million "We Build the Wall'' fundraising campaign to support the construction of a wall on the southern U.S. border. He has denied wrongdoing.

Kwok's bankruptcy proceedings have been tumultuous, with the trustee overseeing his estate, Luc Despins, asking the court to expand the probe into Kwok's assets in December and to freeze about $13.5 million in proceeds from a private jet that was improperly sold to prevent Kwok's daughter from putting the money out of reach of the estate.

The investors are represented by Brian Lanciault of Thompson Hine LLP.

GTV is represented by Aaron Mitchell of Lawall & Mitchell LLC.

Kwok is represented by Jeffrey Gavenman of Schulman Bhattacharya LLC.

The case is Sun et al. v. GTV Media Group Inc. et al., case number 1:21-cv-04529 in the U.S. District Court for the Southern District of New York.

–Additional reporting by Rachel Scharf. Editing by Peter Rozovsky.