

Carbonite Makes \$27.5 Million Deal to End Securities Fraud Suit

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Bloomberg Law

- Settlement would wrap 2019 suit over malfunctioning software
- Suit had been tossed once before, then revived in 2021

Carbonite Inc. and a class of shareholders seek a judge's approval for a \$27.5 million settlement of claims that the company misled investors about its faulty data recovery software.

The proposed deal would put an end to four years of "vigorous and contentious litigation," which included the 2020 dismissal and subsequent revival of the suit the next year, according to the motion for preliminary approval filed Wednesday in US District Court for the District of Massachusetts.

Institutional investor Construction Industry and Laborers' Joint Pension Trust was appointed to lead the class last July, pursuing allegations that Carbonite falsely represented to investors that its Server Backup VM Edition software worked properly for data recovery.

Carbonite's stock price allegedly fell 24% after the company lowered its financial guidance for 2019 and announced plans to withdraw the software from the market.

The \$27.5 million monetary recovery represents a "substantial benefit to the class," and lead counsel for the class at **Robbins Geller Rudman & Dowd LLP** will collect no more than the standard 33.3% in fees, the motion for preliminary approval says.

The deal would benefit a class of Carbonite shareholders who acquired their stock between Oct. 18, 2018 and July 25, 2019.

Quinn Emanuel Urquhart & Sullivan LLP and Skadden, Arps, Slate, Meagher & Flom LLP represent Carbonite and the individual defendants.

The case is Construction Industry and Laborers' Joint Pension Trust v. Carbonite Inc. , D. Mass., No. 1:19-cv-11662, 1/31/24 .

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OpenText's Carbonite to pay \$27.5 million to resolve investor lawsuit

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Nate Raymond

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January 31, 2024

(Reuters) - OpenText Corp has agreed to pay \$27.5 million to resolve claims that the software provider Carbonite misled investors before its acquisition by the Canadian company by promoting a new, "super strong" data backup program that executives knew did not work.

The proposed settlement was disclosed in a filing in federal court in Boston on Wednesday. It would resolve a long-running securities class action lawsuit that predated OpenText's purchase of Massachusetts-based Carbonite in 2019.

David Rosenfeld, a lawyer for the plaintiffs at Robbins Geller Rudman & Dowd, in a statement credited the lead plaintiff, Construction Industry and Laborers' Joint Pension Trust, for helping secure an "excellent recovery" for investors.

OpenText's Carbonite did not admit wrongdoing as part of the settlement, which is subject to approval by U.S. District Judge Leo Sorokin.

James Carroll, a lawyer for the company at Skadden, Arps, Slate, Meagher & Flom, did not immediately respond to a request for comment.

Filed in 2019 before Carbonite's merger was announced, the lawsuit alleged that the company falsely touted to investors a "super strong" and "extremely competitive" data backup product called "Server VM Edition" that launched in October 2018.

The company said the product would allow businesses to recover virtual machine data from a single location.

But the lawsuit alleged that the product in fact never worked as intended and that it "never once successfully backed up a customer's data."

Carbonite eventually announced on July 25, 2019 that it was withdrawing the product from the market.

Its stock price fell more than 24% the next day, according to the lawsuit, which accused the company of violating the Securities Exchange Act of 1934.

Sorokin initially dismissed the case. But the 1st U.S. Circuit Court of Appeals reversed him in 2021, and Sorokin certified the case as class action in July.

The case is Luna v. Carbonite Inc, U.S. District Court for the District of Massachusetts, No. 19-cv-11662.

For investors: David Rosenfeld of Robbins Geller Rudman & Dowd

For Carbonite: James Carroll of Skadden, Arps, Slate, Meagher & Flom

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LifeStance Investors Win Approval of \$50 Million Settlement (1)

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- Lawsuit alleged LifeStance misled investors ahead of IPO
- Judge finds \$50 million settlement to be fair, reasonable

Mental health services provider LifeStance Health Group Inc. will pay \$50 million to end a lawsuit alleging the company misled investors about its clinician retention rate.

Judge Jed Rakoff in the US District Court for the Southern District of New York gave the deal final approval Tuesday, finding it was “fair, reasonable, and adequate.”

The settlement ends litigation that began in August 2022. LifeStance, which went public in June 2021, saw its share price drop over 46% a couple months later when the company reduced its expected profits because of its struggles in retaining clinicians, the lawsuit said.

Investors said LifeStance’s ability to retain therapists and other clinicians was an important factor in evaluating its financial performance, and the company misled them by failing to disclose a marked increase in clinician turnover in the months before its initial public offering.

Rakoff denied LifeStance’s motion to dismiss the suit last year, allowing the suit to proceed. It’s plausible a reasonable investor “would have taken great interest in learning that LifeStance might not only cease to retain physicians in the future but in fact was already struggling to retain them,” he said at the time.

Rakoff on Tuesday also approved attorneys’ fees for the plaintiffs’ lead counsel, **Robbins Geller Rudman & Dowd LLP**, worth 25% of the settlement amount—or \$12.5 million—as well as nearly \$572,000 in litigation expenses.

LifeStance in a statement said it entered the settlement “to avoid the cost and distraction of continued litigation.” The company said it denies the claims alleged in the suit, and doesn’t admit any liability or wrongdoing.

“We believe fully and finally settling this matter is in the best interest of the company and will ensure we can remain focused on helping patients nationwide,” the company said.

Ropes & Gray LLP represents LifeStance.

The case is *Nayani v. LifeStance Health Group, Inc.*, S.D.N.Y., No. 22-cv-06833, 1/30/24 .

(Updates with comment from LifeStance starting in seventh paragraph.)

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Plaintiffs' Lawyers Divided Over Early Mediation of 23andMe Data Breach Cases

[law.com/nationallawjournal/2024/01/31/plaintiffs-lawyers-divided-over-early-mediation-of-23andme-data-breach-cases](https://www.law.com/nationallawjournal/2024/01/31/plaintiffs-lawyers-divided-over-early-mediation-of-23andme-data-breach-cases)



Headquarters of 23andMe in Mountain View, Ca. Credit: Jason Doiy / The Recorder

NEWS

Edelson's Rafey Balabanian, in a Jan. 26 motion to appoint him as lead counsel, said a 'rudderless crowd of firms' was attempting to mediate the cases before leadership had been decided and without further investigation of the facts.

January 31, 2024 at 03:24 PM

Class Actions



Amanda Bronstad 
staff reporter

The original version of this story was published on Law.com

What You Need to Know

- The mediation, to be held on Jan. 31 at a Westin hotel in Napa, California, will include most of the plaintiffs' firms that have filed cases.
- 23andMe filed a Dec. 21 motion for the U.S. Judicial Panel on Multidistrict Litigation to coordinate the data breach cases in the Northern District of California.
- 23andMe filed a motion to continue a status conference, referencing the mediation talks: 'It is the hope of the parties to reach a global resolution there.'

23andMe Inc. will participate in an early mediation on Jan. 31 to resolve more than 35 class actions brought over its data breach, but not all plaintiffs' lawyers are on board.

The mediation, to be held at a Westin hotel in Napa, California, will include most of the plaintiffs' firms that have filed cases. But Chicago's Edelson, in a filing ahead of the planned talks, said the mediation was "bound to be inefficient" or, at worst, result in a "sell-out settlement."

And that's because of a lack of both leadership and further investigation of the facts, wrote Edelson partner Rafey Balabanian.

"Yet a rudderless crowd of firms is moving forward in the dark on this important case," Balabanian wrote in a Jan. 26 motion to appoint him interim lead counsel in the data breach litigation against 23andMe.

Balabanian, who is in San Francisco, noted that the hotel conference room in which the mediation is taking place fits only 20 attorneys, even though all plaintiffs firms were invited to participate. Edelson does not plan to participate.

"This early mediation, unfortunately, is going down a path bristling with warning signs for, at best, a wasted opportunity, and at worst, a slap-dash settlement that will be unacceptable to the court," he wrote.

In an email, Jay Edelson clarified: "We are not arguing to the court that we are the only firm that can lead this case. Instead, we are saying that the court should stop this race to the bottom and appoint strong leads who have a clear track record of delivering outstanding results in novel privacy cases."



Rafey Balabanian of Edelson

Edelson filed a case against 23andMe on Jan. 26 in the Northern District of California, where U.S. District Judge Edward Chen has coordinated most of the lawsuits. In a motion to continue a planned status conference in those cases, 23andMe attorney Ian Ballon, a shareholder at Greenberg Traurig in Los Angeles and Palo Alto, California, cited its Dec. 21 motion for the U.S. Judicial Panel on Multidistrict Litigation to coordinate the cases in the Northern District of California, and the planned mediation.

“A mediation is scheduled for the near term, to which all plaintiffs’ counsel are welcome to attend and participate in, and to which a large number of plaintiffs’ counsel have confirmed they will attend,” he wrote. “It is the hope of the parties to reach a global resolution there.”

Ballon did not respond to a request for comment.

One firm attending the mediation is Robbins Geller Rudman & Dowd. Partner Stuart Davidson, who is in Boca Raton, Florida, said the mediation was “awfully premature.”

“That said, one of my partners will attend not so much because we think it will lead to a fair, reasonable, and adequate resolution—we think it won’t—but simply because we have enough experience to know that it is important to gather information and maintain an open mind,” he wrote. “We respect Greenberg and want to hear what they have to say, though we do so with a healthy dose of skepticism.”

‘Recurrent and Repeated Injury’

Similar disputes in the plaintiffs’ bar about early settlement talks and a fight over leadership have arisen in the litigation over Procter & Gamble’s recalled aerosol deodorant and dry shampoo and in privacy class actions against TikTok, in which U.S. District Judge John Lee, in the Northern District of Illinois, appointed dueling factions of plaintiffs’ lawyers to spearhead the multidistrict litigation.

The TikTok cases settled for \$92 million, but Lee didn’t preliminary approve the deal due to the low claims rate and proposed notice plan. Edelson objected to the TikTok settlement, including its predicted claims rate – a similar issue the firm is now raising in its bid to lead the 23andMe lawsuits.



Gayle Blatt, Casey Gerry Schenk Francavilla Blatt & Penfield partner
(Courtesy Photo)

“We’re asking the court to take into account not just the total amount of our prior settlements, but also the claims rates,” Balabanian wrote. In Edelson’s \$650 million privacy settlement with Facebook, 22% of class members submitted claims, compared to typical claims rates of 1% to 5%.

23andMe, based in South San Francisco, announced the October breach on Dec. 5, but expanded the number of people impacted from an initial 14,000 to nearly 7 million. Hackers gained access to personal information, including genetic backgrounds, some of which have already shown up on the dark web identifying individuals with Ashkenazi Jewish heritage or Chinese descent.

23andMe has moved to stay the litigation until the MDL panel decides whether to coordinate the cases, which is likely to be after its March 28 hearing. But at least 29 plaintiffs’ firms, including Robbins Geller, Scott + Scott and Milberg Coleman Bryson Phillips Grossman, opposed putting the litigation on hold.

“Plaintiffs seek to move forward in this case as expeditiously as possible in order to investigate and mitigate what appears to be expanding harm (as compromised information spreads across the internet) from the unauthorized access to their private information remaining in defendant’s systems,” Gayle Blatt, of San Diego’s Casey Gerry Schenk Francavilla Blatt & Penfield, wrote in a Jan. 12 filing signed by 28 other firms. “Recurrent and repeated injury is, unfortunately, a real concern here.”

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Ad firm Publicis, drugmaker Hikma settle US opioid cases for \$500 million

 [reuters.com/legal/ad-firm-publicis-drugmaker-hikma-settle-us-opioid-cases-500-million-2024-02-01](https://www.reuters.com/legal/ad-firm-publicis-drugmaker-hikma-settle-us-opioid-cases-500-million-2024-02-01)

Nate Raymond



A logo of Publicis Groupe is seen at its exhibition space, at the Viva Technology conference dedicated to innovation and startups at Porte de Versailles exhibition center in Paris, France June 15, 2022. REUTERS/Benoit Tessier/File Photo Acquire Licensing Rights , opens new tab

BOSTON, Feb 1 (Reuters) - A division of French advertising company Publicis Groupe SA (PUBP.PA) , opens new tab and drug company Hikma Pharmaceuticals (HIK.L) , opens new tab have reached separate settlements worth a collective \$500 million to resolve claims that they helped fuel the deadly U.S. opioid epidemic.

The settlements announced by U.S. state attorneys general on Thursday add to the more than \$50 billion that drug manufacturers, distributors, pharmacy operators and consultants have agreed to pay to resolve lawsuits and investigations over their roles in the drug addiction crisis.

Publicis Health, a subsidiary of Publicis Groupe, agreed to pay \$350 million to resolve claims by all U.S. states and territories that it helped OxyContin maker Purdue Pharma devise marketing strategies to boost sales of its prescription opioid painkiller.

Massachusetts, which sued Publicis in 2021 alleging it collected more than \$50 million to help Purdue get doctors to prescribe its opioids to more patients, for longer periods of time, and at higher doses, served on the executive committee of states investigating the company.

Massachusetts Attorney General Andrea Joy Campbell in a statement said the settlement would "bolster accountability and transparency for this ongoing crisis" and provide \$8 million that the state can use to fund treatment and services.

Publicis denied wrongdoing, and had called Massachusetts' case an unprecedented attempt to sue an advertising agency over a manufacturer's marketing of its products. But a state court judge declined to throw the case out in October 2021.

In a statement, Publicis said \$343 million of the settlement would go to the states' opioid relief effort, and the rest would cover legal fees.

It recorded a pre-tax charge of \$213 million for the fourth quarter of 2023 to cover the settlement, after being paid \$130 million by its insurers.

"The fight against the opioid crisis in the United States requires collaboration across industries, lawmakers, and communities, and we are committed to playing our part," Publicis said.

London-listed Hikma separately reached an agreement in principle to resolve claims by states and localities for \$150 million, consisting of \$115 million in cash and \$35 million worth of the opioid addiction treatment medication naloxone.

Hikma said it did not admit wrongdoing. Campbell's office said the deal resolves claims that the generic drugmaker from 2006 to 2021 failed to monitor suspicious orders of opioids from potentially illegal distributors.

The company had been facing more than 900 lawsuits stemming from the epidemic, according to a lawsuit Hikma filed in September against an insurer.

Hikma said in its statement that the deal would resolve the "vast majority" of cases against it.

States that do not accept the addiction treatment medication under the settlement will receive cash instead, according to Campbell's office.

The U.S. Supreme Court in December heard a challenge by President Joe Biden's administration to Purdue Pharma's multi-billion-dollar bankruptcy settlement resolving related claims against the drugmaker. A ruling is expected by June.

Reporting by Nate Raymond in Boston, Editing by Alexia Garamfalvi and Jan Harvey

Opioid Marketer Strikes \$350 Million Deal With All 50 States (1)

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Litigation

Feb. 1, 2024, 10:17 AM PST

Erik Larson

Bloomberg News

- States accused Publicis of boosting Purdue's OxyContin sales
- Publicis agrees not to work again in painkiller market

An advertising firm accused of helping

recklessly increase sales of OxyContin and other highly addictive painkillers for nearly a decade reached a \$350 million settlement with all 50 US states to resolve probes into its conduct.

Publicis Health LLC, a unit of French media conglomerate Publicis Groupe SA, helped carry out a "predatory" marketing strategy to sway the most susceptible doctors to prescribe OxyContin at higher doses and for longer periods of time, according to statements Thursday from several state attorneys general.

"For a decade, Publicis helped opioid manufacturers like Purdue Pharma convince doctors to overprescribe opioids, directly fueling the opioid crisis and causing the devastation of communities nationwide," New York Attorney General Letitia James, one of the leaders of the negotiations, said in a statement.

Publicis Health, which worked with Purdue from 2010 to 2019, implemented the drugmaker's "Evolve to Excellence" plan that targeted the doctors who prescribed the most OxyContin and flooded them with sales calls and marketing intended to increase the dosages even more, according to the statement. That, in turn, led to a major rise in opioid prescriptions across the US, followed by greater abuse, addiction and overdose deaths, the New York attorney general said.

"This settlement, in which the Attorneys General recognized Publicis Health's 'good faith and responsible corporate citizenship', is in no way an admission of wrongdoing or liability," the company said in a statement. "We will, if need be, defend ourselves against any litigation that this agreement does not resolve."

Under the deal, \$343 million will go to all 50 US states plus the District of Columbia and certain US territories to fight the opioid crisis, plus an additional \$7 million for states that led the negotiations. Publicis Health said its insurers will pay \$130 million of the settlement.

Cities, states and municipalities have hammered more than a dozen drugmakers, drug distributors, and retail pharmacies in litigation and forced them to pay \$50 billion in settlements over the companies' misleading marketing and mishandling of opioid pain killers, according to data compiled by Bloomberg News.

Read More:

Purdue's \$6 billion opioid settlement is currently

by the US Supreme Court, as the justices weighed Biden administration contentions that the accord improperly shields Sackler family members who own the company.

Lawsuits have accused firms such as Purdue of downplaying the painkillers' addiction risks and sacrificing patient safety to fatten up their bottom lines. The crisis has taken the lives of more than 500,000 people in the US over the past two decades.

Household names like Johnson & Johnson, Walmart Inc. and CVS Health Corp., have reached settlements where they have collectively agreed to pay billions over the next two decades to bolster police and drug-treatment budgets drained by the opioid crisis. Others include distributors such as AmerisourceBergen and Cardinal Health, along with

., another Purdue publicist.

"Publicis was responsible for creating advertisements and materials such as pamphlets and brochures that promoted OxyContin as safe and unable to be abused, even though this claim was not true," according to the New York AG.

Under the deal, Publicis agreed not to accept future contracts related to the marketing or sale of opioids. The company also agreed to release hundreds of thousands of internal documents related to its work for Purdue and other opioid manufacturers. The company will also release its communications with McKinsey and Practice Fusion, a software company that designed a health-records systems tool that included pop-up banners encouraging doctors to prescribe OxyContin, according to the statement.

(Updates with comment from Publicis Health.)

--With assistance from Jef Feeley.

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Litigation

Jan. 31, 2024, 12:18 PM PST

GM Brass Slow Walked Self-Driving Disclosures, Holder Suit Says

By Ben Miller

- **COURT:** E.D. Mich.
- **TRACK DOCKET:** [2:24-cv-10254](#)

Bloomberg Law News 2024-02-01T11:32:09111261009-05:00

GM Brass Slow Walked Self-Driving Disclosures, Holder Suit Says

By Ben Miller 2024-01-31T15:18:42000-05:00

- **COURT:** E.D. Mich.
- **TRACK DOCKET:** [2:24-cv-10254](#)

General Motors Co.'s directors and top executives allegedly concealed safety issues related to autonomous vehicles and airbags for more than a year before casualties related to both products became publicly known in October, a shareholder complaint says.

The suit follows a proposed class action filed last month with similar claims against the company and executives, marking another legal challenge related to the automaker's safety and technology issues. GM insiders also allegedly caused the company to overpay for share repurchases by \$884 million due to artificially inflated prices from the alleged misrepresentation, according to the complaint filed Tuesday in US District Court for the Eastern District of Michigan.

News of an autonomous vehicle seriously injuring a pedestrian and the subsequent suspension of GM-owned Cruise LLC's driverless testing permits prompted the company to pause its autonomous vehicle operations nationwide in October. That same month, the National Highway and Traffic Safety Administration held a hearing to recommend a recall for more than 50 million airbag inflators linked to deadly explosions, the complaint says.

GM's stock price dropped several times that month, including a 5% drop to \$27.22 on Oct. 27, the same day that Cruise announced it would pause its autonomous vehicle operations across the country. That was GM's biggest share price drop in more than two months, according to data compiled by Bloomberg.



The company's top brass not only allegedly overstated the effectiveness of efforts to mitigate airbag safety defects stemming from misconduct, they also misled investors, regulators, and the general public about the safety of the Cruise autonomous vehicle technology, the complaint says.

During the 21-month period of alleged misrepresentations, GM's board also solicited two proxy statements, calling upon shareholders to elect 12 directors, approve executive compensation, vote on proposals, and ratify the company's accounting firm, according to the complaint.

GM repurchased approximately \$72.8 million shares of its own stock at artificially inflated rates, which cost the company over \$2.8 billion, the complaint says.

Cruise announced last month that it would cut 24% of its workforce, approximately 900 positions primarily in operations roles, shortly after dismissing nine top executives. GM is reducing its spending on Cruise and abandoning former CEO Kyle Vogt's push to expand robotaxi service to more than 12 cities by the end of 2024.

GM also announced last month it would cut 1,300 jobs at a pair of plants in Michigan, shortly after a contract was ratified by its unionized workforce.

Shareholder Samhita Gera seeks to recover damages on behalf of the company for the directors' and officers' alleged violations of the Securities Exchange Act between Feb. 2, 2022 and Oct. 26, 2023. She also seeks legal fees, the complaint says.

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

The Brown Law Firm PC, Abood Law Firm, and Bronstein, Gewirtz & Grossman LLC represent the plaintiff.

The case is Gera v. Barra, E.D. Mich., No. 2:24-cv-10254, complaint filed 1/30/24.

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Boeing is sued by shareholders following MAX 9 blowout

 [reuters.com/legal/boeing-is-sued-by-shareholders-following-max-9-blowout-2024-01-31](https://www.reuters.com/legal/boeing-is-sued-by-shareholders-following-max-9-blowout-2024-01-31)

Jonathan Stempel



[1/4]The fuselage plug area of Alaska Airlines Flight 1282 Boeing 737-9 MAX, which was forced to make an emergency landing with a gap in the fuselage, is seen during its investigation by the National Transportation Safety Board (NTSB) in Portland, Oregon, U.S. January 7, 2024. NTSB/Handout via... [Acquire Licensing Rights](#) , opens new tab [Read more](#)

NEW YORK, Jan 31 (Reuters) - Boeing (BA.N) , opens new tab has been sued by shareholders who said the company prioritized profit over safety and misled them about its commitment to making safe aircraft, prior to the Jan. 5 mid-air cabin panel blowout on an Alaskan Airlines 737 MAX 9.

According to a proposed class action filed on Tuesday, Boeing spent more than four years after the Oct. 2018 and March 2019 crashes of two other MAX planes, which killed 346 people, assuring investors that it was "laser-focused" on safety and would not sacrifice safety for profit.

Shareholders said Boeing's statements were false and misleading because they concealed the "poor quality control" on its assembly line, and caused its stock price to be inflated.

Boeing's share price fell 18.9% from Jan. 5 to Jan. 25, 2024, the day after the Federal Aviation Commission barred Boeing from expanding MAX production because of safety concerns. The decline wiped out more than \$28 billion of market value.

A Boeing spokesman declined to comment on Wednesday.

The lawsuit filed in the Alexandria, Virginia, federal court covers shareholders from Oct. 23, 2019 to Jan. 24, 2024, and is led by Rhode Island General Treasurer James DiOSSa.

Other defendants include Boeing Chief Executive Dave Calhoun and his predecessor Dennis Muilenburg, and Chief Financial Officer Brian West and his predecessor Gregory Smith.

"This case has the potential to effect changes in Boeing's practices to protect passengers and ensure their safety in the future," Diossa said in a statement.

The Jan. 5 blowout caused the FAA to temporarily ground 171 MAX 9 planes, resulting in thousands of flight cancellations at Alaska Air Group (ALK.N) [↗](#), opens new tab and United Airlines (UAL.O) [↗](#), opens new tab.

No one died on the Alaska flight, but some passengers have sued Boeing and the carrier.

On Wednesday, Boeing said it couldn't provide full-year financial targets because of uncertainty over its planes.

It also reported better-than-expected fourth-quarter results [↗](#), opens new tab, which included a \$30 million loss, \$22 billion of revenue and \$3.38 billion of cash flow.

The case is State of Rhode Island Office of the General Treasurer v Boeing Co et al, U.S. District Court, Eastern District of Virginia, No. 24-00151.

Reporting by Jonathan Stempel in New York Editing by Nick Zieminski and David Ljunggren

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The case is In re Enovix Corp. Sec. Litig. , 2024 BL 29941, N.D. Cal., No. 23-cv-00071, 1/30/24 .

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FriendFinder Defeats Investment Firm's Appeal Over Debt Terms

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Securities Law

Photo: Chris Ryan/Getty Images

FriendFinder Networks Inc. and an affiliated company offered debt securities to an investment firm in a private exchange not protected by securities law, the Second Circuit ruled.

Chatham Capital Holdings Inc. and a related entity therefore can't sue FriendFinder, which operates adult entertainment, social networking, and online dating sites, for allegedly reducing the debt instruments' payment terms, the appeals court said Wednesday. A no-suit clause in the contract applies and bars the claims, Judge Richard C. Wesley said.

- FriendFinder allegedly implemented the change "to strong-arm Chatham into selling its own stake back to FriendFinder at a steep discount," according to the court
- The Trust Indenture Act can override no-action clauses in publicly traded debt contracts, or indentures, Wesley said for the US Court of Appeals for the Second Circuit
- But it doesn't apply where the offering, like this one, is private, he said, joined by judges Dennis Jacobs and Beth Robinson

Rottenberg Lipman Rich PC represented Chatham. Friedman Kaplan Seiler Adelman & Robbins LLP represented FriendFinder, its affiliate Interactive Network Inc., and an alleged "supermajority" shareholder.

The case is Chatham Cap. Holdings, Inc. v. Conru , 2024 BL 30948, 2d Cir., No. 23-154, 1/31/24 .

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Texas Tempts Tesla

Published: Thu Feb 01 14:51:01 EST 2024

By Matt Levine

(Bloomberg Opinion) --

Texas

I can tell you, if you want, the rules that apply to Elon Musk's pay as chief executive officer of Tesla Inc. under Delaware corporate law. They are long and boring, a lot of exceptions to exceptions, but to quickly summarize: The board can pay Musk whatever it wants, *unless* he is a "controlling shareholder," in which case the pay has to be "entirely fair," *though* if the shareholders vote to approve the pay then that probably makes it "entirely fair," *unless* the shareholder vote is not fully informed, in which case a judge gets to decide if it was "entirely fair," which requires a "fair process" in which the board negotiates with Musk at arm's length, and also a "fair price" in which, you know, the judge decides if Musk is worth the money.

This week a judge decided that Musk is *not* worth the \$55.8 billion that Tesla's board agreed to pay him in 2018, and wrote a 200-page opinion explaining and applying those rules. You can read the opinion, or my post about it yesterday, for a fuller explanation of these rules and how the judge applied them. But I would say that my two main points yesterday were:

- There is some advantage to having a set of outside rules of good behavior and fair treatment of shareholders, upheld by impartial judges, rather than just letting corporate executives and boards and controlling shareholders do whatever they want, but
- Nonetheless, it is *weird* that Tesla's management and board of directors and (a large majority of) shareholders all agreed that Musk should get paid \$55.8 billion for creating \$600 billion of shareholder value, and he did do that, and he got paid that, and a judge overruled that decision and ordered him to give back the money. I can see why Musk — and Tesla's board, and its shareholders — would find that objectionable! They're trying to run a company here.

The judge who ruled against Musk is the head of the Delaware Court of Chancery, the specialized court in Delaware that hears corporate law disputes, and she heard the dispute about Musk's pay because Tesla, like many US public companies, is incorporated in Delaware. (Even though its factories and offices are mostly located elsewhere.) Lots of public companies are incorporated in Delaware, for a combination of reasons:

1. Delaware *has* a specialized court that hears corporate law disputes, the Court of Chancery. The judges on that court (the chancellor and vice-chancellors) are experts, they hear a lot of corporate law disputes, they understand the issues, and they mostly make sensible decisions. They also understand that these cases are time-sensitive, so they move fast. (Though in Musk's case the decision did take rather a long time.) They also don't have *juries*. So if there's some dispute about what a Delaware public company can do, the company knows it can go to court and get a quick answer from a smart, knowledgeable judge.
2. That court has been around for a long time, so there are a lot of precedents, so Delaware law is *predictable*. I *can* tell you the rules that apply to Elon Musk's pay, and for each of the debatable terms — "controlling shareholder," "entirely fair," etc. — there are cases that explain how to interpret them. Predictability is very important to public companies. They don't *want* to go to court to get answers about what they can do: They want to *know* what they can do, in advance, without getting sued. If you're a Delaware company and you have some gnarly issue, you can call pretty much any big-time corporate lawyer and say "am I allowed to do this gnarly thing," and she will go consult Delaware precedents and come back to you with a pretty good answer.¹ Note that in Delaware, as elsewhere, this is largely a matter of judge-made law, of precedential rulings interpreting the rules; it's not like the Delaware legislature (or any other state's legislature) sat down and wrote detailed rules about how much a company can pay its CEO. But compared to other states, Delaware's judge-made corporate law is more detailed and predictable.
3. In some very general way, Delaware law is pretty business-friendly, and specifically pretty friendly to corporate management. If you ask your fancy lawyer "am I allowed to do this gnarly thing," there's a decent chance that the answer in Delaware is "yes." The answer in most other states is "I don't know"; it's not like the other states have rules against, say, paying your CEO a lot or whatever. But that answer always has a tinge of "I don't know, but it's possible that some judge or jury will find this thing distasteful and rule against you." Whereas in Delaware, the judges have been there before and are not easily affronted, and there are no juries. So you can have a much more businesslike discussion, of the form "look I know that this pile of money we are giving our CEO seems obscene, but we have good business reasons for it," and the judge will be sympathetic to that form of argument and often agree with you. Often! Not in Musk's case though.

That third point is, I want to say, probably the least important factor on the list. If you are deciding where to incorporate your company, knowing that the rules will be predictable and sensible and enforced is really really important: There will be a lot of rules, a lot of potential disputes, a lot of novel situations that you will encounter in running a public company, and you want to know what you are allowed to do in those situations. Knowing that in some situation the rules will be a bit more favorable — knowing that the rule is "we can pay our CEO whatever we want" — is probably less important than knowing that *in general* the rules are predictable and reasonable, that you can run your

company's affairs rationally rather than by guesswork.

On the other hand, if you are another US state (or a foreign jurisdiction), and you want to induce companies to incorporate in your state rather than in Delaware, the *main* thing that you can offer is “we will be even more management-friendly than Delaware.”² You can't offer a deep body of precedent produced by expert judges, or not yet anyway. But you can say “hey, our rules aren't really written yet, and you can't entirely predict what they will be, but you can reasonably guess that they will give corporate managers more freedom and less shareholder oversight than Delaware's rules do.”

Is that an appealing pitch? Maybe? Not to everyone. But you know who really values the freedom to do what he wants, and really does not care about predictability? Bloomberg's Madlin Mekelburg reports:

Elon Musk ... plans to summon Tesla shareholders for a vote on shifting the company's incorporation to Texas from Delaware, after a judge in the tiny state voided his \$55 billion pay package. ...

If Tesla follows through, such a move would amount to another win for a state that has used its ties with him to burnish its pro-business credentials. Texas has been luring CEOs and their companies for years by touting its low taxes and light regulatory touch. Being home to Tesla's legal incorporation would dovetail with a more recent state initiative: developing its own business-court system in a challenge to Delaware. ...

Ditching Delaware and moving Tesla's legal incorporation to Texas would certainly carry risks. The First State has long been the destination of choice for companies seeking to incorporate, due to a well-developed set of corporate-governance laws and 125 years of case decisions out of state courts that provide robust protections for board directors and executives.

Chancery court judges in the state are recognized as business-law experts who can hear cases on a fast-track basis. Most high-profile merger-and-acquisition disputes are litigated in Delaware in non-jury cases. Even foreign companies come to the state to have corporate disputes decided.

The same hasn't been true in Texas, where business law disputes are routinely pushed to make way for emergency criminal cases or family law matters. As a result, business cases sometimes take years to resolve. Moreover, the outcomes can be unpredictable, and the state courts have been known to grant huge awards for plaintiffs suing companies.

In an effort to streamline such proceedings, state leaders moved last year to establish

dedicated business courts in major cities. ... The courts won't open until September, and much about how they will operate has yet to be established.

Nothing here is ever legal advice, and I have never been licensed to practice law in Texas (or Delaware). But I could *not* tell you the rules that would apply to Elon Musk's pay under Texas law, and I spent like 15 minutes Googling them.³ Here is a 1984 federal case under Texas law stating that "transactions involving an interested director are subject to strict judicial scrutiny but are not voidable unless they are shown to be unfair to the corporation," which sounds a *little* like the "entire fairness" standard that the Delaware judge applied to Musk's pay, but I would not want to speculate on the differences between those standards.

You can find articles like "The Importance of Independent and Disinterested Directors for Corporate Litigation in Texas," or "Fiduciary Duties of Corporate Directors and Officers in Texas," but on questions like "what are the rules for what a Texas company can pay its CEO who is also a 20% shareholder," those articles mostly cite Delaware precedents.⁴ Because there are Delaware precedents! More than 300 of the companies in the S&P 500 index are incorporated in Delaware; four are incorporated in Texas. If you have a question about what's allowed under Delaware law, there's a pretty good chance that a Delaware public company has done it and gotten an answer; in Texas the chances are slim.

Still, I mean, the bet here for Elon Musk is reasonable: If he moves Tesla to Texas, and then demands that Tesla's board pay him \$100 billion to keep a reasonable fraction of his time and attention on Tesla, and Tesla's extremely accommodating board says "sure whatever you want," and a majority of shareholders approve the pay package, and one disgruntled shareholder sues, and the case goes to Texas business court, and the complaining shareholder comes into court citing conflicts of interest and the board's lack of independence and the Delaware cases on "entire fairness," and Elon Musk comes into court saying "well that may all be true but what you are missing is that I am Elon Musk," and Texas Governor Greg Abbott is in the first row of spectators with a big sign saying "TX <3 U ELON," is the Texas business court, in its first real high-profile case, going to say "actually it's illegal to pay Elon Musk that much"? It absolutely is not. *That* much is pretty predictable.

More Tornetta

A couple of other points on this week's Delaware Chancery Court decision in *Tornetta v. Musk*, invalidating Elon Musk's big pay package.

First: "The lawyers who represented victorious Tesla shareholders may be in line for a record-breaking payout worth hundreds of millions, or even billions, of dollars," reports Sujeet Indap at the Financial Times. It is *logically possible* for a Delaware judge to conclude that (1) Elon Musk's

successful efforts, as CEO of Tesla, to take Tesla's market value from \$59 billion to \$650 billion, were not worth \$55.8 billion to Tesla shareholders, but (2) some lawyers' successful efforts to make Musk give back the \$55.8 billion *are* worth billions of dollars to Tesla shareholders. And she does in fact get to decide. But I think that if you put it to a vote of Tesla shareholders — “would you rather give Musk \$55.8 billion of Tesla stock for running Tesla, or these lawyers \$1 billion of Tesla stock ⁵ for suing Tesla?” — you'd get a pretty large majority for Musk? I'm not Musk's biggest cheerleader or anything, but I feel like he has probably done a lot more for Tesla than these lawyers have.

Second: Can the board just give Musk *another* big pay package? Part of the problem that the judge found with his 2018 package is that, while shareholders voted to approve it, and while Tesla accurately and completely disclosed its *terms* to the shareholders, the disclosure omitted some bad details about the conflicted *process* by which the board approved it. So the shareholder approval didn't exactly work. Could Tesla just try again? Include all the bad disclosure? Attach a copy of the opinion, to be like “if you want to read how bad our process was, here you go”? Would that solve the problem? At the Wall Street Journal, Stephen Wilmot writes:

Tesla could appeal the ruling to the Supreme Court of Delaware. Alternatively, it could feasibly take the deal back to minority shareholders with a more explicit set of disclosures regarding Musk's role in influencing it. Hence the question: Would Tesla win approval a second time?

The company has an unusually high share of individual shareholders, many of whom are also die-hard Musk fans. Insiders and institutions own just 57% of Tesla shares, according to FactSet, compared with more than 70% for the likes of Microsoft, Nvidia and Alphabet. Some institutional investors have said Musk's extraordinary rewards were due payment for unlikely achievements. But others have been critical, led by proxy advisers Glass Lewis and ISS.

I don't know! I assume that Tesla's shareholders would vote to give him the money back. It's a weird dynamic, though. In 2018, when shareholders approved this package, they were promising Musk options worth as much as \$55.8 billion if he took Tesla's market capitalization from \$59 billion to \$650 billion. They gave him a big incentive to encourage him to do something difficult and valuable. But now he's already done it! They don't need to incentivize it anymore. I suppose they could vote on a new package to give him, like, \$500 billion of stock if he takes the market cap to \$6 trillion, but that is not quite what he wants. Also even before this ruling he was asking for more stock just to not take his best ideas elsewhere.

Also, what if the shareholders *did* approve the pay deal again? Presumably Mr. Tornetta, the disgruntled shareholder who sued in this case, would go back to court. The court would get to review the pay package again, and since Musk is still the controlling shareholder, the review would still be

under the “entire fairness” standard. The fully informed shareholder vote would *help*; as the judge wrote: “Delaware law allows defendants to shift the burden of proof under the entire fairness standard where the transaction was approved by a fully informed vote of the majority of the minority stockholders.” But she would still review the pay package for “entire fairness”; it’s just that now the plaintiffs would bear the burden of proving that it’s *unfair*, instead of the board bearing the burden of proving that it’s fair. But she already ruled that it’s unfair! It should be easy for the plaintiffs to prove that; they can just quote her opinion.

It is possible that the rule of this case is that Tesla is not *allowed* to pay Musk \$55.8 billion, no matter what its shareholders think, no matter how many of them vote to approve it in a fully informed vote. It’s enough to make you want to move to Texas.

FTX!

At some point in early 2022, crypto exchange FTX Trading Ltd. apparently had an equity value of \$32 billion, based on the price it got in a fundraising round. By November 2022, FTX founder Sam Bankman-Fried was shopping it around at an equity value of \$0; he *almost* found a buyer at \$0, but couldn’t quite make it work. FTX had assets (a bunch of crypto tokens, some venture stakes, a surprising amount of Bahamas real estate), and it had liabilities (it owed its customers a lot of crypto tokens), and it had some sort of going-concern franchise value (if it kept operating a crypto exchange, it could keep charging fees and making money). In early 2022, the assets *seemed* to be worth more than the liabilities, and the franchise value — FTX’s large steady profits, and the prospect of more in the future as it expanded — was high, leading to a \$32 billion equity valuation. In late 2022, the assets turned out to be largely magic beans, the liabilities were high, and FTX’s time as a trusted profitable crypto exchange seemed to be over. The result is that no one was willing to pay \$0 to take on FTX’s assets and liabilities and franchise: Any buyer would have to cash out FTX’s customers, and there weren’t enough assets to do that.

Or, I mean, that’s how it seemed. Sam Bankman-Fried, before he went to jail, consistently argued that that wasn’t true, that if he had had another 24 hours he *could* have found a buyer to acquire FTX for at least \$0 and make all of the customers whole. That has always sounded extremely unlikely, given how carelessly FTX handled customer money and how hideous its balance sheet looked at the time of its implosion. But he kept saying it.

In 2024, on the other hand, Bloomberg’s Steven Church and Jonathan Randles report:

Customers and creditors of bankrupt crypto exchange FTX who can prove their losses will likely get back all of their money, the company told the judge overseeing the insolvency case.

Restructuring advisers will need to examine the millions of claims that have been filed against FTX to weed out those that are not legitimate, lawyer Andrew Dietderich said during a Wednesday court hearing in Wilmington, Delaware.

“I would like the court and stakeholders to understand this not as a guarantee, but as an objective,” Dietderich said. “There is still a great amount of work, and risk, between us and that result. But we believe the objective is within reach and we have a strategy to achieve it.”

In addition, the team overseeing the company has dropped an effort to restart or sell the FTX crypto exchange after concluding it would cost too much, Dietderich said. Advisers ran an exhaustive process to find investors willing to restart FTX.com, but nobody would put up the cash needed to revive the exchange, he said.

“The costs and risks of creating a viable exchange from what Mr. Bankman-Fried left in the dumpster were simply too high,” Dietderich said, referencing founder Sam Bankman-Fried, who shut down the crypto firm and handed control to insolvency experts in late 2022.

That last paragraph says that the franchise value is still \$0. It turns out that, still, nobody wants to trade on the FTX exchange; its stream of trading fees is extinguished forever.

But the pile of magic beans and real estate that FTX had at the end of 2022 turned out to be worth more than its liabilities? The roughly \$8 billion hole that FTX’s affiliated trading firm, Alameda Research, blew in its balance sheet got ... filled up? The customer money all turned out to be there? FTX was worth less than \$0 in November 2022, but has somehow become far more valuable in bankruptcy?

It’s weird. There are several explanations for what has changed between November 2022 and now. For one thing, crypto prices collapsed alongside FTX, and by the time Bankman-Fried was looking for buyers, the value of its crypto holdings was low. Now crypto prices are up, which helps on the asset side. It *should* hurt *more* on the liabilities side — if FTX owes customers Bitcoin, that debt is worth more now than it was in 2022 — except that that’s not how the bankruptcy accounting works. FTX’s bankruptcy plan provides for “the valuation of claims in U.S. dollars as of the Petition Date” (Nov. 11, 2022) and payment in cash. If FTX owed you one Bitcoin before it collapsed, now it owes you roughly \$17,000 (the value of a Bitcoin on Nov. 11, 2022). If FTX *had* one Bitcoin before it collapsed, now it has about \$43,000 (the value of a Bitcoin today). If FTX had enough Bitcoins to pay off half of its customers’ claims in 2022, now it has enough to pay off all of them.

I’m not sure that’s the main mechanism. By the time of its collapse FTX *didn’t* really have much

Bitcoin; its crypto holdings were largely “Samcoins” associated with Bankman-Fried that have not recovered nearly as much value. But a big chunk of FTX’s holdings were in Solana, which *has* rallied a lot. And FTX’s bankruptcy estate apparently dumped \$1 billion of the Grayscale Bitcoin exchange-traded fund this month, profiting from the rise in Bitcoin prices since 2022. So rising crypto prices have definitely helped.

For another thing, FTX has, like, posthumously pivoted to AI? In April 2022, Bankman-Fried invested \$500 million of FTX/Alameda’s money into Anthropic, a somewhat obscure artificial intelligence startup. That was kind of a reckless thing to do with *customer demand deposits*, putting them into an illiquid speculative equity investment in futuristic technology. It did *work out*, however: AI is huge now, Anthropic is a big player, and FTX’s stake is probably worth billions of dollars. Bankman-Fried’s whole schtick, for most of his career, was about taking terrifying risks that somehow worked out. “Let’s take our customers’ money and secretly put it into venture investments in an AI startup” is a *terrifying* risk, an insane thing to do, and yet it worked out! Not for Bankman-Fried, though; he’s in jail.

Also there’s the real estate? Generally speaking, FTX seems to have siphoned off a ton of money into fancy apartments for its executives, big vanity investments in their friends’ companies, inflated endorsement deals with celebrities, and other reckless spending. When Bankman-Fried was shopping FTX to buyers in 2022, he didn’t count this stuff as FTX assets, because it mostly wasn’t: The money had been paid out to realtors and friends and celebrities. But the bankruptcy team generally argues that this stuff *does* belong to FTX, that it ended up in the hands of FTX’s executives and friends and family illegitimately, and they are trying to get it back. They might succeed with some of it. If your model of FTX is “Sam Bankman-Fried stole a lot of customer money and used it to buy luxury apartments,” that’s actually pretty good news for customers, because you can seize the apartments and sell them and give the money back to the customers. Whereas “Sam Bankman-Fried lost customer money gambling on crypto” would mean it’s probably gone.

Also there is just a due diligence layer here that probably matters for valuation. The bankruptcy executives who currently control FTX are humorless types who care a lot about careful accounting and who report regularly to a court. When they say things like “we found \$300 million of assets under a couch cushion,” people are inclined to believe it. When they want to sell stuff, they run a slow and heavily lawyered sales process that lets multiple buyers kick the tires, and the buyers can have some confidence in what they are buying.

When Sam Bankman-Fried tried to sell FTX for \$0, he had a slapdash and terrifying spreadsheet that emphasized the “Hidden, poorly internally labeled ‘fiat@’ account” with a balance of negative \$8 billion. If you are a potential buyer, and you get that spreadsheet along with a text message like “hey FYI I need your final binding bid in two hours or it’s off to jail with me,” you might not be inclined to make an aggressive bid? You might think “hmm negative \$8 billion is a suspiciously round number,

what if there are *other* hidden liabilities here that I don't know about and can't find out about in two hours?" You might just pass. It's possible that FTX really *was* worth at least \$0 the whole time, that even at its lowest point it had enough stuff lying around to pay back all its customers. It's just that Sam Bankman-Fried was in no position to make anyone believe that.

You can get paid for not farming wind

Everything is like this, huh:

Dozens of British wind farms run by some of Europe's largest energy companies have routinely overestimated how much power they'll produce, adding millions of pounds a year to consumers' electricity bills, according to market records and interviews with power traders.

These extra costs are linked to a growing problem with Britain's outdated electricity network: On blustery days, too much wind power risks overloading the system, and the grid operator must respond by paying some firms not to generate. This "curtailment" costs consumers hundreds of millions of pounds each year.

Adding to that expense, some wind farm operators exaggerate how much energy they say they intend to produce, which boosts the payments they receive for turning off, according to nine people — traders, academics and market experts — most of whom agreed to discuss this controversial behavior only on condition of anonymity.

In effect, they said, the grid has paid some wind farms not to generate power that they wouldn't have produced anyway.

That's from Bloomberg's Gavin Finch, Todd Gillespie, Eric Fan, Jason Grotto and Sam Dodge. The basic fact of climate markets is that you can get paid for *not doing stuff* that damages the environment, which is philosophically perplexing and has all sorts of baseline and measurement problems. But then a secondary fact is that you can also, occasionally, get paid for *not doing even the green stuff*. Sometimes it's good to generate electricity without using fossil fuel, but sometimes it's even better *not* to generate electricity without using fossil fuel.

Everything is securities fraud

If a door flies off an airplane in midair, is that securities fraud? Say it with me now:

Rhode Island's general treasurer filed a class action lawsuit against The Boeing Company on Tuesday, alleging it betrayed the trust of the state's pensioners. ...

Filed in a U.S. District Court in Virginia, the civil case comes less than a month after a door plug blew out on a Boeing 737 Max 9 midflight and a string of other mishaps raised concerns about the company's planes. The suit alleges Boeing issued false and misleading statements to the market about its safety lapses.

The suit alleges Boeing assured investors it was focused on safety after Max plane crashes in 2018 and 2019 killed 346 people.

See the problem is that Boeing *said* it was trying to build safe planes, but *in fact* was building planes whose doors fly off. From the complaint:

The Class Period starts on October 23, 2019, when Defendants boasted that Boeing was "making steady progress," on its "top priority . . . the safe return to service of the 737 MAX." Throughout the Class Period, Defendants made similar statements, consistently assuring investors that Boeing was "laser-focused on . . . safety, quality and transparency." Defendants also claimed that Boeing did not make "trade-offs," between safety and profit, and that safety has "always been the priority and that will continue to be" at Boeing.

Unbeknownst to investors, statements such as those above were false and misleading because Boeing failed to disclose that it had been prioritizing its profits over safety, which led to poor quality control standards in the production of its commercial aircrafts such as the 737 MAX, resulting in a heightened risk of manufacturing flaws which could render the Company's new airplanes unsafe. This very risk had materialized during the Class Period.

That door flew off on a Friday, and the next Monday the stock dropped by 8%, destroying about \$12 billion of market capitalization. There were 177 passengers on the flight, and they each got \$1,500 of compensation for the trauma and inconvenience of being on a plane whose door flew off in midair. I suppose some might sue for more. If they all sue and get *\$50 million each* of damages, which seems unlikely, that adds up to like \$8.9 billion, still less than Boeing's shareholders lost on the news. Boeing's shareholders are the real victims here, or that is the conclusion of "everything is securities fraud" anyway.

Things happen

A \$560 Billion Property Warning Hits Banks From NY to Tokyo. Citizens CEO Calls NYCB an Outlier, Says Regional-Bank Pain Is in the Past. Deutsche Bank Warns of Potential US Property Losses. A New Solution for CO2 Emissions: Bury Them at Sea. As AI Costs Soar, Some Startups Consider Selling. Russia Helps Lift Austria to Ranks of Energy-Exporters. A Start-Up Secret: Executives' '11th-Hour' Pay Bumps. *Sports Illustrated's* \$10 Million Mystery. America is facing a 'fringe friend' crisis.

Startup Nets \$140 Million to Bring High-Tech Solutions to School Bus Rides.

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1. One thing that I often wondered, as a young mergers-and-acquisitions lawyer in New York, licensed to practice New York law, is how we all got away with giving companies advice about Delaware merger law. But that's not important right now.
2. You could imagine a state trying to distinguish itself by being more *shareholder-friendly* than Delaware, but that seems pointless, because generally the managers choose where to incorporate, not the shareholders. You could imagine an argument of the form "State X's corporate law is more protective of shareholders than Delaware's is, so it increases the value of State X corporations, so companies should incorporate in State X to increase their value by giving up some of the freedom that Delaware offers," but I think in practice that is not very appealing. It is also unlikely mostly due to the points about sensibility and predictability of Delaware law. Shareholders, like managers, will often prefer predictable sensible rules over uncertain rules that might be more favorable to them.
3. I also asked ChatGPT, which gave me a clear, confident but wrong answer: "In summary, Texas courts generally apply the business judgment rule, giving substantial deference to the decisions of corporate directors and officers unless evidence of wrongdoing or breach of fiduciary duty is present. In contrast, Delaware courts typically use the entire fairness standard with enhanced scrutiny, placing a greater burden on corporations and their directors to prove the fairness of CEO compensation packages." But that is not at all true about Delaware law? I mean the chancellor did apply entire fairness in Musk's case, because he is a controlling shareholder, but that is not generally true, and the first page of her opinion says "A board of director's decision on how much to pay a company's chief executive officer is the quintessential business determination subject to great judicial deference." So I will not trust ChatGPT on this one.
4. Incidentally, in that 1984 federal case, the court complained in a footnote: "We are both surprised and inconvenienced by the circumstance that, despite their multitudinous and voluminous briefs and exhibits, neither plaintiffs nor defendants seriously attempt to analyze officers' and directors' fiduciary duties or the business judgment rule under Texas law. This is

particularly so in view of the authorities cited in their discussions of the business judgment rule: Smith and Gearhart argue back and forth over the applicability of the plethora of out-of-state cases they cite, yet they ignore the fact that we are obligated to decide these aspects of this case under Texas law.”

5. Indap notes: “The fee award in this case will be more challenging, however, given that Musk is simply returning shares he had been granted and that no cash is changing hands between the sides. Bernstein and two other law firms working with it could end up taking fees in Tesla shares, some lawyers speculated.”

Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/02/the-bill-comes-due.html

Thursday, February 1, 2024

The Bill Comes Due

By Ann Lipton

So, anything interesting happening in corporate law this week?

I kid, I kid. On Tuesday, Chancellor Kathaleen McCormick of the Delaware Court of Chancery issued her long-awaited opinion in *Tornetta v. Musk*, where she took the extraordinary step of holding that Elon Musk's Tesla pay package from 2018 was not "entirely fair" to Tesla investors, and ordered that it be rescinded. In practical effect, she ordered the cancelation of stock options worth about \$51 billion, or, according to news reports, about a quarter of his current wealth. Put that together with the Twitter purchase, the State of Delaware and Chancellor McCormick have cost Musk about \$90 billion, give or take (though a contrary take would involve the words "actions" and "consequences").

The legal standards

Normally, the decision of what to pay a corporate CEO – like any other business decision – is controlled by the board of directors, and not subject to second-guessing by a court. But, like any other business decision, that changes if the executive pay package can be seen as self-dealing, namely, the decisionmakers have a financial interest in the arrangement.

In a normal company, that isn't a problem; the corporate directors act at arm's length from the CEO for the purposes of negotiating the pay package.

In companies with controlling shareholders – like Meta and Mark Zuckerberg, for example, which McCormick namechecks in her opinion – any compensation package would necessarily be tainted with the specter of self-dealing (how seriously can the Meta board bargain against Zuckerberg?), and so controllers tend to forego compensation entirely, which, of course, seems reasonable because they already have so much equity in the company that they are plenty incentivized to come to work every day.

That said, if a company chooses to engage in a conflicted transaction, it is not automatically illegal; it simply is assessed under a complex set of legal standards if it is later challenged in court by a stockholder.

The basic rule is, if an independent decisionmaker interposes themselves in the process, the court will defer to that decisionmaker. If not, the court will closely examine the transaction to ensure its fairness.

Typically, the independent decisionmaker will be independent board members. In the process of negotiating an executive pay package, for example, some board members may have close ties to the executive, but others will not, and so the ones who can be objective will make the call.

Alternatively, the independent decisionmaker can be the disinterested shareholders, who can vote to approve the transaction.

In Delaware, however, those rules only hold for conflicted transactions that do not involve a “controlling shareholder,” or controller. Typically, controllers are those who control more than 50% of the company’s voting power, but control may in fact exist through other means. More on that in a minute.

Delaware courts have come to coalesce around the rule that if a controlling shareholder is on the other side of a conflicted transaction, both board members and disinterested stockholders may be so intimidated or captured by the controller that they will be hesitant to buck his will. Hence, those transactions can only be cleansed if *both* the independent directors, *and* the disinterested stockholders, approve it.

If only one mechanism is used – just independent directors, or just disinterested stockholders – controlling shareholder conflict transactions will still be assessed for their fairness, but the stockholder plaintiff will have the burden of proving by a preponderance of evidence a *lack* of fairness, rather than the defendant controller proving *fairness*.

What McCormick found

Formally, in *Tornetta*, the court concluded that Elon Musk was a controlling shareholder of Tesla, at least for the purposes of setting his compensation package. The court considered both his 21% percent stake, and his “ability to exercise outsized influence in the board room” due to his close personal ties to the directors and his “superstar CEO” status. She recounted the process by which the pay package was set, noting in particular that Musk proposed it, Musk controlled the timelines of the board’s deliberation, and he received almost no pushback – board members and Tesla’s general counsel seemed to view themselves as participating in a cooperative process to set Musk’s pay, rather than an adversarial one.

What about the stockholder vote? That, too, was tainted, because – McCormick concluded – the proxy statement delivered to shareholders contained material misrepresentations and omissions. It described Tesla’s compensation committee as independent when in fact the members had close personal ties to Musk, and it did not accurately describe the manner in

which his pay package was set – again, with Musk himself proposing it and the board largely acquiescing. With those findings in hand, McCormick did not rule on the plaintiff’s additional arguments that the proxy statement was misleading for other reasons (namely, it falsely described the payment milestones as “stretches” when in fact the early ones were already expected within Tesla internally.)

Therefore, McCormick turned to the fairness analysis, with defendants bearing the burden of proof. McCormick recognized that Musk had delivered extraordinary value for Tesla, but that was only one side of the equation. The other side was whether his shockingly large pay package was *necessary* to get that result; given that Musk already held a 21% stake and had no intention of leaving the company, she concluded it was not. Or, at the very least, the package was flawed because the Board had not even *asked* whether such sums were necessary. Moreover, in its deliberations, the Board had identified precisely one particular concern about Musk: Whether he was too distracted by his outside interests to focus on Tesla. But there was no further discussion of that issue, and no proposal to condition his pay on limiting his distractions.

McCormick did not specifically so hold, but she must have been aware that, far from incentivizing Musk’s undivided attention, the Tesla pay package enabled Musk’s purchase of another massive distraction that almost certainly is damaging Tesla’s brand.

And, well. Here we are.

Currently, however, Delaware is in the process of reevaluating its standards for reviewing controlling shareholder transactions. The argument under consideration is whether certain kinds of transactions – executive pay packages, for example – can be cleansed, and thus insulated from judicial review, through *one* protective mechanism rather than two (independent board or independent shareholder approval), the same way conflict transactions that do not involve a controlling shareholder usually are. Even if the Delaware Supreme Court so holds, though, that fact alone would not necessarily save Musk’s pay package, because McCormick concluded Musk’s pay package was not cleansed *either* way. She might have to rejigger her findings a little to clarify, but that’s all.

Similarly, if the Delaware Supreme Court were to conclude that Musk did not, in fact, deserve the formal label of controlling shareholder – say it suddenly set a bright line rule that controlling shareholders must have 50% of the vote – that still would not save Musk’s pay package (though, again, McCormick might have to revise her opinion a little), because McCormick made clear that the board’s decisionmaking was tainted by close ties to Musk no matter what label you apply (see fn. 546: “The factual findings that render Musk a controller, however, support a finding that the majority of the Board lacked independence.”), and so was the stockholder vote, so either way, there was no independent decisionmaker.

If, however, the Delaware Supreme Court did two things – say it *both* concluded that Musk was not a controlling shareholder, *and* it overturned McCormick's factual finding that the shareholder vote was tainted – that might save Musk's \$51 billion, though – again, more below – the more likely outcome is McCormick would have to retry certain aspects of the case.

The takeaways

The overriding sense that one gets from this opinion that the bill for Tesla's open and notoriously poor governance standards just came due.

Tesla shareholders, as well as other commenters, have for years complained about everything from the close personal ties Tesla's board has to Musk, to the manner in which Musk's other companies compete for his attention, to Musk's open defiance of his settlement with the SEC, to the fact that Musk casually conscripts Tesla employees to work at other companies in his empire. Now, for the first time, all of these aspects of Musk's reign coalesced into a single, legal conclusion that was fairly obvious to the rest of us but I think has devastating implications for Tesla going forward: Tesla's board exercises no oversight over Elon Musk.

McCormick even took on the "Technoking" title:

Musk testified that the title was intended as a joke, but that is a problem in itself. Organizational structures, including titles, promote accountability by clarifying responsibilities. They are not a joke.

McCormick was obviously ruling in the shadow of VC Slight's previous conclusion that Musk *had not* exercised control over the board for the purposes of the SolarCity acquisition, and so *formally*, she limited her own holding to Musk's control *for the purposes of his pay package*, but she also drew in the entirety of Musk's tenure. And, in a footnote, she pointed out that though Slight had characterized board member Robyn Denholm as a "powerful, positive force," that particular version of Denholm had not shown up in McCormick's courtroom:

this court previously held that Denholm was "an independent, powerful and positive force during the deal process" that led to the SolarCity acquisition. And that was surely true at the time. But it was not a factual finding that carries forward for all time. Moreover, Denholm's approach to enforcement of the SEC Settlement, including unawareness of one of its key requirements, suggests a new lackadaisical approach to her oversight obligations.

Leaving aside the legal formalities, the obvious question is – was McCormick *right*? Whether or not Tesla formally complies with Delaware corporate governance standards, Musk has unquestionably delivered extraordinary value to its shareholders. The “Technoking” title may very well highlight the casualness with which Tesla directors approach their responsibilities, but also *that’s the kind of thing Tesla shareholders value*. It may not improve cash flows, but, at least historically, it improves *stock prices* by pleasing Musk fans. Which raises a very interesting doctrinal question – one I think posed in a more academic way in this paper by Charles Korsmo and Minor Myers – is it the duty of a Delaware board to raise stock prices – even by, say, taking Zoom calls with no pants on or buying a gold mine – or is it the duty to improve fundamental value?

Societally we may prefer the latter but Tesla shareholders individually presumably prefer the former. On the other hand, even the share-price approach is a bit like catching the tiger by the tail; it only lasts as long as Musk’s star power lasts, and that may not be forever.

I was struck by Antonio Gracias’s testimony that the package was designed to give Musk “dopamine hits,” because I think that is not a bad way to look at it. Yes, he presumably was internally motivated to boost Tesla’s stock price because of his own 21% stake, but we all know – or we think we know – Musk’s *psychology*. What motivates him psychologically isn’t (just) the money, but things he views as outrageous challenges. Maybe by gameifying his compensation package – presenting him with impossible goals and then, when he met them, ringing bells and showering confetti and gold coins – the board really *did* extract maximum performance.

On the other hand, as McCormick repeatedly emphasized, there was some evidence that at least the early goals were not particularly challenging. But that’s just like any game; the first levels are always the easiest.

We could also ask whether McCormick reached the right conclusion about the shareholder vote. Yes, the proxy statement may not have explained the full extent of Musk’s board ties, but did anyone really not understand the Tesla board’s (lack of) independence? (An internal document from ISS made pretty clear that ISS, at least, believed the board to be weak, but for whatever reason was hesitant to say so openly). And once you know all that, did it really matter that the full embarrassing process by which the compensation package was formulated was not laid out in the proxy? Surely no one thought this was an arm’s length negotiation?

The problem, from my perspective, is that those gut level reactions do not map to the legal standards in a coherent way (you can use concepts like “materiality” or whatnot but there is no way to apply those in the kind of “one ticket only” way that Musk and Tesla require). And

of course, the legal standards have a *societal* function of professionalizing large, powerful companies, in a way that is important even to nonstockholders, regardless of their specific impact at Tesla, though that's not something Delaware can formally acknowledge.

What happens now?

Now, I assume, Tesla appeals. I am not going to hazard a guess on outcome, though I will make a couple of quick observations.

First, as I have previously written – twice – Delaware's standards for determining who gets the label of "controlling shareholder" are very malleable. However, as I blogged previously, I think in its *SolarCity* opinion, the Delaware Supreme Court did provide some guidance on that score, suggesting, in a roundabout way, that only the power to elect directors and approve transactions, or possibly block them, should factor in to the analysis. McCormick did not take that hint, though; she did a more holistic review, which may turn out to be legally vulnerable. But, as I said above, that's not enough, standing alone, to knock out her core conclusions.

Another area that might be the focus of an appeal would be the shareholder vote. Musk could argue that the omissions were, in fact, immaterial to shareholders. I will not say that is a *losing* argument, but I will say it would be *aggressive* if the Delaware Supreme Court were to reverse on that score. If it did so, however, that – standing alone – would not save Musk's pay package. So long as Musk retains the "controlling shareholder" label – and Delaware maintains its double-protection rule for controlling shareholder transactions – a reversal on that score would mean, at most, a remand to shift the burden of proof from defendants to the plaintiff, and I think it's ... unlikely ... the outcome would change. Plus, McCormick did not even rule on arguments that the proxy statement was misleading for *other reasons*, so a remand would give her another crack at that issue.

And if Delaware *both* changes its standards for cleansing controlling shareholder transactions (or holds Musk was not one), *and* holds the shareholder vote was not tainted, that *still* should result in a remand for McCormick to determine whether the plaintiff's *additional* arguments that the proxy statement was false – the ones she did not engage – succeed. For Musk to get a complete win, in other words, the Delaware Supreme Court would likely have to conclude either that he is not a controller (or that controller-conflicted transactions do not need two levels of protection), *and* that the shareholder vote was not tainted, *and* that the claims McCormick *did not rule upon* have no merit and do not need to be tried.

That is ... a tough lift for Musk.

Notice I have not even considered the possibility the Delaware Supreme Court would reverse McCormick's findings that the board was beholden to Musk because ... no. I mean, Musk could *argue* that there is nothing bad about a board "cooperating" with a CEO to develop a pay package; he could try to make a parody of McCormick's findings by claiming that she unfairly seemed to want the CEO and the board to be at loggerheads, but ... no.

Which means on the *law*, I like the plaintiff's chances. On the *political economy*, though – well, Musk is obviously beating some very loud drums about reincorporating out of Delaware, and I have previously asked whether that kind of thing could influence Delaware's decisionmaking. On the other hand, the Delaware Supreme Court cannot be *seen* as capitulating to Musk, which means if it reverses McCormick, it must have a fairly solid basis to do so.

Edit: I suppose the Delaware Supreme Court could reweigh the evidence and conclude the pay package was fair, but that would be *extremely* aggressive. So aggressive that it literally did not occur to me, which is why I had to edit this post.

No, but what happens now to Tesla?

Let's assume the opinion stands. That company does not have a lot of great choices.

Assuming Musk does not want to go the Zuckerberg-no-compensation route, any new compensation award will have to be negotiated by the board in the shadow of McCormick's findings (not to mention Musk's threat to breach his fiduciary duties by diverting AI opportunities from Tesla to his other companies, which, this post is long enough, I am not going there).

But the problem extends beyond compensation to a host of other issues. There are already pending cases, that have been stayed, about board oversight of Musk – the failure to monitor his tweets, for example, or to enforce the SEC settlement – at this point, I've lost track of them all. Tesla was just accused of dumping hazardous waste; that's the stirring of a *Caremark* claim. Musk has been using Tesla engineers at Twitter – there's a claim for self-dealing. Each new Musk antic will prompt another lawsuit, and every single time, the plaintiff will begin by citing the *Tornetta* decision as evidence that the board is not independent of Musk and cannot consider a demand. It's like a dam has broken, a wall of protection around Musk – the polite fiction, which no one believed to begin with, that he operates under board oversight.

One way out would be to visibly and strongly restructure the board – possibly by appointing new members. But can anyone imagine Musk tolerating a genuinely empowered board that tried to, among other things, curb his outside ventures?

Another way out would be for Tesla to follow through on Musk's latest suggestion: Reincorporation to Texas. That would require a shareholder vote, but Tesla's stock is, like, 40-50% retail, with another chunk held by Musk and Musk allies, it's not literally impossible that the vote would succeed.

But can you even imagine what the lawsuit would look like if Musk's board proposed reincorporation to Texas on the basis of Musk's Twitter poll, after a shocking indictment of its stewardship?



There is currently pending a lawsuit challenging a Delaware reincorporation to Nevada. It's a novel claim that the controlling shareholder is seeking to avoid Delaware's strict standards for reviewing conflicted transactions. I have no idea how that will come out; it's a dilemma for the Delaware courts.

But in *Tesla's* case – and someone correct me if I'm wrong – it's not quite as obvious that the formal legal standards in Texas are so different from Delaware's. They seem pretty MBCA-like: universal demand, there may be some limits on what counts as interested/dependence/independence but nothing a clever plaintiff couldn't plead around. That's not the reason Musk wants to go there; he wants to go there because he expects the *judges* will be biased in his favor.

Suing shareholders would argue that the reincorporation was intended to protect Musk's ego and his power, not shareholder value. Which brings us back to the question posed by *Tornetta*: Is shareholder value measured by stock prices alone?

As for me, here's to another round of edits to my *Twitter v. Musk* paper, now forthcoming in the Virginia Law & Business Review.



@annmlipton@esq.social
@AnnMLipton



a tesla sh will file a books and records action to establish musk's knowledge/indifference. then comes the caremark derivative lawsuit, w/ tornetta's findings to establish demand excusal due to a beholden board



Sean O'Kane @sokane1 · 19h

NEW: Tesla sued by DAs in 25 California counties over alleged mishandling/disposal of hazardous waste at service centers and production facilities in the state.

Story (WITH THE FILING AHEM): ...

[Show more](#)

5:01 PM · Jan 31, 2024 · **18.4K** Views



5



24



87



7



Post your reply

Reply



AGr @BrandonAGr · 19h



Why would he have knowledge of trivial waste management procedures at service centers?



177



Andrew Charles Baker @Andrew__Baker · 16h



if its what you say it is i love it, especially later in the summer.



2

195





@annmlipton@esq.social
@AnnMLipton

...

If Tesla holds a shareholder vote on reincorporation based on the outcome of a Twitter poll, I will be so, so happy



Elon Musk @elonmusk · 2h

...

The public vote is unequivocally in favor of Texas!

Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas.



Elon Musk @elonmusk · Jan 30

Should Tesla change its state of incorporation to Texas, home of its physical headquarters?

[Show this poll](#)

11:33 PM · Jan 31, 2024 · 5,603 Views



9



13



77



3



Post your reply

Reply



@annmlipton@esq.social @AnnMLipton · 12h

...

And for the curious, Tesla's charter requires a 2/3 vote to amend certain of its provisions, and I'm like 90-95% sure that does not apply to conversions to a Texas entity as long as the same provision carries over

sec.gov/Archives/edgar...



2



5



21



1.2K



Paul Weitzel @IThinkIAgree · 2h

...

Also, if one of the elements against you is that you dominate the board, maybe don't announce that you can unilaterally decide to switch states based on the whimsy of a Twitter poll.



2



73





John Jenkins @JohnJenkins36 · 7h

...

With each passing day, Elon reminds me more & more of the kid from The Twilight Zone who wishes everyone into the cornfield.



🗨️ 🔄 1 📊 187 📌 ⬆️



DJ @DJNYCNY · 6h
DGCL 141(a)(420)

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🗨️ 🔄 1 📊 78 📌 ⬆️



KSAlberta @k_salberta@masto.ai @ksalberta.bsky.so @k_salberta · 5h

...

Way to prove that McCormick was right, and Musk is a conflicted controller!

🗨️ 🔄 2 📊 73 📌 ⬆️

More replies



O'Neil @ONeilBox · 7h

...

these guys are loving life right about now 🤪

Gregory V. Varallo, Glenn R. McGillivray, BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP, Wilmington, Delaware; Jeroen van Kwawegen, Margaret Sanborn-Lowing, BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP, New York, New York; Peter B. Andrews, Craig J. Springer, David M. Shorz, Andrew J. Peach, Jackson E. Warren, ANDREWS & SPRINGER LLC, Wilmington, Delaware; Jeremy S. Friedman, Spencer M. Oster, David F.E. Teitel, FRIEDMAN OSTER & TEJTEL PLLC, Bedford Hills, New York; Counsel for Plaintiff Richard J. Tornetta:

🗨️ 🔄 1 📊 33 📌 ⬆️



@annmlipton@esq.social
@AnnMLipton

...

Oh for the love of god, The first time a Texas incorporated company promotes a gay person, Ken Paxton will sue to dissolve their charter.

^ Axios 🟡 @axios · 21h

Elon Musk's eye on re-incorporating the automotive company comes as the Lone Star State works on setting up its own business court network — which could challenge Delaware's preeminence. trib.al/Z94cvL6

3:34 PM · Jan 31, 2024 · 4,458 Views



5



1



34



3



Post your reply

Reply



Adam T. Whitten 🇺🇸 @AdamTWhitten · 19h

...

They're having a little trouble recruiting over here.



From news.bloomberglaw.com



1



2



72



@annmlipton@esq.social @AnnMLipton · 19h

...

"He's now stuck searching for candidates with 10 years or more of experience in complex civil business litigation, who are willing to accept a starting salary of \$140,000."

!!! first year corp associates make more than that, if they clerked, they get a higher bonus than that



5



60





Socialist Corporate Lawyer @LawSocialist · 17h

...

This is a fantastic take. I keep thinking about the mileage the Delaware courts have, comparing the stability of internal state politics had not occurred to me. Like the thing that makes it work is a certain amount of balance.



41



Notorious JBG @gelbach · 20h

...

Maybe they can just have ERCOT run the court



121



Kevin Baum @kevinbaum013 · 17h

...

The only time people care about Texas corporate law is when a massively profitable company wants to jettison billions in tort liability.



95



Jon Bryant @JonBryant421 · 19h

...

I don't think they can sell directly in the state either.



48



This Post was deleted by the Post author. [Learn more](#)



@annmlipton@esq.social @AnnMLipton · 20h

...

Don't tell it to me, tell it to the next Disney



59





@annmlipton@esq.social

@AnnMLipton

...

Okay I'm not really liveblogging my read but this is actually my favorite line so far:

When asked about his December 1 proposal, Musk volunteered an answer that the plaintiff's counsel has gleefully emphasized at every opportunity. He said that the December 1 proposal "was, I guess, me negotiating against myself."³³⁹

7:08 PM · Jan 30, 2024 · 7,021 Views



3



18



113



6



Post your reply

Reply



@annmlipton@esq.social @AnnMLipton · Jan 30

...

I am not really liveblogging but wow - I didn't even realize they got these kinds of dox:

agnitude[.]”⁴⁴⁶ In an internal email, ISS noted that it “steered clear of getting too deep into this[]” because “making that argument essentially puts us in the situation of saying Tesla’s board is not strong enough to stand up to Musk[.]”⁴⁴⁷



2



26



1.2K



When asked about his December 1 proposal, Musk volunteered an answer that the plaintiff's counsel has gleefully emphasized at every opportunity. He said that the December 1 proposal “was, I guess, me negotiating against myself.”³³⁹

grant magnitude[.]”⁴⁴⁶ In an internal email, ISS noted that it “steered clear of getting too deep into this[]” because “making that argument essentially puts us in the situation of saying Tesla’s board is not strong enough to stand up to Musk[.]”⁴⁴⁷



Firthermor @firthermor · Jan 30



The negotiations ...



2



211



passthebeano @passthebeano · Jan 30



"If I did it."



8



288





Rob Schmied @rschmied · 10h

Kinda proves that he still completely controls the board. This certainly has not yet been board approved.



Elon Musk @elonmusk · 15h

The public vote is unequivocally in favor of Texas!

Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas. [twitter.com/elonmusk/statu...](https://twitter.com/elonmusk/status/1511111111)

25

21

113

10K



Pabst Street Capital Management @PBRStreetGang7 · 1h

As someone short [\\$TSLA](#), I would like nothing more than for Tesla to incorporate in Texas.

Shareholder Letter to Tesla's Board of Directors

Shareholder Letter to Tesla's Board of Directors

The shareholders (listed in the attachment)

1. Support unequivocally that Tesla's state of incorporation is changed from Delaware to Texas, where Tesla is already headquartered. Tesla staying incorporated in Delaware is untenable if Shareholder Votes will be rescinded.

18

7

50

3.3K

Musk's Tesla-to-Texas Proposal Risks Showdown in Delaware Court

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XO8SHOC000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XO8SHOC000000)



- Tesla CEO floats reincorporating in Texas after loss over pay
- Any move could be a messy process, with more litigation

Elon Musk, frustrated with Delaware, is threatening to relocate Tesla Inc. to Texas, but that could land him back precisely where he doesn't want to be: a Delaware courtroom.

Musk vented on his social media platform, X, about Delaware this week after the state Chancery Court invalidated his \$55 billion pay package with Tesla. And after his X followers overwhelmingly voted in favor of moving Tesla's incorporation to Texas, where the electric car maker is headquartered, Musk said he plans a shareholder vote on the issue.

It wouldn't be the first time Musk decamped from Delaware. After buying Twitter Inc. in 2022, he merged the company with X Corp., an entity incorporated in Nevada. The move probably involved little more than an afternoon of paperwork, and went off without a fight.

A similar move by Tesla, a public company, would be much more complicated, and require a vote by Tesla's public shareholders. It also runs the risk a shareholder could sue to block the deal—as was the case with another public company, TripAdvisor Inc., which was hit with a lawsuit last year over its planned exit from Delaware.

“Twitter to X is like Musk all by himself signs some documents,” said University of Iowa law professor Robert Miller, who has written about the development of Delaware corporate law. “Here he's going to have to, at the minimum, get a shareholder vote. And probably litigation following.”

Shareholder support isn't a given. Large investors are fond of Delaware, which touts itself as home to nearly 70% of Fortune 500 companies. And the “process by which that would get put to the stockholders would have to be pristine because there will be a lawsuit,” said Brian Quinn, a Boston College law professor focused on corporate law.

TripAdvisor's Woes

What happens in the TripAdvisor lawsuit likely will be important for any of Musk's plans to depart Delaware.

Brought by an investor, the suit argues Greg Maffei, chairman of TripAdvisor's parent, is using his voting power to relocate to Nevada, a state whose laws provide more legal protection to company directors against investors' lawsuits. The suit paints the decision as a self-interested move by a controlling shareholder.

A Tesla investor wanting to stay in Delaware might similarly argue that relocating to Texas is Musk's attempt to get his pay package. The court has already found he controlled Tesla when he got that package, in part because of his role as "superstar CEO" and power over the board.

Read More: Musk Ruling Casts Pall on Billionaire-Spawning Moonshot Awards

The Chancery Court heard arguments in the *Maffei* case in November. An eventual ruling, expected in the coming months, will likely provide guidelines for companies when a shareholder who controls the voting power wants to leave Delaware.

"If *Maffei* says, 'No, you can't do this for an inequitable purpose,' it will make it more difficult—not impossible, but more difficult—for Musk to do that," Quinn said.

Rare Move

It's rare for a mature public company to leave Delaware, said Minor Myers, a corporate law professor at the University of Connecticut. Delaware's Chancery Court, with over 125 years of case decisions, has built up an expertise—and a degree of predictability—in handling business disputes that many companies treasure.

In contrast, Texas is set to open a new court just this year to handle complex business disputes.

"When you go to Texas or Nevada or someplace else, things become a lot less predictable," University of Iowa's Miller said.

But observers aren't writing off the reincorporation talk as mere bluster after a devastating court loss over Musk's pay.

Musk has been known to poll X users about important decisions, and by Wednesday evening, about 87% of the 1.1 million votes on his survey were in favor of moving to Texas. In response, Tesla will "move immediately to hold a shareholder vote," he said.

"If it was anybody else, I would say I would not expect it," Anat Alon-Beck, a corporate law professor at Case Western Reserve University, said of the relocation, while noting potential legal issues it could create. "But because it's Musk, I don't know what he's going to do."

'Delighted' to See Him Go

Musk could see potential benefits to moving Tesla's incorporation to the Lone Star State, including thinking he'll get a hometown advantage in potential future court fights, some observers said.

Delaware, for its part, might not mind seeing Musk leave.

Known for his willingness to defy authority, Musk has been involved in messy legal disputes in Delaware courts, including after he tried to back out of buying Twitter. The Tesla pay case, which resulted in a 200-page ruling on Jan. 30, followed years of litigation.

Those types of cases can be a drain on state resources.

"This guy is in court all the time, with big, hard, complicated things," Miller said. "They would be 100% delighted if he leaves."

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To contact the editors responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com; Anna Yukhananov at ayukhananov@bloombergindustry.com

Tesla Inc

Tesla shareholders will vote on moving incorporation to Texas, says Elon Musk

Move comes after chief executive's record pay package was voided by a Delaware judge



Elon Musk said an informal poll he had held on X about a shift to Texas had been 'unequivocally in favour' © NurPhoto/Reuters Connect

William Sandlund in Hong Kong and **Peter Campbell** in Hethel, Norfolk 9 HOURS AGO



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[Explore the China Focus hub](#)

Elon Musk has said Tesla will “immediately” hold an investor vote on whether to move its corporate registration to Texas, after a court judgment in Delaware voided his \$56bn pay package.

The billionaire posted his comments about shifting to the state where Tesla’s physical headquarters are located following the ruling this week by Kathaleen McCormick, a judge in the Delaware Court of Chancery.

“Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas,” Musk [wrote](#) on his social media platform X.

He added that an informal poll he had earlier held on such a shift was “unequivocally in favour of Texas”.

In the X poll, 87.1 per cent of 1.1mn voters said the electric-car maker should change its state of incorporation.

[Tesla](#) already has strong ties to Texas, having moved its headquarters to Austin from Silicon Valley as Musk railed against California’s lockdowns during the coronavirus pandemic.

In this week’s ruling in Delaware, McCormick said Musk’s record-breaking \$56bn remuneration package had been improperly approved by the company’s board and had short-changed shareholders.

Her decision came in a lawsuit by Tesla shareholders who claimed the award was excessive. It also came despite the company hitting 12 out of 16 ambitious financial targets approved by the carmaker’s board when the package was initially approved in 2018.

Musk has previously canvassed his followers on X for their opinion on significant business decisions. In 2021 he asked whether he should sell more of his Tesla shares, while a year later he sought their views on whether to step down as head of Twitter, now renamed X, following his purchase of the platform.

Hours after the ruling, which Tesla can still appeal against, Musk wrote on X: “Never incorporate your company in the state of Delaware.”

The ruling comes at a difficult juncture for Tesla, which last month warned that sales growth would slow as consumers cut back and competition, [particularly from China’s BYD](#), intensifies. Tesla’s share price is down about a quarter this year.

When the targets for Musk’s compensation were initially set, they were judged to be extremely exacting as Tesla struggled to increase production.

The plan was intended to lock him into the business at a time when the board was concerned that he might leave to focus on other interests.

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Here's How Elon Musk's \$56B Executive Comp Loss Could Reverberate

 [law.com/2024/01/31/heres-how-elon-musks-56b-executive-comp-loss-could-reverberate](https://www.law.com/2024/01/31/heres-how-elon-musks-56b-executive-comp-loss-could-reverberate)



Elon Musk, chief executive officer of Tesla, left, and Chancellor Kathaleen McCormick of the Delaware Chancery Court, right. Photos: Sarah Sibling/Bloomberg and Eric Crossan/Delaware Chancery Court via Wikipedia

NEWS

Shortly after Chancellor Kathaleen St. J. McCormick issued her post-trial opinion finding Elon Musk's \$56 billion compensation agreement with Tesla should be rescinded, Musk posted one possible takeaway: "Never incorporate your company in the state of Delaware."

January 31, 2024 at 03:13 PM

Corporate Governance



Ellen Bardash [→](#)

The original version of this story was published on Delaware Business Court Insider

Shortly after Chancellor Kathaleen St. J. McCormick issued her post-trial opinion finding Elon Musk's \$56 billion compensation agreement with Tesla should be rescinded, Musk posted on his X (formerly Twitter) app one possible takeaway: "Never incorporate your company in the state of Delaware."

For litigators who practice in the Court of Chancery or otherwise represent Delaware corporations or their shareholder, there may be more nuanced guidance that the opinion may offer for future litigation or how to avoid it.

Attorneys who represented the winning shareholder, thrash metal drummer Richard Tornetta, in the case say the decision will likely be used as a precedent in some ways, but in others could be an outlier because of its highly fact-specific nature.

"She did an incredibly thorough, scholarly job on this. She took it apart piece by piece by piece, made every decision she needed to make and grounded her reasoning in a careful deep dive into the facts that were proven at trial," Bernstein Litowitz Berger & Grossmann partner Gregory Varallo said of McCormick's decision. "This is exactly what trial judges are supposed to do, and she did an outstanding job with it."

Francis Pileggi of Lewis Brisbois Bisgaard & Smith said it remains to be seen how many other cases will be analogous enough to the Tesla situation for the decision to be applicable.

"The circumstances of this case are unlikely to be replicated soon, not only because it's unlikely that anytime soon the court will review a \$55 billion compensation package for one person, but it's unlikely that the court will be reviewing a situation where the company involved at one point was valued at over \$1 trillion," Pileggi said. "It's unlikely that the person whose compensation is being challenged is also the CEO of several other multi-billion dollar publicly held companies."

Corporate litigators have been awaiting a post-trial decision for a year, wondering if the opinion might fill in a few more pieces of the conflicted shareholder deal litigation puzzle in Delaware that's been coming together in recent years.

Since 2022, a series of decisions from the Court of Chancery and the Delaware Supreme Court have been circling questions of what exactly constitutes a controlling shareholder and when a controlling shareholder goes too far in a transaction, applying the entire fairness standard in several cases challenging how board members and controllers interacted when negotiating transactions.

The Musk compensation decision deviated from the recent trend by identifying an instance where those interactions crossed a line, finding a process and price went too far to be fair under Delaware law.

Until now, the court's increasingly common application of entire fairness had resulted in defense wins, including one against another Tesla shareholder who filed a suit over the company's acquisition of SolarCity. That's put pressure on plaintiffs' lawyers who have seen courts find a deal process was proven to be flawed but not to an extent that resulted in a shareholder victory.

"It's a reminder for directors to comply with their fiduciary obligation and not just bend to the will of some domineering chairperson CEO, and it's a reminder for fiduciaries to be honest and truthful with their shareholders," Bernstein Litowitz partner Jeroen van Kwawegen said. "It's important fiduciaries play by the rules of the game and honor their obligations to the company and the shareholders whose interests they're supposed to be representing."

All of the decisions issued in the SolarCity case avoided directly addressing the issue of whether or not Musk controls Tesla, and McCormick wrote the compensation case was "as good a time as any to run it to ground."

In addition to Musk's ownership of just under 22% of Tesla's stock, McCormick determined Musk controls Tesla, at least in terms of this particular transaction, because of his power over managerial decisions, decision makers and the process. Though that decision was highly fact-specific, Varallo said the analysis offers some guidance for other attorneys trying to make a similar point about control.

"This is very helpful precedent. This takes a deep dive into what situational control means," Varallo said. "Of course, the facts are always different in each case, and the odds of anybody finding facts even close to this again in a company not named Tesla are pretty low."

But that's not a death knell for Musk in other challenges to Tesla transactions that may come before the Delaware court. Because situational control applied, McCormick left the door open for Tesla and its lawyers to argue in any future litigation involving other deals that Musk wasn't a controller in other situations.

Outside the courtroom, Varallo said, Musk's compensation package at Tesla opened the door for other corporations to pay their CEOs much more than they might have in the past, though it's unlikely the decision will spur other litigation over compensation that took into account Musk's agreement. Without Musk's compensation package as an example, he said, CEOs could start seeing compensation agreements worth less.

“Before this pay package, the upper limit was X. Then after this pay package, everybody started giving their CEOs billion dollar packages because Elon did it,” Varallo said. “I think if you uphold the rescission of this, maybe, with a little luck, the data set for compensation comes back closer to Earth rather than Mars.”

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- James Murdoch, Antonio Gracias criticized for personal ties
- Robyn Denholm made \$280 million as Tesla director, judge notes

The judge who rejected Elon Musk's \$55 billion Tesla Inc. compensation package likened the board that approved it to "supine servants of an overweening master" rather than independent directors looking out for shareholders.

In her 200-page decision, Delaware Chancery Court Judge **Kathaleen St. J. McCormick** focused on six board members she called "the decision makers," five of whom she said were conflicted by their personal or business ties to Musk. Two were close friends who often vacationed and socialized with Musk, while three others were "beholden" to him in other ways, the judge said.

One of the directors made \$280 million exercising options she was paid at Tesla, McCormick noted.

"Neither the compensation committee nor the board acted in the best interests of the company when negotiating Musk's compensation plan," the judge said. "In fact, there is barely any evidence of negotiations at all. Rather than negotiate against Musk with the mindset of a third party, the compensation committee worked alongside him, almost as an advisory body."

Musk, his brother **Kimbal** and venture capitalist Steve Jurvetson were also on the nine-member Tesla board but didn't participate in the 2018 votes on the pay package. Here are the directors who unanimously approved it:

Ira Ehrenpreis

Ehrenpreis, a Tesla director since 2007, chaired the board's four-member compensation committee, which was responsible for negotiating the pay package. The founder of venture capital firm DBL Partners, Ehrenpreis netted \$200 million from selling some of his Tesla options in 2021 and also had \$75 million invested in other Musk-controlled companies, the judge noted. He was also invested in Kimbal Musk's restaurant group, and had testified that

his longtime relationship with the Musks had a “significant influence on his professional career.” McCormick said Ehrenpreis’ failure to negotiate with Musk showed he was “beholden” to him.

Antonio J. Gracias

Gracias, also a compensation committee member, probably had the closest personal and business relationship to Musk. The founder of Valor Equity Partners, Gracias was the third-largest individual investor in Tesla in 2017, the judge noted, and his stake was worth \$1 billion in 2021. Valor and Gracias have also invested hundreds of millions of dollars in other Musk ventures, including SpaceX, SolarCity, The Boring Company, and Neuralink. Musk and his brother have in turn invested in Valor. In addition to their business ties, Musk and Gracias socialize as often as once a month, have spent Christmas together and have a longstanding tradition of spending Presidents Day weekend together at Gracias’ home in Jackson Hole, Wyoming. They’ve also vacationed together, including at illusionist **David Copperfield’s** Bahamas retreat. “The combination of business and personal ties make it undeniable that Gracias lacked independence from Musk.” McCormick said.

James Murdoch

Murdoch, the younger son of media mogul **Rupert**, was a board member who wasn’t on the compensation committee but voted on the pay package. Murdoch testified at the trial that he met Musk in the late 1990s, but they fell out of touch until becoming friends in 2006 or 2007, when Murdoch bought a Tesla Roadster. Since then, they’ve become close, vacationing together with their families in Israel, Mexico, and the Bahamas. It was during one of those trips, which Gracias also attended, that Murdoch was recruited to the Tesla board. The judge said Murdoch was conflicted due to his personal ties, though she also noted that he owned 10,485 Tesla shares through a family trust, personally invested \$20 million in SpaceX and another \$50 million through his private investment company.

Bradley W. Buss

Buss was a member of the board and compensation committee. A retired accountant and former chief financial officer of SolarCity Corp., Musk’s solar energy company that was acquired by Tesla in 2016, Buss had no personal relationship with Musk, according to the judge. But she found that Buss was beholden because nearly half his net worth was derived from his relationship to Musk. McCormick noted that he was paid \$2 million at SolarCity, then received \$17 million in compensation for service as a Tesla director between 2011 and 2018. He realized \$24 million from his sale of Tesla shares before 2018.

Robyn M. Denholm

Denholm, a former executive at Telstra Corp. and Juniper Networks Inc., joined the board and compensation committee in 2014. Like Buss, who recruited her, Denholm had no personal ties to Musk. But McCormick ruled that she lacked independence because she owed most of her wealth to her service as a Tesla director. She was paid \$17 million between 2014 and 2017 but made \$280 million exercising her Tesla options in 2021 and 2022, which she called “life-changing.”

Linda Johnson Rice

Johnson Rice was the only Tesla director McCormick found was not conflicted, though she also voted to approve Musk’s pay package. The former chair of Johnson Publishing Co., the now-defunct publisher of Ebony and Jet magazines, she was granted options for her work on the board but let them expire without being exercised, according to the judge. According to her personal website, she’s currently on the board of Omnicom Media Group and Enova International as well as a trustee of the Art Institute of Chicago.

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Musk, Tesla board have to start from scratch after \$56 billion pay deal thrown out

 [reuters.com/business/what-happens-musks-tesla-pay-after-56-billion-package-thrown-out-it-is-2024-01-31](https://www.reuters.com/business/what-happens-musks-tesla-pay-after-56-billion-package-thrown-out-it-is-2024-01-31)

Hyunjoo Jin, Tom Hals



Tesla and SpaceX's CEO Elon Musk gestures during an in-conversation event with British Prime Minister Rishi Sunak in London, Britain, Thursday, Nov. 2, 2023. Kirsty Wigglesworth/Pool via REUTERS/File Photo Acquire Licensing Rights [↗](#), opens new tab

Jan 31 (Reuters) - After a Delaware court threw out Elon Musk's \$56 billion pay package on Tuesday, the Tesla chief executive and a board seen as captive to him must find a way to negotiate a replacement contract. It will not be easy.

The ruling is spurring on investors who for years have raised concerns about Tesla board independence. This could be a turning point for Musk, who recently said he was uncomfortable transforming Tesla into an artificial intelligence leader if his control did not rise with a new pay package.

"This throws Tesla into a complete sort of tailspin from an executive perspective," said Tesla shareholder Ross Gerber, who said the court decision essentially required new independent board members who would provide CEO oversight. "Then it gets real messy because Elon - it's either his way or the highway," said Gerber, who last year publicly considered a board run as an independent.

Musk has not said what he will do, though an appeal is almost certain. Tesla shares fell 2.2% on Wednesday.

First, Musk will have to give back what he got if the ruling stands. He has satisfied the 2018 contract terms and received 12 tranches of options worth about \$51 billion.

However, the options grant "sits unexercised and undisturbed," the court ruling said, so giving up his earnings may not be complicated.

Deciding what to replace the package with will be a difficult process, since it is unclear who will bargain on Tesla's side. The judge who threw out the package called it an "unfathomable sum" that was unfair to shareholders and questioned the board's independence.

Equilar estimated in 2022 that Musk's package was around six times larger than the combined pay of the 200 highest-paid executives in 2021. Musk was the world's second-richest person, worth \$184 billion on Wednesday, Forbes calculated.

TEARS OF ADMIRATION

Delaware Judge Kathaleen McCormick said many current board directors labeled as independent by Tesla, including James Murdoch, Chair Robyn Denholm and Ira Ehrenpreis, showed a lack of independence in the pay decision.

The judge's ruling described a board with little control over its chaotic CEO. After a settlement with the U.S. securities regulator required Musk to get approval from a Tesla lawyer for some tweets, Denholm described the Musk tweet process as "self-regulating."

The chair said sales of \$280 million in stock received for her director service were "life-changing," and the judge described the board members and executives as advisors to Musk. The compensation setting process was "me negotiating against myself," Musk testified.

"They're going to have to refresh the board," said Charles Elson, director of the University of Delaware's corporate governance center. "I mean, he may not like it, but it's going to be very hard to run this company as it did."

Musk could decide to leave, a possibility raised by JP Morgan, but Elson said that would torpedo the value of the 13% stake Musk holds, independent of the pay package.

Even before Tesla has announced this year's annual meeting, several shareholders already are promoting resolutions to give investors more control by moving to annual director elections and eliminating a supermajority voting requirement.

McCormick questioned if any pay for Musk was necessary, given his fortune swelled along with Tesla's success, through his stake in the company.

"There are many examples of visionaries with large pre-existing equity holdings foregoing compensation entirely: Zuckerberg, Bezos, Gates, and others so familiar to the world that no first names are required," McCormick wrote.

Musk brings a strong record into any negotiations.

Tesla's stock market value was \$53 billion when Musk's package was approved in 2018. It was a money-losing enterprise, struggling to accelerate production of its Model 3 sedan. That was when Musk famously described Tesla as being in "production hell."

By 2021, now profitable, having weathered the pandemic and launched the Model Y small SUV, Tesla's market value reached \$1.2 trillion. That became the world's second best selling car or SUV last year, Car and Driver estimated.

Tesla's valuation has fallen to around \$600 billion, but that is still more than 10 times what it was when the process began, and the company remains worth more than most auto industry veterans, combined.

Reporting by Hyunjoo Jin and Tom Hals; Additional reporting by Joe White; Writing by Peter Henderson; Editing by Richard Chang

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Tom Hals
Thomson Reuters

Tom Hals is an award-winning reporter with 25 years of experience working in Asia, Europe and the United States. Since 2009 he has covered legal issues and high-stakes court battles, ranging from challenges to pandemic policies to Elon Musk's campaign to end his deal for Twitter.

Elon Musk bashed by heavy metal drummer who cost him \$56 billion

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Tom Hals

Tesla, X (formerly known as Twitter) and SpaceX's CEO Elon Musk speaks with members of the media during the AI Safety Summit at Bletchley Park in Bletchley, Britain on November 1, 2023. Leon Neal/Pool via REUTERS/File Photo Acquire Licensing Rights , opens new tab

WILMINGTON, Delaware, Feb 1 (Reuters) - Elon Musk suffered one of the biggest legal losses in U.S. history this week when the Tesla CEO was stripped of his \$56 billion pay package in a case brought by an unlikely opponent, a former heavy metal drummer.

Richard Tornetta sued Musk in 2018, when the Pennsylvania resident held just nine shares of Tesla. The case eventually made its way to trial in late 2022 and on Tuesday a judge sided with Tornetta, voiding the enormous pay deal for being unfair to him and all his fellow Tesla shareholders.

Tornetta could not be reached for a comment and his attorney declined to comment.

Until Tornetta's case, Musk prevailed in a string of trials accusing him of defamation, of breaching his duty to shareholders and of violating securities laws.

Based on his online presence, Tornetta seems to have more of an interest in creating audio gear for car-customizing enthusiasts than going after corporate excess and malfeasance.

He has posted light-hearted videos about gadgets he has created or mishaps, including describing how he torched his eyebrows.

Tornetta also turned up in videos drumming at the legendary former New York club CBGB with his now-defunct metal band "Dawn of Correction", which described its sound as "a swift kick to the face with a steel-toed work boot."

On social media, fans of Tesla and Musk seemed to find the case a travesty of justice and speculated about Tornetta's intentions and political affiliations, asking how an investor with such miniscule holdings could wield such power.

Delaware corporate case law is full of cases bearing the names of individual investors with tiny shareholdings who wound up shaping America's corporate law.

Many law firms that represent shareholders keep a stable of investors they can work with to bring cases, says Eric Talley, who teaches corporate law at Columbia Law School. They might be pension funds with a broad range of stock holdings but they are also often individuals like Tornetta.

The plaintiff signs paperwork to file the lawsuit and then generally gets out of the way, says Talley. The investors don't pay the law firm, which takes the case on contingency, as the lawyers did in the Musk case.

Tornetta benefits from winning the case the same way other Tesla shareholders benefit: saving the company billions of dollars that a subservient board of directors paid to Musk.

Business groups have long criticized cases brought by individuals as an indication of potentially abusive litigation. Delaware 10 years ago was plagued with lawsuits led by retail investors owning a few shares challenging merger deals. The cases were often quickly resolved with meaningless settlements that always included payments to the attorneys bringing the cases. Delaware judges and lawmakers eventually reined in the practice.

Experts said people like Tornetta are vital for policing boardrooms. Lawmakers and judges have long wanted large investment firms to lead such corporate litigation since they are better equipped to keep an eye on their lawyers' tactics. But experts said fund managers do not want to jeopardize relationships on Wall Street.

So it was up to Tornetta to take on Musk.

"His name is now etched in the annals of corporate law," Talley said. "My students will be reading Tornetta v Musk for the next 10 years."

Reporting by Tom Hals in Wilmington, Delaware; Editing by Noeleen Walder and David Gregorio

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Tom Hals is an award-winning reporter with 25 years of experience working in Asia, Europe and the United States. Since 2009 he has covered legal issues and high-stakes court battles, ranging from challenges to pandemic policies to Elon Musk's campaign to end his deal for Twitter.

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BUSINESS

The Lawyer—and Drummer—who Felled Elon Musk's \$55.8 Billion Compensation Package

A former corporate-defense lawyer handled case that led to Tesla CEO's pay deal being nixed

By [Ryan Felton](#) [Follow](#) and [James Fanelli](#) [Follow](#)

Updated Feb. 1, 2024 7:35 am ET



Tesla CEO Elon Musk has said he didn't dictate the terms of his pay plan. PHOTO: JULIA NIKHINSON/REUTERS

The case that brought down Elon Musk's multibillion-dollar pay package at Tesla **TSLA 0.31% ▲** was driven by a lawyer who spent decades representing big companies like Goldman Sachs and 21st Century Fox, and a shareholder who played drums in a heavy-metal band.

The bombshell decision, issued Tuesday in the Delaware Court of Chancery, came more than five years after a Tesla shareholder originally filed suit, asking the state's business-law court to cancel Musk's pay package at the electric-car maker.

The suit, filed in 2018, alleged that Tesla's chief executive controlled the approval process and that the board misled investors, who later approved it. Musk has

said he didn't dictate the terms of his pay plan.

The judge in the case, Chancellor Kathaleen McCormick, found that the process for securing approval of Musk's compensation was "deeply flawed," and agreed this week to rescind the CEO's package, which was valued at a maximum of \$55.8 billion.

"This would be as though it never happened," said Greg Varallo, lead lawyer for the single shareholder plaintiff, Richard Tornetta, referring to the board's decision to award the package. Varallo and his team defeated a team of lawyers led by heavyweight New York law firm Cravath, Swaine & Moore and its chairman, Evan Chesler.

The case was originally filed by lawyers from Friedman Oster & Tejtzel and Delaware-based Andrews & Springer, which also represents Tornetta in a separate lawsuit that began in 2019. That suit, which is ongoing, is challenging the sale of Pandora Media to Sirius XM.

Friedman Oster & Tejtzel is based in New York, but it specializes in corporate-misconduct cases in Delaware, said principal David Tejtzel. Tornetta's lawyers at Andrews & Springer didn't respond to requests for comments.

Varallo, 64, and several other lawyers at Bernstein, Litowitz, Berger & Grossmann, joined the litigation in 2021. At the time, Tornetta had just survived a motion to dismiss by Tesla's board of directors, raising the likelihood that the case could go to trial. Tejtzel said the original legal team recognized it was going to be a massive undertaking.

"It made sense to enlist reinforcements," he said, on the decision to bring on Varallo. The trial began in 2022.

A former corporate-defense lawyer, Varallo has litigated hundreds of complex business disputes throughout the U.S., including in Delaware, according to a biography on his firm's page. He represented Goldman Sachs in a challenge to its compensation structure, and served as lead counsel for News Corp and 21st Century Fox in shareholder litigation, the biography says. News Corp is the parent company of Dow Jones, publisher of The Wall Street Journal.

In 2019, after a three-decade career at corporate-defense firm Richards, Layton & Finger, Varallo—a self-described “blue-collar kid” from Philadelphia—made an uncommon decision for a well-established defense lawyer: to start working for plaintiffs.



A courtroom sketch shows Greg Varallo, standing, the lead lawyer for the plaintiff in the suit challenging Elon Musk's compensation plan, as the trial began in 2022. PHOTO: ELIZABETH WILLIAMS/ASSOCIATED PRESS

“This was an opportunity in a very entrepreneurial way, to do something entirely new, to work with people that I did know, but in an area that would require some new learning on my part,” he said in a 2021 podcast interview.

Varallo said in the interview that his initial warm welcome by his new colleagues was surprising. “I think as a defense lawyer, the perspective on the plaintiffs bar is unduly cabined, unduly narrow,” he said in the interview. “Coming over, I was really heartened by the reception.”

In his free time, Varallo said he enjoys goose and duck hunting—“I’m not the only Delaware lawyer that has this passion”—and playing poker.

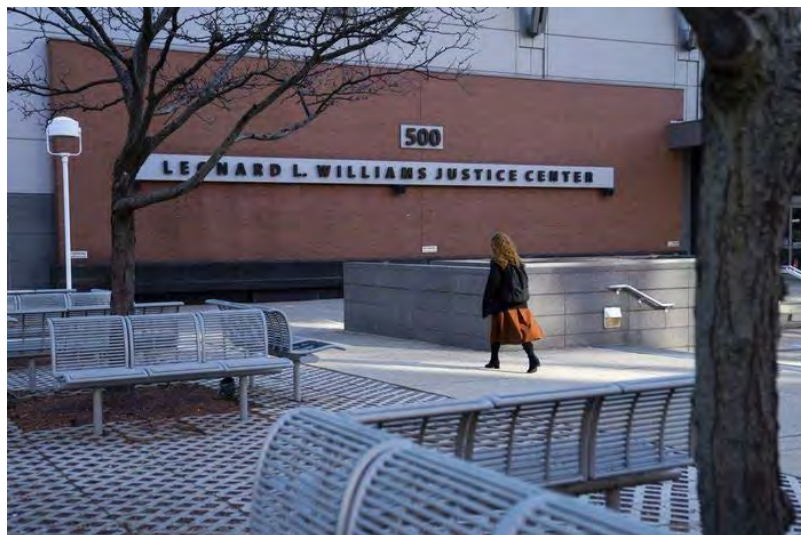
“We litigate in a world where we have imperfect information, and you play competitive poker in a world where you’ve got imperfect information,” he said. “There’s some, I think, overlap between the two.”

Tornetta, who didn’t respond to requests for comment, previously worked for a company that created aftermarket audio equipment for cars and other automotive companies, according to public records and an archived version of his LinkedIn page.

In the mid-2000s, Tornetta drummed in a heavy-metal band called Dawn of Correction, which described itself as “loud aggressive rock and roll with a foundation of old metal roots.”

Tejtel praised Tornetta for not backing down during the litigation despite some people making negative online statements about the case. “It took a ton of courage to step forward and stay in the game,” Tejtel said.

John Jasnoch, a partner at law firm Scott+Scott, said it isn’t uncommon in shareholder derivative suits for a plaintiff’s law firm to seek out a shareholder willing to serve as a lead plaintiff. Such plaintiffs don’t always play a big role in the case, but can receive compensation if a case is successful.



The Delaware Court of Chancery’s decision came more than five years after the suit was first filed.
PHOTO: SARAH SILBIGER/BLOOMBERG NEWS

In these cases, the plaintiff “is standing in the shoes of the company,” Jasnoch said, and sues its board or executives for actions that harmed the company. If the suit is successful, the financial benefits go to the company, while the plaintiff typically receives a small incentive award.

Lawyers have the potential to score a much bigger bounty, said Renee Zaytsev, a partner at law firm Boies Schiller Flexner. In Delaware, a judge has the final say on the fees lawyers receive. The fees are typically a percentage of the benefit the company receives and are dependent on the stage at which the case is resolved, Zaytsev said.

In the Musk case, the judge directed both sides to meet and come to an agreement on court costs and who pays them, as well as the precise language of a final order in the case, Varallo said. Tesla's board of directors would then have 30 days to file an appeal once that order is entered, he said.

The nonjury trial, which lasted five days, saw several current and former Tesla board directors take the stand and included more than 1,700 exhibits, including emails and internal documents from the automaker.

Varallo agreed with one witness late in the trial that it had been an exhausting week.

"The days have blended together, as have the nights," he said.

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Corrections & Amplifications

Lawyers at Bernstein, Litowitz, Berger & Grossmann joined the litigation in 2021. An earlier version of this article misspelled the law firm's name as Bernstein, Litowitz, Berger & Grossman. (Corrected on Feb. 1)

Musk seeks Tesla shareholder vote on moving incorporation to Texas

 [reuters.com/business/autos-transportation/tesla-take-shareholder-vote-shifting-incorporation-texas-musk-says-2024-02-01](https://www.reuters.com/business/autos-transportation/tesla-take-shareholder-vote-shifting-incorporation-texas-musk-says-2024-02-01)

Shubham Kalia, Maria Ponnezhath, Samritha A

Feb 1 (Reuters) - Tesla (TSLA.O) , opens new tab CEO Elon Musk said late on Thursday the company will hold a shareholder vote to transfer its state of incorporation to Texas from Delaware, after a judge invalidated his \$56 billion pay package at the electric vehicle (EV) maker.

Delaware judge Kathaleen McCormick had on Tuesday called the 2018 share-based pay package - the largest in corporate America - "an unfathomable sum" that was unfair to shareholders and found it was negotiated by directors who appeared beholden to Musk.

"Never incorporate your company in the state of Delaware," Musk posted on social media X shortly after the ruling.

But getting shareholders on board could be a hurdle for Musk, should he go through with the vote. He would almost certainly face investor lawsuits, particularly if it was seen as a move to secure his pay package, legal experts said.

"Shareholders need to take a hard look at how transitioning out of Delaware might impact their rights and the company's governance," Independent business adviser Keith Donovan said.

There could also be some dispute over the level of support Musk would need to change Tesla's governing rules for the move.

Some specific changes require two-thirds of shareholders to back. If Tesla were to adopt a Texas charter that did not change the provisions that require a super majority, it would likely be able to move to Texas with a simple majority, said Ann Lipton, a professor at Tulane University Law School.

It would take at least 40 to 60 days to organize a shareholder vote, although the U.S. Securities and Exchange Commission could slow the process by requiring additional disclosures, she said.

Tesla shares were largely flat in afternoon trading on Thursday. After more than doubling in 2023, the stock has lost roughly a quarter of its value this year due to growing concerns of soft EV demand.

The ruling is not the first time that Musk has suffered a setback in Delaware.

McCormick was the same judge who oversaw Twitter's July 2022 lawsuit against Musk after he tried to back out of his contract to buy the social media platform for \$44 billion. The judge rejected his delaying tactics and Musk finally went through with the deal.

"Musk must believe that Texas judges are more 'business friendly' than their Delaware counterparts... Musk must be assuming that Texas judges will...take a more relaxed approach to the issue than Delaware judges," said Brian Cheffins, a professor of corporate law at Cambridge University.

[1/2] Tesla electric vehicles (EVs) fast-charge using Tesla Superchargers at a Buc-ee's travel center and gas station in Baytown, Texas, U.S., March 18, 2023. REUTERS/Bing Guan/File Photo Acquire Licensing Rights , opens new tab

"It is far from clear Texas judges will do so."

More than 65% of Fortune 500 companies and over half of all U.S. publicly traded companies are incorporated in Delaware, lured by the state's business-friendly legal framework and tax policies, according to Harvard Business Services, a firm offering Delaware business formation services.

U.S. public companies look to incorporate in Delaware for access to the state's courts. Its corporate law places greater restraints on management and is more protective of investors than states like Nevada, making it cheaper for Delaware companies to raise capital.

TripAdvisor and its parent company are currently defending a lawsuit by their shareholders, who have challenged the company's plans to re-incorporate in Nevada from Delaware.

MUSK AND LONE STAR

Musk has also recently said he would be uncomfortable growing the automaker to be a leader in artificial intelligence (AI) and robotics without at least 25% voting control of the company, which is nearly double his current stake.

""What's more concerning is he has a lot of AI efforts in Tesla, and if he doesn't get his way with his pay package, what will he do in terms of those efforts diminishing in Tesla and going somewhere else?" said Thomas Martin, senior portfolio manager at shareholder Globalt Investments.

Musk has more than a small interest in Texas.

He shifted Tesla's corporate headquarters to the state from California in 2021 after criticizing California's regulations and taxes, and clashing with health officials at the start of the COVID-19 pandemic over reopening a factory in Fremont.

One of the EV maker's gigafactories is in Texas, where it is also planning an over \$750 million expansion. It is also building a lithium refinery in the state, aiming to produce enough for about 1 million EVs by 2025.

Musk's other companies - SpaceX and The Boring Company - also have operations in Texas.

Musk, like in the past, held a poll on X, and proclaimed that the 87% "yes" vote out of 1.1 million total votes was a deciding factor.

"The public vote is unequivocally in favor of Texas! Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas," Musk said on X.

Reporting by Maria Ponnezhath, Shubham Kalia, Samritha Arunasalam and Akash Sriram in Bengaluru, Tom Hals in Wilmington and Martin Coulter in London; Editing by Saumyadeb Chakrabarty, Sayantani Ghosh and Arun Koyyur

Musk's \$55 Billion Loss Threatens Soaring Pay for Superstar CEOs

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- Superstardom creates corporate governance 'distortion field'
- 'Thunderbolt' ruling may force reckoning for copycat pay deals

This week's court ruling invalidating Elon Musk's \$55 billion pay package at Tesla Inc. signals tougher court oversight of iconic corporate founders who dominate a company's affairs through force of charisma rather than majority ownership.

The decision to undo the largest stock option award ever for a US chief executive jeopardizes Musk's status as the world's richest man. It could have even more far-reaching consequences for other high-profile corporate leaders who hold only minority stakes.

"It's a reminder to the superstar CEOs of the world that they still have fiduciary duties," said Greg Varallo, lead counsel for the investor who brought the litigation. "No matter how much esteem they hold themselves in or how important they think they are, they still have to look out for shareholders first."

The ruling will likely weigh on shareholders and corporate directors as they negotiate, approve, and potentially litigate future pay packages. Musk has repeatedly urged Tesla to hand him another huge equity award, for example, after he sold a significant portion of his stake to fund the \$44 billion acquisition of Twitter Inc.

"What happens the next time they give him another big package?" said Charles Elson, a retired University of Delaware law professor. "It'll be another suit. And they'll be locked in that for another 10 years, with the precedent of rescission."

Three of Musk's attorneys—Cravath, Swaine & Moore LLP partners Evan Chesler, Daniel Slifkin, and Vanessa Lavelly—didn't immediately respond to an email seeking comment.

'Distortion Field'

The ruling, representing Musk's first major court loss, followed more than a year after a trial in Delaware's Chancery Court overseen by its chief judge, Chancellor Kathaleen St. J. McCormick, who previously presided over the dispute prompted by the billionaire's failed attempt to back out of buying Twitter.

McCormick's 200-page opinion zeroed in on the "superstardom" of leaders like Musk. The phenomenon "shifts the balance of power between management, the board, and the stockholders," she said, creating "a 'distortion field' that interferes with board oversight."

Elson called the decision "a thunderbolt," saying the ruling will force a reckoning for "copycat" corporate boards that followed Tesla's lead in handing out multibillion-dollar stock grants.

"It's going to be interesting to see where those boards are today," Elson said. "They're going to have to negotiate their way out of it."

Varallo—a partner at Bernstein Litowitz Berger & Grossmann LLP—said Musk's grant was so astronomical that it warped the entire universe of CEO pay data, leading to inflated compensation for other chief executives. "If you remove the skewing effect of this one data point, you could see the data set that comp consultants use come a little bit closer to earth," he said.

Corporate Control

McCormick's decision was the first to answer a question dodged by other judges: whether Musk's influence made him Tesla's controlling stockholder, subject to the highest levels of judicial scrutiny, despite a stake of only 22% at the time.

He "wielded the maximum influence that a manager can wield over a company," McCormick said. "Musk occupied the most powerful trifecta of roles within a corporation—CEO, chair, and founder."

She cited overwhelming evidence showing Musk controlled the compensation decision—including his own candor at trial, when he said he was "negotiating against myself," and the testimony of board members who acknowledged "they were there to cooperate with Musk, not negotiate against him."

That's where the CEO superstardom idea fits in, said Eric Talley, a Columbia University law professor. The judge seemed to use the label as "shorthand for charismatic CEOs who—almost as part of the definition of who they are—influence other people" more than their stockholdings alone would suggest, according to Talley, who likened the concept to a charisma tax.

Though the idea of personal charisma as a tool of corporate control isn't new, "the superstar CEO framework is now baked into a major Delaware opinion by the chancellor herself," he said. "It's hard to imagine anyone who's got a more influential personality than Elon Musk—maybe Donald Trump."

The decision to treat Musk as a controlling stockholder put him at a legal disadvantage, forcing him to prove the pay package was "entirely fair" unless his conflicts of interest were "cleansed" by the approval of an independent board and fully informed stockholder vote. McCormick found they weren't.

The board "acted under a controlled mindset," and investors weren't told about Musk's lead role in setting his own pay, the judge said.

She "saw the elephant in the room" and "finally called it an elephant," Elson said.

Peerless

But Paul Weitzel, a University of Nebraska law professor, said the judge went awry in finding that other board members were beholden to Musk by virtue of their interests in his businesses.

"That's insane," he said. Musk didn't have any personal authority over their pay, according to Weitzel. Instead, their fortunes were linked to his simply through their investments.

"Saying that a director owning stock options makes the director beholden to the CEO" would be "a major shift in the law," he said in a post on X. The framework would make virtually every director "beholden," gutting the ordinary standard of review, Weitzel added in an email.

Talley called the shareholder vote a tossup, saying it's arguable that only the economic terms had to be disclosed. But the ruling "is pretty consistent with the textbook legal approach," he said. "These kinds of omissions have been found to be material in other cases."

According to Talley, the same evidence—of the board's "almost religious faith" in Musk and his control over the talks—made it nearly impossible for him to satisfy the entire-fairness test.

The framework involves showing that both the process and the price were adequate, but "the way you've gotten there in the first place is by documenting that the process was terrible," he said. "So now Musk has to try to fight entire fairness with one hand tied behind his back. He has to fall back on the substantive fairness of the richest executive compensation deal ever handed out."

Meanwhile, Musk's nearest peers—Mark Zuckerberg and Jeff Bezos—take no compensation other than any increase in the value of their stock, Talley said.

McCormick, for her part, rejected Musk's comparison "to compensation structures common in the portfolio companies backed by venture capital." The clear problem is that Tesla is publicly traded, she said.

The Appeal

Musk will almost certainly ask Delaware's Supreme Court to reinstate his award. But while the state's justices could find grounds to reverse McCormick, "if they want to get there," the judge took steps to appeal-proof her ruling, said Ann Lipton, a Tulane University law professor.

The higher court would have to overturn reams of factual findings that it's supposed to review under a deferential standard, according to Lipton.

"The label of controller is doing some work, but not all the work," she said. "If everything else about her opinion stands, but he's not a controller, the opinion stands."

Still, "there are arguments," particularly the idea that the close ties between Musk and the board were known to shareholders, Lipton said. "You can argue that, and they will."

Weitzel took a brighter view of Musk's chances. "No way that gets upheld," he said.

McCormick's decision to knock out the whole package—rather than cutting it down to size—left Musk totally uncompensated for his work at Tesla. According to Talley, that opens a "weird" path: Musk could sue Tesla for the fair value of his labor.

Elson said he expected any lawsuit along those lines to be "a loser."

Hot Potato for Delaware

Musk has responded indirectly on X, suggesting he'd like to reincorporate Tesla in Texas, where its headquarters are, or Nevada, a state trying to woo corporations away from Delaware. A poll posted by Musk showed most of his 170 million followers back a move to Texas. He previously relocated X to Nevada.

Lipton said McCormick had "dropped a hot potato" on a state supreme court that's "very protective of Delaware being a place where companies want to incorporate." The state is home to nearly 70% of Fortune 500 companies.

"We live in a world of these complex voting structures and dual-class share structures," and "they don't want to make it look like this is an unfriendly place to do business for a controlling shareholder," according to Lipton. "But this is so high-profile, and Musk is out there tweeting," she said. "That makes it very hard for the Delaware Supreme Court to look like they're bowing to his demands."

According to Elson, relocating X was straightforward because Musk had taken the company private, while moving Tesla would require the backing of its investors.

“As a shareholder, would you approve it if the genius says, ‘Either you pay me or I’ll blow myself up?’” Elson said.

—With assistance from Jennifer Kay.

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FT Alphaville Tesla Inc

Tesla is five times bigger than all the public companies in Texas

And yet, we're struggling to care



© FTAV montage

Bryce Elder 2 HOURS AGO



Elon Musk has done another thing, which obliges us to do another thing. Here, per MainFT, is [the latest thing](#):

“

Elon Musk has said Tesla will “immediately” hold an investor vote on whether to move its corporate registration to Texas, after a court judgment in Delaware voided his \$56bn pay package.

The billionaire posted his comments about shifting to the state where Tesla’s physical headquarters are located following the ruling this week by Kathaleen McCormick, a judge in the Delaware Court of Chancery.

“Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas,” Musk wrote on his social media platform X.

Good, fine, whatever. A person might have strong opinions about whether Delaware courts are more rigorous around corporate governance standards and fiduciary duty as applied to Cult-of-Personality stocks than those in Texas. Those without strong opinions can refer to comprehensive coverage from the FT’s [Richard Waters](#), [Stuart Kirk](#), [Sujeet Indap](#) (twice) and [Lex](#), as well as a multi-bylined [Q&A](#).

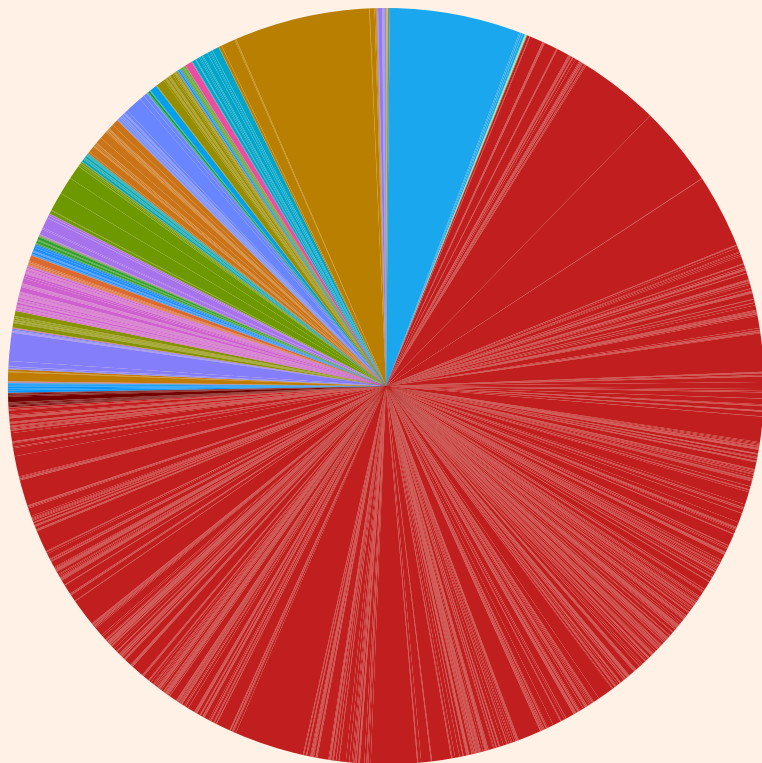
All we’re going to add is data, starting here:

Russell 3000 by market cap

(Stocks with non-US domiciles are excluded)

Choose a state domicile from the dropdown menu

All ▼

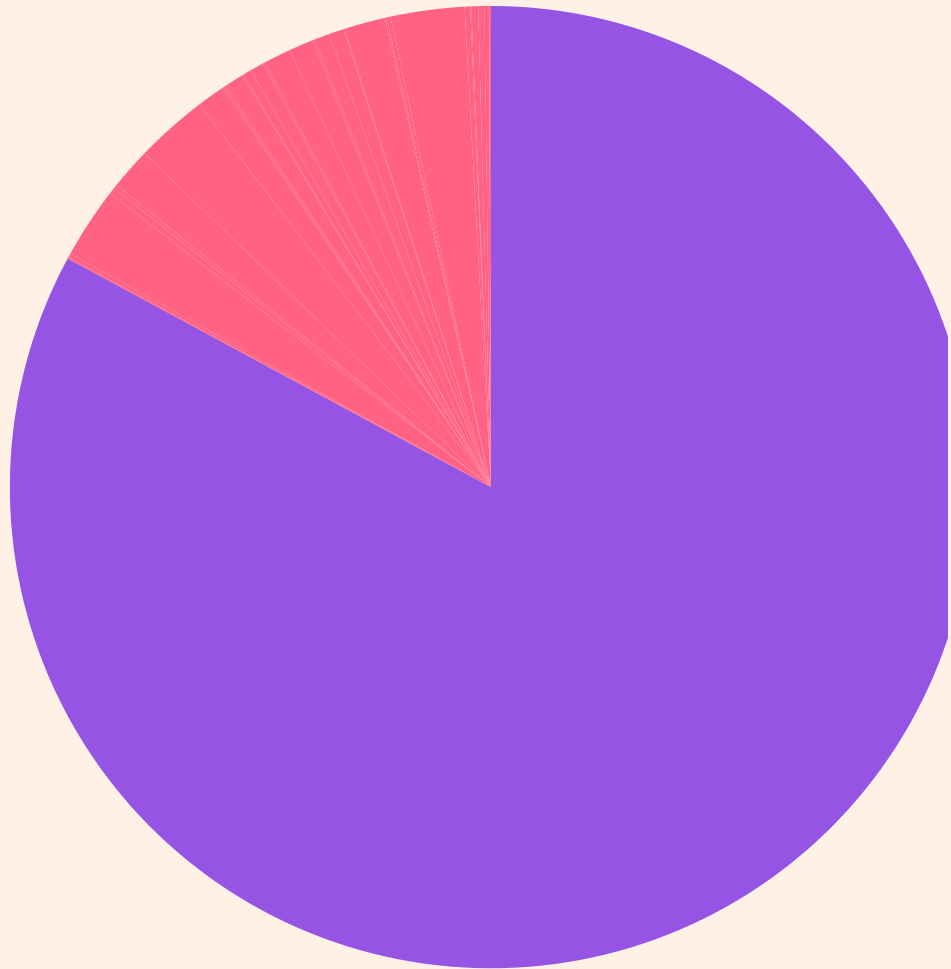


Source: FTAV, Bloomberg data

By market cap Tesla is in the top tier of companies incorporated in Delaware, though the year-to-date sell-off has narrowed its lead over the pack (Visa, Broadcom, UnitedHealth, Walmart, etc) to about \$10bn. Delaware-incorporated companies are valued at \$34tn in aggregate, so Tesla is 1.7 per cent of that total.

But Tesla is five times bigger than all the Texas-incorporated Russell 3000 stocks put together:

Tesla + Texas



Source: FTAV, Bloomberg data

Could we have made these charts look better? Yes, we could. Can we be bothered?
No, we can't.

Thing is, it's possible to argue that companies like Apple and Farmer Mac extract some advantage from being domiciled in the same state as they're incorporated. There's loads of research on home bias versus the [Delaware advantage](#), which might be extrapolated in all sorts of ways when applied to big data sets like this:

Does the domicile match the jurisdiction?

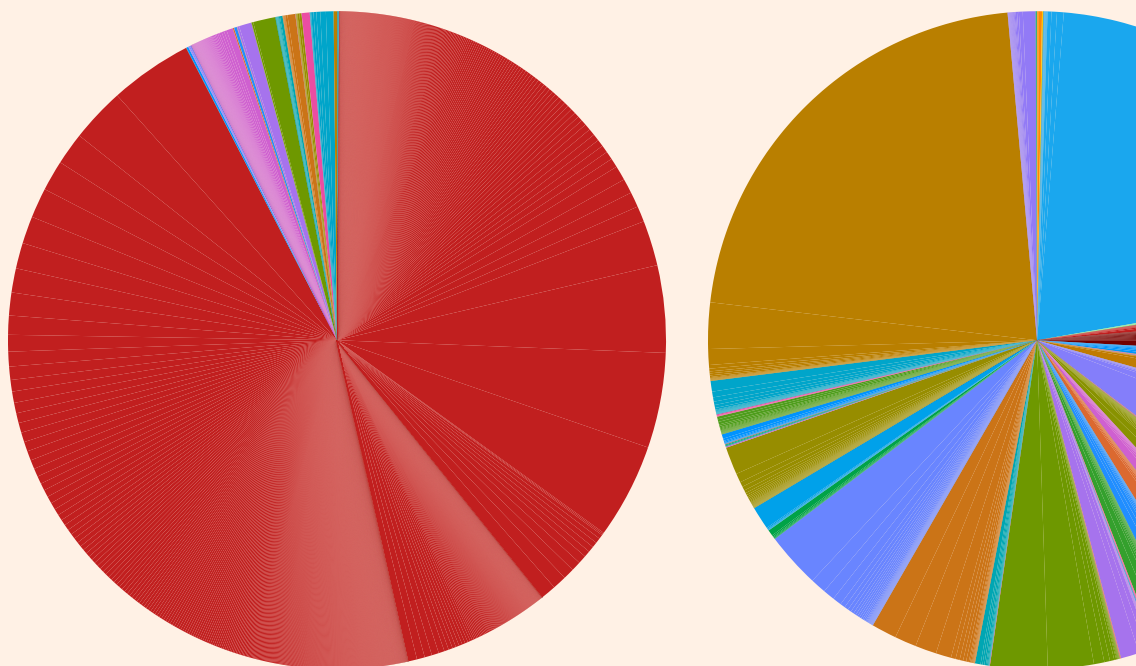
Russell 3000 stocks by market cap excluding non-US domiciles

All



FALSE

TRUE



These are normal sorts of enterprises with conventional chains of command, though. Their ways of working just don't apply to Tesla, which is less a company and more the publicly traded division of a self-contained hysteria factory. Any deeper analysis of state court jurisdiction over businesses as it applies to Tesla will be rendered irrelevant the moment Musk does another thing, and won't change even one reader's preconceptions in the meantime.

Honestly, we're only posting this so you have a fresh comment box in which to argue with each other.

Tesla sued by California counties over hazardous waste

 [reuters.com/business/environment/tesla-sued-by-california-counties-over-hazardous-waste-2024-01-31](https://www.reuters.com/business/environment/tesla-sued-by-california-counties-over-hazardous-waste-2024-01-31)

Clark Mindock

Environment

By Clark Mindock

January 31, 2024 12:59 PM PST Updated 18 hours ago

A Tesla vehicle drives past Tesla's primary vehicle factory after CEO Elon Musk announced he was defying local officials' coronavirus disease (COVID-19) restrictions by reopening the plant in Fremont, California, U.S. May 11, 2020. REUTERS/Stephen Lam/File Photo Acquire Licensing Rights , opens new tab

Jan 31 (Reuters) - A group of 25 California counties have sued Elon Musk's Tesla (TSLA.O) , opens new tab, claiming the electric vehicle maker mishandled hazardous waste at its facilities across the state.

The lawsuit from Los Angeles, Alameda, San Joaquin, San Francisco and other counties was filed on Tuesday in California state court. It seeks civil penalties and an injunction that would require the company to properly handle its waste in the future.

Tesla did not immediately respond to a request for comment.

The counties accused Tesla of violating state unfair business and hazardous waste management laws by improperly labeling waste and sending the materials to landfills that cannot accept hazardous material. California's hazardous waste management law carries potential civil penalties as high as \$70,000 per violation per day.

Waste produced or handled at the facilities includes paint materials, brake fluids, used batteries, antifreeze and diesel fuel, the counties said.

The lawsuit claims that violations have occurred at as many as 101 facilities, including at Tesla's manufacturing plant in Fremont.

Spokespeople for the counties did not immediately provide additional details about the case.

The lawsuit is not the first time Tesla has faced allegations related to its hazardous waste management practices.

The company reached a settlement in 2019 with the U.S. Environmental Protection Agency over alleged federal hazardous waste violations at its Fremont plant. In that deal, Tesla agreed to take steps to properly manage waste at the facility and pay a \$31,000 fine.

Tesla later reached a deal with the EPA in 2022 in which it agreed to pay a \$275,000 penalty after the federal agency said the company was failing to keep records and to implement plans to minimize air pollutants from painting operations at the Fremont plant.

Reporting by Clark Mindock; Editing by David Bario and Mark Porter

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By M.C. Sungaila



Scott Musoff ,left, of Skadden, and Gerald H. Silk, right, of Bernstein Litowitz Berger & Grossmann. Courtesy photos

ANALYSIS

Some Thoughts on Securities Litigation Trends From Either Side of the Bar

Jerry Silk of Bernstein Litowitz and Scott Musoff of Skadden weigh in on what's going on behind the numbers in the latest Cornerstone Research annual report on securities class actions.

February 01, 2024 at 07:30 AM

Ross Todd 
Editor/columnist

In yesterday's column, we ran through some key takeaways from the latest annual tally of securities class action filings from Cornerstone Research. Today, as previously promised, we'll chew on the Cornerstone numbers with a pair of practitioners from opposite sides of the securities bar: **Jerry Silk of Bernstein Litowitz Berger & Grossmann** and **Scott Musoff of Skadden, Arps, Slate, Meagher & Flom**.

First, a quick review of what jumped out in this year's numbers: The overall volume of new filings ticked up slightly in 2023 to 215 from 208 in 2022—the first increase after three consecutive years of decline. This uptick occurred despite a slowdown in three significant lines of cases Cornerstone has tracked over the past few years: New filings involving claims tied to COVID and SPACs both fell by 39% last year and there were 50% fewer cryptocurrency cases than in 2022. Part of what was driving the overall increase, however, was an emerging line of nine cases that sprang out of last year's regional bank failures, including eight new cases filed in 2023.

Where cases were being filed also underwent an interesting shift. The Second Circuit, the perennial leader in securities class actions activity, saw the number of new filings drop for the second consecutive year, falling to 50 in 2023 from 73 in 2022 after seeing a peak of 82 in 2021. The Ninth Circuit, meanwhile, significantly outpaced the Second Circuit last year in terms of new filings with 67.

Silk of Bernstein Litowitz said he “wasn't terribly surprised” to see the shift in cases toward the Ninth Circuit. For one, he said what seems to be driving the securities practice right now are cases against technology, media and telecom companies and biotech companies that are largely located on the West Coast. He added that the Second Circuit is usually home to a lot of cases involving financial services cases, but this latest wave of bank failures has been confined largely to regional banks on the West Coast, including Silvergate Bank, Silicon Valley Bank, and First Republic, all banks headquartered in California, where his firm is serving as lead or co-lead counsel in the follow-on securities suits.

Skadden's Musoff agreed with Silk's observation about the West Coast nature of the recent regional bank crisis driving some of the shift in filings to the Ninth Circuit. But he added that there had been a significant dropoff in 1933 Act filings, especially Section 11 suits brought in the wake of initial public offerings. Those cases, he noted, often end up in the Second Circuit because that is where many of the banks underwriting those IPOs are located.

As to the dropoff in COVID, SPAC and crypto cases, neither Musoff nor Silk was surprised. As to SPACs, Silk said, “We've all seen that this stock vehicle is no longer one favored by Wall Street.” Fewer SPAC deals means fewer SPAC securities suits. Simple enough. In cryptocurrency cases, Silk said there have been some issues that have popped up around

offshore entities and opaque business structures that have made recoverability an issue for plaintiffs in some of those cases. “That’s probably one reason that you’ve seen a slowing pace on those cases,” he said.

Looking at the numbers with Silk and Musoff made me realize that securities litigation is clearly a lagging economic indicator. Fewer IPOs mean fewer IPO suits. And with fewer Section 11 suits, where strict liability attaches to material misrepresentations in company registration statements, that leaves the plaintiffs bar working on more 10b-5 where the intent of the speaker making the alleged misleading statement comes into play.

I asked Silk if this sort of economic environment makes it more difficult for lawyers practicing on the plaintiffs’ side of the securities bar. He pointed out that the S&P 500 was up 24% in 2023. He said the IPO market, with interest rates sitting where they were, was largely “closed for business.” He said his clients understand the significance of Section 11 claims and the history of the securities laws building “extra protections for investors in the IPO setting.”

“I’m not gonna say it’s more challenging, but we’re seeing less of that for sure,” he said. Silk added that another aspect of having the stock market on an overall upward trajectory is that sometimes, when a company discloses something potentially damaging, the market doesn’t quite react as it might otherwise. All the other positive news in the market can have the effect of driving the stock prices upward, he said.

To that, Musoff noted that while you can look at what the S&P 500 or any other index does over the whole year, interim stock price declines at individual companies are what drive many 10b-5 suits. A rising market means higher valuations. “If there is something that causes more volatility, we may see declines that end up with higher market cap losses, which will attract securities litigation,” Musoff said.

We’ll see about that next year.

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- Latest

Securities Law Prof Blog

 lawprofessors.typepad.com/securities/2024/02/new-securities-law-articles-in-print.html

Thursday, February 1, 2024

New Securities Law Articles in Print

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

Yuliya Guseva & Irena Hutton, *Regulatory Fragmentation: Investor Reaction to SEC and CFTC Enforcement in Crypto Markets*, 64 B.C. L. Rev. 1555 (2023).

Joon Buhm Lee, *Where Is the Action?: Choosing Securities Joinder Action over Securities Class Action in Korea*, 22 J. Int'l Bus. & L. 68 (2023).

Michael Morelli, *Courts, Competence, and Competition: Brewing Tensions between Administrative, Antitrust, and Securities Law*, 64 B.C. L. Rev. 1615 (2023).

Judge Appoints Morgan & Morgan's Jean S. Martin as Interim Lead Class Counsel

 [law.com/2024/01/31/federal-judge-appoints-interim-lead-class-counsel-in-zoll-data-breach-litigation](https://www.law.com/2024/01/31/federal-judge-appoints-interim-lead-class-counsel-in-zoll-data-breach-litigation)

Credit: nadia_snopek/Adobe Stock

Federal Judge Appoints Interim Lead Class Counsel in Zoll Data Breach Litigation

U.S. District Judge Indira Talwani appointed interim lead counsel in 15 putative class actions seeking to hold Zoll Medical liable after a data breach allegedly affecting more than a million people.

January 31, 2024 at 02:41 PM

Class Actions

Allison Dunn 

A federal judge in Massachusetts had several experienced litigators to choose from to serve as interim lead counsel to lead the plaintiffs in a consolidated data breach matter against a medical technology company, but the applicants who provided greater detail on the work already completed, the resources available, and the funding commitments may have had a leg up.

U.S. District Judge Indira Talwani appointed Jean S. Martin, lead attorney for Morgan & Morgan's complex litigation group in Tampa, Florida, to serve as interim lead class counsel in a consolidated data breach action against medical technology company Zoll Medical Corp. According to her firm's bio, Martin has served as interim co-lead counsel in other data breach cases against Morgan Stanley, Chili's parent company Brinker International and Chipotle Mexican Grill.

Jason M. Leviton, co-founding partner of Block & Leviton, a small firm in Boston, was also appointed as interim liaison counsel. He has been part of a lengthy list of massive settlements, including *In re Madison Square Garden Entertainment Corp. Stockholders Litigation*, in which an \$85 million settlement was reached less than two months before trial.

But he also has experience in consumer class actions, and recovered 100% of the alleged damages in litigation that accused Starbucks of overcharging for scooped coffee beans, according to firm bio.

Martin told Law.com that the lawyers were “pleased that we can now move forward with this important litigation on behalf of those harmed by this security incident,” but declined to comment further on the pending case.

The plaintiffs in 15 putative class actions filed in U.S. District Court for the District of Massachusetts seek to hold Zoll liable for a data breach that allegedly exposed personal identifying information and protected health information of potentially more than a million people, according to one of the class action complaints filed by Robert Smith in March.

Zoll, which is headquartered in Chelmsford, Massachusetts, and makes various emergency care devices such as defibrillators and cardiac monitors, learned of unusual activity on its internal network on Jan. 28, 2023, and determined that the plaintiffs and class members’ information was potentially affected on Feb. 2, 2023, according to Smith’s complaint.

The plaintiffs in the similar class actions filed unopposed motions to consolidate, and asked the court to set a deadline for applications for appointment of interim class counsel pursuant to Federal Rule of Civil Procedure 23(g). The court received three applications on behalf of three groups of plaintiffs.

Smith sought the appointment of both Martin and Terence R. Coates, managing partner of Markovits Stock DeMarco in Cincinnati, Ohio, as interim lead counsel; and Leviton as interim liaison counsel.

Another plaintiff, Jamie Calvert, requested the appointment of Ben Barnow, an attorney with Barnow and Associates in Chicago, as interim lead counsel; and David Pastor, of Pastor Law Office in Boston, as interim liaison counsel.

The third plaintiff, Patricia McMahon, sought the appointment as interim lead counsel of James Pizzirusso, a partner at Hausfeld’s Washington, D.C., office, and Amy Keller, a partner at Dicello Levitt in Chicago; and Edward F. Haber, a partner at Shapiro Haber & Urmy in Boston, as interim liaison counsel.

“The Smith Plaintiffs’ motion states that ‘immediately after the public announcement of the data breach[,]’ their proposed interim class counsel (Jean S. Martin, Terence R. Coates, and Jason M. Leviton) ‘began investigating potential legal claims and remedies for the victims of the breach,’ including ‘[i]nvestigating the facts surrounding the data breach’; ‘[i]nterviewing numerous consumers injured by the data breach’; ‘[r]esearching legal claims’; ‘[d]rafting initial pleadings ...’; and ‘[i]nvestigating experts in the area of data security and

damages[.]’ Attorney Martin states further that she and members of her firm ‘have already commenced substantive development of Plaintiffs’ claims and investigation of the factual circumstances surrounding the data breach,” Talwani wrote in the order filed Thursday.

Furthermore, Martin and Leviton were already counsel of record on two and three complaints, respectively.

“Attorney Martin states that her law firm, Morgan & Morgan, ‘is among the largest, if not the largest, exclusively Plaintiff’s law firms in the United States, employing over 800 lawyers and 2,000 support staff serving consumers across the country.’ Martin Decl. ... Attorney Martin states further that she and her law firm ‘are fully and unequivocally committed to this action and the time-consuming task of prosecuting this litigation to conclusion, and even to trial,’” the court’s order cited.

Smith’s motion also indicated that the “proposed interim Class Counsel ‘are ... expected to pay assessment when necessary to ensure that adequate funds are available to prosecute this litigation,’” the order said.

However, Talwani noted that the attorneys proposed by plaintiffs Calvert and McMahon did not provide as much detail about researching the case or providing further information about funding the litigation.

Hausfeld has 170 lawyers worldwide and DiCello Levitt has offices in eight cities, and has doubled recently, but while the resumes “document the extensive experience of counsel,” the applications for interim class counsel provide “no detail as to the funding of the litigation,” Talwani said.

“The Smith Plaintiffs’ proposed interim class counsel have demonstrated their ability to coordinate efforts in filing the motion to consolidate cases that all Plaintiffs’ counsel joined, and their own motion to appoint counsel, which counsel in thirteen of the fifteen cases joined. See Pls.’ Mot. to Consolidate. ... While all of the proposed liaison counsel appear qualified to perform this liaison task, the Smith Plaintiffs’ proposed interim liaison counsel, Jason Leviton, already has a direct attorney-client relationship with three of the Plaintiffs, and the support of thirteen,” Talwani wrote.

Zoll is represented by attorneys with Baker & Hostetler. Washington, D.C., partner Gil Keteltas declined to comment.

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Pharma companies lose fight over venue for states' price-fixing lawsuits

 [reuters.com/legal/litigation/pharma-companies-lose-fight-over-venue-states-price-fixing-lawsuits-2024-01-31](https://www.reuters.com/legal/litigation/pharma-companies-lose-fight-over-venue-states-price-fixing-lawsuits-2024-01-31)

Mike Scarcella

Used blister packets that contained medicines, tablets and pills are seen, in this picture illustration taken June 30, 2018. [REUTERS/Russell Boyce Acquire Licensing Rights](#) , opens new tab

Jan 31 (Reuters) - Dozens of drug makers have lost their bid to keep a group of price-fixing lawsuits joined together in Pennsylvania federal court, after a court panel on Wednesday said Connecticut and other state plaintiffs could press their own cases separately.

The federal Judicial Panel on Multidistrict Litigation granted a request , opens new tab from Connecticut and 45 other states to litigate their antitrust lawsuits in Connecticut federal court, where they were first filed in 2016.

The states' cases had been part of a sweeping multidistrict litigation (MDL) in Pennsylvania, where about 40 pharmaceutical companies are fighting long-running accusations that they conspired to keep the price of generic drugs artificially high.

Sending the state cases back to Connecticut “may temporarily disrupt proceedings in the MDL,” the court panel acknowledged in Wednesday’s order. But the court said it was bound by a new federal law that gives state attorneys general more authority to choose where to litigate antitrust actions.

Wednesday’s order marked the latest ruling to cite the new law, enacted in late 2022. It grants states the same authority as the U.S. Justice Department to remain apart from antitrust multidistrict litigation proceedings.

The panel said prior rulings involving the states' claims likely would still hold and that “informal cooperation among the parties and coordination among the involved courts remains possible.”

Representatives for Teva, Sandoz and Aurobindo Pharma did not immediately respond to requests for comment. The drug companies' efforts to dismiss the claims remain pending.

Drug makers Teva, Sandoz, Aurobindo and others had urged the judicial panel not to let Connecticut and its state coalition break away, warning it would cause “chaos” in the litigation.

They argued that they should not be forced to fight the same claims in different federal courts before separate judges.

Connecticut praised the panel order.

"We all pay far too much for our prescription drugs, and that won't change until we restore fair and honest competition throughout the generic drug industry," Connecticut Attorney General William Tong said in a statement. "We agree with this decision and are pleased these important cases will move forward here in Connecticut."

The case is *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, U.S. Judicial Panel on Multidistrict Litigation, MDL No. 2724.

Liaison counsel for states: W. Joseph Nielsen of Connecticut Attorney General's Office

For Teva: J. Gordon Cooney Jr. of Morgan, Lewis & Bockius

For Sandoz: Margaret Rogers of Arnold & Porter Kaye Scholer

For Aurobindo: Nathan Denning of Wiggin and Dana

Read more:

US states flex new power to steer antitrust lawsuits

Pharma giants warn of 'chaos' in venue fight over US price-fixing cases

Jumpstart your morning with top legal news delivered straight to your inbox from The

Daily Docket [🔗](#), opens new tab

Reporting by Mike Scarcella

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Visa, Mastercard ask U.S. Supreme Court to fix 'rampant confusion' on class certification

 [reuters.com/legal/government/column-visa-mastercard-ask-us-supreme-court-fix-rampant-confusion-class-2024-01-31](https://www.reuters.com/legal/government/column-visa-mastercard-ask-us-supreme-court-fix-rampant-confusion-class-2024-01-31)

Alison Frankel

Credit card is seen in front of displayed Visa logo in this illustration taken, July 15, 2021.

REUTERS/Dado Ruvic/Illustration/File Photo Acquire Licensing Rights [↗](#), opens new tab

Jan 31 (Reuters) - Facing \$9 billion in exposure in three antitrust class actions over ATM fees, Visa and Mastercard have asked [↗](#), opens new tab the U.S. Supreme Court to tighten the standard for trial courts weighing whether to certify plaintiffs to sue as a class.

The credit card companies, as my colleague Mike Scarcella reported last Friday, contend that the District of Columbia U.S. Circuit Court of Appeals was too lax when it affirmed [↗](#), opens new tab a trial court decision [↗](#), opens new tab certifying a class of ATM operators and two different classes of consumers to pursue claims that Visa and Mastercard squelched competition by blocking ATM operators from offering lower fees for certain transactions. Supreme Court precedent, wrote Visa (V.N) [↗](#), opens new tab and Mastercard (MA.N) [↗](#), opens new tab Supreme Court counsel from Paul, Weiss, Rifkind, Wharton & Garrison, requires trial courts to use "rigorous analysis" to decide whether classwide issues predominate over individual issues. But the federal appellate circuits, the credit card companies argued, are divided on what that actually means.

In the 2nd, 3rd, 5th and 11th Circuits, according to Visa and Mastercard, it's not enough for trial judges to conclude merely that plaintiffs have offered a plausible theory of classwide injuries. Courts in those circuits, the petition argued, must also decide whether defendants' challenges fatally undermine plaintiffs' models.

The 3rd Circuit, for instance, ruled [↗](#), opens new tab in 2020 that a trial judge erred in certifying an antitrust class of epilepsy drug purchasers because he didn't give sufficient weight to defense evidence that suggested one-third of the class would have bought the higher-priced drug even if there were a cheaper alternative. Those individualized purchasing decisions, the appeals court held, could not be squared with the predominance requirement in the federal rules for class actions.

But according to Visa and Mastercard, trial judges in the 8th, 9th and D.C. Circuits don't have to weigh competing defense theories and can certify classes as long as they've determined the plausibility of plaintiffs' models.

In the ATM fee case, the D.C. Circuit faulted the trial judge, U.S. District Judge Richard Leon of Washington, D.C., for his "terse" predominance analysis, which, the appeals court said, used imprecise language and cited out-of-date precedent. Leon's shortcomings, the appeals

court said, were “surprising and unfortunate, given the breadth of the asserted unlawful practice, the amount of money asserted to be at stake, and the voluminous record including dueling expert reports.”

But the D.C. Circuit nevertheless concluded that Leon followed the dictates of the Supreme Court’s more recent cases, most notably 2013’s *Comcast v. Behrend* [↗](#), opens new tab. The trial judge’s analysis was short, the appeals court said, but “materially correct.” Visa and Mastercard told the Supreme Court that the 2nd, 3rd, 5th and 11th Circuits would have reached a different conclusion about certifying the classes in its case, proving the implications of the purported “disarray” among lower courts on the standard for class certification.

“This court’s intervention is necessary to resolve the rampant confusion in the lower courts,” Visa and Mastercard told the justices. “Relying on incorrect legal standards and untested expert evidence, courts nationwide are certifying classes with uninjured members in a range of contexts, from antitrust to securities and mass torts.”

Not so, said Jonathan Rubin of MoginRubin, who launched the ATM operators’ case against Visa and Mastercard more than a decade ago. The trial judge, Rubin said, may not have used up-to-date lingo in his class certification opinion. But the D.C. Circuit carefully considered Visa and Mastercard’s challenges to Leon’s predominance holding – including the credit card companies’ argument that the certified classes contained uninjured class members -- and decided that Leon reached the right result, Rubin said.

“This is another hollow petition for certiorari,” Rubin told me, noting that the Supreme Court previously agreed to review the decision denying defendants’ motion to dismiss the litigation, but then tossed [↗](#), opens new tab the appeal in 2016 after the defendants changed their theory in merits briefing. “They don’t have much more to go on than that the judge used the wrong words,” Rubin said.

Steve Berman of Hagens Berman Sobol Shapiro, who is co-counsel with Quinn Emanuel Urquhart & Sullivan and Mehri & Skalet in one of the companion consumer cases, agreed.

“The D.C. Circuit’s unpublished decision affirming class certification reflects a straightforward application of settled law to the particular facts of these cases,” Berman said by email. “Visa and Mastercard fundamentally contest the fact-specific result the D.C. Circuit reached, and not any legal error or circuit split on which the Supreme Court’s guidance is needed.”

Lawyers from Finkelstein Thompson and Lovell Stewart Halebian Jacobson, which represent the other consumer class, did not respond to a query.

You may have noticed that Visa and Mastercard did not frame their Supreme Court petition as a request for the justices to clarify whether classes can be certified even if they contain more than a handful of uninjured class members, focusing instead on the degree of scrutiny

that trial courts must apply to plaintiffs' theories of classwide injury.

The uninjured class member issue, you probably recall, came to the Supreme Court a couple of years ago, when Dongwon Industries' (006040.KS) [opens new tab](#) subsidiary StarKist asked for review of a 9th Circuit decision certifying three antitrust classes. Despite exhortations from the U.S. Chamber of Commerce and other business groups, the justices denied the petition in 2022.

StarKist had argued that the D.C. Circuit was actually on the right side of a circuit split over certifying classes with uninjured class members after expressing skepticism in a couple of antitrust rail freight cases. Visa and Mastercard cited the rail freight cases in their appeal, but the court distinguished between those decisions – in which plaintiffs' own model anticipated that not all class members were injured – and the ATM case, in which plaintiffs did not concede uninjured class members, but Visa and Mastercard offered competing models to highlight the purported problem.

We'll have to wait to see if the credit card companies' reframing is more enticing to the Supreme Court than StarKist's.

Read more:

Visa, Mastercard ask US Supreme Court to undo class-action orders

U.S. Supreme Court rejects StarKist's tuna price-fixing class action appeal

Tuna buyers to justices: Circuits not split over classes with uninjured members

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Reporting By Alison Frankel

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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.

As Roundup verdicts pile up, Bayer bets big on US appeals courts

 [reuters.com/business/healthcare-pharmaceuticals/roundup-verdicts-pile-up-bayer-bets-big-us-appeals-courts-2024-01-31](https://www.reuters.com/business/healthcare-pharmaceuticals/roundup-verdicts-pile-up-bayer-bets-big-us-appeals-courts-2024-01-31)

Brendan Pierson

Bottles of Roundup, a brand owned by Bayer, are seen for sale in a store in Manhattan, New York City, U.S., June 30, 2022. REUTERS/Andrew Kelly/File Photo Acquire Licensing Rights [↗](#), opens new tab

Jan 31 (Reuters) - Despite more than \$4 billion in U.S. jury verdicts over Bayer's (BAYGn.DE) [↗](#), opens new tab Roundup weedkiller, including a \$2.25 billion verdict last week, the company so far has shown no willingness to settle, instead betting that it can greatly reduce, or wipe out, its liability through legal appeals.

The strategy means the German pharmaceutical and biotechnology company could face further trials and hefty verdicts for years to come as its appeals work their way through U.S. courts. At least 10 trials are expected this year in state courts around the United States, and close to 50,000 Roundup lawsuits are currently pending.

Plaintiffs suing Bayer have said they developed non-Hodgkin's lymphoma and other forms of cancer due to using Roundup, either at home or on the job. Bayer denies those claims, and maintains the product is safe.

The long-running litigation has led some investors to call for a change of course, which could include restarting settlement talks or breaking up its business. Bayer shares have lost 70% of their value since the company inherited the lawsuits through its acquisition of U.S. agrochemical company Monsanto for \$63 billion in 2018.

"Mass tort litigation like the Roundup cases takes time before the outcomes are clear," Bayer said in a statement to Reuters. "The company will continue to try cases based on the extensive body of science and regulatory scientific assessments worldwide that support the safety and non-carcinogenicity of Roundup."

The World Health Organization's cancer research agency concluded in 2015 that glyphosate, Roundup's active ingredient, was likely capable of causing cancer, though it did not reach a conclusion about whether it posed a risk in real world use. U.S. and European regulators have found that glyphosate likely does not cause cancer and allowed its continued sale.

SHIFTING FORTUNES

Last September, Bayer was touting its ninth consecutive victory in Roundup trials. Its fortunes shifted in October, when plaintiffs started racking up victories of their own in California, Missouri and Pennsylvania state courts.

Most recently, a jury last Friday awarded \$2.25 billion to Pennsylvania resident John McKivison, the largest Roundup verdict so far. Shares of Bayer, which has set aside \$6 billion to cover Roundup liability, slumped more than 5% on the news.

In response to the trial losses, Bayer has vowed to appeal and expressed confidence that it will ultimately prevail. It has touted previous successes in appeals, pointing to three cases that went to trial before 2020 in which it managed to get verdicts totaling more than \$1.4 billion knocked down to \$132 million - a reduction of nearly 95%.

Most of that reduction resulted from U.S. Supreme Court guidance that punitive damages awards generally should not be more than nine times compensatory damages.

Bayer will be able to use that argument in some of the recent verdicts, too - though likely not in the McKivison case in which the jury awarded \$250 million in compensatory damages and \$2 billion in punitive damages, a factor of eight. It may still argue that the award was excessive for other reasons.

The company also has said that judges in recent trials have allowed expert witnesses presented by plaintiffs to misrepresent the science on the subject, an argument it is likely to make on appeal in an effort to overturn verdicts.

Finally, the company for years has been pursuing another legal argument that could limit its liability: that the approval of Roundup's label by federal regulators years ago means it cannot be sued for failing to warn consumers of alleged cancer risk.

Bayer has tried to get that argument before the conservative-majority U.S. Supreme Court, but so far, it has been rebuffed. Still, two pending appellate cases could open the door again, and Bayer has said it believes a Supreme Court victory on the issue would wipe out most of the Roundup litigation.

What all of Bayer's strategies have in common is that they will take years, and none is guaranteed to succeed. It could be a year or more before the Supreme Court hears any case, and if Bayer hopes to win at the state level, it would need to do so separately in each state's highest court, after making its way through mid-level appellate courts.

"It's almost naturally a bet-the-company posture," said David Noll, a Rutgers Law School professor who studies mass torts. "The litigation is in this strange holding pattern where Bayer is confident that it will eventually win on the science and knock out the entire litigation, but in the meantime, it's getting clobbered with verdicts."

At the same time, it is not clear how easily Bayer could settle the litigation overall - though it has settled some individual cases before trial.

In 2020, it agreed to pay \$10.9 billion to resolve most then-pending Roundup lawsuits, but in 2021 a court rejected approval for a \$2 billion plan to settle future cases.

In the wake of that rejection, Bayer began withdrawing Roundup from the home consumer market that year, though it is still sold for professional and agricultural uses. Bayer still could face new lawsuits from people who developed cancer years after exposure, or who used the product professionally, like farmers or landscapers.

Even after a settlement, new plaintiffs could be "knocking on Bayer's door again in one to two years' time," fund manager Markus Manns of Union Investment said.

Reporting by Brendan Pierson in New York; Editing by Will Dunham, Alexia Garamfalvi and Amy Stevens

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Camp Lejeune water contamination tied to a range of cancers, CDC study says

 [courthousenews.com/camp-lejeune-water-contamination-tied-to-a-range-of-cancers-cdc-study-says](https://www.courthousenews.com/camp-lejeune-water-contamination-tied-to-a-range-of-cancers-cdc-study-says)

Associated Press

NEW YORK (AP) — Military personnel stationed at Camp Lejeune from 1975 to 1985 had at least a 20% higher risk for a number of cancers than those stationed elsewhere, federal health officials said Wednesday in a long-awaited study about the North Carolina base's contaminated drinking water.

Federal health officials called the research one the largest ever done in the United States to assess cancer risk by comparing a group who live and worked in a polluted environment to a similar group that did not.

The study found military personnel stationed at U.S. Marine Corps Base Camp Lejeune were at higher risk for some types of leukemia and lymphoma and cancers of the lung, breast, throat, esophagus and thyroid. Civilians who worked at the base also were at a higher risk for a shorter list of cancers.

Courthouse News' podcast Sidebar tackles the stories you need to know from the legal world. Join our hosts as they take you in and out of courtrooms in the U.S. and beyond.

The study is "quite impressive," but cannot count as final proof that the tainted drinking water caused the cancers, said David Savitz, a Brown University disease researcher who is consulting for plaintiffs' attorneys in Camp Lejeune-related litigation.

"This is not something we're going to be able to resolve definitively," he said. "We are talking about exposures that happened (decades ago) that were not well documented."

But he said the new research will add weight to arguments made on behalf of people who got sick after living and working at the base.

Camp Lejeune was built in a sandy pine forest along the North Carolina coast in the early 1940s. Its drinking water was contaminated with industrial solvents from the early 1950s to 1985. The contamination — detected in the early 1980s — was blamed on a poorly maintained fuel depot and indiscriminate dumping on the base, as well as from an off-base dry cleaner.

Before wells were shut down, contaminated water was piped to barracks, offices, housing for enlisted families, schools and the base's hospital. Military personnel and families drank it, cooked with it and bathed in it.

The contamination has spawned a wave of litigation by law firms that have aggressively sought out clients with TV ads.

People who got sick after being at Camp Lejeune have accused the Marine Corps of failing to protect the health of its personnel and criticized the federal government for being slow to investigate. Marine Corps officials have repeatedly said that federal environmental regulations for these cancer-causing chemicals were not finalized until 1989, after the wells were shut down.

The Agency for Toxic Substances and Disease Registry, or ATSDR, an Atlanta-based sister agency to the Centers for Disease Control and Prevention, has done about a half-dozen studies focused on health problems in people at Camp Lejeune. Those studies were smaller than the new one, and had varied focuses, including male breast cancer rates and birth defects in children born to base personnel.

The earlier studies pointed out health risks, but the new work “more fully establishes the scope,” said Richard Clapp, a Boston University emeritus public health professor who has been involved in past Camp Lejeune research.

Dr. Aaron Bernstein, the head of the ATSDR and CDC’s environmental health programs, called the new study “remarkable” for being bigger and more rigorous than past research.

In the new paper, the ATSDR investigated cancer in about 211,000 people who were stationed at or worked at Camp Lejeune between 1975 and 1985 and compared them to about 224,000 people at California's Camp Pendleton — which was not known to have polluted groundwater — during the same time period.

Frank Bove, a senior epidemiologist, has led the agency's Camp Lejeune research for many years and was in charge of the latest study. He relied on staff at Battelle Memorial Institute and others to comb through cancer registries across the country to look for cases tied to either base.

They found a similar number of malignant cancers in each group, about 12,000. But the numbers — and the relative risks calculated from those numbers — were higher in the Camp Lejeune population for a number of specific types of cancer. That list included some that weren't clearly identified in some earlier studies, most notably thyroid cancer, Clapp said.

A federal law signed by President Joe Biden in August 2022 included language to address concerns of people who developed certain health problems they believe were linked to Camp Lejeune water contamination. It gave them a two-year window to file claims.

The new study may lead to inclusion of thyroid cancer to be added to the list of diseases for which Camp Lejeune personnel and their families might one day be compensated, Clapp said.

The paper, which underwent external peer review, is being submitted for publication, agency officials said.

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By MIKE STOBBE AP Medical Writer

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Cancer in the Corn Belt Sparks Actions to Fight Farm Fertilizer Nitrate Contamination

 [nakedcapitalism.com/2024/02/cancer-in-the-corn-belt-sparks-actions-to-fight-farm-fertilizer-nitrate-contamination.html](https://www.nakedcapitalism.com/2024/02/cancer-in-the-corn-belt-sparks-actions-to-fight-farm-fertilizer-nitrate-contamination.html)

By Yves Smith

February 1, 2024

Yves here. This story somewhat buries the lead. The reason several Farm Belt states are teaming up is out of concern that the runoff from nitrogen fertilizer is getting toxic nitrates into water supplies...and the level the EPA deems to be acceptable looks to be too permissive. Note this concern is not new, as a 2016 article from EcoWatch demonstrates. But the fact that some states are saddling up may change the equation.

By Keith Schneider, a former New York Times national correspondent and senior editor for Circle of Blue. He has reported on the contest for energy, food, and water in the era of climate change from six continents. Originally published at The New Lede

When directors of the public water utility in Des Moines, Iowa, went to court in 2015 to try to stop toxic farm nutrients from contaminating the city's drinking water, they knew the federal lawsuit they filed would be seen as not just a desperate step to protect public health, but also a brazen act of defiance that would provoke a ferocious response from Iowa's powerful farm and political leadership.

As they anticipated, a cohort of agricultural interests joined then-Gov. Terry Branstad in beating back the lawsuit, which Branstad declared an act of "war on rural Iowa." Des Moines Water Works alleged that drainage districts in three Iowa counties had polluted the Raccoon River with nitrates, forcing costly efforts by Des Moines to render the polluted water safe for drinking. The case was dismissed in 2017 after a court ruled that Iowa law immunizes drainage districts from damage claims.

It was the last time a government entity in Iowa or any other Corn Belt state made a focused attempt to reduce human exposure to suspected cancer-causing commercial fertilizers and a flood of livestock manure that routinely drains from farm fields into groundwater, streams, and rivers.

Until now.

Prompted by compelling research showing that cancer-related diseases and deaths are climbing as contamination from common agricultural chemicals and manure increases in key farm states, lawmakers and health officials in Iowa, Minnesota, and Nebraska are pursuing an array of new strategies aimed at reducing the risks to human health presented by the ongoing farm-related contamination.

A top concern for lawmakers and health professionals in the three states is reducing exposure to nitrates, which form when nitrogen from fertilizer and manure combine with oxygen. Babies can suffer severe health problems when consuming nitrates in drinking water, and a growing body of literature indicates potential associations that include an increased risk of cancer.

“It’s pretty obvious that in the areas where levels of nitrates and other agrichemicals in water are higher, you get more pediatric cancers and birth defects,” said Eleanor Rogan, chair of the Department of Environmental, Agricultural, and Occupational Health at the University of Nebraska Medical Center. “So that sort of tells you maybe you should do something about this and get the levels down.”

Iowa’s “Cancer Crisis”

Rogan is one of the leaders of Nebraska’s active epidemiological investigation into the state’s high rate of birth defects and pediatric cancers in areas where groundwater is contaminated with nitrates and atrazine, a weed killer. State lawmakers last year approved \$2.5 million to add a pediatric oncologist unit to the team of scientists and medical specialists at the Medical Center charged in part with identifying and controlling the sources of cancer in the state’s children. In 2022, the legislature approved grants available to households and communities to develop new sources of uncontaminated groundwater.

In Iowa, first-term Democratic state Rep. Austin Baeth, an internal medicine specialist from Des Moines, is leading a bipartisan effort in the state legislature to end what he calls “Iowa’s cancer crisis.” Working with Democrats and Republicans, Baeth says a number of bills are being drafted for legislative consideration later this year.

“One of the policies we are pursuing is to dedicate state resources to cancer epidemiology for us to start to try to find some of those linkages to figure out what are the key drivers of our cancer rate,” Baeth said. “I have been successful in finding champions on the Republican side who share my concern.”

A proposal that Baeth and colleagues are developing would fund an epidemiological research program to more precisely evaluate potential causes of cancer, identify the sources of exposure, the number of people sickened, and the places where excess cancers are developing.

The research findings would complement the Iowa Cancer Consortium project to better understand and make the case for limiting exposure to pesticides, commercial fertilizer, and animal manure used and generated by Iowa agriculture, among other environmental contaminants.

“I cannot say that we conclusively know that nitrates are the cause of our exceedingly high cancer in Iowa,” said Baeth. “But certainly nitrates and other potential toxins in the water are on the list of potential culprits. We know that high nitrate concentrations are linked to cancer.”

In Minnesota, state Rep. Rick Hansen, the Democratic chairman of the House Environment Committee, is introducing a bill this year that levies what he calls a “polluter pays” tax on commercial fertilizer to help families and communities develop clean sources of drinking water. Minnesota farms apply roughly 3 million tons of commercial fertilizer annually, according to state figures. A \$1 per ton tax on fertilizer that now sells for \$720 a ton would raise \$3 million.

Hansen’s proposal is a response to some of the nation’s worst nitrate contamination found in groundwater and drinking water wells in nine southeast Minnesota counties. In November, the US Environmental Protection Agency ordered Minnesota to address “imminent and substantial endangerment to the health” of thousands of residents who were being exposed to high levels of nitrate contamination in their drinking water.

Since 2010 Minnesota has spent an average of \$103 million annually to prevent water pollution from its sales-tax funded Clean Water, Land, and Legacy Fund. The fund modernized water treatment plants and preserved 17,000 acres along streams and rivers as unplanted natural areas. The fund also provided low interest loans to 1,100 of the state’s 67,400 farms to deploy voluntary best management practices to stem the flow of nitrates into water.

Yet contamination, according to the most recent state assessment, is getting worse. New approaches are needed, starting with a fertilizer tax, Hansen said.

“If we are in a public health crisis with high nitrates, you got to find a good alternative water for those people,” said Hansen, who represents the Twin Cities metropolitan area. “Who’s going to pay for it? I don’t believe that the general taxpayer should pay for it.”

Hansen’s proposal is supported by influential lawmakers in the state Senate, among them Sen. Matt Klein, the Democratic chairman of the Senate Commerce Committee, and an internist in Minneapolis. “The polluter pays for cleanup in the state of Minnesota,” he said. “If kids are drinking water that has been poisoned by nitrogen fertilizer, then the makers of nitrogen fertilizers need to help us fix that problem.”

“A Real Problem”

The steps taken by three of the nation’s largest farm states comes in response to long-term trends in agricultural production, water quality, and public health that converged over a decade ago and have intensified since.

The amount of nitrogen applied to corn, considered a necessity to boost yields, has increased 120 million pounds annually since 2000, according to the US Department of Agriculture (USDA). And the amount of nitrogen-rich and untreated liquid and solid manure from livestock being spread on farmland – most of it in the Midwest – grew to 1.4 billion tons by 2018, 300 million more tons than in 2007, USDA data shows.

Commercial nitrogen fertilizer and nitrogen-rich livestock and poultry manure are the leading sources of nitrate contamination that is increasing in the region's surface and groundwater, according to state environment and agriculture agencies. According to many studies, as much as 70% of the nitrogen applied to farmland leaked off fields and drained as toxic nitrates into the region's waters.

In Minnesota, for example, farmers are buying more commercial fertilizer. And the state's immense population of hogs, cows, and poultry is producing nearly 50 million tons of liquid manure. The most recent state assessment found "nitrates are increasing in major rivers," and "since 1992, there has been a general increase in the percent of new wells that have nitrate levels above the drinking water standard."

The science tying nitrates to cancer also has been building over the last 20 years and continues to build. Medical researchers have been conducting epidemiology studies, looking at large groups of people and what they're exposed to and their rates of cancers. The results, some scientists say, indicate that exposure to nitrates in drinking water poses a health threat at much lower concentrations than the 10 parts per million (ppm) federal drinking water standard.

In 2012 the US Centers for Disease Control and Prevention (CDC) reported that the incidence of cancer in Iowa, Nebraska, Minnesota and two other states in the Corn Belt – Ohio and Wisconsin — was increasing, even as the overall incidence of cancer in the US continued a decades-long decline. Just three states outside the Corn Belt experienced the same upward trend in incidence – Arkansas, Louisiana, and West Virginia.

Last year, alarm bells finally started to ring in Iowa when the state Cancer Registry reported that its citizens were suffering with the second-highest incidence of cancer in the US. The latest CDC data also found that in five other Corn Belt states – Illinois, Minnesota, Nebraska, Ohio, and Wisconsin – the incidence of cancer ranked near the top.

Digging into the data even deeper — of the counties across the country with the highest incidence of cancer, according to the CDC, Palo Alto County in Iowa has the second highest incidence, and four others in Nebraska are in the top 25.

"At some point as a society we're going to have to say, 'Well, do we want to expose everybody to all these agricultural chemicals?'," said Rogan of the University of Nebraska Medical Center. "Everybody's ending up being exposed to them and that's a real problem."

(This report, co-published with Circle of Blue, was made possible by an investigative reporting fellowship awarded by the Alicia Patterson Foundation and the Fund for Investigative Journalism. It is part of an ongoing series looking at how changing agricultural policies are affecting human and environmental health.)

Consumer Drops Data Breach Suit Against Citrix Systems, LoanCare

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X5CVTMAK000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X5CVTMAK000000)

Class Action

Photo Illustration: Jonathan Hurtarte/Bloomberg Law

A consumer voluntarily dismissed her proposed class action alleging Citrix Systems Inc. and mortgage-loan services provider LoanCare LLC failed to protect the personal information of more than 1 million people that was exposed in a November data breach.

Shirley Dailey alleged that Citrix, a provider of cloud computing services, and LoanCare failed to encrypt or redact sensitive information and failed to implement adequate data-security measures.

- Dailey filed a notice of voluntary dismissal Tuesday
- Information exposed in the breach included names, addresses, Social Security numbers, and loan numbers, the complaint said
- Dailey's attorney didn't respond to a request for comment on the dismissal

Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Consumer Protection Firm PLLC, Bailey & Glasser LLP, and Milberg Coleman Bryson Phillips Grossman PLLC represent Dailey and the proposed class. Sidley Austin LLP represents LoanCare.

The case is Dailey v. Citrix Systems Inc. , S.D. Fla., No. 0:24-cv-60038, notice filed 1/30/24 .

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Home brokerage Keller Williams to pay \$70 mln in antitrust settlement

 [reuters.com/legal/litigation/home-brokerage-keller-williams-pay-70-mln-antitrust-settlement-2024-02-01](https://www.reuters.com/legal/litigation/home-brokerage-keller-williams-pay-70-mln-antitrust-settlement-2024-02-01)

Mike Scarcella

REUTERS/George Frey Acquire Licensing Rights , opens new tab

Feb 1 (Reuters) - Home brokerage Keller Williams has agreed to pay \$70 million as part of a settlement to resolve claims that it conspired to overcharge U.S. home sellers by billions of dollars on the commissions they pay to agents for buyers.

Lawyers for the plaintiffs disclosed the proposed settlement , opens new tab in Missouri federal court on Thursday. The deal must be approved by a judge.

The agreement with Texas-based Keller Williams, which did not admit wrongdoing, is the third settlement by a brokerage in the Missouri class action lawsuit. The home seller plaintiffs in October won a \$1.8 billion verdict against Keller Williams and other defendants, including the National Association of Realtors and units of Warren Buffett's Berkshire Hathaway. The plaintiffs objected to an industry rule requiring home sellers to pay a commission to the agent for a buyer. Home sellers have called the rule anticompetitive, since agents can steer prospective buyers to homes listed with a higher commission.

Broker compensation can run to about 5% to 6% of a sales price, and buyer agents split the fee with a seller's representative.

"Our whole goal in this lawsuit is to get the National Association of Realtors and these large corporations out of the business of setting the cost of selling a home, and let the free market decide," said plaintiffs' lawyer Michael Ketchmark, a lead attorney in the case.

Ketchmark said the Keller Williams settlement was "another solid step in that direction." In addition to paying \$70 million, the brokerage agreed to make clear to franchises that compensation offers from sellers to buyers' agents are not required, among other changes.

Keller Williams executive chairman Gary Keller in a statement said the settlement "provides our agents and franchisees with much-needed relief, stability, and freedom from distraction while preserving their ability to run their businesses independently."

A spokesperson for the company, Darryl Frost, said the deal will not affect the company's operations.

The National Association of Realtors had no immediate comment.

The defendants are seeking to overturn the jury's October verdict, challenging the evidence and damages amount. The verdict has spurred related lawsuits around the country in recent

months.

Anywhere and Re/Max reached settlements last year in the Missouri lawsuit, agreeing to pay \$83.5 million and \$55 million, respectively. They did not admit any wrongdoing.

The case is Burnett et al v. The National Association of Realtors et al, U.S. District Court for the Western District of Missouri, No. 4:19-cv-00332-SRB.

For plaintiffs: Michael Ketchmark of Ketchmark and McCreight; Eric Dirks of Williams Dirks Dameron; and Brandon Boulware of Boulware Law

For The National Association of Realtors: Ethan Glass of Cooley

For HomeServices and affiliates: Robert MacGill of MacGill PC; Jay Varon of Foley & Lardner; and Brian Fries of Lathrop GPM

For Keller Williams: David Kully of Holland & Knight

Read more:

As real estate commission lawsuits rise, consumer attorneys seek case consolidation

Brokerages push to undo \$1.8 bln verdict in real estate commissions case

Realtors group urges end to home sellers' \$13 bln commission lawsuit

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Reporting by Mike Scarcella

'Late Adopters' or 'Cautious Optimism': Law Firm Partners Share Divergent Approaches to Gen AI

 [law.com/2024/01/31/late-adopters-or-cautious-optimism-law-firm-partners-share-divergent-approaches-to-gen-ai](https://www.law.com/2024/01/31/late-adopters-or-cautious-optimism-law-firm-partners-share-divergent-approaches-to-gen-ai)

(Credit: Tada Images/Adobe Stock)

NEWS

A Legalweek panel highlighted the lack of consensus surrounding how large law firms should be approaching the emerging technology.

January 31, 2024 at 06:57 PM

Artificial Intelligence

Justin Henry
Reporter

The original version of this story was published on The American Lawyer

The lack of consensus about how law firms should be embracing generative artificial intelligence came into focus Wednesday at a Legalweek panel on ethical deployment of the emerging technology in litigation, with a partner at the U.S.'s most profitable law firm highlighting a timid approach in comparison to the guarded enthusiasm shared by a partner at one of the country's largest labor and employment shops.

The "risk-averse" Kirkland & Ellis is a "late adopter" of generative AI, said litigation partner Vanessa Barsanti, who leads the firm's e-discovery practice. While the firm is testing new tools with clients, Barsanti said finding the right time and place to justify the risks of generative AI is taking time.

"It's not that we're not exploring AI options," Barsanti said. "We're doing lots of testing with clients. We are generally late adopters of new technology, because we want to make sure it's operating in a way where we are comfortable with the risks associated with it."

At least in rhetoric, Barsanti's attitude toward artificial intelligence contrasted with that of Niloy Ray, a Littler Mendelson shareholder, who expressed "cautious optimism."

"We are carefully building out the use cases," Ray said. "The tool may be great for some purposes and not great for others. As with the rest of the industry, this will become de rigueur for the industry in some manner."

Hanging over the panel was another instance on Tuesday of a New York lawyer coming under fire for submitting a GPT-generated legal brief containing fake citations. And earlier in the month, the Florida bar said lawyers may ethically employ generative AI technologies in accordance with ethical obligations.

These recent events provided moderator Karl Harris, CEO of Lex Machina, with timely questions for panelists.

Harris noted the New York appellate court's decision regarding the fake citations said the lawyer's conduct didn't spark a new rule. The panel's decision said such a rule isn't necessary for a member of the bar to fulfill the basic duty of ensuring the accuracy of legal submissions.

That point led to an exchange over the duty of lawyers to understand and explain the technology they use to generate work product, a difficult matter given the uncertainty of LLMs' "black box" process for generating content. Drawing an analogy to his car, Ray said there is already so much technology professionals use every day which they aren't obligated to understand in order to use it responsibly.

"I feel like I'm a confident driver, but I couldn't explain how continuous variable transmission works," Ray said. "It's not just AI. There's a lot of tech in our lives. We need to understand the risks and limitations when we use these tools. We've had predictive coding going on 12 years now, and essentially that is predictive AI."

Barsanti challenged Ray's car analogy, arguing no lawyer will ever be required to explain combustion in court, whereas in a discovery dispute, litigators are responsible for explaining their methods to a judge and opposing counsel.

"Maybe it doesn't need to be you in your practice; sometimes I rely on others in my firm who are experts because I don't know everything about the law," Barsanti said. "But you need to have someone who is very knowledgeable to help you relay to the court how you know what you have done is reasonable."

Michelle Six, of counsel at Florida-based Gunster, said lawyers shouldn't use innovative technology as an excuse for missteps.

"There's a double standard we're seeing being applied here where lawyers are not making the best choices," Six said. "It's not a condemnation of generative AI; it's condemnation of someone practicing not as well as they should be."

Six and Chris Chapman, director of litigation support at Dickinson Wright, agreed that generative AI requires lawyers to perform a use case analysis. Chapman said, for example, when a judge said his firm could use a generative AI tool for a certain case, the firm decided

it wasn't necessary. But if a lawyer could use generative AI to better represent a client, the lawyer may have a professional obligation to do so.

Pricing in Flux

The issue of generative AI's implications for the traditional method of pricing legal services also came up. Couldn't the efficiencies of generative AI be passed along to clients, Harris posed to an initially hesitant panel.

Ray's response was that "the Florida bar didn't say it should be an hour or less; it's to help you create a better work product," Ray said. "Value billing is a good thing when the client only has a budget for a certain amount of work."

Six, meanwhile, lamented the possibility of gen AI tools to displace formative work experiences for junior associates.

"To me, there is a very real live possibility that these tools could generate a draft motion to dismiss in two minutes that isn't perfect and doesn't sing but is as good as what I get out of a first or second year associate but much quicker," Six said. "How are those baby associates going to learn? You can press a button and get a product."

The topic of monetizing legal services powered by generative AI also arose later Wednesday at another panel on knowledge management. Speaking as a consumer of legal services, Joseph Mazzarella, president and general counsel of emergency communications provider Mutualink, said the advent of new technologies may naturally lead to the replacement of hourly billing with value-based and flat-fee billing.

"If I'm getting charged \$750 an hour, I want to make sure I'm getting \$750 worth of advice," Mazzarella said. "If I'm getting a bill for an hour and that hour was generated by an LLM, where's the value? It's going to put strange pressures on the system."

In the earlier panel, Barsanti said integrating generative AI into work functions will require a shift in how firms think about training associates. One solution, she suggested, could be to allow associates to do a first review of AI-generated material with the oversight of a partner.

"It still isn't going to be perfect, but you're training them, and it's still taking less time," Barsanti said. "It's not the easy button; maybe it's the easier button."

One barrier to training generative AI tools using client information is the hesitance of clients due to security and confidentiality concerns.

Todd Friedlich, director of knowledge management and innovation at Willkie Farr & Gallagher, said no client of his firm has given consent to train LLM with their data. To the contrary, he said clients are writing in to request the firm refrain from doing so.

Prior to the panel, Friedlich said he'd been speaking with a vendor which uses an LLM to query internal firm emails, which he noted is a bevy of privileged information. "That's interesting, but we can't not have client communications in our emails," Friedlich said. "I don't think we'll ever have approval to do that."

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- US accounting standard-setters will explore clarifying parts of their high-profile plan to force businesses to reveal more details about major expenses, but the crux of proposal will remain intact, Financial Accounting Standards Board members said Wednesday.

The proposal, released in July, aims to make publicly traded companies explain how they spend their money by disclosing key expense details like raw materials and worker pay. It's a response to years of investor complaints that companies lump expenses into catch-all financial statement categories like "selling, general, and administrative," without explaining the biggest cost drivers inside them.

Businesses have bristled against the plan, saying it will cost too much money and take too much time to implement. Some asked for industry-specific carveouts, such as for banking or insurance, or breaks for classes of publicly traded businesses that qualify as smaller reporting companies. At a meeting to review feedback on the much-watched plan, FASB members rejected requests to narrow the number of companies that would have to comply.

But the board will consider ways to make the proposal easier to follow, such as offering guidance for certain industries or simplifying how to approach inventory and manufacturing expense disclosures, one of the biggest sources of pushback from businesses.

“At this point it’s imperative that we just get this project over the finish line,” FASB member Christine Botosan said. “I don’t want to reopen the project in any substantive way.”

Board members acknowledged several times Wednesday that the project, once finalized, will not be an easy undertaking for companies. It will take time and money to update expense-tracking systems, but it also could give investors and analysts new, key information to help them make forecasts, assess profitability, and compare companies, FASB said.

The proposal could have gone even farther, but the board wanted to be realistic, FASB Chair Richard Jones said.

Released in July, the proposal requires publicly traded businesses to divulge in their financial statement footnotes details about each expense item they list in their income statement, including the amounts of depreciation, amortization, employee compensation, and any costs related to inventory and manufacturing activities.

Potential Clarifications

The board also will weigh providing guidance for certain industries such as oil and gas, aerospace and defense, and banking and insurance. Businesses in these industries are subject to regulatory requirements that differ from businesses such as retailers, companies told FASB.

Some businesses requested clarity on selling expenses, which is not defined by the proposal. FASB agreed to explore minor tweaks, such as clarifying whether advertising expense is a component of selling expense or providing examples of selling expense disclosures.

Inventory, Manufacturing Concerns

2/3

Companies said it would be difficult to separate inventory and manufacturing expense information from other required expense categories. Companies that do not have significant manufacturing activities also asked for flexibility.

FASB members did not commit to a path to explore, but did say they knew there were problems with the inventory and manufacturing expense part of the proposal and they had to tackle them.

“This is the area where I think we clearly received the most feedback that indicated what we proposed in this condition isn’t operable, and it needs the most work of everything that we’ve talked about,” FASB member Marsha Hunt said. “I am supportive of looking into everything that in this topic would make that more operable.”

Wednesday’s discussion was FASB’s first step in plotting how to proceed with its expense disaggregation project. The board has not targeted a timeline for publishing a final accounting standard.

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Coinbase and Its CEO Prep 'War Chest' for Pro-Crypto Politicians

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Jan. 31, 2024, 12:10 PM PST

Yueqi Yang

Bloomberg News

- Crypto exchange gets ready for 'most consequential' election
- Fairshake supports crypto-friendly candidates in both parties

With two of his most-formidable competitors in prison or likely headed there soon, **Brian Armstrong** has emerged as arguably the most-powerful leader in the digital-asset industry. And his ascendancy comes at an intriguing time: the start of campaign season for a US election that his company has described as "the most consequential in crypto's history."

The Coinbase Global Inc. chief executive officer's rising influence is being bolstered by his own resurging affluence, with Armstrong putting some of his fortune to work to help fund what he calls a "war chest" to support crypto-friendly politicians as the industry remains pressured by a US government crackdown that began last year. He personally has donated \$1 million to the Fairshake super-PAC and Coinbase itself kicked in another \$24.5 million, according to Josh Vlasto, a spokesperson for the political action committee.

Armstrong and his company account for about one-third of the \$85 million that the group says it has raised so far. Coinbase has described the PAC's goal as spending big to amplify "crypto's superpower of grassroots support," a reminder that the industry's influence on politics remains even after the downfall of mega-donor **Sam Bankman-Fried**.

"FTX, Voyager, Genesis went down — many of Coinbase's peers actually went down," said **Owen Lau**, analyst at Oppenheimer & Co. "Coinbase is still standing and fighting for the industry. He needs to get this done."

Brian Armstrong speaks during the Messari Mainnet summit in New York in September.

Photographer: Michael Nagle/Bloomberg

Armstrong has plenty more to spend, should he choose. Last year's massive rebound in the company's stock lifted his personal fortune to an estimated \$5.8 billion, a jump of about 300% from the beginning of 2023, according to the Bloomberg Billionaires Index. He cashed in \$78 million worth of shares in the company last year, according to data compiled by InsiderInsights.com.

Coinbase didn't immediately respond to a request for comment on the political spending.

Read More: Coinbase Hires Former UK Chancellor Osborne in Advisory Role

Coinbase itself is in a legal battle with the Securities and Exchange Commission, which last year accused the company of running an unregistered exchange, broker-dealer and clearinghouse for tokens it deemed to be securities. Coinbase has disputed the allegations, claiming the SEC is overstepping its bounds.

Fairshake supports pro-crypto candidates from both the Democratic and Republican parties. Its biggest spending so far has been on behalf of Representative Patrick McHenry, a North Carolina Republican, who has announced he won't seek re-election. Fairshake has also supported Representatives Dusty Johnson, a South Dakota Republican; Josh Gottheimer, New Jersey Democrat; and Tom Emmer, a Minnesota Republican, among others, according to data from OpenSecrets.

"The crypto community is united to help elect leaders who support American innovation and job creation," Fairshake's Vlasto said in a text message. "It is long past time for Congress and the administration to pass strong and responsible regulation that supports innovation and growth, protects consumers, and roots out bad actors."

More details about the super-PAC's donors are expected to be revealed Wednesday through a filing with the Federal Elections Commission. According to Vlasto, Fairshake also received \$20 million from the venture-capital firm Andreessen Horowitz, which has been very active in raising funds for crypto companies. Other donors include Ripple, which gave \$20 million, and venture-capital firm Electric Capital, which donated \$500,000, he added.

"Supporting candidates, from both parties, who take a long-term view of technology is an important part of ensuring that clear rules of the road are developed for blockchain technology and digital assets," **Collin McCune**, head of government affairs at Andreessen Horowitz, said in a statement. "Crypto is at a tipping point in the U.S. and without a clear regulatory framework for entrepreneurs, we risk sending innovation abroad while harming consumers by allowing bad actors to continue to slip through the cracks."

To critics of the industry, Coinbase's lobbying is a reminder that the industry's influence in Washington remains, even after the FTX exchange collapsed. FTX's imprisoned former leader Bankman-Fried shook Capitol Hill with his vast political spending before his

subsequent downfall and conviction on fraud charges left deep scars on the industry. One of Armstrong's other main competitors, Binance's **Changpeng "CZ" Zhao**, is out on bail as he awaits a sentence of as long as 18 months in prison after pleading guilty to failing to maintain an effective anti-money-laundering program at his crypto exchange.

"Because crypto still has no legitimate use and is the preferred financial product of speculators, gamblers, predators, and criminals, it will remain difficult to get most policymakers to take their baseless claims seriously," said **Dennis Kelleher**, president and CEO of the advocacy group Better Markets. "However, money talks in Congress and on the campaign trail so they will undoubtedly have some success in buying allies who will push crypto's priorities over the public interest."

Armstrong slowed his stock sales when Coinbase shares were down in 2022, but accelerated the sales last year. In late 2022, he announced plans to sell about 2% of his Coinbase holdings over the next year to fund scientific research and companies. Still, his biggest stock sales — amounting to \$292 million in total — occurred in 2021, the year Coinbase shares began trading on Nasdaq. Coinbase said its direct listing required large existing stockholders to sell a portion of their holdings to create liquidity for the market.

Executives selling into share-price strength is "very common" among corporate insiders and shouldn't be interpreted as an indicator that the stock price is peaking, said **Jonathan Moreland**, director of research at InsiderInsights.com.

"Mr. Armstrong made his killing in his stock at the hyped-up IPO price back in April 2021," Moreland said. "His decision to accelerate his sales last year is also unsurprising after his share price rose again in concert with prospects for the SEC approving a Bitcoin ETF."

(Adds other donors in 10th paragraph.)

--With assistance from **Kristine Owram** and **Bill Allison**.

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US Objects to Liability Releases in SAS Airline Bankruptcy Plan

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Litigation

- Bankruptcy plan release provisions too broad, watchdog says
- Reorg rests on \$1.2 billion Air France-KLM, Castlelake deal

Scandinavian airline SAS AB should be forced to revise its Chapter 11 bankruptcy plan disclosure documents to limit the breadth of provisions shielding third parties from future litigation related to the case, the Justice Department's bankruptcy monitoring arm said.

The US Bankruptcy Court for the Southern District of New York shouldn't approve the bankrupt airline's Chapter 11 plan solicitation materials until the company removes or revises the "extraordinarily broad" release language, the US Trustee said in a Tuesday court filing.

Although the company's pending Chapter 11 plan allows creditors to opt in to granting litigation releases for related third parties, it also includes sections that appear to impose a non-consensual release on "every person and every entity existing in the world, and certainly any creditors receiving a distribution regardless of whether they opt-in," the DOJ watchdog said.

The company's plan should also provide creditors with more details about the creation of a bankruptcy plan trust and post-bankruptcy obligations, the government said.

Lawyers for SAS didn't immediately respond to a request for comment.

The airline's Chapter 11 plan stems from a \$1.2 billion restructuring deal it reached last year with a consortium including Air France-KLM and private equity firm Castlelake LP, which are set to take an equity stake in the troubled company.

The Scandinavian carrier filed for Chapter 11 bankruptcy protection in July 2022 to deal with ballooning debt and address operational issues.

The case is *In re SAS AB*, Bankr. S.D.N.Y., No. 22-10925, objection filed 1/30/24 .

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Philips Halts U.S. Sales of CPAP Breathing Machines After Recall

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Feb. 1, 2024, 10:50 AM PST

By Aaron Gregg

(Washington Post) -- Philips Respironics will halt U.S. sales of its ventilators and CPAP breathing machines after reaching a settlement with the Food and Drug Administration, the company disclosed in a Securities and Exchange Commission filing Monday.

The company recalled more than 1 million breathing machines in 2021 amid reports that they were blowing gas and bits of foam into users' airways.

The agreement with the FDA and Justice Department, which requires approval from a U.S. court, specifies that the company will keep servicing the machines already in use while halting new sales until certain conditions are met.

The final amount of the settlement hasn't been determined and will depend in part on the number of claims ultimately filed. But the company recorded a provision of about \$392 million and told investors it expects further costs to cover remediation and other punitive charges in 2024, according to the SEC filing.

The sales halt covers the company's widely used CPAP (continuous positive airway pressure) machines, used to treat sleep apnea and other breathing disorders, as well as BiPAP sleep therapy devices.

Executives said the company values safety and quality above all else and apologized for the harm caused to patients.

"Resolving the consequences of the Respironics recall for our patients and customers is a key focus area and I acknowledge and apologize for the distress and concern caused," Philips chief executive Roy Jakobs said in a statement. "We are fully committed to complying with the consent decree, which is an important step and provides a clear path forward."

The company recalled certain ventilators starting in June 2021 over concerns related to the polyester-based foam that is used to reduce sound and vibration in the machines. "If the foam breaks down, black pieces of foam, or certain chemicals that are not visible, could be breathed in or swallowed by the person using the device," according to the FDA.

The company conducted additional testing, which it said in July showed that the levels of particulate matter released into users' airways were "within the applicable safety limits and are unlikely to result in appreciable harm to health of patients." In a response dated Oct. 5, however, the FDA countered that it didn't "believe that the testing and analysis Philips has shared to date are adequate to fully evaluate the risks posed to users from the recalled devices."

The FDA said it "remain[ed] unsatisfied with the status of this recall" as of October, according to a statement attributed to Jeff Shuren, director of the FDA's Center for Devices and Radiological Health.

The settlement reached with the FDA also resolves product liability claims brought against the company.

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Carbonite Inks \$27.5M Deal To End Stock-Drop Investor Suit

By **Henrik Nilsson**

Law360 (January 31, 2024, 8:53 PM EST) -- Data backup provider Carbonite Inc. has agreed to pay \$27.5 million to a certified class of investors alleging the company overhyped a product that was later pulled from the market, according to a motion to approve the deal filed in Massachusetts federal court on Wednesday.

The Construction Industry and Laborers' Joint Pension Trust **urged** the court to grant preliminary approval of the deal and end "four years of vigorous and contentious litigation," saying the proposed \$27.5 million settlement is good for the investors, especially when weighed against the risk of continued litigation.

"Given the risks inherent in this complex securities class action and the outstanding result obtained, the settlement represents an excellent result for the class," the investors argued.

Class counsel is seeking approval of attorney fees not to exceed 33% of the settlement amount and expenses up to \$600,000.

The class consists of investors who purchased or acquired Carbonite common stock between Oct. 18, 2018, and July 25, 2019, and suffered damages. Class members are entitled to at least \$10 under the proposed deal. Any remaining funds after redistribution will be donated to a charitable organization, according to the motion.

In exchange, class members will release Carbonite from all claims, according to the motion.

The investors sued in August 2019, alleging Carbonite and its former executives Mohamad S. Ali and Anthony Folger induced them into purchasing shares in the Massachusetts-based Carbonite Inc. when it launched a new data backup product called Server VM Edition, or VME, in 2018.

The product failed to live up to expectations, however, requiring frequent patches and repairs before it was pulled from the company's lineup the following year. The investors allege that Ali and Folger knew, or at least should have known, of the product's shortcomings even as they put out projections continuing to show VME boosting the company's profits.

The case was **dismissed** in 2020 but revived the next year by the First Circuit, which ruled that the complaint sufficiently alleged that Carbonite executives intended to mislead investors.

U.S. District Judge Leo T. Sorokin **granted class certification** in July, designating the Construction Industry and Laborers' Joint Pension Trust as the representative plaintiff and Robbins Geller Rudman & Dowd LLP as class counsel.

Carbonite **moved to decertify** the class in September and the motion was still pending as of Wednesday. The company denies the fraud allegations and maintains that the losses investors suffered were unrelated to the alleged misstatements, the investors said in their motion.

Carbonite's continued denial is another factor that weighs in favor of approving the deal, the investors argued, saying any potential recovery "could be eliminated or dramatically reduced" if the court sided with Carbonite at the summary judgment stage or at trial.

"And even if lead plaintiff prevailed at each of those stages, it would also have to prevail on the appeals that would likely follow, and then collect on any judgment after the likely exhaustion of remaining insurance policy proceeds," the investors said.

Counsel for the investors, David Rosenfeld of Robbins Geller, told Law360 that the settlement "is an excellent result for the class and is a great example of what can be achieved when you have a strong and committed lead plaintiff like the Pension Trust."

Counsel and representatives for Carbonite did not immediately respond to a request for comment.

The investors are represented by Samuel H. Rudman, David A. Rosenfeld, Robert D. Gerson and Ellen Gusikoff Stewart of Robbins Geller Rudman & Dowd LLP, and Theodore M. Hess-Mahan of Hutchings Barsamian Mandelcorn LLP.

Carbonite is represented by James R. Carroll, Kurt Wm. Hemr, Alisha Q. Nanda and Nigel Tamton of Skadden Arps Slate Meagher & Flom LLP.

The case is Construction Industry and Laborers Joint Pension Trust et al. v. Carbonite Inc. et al., case number 1:19-cv-11662, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Katryna Perera, Brian Dowling and Julie Manganis. Editing by Scott Russell.

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Chancery's Musk Ruling Could Dim Superstar Execs' Shine

By **Jeff Montgomery**

Law360 (January 31, 2024, 10:06 PM EST) -- When the Delaware Chancery Court scuttled Elon Musk's \$55 billion Tesla compensation package in a first-of-its-kind ruling, experts said it was a "groundbreaking" move that checks the clout of superstar celebrity CEOs and their boardroom allies and could blunt their power against shareholders, experts told Law360.

Chancellor Kathaleen St. J. McCormick's 200-page opinion, which came down late Tuesday, was described as an exhaustive mapping of corporate controller status, fiduciary obligation and an allegedly super-sized fail by directors that was brought to light through stockholder class litigation.

Jill E. Fisch, Saul A. Fox distinguished professor of business law at the University of Pennsylvania Carey Law School, described the Tesla decision as notable and important.

"The interesting question is: How much of this is personal and focused on Elon Musk, who is widely seen as 'a larger than life person?'" she said.

Fisch said it was hard to complete a process perfectly "in a company in which there is somebody who is as dominant as Elon Musk, but there are a lot of companies out there with controlling stockholders."

Chancellor McCormick, she said, did not think there was a robust negotiation in Musk's compensation process, and was skeptical that the board's committee acted with an independent mindset.

"Those are all requirements for what you might call a fair process," Fisch said. "This is a very careful opinion. It's very well thought out, well reasoned, but she's breaking ground on a number of, I think, new issues, and I think it's entirely possible that the Supreme Court is going to weigh in on some of them."

Charles Elson, retired professor of governance at the University of Delaware and founding director of the university's Weinberg Center for Corporate Governance, said the fact that the chancellor would rescind the entire package "is quite dramatic. I thought it was a very intelligent decision, clearly thought out and very well reasoned, and I think she did the right thing."

Elson wrote an amicus brief supporting the stockholders and has published on larger-than-life, so-called "superstar" executives.

In the decision, still subject to a state supreme court appeal, the chancellor broke down the extent and sources of Musk's influence. She took a side trip into Musk's conviction that his efforts are aimed at saving mankind, an argument the tech guru used to justify his pay package.

Chancellor McCormick concluded that Tesla failed to show that his "unfathomable" equity package, 250 times greater than the 2017 median for peer CEOs, was fair or that it was even necessary given that Musk's existing 21.9% equity stake and compensation was already enough of a motivator.

"It could be said that Musk wields unusually expansive managerial authority, equaling or even exceeding the imperial CEOs of the 1960s" and enjoying the clout of a "Superstar" CEO, Chancellor McCormick wrote.

That status, the opinion said, can tilt and distort corporate decision-making, increasing the importance of minority protection and the kind of independent directors that Tesla was found to lack.

Elson, who co-authored a paper called "Executive Superstars, Peer Groups and Overcompensation" in 2013 — published by the University of Delaware's John L. Weinberg Center for Corporate Governance — agreed with Chancellor McCormick's assessment of Musk's public profile.

"The 'superstar' never is as bright a star as people thought," he said. "The theory that superstars get up and move was really fallacious, and to award someone an outsized package out of fear they would leave was incorrect," in the case of Tesla, along with "the notion that he's going to get up and walk away from Tesla with most of his wealth tied up."

Delaware's Supreme Court already has before it another high-stakes, big-money, controller-focused dispute involving the fairness of the \$30 billion spinoff of Match.com from Barry Diller-controlled IAC.

Vice Chancellor Morgan T. Zurn found in September 2022 that the controller-dominated squeeze-out deal's complex structure enabled it to avoid "enhanced scrutiny" and review under more stringent standards.

"I can say that the fiduciary obligations of controllers and the definition of controller are two ongoing problems for Delaware, which is why the Match case is pending before the Delaware Supreme Court right now," said Ann M. Lipton, Tulane University Law School's Michael M. Fleishman associate professor in business law and entrepreneurship and associate dean for faculty research.

"This [Tesla decision] just adds to the complexity of the problems the Delaware Supreme Court faces in terms of developing a coherent set of standards," she said.

The chancellor's opinion noted that three earlier court proceedings had taken up the issue of Musk's controller muscle, including a Tesla Motors stockholder suit that challenged the stock-for-stock merger of Tesla with rooftop solar venture SolarCity. Musk was SolarCity's largest stockholder and chairman of its board, among other conflicts.

The SolarCity case, presided over by now-retired Vice Chancellor Joseph R. Slights III, nevertheless concluded that the price was entirely fair and the acquisition was "meaningfully vetted." In the decision, however, the vice chancellor never got to a position requiring a ruling on whether Musk was a controller, nor did the supreme court.

Tesla and SolarCity, Chancellor McCormick wrote, both involved Musk enterprises that she argued promote "a good future for humanity," albeit one in which ultimate survival might mean having to colonize Mars.

Tesla's directors were concerned, the chancellor wrote, that failure to provide incentives enough to keep Musk fully engaged with Tesla could mean more attention to SpaceX. There, "he could fulfill his galactic ambitions to establish interplanetary travel, colonize Mars, and potentially earn more money in the meantime."

That argument, the Tesla ruling said, "begs another question: If encouraging Musk to prioritize Tesla over his other ventures was so important, why not place guardrails on how much time or energy Musk had to put into Tesla?"

The chancellor's decision appeared to annoy Musk, who shortly after advised against incorporation in Delaware in a post on his X platform, known as Twitter before he bought it in a contentious sale in 2022. He later launched a poll about moving the corporate charter of his flagship business to Texas.

Francis G.X. Pileggi, the managing partner of the Wilmington office of Lewis Brisbois Bisgaard & Smith LLP and the author of the long-running Delaware Corporate & Commercial Litigation Blog, said the decision on Tuesday, unless overturned, will "need to be reckoned with" in future executive compensation challenges. He added that it was unlikely another case like it would come up soon.

"As far as moving to Texas, I can understand why Mr. Musk might be unhappy with the decision, if it is not overturned on appeal," Pileggi said. "But the benefits of being a Delaware company include the

guidance from over 200 years of case law and the annual legislative fine-tuning of the corporate statutes, among others, and that cannot be replicated overnight by moving to any other state."

The threat drew some parallels with a years-long battle over control of global translation venture TransPerfect Corp., which moved its corporate home from Delaware to Nevada in 2018 after a chaotic battle between its divorced founders prompted then Chancellor Andre G. Bouchard to order a sale of the business.

Lawrence Hamermesh, former director of the University of Pennsylvania Carey Law School's Institute for Law and Economics and professor emeritus at Widener University Delaware Law School, described the decision as "deftly written and thorough, but relatively straightforward and unsurprising in terms of legal analysis."

While the finding that Musk was a controlling stockholder and the rescission order were interesting, Hamermesh said, they were interesting "only in the sense that those rulings are relatively rare post-trial. I don't find either decision problematic."

Minor Myers, professor of law at the University of Connecticut School of Law, said Chancellor McCormick's decision made clear that "at the board level and at the level of the stockholder vote, there was simply no credible disinterested decision-maker who passed on the advisability of Musk's grants."

Neither the board, because of directors' personal ties, nor stockholders, because crucial information was withheld, rejected the proposal at the time, he said.

"That of course may be the way Musk likes things. And that may also explain the splenetic public reaction he had to the decision in saying how much he dislikes Delaware's corporate law regime," Myers said. "In the chancellor, Musk finally confronted someone who was not cowed by his personality or bank account and who did nothing more than apply to him the same rules of corporate governance that apply to everyone else, and that may ultimately be what he hates so much about Delaware."

Plaintiff Richard J. Tornetta is represented by Jeroen van Kwawegen, Gregory V. Varallo and Glenn R. McGillivray of Bernstein Litowitz Berger & Grossmann LLP, Jeremy S. Friedman, Spencer M. Oster and David F.E. Tejtelt of Friedman Oster & Tejtelt PLLC, and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC.

Musk and the other defendants are represented by Evan Chesler, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP, and David E. Ross and Garrett B. Moritz of Ross Aronstam & Moritz LLP.

The case is Tornetta et al. v. Musk et al., case number 2018-0408, in the Court of Chancery of the State of Delaware.

--Editing by Adam LoBelia.



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Musk Wants Investor Vote To Move Tesla From Del. To Texas

By **Madeline Lyskawa**

Law360 (February 1, 2024, 12:17 PM EST) -- Tesla CEO Elon Musk said Thursday the company will immediately move to hold a shareholder vote to transfer its state of incorporation from Delaware to Texas, shortly after Delaware's chancellor struck down Musk's proposed \$55 billion Tesla pay package.

In a series of posts on X, formerly Twitter, Musk lamented over his decision to incorporate Tesla in Delaware, warning his followers on Tuesday to "never incorporate your company in the state of Delaware," and instead saying, "I recommend incorporating in Nevada or Texas if you prefer shareholders to decide matters."

Musk then created a poll asking his followers to vote on whether Tesla should change its state of incorporation to Texas, where its physical headquarters are located. With more than 1 million votes tallied, more than 87% came out in favor of the move.

Galvanized by the response, Musk announced his plan to immediately hold a shareholder vote to transfer the company's state of incorporation to the Lone Star State, in a post published early Thursday morning, just past midnight Eastern time.

"The public vote is unequivocally in favor of Texas!" Musk said. "Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas."

Musk's started posting on X Tuesday, the same day Chancellor Kathaleen St. J. McCormick **struck down** his proposed Tesla pay package, finding shareholders who challenged it "demonstrated that rescission is reasonable, appropriate and practicable."

Chancellor McCormick **further found** that "Musk dictated the timing of the process, making last-minute changes to the timeline or altering substantive terms immediately prior to six out of the 10 board or compensation committee meetings during which the plan was discussed."

The plan, which had been in the works since 2018, initially went to a weeklong trial in November 2022 after stockholders sought to oppose the pay package's 10-year compensation scheme, which included 12 tranches or performance milestones that Musk had to meet before qualifying for a portion of the total, once estimated at as much as \$56 billion.

During the trial, Tesla had argued that the plan was designed to incentivize Musk with equity awards for achieving "breathtakingly difficult milestones," adding the board never considered requiring Musk to work a certain number of hours as part of the package.

Representatives for Musk and Tesla did not immediately respond to requests for comment on Thursday.

--Additional reporting by Jeff Montgomery. Editing by Robert Rudinger.



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FibroGen's \$28.5M Deal With 30K Investors Nears Tentative OK

By **Gina Kim**

Law360 (January 31, 2024, 10:06 PM EST) -- A California federal judge indicated Wednesday that he'll preliminarily sign off on a \$28.5 million settlement secured for a class of approximately 30,000 FibroGen investors who accused the company of making misleading statements about the safety of its anemia drug, citing the risk of recoverability issues due to FibroGen's financial state.

During a remote hearing Wednesday afternoon, U.S. District Judge Edward M. Chen said he plans to grant preliminary approval to the class action settlement reached last fall between FibroGen and its investors, who accused the company and its top brass of violating federal securities laws.

Investors claimed that FibroGen made misleading statements about its once-hyped flagship blockbuster drug, Roxadustat — which was to be used to treat patients with anemia — but that stock prices plummeted when the truth came to light in the spring of 2021. Roxadustat never obtained regulatory approval in the U.S., and FibroGen's only other major drug candidate, Pamrevlumab, had yet to be approved anywhere, the investors alleged.

On Wednesday, class counsel Lester Hooker of Saxena White PA said that further litigation could have resulted in lower recovery or the possibility of no recovery at all for the class because the court had accepted some of FibroGen's arguments during the class certification stage by shortening the class period.

FibroGen would have continued to advocate along the same lines on loss causation grounds to further chip away at the class period at the summary judgment stage and trial, as the company has maintained that none of the challenged statements were actionably false, Hooker added.

If the judge, the jury or the appellate court lent any credence to FibroGen's arguments, "it's hard not to envision a scenario where the class recovers nothing at all" or far less than the settlement, Hooker told the judge.

And the investors are cognizant of FibroGen's ability to pay as the liability insurance for its directors and officers was diminishing by the time settlement was reached and would've continued to erode had litigation proceeded, he added.

"Lastly, the \$28.5 million settlement on a pure monetary level compares favorably to similar settlements in similar-sized class actions," and the settlement is an "outstanding result" for the investor class, he said. The entire settlement will primarily be funded from the defendants' directors and officers insurance, the judge was told.

"And, as I understand it, there are no other pending pharmaceutical products in the pipeline for which there is an imminent prospect of substantial change in the financial picture?" Judge Chen asked.

Hooker said no, based on publicly available information.

At the end of the hearing, Judge Chen noted that the plaintiffs showed the settlement was the result of arm's-length negotiations and that the financial risks and collectability issues facing FibroGen warrant approval.

Wednesday's hearing brings the litigation closer to its end, nearly three years after FibroGen investors sued the company on April 12, 2021.

FibroGen submitted a new drug application for Roxadustat, which it worked with AstraZeneca to make, to the FDA in 2019. On April 6, 2021, at the close of trading, FibroGen announced that it became aware that the data for the drug's safety testing was manipulated in advance of an FDA advisory meeting, the plaintiffs alleged.

That caused FibroGen's share prices to fall 43%, down \$14.09 to close at \$19.74 per share on April 7, 2021, on heavy volume.

Shares continued to sink on April 8, 2021, and closed at \$18.81 per share, according to the investors.

On Nov. 27, 2020, FibroGen's former chief medical officer, Peony Yu, who led the charge for Roxadustat's safety and efficacy testing, abruptly resigned from her post, just before the drug was expected to gain FDA approval, the plaintiffs alleged. Yu wiped her company-issued laptop's hard drive a week before FibroGen acknowledged that the safety analysis for the drug was manipulated, the plaintiffs claimed.

Three weeks later, FibroGen announced that regulators had extended the review period for Roxadustat by three months. On Aug. 11, 2021, the company said Roxadustat wouldn't be approved for any patient group at the time.

Investors sought to have the court certify the class period to run from Dec. 20, 2018, to July 15, 2021. Last year, Judge Chen partly granted and denied the certification bid and designated April 6, 2021, as the cutoff date for the class period.

The class's Dec. 8 preliminary approval motion said that establishing liability against FibroGen wouldn't be an easy feat because the company continued to fight against key issues regarding falsity, scienter, loss causation and damages stemming from the alleged false statements regarding Roxadustat's safety and efficacy.

Furthermore, FibroGen hasn't been in the best financial condition, as its stock is currently trading at \$0.65 per share, which is down a whopping 99% from its class period trading at a high of nearly \$60 per share, the preliminary approval motion said.

Class counsel said that they plan to seek no more than \$7.125 million from the settlement for fees and that expenses that won't exceed \$715,000.

The plaintiffs are represented by David R. Kaplan, Maya Saxena, Emily Bishop, Steven Singer, Kyla Grant, Sara DiLeo, Joshua Saltzman, Lester Hooker and Dianne Pitre of Saxena White.

FibroGen and its officers are represented by Patrick Gibbs, Tijana Brien, Brett De Jarnette, Zaneta Kim, Alexandra Eber and Caitlin Munley of Cooley LLP.

Yu is represented by Bruce Ericson and Lee Brand of Pillsbury Winthrop Shaw Pittman LLP and Eric Wei of Wei Group LLP.

The cases are *In re FibroGen Inc. Securities Litigation*, case number 3:21-cv-02623, and *Vanessa Pardos Millan v. James A. Schoeneck et al.*, case number 3:21-cv-05871, both in the U.S. District Court for the Northern District of California.

--Editing by Rich Mills.



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Crypto Faded As A Shareholder Suit Target In '23, Study Finds

By **Jessica Corso**

Law360 (January 31, 2024, 9:58 PM EST) -- The number of securities class actions filed last year ticked up slightly from the year before, even with a drop in new suits against the cryptocurrency sector and blank-check companies, according to a report released Wednesday by Cornerstone Research.

There were 215 securities class actions filed last year compared with 208 filed in 2022, a slight increase due in part to a **wave of lawsuits** filed against banks that collapsed following turbulence in the markets last spring. Cornerstone's latest report found that nine cases tied to last year's banking crisis, in which regional lenders like Silicon Valley Bank imploded, were filed in 2023.

But while new case filings were up overall, there was a nearly 40% drop in new suits against both the crypto industry and special purpose acquisition companies, or SPACs, Cornerstone said.

The Survival of The Crypto Docket

While there was a drop in new crypto cases filed last year, the vast majority of those filed in 2022 remain pending in the courts.

	Dismissed	Settled	Remanded	Continuing
2018-19				
Crypto filings	61%		33%	6%
All others	54%		39%	8%
2020				
Crypto filings	77%		15%	8%
All others	55%		29%	16%
2021				
Crypto filings	45%		18%	36%
All others	36%		17%	47%
2022				
Crypto filings		91%		
All others	25%		6%	69%

Percentages may not add up to 100% due to rounding.

The decrease in new SPAC cases is not surprising given that fewer companies are turning to blank-check entities as a means of going public, Simpson Thacher & Bartlett LLP attorney Jonathan Youngwood said.

Youngwood, who leads his firm's civil securities litigation practice, told Law360 Wednesday that he wouldn't be surprised if there were even fewer SPAC cases filed this year as the market continues to cool.

"SPACs have somewhat run their course and clearly are not a tool of entering the market that many companies are using to the same degree that they used them several years ago," he said.

Youngwood was more surprised by the drop in crypto cases, however, and wondered whether it was just a consequence of waning interest in a once-trendy new area of litigation.

"It may be that starting around 2021 or 2022, it was a new avenue where plaintiffs firms were looking for cases," he said. "And now they have sort of settled and matured and plaintiffs firms are filing fewer of them."

There was a **big increase** in new cryptocurrency suits in 2022 as the industry hit significant turmoil with the collapse of FTX and several other major industry players in what was termed the **crypto winter**.

Twenty-three suits were filed against the industry that year, a high that was not repeated with this year's filing of 14 new crypto securities cases, according to Cornerstone. But crypto filings were still above 2021 and 2020, which saw 11 and 13 new cases, respectively.

While it might be tempting to be "mystified" by the drop in cases against an industry in which massive fraud has been alleged, Stanford Law professor Joseph Grundfest said the reason is fairly straightforward.

"Crypto prices rebounded in the second half of the year. When prices are up, damages are harder to allege so litigation declines," Grundfest said in a statement accompanying the release of the Cornerstone report.

Stanford Law School's Securities Class Action Clearinghouse works alongside Cornerstone Research to collect data for the annual report.

Although new cases have fallen, the host of 2022 lawsuits against crypto platforms and token issuers seem to be sticking around much more than their noncrypto counterparts.

A total of 25% of 2022 securities class action filings outside the crypto industry have been dismissed, but only 4% of crypto cases filed that year have been tossed, Cornerstone's data says. In fact, 91% of 2022 crypto cases remain active, compared with 69% of noncrypto-related filings, according to the report.

Second Circuit Slowdown

Courts in the Second Circuit saw fewer than average new securities class actions last year, while new cases shot up in courts under the Third Circuit's purview.

Circuit	Average for 1997-2022	2021	2022	2023
First	8	4	3	6
Second	56	82	73	50
Third	17	15	16	36
Fourth	6	6	7	7
Fifth	11	8	7	7
Sixth	8	6	1	9
Seventh	8	4	7	6
Eighth	5	1	1	2
Ninth	50	57	59	67
Tenth	6	3	7	4
Eleventh	13	7	8	12
D.C.	1	0	1	1

Another potentially surprising find is that the number of new cases filed in Second Circuit districts, which include Wall Street, has dropped for a second year in a row.

Fifty new securities class actions were filed in the Second Circuit in 2023, after 73 in 2022 and 82 in 2021. Last year's new Second Circuit filings were below the 25-year average of 56 new cases, according to Cornerstone.

On the other hand, filings in the Third Circuit were way up in 2023, with 36 new securities cases compared with 16 in 2022 and a 25-year average of 17.

Youngwood said he wasn't sure what was causing the circuit shift but that "two years probably doesn't make a trend" and noted that the Second Circuit remains dominant in the securities realm.

"It'll be curious what the next couple of years bring, but the overwhelming majority of securities cases seem to be brought on the coasts, specifically the Second Circuit and the Ninth Circuit," he said.

--Editing by Scott Russell. Graphics by Ben Jay.

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Lithium Battery Maker Enovix Escapes Investor Suit

By **Katryna Perera**

Law360 (January 31, 2024, 9:33 PM EST) -- Lithium battery maker Enovix Corp. has, for now, beaten an investor suit over a stock price drop due to alleged equipment testing failures, with a California federal judge ruling that investors' complaint "suffers from a lack of particularity."

U.S. District Judge Susan Illston issued an **order** on Tuesday tossing the investors' suit with leave to amend, saying the investors failed to sufficiently plead any false or misleading statements made by the defendants, or an intent to deceive.

According to the order, in 2012, Enovix began transforming from a company focused on research and development to one focused on manufacturing. In a July consolidated complaint, investors claim that in an "ambitious" attempt to set up its U.S.-based commercial battery production facility, it decided to waive key testing stages of its manufacturing equipment.

This, in turn, caused equipment failures, and Enovix was unable to meet output and revenue targets, leading to a stock drop, the investors say.

Enovix and the named individual defendants moved for dismissal in September, arguing that the complaint does not allege any facts supporting the conclusion that Enovix "conducted no testing at all," and that the investors mischaracterize certain statements made by the defendants.

The investors allege that between February 2021 and March 2022, the defendants made 13 false or misleading statements about the qualification of its manufacturing equipment and the decision by Enovix to skip "factory acceptance testing" and "site acceptance testing."

According to the order, factory acceptance testing, or FAT, occurs before the equipment leaves the vendor's factory, and site acceptance testing, or SAT, happens once the equipment has been installed at the production facility.

Of the 13 identified statements, a few are affirmative statements that the FAT or SAT had occurred or was occurring, which the investors say were false or misleading since Enovix waived the tests. It was, therefore, false to say otherwise.

However, Judge Illston said Tuesday that this requires accepting the allegation that the tests were waived as true. This allegation is "conclusory at best," the judge said, especially because the investors seem to have backed away from this claim in recent filings, "representing that the complaint does not assert that Enovix 'conducted no testing at all.'"

The investors also claimed the affirmative statements were false and misleading because the company had allegedly stated that it would send engineers to the factory in China as part of the FAT and that the vendor's engineers would travel from China to California as part of the SAT, but this never happened due to COVID-19 travel restrictions.

Judge Illston rejected this argument, noting that none of the challenged statements created the impression that Enovix engineers would go to China or that the vendor's engineers would travel to Enovix as part of quality testing.

"Plaintiffs failed to plead with particularity that the FAT and SAT were waived entirely, nor have they identified any statements that stated or implied that Enovix would send its engineers to China or bring the vendor's engineers to California," the order said. "By failing to connect these dots, plaintiffs

have not adequately pled that Enovix made false or misleading statements when it stated that the FAT or SAT was or had been conducted."

The investors also claimed that some of the challenged statements failed to disclose that the FAT and SAT had been waived.

But Judge Illston said these statements are not actionable because they again require the theory that the FAT and SAT were waived entirely. The judge said the investors have also failed to provide reasons why the alleged omissions were misleading.

"Instead, [the investors] essentially argue that every reference to installation of equipment, supply chain constraints, and vendor support should have included the additional details that Enovix waived the FAT and SAT in order to address these challenges. This is not what the PSLRA requires," the order said, referring to the Private Securities Litigation Reform Act.

Finally, Judge Illston rejected the investors' claim that several of the 13 challenged statements qualify as risk disclosures and are false and misleading.

The judge also tossed the investors' claims that the defendants knowingly acted wrongfully, ruling that the suit's scienter theory "depends entirely on an admission that the complaint does not actually allege defendants made."

The complaint also does not explicitly state what the defendants knew and when, according to the order.

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

The investors are represented by Laurence M. Rosen, Phillip Kim and Josh Baker of The Rosen Law Firm and by Lawrence M. Rolnick and Marc B. Kramer of Rolnick Kramer Sadighi LLP.

Enovix and the individual defendants are represented by Shannon M. Eagan, Brett De Jarnette, Sam Blankenship and Sarah M. Lightdale of Cooley LLP.

The case is In Re Enovix Corporation Securities Litigation, case number 3:23-cv-00071, in the U.S. District Court for the Northern District of California.

--Editing by Alex Hubbard.



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GM Execs Hid Driverless Tech And Airbag Concerns, Suit Says

By **Sydney Price**

Law360 (January 31, 2024, 9:21 PM EST) -- GM executives and directors have been hit with a shareholder derivative suit alleging they placed the company in legal jeopardy and harmed its share price by downplaying safety concerns about its Cruise autonomous vehicle technology and making misrepresentations about airbag safety.

Shareholder Samhita Gera alleged in Michigan federal court Tuesday that General Motors Co.'s brass has overstated its efforts to address hazards associated with both its driverless vehicles and airbags.

Truth regarding GM's precautions for both matters began to emerge in October 2023, the suit claims, when a news report revealed a pedestrian suffered major injuries after she was struck by a driverless Cruise vehicle, and the National Highway Traffic Safety Administration recommended an airbag recall.

In addition to nominal defendant GM, the suit lists 15 individual defendants, including CEO Mary T. Barra, Chief Financial Officer Paul A. Jacobson and several directors.

The suit's relevant period begins Feb. 2, 2022, the day GM filed its annual report for the previous year, in which it said that "safety will continue to be the gating metric — supported by Cruise's Safety Management System and its other risk identification, assessment and mitigation processes." GM repeated these representations in filings throughout the class period, the suit states.

However, on Oct. 2, 2023, an NBC Bay Area news report revealed that earlier in the day, a pedestrian suffered major injuries after she was run over by and pinned under a driverless Cruise vehicle. The article also noted that the California DMV had launched a safety probe into Cruise vehicles in August.

On this news, GM's shares fell \$1.09 per share, or 3%, to close at \$31.38 per share on Oct. 3., according to the suit.

On Oct. 5, the company's airbags made headlines when the NHTSA held a public hearing and recommended a recall of more than 50 million airbag inflators linked to potentially deadly explosions, the suit states. The same day, The Wall Street Journal reported that at least 20 million of GM's vehicles were built with the defective airbag inflators in question, which led to at least one death, according to the complaint.

On this news, GM's shares fell \$0.73, or 2%, to close at \$30.31 per share that day.

Shortly after, on Oct. 17, the NHTSA announced that after reviewing approximately 594 Cruise vehicles, it was opening a probe into whether Cruise was taking sufficient precautions to protect pedestrians, according to the suit.

GM's shares then fell \$0.85, or about 3%, and closed at \$29.48 on Oct. 18, according to the suit.

GM's driverless technology again made headlines on Oct. 24 when the California DMV announced the immediate suspension of Cruise's deployment and driverless testing permits, according to the complaint. The department alleged Cruise had misrepresented information related to vehicle safety, the complaint stated.

Afterward, GM's shares fell \$0.66, or 2%, to close at \$28.56 per share on Oct. 24.

Two days later, Cruise announced via social media that it would halt all of its autonomous vehicle operations across the country "to examine our processes, systems, and tools and reflect on how we can better operate in a way that will earn public trust," the complaint stated.

On this news, GM's shares fell \$1.33, nearly 5%, to close at \$27.22 per share on Oct. 27.

The suit further alleges that during the relevant period, GM spent over \$2.82 billion to repurchase approximately 72.8 million shares of its own common stock at inflated prices, which damaged the company. GM overpaid for its own stock by about \$844 million, the suit claims.

The complaint also notes GM is facing a **related securities class action** in Michigan federal court and multidistrict litigation regarding its airbags.

Gera accuses the individual defendants of violating the Exchange Act, breaching fiduciary duties, unjust enrichment, abuse of control, gross mismanagement and wasting corporate assets.

Counsel for Gera declined to comment Wednesday. A representative for GM did not immediately respond to a request for comment.

Gera is represented by Andrew P. Abood and Jeffrey Lance Abood of Abood Law Firm, Timothy Brown of The Brown Law Firm PC and Peretz Bronstein and Eitan Kimelman of Bronstein Gewirtz & Grossman LLC.

Counsel information for GM and the individual defendants was not immediately available Wednesday.

The case is Gera v. Barra et al., case number 2:24-cv-10254, in the U.S. District Court for the Eastern District of Michigan.

--Editing by Caitlin Wolper.

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JPMorgan Directors Seek Toss Of Zelle Fraud Suit In Del.

By **Leslie A. Pappas**

Law360, Wilmington, Del. (January 31, 2024, 2:06 PM EST) -- A shareholder lawsuit accusing JPMorgan Chase & Co. of ignoring fraud complaints about peer-to-peer banking platform Zelle cites only a few news articles and a congressional hearing as "red flags" that directors allegedly missed, falling "well short" of a valid claim, the directors' attorney told Delaware's Court of Chancery Wednesday.

At a hearing in Wilmington on the defendants' motion to dismiss, Audra J. Soloway of Paul Weiss Rifkind Wharton & Garrison LLP, representing the defendants, called the shareholders' complaint "defective," saying it failed to show how the bank was harmed or what any of the directors actually did that breached their duties to the company.

The complaint "doesn't plead particularized facts about the directors," she said. It just points to "a handful of news articles" and a U.S. Senate committee investigation, "and then extrapolates that this is proof of widespread violation."

The shareholder, IMG Holding LLC, **filed the derivative complaint** against JPMorgan's Chairman and CEO James "Jamie" Dimon and the rest of the bank's 12-member board in May, asserting that they had breached their fiduciary duty of loyalty.

The suit focuses on the online banking platform called Zelle, which allows consumers to transfer money from their bank account to another person's bank account.

Zelle is operated by Early Warning Services LLC, a Delaware limited liability company, and jointly owned by seven banks: JPMorgan, Bank of America, Truist, Capital One, PNC Bank, U.S. Bank and Wells Fargo, according to court papers.

Zelle came under congressional scrutiny in 2021 after reports that some customers had been defrauded through unexplained unauthorized transfers out of their accounts.

Despite media reports and Senate hearings concerning fraudsters' use of Zelle to scam people, JPMorgan's directors didn't change any of the bank's policies, and violated federal law by not reimbursing their customers for the unauthorized transfers, the complaint alleges.

It is "reasonable to infer" that JPMorgan is violating Regulation E of the Electronic Funds Transfer Act by failing to reimburse customers who were victims of unauthorized transfers within 10 business days, the shareholder's attorney said at the hearing Wednesday.

"JPMorgan knows that most banks are probably violating Reg E," Mark M. Billion of Billion Law told the court. "The reasonable thing to do is make sure that your house is in order."

Chancellor Kathaleen St. J. McCormick did not ask any questions at the hearing. She took the matter under advisement and did not say when she would issue a decision.

IMG Holding is represented by Mark M. Billion and Peter K. Schaeffer of Billion Law.

The director defendants are represented by Audra J. Soloway, Daniel A. Mason, and Sabrina M. Hendershot of Paul Weiss Rifkind Wharton & Garrison LLP.

Defendant James Dimon and nominal defendant JPMorgan Chase & Co. are represented by Peter J. Walsh Jr., Aaron R. Sims and Charles P. Wood of Potter Anderson & Corroon LLP.

The case is IMG Holding LLC derivatively on behalf of JPMorgan Chase & Co. v. Dimon et al., case number 2023-0522, in the Court of Chancery for the State of Delaware.

--Editing by John C. Davenport.

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2nd Circ. Backs Wall Street In Treasury Auction-Rigging Case

By **Jon Hill**

Law360 (February 1, 2024, 12:17 PM EST) -- The Second Circuit declined Thursday to revive antitrust litigation accusing major Wall Street banks of conspiring to rig U.S. Treasury auctions and defend their secondary-market middlemen roles, ruling that the pension funds and other investors behind the case failed to paint plausible pictures of collusion.

The decision by a three-judge panel leaves in place a New York federal judge's **2022 dismissal** of the litigation, which dates back nearly a decade and names defendants that include units of Citigroup, Goldman Sachs, JPMorgan and seven other "primary dealer" banks for U.S. Treasury securities.

"Plaintiffs fail to demonstrate that the dealers formed an anticompetitive agreement, as required to plead their antitrust claims," the panel said in a **76-page opinion** penned by U.S. Circuit Judge Dennis Jacobs.

With the Treasury auction-rigging claims, for example, "plaintiffs' allegations of wrongful information-sharing largely amount to inconsequential market chatter; and their statistical analyses are not focused specifically on the dealer-defendants and rely on averages spread over an excessively long span of time," the panel said.

--Editing by Haylee Pearl.

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\$25M Flint Water Crisis Deal Heads Off Impending Trial

By **Danielle Ferguson**

Law360 (February 1, 2024, 10:35 AM EST) -- Flint residents and the last remaining engineering defendant in sprawling litigation over the city's water crisis announced Thursday they had reached a \$25 million deal that would avoid an upcoming trial, with the engineering firm saying more than half of Flint residents will get a payout.

Veolia North America and a class of 45,000 Flint property owners, businesses and adults announced the settlement separately Thursday morning, less than two weeks before a trial was set to begin in Ann Arbor.



Residents alleged that Veolia failed to warn the city that its drinking water, sourced from the Flint River, was unsafe and that immediate corrosion control measures were necessary. The deal announced Thursday will benefit more than half of Flint residents. (Seth Herald/AFP via **Getty Images**)

The settlement with Veolia brings the total amount of settlements reached on behalf of Flint plaintiffs to more than \$655 million, class attorneys said. The class action resulted in a "landmark" \$625 million **settlement** against the state of Michigan in 2021. The class also **settled** with private engineering firm Lockwood Andrews & Newnam in October for \$8 million.

The class alleged in 2016 that Veolia failed to identify corroding pipes and warn government officials, exacerbating the water crisis. The class alleged that, had Veolia recommended remediation, the contamination could have ended sooner.

Veolia has maintained that state and local government actors are to blame for the crisis, saying it was

hired as a consultant months after the city switched to using Flint River water. Veolia said it made recommendations to the city, which were ignored by officials.

The agreement includes payment of \$1,500 per individual minor claimant represented by class counsel, not to exceed \$1.5 million, according to Veolia.

The settlement does not resolve claims against Veolia by individual plaintiffs, the firm said.

The case is In re: Flint Water Cases, case number 5:16-cv-10444, in the U.S. District Court for the Eastern District of Michigan.

--Editing by Daniel King.

This is a developing story.

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Meta Judge Pointed To Colleague's Ruling In Privacy Battle

By **Craig Clough**

Law360 (January 31, 2024, 11:05 PM EST) -- Consumers suing Meta Platforms over allegations Facebook illegally received their sensitive health information urged U.S. District Judge William Orrick on Wednesday to preserve their Unfair Competition Law claim, saying that a recent decision by his Northern District colleague Judge Vince Chhabria supports their argument for standing on the claim.

During a hearing held via Zoom, an attorney for the consumers urged Judge Orrick to look closely at a Jan. 17 order in **McClung et al. v. AddShopper Inc. et al.** because it bolsters their California Unfair Competition Law standing, which is one of several claims Meta is looking to **get tossed** from the suit.

The plaintiffs on Monday submitted the Jan. 17 order in a motion for supplemental authority to counter Meta's argument that the proposed class of non-Meta users lack UCL standing because they didn't argue they relied on any specific communications from Meta when alleging the tech giant's Facebook platform secretly collected their health data through an "invisible tracker" on third-party websites.

In the McClung case, the plaintiff accuses AddShoppers of illegally intercepting consumers' data after it was shared with retailers, and of using that information to bombard them with unwanted emails. Judge Chhabria allowed a UCL claim to proceed against AddShoppers under the theory that the emails deprived the consumers of the benefit of the bargain with the retailers.

Abigail Burman of Motley Rice LLC, who represents the proposed class, said the UCL claim is not about the plaintiffs' personal health data, but rather the loss of the benefit of the bargain with Cerebral, a telehealth company they allege Meta took their data from.

The basis for the McClung ruling "was not that the defendant had at some point made contact with the plaintiffs, but that AddShoppers' conduct was the proximate cause of the benefit of the bargain loss that the plaintiffs suffered," Burman said.

She added that "AddShoppers bleeds well into the fact that this is a benefit of the bargain case, so defendants are ignoring the fact that plaintiffs allege throughout their complaint that they would not have purchased services from Cerebral had they known about the truth of Meta's intersections."

According to the **September 2023 complaint**, through the use of its "invisible tracker" Meta Pixel, which third-party businesses can place on their websites to transmit any number of details about consumers to the social media behemoth for its advertising business, Meta has been collecting consumers' detailed sensitive health information — even when they do not have Facebook accounts, consumers E.H. and C.S. allege.

Meta has publicly acknowledged that it uses data from nonusers for a variety of business reasons, including consumer analytic reports and product development, but the company's lack of internal data controls means it can't constrain this nonuser data to just those uses, according to the suit.

The Pixel tool not only transmits consumers' browsing behavior but, depending on the kinds of websites, can also include detailed and identifiable healthcare information, the suit states. That sensitive data can include mental health symptoms, prescriptions and diagnoses — information that

not even close friends and family might know about, the consumers state.

These data transmissions occur, even though, when coming from the website of an entity covered by the Health Insurance Portability and Accountability Act or the California Medical Information Act, that information is protected by health care privacy laws, according to the complaint.

Neither E.H., a resident of Oklahoma, nor C.S., a resident of Massachusetts, have Facebook accounts, but they claim their identifiable health information — including their names, contact information and mental health questionnaire answers — were transmitted while using the services of a telehealth company.

In a November 2023 motion seeking to toss certain claims, Meta argues that the consumers failed to show that the alleged sharing of their personal information cost them financially or caused a tangible burden to them, as required under the California Unfair Competition Law and the California Consumer Legal Remedies Act. The company says the court has already acknowledged the dismissal of cases where injury is based on the loss of the "inherent value" of personal data.

Lauren R. Goldman of Gibson Dunn & Crutcher LLP, who represents Meta, argued on Wednesday that the McClung ruling is different from the plaintiffs' case "because AddShoppers there sent emails directly to the plaintiffs. That's why it proximately caused their harm. It's just not on point here where the plaintiffs had no contact with Meta whatsoever."

Burman, when given a chance to respond, said the plaintiffs "just want to emphasize, that they did have contact with Meta. It was not contact that they wanted. It was not contact that they asked for or consented to, but Meta took their protected health information and used it throughout its business and that is contact, wrongful though it was."

Judge Orrick did not make a ruling on Meta's motion before the hearing ended.

The consumers are represented in the current suit by James M. Wagstaffe and Frank Busch of Wagstaffe Von Loewenfeldt Busch & Radwick LLP and Previn Warren, Abigail Burman and Mathew Jasinski of Motley Rice LLC.

Meta is represented by Lauren R. Goldman, Darcy C. Harris, Elizabeth K. McCloskey and Abigail A. Barrera of Gibson Dunn & Crutcher LLP and Michael G. Rhodes, Kyle C. Wong and Caroline A. Lebel of Cooley LLP.

The case is E.H. et al. v. Meta Platforms Inc., case number 3:23-cv-04784, in the U.S. District Court for the Northern District of California.

--Additional reporting by Gianna Ferrarin and Lauren Berg. Editing by Kristen Becker.



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'Real Nutrition' Supplement Almost Half Sugar, Suit Says

By **Lauraann Wood**

Law360 (January 31, 2024, 7:46 PM EST) -- A company that makes Balance of Nature dietary supplements unlawfully deceives consumers into thinking the product provides a significant boost to their health and well-being when "nothing could be further from the truth," a customer claimed Tuesday in Illinois federal court.

Consumer William Spivey's proposed class suit claims Evig LLC, which does business as Balance of Nature, has violated Illinois' consumer fraud law by marketing its Fruits and Veggies supplements as an affordable and meaningful boost for people looking to fill the gaps in their daily nutritional needs.

The marketing is deceptive because, at nearly \$90 for a single bottle or about \$70 for a monthly subscription, consumers are paying "shockingly excessive" prices for a supplement that provides "ridiculously trivial" amounts of daily nutrients and is about 40% sugar, the consumer says.

Spivey's attorney, Steward Weltman of Hart McLaughlin & Eldridge, told Law360 Wednesday that "a reading of the complaint should show that it's the byproduct of considerable scientific research and analysis."

A representative for Balance of Nature didn't immediately respond Wednesday to a request for comment.

Balance of Nature has been selling its Fruits and Veggies supplements as a combination package since 1997, according to **Spivey's complaint**. Evig had previously marketed its supplements as treatments for ailments including the common cold, pneumonia and cancer, but the company agreed in a November settlement with the U.S. Food and Drug Administration to stop making such claims and **destroy its supplement supply** until it fell in line with federal regulations.

The supplements' packaging prominently features a banner essentially touting the product as "Real Food — Real Science — Real Nutrition," according to Spivey's suit. But calling the product real nutrition "is, at a minimum, a half-truth" designed to deceive customers because the amount of daily nutrition they receive from a combined daily dose of the Fruits and Veggies supplements "is so small as to be trivial and meaningless," the consumer alleged.

For instance, one dose of the product provides customers just 2.747 milligrams of vitamin C when recommended dietary allowances land at 90 milligrams for men and 75 milligrams for women, according to Spivey's suit. A consumer would pay about 85 cents for that dose of vitamin C based on subscription costs, but "that same consumer could pay \$0.09 for a daily dose of Centrum Silver Multivitamin that provides 100 mg of vitamin C," Spivey claimed.

"So much for Balance of Nature costing less or, more importantly, filling any gaps in consumers' daily nutritional needs," he said in his suit. "And if the comparator for the 'costs less' is actual fruit or vegetables, the numbers are no better, as an orange costs approximately \$1 at retail and contains 51 [milligrams] of vitamin C at a cost of 2 cents per milligram."

Evig's supplement labeling and marketing are also deceptive given the products' sugar content, Spivey claimed. If a consumer took a Fruits supplement and a Veggies supplement at the same time, sugar would account for 1.5 grams of that 4-gram dose, he said.

That means consumers receiving monthly supplement subscriptions are paying about 93 cents daily for the dose of sugar, "the single largest component of the Balance of Nature products by multiples of multiples," Spivey alleged.

Evig's failure to inform customers that they are "grossly overpaying" for a product containing that much sugar "is, in itself, a material concealment as it not only conceals the price gouging committed by defendants, but it is also a material concealment about the fact that almost 40% of the Balance of Nature products are predominantly vacant calories provided by sugar," he claimed.

The "real food" claim on Balance of Nature supplements is true in the sense that the product is made with freeze-dried and pulverized versions of its fruit and vegetable ingredients, Spivey said in his suit. But the representation is also unlawfully misleading because reasonable consumers believe that taking the product is at least partially a substitute for eating a serving of real fruits and vegetables when, "again, nothing could be further from the truth," the consumer claimed.

The product label's "real science" claim is also a half-truth if it isn't "outright false" because it wrongly implies that peer-reviewed studies exist showing that taking Balance of Nature's Fruits and Veggies supplements provides the health and well-being benefits they're marketed to contain, Spivey said. No such study exists on PubMed, a search engine on life science and biomedical topics, and none of the unpublished studies previously featured on the Balance of Nature website related to the label representations at issue, he alleged.

Spivey is looking to pursue his claims on behalf of a nationwide class and two subclasses of similarly situated consumers. He is asking the court for damages, restitution and disgorgement of revenues stemming from the allegedly unlawful marketing.

Spivey is represented by Stewart Weltman, Steven Hart and Sean O'Malley of Hart McLaughlin & Eldridge, Charles Schaffer of Levin Sedran & Berman LLP, Charles LaDuca of Cuneo Gilbert & LaDuca LLP and Michael McShane of Audet & Partners LLP.

Counsel information for Evig and CEO Douglas Howard, who is also named in the suit, couldn't be determined Wednesday.

The case is William Spivey v. Evig LLC et al., case number 1:24-cv-00781, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Jonathan Capriel. Editing by John C. Davenport.



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Suit Says Oreo Maker 'Greenwashes' Deforesting And Child Labor

By Ayden Crosby

Law360 (January 31, 2024, 9:37 PM EST) -- The maker of Oreos and Clif Bars "greenwashes" its cocoa-containing food products with deceptive labeling that hides evidence of environmental degradation, child labor and child slavery in its supply chain, a proposed class action claims.

California resident Waggener Van Meter launched the complaint in California federal court Tuesday, claiming Mondelez International Inc.'s "phony" claims on snack packages characterize its cocoa as sustainably sourced, driving up sales and public support despite evidence of child labor and other ills.

"Mondelez claims that its products are sustainable and its relationship with the suppliers improves the lives of the cocoa farmers in the Côte D'Ivoire region," the complaint states. "This could not be further from the truth. Mondelez's products were not sourced from sustainable farming practices but rather off the backs of child slaves and trafficked labor."

According to the complaint, which cites various news reports, child labor and child slavery are rampant in the cocoa industry in Ghana and Côte D'Ivoire, largely driven by low wages stemming from the gap in market power between small farms and multinational chocolate companies. The complaint also asserts that cocoa operations in the region have contributed to large-scale deforestation of the Ivorian rainforest.

The complaint refers to industrywide acknowledgment of such challenges as ongoing and criticizes a sustainability program by Mondelez called Cocoa Life as ineffective and deceptively heartening to consumers.

"Mondelez makes false assurances that its Cocoa Life program is seeking to 'accelerate positive impact and help drive sector transformation' and that it is 'working to help prevent and combat the risk of child labor,'" the complaint says.

Such assurances amount to "greenwashing," according to the suit, and gives this definition of the term: "the practice of making an unsubstantiated or misleading claim about the environmental or social benefits of a product, service, technology or company practice."

Although the complaint does not allege the products are specifically labeled as free of child labor or slavery, it argues a reasonable consumer could assume claims of sustainability also encompass ethical issues, citing peers such as PepsiCo, Unilever and chocolate giant Barry Callebaut as defining sustainability as including both environmental and social concerns.

"Sustainability is a broad concept that encompasses a wide range of environmental and social practices," the complaint states.

Labeling practices by Mondelez, the complaint states, violate California consumer protection and unfair competition laws, including a requirement that companies comply with Federal Trade Commission guidelines on environmental marketing, also known as its "Green Guides."

Sustainability labeling capitalizes on consumers' desire to purchase ethically sourced products, the complaint says, asserting the results of a study that found 60% of consumers would no longer purchase a product if they knew human trafficking or forced labor was involved in its production. According to the suit, assurances of ethical sourcing have boosted Mondelez's sales and reputation,

enriching the company at the expense of consumers, farmers and the environment.

Van Meter is seeking classwide damages for consumers who purchased Mondelez cocoa products labeled with seals indicating they are environmentally and socially beneficial in the past four years, and for an order barring the company from continuing to use such labeling in the future.

Counsel for the plaintiff and representatives for Mondelez International, Inc did not respond to requests for comment.

The proposed lead plaintiff is represented by James B. Zouras, Ryan F. Stephan, Justin M. Caparco, and Lauren A. Warwick of Stephan Zouras LLP

Counsel Information for Mondelez International, Inc. was not available on Wednesday.

The case is Waggener van Meter v. Mondelez International, Inc., case number 4:24-cv-00565, in the U.S. District Court for the Northern District of California

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