

GE Workers Seek Lawyer Fees After Record In-House 401(k) Deal

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The GE logo.

Photographer: Michael Nagle/Bloomberg

- \$61 million settlement covers class of hundreds of thousands
- Subsidiary allegedly profited from funds in worker 401(k)

Lawyers representing General Electric Co. workers asked for a one-third cut of the \$61 million class settlement they negotiated in a lawsuit challenging the in-house funds in the company's 401(k) plan.

The "outstanding" deal is the largest class settlement ever reached in an Employee Retirement Income Security Act lawsuit involving a retirement plan that offers affiliated investments, the workers said in a motion asking that the agreement receive final approval. The settlement amount represents about 21.5% of the workers' estimated damages, which is "certainly at the higher end of ERISA class action settlements," they said.

The motion, filed Thursday in the US District Court for the District of Massachusetts, also seeks an attorneys' fee award of more than \$20 million. An award of one-third the settlement amount is the "market rate" for ERISA class actions, and it's warranted by the "record-setting recovery" achieved for the workers and the nearly 25,000 attorney hours spent litigating the case, according to the motion.

The six-year-old class action, which covers hundreds of thousands of people, says GE forced workers to invest their retirement dollars in affiliated mutual funds that performed poorly and carried high fees in violation of ERISA. These funds gave GE's subsidiary—GE Asset Management Inc.—a constant source of fees and helped inflate its market value before it was sold to State Street for \$485 million in 2016, according to the lawsuit.

Judge Indira Talwani, who granted preliminary approval to the deal last fall, allowed most of the lawsuit to move forward in 2018, including claims that GE breached an ERISA rule prohibiting plan fiduciaries from dealing with plan assets for their own benefit. Talwani said GE's conduct likely wasn't excused by a legal exemption for mutual funds held by employees of the fund's offering company, in part because this exemption doesn't change the fiduciary duty to be loyal to plan participants.

GE urged Talwani to reconsider, saying she had conflated ERISA's prohibited transaction rules with the statute's fiduciary obligations. Talwani issued a revised opinion that removed some references to fiduciary duties but nevertheless allowed the claim to move forward.

The employees are represented by **Robbins Geller** Rudman & Dowd LLP; Squitieri & Fearon LLP; Gardy & Notis LLP; Sanford Heisler Sharp LLP; and Block & Leviton LLP. GE is represented by Goodwin Procter LLP.

The case is In re GE ERISA Litig. , D. Mass., No. 1:17-cv-12123, settlement motion 2/1/24 .

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CMO TODAY

Ad Agency Publicis Health to Pay \$350 Million Over Opioid Marketing

New York's attorney general says Publicis is the first advertising agency to settle claims it contributed to fueling the opioid crisis

By [Katie Deighton](#) [Follow](#) and [Patrick Coffee](#) [Follow](#)

Feb. 1, 2024 3:08 pm ET



Publicis Health worked on Purdue Pharma's 'Evolve to Excellence' campaign, which identified doctors who prescribed the most OxyContin and targeted them with sales calls and marketing, according to New York State Attorney General Letitia James. PHOTO: BENOIT TESSIER/REUTERS

Publicis Health, part of ad giant Publicis Groupe, has agreed to pay \$350 million to settle claims that its advertising campaigns for Purdue Pharma played a role in the opioid crisis, according to the office of New York State Attorney General Letitia James.

The agreement also prohibits Publicis from accepting any future contracts or engagements related to the marketing or sale of opioids, James said in a statement on Thursday. Publicis must pay the settlement within 60 days and release hundreds of thousands of documents detailing its past work for Purdue, according to the statement. The total will be divided among all 50 states as well

as the District of Columbia and U.S. territories, according to a spokeswoman for James's office.

The settlement isn't an admission of wrongdoing, and Publicis Health will defend itself against any further litigation not resolved by the agreement, the company said in a statement.



New York Attorney General Letitia James.
PHOTO: YUKI IWAMURA/ASSOCIATED PRESS

“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.

The payment forms part of a nationwide crusade to punish companies considered to have played a part in fueling the U.S. opioid

epidemic, a crackdown that so far has resulted in settlements totaling billions of dollars from companies including Johnson & Johnson, CVS and Walmart. Fines are directed to opioid abatement, treatment and prevention.

Nearly 645,000 people died from overdoses involving opioids from 1999 to 2021, according to the Centers for Disease Control and Prevention.

Purdue filed for bankruptcy in 2019 after thousands of lawsuits from state and local governments alleged the company oversupplied OxyContin, though its bankruptcy plan remains in legal dispute. It pleaded guilty in 2020 to three federal felonies related to marketing and distributing the drug.

Publicis is the first advertising agency to be held responsible for its role in driving demand for opioids, according to James, who co-led the coalition of attorneys general that reached the settlement.

Publicis worked with Purdue from 2010 until 2019, developing marketing campaigns and materials promoting OxyContin as well as the opioid brands Butrans and Hysingla, James said.

At the heart of the Publicis settlement is Purdue Pharma's "Evolve to Excellence" campaign, which identified doctors who prescribed the most OxyContin and targeted them with sales calls and marketing, according to James' office. The campaign advertised the "abuse-deterrent" aspects of the painkiller to doctors and encouraged increasing patients' dosages, James said.

Publicis Health created advertisements and materials such as pamphlets and brochures that promoted OxyContin as safe and unable to be abused, though this wasn't true, James said.

The settlement follows consulting firm McKinsey & Co.'s 2021 agreement to pay \$573 million for its own role promoting Purdue's drugs. Publicis Health worked with McKinsey and digital health-record company Practice Fusion in its marketing push to increase Purdue's opioid sales, according to James's press release.

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Appeared in the February 2, 2024, print edition as 'Ad Agency to Pay \$350 Million Over Opioid Marketing'.

Opioid marketing firm settles suit with states for \$350 million

 [courthousenews.com/opioid-marketing-firm-settles-suit-with-states-for-350-million](https://www.courthousenews.com/opioid-marketing-firm-settles-suit-with-states-for-350-million)

Rox Laird

Publicis Health agreed to pay \$350 million across multiple states to settle a suit over its promotion of opioid drugs for pharmaceutical companies including Purdue Pharma.

(CN) — A nationwide group of state attorneys general announced on Thursday a settlement with the global healthcare marketing firm Publicis Health, which will now pay \$350 million to resolve a civil lawsuit brought against the firm for its promotion of opioid drugs for pharmaceutical companies.

The action against Publicis Health was led by a group of 10 states' attorneys general including Massachusetts Attorney General Andrea Joy Campbell whose office filed the original complaint in Massachusetts state court in 2021. Those states were joined in the multistate settlement by the attorneys general from all states, territories, and the District of Columbia.

"For years, Publicis Health's marketing schemes helped fuel the nationwide opioid crisis, which has shattered some of our most vulnerable communities, while creating significant financial strain on our state systems," Campbell said in a statement released Thursday. "I am proud of my team's national leadership in securing this settlement, which will not only bolster accountability and transparency for this ongoing crisis but will also provide millions of dollars for much needed treatment and services to support individuals and families across Massachusetts."

Publicis Health is a global marketing company headquartered in New York and is owned by parent company Publicis Groupe S.A., a French marketing and public relations conglomerate. Publicis Groupe had revenues of more than \$11 billion in 2020, according to Massachusetts in its 2021 complaint.

From 2010 until 2019, the commonwealth said, "Publicis worked with opioid companies, particularly Purdue Pharma, to increase sales of dangerous opioids like OxyContin, including in Massachusetts, in ways that increased the risk to patients and the public of opioid use disorder, overdose, and death. Publicis devised and deployed unfair and deceptive marketing campaigns designed to push doctors to prescribe opioids to more patients, in higher doses, and for longer periods of time."

Publicis Health did not immediately respond to a request for comment from Courthouse News Service Thursday.

Under the settlement agreement submitted as a final judgment that must be approved by the court, the states agreed to drop their suit and Publicis Health agreed to end any current opioid marketing and will not accept future engagements relating to the marketing, promotion, advertising, sale, prescribing or use of any opioid or opioid-based controlled substances.

The opioid crisis nationwide has affected nearly every community in every state, resulting in untold numbers of overdose deaths, disrupting families and communities. In Massachusetts, for example, Campbell said in Thursday's statement, more than 20,000 residents in the state have died from opioid-related overdoses over the past two decades.

"These deaths — and the impacts on thousands who have struggled with opioid addiction — have created considerable costs for our health care, child welfare and criminal justice systems," Campbell said. "More significant than the dollars and cents in damage to our state, the opioid crisis has harmed communities, damaged relationships and torn families apart."

Under the settlement released Thursday, Publicis Health's payment will be divided among the states, territories and the District of Columbia, ranging from \$572,000 for North Dakota to \$34 million in California.

According to the attorneys general in their settlement agreement, the payment will be used by the states "to remediate the harms caused to the Settling States and their residents by the opioid epidemic." In Massachusetts, for example, the money will be used for state's Opioid Recovery and Remediation Fund to provide support for opioid use disorder prevention, treatment, recovery and harm reduction efforts throughout the state.

In addition to the cash payment to the states, the agreement calls for the company to disclose to participating states thousands of internal documents relating to its work for opioid companies that participating states can use — at Publicis Health's expense — to create a searchable public website.

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US opioid epidemic**Publicis to pay \$350mn to settle US opioid crisis case**

Agreement with French group is the first prosecutors have made with an advertising agency over its alleged role



Addicts on a street in Philadelphia illustrate the impact the opioid crisis has had on communities across the US © Teun Voeten/Sipa USA via Reuters

Adrienne Klasa in Paris 7 HOURS AGO



French advertising group Publicis will pay \$350mn to US states to settle allegations that work by its health division aggravated and profited from the opioid crisis in America.

The settlement, announced late on Thursday, is the first US prosecutors have made with an advertising agency for its alleged role in the opioid crisis, which has killed hundreds of thousands in the past two decades and decimated many communities.

Publicis Health, a division of the Paris-listed agency, worked with opioid manufacturer Purdue Pharma from 2010 to 2019, creating advertising campaigns and materials to promote opioids including OxyContin, Butrans, and Hysingla.

“For a decade, Publicis helped opioid manufacturers like Purdue Pharma convince doctors to overprescribe opioids, directly fuelling the [opioid crisis](#) and causing the devastation of communities nationwide,” New York attorney-general Letitia James, who led a coalition of 50 state attorneys-general in their action against Publicis, [said in a statement](#).

[Publicis](#) said that the settlement “is in no way an admission of wrongdoing or liability”.

“We will, if need be, defend ourselves against any litigation that this agreement does not resolve,” the company added.

Publicis will pay \$343mn to the US states to fund opioid relief programmes while \$7mn will cover legal costs. The state of New York will receive \$19mn from the total, which will go towards opioid treatment and prevention work, the attorney-general’s office said. After insurance payouts, the French group will book a non-recurring charge of \$213mn before tax in the fourth quarter of 2023.

Opioids are highly addictive but were widely prescribed for pain management in the US, fuelling an addiction crisis that killed over 645,000 people between 1999 and 2021, according to the Centers for Disease Control and Prevention.

Purdue Pharma, which is owned by the billionaire [Sackler family](#), has been the target of multiple lawsuits and criminal proceedings for promoting the widespread use and safety of the opioids it manufactured like OxyContin.

During its time working for Purdue, Publicis Health produced advertising materials that promoted OxyContin as “safe and unable to be abused, even though this claim was not true”, the New York prosecutor’s office said. The advertiser also worked with consultancy [McKinsey](#) on strategies to increase opioid sales by targeting doctors and encouraging them to increase patients’ dosages, according to the statement.

Publicis was the world’s third-largest advertising agency by revenues in 2022, with a market value of €23.79bn.

It said that most of the work with Purdue and other opioid makers was done by Rosetta, an agency it acquired in 2011 and which closed a decade ago.

“The work for pharmaceutical companies addressed by this settlement was at all times fully compliant with the law,” Publicis said.

However “we recognise the broader context in which that lawful work took place . . . That is why we worked to reach this agreement, and why we are also reaffirming our long-standing decision to turn down any future opioid-related projects.”

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Drink Maker Celsius, Investors Get \$7.9 Million Pact Approved

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Class Action

Guests with Celsius-brand drinks at Caribe Royale Orlando in Orlando, Fla., on Dec. 15, 2023.

Douglas P. DeFelice/Getty Images for CELSIUS

Celsius Holdings Inc.'s agreement to settle investors' accounting-related securities fraud claims for \$7.9 million merits final approval, a federal court ruled.

The amount represents about 10% to 20% of the estimated damages recoverable at trial, Judge Donald M. Middlebrooks said for the US District Court for the Southern District of Florida. The plaintiffs faced a significant risk at trial, particularly in their proof of loss causation, he said.

- The price of Celsius stock suffered losses of 26% in March 2022, allegedly due to the beverage maker's acknowledgment of accounting weaknesses related to nine former employees' stock options
- The parties received no objections to the settlement, and a 25% attorneys' fee request is fair and reasonable, Middlebrooks said
- A derivative suit on behalf of the company with similar allegations, pending in the US District Court for the District of Nevada, has been paused while the proposed class action proceeds

Grant & Eisenhofer PA was lead counsel for the plaintiffs and the proposed class. Alston & Bird LLP represented Celsius.

The case is City of Atlanta Police Officers' Pension Plan v. Celsius Holdings, Inc. , S.D. Fla., No. 9:22-cv-80418, 2/1/24 .

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Feb. 1, 2024, 11:43 AM PST

Microvast Brass Sued After Lost Grant Sparks Worst Selloff Ever

By Ben Miller

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Bloomberg Law News 2024-02-02T10:32:54854387689-05:00

Microvast Brass Sued After Lost Grant Sparks Worst Selloff Ever

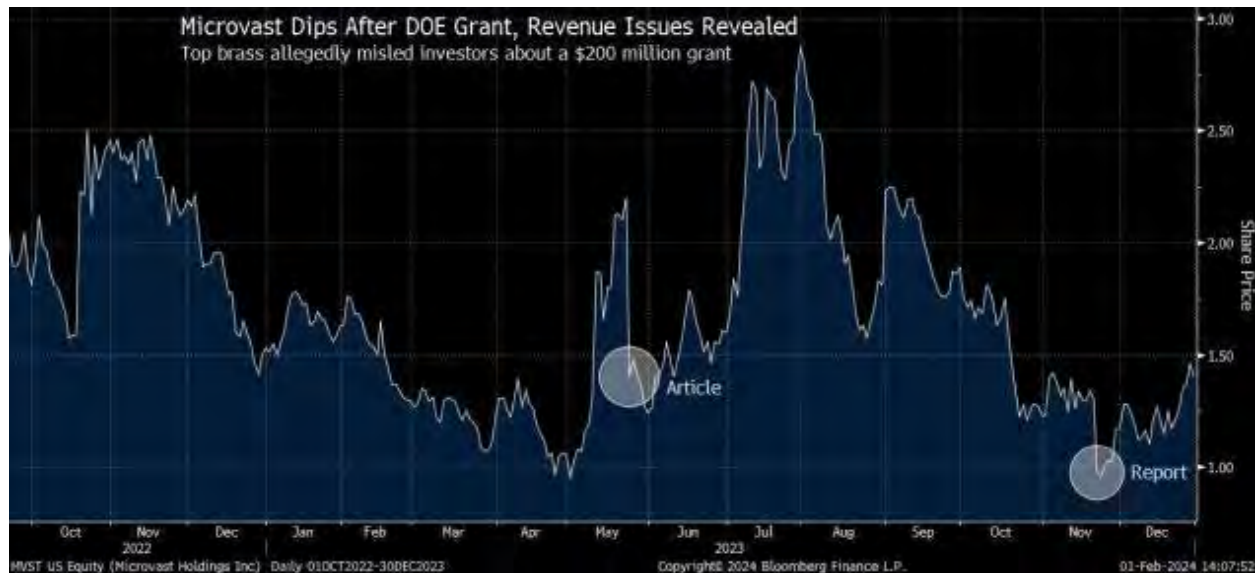
By Ben Miller 2024-02-01T14:43:56000-05:00

Microvast Holdings Inc.'s directors and top executives allegedly withheld information about a \$200 million Energy Department grant, including the slim chances of winning it, from investors for more than a year, a shareholder lawsuit says.

The leaders allowed the battery manufacturer to misrepresent in public statements and disclosures that it was likely to receive the grant, which would have funded a proposed production facility, according to the complaint filed Wednesday in US District Court for the Southern District of Texas. The stock had its worst selloff on record when the news eventually reached traders.

After the Energy Department conditionally selected Microvast for the proposed \$200 million grant in October 2022, the board and executives allegedly assured the public that the grant was likely to be awarded to the company until May 2023, when news that the government wouldn't deliver the grant was published in a news report.

The day that article ran, the company's share price fell 36% on May 23. That was Microvast's biggest decline ever since its 2019 market debut, according to data compiled by Bloomberg.



Six months later, J Capital Research published a report alleging that directors and executives at Microvast knew the company wouldn't receive the grant months before that became public knowledge. The report also said that most of the company's sales may be fake, citing a 57% revenue figure comprised of Chinese customer spending in 2023 alongside aerial drone surveillance images showing "almost no activity" at Microvast's factory in China.

The company's share price fell another 25% that day on Nov. 21, 2023.

Shareholder Denish Bhavsar alleges that the company's leadership violated the Securities Exchange Act by overstating business prospects and concealing details about the status of the Energy Department grant from investors.

Bhavsar also alleges that director and former CFO Yanzhuan Zheng sold 1 million shares of his stock, receiving approximately \$1.3 million in proceeds, while Microvast shares were trading at the artificially inflated prices.

Bhavsar seeks to recover damages on behalf of the company, which is named as a nominal defendant in the complaint, as well as legal fees.

A separate class action filed against the company in December alleging similar misrepresentations about the Energy Department grant is still pending in the same Southern District of Texas court.

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

The Brown Law Firm PC represents the plaintiff.

The case is Bhavsar v. Microvast Holdings Inc. , S.D. Tex., No. 4:24-cv-00372, complaint filed 1/31/24

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Feb. 2, 2024, 9:03 AM PST
Unisys Beats Class Action Over Financial Audit Probe, Stock Drop
By [Ben Miller](#)
Documents

-  [Memorandum](#)
-  [Docket](#)

- Judge tosses case for deficient pleading, with chance to amend
- Stock declined 48% due to misleading statements, investor said

Bloomberg Law News 2024-02-02T12:55:10976673844-05:00
Unisys Beats Class Action Over Financial Audit Probe, Stock Drop

By Ben Miller 2024-02-02T12:03:39000-05:00
Judge tosses case for deficient pleading, with chance to amend
Stock declined 48% due to misleading statements, investor said

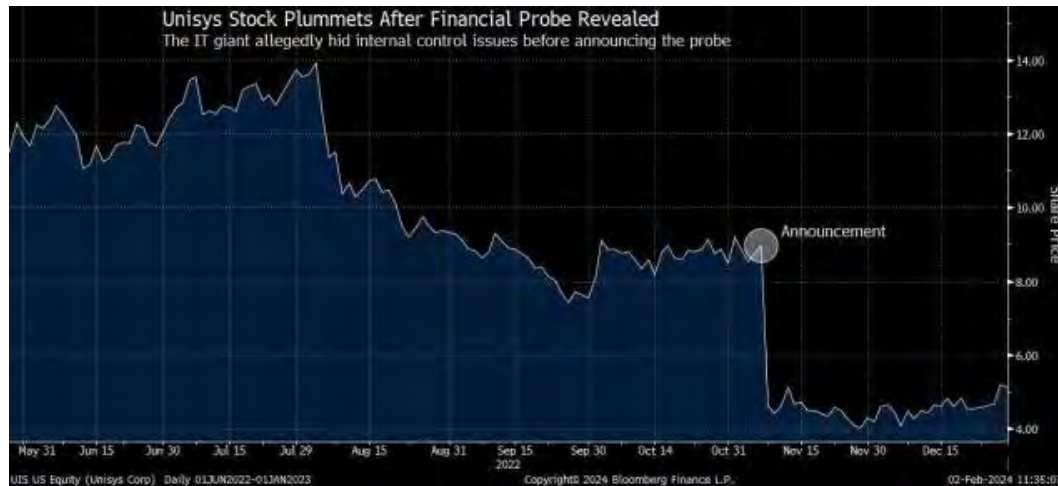
Unisys Corp. defeated, for now, allegations that it knowingly disclosed misleading financial results before revealing that its audit department had initiated a probe into its accounting practices.

The proposed class action against the information technology giant and two top executives was dismissed, but the plaintiff has an opportunity to amend his complaint to show the defendants knowingly misled investors and caused a historic stock drop, according to Judge Gerald J. Pappert’s memorandum filed Thursday in US District Court for the Eastern District of Pennsylvania.

Unisys announced in November 2022 that it was looking into its disclosure controls and other procedures, telling the public that it expected it may determine that there are “one or more material weaknesses” in its internal controls for financial reporting. In that same announcement, the company acknowledged it could conclude those controls weren’t effective.

The company’s share price fell 48% on Nov. 8, 2022, the day after Unisys announced the audit department probe of its internal controls, the stock’s biggest decline ever, according to data compiled by Bloomberg.

https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X8QRCNCG000000?bc=W1siU2VhcmNoICYgQnJvd3NIliwiaHR0cHM6... 1/3



The positive financial results Unisys filed for the second quarter of 2022 weren't necessarily disclosed with prior knowledge of the deficiencies that plaintiff John Connor highlighted in his November 2022 complaint, according to Pappert.

"Treating Connor's allegations as sufficient would allow plaintiffs to always speculate that control deficiencies missed initially but discovered later were within company knowledge from the start," the judge said in the memorandum.

Connor's argument that the financial disclosures caused the subsequent stock drop losses for investors also failed to stand up to scrutiny from Pappert, who noted that the announcement of an internal investigation into controls and procedures doesn't constitute a corrective disclosure.

Allegations that the company's stock price wouldn't have been inflated if Unisys had announced the internal investigation sooner would have helped to establish loss causation, but only if Connor could show false statements were made with prior knowledge, Pappert said.

Connor has until March 1 to file an amended complaint that fixes the deficient pleading, an accompanying court order said.

The Rosen Law Firm PA represents the plaintiff and the proposed class.

Sullivan & Cromwell LLP; Linklaters LLP; and Morgan, Lewis & Bockius LLP represent Unisys.

The case is Connor v. Unisys Corp. , E.D. Pa., No. 2:22-cv-04529, 2/1/24 .

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Elon Musk Meets His Match in Shakespeare-Quoting Judge (1)

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When Elon Musk tried to back out of buying Twitter Inc. in 2022, Delaware Chancery Court Judge **Kathaleen St. Jude McCormick** reined him in, with one ruling after another, until he finally relented and closed the \$44 billion deal.

This week, McCormick voided the Tesla Inc. chief executive officer's \$55.8 billion pay package — the largest ever awarded — in a 201-page decision that includes references to both Shakespeare and *Star Trek*.

Musk, for now the richest person on the planet, takes a hardcore approach to litigation. And he has emerged from the courtroom victorious in most of his

, including with a cave diver who

him for defamation after being insulted as a “pedo” to the Tesla shareholders who of him of fraud after he infamously tweeted about taking the electric-car maker private.

Then he faced McCormick, a Delaware native whose written decisions often carry a touch of flair. While in most federal and state courts throughout the US cases are assigned to judges through random lotteries to avoid the appearance of impropriety, as chief judge, she had the power to choose which cases she handles.

“Elon Musk had a reputation as Teflon Elon. He always won in jury trials,” said Ann Lipton, a business law professor at

. “Suddenly, in these back-to-back rulings, he has these major, major losses in Delaware. Tesla's board is now operating in the shadow of her findings.”

Delaware Chancellor Kathaleen St. Jude McCormick in 2019.

Photographer: Eric Crossan/AP

McCormick, 44, the daughter of two public school teachers, was the first from her close-knit community in the tiny town of Smyrna to go to Harvard, where she majored in philosophy.

After

and a couple of years as a legal-aid lawyer working on housing discrimination issues, she landed at a law firm guiding Fortune 500 businesses through the perils and prerequisites of Delaware's corporate statutes.

"She knocked it out of the park as a litigator," said Bruce Silverstein, a former partner at

who mentored McCormick as she rose through the ranks from associate to partner.

In 2015, she was installed on the

by Delaware Governor John Carney – a fellow member of Wilmington's St. Patrick's Day Society, which raises funds to help needy residents.

Judge Katie, as she's often referred to, is comfortable sprinkling mainstream cultural references into expositions on complex legal concepts. In assessing whether the pay deal was acceptable, McCormick looked to *Star Trek* and *Henry V* for inspiration in the 200-page order she issued.

She said she would "boldly go where no man has gone before" to answer the question of whether Musk controls Tesla, quoting the classic 1960s science fiction franchise. McCormick later declaimed "once more unto the breach, dear friends, once more," invoking Shakespeare's warrior king.

In a 2021 case involving a fight over whether private-equity firm Kohlberg & Co could renege on a \$550 million agreement to buy a cake-decorating firm, McCormick turned to the late Julia Child.

"Julia Child is rumored to have once said: 'A party without a cake is just a meeting,'" she wrote in her 125-page decision, which forced Kohlberg to consummate the deal even though it had "lost its appetite" for the buyout. The ruling was hailed as a "victory for deal certainty" by legal commentators.

That same year, Carney appointed McCormick as the Chancery Court's chief judge — the first woman to ever hold the position. The court's judges are recognized as business-law experts who can hear cases on a fast-track basis, and most high-profile merger-and-acquisition

are litigated in the state.

In the trial over Musk's pay package, McCormick showed she was in charge when Musk veered in his testimony into a digression about the early days of electric vehicles.

"I'm going to interrupt, Mr. Musk, only because we can all listen to this all day because it's very interesting, but I don't think it was responsive to the question, which I've now forgotten," said McCormick, according to the trial transcript.

McCormick spent about a year working on her ruling — not including a month that she was out for back surgery.

"Was the richest person in the world overpaid?" begins the decision.

Sean O'Sullivan, a spokesman for Delaware's court system, said that McCormick is not commenting on her ruling because the case "is still an active matter." The judge still must decide how much to award in legal fees to the attorneys representing the shareholder who won the case and enter a final judgment.

Hours after the ruling came out Tuesday, an irate Musk

to pull Tesla out of Delaware, where it incorporated in 2003, and move it to Texas, where the company has a massive factory.

On Thursday, the entrepreneur used his social media platform X, formerly Twitter, to call McCormick "an activist and a politician." He went even further in another post.

Musk's words aren't likely to rattle McCormick.

"When she sees an injustice, she feels compelled to address it," said Silverstein, her former mentor. "She also doesn't have a lot of concerns about the repercussions of her decisions when she believes she's right."

(Updates with Julia Child reference in paragraph 12.)

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Peter Blumberg, Peter Jeffrey

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Tesla activist investors to seize on Elon Musk pay ruling

 [reuters.com/business/autos-transportation/tesla-activist-investors-seize-elon-musk-pay-ruling-2024-02-02](https://www.reuters.com/business/autos-transportation/tesla-activist-investors-seize-elon-musk-pay-ruling-2024-02-02)

Ross Kerber

[1/2] The Tesla logo is seen on a car in Los Angeles, California, U.S., July 9, 2020. REUTERS/Lucy Nicholson/File Photo Acquire Licensing Rights [↗](#), opens new tab

Feb 2 (Reuters) - Activist investors who have for years accused Tesla's (TSLA.O) [↗](#), opens new tab board of failing to rein in Elon Musk say this week's court ruling on the electric vehicle maker CEO's compensation could give them the shareholder support they need for reforms.

These investors have offered various resolutions at Tesla annual shareholder meetings on corporate governance issues such as director term lengths or voting thresholds for new bylaws, but so far they have won few changes.

Now, Tesla's critics say a Delaware judge's ruling voiding Musk's record-breaking \$56 billion stock compensation was so critical of its board for being beholden to Musk, they hope to win more of the support needed from big index funds and other investors to prevail in shareholder votes.

"People are going to be looking to rein in what's going on," said John Chevedden, an independent activist investor. He has put forward a resolution at Tesla's upcoming shareholder meeting expected this spring that would replace a requirement for major corporate changes to gain support from two-thirds of all shares outstanding with a simple majority vote.

Tesla has not yet set a date for the meeting, which last year was held in May.

Only a few of Tesla's eight directors will be up for re-election this year, because the company has a "staggered" board where every director faces re-election once every three years.

Based on past disclosures, directors who would need re-election this year include Musk's brother Kimbal and media investor and former 21st Century Fox CEO James Murdoch, whom the Delaware judge said lacked independence because of their close personal ties with the CEO.

Uncontested directors typically get re-elected with 90%-plus shareholder support. Three years ago, Murdoch and Kimbal Musk were re-elected with 70% and 80% of the votes cast, respectively, after proxy adviser Institutional Shareholder Services (ISS) recommended investors withhold support over what it argued was excessive compensation to executives and directors.

Some activist investors believe ISS and Glass Lewis, another influential proxy advisory firm, will gain more ammunition from the ruling to recommend against Tesla's board. ISS and Glass Lewis declined to comment.

"ISS has consistently called for votes against these two (directors) over pay concerns. This year should certainly be no different," said Rich Clayton, research director for SOC Investment Group, a labor-affiliated pension adviser.

Tesla did not respond to requests to comment or make Elon and Kimbal Musk or James Murdoch available for interviews. Efforts to reach Murdoch and Kimbal Musk separately were unsuccessful.

Another shareholder resolution submitted this year would require all of its directors to face re-election every year.

Musk, Tesla's largest shareholder, has a 12.9% voting stake and a strong personal following among many investors. To prevail, shareholder critics would need to gain support from big mutual fund holders of the stock such as BlackRock (BLK.N) [opens new tab](#) and Vanguard.

In some cases major investors have sided with Tesla's board. When ISS last year recommended shareholders withhold support from board chair Robyn Delhom's re-election bid because of concerns about the board's oversight, BlackRock and Vanguard backed her, and she kept her seat with 74% of the votes in her favor. Those firms, however, have sometimes opposed the election of other directors in the past.

BlackRock and Vanguard declined to comment.

WAKE-UP CALL

The judge in the Delaware case, Kathaleen McCormick, said neither the compensation committee nor the Tesla board acted in the company's best interests when negotiating Musk's compensation plan.

"In fact, there is barely any evidence of negotiations at all," she said in the court ruling.

Charles Elson, founding director of the Weinberg Center for Corporate Governance at the University of Delaware, said the court ruling was so scathing and far-reaching that it could prompt even Tesla's top investors to change their stance.

"The ruling will certainly give the reformers more influence. These people (the board directors) were eviscerated by the judge," Elson said.

The Delaware judge has asked the Tesla shareholder who challenged Musk's compensation to work with his legal team on a new pay plan. It is unclear what that will be and if it will come to a shareholder vote. The ruling could be appealed to the Delaware Supreme Court, and Tesla and Musk have not said if they will seek to do so.

Andrew Poreda, senior research analyst for Sage Advisory Services and an investor in Tesla through exchange-traded funds, said no matter the impact on Musk's pay, the ruling should motivate critics of the company's corporate governance.

"The judge's ruling should be a wakeup call (for Tesla shareholders) that things have gotten out of hand," Poreda said.

Reporting by Ross Kerber in Boston; Additional reporting by Jody Godoy in New York;
Editing by Greg Roumeliotis and Jamie Freed

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Ross Kerber

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Ross Kerber is U.S. Sustainable Business Correspondent for Reuters News, a beat he created to cover investors' growing concern for environmental, social and governance (ESG) issues, and the response from executives and policymakers. Ross joined Reuters in 2009 after a decade at The Boston Globe and has written on topics including proxy voting by the largest asset managers, the corporate response to social movements like Black Lives Matter, and the backlash to ESG efforts by conservatives. He writes the weekly Reuters Sustainable Finance Newsletter.

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- 



@annmlipton@esq.social
@AnnMLipton

...

it just occurred to me that the SEC might require that the proxy disclose the impetus for the decision, which means Musk either has to say in the proxy it was based on the poll, or say that the poll was meaningless.



@annmlipton@esq.social @AnnMLipton · Jan 31

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



Elon Musk · 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 · Jan 30

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

[Show this poll](#)

8:23 AM · Feb 2, 2024 · 3,783 Views



2



12



52



4



Post your reply

Reply



@annmlipton@esq.social @AnnMLipton · 2h

...

forget fiduciary duties, the proxy statement will be the source of the most epic 14a-9 claim the world has ever seen.



3



3



19



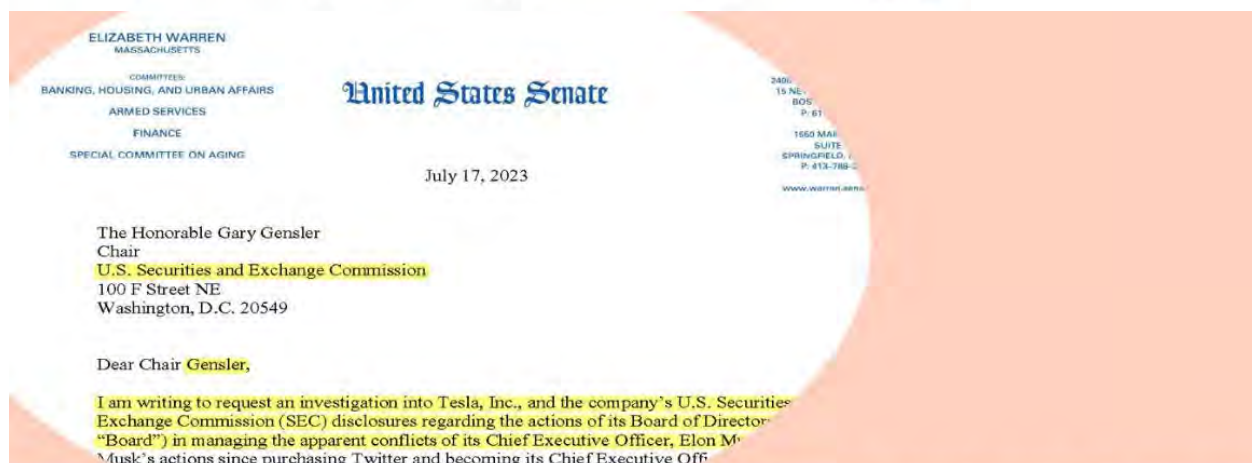
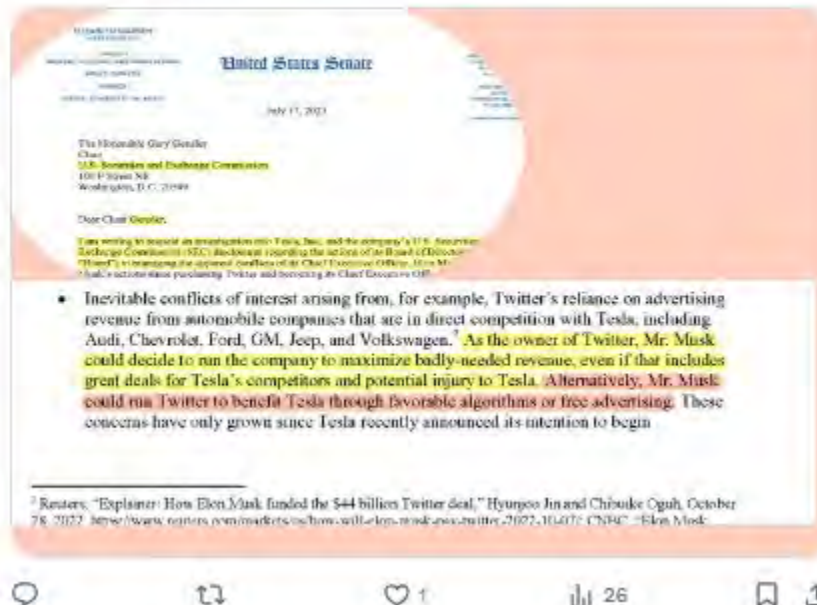
751





O'Neil @ONeilBox · 2h

somehow I have a distinct suspicion that E. Warren will soon be poking around into this case



- Inevitable conflicts of interest arising from, for example, Twitter's reliance on advertising revenue from automobile companies that are in direct competition with Tesla, including Audi, Chevrolet, Ford, GM, Jeep, and Volkswagen.⁷ As the owner of Twitter, Mr. Musk could decide to run the company to maximize badly-needed revenue, even if that includes great deals for Tesla's competitors and potential injury to Tesla. Alternatively, Mr. Musk could run Twitter to benefit Tesla through favorable algorithms or free advertising. These concerns have only grown since Tesla recently announced its intention to begin

³ Reuters, "Explainer: How Elon Musk funded the \$44 billion Twitter deal," Hyunjoon Jin and Chibuike Oguh, October 28, 2022. <https://www.reuters.com/markets/us/how-will-elon-musk-pay-twitter-2022-10-07/>. CNBC, "Elon Musk

B

Deep Dive



Reporter

- 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 preferred pay package. The court has already found he controlled Tesla when he got the \$55 billion package, in part because of his role as “superstar CEO” and power over the board.

“To me, this is very much a self-interested situation in which Musk wants to move for the benefit of himself, rather than the benefit of the shareholders,” said Gonzaga University law professor Angela Aneiros, who studies corporate governance.

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."

(Updates with comment from law professor in 10th paragraph.)

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<https://www.wsj.com/business/autos/a-lawyer-explains-how-he-beat-elon-musk-tesla-pay-c0bb70cc>

A Lawyer Explains How He Beat Elon Musk

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

Feb. 2, 2024 12:26 pm ET

At the pivotal moment in the case that cost Elon Musk his \$55 billion Tesla pay package, the lawyer cross-examining him let him go on and on and on.

“He was trying to assert control over the courtroom. He was asked a yes or no question, and instead of answering the yes or no question he began a long answer,” said Greg Varallo, the plaintiff’s lawyer in the Delaware courtroom. “And I remember the ordinary move there is to interrupt him, demand a yes or no answer and ask the court to instruct him to answer the question.”

“And I just had an intuition to leave him alone. The more he spoke the more irrelevant what was coming out of his mouth was,” he said. “He was embarrassed.”

In Varallo, Musk ran up against a massive plaintiff’s lawyers operation. Varallo is head of Bernstein, Litowitz, Berger & Grossmann in Delaware, and, unusually for a plaintiff’s attorney, he spent decades on the other side, representing big companies like Goldman Sachs and 21st Century Fox.

The bombshell decision, issued this past week 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. Musk argued it was OK because he didn’t dictate terms of his plan.



Greg Varallo took a surprising approach to questioning Elon Musk in court. PHOTO: GREG VARALLO

The many lawyers on the case, from multiple firms, represented a single shareholder plaintiff, Richard Tornetta. Lawyers wouldn't say how they connected with Tornetta. Tornetta drummed in the mid-2000s in a heavy-metal band called Dawn of Correction, which described itself as "loud aggressive rock 'n' roll with a foundation of old metal roots." Lawyers were attracted to the case because of Musk's outsize pay package.

The day he was set to cross-examine Musk was Varallo's 36th wedding anniversary so he invited his wife to come watch. The courtroom in the trial, decided by a judge without a jury, was filled with lawyers and reporters, who also filled an overflow room. His wife found a seat in the jury box.

"She took notes, when we had a break in the cross she came over with her notes and made some really interesting points from her point of view," said Varallo, 64. She used a legal pad and advised what series of questions seemed to work best and how Musk reacted to a certain line of inquiry. She suggested pressing harder on other points. "I was able to incorporate those comments for the rest of the cross. It was really special for me to be able to have her there and have her participate in the cross and, of course, it was a special day for both of us."

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

to rescind the CEO's package, which was valued at a maximum of \$55.8 billion.

The case was originally filed by lawyers from Friedman Oster & Tejtelt and Delaware-based Andrews & Springer, which also represents Tornetta in a separate lawsuit that began in 2019.

The lawyers brought in Varallo and several others from his firm in 2021. At the time, they had just survived a motion to dismiss by Tesla's board of directors, raising the likelihood that the case could go to trial. The original legal team recognized it was going to be a massive undertaking, said David Tejtelt, principal at Friedman Oster & Tejtelt which is based in New York and specializes in corporate-misconduct cases in Delaware.

More than a week before the trial, the entire legal team essentially moved into Bernstein Litowitz's office and its trial war room to work around the clock. "That was home for us outside the courtroom," Tejtelt said.

As a corporate-defense lawyer for 36 years at Delaware's largest firm, including a time as president of the firm, Varallo litigated hundreds of complex business disputes throughout the U.S., including in Delaware. 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. News Corp is the parent company of Dow Jones, publisher of The Wall Street Journal.

In 2019, the self-described "blue-collar kid" from Philadelphia—made an uncommon decision for a well-established defense lawyer: to start working for plaintiffs.

"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.



Elon Musk arrives for a Senate hearing. PHOTO: JULIA NIKHINSON/REUTERS

In his free time, Varallo said he enjoys goose and duck hunting and has been “a game hunter for a long, long time.” An elk from Northern Colorado and a mule deer from Mexico trophy hang in his office in Wilmington.

He also plays 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 on a podcast from The Deal. “There’s some, I think, overlap between the two.”

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

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.

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.

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.

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, Zaytsev said, and a factor is the stage at which the case is resolved.

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.

Write to Ryan Felton at ryan.felton@wsj.com and James Fanelli at james.fanelli@wsj.com

Opinion **Corporate governance**

Tesla's board took a holiday from managing Elon Musk

Company's directors behaved slackly in giving CEO a \$55.8bn pay package and Delaware's chancery court has rightly intervened

JOHN GAPPER



The fact that Elon Musk already held 22 per cent of Tesla's shares only encouraged the board to keep on doling out regular economic stimulants © Jim Watson/AFP/Getty Images

John Gapper 8 HOURS AGO



Imagine a company, several of whose board directors used to go on family holidays with its chief executive and who recruited one director after he took a break with them. Imagine that they then granted the CEO a package of share options that turned out to be worth \$55.8bn, with hardly any negotiation. This is not a dream, because the company is Tesla, and its leader is Elon Musk.

Musk has been so successful as a visionary co-founder and entrepreneur at companies including Tesla and SpaceX that the usual rules of business hardly seem to apply to him. He certainly behaves as if most of them should not. A judge in Delaware disagreed with him sharply this week, [declaring](#) that Tesla's astonishing 2018 pay deal with its billionaire CEO was unfair, and scrapping it.

The ruling came from a small court that oversees most large US public companies, thanks to so many of them being incorporated in the state. Musk was duly irate, [promising](#) a shareholder vote on moving Tesla's incorporation to Texas, where the company is already based. Texas last year [created](#) its own business court, although it has a long way to go to rival Delaware.

It is an exciting moment for scholars who follow Delaware's chancery court, which is hardly a revolutionary outfit by nature. Most of the time, it intentionally gives plenty of leeway to directors, so long as they follow basic [governance](#) edicts and do not steal money. "This has just not happened before. It is extraordinary," Charles Elson, a governance expert at the University of Delaware, told me this week.

The corporate culture of the US is that many CEOs receive pay packages worth tens, and sometimes hundreds, of millions of dollars and can also chair their boards. The court, which [traces its origins](#) to the King's Chapel in feudal England, does not contest this, and is usually pretty wary of second-guessing business judgments.

Nor was the ruling delivered by a renegade: Kathaleen McCormick is the court's chancellor, and thus its most senior figure. So when she writes, quoting one of her predecessors, that [Tesla's](#) directors behaved "like supine servants of an overweening master" in granting Musk 12 per cent of the company's equity — mainly because he wanted it — her verdict carries weight.

This is a pivotal event for US corporate governance, recalling the last time the court came close to such a momentous step. That was 20 years ago, when it criticised the directors of Walt Disney for waving through a \$140mn pay-off for Michael Ovitz when he was ejected as its president. That sounds like peanuts now, and although the court grumbled it eventually let it through.

Musk is not big on boundaries, and the one that he and his eight-member board ignored is that between private venture-backed companies and public ones. Silicon Valley's cult of the founder means that leaders are paid juicily and indulged by their boards as long as they produce outstanding financial returns, which Musk unquestionably did at Tesla, until [recently](#).

Tesla's infatuated board treated him as a genius whom it would be dangerous to defy, and I know why. I was in the audience at the New York Times DealBook summit in November when he made an expletive-filled [attack](#) on X's advertisers and there was a dark atmosphere. "My mind often feels like a very wild storm," he reflected then; it was easy to believe.

One director of Tesla, whose board currently includes Musk's brother and the media investor James Murdoch, said that they awarded him the options in stages to give him the regular "dopamine hits" that they thought he needed. The fact that Musk already held 22 per cent of Tesla's shares only encouraged them to keep on doling out regular economic stimulants.

A reasonable person might ask where this would end (not being reasonable, Musk has demanded another award to make up for the billions of dollars of equity he sold to buy X in 2022). As McCormick noted, the idea that he was insufficiently incentivised to keep Tesla growing was far-fetched, given that for each \$50bn it rose in value, he gained \$10bn anyway.

The bigger issue than paying a CEO billions, strange as this feels to write, is the board's lack of independence. It seems to have regarded its role as to keep ensuring that Prometheus had as much fire as he fancied. As to negotiating in a disciplined fashion on behalf of Tesla and other shareholders, it took a holiday from its duties.

So it is not surprising that Delaware's chancery court has had enough. Indeed, the board might have got away with a similar outcome if it had just taken a bit more care about it. "It's a striking decision but I'm not sure how much of a precedent it will set because everything Elon Musk does is *sui generis*," says Ann Lipton, associate professor of law at Tulane University.

There is one lesson for public company boards, though: no matter how stridently a chief executive insists that no one challenges him, that is part of directors' jobs. Tesla could move to Texas in search of greater indulgence, but is it really a good idea?

john.gapper@ft.com

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Expert Perspectives on Biggest Court Cases

LAW [law.com/litigationdaily/2024/02/02/litigators-of-the-week-rolling-back-elon-musk-56b-tesla-compensation-package](https://www.law.com/litigationdaily/2024/02/02/litigators-of-the-week-rolling-back-elon-musk-56b-tesla-compensation-package)

By Ross Todd



L-R: Greg Varallo and Jeroen van Kwawegen of Bernstein Litowitz Berger & Grossmann and David Tejtzel of Friedman Oster & Tejtzel. Courtesy photos

Q&A

Litigators of the Week: Rolling Back Elon Musk's \$56B Tesla Compensation Package

A team led by Greg Varallo and Jeroen van Kwawegen of Bernstein Litowitz Berger & Grossmann and David Tejtzel of Friedman Oster & Tejtzel secured a post-trial ruling from Delaware Chancellor Kathaleen McCormick finding that when it came to the Tesla CEO's pay package "Musk launched a self-driving process, recalibrating the speed and direction along the way as he saw fit."

February 02, 2024 at 07:30 AM

Ross Todd 
Editor/columnist

The question of whether Elon Musk was the "controlling shareholder" at Tesla while his record pay package was being hashed out was one of the central legal questions facing Delaware Chancellor Kathaleen McCormick.

After a five-day trial last year, McCormick this week gave a pretty emphatic answer in her 200-page opinion rescinding the \$55.8 billion deal: Musk, at least as it came to this transaction, was in control.

McCormick wrote that “Musk launched a self-driving process, recalibrating the speed and direction along the way as he saw fit.”

“Swept up by the rhetoric of ‘all upside,’ or perhaps starry eyed by Musk’s superstar appeal, the board never asked the \$55.8 billion question: Was the plan even necessary for Tesla to retain Musk and achieve its goals?” she wrote.

Our Litigators of the Week are **Greg Varallo** and **Jeroen van Kwawegen** of **Bernstein Litowitz Berger & Grossmann** and **David Tejtzel** of **Friedman Oster & Tejtzel**, who led a plaintiff’s trial team.

I usually start off by asking what was at stake. But here it was pretty clear that what was at stake was a \$56 billion compensation package—one Chancellor McCormick pointed out was more than 33 times larger than its closest comparison point, Elon Musk’s prior comp plan. So let me ask: What greater legal principles were at stake here?

Jeroen van Kwawegen: The greater principle at stake is whether directors and officers of publicly traded companies will comply with their fiduciary duties to represent the interests of all shareholders and the company rather than the interests of a founder “superstar” CEO who is trying to get private benefits. This principle was magnified by the outsized personality of the “superstar” CEO and his outsized demand for private benefits that, if granted, would make him the richest person on earth. In deciding this question and finding that the directors did not comply with their fiduciary duties, the court applied well-established legal precedents to the facts that were established at trial.

Greg Varallo: Among other things, the court had to decide whether to make an evaluation of whether Elon Musk had control (general or situational) at Tesla. Her Honor did that, faithfully applying a substantial body of precedent to the huge factual record and concluded that Musk (situationally) controlled this exercise. Likewise, the court made important findings about the lack of independence (in fact) of various directors. This case affirms (again) the idea that any analysis of independence in Delaware is not a rote “check the box” exercise.

How did this case come to you and your firms? And as a shareholder who has seen the value of his Tesla stock grow dramatically under Musk’s tenure, what motivated your client to bring suit?

David Tejtzel: The case was filed by Friedman Oster & Tejtzel and **Andrews & Springer**, who defeated the defendants’ motion to dismiss and embarked on extensive discovery. As it became increasingly clear the case would be a massive undertaking and was destined for

trial, we reached out to Bernstein, Litowitz, Berger & Grossman—with whom we have shared many previous successes, including at trial—to join our ranks, and we were thrilled when they agreed.

Who all is on your team and how did you divide the work, especially in the run-up to trial last year?

Tetjel: We had a large team made up of all three firms. From FOT, the team included **Jeremy Friedman, Spencer Oster, Michael Lee, Lindsay La Marca and David Rosenfeld**. From A&S, the team included **Peter Andrews, Craig Springer, David Sborz, Andrew Peach, Jackson Warren, Jacob Jeifa and Dara Cupingood**. From BLB&G, the team was led by Greg and Jeroen with assistance from associates **Meg Sanborn-Lowing, Glenn McGillivray and Dan Meyer**. BLB&G also provided the logistics of the trial team, including trial support staff.

Van Kwawegen: Functionally, Greg took ownership of the overall trial strategy and deposed and cross-examined, among others, Elon Musk, Ira Ehrenpreis, and Robyn Denholm. David and the team at FOT took ownership of challenging the independence of the other Tesla directors, including deposing and cross-examining Antonio Gracias, James Murdoch and defendants' experts. A&S handled the direct examination of expert Brian Dunn, and cross-examined director Brad Buss. I took ownership of deposing and cross-examining Tesla management and the external compensation consultant facilitating Elon Musk's self-dealing in breach of their duties and contrary to the information provided to shareholders.

Greg, did your approach to examining Elon Musk—someone who has racked up quite a bit of time on the witness stand in various cases at this point—differ at all from your typical approach? And with this decision in hand, are there any particular moments from that exchange that stand out?

Varallo: Elon's cross did not follow the ordinary patterns. First, I would point out that, although the Elon cross got all the attention, it was not as important as the publicity surrounding it would suggest. The cross of Ira Ehrenpreis, the Compensation Committee chair, director Antonio Gracias, and Todd Maron, the general counsel, were probably more important to the case than Elon's.

This was reflected in the relatively short time that we allocated to this cross. That said, the biggest problem in preparing an Elon cross was the mountain of really good material to work with. Unlike the typical case where you sometimes have to scramble to find really good cross material, this one was the direct opposite. And Elon's tweeting "habit" kept creating additional material every day. So it was an exercise in sifting through the very large amount of material to find only the very best evidence to use. Meg was particularly helpful in preparing this.

Then during the cross, I made the strategic decision not to try to “control” the witness, but rather let him tell his story. In response to an early “yes/no” question, Musk decided to try to catalog his thoughts since birth. Rather than cut him off, I let him speak. Ten minutes or so later the court interrupted to ask Musk if he remembered the question, which he didn’t. This turned out very well because, in the end, Musk disciplined himself.

Jeroen, you cross-examined Todd Maron, Musk’s divorce attorney who became Tesla’s general counsel. The decision notes he held back tears during his deposition and trial when talking about leaving the company. How important was he to illustrate the conflicts at play here and the lack of internal recognition of them at Tesla?

Van Kwawegen: Maron’s testimony was important to show the pervasiveness of the “controlled mindset” among all fiduciaries—directors and executives—to just give Musk what he demanded without negotiation or regard for their own duties to Tesla’s public shareholders. Founders/dominant CEOs often believe and act as if what is good for them is inevitably also good for the company and other shareholders. In this case, everyone around Musk, including Maron, bought into that idea. But there can be conflicts of interest of course, including when setting operational milestones for the compensation package or when deciding how much time the CEO must spend on projects for the company. Maron was so emotionally invested in his relationship with Musk that he did everything to facilitate Musk’s wishes—including allowing Musk to “negotiate with himself”—even though Maron had his own fiduciary duties to Tesla’s shareholders.

What lessons do you hope compensation committees take from this trial and this decision?

Varallo: In my prior life as a defense lawyer I had occasion to counsel quite a few comp committees. When they understood what their goal was and the importance of independence, they did brilliantly. But that requires an understanding that they are not the CEO’s buddies whose job is to give him whatever he asks for. They are supposed to deal with the topic at arm’s length. As the court found, Tesla’s committee failed miserably at that goal.

Van Kwawegen: Equally importantly, I would say that the choice of the compensation advisors and/or the committee not to ask for benchmarking data was inexcusable here. At trial, I cross-examined the compensation consultant who testified that the committee “knew” that the benchmarking data would show that Musk’s requested compensation package was so far off the charts that they decided not to use it. In other words, they made a conscious decision not to use any benchmarking because it would not help give Musk what he wanted. That is truly awful and something that should never, ever happen again.

Tejtel: The decision also helps underscore the critical importance of independence. Although personal and professional conflicts of interest are no strangers to corporate boardrooms, the conflicts permeating the Tesla Board here were exceptionally deep. For example, ostensibly independent Compensation Committee member Antonio Gracias admitted at trial to amassing dynastic and generational wealth through his relationship with Musk, being close friends with Musk, and vacationing internationally and spending holidays with Musk and their respective families. The near-familial nature of such conflicts poisons the process that produces the compensation plan.

What lessons can potential plaintiffs in these types of actions take from what you have accomplished here?

Van Kwawegen: The “lessons” that stand out for me are that we live in a country where the rule of law matters; that we have courageous public servants who are not intimidated and who, in good faith, are exercising their duties; and that a shareholder who sees something that he or she believes is wrong can get a fair hearing even if the defendant is one of the richest and most powerful people in the world with a privately-owned communications network. That is a remarkable testament to our country.

Not to get ahead of myself here, but how does the attorney fees process work in a matter such as this?

Varallo: In Delaware corporate litigation matters, successful attorneys who take matters on a contingent fee basis are entitled to a “percentage of the benefit” that they create. The court awards that fee based on a series of well-known factors, the primary one of which is the benefit created.

What will you remember most about this matter?

Varallo: Elon testifying that he took the red eye to fly to court (on his G5).

Tejtel: For me, a particularly memorable part was when Antonio Gracias, at the conclusion of being cross-examined regarding his conflicts of interest, stated on the record: “Yes, yes, yes, yes, yes, yes, yes, yes. ... I stipulate to yes.”

Van Kwawegen: What I will remember most of this matter? That is easy. My cross of the compensation consultant. He was the last witness of the case. We were under time pressure. After catching him in a lie on direct (that he would normally not use benchmarks while he testified the opposite in his deposition), I used the remainder of our limited time to walk the court through all the various iterations of the comp plan, showing there were no meaningful changes after Elon first proposed it. It was like a summation at the end of trial before post-trial briefing and argument.

Who is Kathaleen McCormick, the judge who slashed Elon Musk's pay package?

 [reuters.com/legal/judge-who-slashed-elon-musks-pay-package-known-being-tough-wall-street-2024-01-30](https://www.reuters.com/legal/judge-who-slashed-elon-musks-pay-package-known-being-tough-wall-street-2024-01-30)

Tom Hals



Chancellor Kathaleen McCormick, Delaware Court of Chancery, speaks during the gathering of top global M&A advisors, including Wall Street's most high-profile investment bankers and lawyers, at the 35th Annual Tulane Corporate Law Institute in New Orleans, Louisiana, U.S., March 23, 2023. REUTERS/Kathleen Flynn/File Photo Acquire Licensing Rights , opens new tab

WILMINGTON, Delaware, Jan 30 (Reuters) - The Delaware judge who rescinded Elon Musk's record \$56 billion compensation from Tesla (TSLA.O) , opens new tab on Tuesday has a reputation for her calm demeanor and demanding standards for corporate behavior. Chancellor Kathaleen McCormick's ruling on Musk's pay follows decisions against a private equity firm that tried to wriggle out of a takeover deal and a CEO who shortchanged his own shareholders when he sold his company.

The first woman to lead Delaware's Court of Chancery, the go-to venue for U.S. corporate litigation, has also tangled with Musk before.

McCormick oversaw Twitter's July 2022 lawsuit against the entrepreneur when he tried to break his \$44 billion contract to buy the social media platform. The judge rejected Musk's foot-dragging tactics and on the eve of an expedited October trial, he agreed to stick to his deal to buy the company that is now known as X.

The judge said she rushed the Twitter case to protect the company and shareholders from damaging uncertainty. By contrast, the Musk ruling took an unusually long time for a court that prides itself on delivering complex rulings in a matter of months. The week-long pay trial for Musk, which was held without a jury, ended in November 2022.

McCormick is known as soft-spoken, smart and amiable, a contrast to Musk's sometimes brash and volatile behavior.

"She's met a lot of people like him in private practice," Charles Elson, a retired University of Delaware professor, who filed a brief in the case arguing Musk's pay was unfair. "He's not going to intimidate her."

She's defended her court from conservative critics from the former Trump administration and guarded the interests of smaller investors.

Last year, in the first ruling of its kind, she found Rick Stollmeyer shortchanged shareholders of Mindbody Inc, the company he co-founded, when the CEO rigged a cut-price sale to his favored buyer.

In 2021, she became one of the few judges to order a reluctant buyer to close a corporate takeover when she rejected Kohlberg & Co's claims it lacked financing for its \$550 million deal for DecoPac Holding Inc.

She's even protected investors from their own attorneys.

In July, she slashed a requested legal fee more than 90% for attorneys who brought a dubious lawsuit on behalf of shareholders of Magellan Health

"Where lawsuits are not worth much, plaintiffs' counsel should not be paid much," she wrote.

Her opinions have topped 100 pages in length, which she has enlivened with quotes from Julia Childs and insights from college football legend Knute Rockne, who coached at Notre Dame, where she earned her law degree.

McCormick started her career with the Delaware branch of the Legal Aid Society, which helps low-income people navigate the court system.

She went into private practice for financial reasons, joining one of the state's top corporate law firms, Young Conaway Stargatt & Taylor, according to her confirmation testimony to the Delaware Senate.

"They taught me a form of advocacy that appealed to my natural inclination," she told the senate. She learned that the best way to deal with difficulties, in business and in life, was "not with ego, but with logic, and reason, and open minds."

Reporting by Tom Hals in Wilmington, Delaware; Editing by Noeleen Walder and Lisa Shumaker

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Tom Hals

Thomson Reuters

Tesla Inc

Tesla must fix software in more than 2mn US vehicles after safety ruling

Regulator says small font size on warning lights is difficult to read, 'increasing the risk of a crash'



The software update on 2.2mn vehicles covers Tesla's 3, S, X and Y models and its new Cybertruck, almost every car it has sold in the US © Mohd Rasfan/AFP via Getty Images

Steff Chávez in Chicago and **Peter Campbell** in London 4 HOURS AGO



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Tesla must fix the software of more than 2mn US vehicles, its third major safety update in the space of three months, coming at the end of a fraught week for the US electric-car maker.

The software update on 2.2mn vehicles covers Tesla's 3, S, X and Y models and its new Cybertruck, almost every car the company has ever sold in the US, and was ordered because warning lights on the instrument panel are too small, according to federal safety standards.

The US National Highway Traffic Safety Administration said the small font size on the lights "can make critical safety information on the instrument panel difficult to read, increasing the risk of a crash".

The digital fix involves increasing the font size for Tesla's brake, park and anti-lock brake system, which are smaller than the mandated size, the [NHTSA](#) said.

[Tesla](#) was notified by the regulator of the problem on January 8 and the company "voluntarily made a recall determination" on January 24, the NHTSA said in a report dated January 30.

Tesla has already begun rolling out a software update, the NHTSA added.

The agency said Tesla was unaware of any collisions, injuries or deaths related to the warning size issue. Tesla did not immediately respond to a request for comment.

The carmaker issued another [widespread software fix](#) in December to improve safeguards in its Autopilot driver-assistance system, after an NHTSA investigation into a series of fatal accidents. The fix affected 2mn vehicles. Last month, Tesla rolled out a similar fix to 1.6mn vehicles in China.

Tesla has been under investigation by the NHTSA for more than two years over whether the Autopilot system ensures drivers pay attention to the road when the vehicle is steering itself.

The latest NHTSA ruling caps a week that has seen the role of Tesla's board come into greater focus after [a Delaware court struck down](#) chief executive Elon Musk's record pay package.

Musk had been awarded stock in 2018 that would only vest if he hit financial targets that, at the time, were considered impossibly stretching. The company's profitability, and a rising share price that briefly valued it above \$1tn, means the shares were due to pay about \$55bn.

Following Tuesday's ruling, Musk held a poll on social media site X, which he owns, asking whether Tesla should move its incorporation from Delaware to Texas, where it is already headquartered. After the result, he said Tesla's shareholders would vote on the measure.

The pay ruling threatens to distract Musk at a time when Tesla's decade of dominance in the electric vehicle market is under threat from Chinese competitor BYD, which [overtook the US company](#) late last year as the world's largest battery-only car manufacturer.

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<https://www.wsj.com/business/autos/tesla-to-recall-more-than-two-million-vehicles-for-software-fix-a5fb3626>

BUSINESS | AUTOS

Tesla Recalls Millions of Vehicles Over Latest Safety Flaw

Automaker's biggest recall to date covers more than two million EVs

By [Gareth Vipers](#)

Updated Feb. 2, 2024 12:07 pm ET

Tesla TSLA **-1.75%** ▼ is recalling nearly all the electric vehicles it has sold in the U.S. because the font for some visual warning lights is too small, marking another safety setback for the world's most valuable automaker.

“Warning lights with a smaller font size can make critical safety information on the instrument panel difficult to read, increasing the risk of a crash,” the National Highway Traffic Safety Administration said.

The recall affects about 2.19 million vehicles sold between 2012 and 2024. Tesla said impacted vehicles will receive an over-the-air software fix, which is a type of remedy sent through a wireless connection. The company isn't aware of any crashes related to the warning-light issue, it said.

Tesla didn't respond to a request for comment. The company's shares were down roughly 3% in trading Friday morning.

NHTSA said the issue was identified last month as part of a routine compliance check by the auto-safety regulator of a 2023 Tesla Model Y SUV. The agency found that the warning indicators for certain brake and park systems had font size that was smaller than the one-eighth of an inch required by motor-vehicle regulations.

Tesla conducted its own assessment, and two weeks later decided to issue this recall.

A fix is unlikely to be expensive to implement but the recall could still dent Tesla's reputation as it comes off the back of a number of recent safety issues.

In December, Tesla initiated a recall of about two million vehicles to update the Autopilot software and install new safeguards to prevent driver misuse.

Since the Autopilot update was rolled out, U.S. auto-safety regulators have received dozens of complaints about the changes it made to Autopilot, an unusually high number in such a short window. These include drivers who say the warnings have become excessive and are triggered by performing routine tasks, according to a government database of these complaints.

Last month, the company conducted its biggest ever recall in China over what regulators said were similar problems with the driver-assistance features. That move came amid fierce competition for Tesla in the world's largest auto market, where it trails homegrown rival BYD.

In 2023, Tesla delivered around 1.8 million vehicles worldwide.

The NHTSA said in a separate notice published Thursday that it was expanding an earlier probe into steering problems affecting roughly 335,000 Tesla vehicles.

Regulators said an engineering analysis would be undertaken, which is a crucial step for NHTSA in determining whether to compel a recall.

The probe, which was opened in July, relates to Tesla's 2023 Model 3 and Y vehicles, and is separate from issues concerning warning lights and Autopilot. "The investigation identified 2,388 total complaints regarding the alleged defect," the agency said.

The latest recall affects certain 2012-23 Model S, 2016-24 Model X, 2017-23 Model 3, 2019-24 Model Y, and 2024 Cybertruck vehicles, according to NHTSA.

Tesla Chief Executive Elon Musk was dealt a personal blow earlier this week when a Delaware judge ruled to void his \$55.8 billion compensation package after finding the process for securing its approval "deeply flawed." The ruling was a major setback for Musk, who has in recent years ranked as the world's richest person.

On Thursday, Musk said Tesla would hold a shareholder vote on whether to move the company's incorporation from Delaware to Texas.

“Never incorporate your company in the state of Delaware,” Musk tweeted after the decision was released. The move was widely seen as a knee-jerk reaction by the CEO to what he felt was an unfair ruling, and it wasn’t clear if Tesla shareholders would approve such a move.

The billionaire currently owns around 13% of the automaker, according to FactSet, making him its largest shareholder.

—Ryan Felton contributed to this article.

Write to Gareth Vipers at gareth.vipers@wsj.com

25 counties settle hazardous waste suit against Tesla for \$1.5M

DJ [dailyjournal.com/articles/376984-25-counties-settle-hazardous-waste-suit-against-tesla-for-1-5m](https://www.dailyjournal.com/articles/376984-25-counties-settle-hazardous-waste-suit-against-tesla-for-1-5m)

Feb. 2, 2024

In the complaint, San Joaquin County District Attorney Ronald J. Freitas detailed California's "cradle to grave" legal structure meant to prevent companies from committing violations such as those alleged against Tesla.

The 25 counties that sued Tesla Inc. announced a \$1.5 million settlement Thursday, just two days later, in a lawsuit claiming the company illegally dumped hazardous materials at its facilities throughout the state.

San Francisco County District Attorney Brook Jenkins said in Thursday's news release announcing the settlement, "While electric vehicles may benefit the environment, the manufacturing and servicing of these vehicles still generates many harmful waste streams."

According to the complaint, filed by San Joaquin County District Attorney Ronald J. Freitas in San Joaquin County Superior Court, Tesla disposed of hazardous waste accumulated during the manufacturing of its cars and batteries at unauthorized locations including "trash containers, dumpsters, or compactors at the facilities or caused the disposal of hazardous waste at a transfer station or landfill that is not permitted to accept hazardous waste." *State of California v. Tesla Inc.*, STK-CV-UBT-2024-1154 (San Joaquin Sup. Ct. filed Jan. 30, 2024).

Jenkins said in her news release the settlement stems from a 2018 undercover investigation into the company's trash containers at its car service centers initiated by the San Francisco District Attorney Office's Environmental Division.

"Tesla Inc. cooperated with the district attorneys' investigation and took steps to improve its compliance with the environmental protection laws brought to its attention by the prosecutors," Jenkins release said. "After Tesla was notified of the issues, they began quarantining and screening trash containers for hazardous waste at all of its service centers before trash was brought to the landfill."

According to the news release Tesla's California operation includes 57 car service centers, 18 solar energy facilities, and its Fremont factory.

Tesla's press office did not respond to email requests for comment Thursday. The company touted its waste reduction methods implemented at newer facilities but noted an inefficiency at its flagship Fremont location in its 2022 environmental impact report: "As we build more efficient factories, our waste per vehicle decreases. Our legacy manufacturing operations at the Fremont Factory will always produce more waste per vehicle than our newly designed factories."

In the lawsuit, Freitas detailed California's "cradle to grave" legal structure implemented to prevent companies from committing violations such as those alleged against Tesla.

"The State of California has enacted a comprehensive statutory and regulatory framework for the generation, handling, treatment, storage, transportation, and disposal of hazardous wastes," he wrote. "This framework ... mandates a 'cradle to grave' system known as the Hazardous Waste Control Law (HWCL). The HWCL system is maintained to record the generation, registration, tracking, storage, treatment, and disposal of hazardous wastes and to provide for the protection of the public and the environment from present and potential risks posed by hazardous wastes."

Tesla's compliance with environmental regulations at its facilities has been in the cross hairs of the state and federal government in recent years. Since 2019, the company has settled twice with the U.S. Environmental Protection Agency.

On April 1, 2019, the EPA announced its settlement with Tesla to address hazardous waste violations at its Fremont facility; requiring the company to pay a \$31,000 penalty and to purchase \$55,000 in emergency response equipment for the City of Fremont's Fire Department.

The company also settled with the EPA in February 2022 over alleged Clean Air Act violations at the Fremont factory.

#376984

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Is calling litigation 'without merit' actually without merit?

 [abajournal.com/web/article/is-calling-litigation-without-merit-without-merit](https://www.abajournal.com/web/article/is-calling-litigation-without-merit-without-merit)

Litigation Management

By Mark F. Walsh

February 2, 2024, 10:06 am CST

“Given the risk, you don't have any big upside in using the expression 'meritless,’” says Matteo Gatti, a professor at Rutgers Law School and a corporate governance expert. “It’s not going to benefit the stock price that much by using it, unless you want to signal that a litigation effort is reckless or a strike suit.” (Image from Shutterstock)

Scan corporate financial filings, and it doesn’t take long to notice that companies often dismiss legal actions brought against them as being “without merit” or “meritless.”

It’s boilerplate text—hardly surprising in annual or quarterly securities filings filled with stock phrases and standard caveats, such as: “Our industry is highly competitive,” or “Our financial results will fluctuate from quarter to quarter.” But a federal court ruling suggests that reliance on such phrases can backfire when it comes to litigation disclosures.

That opinion came in a shareholder class action securities fraud complaint filed in 2023 against Pegasystems Inc., a Cambridge, Massachusetts-based maker of low-code software, after it was ordered to pay more than \$2 billion in damages in a prior lawsuit alleging trade secret theft brought by the Appian Corp., its rival.

U.S. District Judge William G. Young of the District of Massachusetts ruled last July that Pegasystems’ portrayal of the trade secrets case as “without merit” in its 2021 10-K annual report was misleading given Pegasystems CEO Alan Trefler’s knowledge of and involvement in the company’s espionage campaign against the Appian Corp.

“Here, Trefler and Pega[systems] categorically denied that Appian’s claims had any merit—despite possessing substantial information about the viability of those claims. [Trefler’s] and Pega[systems]’ opinion statement that Appian’s claims were ‘without merit’ was, therefore, misleading,” according to Young’s opinion on Pegasystems’ motion to dismiss for failure to state a claim.

Citing that decision, at least one major law firm is advising clients to drop the “without merit” language in relation to pending suits. In a December publication on its website about preparing annual 10-K forms for 2023, Gibson, Dunn & Crutcher highlighted the Pegasystems ruling.

“The court’s decision provides a cautionary tale against using boilerplate disclosure language when describing a company’s litigation matters, particularly where those disclosures are contradictory to the actual prospect of an adverse result,” according to the Gibson Dunn publication.

It reasons that litigation often has “at least some merit,” even when a defendant has a strong legal defense.

Without ‘without merit’

That advice could extend well beyond Gibson Dunn’s clientele. A keyword search of “without merit” using the U.S. Securities and Exchange Commission’s EDGAR database of 10-K forms filed in 2023, for instance, returned more than 1,600 results. That includes filings from a range of major U.S. businesses that include Meta Platforms, Philip Morris, Sherwin-Williams and Marathon Oil.

Depending on how many suits that a company faces, “without merit” may appear multiple times within a single 10-K report. Facebook owner Meta Platforms, for instance, uses the phrase several times in relation to different legal matters detailed within the “Legal Proceedings” section of its report filed in early 2023.

So why is it favored as an all-purpose response to litigation?

Michael Titera, a partner in Gibson Dunn’s corporate securities and governance practice, says a terse denial may be seen as preferable to making voluntary disclosures that could later be challenged.

Further, “discussing the merits of a legal proceeding in detail in an SEC filing could suggest to investors or analysts that the proceeding is more important than it actually is,” Titera says.

A succinct statement helps sidestep such potential pitfalls.

But instead of outright declaring a suit “without merit,” the firm recommends alternative language, such as: “We intend to contest this matter vigorously,” or “We have substantial defenses.” That signals that a company is actively addressing a legal action without judging its legitimacy.

In his opinion, Young noted that Pegasystems was not required to admit wrongdoing in its disclosure, and that “an issuer may legitimately oppose a claim against it, even when it possesses subjective knowledge that the facts underlying the claims against it are true.” But when it does so, it must be done with “exceptional care” to avoid misleading investors.

Matteo Gatti, a professor at Rutgers Law School and a corporate governance expert, supports that approach.

“Given the risk, you don’t have any big upside in using the expression ‘meritless,’” Gatti says. “It’s not going to benefit the stock price that much by using it, unless you want to signal that a litigation effort is reckless or a strike suit.”

Indeed, the class action suit against Pegasystems noted that the company’s stock price decreased 15.6% in February 2022, the day after the company filed the 10-K report for its 2021 fiscal year in where it deemed the Appian Corp. trade secrets claims to be “without merit.” Hardly magic words to ease investor concerns.

But as 10-K filing season kicks off this year, don’t expect the phrase to disappear from company reports or public statements. It’s an entrenched part of the legal disclosure landscape. And Titera acknowledges that using “without merit” won’t necessarily come back to bite companies in most instances. But it’s better to play it safe.

“At the end of the day, whether a company’s description is problematic will depend on the facts. And by avoiding ‘without merit’ altogether, a company can decrease the risk that it will face a suit alleging that its description was materially false or misleading,” Titera says.

Mark F. Walsh is a New York City-based freelance writer. He is a former reporter for American Lawyer Media publications.

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Wall Street Banks Prevail in Treasury Securities Antitrust Suit

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- Claims amount to ‘inconsequential market chatter,’ court says
- Plaintiffs allege big banks conspired to rig Treasury auctions

Wall Street’s largest banks prevailed in an antitrust suit accusing them of colluding to rig US Treasury securities after a federal appeals court affirmed a lower court’s ruling to dismiss the case.

The plaintiffs—including pension funds and other investors in the Treasury securities market—failed to demonstrate the banks formed an anticompetitive agreement in violation of Section 1 of the Sherman Act, which prohibits conspiracies that restrain trade, the US Court of Appeals for the Second Circuit said in a Thursday opinion. The plaintiffs’ claims of “wrongful information-sharing largely amount to inconsequential market chatter,” the appellate court added, upholding a 2021 ruling from the US District Court for the Southern District of New York.

The decision hands a win to the defendant banks including Goldman Sachs Group Inc., Morgan Stanley, JPMorgan Chase & Co., and Bank of America Corp., all of which participate in the multitrillion-dollar market for Treasury securities treated as safe and reliable investments backed by the US government.

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The banks have been the focus of investigations opened by federal and state authorities in recent years over alleged misconduct in connection with Treasuries, but those probes didn’t result in charges or settlements, the appeals court said.

The pension and retirement fund plaintiffs sued the banks in 2015, the year the Justice Department opened its probe.

The plaintiffs claimed the banks engaged in a roughly eight-and-a-half year conspiracy to rig Treasury auctions by sharing sensitive information and placing collusive bids. Treasuries are issued in auctions held at scheduled intervals.

The plaintiffs also alleged that seven of the defendant banks conspired to boycott trading in the robust secondary market for Treasuries, in which roughly \$510 billion in Treasuries are traded daily.

With regard to the alleged boycotts, “plaintiffs fail in their attempt to weave scattered, unrelated episodes involving different dealers over the course of roughly two decades into an actionable conspiratorial narrative,” the appellate court said. “Such allegations do not plausibly rebut the available inference that the dealers’ conduct served their respective, individual, legitimate business interests to maintain a profitable and reliable market structure.”

The banks are represented by firms including Cahill Gordon & Reindel LLP, Sullivan & Cromwell LLP, and Paul, Weiss, Rifkind, Wharton & Garrison LLP. The plaintiffs are represented by firms including Cohen Milstein Sellers & Toll PLLC.

The case is *In re Treasury Securities Auction Antitrust Litigation*, 2d Cir., No. 22-943, 2/1/24 .

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'Abusive Discovery Tactics'? Talc Plaintiffs Spar Over New J&J Subpoenas

 [law.com/nationallawjournal/2024/02/01/abusive-discovery-tactics-talc-plaintiffs-attack-new-jj-subpoenas](https://www.law.com/nationallawjournal/2024/02/01/abusive-discovery-tactics-talc-plaintiffs-attack-new-jj-subpoenas)

Johnson & Johnson headquarters.

NEWS

'Abusive Discovery Tactics'? Talc Plaintiffs Attack New J&J Subpoenas

Johnson & Johnson subpoenaed records concerning plaintiffs' expert Dr. Jacqueline Moline and a partnership involving attorney Andy Birchfield and one of its former lawyers.

February 01, 2024 at 05:48 PM

Discovery

Amanda Bronstad
staff reporter

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

What You Need to Know

- The subpoenas come ahead of the first bellwether trials in the talcum powder multidistrict litigation in New Jersey.
- Johnson & Johnson subsidiary LTL Management previously sued Dr. Jacqueline Moline while it was in Chapter 11 bankruptcy.
- Lead plaintiffs lawyers called Johnson & Johnson's subpoena relating to Andy Birchfield a 'fishing expedition.'

Plaintiffs lawyers are fighting new subpoenas from Johnson & Johnson as they prepare for the first bellwether trials in the talcum powder multidistrict litigation in New Jersey.

Johnson & Johnson has subpoenaed Northwell Health Inc., the employer of plaintiffs' expert Dr. Jacqueline Moline, an occupational medicine specialist, to uncover the names of individuals in her research tying cosmetic talcum powder to mesothelioma.

And it's not the first time her reports have come under fire. Johnson & Johnson subsidiary LTL Management previously sued Moline while in Chapter 11 bankruptcy, and another cosmetic talc manufacturer, American International Industries, unsuccessfully sought similar information last year.

Both the plaintiffs' steering committee and Northwell, represented by Michael Gordon of GordonLaw in Katonah, New York, insisted that the information being subpoenaed is both irrelevant and confidential. Moline, they argued in court filings, is not an expert in the multidistrict litigation, which focuses exclusively on plaintiffs who have ovarian cancer.

"Dr. Moline's articles concern the link between cosmetic talc use and mesothelioma—not ovarian cancer," the plaintiffs' steering committee wrote in a Jan. 12 motion for a protective order on behalf of Northwell.

Andy Birchfield, a principal with Beasley Allen. Courtesy photo

Also subpoenaed is KCIC, a products liability consultant, as part of

Johnson & Johnson's new move to disqualify plaintiffs attorney Andy Birchfield and his Montgomery, Alabama-based firm, Beasley Allen, from the leadership in the multidistrict litigation. Birchfield has called the effort the "latest example in a long line of smear tactics" designed to derail the upcoming bellwether trials.

That subpoena, the plaintiffs' steering committee wrote, should be quashed or under a protective order because it "seeks confidential, privileged communications that occurred in the LTL bankruptcy proceedings," not to mention are "irrelevant and inadmissible."

"Defendants' vague argument makes clear that this is nothing more than a fishing expedition and a blatant attempt to further defendants' meritless disqualification motion," said a Jan. 29 filing by the plaintiffs' steering committee, which includes co-lead counsel Leigh O'Dell, of Beasley Allen, and Michelle Parfitt, of Ashcraft & Gerel in Washington, D.C. "While defendants offer pure speculation, one thing is certain: allowing these abusive discovery tactics to proceed will unnecessarily harm plaintiffs in this MDL, as well as others who are not parties to this litigation, by disclosing *their* confidences."

The subpoenas could come up at a Feb. 7 hearing on the Birchfield disqualification motion.

'This Is No Mere Fishing Expedition'

The subpoenas come as both sides are preparing for the first bellwether trials since LTL's bankruptcies in 2021 and 2023 halted the talc litigation.

On Sept. 6, at his first hearing since taking over the talc multidistrict litigation, U.S. District Judge Michael Shipp asked whether amendments to the Evidence Rule 702 would have any impact on the litigation, in particular, a 2020 opinion from U.S. District Judge Freda Wolfson, now retired, that allowed five plaintiffs' general causation experts into trials. Those amendments became effective on Dec. 1.

In pushing for the subpoena of "two short documents" detailing the names in Moline's research, Johnson & Johnson insisted that many of plaintiffs' experts rely on her articles, published in 2020 and 2023, which contain "highly relevant, non-confidential information."

"The only reason the PSC wants to block the subpoena is because the information damages their case—in which case, the relevance of the documents is indisputable," Johnson & Johnson attorney Susan Sharko, a Faegre Drinker Biddle & Reath partner in Florham Park, New Jersey, wrote in a Jan. 22 court filing.

"The PSC's allegations that asbestos is present in cosmetic talc is a central and hotly disputed issue in this litigation," Sharko added. "And as a result, demonstrating that these individuals had *other, non-talc* exposures to asbestos is critical to explaining how the articles do not, in fact, demonstrate the presence of asbestos. This is no mere fishing expedition."

Moline's research, frequently referenced in mesothelioma trials, will be used to convince jurors that Johnson & Johnson's talc contains asbestos, Sharko wrote, yet many of the individuals in her reports appear to be plaintiffs in lawsuits with other potential exposures, such as cigarettes, ceiling pipes and nearby industrial plants.

In 2022, a federal judge in the Middle District of North Carolina found evidence that the plaintiff in a case against Clubman cosmetic talc manufacturer American International Industries had made a workers' compensation claim for asbestos exposure other than talc. That finding, the judge concluded, had a "direct bearing on the study's credibility," given that the plaintiff also happened to be one of the individuals in Moline's report.

Steve Brody, with O'Melveny & Myers. October 2021. Photo: Andrew Zinn

In a statement
to Law.com,
Johnson &

Johnson's worldwide vice president of litigation, Erik Haas, said the plaintiffs' steering committee's subpoena fights "reflect the depths they will go to perpetuate the use of junk science in the tort system. They oppose the production of the two documents because they fear they will demonstrate Dr. Jacqueline Moline's pervasive fraud, and shine a light on the false narrative being presented in scientific journals and the courtrooms across this country."

The KCIC subpoena focuses on a partnership between Birchfield and one of Johnson & Johnson's former lawyers, James Conlan. Conlan, founder of Legacy Liability Solutions, teamed with Birchfield in proposing a \$19 billion deal to resolve talc lawsuits against Johnson & Johnson.

The subpoena of KCIC seeks "certain documents and communications related to its involvement in that plan," Johnson & Johnson attorney Steve Brody, of O'Melveny & Myers in Washington, D.C., wrote in a Jan. 22 filing. Birchfield and Conlan's "improper and unethical collaboration," Haas wrote in a statement to Law.com, "was designed to thwart a reasonable and appropriate resolution of the talc litigation."

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Teva, Drug Manufacturer Antitrust Cases Sent Back to Connecticut

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Class Action

Photographer: Andrey Rudakov/Bloomberg

- Multidistrict panel pointed to 2022 law limiting consolidation
- Move could ‘temporarily disrupt’ drug price-fixing proceedings

Several antitrust lawsuits against top drugmakers will be sent back to Connecticut federal court, a judicial panel said Wednesday, denying about 40 defendants’ bid to pull the cases into multidistrict litigation in Pennsylvania.

Acknowledging that the move could “temporarily disrupt proceedings,” the US Judicial Panel on Multidistrict Litigation pointed to an amendment to a law that took effect in 2022, which allowed states to avoid consolidating antitrust cases when they haven’t waived their rights.

The panel was also unconvinced by the drugmakers’ arguments the federal law should be interpreted and applied differently because the multidistrict litigation was in the Third Circuit.

“If there indeed is a split between the Second and Third Circuits as to the interpretation of Section 1407, that split should be resolved by the Supreme Court,” Judge Karen K. Caldwell wrote for the panel.

The motion, brought by nearly every state, alleged that the drugmakers worked together to make generic drugs more expensive and stifle competition. A federal judge in 2022 let drug distributors including McKesson Corp. and Walgreens Boots Alliance Inc. escape the federal litigation, saying more than a “desire for profit” should be alleged to determine whether they participated in a conspiracy.

An amendment that took effect in late 2022 exempted state antitrust enforcement actions that rely on federal law from multidistrict litigation.

The case is *In re Generic Pharms Pricing Antitrust Litig.*, J.P.M.L., No. 2724, remand order 1/31/24 .

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New Starz suit reveals latest mass arbitration defense: Make customers pay for mediation

 [reuters.com/legal/litigation/column-new-starz-suit-reveals-latest-mass-arbitration-defense-make-customers-pay-2024-02-01](https://www.reuters.com/legal/litigation/column-new-starz-suit-reveals-latest-mass-arbitration-defense-make-customers-pay-2024-02-01)

Alison Frankel

A boardroom is seen in an office building in Manhattan, New York City, New York, U.S., May 24, 2021. REUTERS/Andrew Kelly Acquire Licensing Rights , opens new tab

Feb 1 (Reuters) - Corporate creativity seemingly has no bounds when it comes to combating mass arbitration.

I've already told you about companies requiring consumers to arbitrate claims in small batches, using class actions to settle disputes after barring consumers from suing as a class and even suing customers for allegedly skipping pre-arbitration requirements.

But here's a tactic I haven't seen before: The pay-TV company Starz Entertainment, which requires consumers to engage in mediation before they file a formal arbitration case, is insisting that customers split mediation costs, according to a new petition , opens new tab to compel arbitration.

Mediation can cost upward of \$10,000 a day, the filing said. So, according to plaintiffs' lawyers from Keller Postman, Starz is effectively insisting that its customers put up thousands of dollars in mediation fees before they can bring an actual arbitration claim. That, according to Keller Postman, is a violation of California law.

Fair warning: There are definitely two sides to this story. Starz, as I'll explain, contends that its goal is a fair and efficient resolution of allegations that it violated video privacy laws by sharing customers' viewing data without their consent. The company and its lawyers blame Keller Postman for thwarting efforts to streamline the mass arbitration. It claims that the plaintiffs firm is maneuvering to use the leverage of arbitration fees to force Starz into a settlement.

Both sides, in other words, are claiming the moral high ground. Thanks to Keller Postman's petition, which was filed on Wednesday in federal court in Riverside, California, it will now be up to a judge to decide which side deserves it.

What's undisputed is that in January 2023, Keller Postman notified JAMS – the arbitration forum specified in Starz' consumer contract – that it represents about 100,000 Starz customers with video privacy claims. The plaintiffs' firm subsequently said it would stay arbitration for most of those clients but demanded to proceed with individual arbitration for 7,300 Starz customers.

The Starz consumer contract requires customers to enter mediation before launching arbitration. Mediators, as I mentioned, don't come cheap: According to Keller Postman, the daily rate for a JAMS mediator averages nearly \$13,000. Hourly rates average \$900.

Keller Postman told Starz that its clients should each bear only \$250 of that cost because that's the cap on consumer fees under JAMS arbitration rules. Starz responded that the arbitration rules don't apply to mediation. There is no specified cap in JAMS rules on consumer mediation fees, so, according to Starz, Keller Postman's clients must split the entire cost of pre-arbitration mediation.

In June, JAMS sided [↗](#), opens new tab with Starz.

Keller Postman said that didn't matter. Under the terms of Starz' consumer contract, the plaintiffs' firm said, only an individual arbitrator — and not JAMS itself — can decide the threshold question of how much customers must pay for pre-arbitration mediation. (I know, this is all a bit head-spinning.)

Keller Postman demanded that its first batch of 7,300 clients be permitted to initiate arbitration.

Starz then asked JAMS to consolidate the 7,300 cases into a single arbitration to decide common issues, beginning with the threshold fight over mediation fees, arguing [↗](#), opens new tab that it would be a waste of time and money to handle the cases individually.

Starz acknowledged that its contract bars consumers from arbitrating as a class. But the company said its demand for consolidated arbitration was different because each customer would still be pursuing an individual claim, albeit before a single arbitrator. The contractual "prohibition on class or representative proceedings," Starz insisted, "has no relevance to JAMS' ability to consolidate individual arbitrations."

Keller Postman opposed consolidation, asserting [↗](#), opens new tab that its clients were only following the rules that Starz imposed on them. Starz told consumers that they had to arbitrate their disputes individually. Forcing claimants into a consolidated proceeding, Keller Postman said, would violate that very contract.

JAMS agreed to consolidate the cases before a single arbitrator.

That only escalated the battle between Keller Postman and Starz.

Most, but not all, of Keller Postman's clients sought to disqualify the appointed arbitrator. The firm said [↗](#), opens new tab its clients were simply exercising their right under California law to have a say in who oversees their cases.

Starz, meanwhile, said [↗](#), opens new tab Keller Postman was trying to fracture the consolidated arbitration to force Starz to pay additional fees. The company persuaded JAMS to remove the appointed arbitrator from the consolidated case, even though some of Keller Postman's clients were willing to proceed.

“Your true strategy is to maximize the procedural costs of arbitration to make your clients’ claims too expensive to defend,” DLA wrote to the plaintiffs’ firm on Jan. 17.

Keller Postman’s Albert Pak told me by email that Starz is the real obstructionist. The company insisted on individual mediation when it thought it could impose crippling mediation fees on each claimant, Pak said, then refused to allow the original arbitrator to proceed on behalf of its willing clients.

Starz declined to provide a statement.

Keller Postman filed Wednesday’s petition to compel arbitration on behalf of a client who did not seek to disqualify the original JAMS arbitrator, arguing that her case should be allowed to proceed. The petition also said that the Starz arbitration contract cannot be enforced if, as Starz insists, consumers are on the hook for thousands of dollars in upfront mediation fees before they can arbitrate their actual claims.

The stakes for Starz are huge, considering that Keller Postman told JAMS that it represents 100,000 customers. If each one is entitled to individual arbitration, Starz would be facing \$170 million in initial fees alone.

Remember when companies touted arbitration as a quick, uncomplicated way to resolve customer disputes?

If nothing else, the Starz case shows those days are long gone.

Read more:

Epson’s unusual mass arbitration defense: Sue your (alleged) customers

Verizon’s \$100 million settlement gets thumbs down from lawyers for 10,000 customers

‘Bellwether’ arbitration takes another hit ahead of key appeal

Jumpstart your morning with top legal news delivered straight to your inbox from The Daily Docket [↗](#), opens new tab

Reporting By Alison Frankel

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Coinbase Users Push Court to Revive Suit Against Crypto Exchange

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- Users allege Coinbase sold them unregistered securities
- Second Circuit panel considering whether to restore suit

A federal appeals court is weighing whether to revive a lawsuit against Coinbase Global Inc. brought by users who allege the crypto exchange illegally sells unregistered securities.

The district court that dismissed the suit erred in considering a user agreement specifying the crypto exchange doesn't sell digital tokens, the Coinbase users argue. The agreement, which was omitted from the crypto users' amended complaint, factored heavily in the lower court's decision that Coinbase isn't a "seller" under federal securities law.

Judges on a panel for the US Court of Appeals for the Second Circuit pressed attorneys on Coinbase's user agreement, and apparent discrepancies with other versions, during arguments Thursday. At least one judge indicated the case may have been decided too soon.

"I'm still trying to figure out how it gets resolved at dismissal," Judge Reena Raggi said.

The Coinbase users' proposed class action alleges the crypto exchange sells, or solicits the sale of, unregistered securities. Whether digital assets are securities is a hotly contested question that is at the center of a separate lawsuit the Securities and Exchange Commission brought alleging Coinbase operates an unregistered securities exchange.

The users want, in part, to rescind their contracts with Coinbase and recover transaction fees they paid the exchange to fulfill purchaser orders for tokens.

Competing Agreements

Arguments Thursday focused largely on the US District Court for the Southern District of New York's finding last year that Coinbase isn't a seller of the tokens. The district court noted language in a December 2020 user agreement that said users aren't "buying Digital Currency from Coinbase or selling Digital Currency to Coinbase."

Although the agreement wasn't cited in the amended complaint, Coinbase argues it's integral to the suit, opening the door for it to be considered at the dismissal stage. Some judges on the panel appeared inclined to agree.

"You're suggesting that a court can't look at the agreement that governs the user fees?" Judge Joseph Bianco asked an attorney for the users, Jordan Goldstein of Selendy Gay PLLC.

But even if the user agreement is integral, earlier versions of that agreement had different language suggesting Coinbase was in fact selling the tokens, the users argue. Goldstein said the district court wasn't entitled to "pick the version of the user agreement that was most disadvantageous to the plaintiffs."

Some judges seemed receptive to Goldstein's argument that questions surrounding the different versions of the agreement can't be determined on a motion to dismiss.

"This issue of which version controls was never conceded," Bianco said to a Coinbase attorney, Lara Flath of Skadden, Arps, Slate, Meagher & Flom LLP. Flath responded by noting the users referred in court filings to "the user agreement."

"Why can't that be the 2017 or the 2019 that contradicts and says that the sale of assets is between your company and them?" Bianco said.

The case is Underwood v. Coinbase Global Inc. , 2d Cir., No. 23-00184, argument held 2/1/24 .

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Lawsuit claims Stanley drink cups risk lead exposure

DJ [dailyjournal.com/articles/376988-lawsuit-claims-stanley-drink-cups-risk-lead-exposure](https://www.dailyjournal.com/articles/376988-lawsuit-claims-stanley-drink-cups-risk-lead-exposure)

Litigation & Arbitration

Feb. 2, 2024

The lawsuit, filed by John Rushing and Ryan McCarl of Rushing McCarl LLP in El Segundo, targets Pacific Market International LLC, which makes the Stanley cups.

A putative class action against the makers of Stanley brand drinkware claimed Thursday that the company sold its highly popular tumblers knowing that they contained a risk of lead exposure.

The company stated on its website that there is no lead on any surface of the cups and said that if, in a rare occurrence, a case cap comes off and exposes a seal with lead, it falls under a lifetime replacement warranty.

The lawsuit, filed by John Rushing and Ryan McCarl of Rushing McCarl LLP in El Segundo, targets Pacific Market International LLC, which makes the Stanley cups.

“PMI had a duty to disclose its use of lead before enticing millions of customers to unwittingly buy its drinkware,” the lawsuit stated. “Instead of allowing consumers to decide for themselves and their families whether to accept any risks associated with using a lead-containing drinking cup, PMI kept customers in the dark so as not to interfere with its bonanza of influencer-driven sales, especially sales to young women.” Mackenzie Brown et al. v. Pacific Market International LLC, 24STCV02653 (L.A. Sup. Ct., filed Feb. 1, 2024).

“Those products actually contain a toxic material — lead — and that, if the cups are damaged, the consumers could come into contact with it,” Rushing said in a phone call on Thursday.

Stanley’s support website states: “Rest assured that no lead is present on the surface of any Stanley product that comes into contact with the consumer nor the contents of the product. In the rare occurrence the base cap of a product comes off due to ordinary use and exposes this seal, it is eligible for our lifetime warranty.”

Plaintiffs in the lawsuit are four women who said they bought Stanley cups that provided no warnings about lead, believing that they were broadly safe for household and outdoor use.

As an example, Rushing said one of the plaintiffs is an LAPD forensic scientist who is also an avid hiker and sailor.

“If she had been told that damage to the cup might expose her to lead, she would not have bought it and used it in recreational activities. She would have bought a cup that did not contain lead.” he said. “But PMI concealed the lead and didn’t give her that choice.”

The lawsuit seeks a permanent injunction compelling Pacific Market International to disclose all lead and toxins present in its products. It also seeks compensatory damages for the cost of the cups and punitive damages for allegedly deliberately concealing the risk of lead contamination.

Representatives for Pacific Market International could not be reached for comment via phone or email by press time.

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<https://www.wsj.com/business/federal-prosecutors-investigate-vince-mcmahon-sex-trafficking-allegations-460a6822>

EXCLUSIVE BUSINESS

Federal Prosecutors Investigate Vince McMahon Sex-Trafficking Allegations

Authorities have been interviewing women who accuse longtime WWE boss of sexual misconduct

By [Joe Palazzolo](#) [Follow](#), [Khadeeja Safdar](#) [Follow](#) and [Ted Mann](#) [Follow](#)

Feb. 2, 2024 7:30 am ET



Vince McMahon at a WWE Hall of Fame ceremony in 2009. PHOTO: BOB LEVEY/WIREIMAGE/GETTY IMAGES

Federal authorities have been investigating sexual assault and sex trafficking allegations against WWE co-founder Vince McMahon, according to people familiar with the investigation.

Prosecutors in New York in recent months have been in contact with women who have accused McMahon of sexual misconduct, the people said.

The billionaire resigned last week from the wrestling empire he long ran after former WWE employee Janel Grant filed a lawsuit accusing him of sexually abusing her and trafficking her to other men inside WWE.

McMahon has denied Grant's allegations and said the federal probe won't find wrongdoing. He referred to a statement from last week: "I intend to vigorously defend myself against these baseless accusations, and look forward to clearing my name."

WWE didn't respond to requests about the probe or about the individual women's allegations.

Over the summer, federal agents executed a search warrant for McMahon's phone and delivered a subpoena to him for documents related to any allegation of "rape, sex trafficking, sexual assault, commercial sex transaction, harassment or discrimination" against current or former WWE employees.

The grand jury subpoena, described to The Wall Street Journal, offers the first window into the investigation, which began in 2022. The Journal reported in 2022 that McMahon had made payouts to several women who accused him of sexual misconduct while he was CEO and that prosecutors were investigating the payouts. The subpoena also sought communications between McMahon and these women, including Grant.

The businessman and TV personality resigned as executive chairman of WWE parent TKO Group **TKO -0.86% ▼** on Jan. 26, the day after Grant's lawsuit was filed. Her complaint contained graphic depictions of sex acts and copies of explicit text messages.



WWE's headquarters in Stamford, Conn. PHOTO: JOHN MOORE/GETTY IMAGES

Grant and at least four of the women named in the grand jury subpoena had entered into settlement agreements with McMahon over allegations of sexual misconduct. Prosecutors have interviewed some of the women, the people said.

Grant's lawsuit said McMahon agreed in 2022 to pay her \$3 million to keep silent about their relationship, which she said began after they met in 2019 at his luxury apartment building, where Grant also lived. Grant, who worked in the talent-relations and legal departments at WWE from 2019 to 2022, said in her lawsuit that McMahon stopped paying her after an initial \$1 million wire transfer.

The other women named in the grand jury subpoena include a WWE contractor whom McMahon allegedly sent unsolicited nude photos and sexually harassed; a former WWE wrestler who said McMahon coerced her into giving him oral sex; former WWE referee Rita Chatterton, who publicly accused McMahon of raping her; a spa manager who said McMahon assaulted her at a Southern California resort; and a former WWE employee who alleged the head of talent relations at the company at the time, John Laurinaitis, demoted her after she broke off an affair with him.

McMahon has long denied the rape allegations by Chatterton, first made publicly in televised interviews in the 1990s. He agreed to a multimillion-dollar settlement in late 2022 without admitting wrongdoing. His lawyer said he agreed to the settlement to avoid the cost of litigation.

McMahon hasn't addressed the allegations by the other women.

Laurinaitis also appeared in Grant's lawsuit, which said McMahon directed her to visit Laurinaitis at his hotel rooms, where she had sex with Laurinaitis before the start of workdays. The suit also alleged that the two men took turns restraining and assaulting her inside WWE's offices on one occasion in 2021.

Laurinaitis, a former wrestler known as Johnny Ace and a longtime WWE executive, left the company in 2022. Laurinaitis hasn't publicly commented on his departure.

A lawyer for Laurinaitis, Edward Brennan, said, "We deny any and all allegations and will vigorously defend the charges against Mr. Laurinaitis in the appropriate

setting.”

Brennan said Grant’s lawsuit doesn’t highlight any examples of Laurinaitis making sexual demands or exchanging items of value. “Count how many times in the complaint Vince exerts control over both the Plaintiff and Johnny,” he wrote in an email, referring to his client. “It’s a good complaint. It just doesn’t list all the victims, including Johnny.”

McMahon briefly left the WWE in 2022 during a board investigation and returned in early 2023. Soon after, he negotiated a sale of WWE to Endeavor Group EDR **-0.56%** ▼, owner of the UFC mixed martial arts league. The deal created a new public company called TKO Group and until last week he served as its executive chairman.

TKO Group had warned investors about the risks associated with WWE’s longtime leader, who remains a major shareholder. In securities filings last year, TKO Group said McMahon’s presence on its board could result in negative publicity and “any further allegations and investigations may have an adverse financial and operational impact on our business performance.”

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Unhedged Markets

Dick Bove: 'Research is dead'

The legendary analyst looks back at his hits and misses



Dick Bove © Jin Lee/Bloomberg

Robert Armstrong and Ethan Wu YESTERDAY



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Good morning. Meta, formerly a moonshot on whatever the Metaverse is, announced last night that it would pay a dividend for the first time and was adding to its buyback authorisation. The stock rose 14 per cent in late trading. We have seen the future of the Magnificent 7, and in that future they are value stocks! But we would say that, [wouldn't we](#). It may also have helped that Meta beat Wall Street estimates and issued strong guidance. Amazon and Apple beat estimates too. Big Tech, like the [US economy](#), just does not seem to be slowing down. Email us: robert.Armstrong@ft.com and ethan.wu@ft.com.

Friday interview: Dick Bove

Dick Bove (pronounced bo-VAY) has spent more than half a century as a banking analyst, becoming widely known for bold, contrarian and sometimes prescient calls. He retired at the end of last year. Below, he sums up the lessons of his long career in his famously plain-spoken manner — and argues that the banks are headed for trouble.

***Unhedged:* You've had a long career. Looking back, when you think about your most consequential calls or positions, what do you think of?**

Dick Bove: The first consequential call came in the 1970s. In 1972, housing starts hit the highest level in the history of the United States. That was because the US had made the decision in 1968 to build 26mn housing units. Financial structures were changed to allow money to flow into the industry. The government created Freddie Mac, Ginnie Mae, mortgage-backed securities, modified mortgages and subsidised rates for homeowners. It was a 1 per cent mortgage era.

By 1978-79, I became convinced that the US was over-housed. At the time, I indicated that housing starts would not get back to the '72 level for at least a generation. And of course, they never got back there until the 2006-07 period.

The second big one I was correct on was my 2006 report "This Powder Keg Is Gonna Blow". Basically, I defined what was wrong with mortgage markets. These "modified mortgages" entailed you buying the home, borrowing the money and paying 1 per cent on the mortgage for three years. Then at the end of the third year, the mortgage rate would jump to a market rate, and all the interest which you didn't pay in the first three years would be added to the balance of the loan. So when you got to the end of the modified period, all of a sudden you owed more money on that house and the interest rate had jumped to a market rate, which was roughly 7.5 per cent. You couldn't afford it. We also pointed out the fact that funding for the industry was coming from the creation of questionable securities, such as [collateralised debt obligations]. That one worked out well for me.

***Unhedged:* Those were your big successes. How about your big misses?**

Bove: I'd been following Fannie and Freddie since I started as an analyst, both as a housing analyst and as a banking analyst. When President Trump was elected in his first term, Treasury secretary Steven Mnuchin went on television and said these companies have to get out of conservatorship [the government bailed out the two mortgage insurers in 2008, and in 2012 announced that all future profits would be "swept" into the Treasury]. Trump appointed Mark Calabria as the head of the Federal Housing Finance Agency [the Fannie and Freddie umbrella organisation]. He went everywhere, talking to every news organisation, every lobbying group, saying, "I have the power to make these companies free. I can take them out of conservatorship." And he was right. The Housing and Economic Recovery Act of 2008 gave him the power to do so.

I believed these guys. But when push came to shove, Calabria didn't do it. I had sold my soul on the basis that these guys would live up to what they said. I'd put just about every client I knew into the stocks [which continue to trade, despite the profit sweep]. I'd owned the stocks personally. But they didn't take them out, and the stocks absolutely collapsed. That was a massive mistake on my part.

The expectation now is that if Mr Trump gets elected president, he will live up to the promise. Anything positive related to Trump's campaign pushes the stocks up. These stocks have tripled. But I don't think they're going to do it. Fannie Mae is paying something like 92 per cent of its revenues to the government, and Freddie is something like 73 per cent. That's \$40bn a year; over the life of a presidency, it's maybe \$160bn. So with Congress having fits over the size of the deficit, I don't think there's a prayer in hell that Trump is going to take Fannie or Freddie public.

***Unhedged:* Turning back to banking for a second, it seems to me that some of the big banks are doing OK, despite all the regulation. Bank of America and JPMorgan are reporting quite good profits. Some of the regionals are doing OK, too.**

Bove: Earnings weren't good in the fourth quarter. The banks you mentioned are losing market share to their competitors. And they have balance sheets which are financially sound, but highly questionable in one respect. Both of the banks you mentioned and all of the regional banks have a lot of fixed-rate mortgage loans on their books. And those loans are not worth anywhere near what they listed as. That's why First Republic went under. They have hundreds of billions of dollars of Treasuries, again, with a listed value above true value. That is what drove Silicon Valley Bank out of business.

The money supply in the US has jumped by \$7tn [since the start of the pandemic]. That's nearly a 50 per cent increase. But that didn't happen at any of those banks. Those banks did not capture those deposits; they were captured by the capital markets sector and by private equity funds. Companies like SoFi, it's now a \$30bn [in assets] company. The banks are overstating the value of their equity, and they are not keeping pace with the market. And they're looking forward to, soft landing or not, a significant increase of loan losses in two sectors: the commercial real estate market, which everybody talks about, but far more importantly the consumer market.

So I don't think there was anything in the last quarter to suggest, to me at least, that these earnings were good. I thought they were bad earnings. The banks got lifted not because of earnings but because of interest rates. The market expectation is for six [Fed policy rate] cuts. Where that hits is in three portfolios: the auto portfolio, the home [mortgage] portfolio and the Treasury portfolio. The real value of all those portfolios will go up. And historically in banking, that is what drives the prices of bank stocks.

***Unhedged:* You have spoken in the past about big banks as guardians of national prosperity. Now that there are these other sources of credit, from non-bank lenders to private credit, is the fact that banks are losing market share to other credit providers bad news for the American economy?**

Bove: The banks are the core safety valve of the financial system. The fact that they are losing market share to entities that are not protected in any fashion is extraordinarily scary. If you go back to the 1930s, the government attempted, with the Glass-Steagall Act and other [laws], to shore up confidence in the American banking system, and the banking system then became the source of funding for the economy. And by the way, when you go back to 1958 through 1970, the government doubled down on the guarantees that it was giving the financial system.

But with the Dodd-Frank Act in 2010, they started unravelling those guarantees. Banks can no longer protect companies that are going under, the way they used to in the past. The Fed cannot automatically give money to failing banks. Now what they're doing with this new set of regulations [the Basel III endgame] is they're setting the banks up so that they cannot protect the US economy, because they can't make the loans that they were making previously. Let's assume we ran into another housing crisis. Private equity firms own hundreds of thousands of houses in the United States. What the hell's going to happen there? Who's going to protect on the downside? No one.

By making it so expensive for the banks to lend, they take the banks out of the picture. You can call up Jamie Dimon, and after he curses up a storm, he will tell you what he thinks of these regulations from a competitive standpoint. And then he'll end by saying, we'll deal with whatever happens. He's one of my great heroes; he's smart enough to do that.

The point is that the banking system is being de-risked, the government's relationship to the financial system is being de-risked. We're throwing all those loans out into the marketplace under the hope and expectation that the originators of those loans have enough capital to protect them, and they don't. In a recession, funding dries up and you don't have any FDIC insurance, which causes people to run to the banks with their deposits. You're going to see a major problem [at the non-bank credit providers].

***Unhedged:* How would you respond to criticism of so-called superstar analysts, folks like you who have made a name for themselves by making bold predictions? The criticism you hear is that you're more focused on getting on TV than making the right call.**

Bove: If you're an analyst working at a small firm, which I have been doing for the last 16 years, you don't have 5,000 salespeople out there pushing your product. Somehow you've got to get the buyer of the stock to look at what you're doing. In order to do that, you've got to create a brand name.

What choice do I have? I've got to make bold predictions. If you go back, every one of them, I believe they're supported by the numbers. Any prediction that I've ever made, whether it's right or wrong — I would say 53 per cent have been right, 47 per cent wrong — I can back up with numbers and history. But understand the mechanism: if I want to be paid by investors, I have to get in front of investors. If I have no salesforce, because I'm working for small firms, I have got to get to the media. And that's what I did. Whether that's right or wrong, who the hell knows.

***Unhedged:* More generally, then, how do you think about the role of the analyst and how it's changed?**

Bove: The role of the analyst has changed extraordinarily since I've been in the industry. When I started in the late '60s, mutual funds were coming into their own. Consumers had a lot of money [to invest]. Mutual funds started to take off like rockets. Everybody was concerned that mutual funds were not properly managed. So the "prudent man rule", which dates back to the 1800s, was brought up all the time: you had to prove that you've done significant fundamental research on whatever you're putting into that fund. As a result of that, you had a bunch of firms that were solely doing prudent-man research.

The analysts were gods. They ran everything. Everybody thought the analysts were the top of the industry. But then you got to the late '70s, and the analysts didn't see the market collapse coming. They blew it. And all of a sudden everybody said, these guys are not gods, they're just like everyone else. They are [idiots]. So now the industry had to decide what to do with all these analysts. The solution was we're going to use the analysts to support our [investment banking] efforts.

If you ask me the biggest embarrassment of my career, it was that I fell into that position like everybody else. The corporate finance departments were using analysts to bring in corporate finance business. You would go out and you would have to promise the company going public that you would not step away from it if times got bad, that you would support it in the market, that you would do an intensive job selling that company's stock.

That worked until 2002 when the guy from Merrill Lynch whose name I forget [Henry Blodget] publicly stated that this company was [no good](#) while having a strong buy recommendation on it. That scandal resulted in a whole set of rules being created. And now you're back to the same problem. We don't need the analysts for research. We can't use them for corporate finance. What the hell are we going to do with these guys? You had a swing in where the profit centre was in the brokerage industry, towards trade execution. The traders became kings, and rightly so, because they are executing the sale. So you figured out how to use the analysts: to support the trading activities of the firm. You've gone from the analyst being at the very highest rank in the industry to being at the lowest rung in the industry, because nobody thinks you need them. A lot of guys do really phenomenal work for many hours, and nobody gives a damn about what they write.

Going back to Fannie and Freddie, people call me and say, what do you think? I say: I think that they are not going to go public. They say: yeah, but what if Trump gets elected, he wrote this letter to the appeals court? I say, yeah he wrote the letter, he's not going to take him out now because he's not gonna lose the money. And everybody says, I don't give a shit what you think, Trump is going to do it, we're going to buy the stocks, and the stocks have tripled. Research is dead as a driving factor in the market.

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Pharma Hikma Reaches \$150M Opioid Settlement With States

By **Gianna Ferrarin**

Law360 (February 1, 2024, 8:55 PM EST) -- Hikma Pharmaceuticals and several attorneys general announced a \$150 million agreement in principle on Thursday resolving cases brought by a group of states and localities alleging the company fueled the opioid crisis by failing to report suspicious opioid orders from potentially illegal distributors.

Hikma said in the announcement that if the agreement's conditions are satisfied, it will pay \$115 million in cash and donate \$35 million worth of a product it manufactures that is used to reverse the effects of opioid overdose, resolving what it said was the "vast majority" of opioid-related cases against it by states, their subdivisions and tribal nations.

The deal was negotiated by the attorneys general of New York, California, Delaware, Tennessee, Utah and Virginia, according to an announcement by New York Attorney General Letitia James.

The deal accompanies a **\$350 million opioid settlement** also announced Thursday resolving litigation against France-based advertising giant Publicis Health LLC, which all 50 U.S. states had accused of exacerbating the opioid crisis through its work with the manufacturer of Oxycontin.

James said in her announcement that Hikma was "part of an industry that flooded the country with dangerous opioids, profiting off the products that have caused our current national public health crisis."

"While this settlement won't fully repair the devastation opioids have caused, the funds we secured will help combat the crisis of addictions and overdoses, and help people across the country get the treatment they need," James said.

In its announcement, Hikma said the deal is not an admission of wrongdoing or liability.

Hikma is one of many pharmaceutical companies that have been targeted in multidistrict litigation over the opioid crisis, including Abbott Laboratories, Novartis Pharmaceuticals Corp. and Mylan Inc. The deals by Hikma and Publicis come in the wake of **multibillion-dollar settlements** reached with top pharmacy chains like CVS Pharmacy and Walgreens and major drugmakers like Teva Pharmaceuticals and Allergan.

So far, law firms have secured more than \$51 billion for communities affected by the opioid crisis, according to a statement by co-leads of the MDL plaintiffs executive committee, Jayne Conroy of Simmons Hanly Conroy LLC, Paul T. Farrell Jr. of Farrell & Fuller Law LLC and Joe Rice of Motley Rice LLC.

"While the efforts of the law firms appointed to the opioid MDL leadership have thus far obtained over \$51 billion for communities nationwide, our work is far from finished," the attorneys said in a statement. "We will continue to work to hold every defendant who played a role in the opioid epidemic in our country fully accountable for the pain and suffering of millions of Americans."

"The \$150 million settlement with Hikma Pharmaceuticals is the result of the work and significant collaboration between the opioids MDL leadership and state attorneys general," the attorneys said.

The litigation against Hikma accuses the company of failing to monitor suspicious opioid orders from

2006 to 2021, "even while its personnel knew their systems to monitor suspicious orders were inadequate and prone to failure," James said.

Under the \$150 million deal, states that do not accept Hikma's donation of opioid addiction treatment medication will instead receive a cash payment. The deal was reached in coordination with an executive committee consisting of the attorneys general of Colorado, Idaho, Illinois, Massachusetts, North Carolina, Ohio and Oregon, according to statements by James and California Attorney General Rob Bonta.

The final settlement is contingent on consensus around "critical business practice changes," according to Bonta's announcement, as well as the "the number of states and local governments that elect to opt into the agreement," according to Hikma.

Sam Park, general counsel for Hikma, said in a statement that the cash payment and product donation will "directly support state and local efforts in addressing the impact of the opioid crisis in their communities."

"I am pleased that we have been able to reach a settlement framework agreement that works for all parties, while providing clarity to all of our stakeholders in regard to ending these pending matters," Park said.

Hikma is represented by Scott M. Ahmad and Christopher B. Essig of Winston & Strawn LLP.

The plaintiffs' executive committee is represented by Jayne Conroy of Simmons Hanly Conroy LLC, Joseph F. Rice of Motley Rice LLC and Paul T. Farrell Jr. of Farrell & Fuller.

The multidistrict litigation is in re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Jeff Overley. Editing by Alanna Weissman.

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Publicis Reaches \$350M Opioid Settlement With All 50 States

By **Chart Riggall**

Law360 (February 1, 2024, 4:45 PM EST) -- Publicis Health LLC settled a lawsuit on Thursday with all 50 U.S. states, the District of Columbia, and several U.S. territories for \$350 million over claims that it helped exacerbate the opioid crisis through its work with Purdue Pharma, the manufacturer behind OxyContin.



The settlement brings an end to claims initiated by Massachusetts that the company used deceptive marketing to push pills on doctors and patients. (AP Photo/Toby Talbot, File)

Announced by both Publicis and several state attorneys general, the settlement brings an end to claims initiated by Massachusetts that the company used deceptive marketing to push pills on doctors and patients.

Under the agreement, Publicis agreed to abandon any current and future opioid marketing, while paying sums to each state ranging from the hundreds of thousands to the tens of millions of dollars. California, for example, will receive more than \$34 million, according to a copy of the settlement.

In a statement, Publicis downplayed its work with Purdue, saying it had been done by a small subsidiary called Rosetta, which shuttered a decade ago and was already working with pharmaceutical clients when the company acquired it.

"After three years of discussions, this settlement brings the matter to a close with a net payment of €148 million," or about \$161 million, Publicis said. "The full settlement amount should quickly and directly

contribute to the states' opioid relief effort."

"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 added. "We will, if need be, defend ourselves against any litigation that this agreement does not resolve."

Attorneys general across the country, meanwhile, touted the settlement as a win for consumers and a step toward redressing the damage wrought by the opioid epidemic.

"For years, Publicis Health's marketing schemes helped fuel the nationwide opioid crisis, which has shattered some of our most vulnerable communities, while creating significant financial strain on our state systems," Massachusetts Attorney General Andrea Joy Campbell said in a statement.

"I am proud of my team's national leadership in securing this settlement, which will not only bolster accountability and transparency for this ongoing crisis but will also provide millions of dollars for much needed treatment and services to support individuals and families across Massachusetts," she added.

The litigation against Publicis, which is based in France but operates subsidiaries in the U.S., was kicked off in 2021 by Campbell's predecessor, now-Massachusetts Gov. Maura Healey. The suit alleged that the firm had worked with Purdue between 2010 and 2019, reaping tens of millions in fees to push more pills, at higher doses, onto prescribers.

The tactics the company was accused of using included placing ads for OxyContin on patients' medical records, and devising messaging to counter CDC guidelines on opioid prescription.

Georgia sued Publicis Thursday — a necessary step to join the settlement, according to a person familiar with the matter — accusing it of using more nefarious tactics such as paying off spokespeople to promote the drug without disclosing their relationship to Purdue.

A Publicis subsidiary, Verilogue, is said to have "provided prescribers small digital recording devices to record intimate conversations with patients," according to the state, using those conversations to develop strategies to counter patients' reservations about the drugs.

Massachusetts is represented by Ethan W. Marks, Chloe Cable and Gregory A. Hardy of the Massachusetts Attorney General's office.

Publicis is represented by Scott Harshbarger and Edward V. Colbert III of Casner & Edwards LLP, David Anders of Wachtell Lipton Rosen & Katz, and Michael Dockterman of Steptoe LLP.

The case is Commonwealth of Massachusetts v. Publicis Health LLC, case number 2184-CV-01055-BLS1, in the Superior Court of Suffolk County, Massachusetts.

--Editing by Adam LoBelia.



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T-Mobile Data Breach Claims Puzzle Del. Vice Chancellor

By **Jeff Montgomery**

Law360 (February 1, 2024, 9:24 PM EST) -- A Delaware vice chancellor said Thursday he was "struggling" with T-Mobile US Inc. stockholder arguments that tied costly data breaches to an overseas telecom giant controller's campaign to use company data for a global AI machine-learning and data-mining campaign, exposing T-Mobile customers to multiple hacks.

Attorneys for T-Mobile customer Jenna Harper made the claims during a dismissal argument in an amended suit seeking derivative recoveries on the company's behalf from the 17 of T-Mobile's current or former directors, including a conflicted majority tied to controller Deutsche Telekom AG.

The class suit, filed in September 2022 and amended in April 2023, accused those named of mounting a "reckless plan to hurriedly create a broad data-mining architecture that could allow the new T-Mobile to contribute to DT's group wide machine learning and artificial intelligence apparatus."

As alleged – and disputed by attorneys for the company – T-Mobile acquiesced to pressure to adopt a data structure, dubbed "Sharing with Caring" by DT, which created vulnerabilities and opportunities for hacker access to vast company data troves.

"I think it's very difficult to say this wasn't what happened," Yavar Bathaee of Bathaee Dunne LLP, counsel to the stockholders, told Vice Chancellor Sam Glasscock III during an argument at Widener University's Delaware Law School. "To say this is far-fetched is wrong, when you see data breaches that coincide exactly when we say 'Sharing with Caring' was implemented."

One data breach allegedly tied to the purported DT-created vulnerability cost T-Mobile \$500 million in liability settlements covering tens of millions of customers, Bathaee said, but failed to produce adequate security reforms.

According to the complaint, T-Mobile rushed into a cloud-based data-harvesting and artificial intelligence-driven structure that prioritized user data access and "machine learning" about customers over security. The effort began after Deutsche Telekom's agreement with SoftBank in 2018 to create — with Sprint and T-Mobile — the nation's second-largest pool of wireless users.

Vice Chancellor Glasscock acknowledged skepticism and said he would take the arguments under advisement.

"I'm struggling to see actual proof that there was a transfer of value," the vice chancellor said. "I understand what you're saying. What I don't see is a pleading of specific facts that shows me DT did access that information" and had a hand in creating the vulnerabilities.

Roger A. Cooper of Cleary Gotlieb Steen & Hamilton LLP, counsel to T-Mobile, described the suit as a "novel theory" built around an argument that the 2022 T-Mobile cybersecurity incident was "actually a case of corporate looting" by its controller in a "conscious decision foisted upon it" by DT "overlords."

Cooper said the suit raised unfounded, "extraordinary accusations of significant misconduct by a U.S. company – one of the largest telecoms in the U.S." alleging that its majority stockholder was permitted to "take over and steal customer data for its own gain."

Bathae told the vice chancellor that the benefit to DT was clear, and that it was putting the centralized data mining and AI system in place, national company by national company, in Europe and elsewhere.

As data security measures in Europe are tougher, Bathae said, the U.S. was "quite handy" for DT's purposes.

"The U.S. is much more lax, so they could use the U.S. to roll out early versions of models they were testing globally," Bathae said, adding that shareholders of T-Mobile got none of the benefits from DT's enterprise, just heightened risk.

Vice Chancellor Glasscock pressed Bathae on the lack of an initial, investigatory demand for corporate books and records before the suit was filed.

"We thought the public evidence was pretty clear. They implemented this plan. We thought that was public enough – we could tell from the information, the data breach, that this happened," Bathae said.

"If you had a board document that was presented by DT management, recommending they do this and explaining why, you would have a much stronger case than suggesting it was done for the benefit of DT," the vice chancellor said.

Bathae called DT's efforts a kind of "data arbitrage," and said a majority of T-Mobile's board were aligned with DT and the board too conflicted to objectively consider a demand to launch the suit on its own, justifying stockholder action.

"All you've got is an inference," the vice chancellor said. "I understand what you're saying. What I don't see is a pleading of specific facts."

Cooper said counsel for those sued "agree with your honor's comment that this all looks like a string of inferences. I saw nothing showing that DT received any data or any other non-ratable benefit."

According to the complaint, T-Mobile rushed into a cloud-based data-harvesting and artificial intelligence-driven structure that put user data access and machine learning about customers ahead of security. The effort began after Deutsche Telekom's agreement with SoftBank in 2018 to create — with Sprint and T-Mobile — the nation's second-largest pool of wireless users.

T-Mobile, which came late to the chase, reported six major data breaches between late 2018 and late 2021, while "customers, regulators, and shareholders watched in amazement as T-Mobile appeared incapable of securing its customer data."

The company agreed in July to a \$500 million multidistrict class settlement, including \$350 million in cash for customer claims and \$150 million for cybersecurity to end multidistrict litigation over a breach in August 2021 that exposed the data of 76.6 million people in the U.S.

Harper and the derivative class are represented by Joseph L. Christensen of Christensen & Dougherty LLP and Brian J. Dunne, Edward M. Grauman, Yavar Bathae and Andrew C. Wolinsky of Bathae Dunne LLP.

The current and former directors and T-Mobile are represented by A. Thompson Bayliss, E. Wade Houston and Peter C. Cirka of Abrams & Bayliss LLP and Roger A. Cooper and Mark E. McDonald of Cleary Gottlieb Steen & Hamilton LLP.

The case is Harper v. G. Sievert et al., case number 2022-0819, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.



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Unisys Beats Investor Suit Over Accounting Control Claims

By **Katryna Perera**

Law360 (February 1, 2024, 10:10 PM EST) -- Information technology company Unisys and its top brass have defeated, for now, a shareholder suit alleging they made false and misleading statements about the company's internal controls, with a Pennsylvania federal court saying the suit's allegations were not pled with particularity.

U.S. District Judge Gerald J. Pappert issued a memo Thursday tossing John Connor's class action, but stating his claims are not unreasonable and he will have leave to amend.

Connor sued Unisys Corp. and a few of its current and former executives in 2022, alleging material weaknesses existed in Unisys' internal controls and procedures related to financial reporting. Connor claims that once Unisys disclosed its audit committee was conducting an internal investigation into the alleged shortcomings, the price of the company's common stock fell by nearly 50%.

Unisys and the individual defendants moved to dismiss the suit in October, arguing Connor has failed to adequately allege falsity, scienter and loss causation.

In granting the dismissal motion, Judge Pappert said Connor has acknowledged several of the challenged statements in the complaint are opinions, and that on two statements he argues are "statements of verifiable fact," he is conflating opinion and fact.

Connor alleged statements claiming that policies were designed and internal controls were evaluated in a specific way are false because the company later admitted it "failed to design formal policies and procedures to ensure that information from the IT and legal and compliance departments were being communicated to other departments on a timely basis for decision-making and required reporting purposes."

Judge Pappert said this "is an attack on the policies and procedures' effectiveness, not a contention that [the] defendants designed no policies or procedures at all."

"Adopting Connor's theory would conflate opinions and factual statements," the judge added. "Conclusions about the controls' effectiveness are just that, conclusions. As such, they are statements of opinion. Connor cannot invert this rule by framing ineffectiveness as nonexistence."

The judge found Connor had adequately failed to plead the falsity of several other challenged statements, and also rejected Connor's theory that the remedial measures Unisys implemented after the internal investigation prove the defendants never conducted a "good faith evaluation of the company's controls and procedures" during the class period.

Without more, Judge Pappert said the existence of these remedial measures is insufficient to state a claim, and Connor's assertions are conclusory.

The judge also agreed with the defendants that Connor has not sufficiently pleaded scienter since his allegations are "all speculation."

"Although Connor believes defendants 'had access to contrary facts,' he does not identify any 'reports or statements containing this information,' relying instead on conjecture," the memo states. "While defendants' role in 'designing and evaluating the internal controls is relevant to the inquiry,' Connor

does not specifically allege they were 'aware of at least some problems with internal controls.'"

None of the suit's allegations demonstrate that the individual defendants had any knowledge of violations, the judge said. Connor's only argument is that the defendants' simple "disregard" of the "obvious" control deficiencies means they must have been aware of the issues, but such conclusory allegations cannot raise an inference of scienter, the memo states.

Finally, Judge Pappert tossed Connor's claims of loss causation, saying he "does not allege an unreasonable theory, but he also does not adequately allege it with the particularity the [Private Securities Litigation Reform Act] requires."

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

Connor is represented by Yu Shi and Jacob A. Goldberg of The Rosen Law Firm PA.

Unisys and the individual defendants are represented by Brian T. Frawley and Julia A. Malkina of Sullivan & Cromwell LLP and by Jonathan Gafni and Robin Nunn of Linklaters LLP.

The case is Connor v. Unisys Corp. et al., case number 2:22-cv-04529, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Caitlin Wolper.

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3 Firms Net \$1.9M Fee In Celsius Investors' Stock Payout Suit

By **Emilie Ruscoe**

Law360 (February 1, 2024, 10:56 PM EST) -- A legal team comprising litigators from Grant & Eisenhofer PA, Klausner Kaufman Jensen & Levinson and The Reeves Law Firm will receive a fee of over \$1.9 million for their work on an investor suit, alleging drink company Celsius improperly inflated its revenue.

In a Thursday filing, U.S. District Judge Donald M. Middlebrooks found the requested sum to be "fair and reasonable," noting the fee is 25% of the \$7.9 million settlement the attorney brokered on behalf of the proposed class of Celsius investors.

The investors' legal team will also receive nearly \$344,000 to reimburse litigation costs, with the judge finding the investors' counsel spent a reasonable number of hours on the matter.

Co-lead plaintiffs, the City of Atlanta Police Officers' Pension Plan and City of Atlanta Firefighters' Pension Plan, requested approval of their settlement deal in August, telling the court the proposed settlement was "a substantial result" for the proposed investor class and would represent the recovery of an estimated 10% to 17% of the class' damages.

The investors reached a deal after their attorneys analyzed nearly 9,000 documents produced during discovery and at the recommendation of a mediator, the investors told Judge Middlebrooks in August.

The deal ends claims that Celsius CEO John Fieldley and former chief operating officer, Edward Negron-Carballo, named alongside the company in the action, inflated the company's revenue in public filings by misrepresenting the costs associated with an employee stock compensation program.

According to the investors, the company kept its compensation costs down, in part, by compensating its employees with stock awards.

However, in mid-2021, the investors said, trading prices for Celsius shares spiked, and several employees departed, putting the company in the position of paying out the employees' shares with its stock at an all-time high.

The investors claimed the company reported an inflated net income in the relevant quarters and delayed acceleration of its workers' share-based compensation. The suit also claimed the company's brass sat on the truth until trading prices fell.

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

The plaintiffs are represented by Daniel L. Berger, Caitlin M. Moyna, Vincent J. Pontrello and Mica A. Cocco of Grant & Eisenhofer PA, Robert D. Klausner of Klausner Kaufman Jensen & Levinson and Jeffrey Reeves of The Reeves Law Firm LLC.

The defendants are represented by Theodore J. Sawicki, Joseph G. Tully, Jason R. Outlaw, Matthew LaGrone and Oyinkansola Y. Muraina of Alston & Bird.

The case is City of Atlanta Police Officers' Pension Plan et al. v. Celsius Holdings Inc. et al., case number 9:22-cv-80418, in the U.S. District Court for the Southern District of Florida.



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Hertz Controllers Saw \$126M In Short-Swing Profits, Suit Says

By **Katryna Perera**

Law360 (February 1, 2024, 6:40 PM EST) -- The controlling shareholders of car rental company Hertz Global Holdings Inc. were hit with an investor suit in New York federal court alleging they realized at least \$126 million in short-swing profits by selling their shares shortly before the company's directors greenlit a \$2 billion stock repurchase program.

Plaintiff Andrew Roth filed a **complaint** on Wednesday against five institutional shareholders of Hertz, who allegedly also appointed the board members that authorized the stock buyback.

The complaint states that on Nov. 8, 2021, Amarillo LP, eleven other shareholders and several underwriters entered into an underwriting agreement under which the selling shareholders sold their Hertz common stock — about 15 million shares — to the underwriters at a price of roughly \$27 per share. The underwriters then sold those same shares to the public at \$29 per share.

A few weeks later, on Nov. 29, 2021, Hertz announced that its board of directors, of which four members were appointed by the defendants, had authorized the repurchase of up to \$2 billion of the company's outstanding common stock, according to the complaint.

Roth says that nothing in Hertz's announcement indicated that any directors recused themselves from the decision or that an independent board committee approved the repurchase.

The complaint states that because the defendants are controlling shareholders of Hertz, they both directly and indirectly profit from or share in any profit the company experiences due to a stock buyback.

"Defendants had, at minimum, an approximately 39% indirect pecuniary interest in the company's repurchases, measured by their percentage ownership of the common stock as of Nov. 16, 2021," the complaint states. "By engaging in the short-swing transactions identified herein, defendants, as statutory insiders, breached the trust and fiduciary duty that they owed to the company to refrain from engaging in short-swing trading in the company's common stock."

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

Another Hertz shareholder, Angelo Cascia, filed a derivative suit in May against many of the same defendants and nine current or former Hertz directors. Cascia **alleges** Hertz and its now-minority stockholders had no say and received no premium for putting CK Amarillo LP — a joint interest of Knighthead Capital Management LLC and Certares Opportunities LLC — in the driver's seat after the company emerged from Chapter 11 in June 2021.

Cascia is seeking damages for company stock buybacks that he says vaulted CK Amarillo "for free" into a 57% controller position.

Roth is represented by Glenn F. Ostrager, Joshua S. Broitman and Roberto L. Gomez of Ostrager Chong Flaherty & Broitman PC.

Counsel information for the defendants was not immediately available.

The case is Roth v. CK Amarillo LP et al., case number 1:24-cv-00706, in the U.S. District Court for

the Southern District of New York.

--Additional reporting by Jeff Montgomery. Editing by Jeremy Abrams.

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LivePerson Board Faces Shareholder Suit Over Poison Pill

By **Emilie Ruscoe**

Law360 (February 1, 2024, 9:40 PM EST) -- Board members of artificial intelligence software company LivePerson face a stockholder derivative action in the Delaware Court of Chancery alleging an activist hedge fund is pushing to prevent LivePerson's sale to a private equity firm.

In a Wednesday filing, LivePerson investor Sonja Browne took aim at eight members of LivePerson's board, including its CEO John Sabino, with allegations that they'd implemented a so-called poison pill shareholder rights measure to prevent a near-term sale of the company in breach of their fiduciary duty to LivePerson's shareholders.

The action's defendants include Sabino and four board members — Jill Layfield, Bruce Hansen, Vanessa Pegueros and Yael Zhen — allegedly appointed to LivePerson's board as part of what Browne described as "a largely successful campaign to reshape the company's board" undertaken by hedge fund Starboard Value LP, which the investor described as "notorious for its activist campaigns."

"Importantly, Starboard's typical strategy involves longer-term turnarounds rather than pushing for a quick sale," Browne said.

LivePerson is a nominal defendant in the action.

Browne further alleged that when private equity firm Vector Capital disclosed in January a 12% stake in LivePerson, making it a "plausible buyer" for the company, the Starboard-controlled board of LivePerson took "entrenching measures" to stymie a sale.

Specifically, Browne claimed, the board adopted a poison pill that would be triggered by ownership of a stake greater than 5% of LivePerson.

Browne said that public statements made by the defendants suggested that the poison pill was "necessary to defend the value of the company's net operating loss carryforwards," which allows a company that sees losses in one year to deduct its losses from its profits in future years.

But Browne called the pill's provisions overbroad and characterized the measure as a pretext for the defendants.

Browne argued that the pill was implemented because Starboard "incentivized to resist a near-term sale and pursue a long-shot turnaround strategy" because it holds LivePerson convertible notes that mature in 2026 after selling off its LivePerson common stock.

The latest events at the company take place after Starboard's initial campaign to seize power at LivePerson, which played out over the past two years, failed to push up trading prices for LivePerson shares.

At the time that Browne's suit was filed, she said, LivePerson shares were trading at about \$3, down significantly from highs as great as \$70 in 2021, before the Starboard campaign.

The litigation comes amid surging interest in AI companies. LivePerson's flagship offering is its Conversational Cloud, a conversational AI platform that can message with customers. According to

the company, its technology is used by banks including PNC Bank and Santander, telecommunications companies Verizon and Virgin Media, and an urgent care company in partnership with Tampa General Hospital.

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

Sonja Browne is represented by Christine M. Mackintosh, Jonathan C. Millis and Christopher J. Orrico of Grant & Eisenhofer PA and Joel Fleming and Amanda Crawford of Equity Litigation Group LLP.

Counsel information for the defendants wasn't immediately available Thursday.

The case is Browne v. Layfield et al., case number 2024-0079, in the Court of Chancery of the State of Delaware.

--Editing by Jay Jackson Jr.

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2nd Circ. Hints It May Revive Coinbase User Suit

By **Jessica Corso**

Law360 (February 1, 2024, 6:09 PM EST) -- The Second Circuit appears ready to revive a proposed class action accusing crypto platform Coinbase of selling unregistered securities, with judges on Thursday casting doubt on the company's claims that it can't be sued because it doesn't own the cryptocurrencies that trade on its platform.

A three-judge panel of the appellate court heard oral arguments in a case seeking to recover millions of dollars on behalf of Coinbase users claiming they lost money trading cryptocurrencies on one of the company's two exchanges.

The case was **dismissed** last year by a lower court judge who found that Coinbase was not the immediate seller of the tokens in question.

The Second Circuit, however, appeared skeptical of Coinbase's argument that user agreements signed by the plaintiffs clearly state that the company doesn't hold title to the coins in question.

Judge Reena Raggi said there were "ambiguities" in the agreements because one provision appears to state that users are purchasing directly from Coinbase.

"What are you selling if you don't have title?" Judge Raggi asked Coinbase attorney Lara Flath of Skadden Arps Slate Meagher & Flom LLP.

She seemed unconvinced by Flath's arguments that plaintiffs could not move forward with their case because the key language in the agreements states that the company does not hold title.

"You say, 'Ah, but we have a user agreement, and under that user agreement, we told them we never have title.' And they come back and say, 'Yes, but that user agreement also says we're purchasing from them,'" Judge Raggi said. "So this goes back and forth and gets resolved. I am still trying to figure out how it gets resolved at dismissal."

Circuit Judge Pierre Leval also said the question of title wasn't clear given the "ambiguities" in the user agreements.

"The fact that somebody seeks to avoid securities liability under the securities laws by having inserted a provision favorable to themselves when the document could be construed to indicate the opposite shouldn't invalidate your complaint," Judge Leval said when speaking to Jordan Goldstein of Selendy Gay PLLC, who is representing Coinbase users attempting to revive the case.

Plaintiffs Christopher Underwood, Louis Oberlander and Henry Rodriguez **complained** in 2022 that they lost thousands of dollars trading on one of two exchanges run by Coinbase. Aside from issuing a refund, the suing plaintiffs are arguing that Coinbase should return the transaction fees it charged.

Plaintiffs said the company should be held responsible for the fact that many coins traded on the exchanges were not registered with the U.S. Securities and Exchange Commission or state regulators despite meeting the legal definition of a security.

But U.S. District Judge Paul A. Engelmayer ruled in February 2023 that the plaintiffs failed to show that Coinbase qualified as the "immediate seller" of the alleged securities since there is no evidence that Coinbase "held the title" to the tokens in the disputed transactions.

The relevant user agreement made it clear that it was the Coinbase users who held title and plaintiffs cannot amend their complaint in an attempt to get around the agreement, Judge Engelmayer said.

Goldstein told the Second Circuit that the complaint should be revived in order to give plaintiffs the opportunity to prove that Coinbase acted both as a buyer and a seller in the trading that occurs on the exchanges.

"Where the assets lie, that's a factual thing, right?" Judge Joseph Bianco, who rounded out Thursday's panel, asked Goldstein.

"It's a factual thing," Goldstein responded. "And we want to undertake discovery."

Coinbase users are represented by Jordan Goldstein of Selendy Gay PLLC and Steven Bloch of Silver Golub & Teitell LLP.

Coinbase is represented by Lara Flath, Jay Kasner, Alexander Drylewski and Abigail Davis of Skadden Arps Slate Meagher & Flom LLP.

The case is Underwood v. Coinbase Global Inc., case number 23-184, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Patrick Reagan.

Correction: A previous version of this story incorrectly referred to Selendy Gay PLLC by its previous name. The error has been corrected.



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Conn. PFAS Water Pollution Suit Escapes Multidistrict Bid

By **Brian Steele**

Law360 (February 1, 2024, 8:52 PM EST) -- The federal multidistrict litigation panel has denied a Connecticut utility's attempt to funnel a lawsuit arising from PFAS "forever chemicals" into a broader nationwide case, concluding that the claims against Connecticut Water Co. are too different to be lumped into the MDL.

On Wednesday, the U.S. Judicial Panel on Multidistrict Litigation **declined to add a case** brought by three of the utility's customers to MDL No. 2873 in the District of South Carolina, known as In re: Aqueous Film-Forming Foams Products Liability Litigation. The MDL involves allegations that the foam products, used in firefighting, caused PFAS contaminants to leak into groundwater and drinking water supplies.

The panel said in its ruling that it has only transferred cases that named "entities involved in the manufacture, marketing, supply, use, or disposal" of aqueous film-forming foams, or AFFF, as defendants, but the proposed class action brought by Connecticut Water Co. customers, including Frances Hoffnagle, names only the water service provider.

Adding the case to the MDL "would significantly and unnecessarily broaden the scope of the MDL," the panel held. "The source of the alleged PFAS-contamination at issue in Hoffnagle is, to a large extent, irrelevant to plaintiffs' claims against CWC."

Hoffnagle and two other named plaintiffs sued Connecticut Water, a unit of SJW Group, in state court in October, accusing the utility that serves 60 communities of **knowingly selling water** contaminated with dangerous levels of PFAS and failing to take steps to remove the pollutants. The proposed class action seeks damages, the establishment of a medical monitoring program and an order to force the utility to filter out PFAS.

Counsel for the plaintiffs, Ian Sloss of Silver Golub & Teitell LLP, told Law360 on Thursday that the likely next step in the case is action on his clients' **motion to remand** to Connecticut Superior Court. He said the panel's ruling was "correct" and the utility's removal of the case to federal court in November was "baseless."

"We think that this is all part of an improper procedure," he said. "Our claims don't concern the source of the contamination. ... We're not suing a manufacturer that used this stuff. We're not suing a manufacturer that invented this stuff."

Connecticut Water sued 3M Co. and other PFAS manufacturers in November 2021 in a complaint that ultimately made its way into the South Carolina MDL. The utility demanded the cost of cleaning up its "wells, water sources and supply, and delivery system infrastructure, including any treatment systems."

The MDL panel noted that 3M, "one of the principal defendants," filed an amicus brief supporting transfer of the Hoffnagle case, but neither company met the legal burden.

"Any overlap in discovery with CWC's claims against PFAS and AFFF manufacturers in the MDL should be minimal and can be addressed through informal cooperation and coordination among the involved parties and courts," the panel wrote.

Counsel for Connecticut Water Co. did not immediately respond to a request for comment Thursday.

The customers are represented by Ian W. Sloss, David S. Golub, Johnathan Seredynski and Krystyna Gancoss of Silver Golub & Teitell LLP.

Connecticut Water Co. is represented by Neal L. Moskow of Moskow Law Group LLC and Scott Summy of Baron & Budd PC.

The case is Hoffnagle et al. v. Connecticut Water Co., case number 3:23-cv-01489, in the U.S. District Court for the District of Connecticut. The MDL is In re: Aqueous Film-Forming Foams Products Liability Litigation, case number 2:18-mn-02873, in the U.S. District Court for the District of South Carolina.

--Additional reporting by Aaron Keller and Tom Lotshaw. Editing by Linda Voorhis.

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Pacific Market's Trendy Stanley Cups Contain Lead, Suit Says

By **Gina Kim**

Law360 (February 1, 2024, 9:49 PM EST) -- Pacific Market International was hit with a proposed false advertising class action in California state court Thursday by four women who allege that its trendy, Stanley-branded drinking tumblers that have gone viral and skyrocketed in popularity thanks to its brand partnerships with social media influencers, contain lead.



The Stanley Adventure Quencher: Now in 4 sizes



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The makers of the popular oversize Stanley cups were hit with a proposed class action Thursday in California state court by four women who claim the company pays social media influencers to advertise its products as being safe and fashionable, while previously hiding the fact that they contain lead. (Court documents)

In a **25-page putative class action** filed in Los Angeles County Superior Court, Mackenzie Brown and three other women accuse the Seattle, Washington-based company of hiding from consumers for the last several years that its popular, oversize Stanley tumbler cups contain lead, in order to bolster profits. It wasn't until last week that the company conceded that lead is used to seal the vacuum installation at the base, according to the complaint.

"PMI had a duty to disclose its use of lead before enticing millions of customers to unwittingly buy its drinkware," the filing reads. "Instead of allowing consumers to decide for themselves and their families whether to accept any risks associated with using a lead-containing drinking cup, PMI kept customers in the dark as not to interfere with its bonanza of influencer-driven sales, especially sales to young women."

Brown, an attorney and mother of three young children who live in Los Angeles, alleges she bought a popular, rose-gold colored Stanley tumbler from a Dick's Sporting Goods store "after being bombarded with advertising." Brown says that had she known the cup contained lead, she would've never bought it.

While PMI markets its cups as being "BPA-free," and that it's made from recycled stainless steel, the company omitted the fact that the vacuum seal in the cups contains lead, which over time can be poisonous, even in low levels, the suit says. The product is often targeted toward a specific demographic of millennial and Gen Z women of childbearing age, the plaintiffs allege.

The cups generally sell for \$20 to \$60 per tumbler, and the most popular cups cost an average of \$45 each, the suit says.

According to the complaint, PMI launched its marketing efforts five years ago to bolster sales of its Adventure Quencher Travel Tumbler, and collaborated with popular social media influences to advertise the product to young women. The product has gone viral on social media platforms like TikTok, and quickly became "the model of choice among a lot of millennial and Gen Z women, many of whom are mothers," the suit alleges.

PMI advertised its Stanley tumblers as being "safe" and "fashionable" choices for young mothers, and often feature the cups being used by women while taking care of children, or doing outdoor activities, the plaintiffs say.

The defendant's marketing campaign worked, as its yearly sales skyrocketed from \$70 million to over \$750 million in 2023, the complaint alleges. But, what the company has hidden from the public until recently — the complaint cites a January article on the Today show's website — is that the cups use lead to seal the vacuum installation on the cups' base, the plaintiffs allege. That seal is covered with a layer of steel that could come off during the course of ordinary use and expose consumers to lead, according to the suit.

Stanley, in the support portion of its website, said that the steel layer makes the area containing lead inaccessible to consumers and that no lead is present on the surface of its cups.

The Stanley products don't come with a Proposition 65 lead warning either, and while the plaintiffs don't assert against PMI a violation of Proposition 65, the proposition is relevant insofar as it helps reasonable consumers make purchasing decisions, the complaint says.

The plaintiffs want to represent a proposed class of shoppers in California who bought the Stanley tumblers at issue, and assert claims under California's False Advertising and Unfair Competition laws, fraud and unjust enrichment.

The plaintiffs also ask the court to issue a permanent injunction ordering PMI to disclose its use of lead in its consumer-drinking products at point of sale and on its packaging, pay more than \$70 million in punitive damages to refund its customers, attorney fees and costs, and hold a jury trial on all their claims.

In a statement issued Thursday, plaintiffs' counsel John Rushing of Rushing McCarl LLP accused the defendant of choosing a "full wallet over full disclosure."

"Stanley's manufacturer could have been honest with consumers about its use of lead in drinking cups," Rushing said. "But that would have driven away the company's core consumers: professional women of childbearing age."

Representatives for PMI did not immediately respond to inquiries seeking comment Thursday.

The plaintiffs are represented by John Mayfield Rushing, Ryan McCarl, Davit Avagyan and Elisabeth Nations of Rushing McCarl LLP.

Counsel information for PMI was not immediately available.

The case is Mackenzie Brown et al. v. Pacific Market International LLC, case number 24STCV02653, in the Superior Court of the State of California, County of Los Angeles.

--Editing by Michael Watanabe.



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Water Brand Had 'No One Qualified' To Make It, Jury Hears

By **Cara Salvatore**

Law360 (February 1, 2024, 9:36 PM EST) -- The Las Vegas jury weighing liver failure claims against "alkaline water" brand Real Water heard Thursday from a food safety expert about a 2018 health audit that she said found there was "no one qualified to make safe and clean water in this facility."

Catherine Adams Hutt, who has been in high-level global food safety roles for McDonald's Corp. and Coors Brewing Co. in her career, walked the jury through what she said was a particularly bad December 2018 audit for Real Water, whose manufacturing process was found in 2021 to create the toxin hydrazine as a byproduct. The company has admitted liability but is fighting to keep the damages as low as possible with regard to five plaintiffs who experienced liver failure in late 2020.

In the December 2018 Real Water audit, done by the food safety company NSF at the behest of Costco, the auditor gave Real Water a 6.7% compliance score for HACCP, or Hazard Analysis and Critical Control Points.

The auditor made an "unprecedented remark that I've never seen in an audit, and that's that there is no one qualified to make safe and clean water in this facility," Hutt said.

"That is a complete breakdown, a complete failure," she said, characterizing it as "incriminating."

At the time of the audit, no one at the company was HACCP certified. By the time of a February 2019 reaudit, executive Blaine Jones had gotten certified, Hutt acknowledged on cross-examination by a Real Water lawyer.

Hutt also acknowledged on cross that in the February 2019 reaudit by a different auditor, the company scored 100% on its HACCP component.

Hutt also testified that the company's complaint handling was woefully poor. Written documents recorded two complaints were made about the same batch of water in May 2014. On May 1, someone complained about a strong chemical smell, and on May 21, someone said it seemed to be like gasoline. In each case, the employee who wrote up the complaints said they drove to buy more bottles of water at the gas stations where it was procured and did some testing.

However, Hutt said the company was obligated to do much more.

"Now I have two complaints about the same lot," she said. "In my personal experience, I'd break down doors to find out what is going on with this particular manufacturing lot ... We'd go back to, number one, the retained sample [stored from that lot] and do a serious investigation using analytical chemistry."

The jury also heard Thursday from John Marlow, who invented the technology for making the water and licensed it to Real Water, but testified he had no chemistry background.

On Thursday morning, the second defendant, Terrible Herbst, notified the court that it had settled out of the suit. The local gas station chain was accused of selling and advertising the water without testing it or being certain it was safe.

The jury heard in plaintiffs' opening arguments that even its own executive, Jones, developed a liver

illness, but the company still did not test properly or issue a recall.

The product was pulled from shelves in March 2021.

The company's four-stage manufacturing process involved electrolyzing tanks of water and then separating more-acidic from less-acidic water, the jury heard in openings.

In late 2020, alerted by a doctor in Salt Lake City who was seeing a spike in liver patients from Nevada, the FDA, CDC and the Southern Nevada Health District began an investigation that took the better part of 2021, plaintiffs' lawyer Will Kemp said.

The fatality rate for acute liver failure is 20%, but plaintiffs Myles Hunwardsen, Miriam Brody, Jazmin Schaffer, Tina Hartshorn and Christina Sosa all survived, according to their lawyers. Hunwardsen had a liver transplant and has a severely truncated life expectancy.

The plaintiffs are represented by Will Kemp and Eric Pepperman of Kemp & Jones.

Real Water, also known as Affinitylifestyles, is represented by Joel Odou of Wood Smith Henning & Berman LLP.

Terrible Herbst is represented by Valerie Rojas of Cozen O'Connor.

The case is Hunwardsen v. Affinitylifestyles et al., case number A-21-831543-B, in the 8th District Court of Nevada, Clark County.

--Editing by Vaqas Asghar.

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