

Apache Shareholders Given Class Status Over Market-Moving Claims

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- Price impact shown for some statements, magistrate judge says
- Opinion trims proposed class period, citing Apache's rebuttal

A swath of Apache Corp. investors should be able to proceed as a class in their lawsuit alleging the oil and gas company misrepresented its potential to secure natural gas in the Permian Basin, a magistrate judge recommended.

Apache's statements about its prospects in the Permian Basin could have been misleading and artificially inflated its share price between Sept. 7, 2016 and Feb. 22, 2018, potentially supporting investor claims during that period of time, Magistrate Judge Andrew M. Edison said in an Feb. 9 opinion, partially recommending approval of the class certification.

The company and its executives had also admitted that the statements could have impacted the share price in that time frame, according to earlier court filings.

According to the investors's 2021 complaint, Apache, now known as APA Corp., had doubts about the profitability of an energy exploration project in the Permian Basin's Alpine High area but continued to reassure investors the resource play would change the course of the company and drive cash flow for decades to come.

The company initially claimed the Alpine High area held over three billion barrels of oil and a significant amount of natural gas but issued a series of corrective disclosures forecasting production would take longer and result in lower output than expected, the complaint said.

The class action had sought to also include investors who acquired shares in Apache between Feb. 23, 2018 and March 13, 2020, but the magistrate judge didn't find Apache's statements about the Alpine High project had a price impact after Feb. 22, 2018.

The magistrate judge attributed subsequent stock drops to general uncertainty about low gas prices, rather than specific revelations about Alpine High. The company sufficiently addressed corrective disclosures it issued in the two-year period after Feb. 23, 2018, Edison said.

The parties have 14 days from the service of the recommendation's memorandum to file objections.

Saxena White PA and Kessler Topaz Meltzer & Check LLP represent the class, and were recommended as lead counsel.

Baker Botts LLP represents Apache and the executive defendants.

The case is In re Apache Corp. Sec. Litig. , S.D. Tex., No. 4:21-cv-00575, 2/9/24

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LuxUrban Sued for Stock Crash After Hedge Fund Denied Hotel Deal

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A shareholder is calling on other investors to join in suing LuxUrban Hotels Inc. for steep share prices losses after an activist hedge fund published a report alleging the short-term rental company falsely claimed it inked a deal to lease a New York City hotel.

The Nasdaq-traded company announced in November that it had signed a 25-year master lease with the Royalton Hotel NYC to rent out select hotel units for short-term stays under its independent LuxUrban brand. Once a Bleeker Street Research report came out in January stating it had been told by the Royalton's building owner that the lease hadn't actually been signed, LuxUrban stock tumbled precipitously, according to a proposed class action lawsuit filed Monday in the US District Court for the Southern District of New York.

The stock price spiraled even further about two weeks after the report was published, when LuxUrban announced it had stopped discussions to add the Royalton to its roster of properties and it was retracting prior statements it made about the hotel from US Securities and Exchange Commission filings, according to the complaint.

LuxUrban's share price fell 12% to close at \$4.32 on Jan. 17, the day the Bleeker Street Research report was published, and another 10% to close at \$3.89 on Jan. 18, on unusually heavy trading volume, according to the complaint. The company's share price then fell 22% to close at \$3.50 on Feb. 5, its biggest-ever drop since LuxUrban went public in 2022, according to data compiled by Bloomberg.

The Miami-based company leases hotel properties in major metropolitan areas across the US and rents out hotel rooms for long-term stays. The company recently announced in August that it had partnered with Wyndham Hotels & Resorts Inc. Bleeker Street Research is a hedge fund that takes activist short positions and releases research on companies it believes are overvalued. LuxUrban didn't immediately respond to requests for comment.

The Bleeker Street report said LuxUrban hadn't provided a letter of credit to the Royalton's building owner months after engaging in discussions about the potential lease, and no agreement had been signed as of Jan. 14. LuxUrban, as late as January, made public announcements that it would begin welcoming guests to the Royalton by the end of the month.

The proposed class action would cover investors who acquired shares of LuxUrban stock between Nov. 8, 2023, when the company announced its plans about the Royalton, and Feb. 2, 2024, when it backpedaled on them.

The lawsuit also says LuxUrban used its allegedly misleading statements about the Royalton to overstate its total number of available rental units, giving the false impression it had higher revenue potential. LuxUrban told investors that as of Nov. 8, it had 18 leased properties and 1,599 available rental units, out of 21 leased properties and 2,032 rental units including properties that weren't available for rent yet.

Bleecker Street also said LuxUrban never disclosed to the public that when the company was first founded and called CorpHousing Inc., it was named in several debt collection and eviction lawsuits brought by landlords over its repeated failure to pay rent. The suits could leave LuxUrban on the hook for up to \$1.75 million in damages, according to the report.

Glancy Prongay & Murray LLP and Frank R. Cruz, who practices in Century City, Calif., represent the plaintiff and the proposed class.

The case is Pack v. LuxUrban Hotels Inc. , S.D.N.Y., No. 1:24-cv-01030, complaint filed 2/12/24 .

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Credit Suisse Avoids Suit After Delisting Exchange Traded Notes

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- Credit Suisse provided sufficient notice about process
- Plaintiff didn't establish intention to deceive, defraud

A finding that Credit Suisse AG didn't commit securities fraud when it announced in 2020 that it would delist and suspend issuance of specified exchange traded notes was upheld by the Second Circuit.

Plaintiff Adelina Gomez said that Credit Suisse made material misstatements about the transaction and tried to manipulate the market. But Gomez didn't allege that Credit Suisse intended to deceive, manipulate, or defraud in the announcement, the unpublished opinion said Feb. 9, affirming dismissal of her claims under the Securities Exchange Act and Securities and Exchange Commission rule 10b-5.

Gomez said Credit Suisse was motivated to deceive because it had potential interest in either selling into the short squeeze that occurred when DGAZ's price spiked in August 2020 or receiving continued fees instead of having to pay to accelerate all of the outstanding notes.

Credit Suisse didn't sell any of the DGAZ units it held between June 22, 2020, and Aug. 12, 2020, "even though the market price of DGAZ increased from less than \$600 to approximately \$25,000 per note during that period," the US Court of Appeals for the Second Circuit said Feb. 9. The investor fees Credit Suisse received during the same period "only amounted to approximately \$135,600," it said.

"The inference that Credit Suisse engaged in securities fraud to collect this sum—particularly when it could have made more than \$10 billion by selling its DGAZ units—is not one that we find plausible," the court said, affirming the district court's decision granting the company's motion to dismiss.

Gomez also said that Credit Suisse's scienter could be drawn from its failure to disclose information. But the court said that the "offering documents for DGAZ contained detailed warnings of the risks involved in holding the ETN." For example, Credit Suisse warned that holding DGAZ for more than a single day could result in the loss of the full value of the investment, it said.

Credit Suisse's press release on June 22, 2020, also said that it would cease issuing DGAZ immediately and delist it July 12, the court said. The release reiterated that Credit Suisse's actions could impact DGAZ's trading price, it said. "The warnings Credit Suisse included in the press release, on top of those in the offering documents, adequately captured the range of risks investors in DGAZ faced," it said.

Judges Robert D. Sack, Reena Raggi, and Joseph F. Bianco were on the panel.

Peiffer Wolf Carr Kane Conway & Wise LLP and Daren A. Luma of White Plains, N.Y., represented Gomez. Cahill Gordon & Reindel LLP represented Credit Suisse.

The case is Gomez v. Credit Suisse AG , 2024 BL 44583, 2d Cir., No. 23-862-cv, 2/9/24 .

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Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/02/this-post-is-not-just-about-elon-musk.html

Friday, February 9, 2024

This Post is Not (Just) About Elon Musk

By Ann Lipton

Look, it's not like I *want* to post about Elon Musk every week, it's just that he keeps doing things that result in interesting corporate governance conundrums. So this week's post covers several things, only one of which is a Musk thing.

The Musk Thing

After Chancellor McCormick struck down his Musk's 2018 pay package, one bit of speculation that floated about was whether Musk *could sue Tesla* to recover the package, on some kind of restitution/quantum meruit theory. My suspicion is that such a claim would be unlikely to succeed because Musk's own fiduciary breaches are what led to the original forfeiture, and he who comes into equity must do so with clean hands. Or, as the famous jurist Leo Rosten put it, it would be like "a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan."

But despite the dubious merit such a claim would have, given the close ties McCormick identified between Tesla's board and Elon Musk, there would be a risk that the board would take a dive and settle unnecessarily.

(More under the cut)

If *that* happened, shareholders could bring *another* derivative claim, alleging that the settlement was tainted and designed to benefit Musk rather than benefit the company. In fact, there's precedent for that: As I previously discussed, shareholders are currently suing Meta, alleging that the company settled claims with the FTC and absorbed excess liability for the purpose of shielding its controlling shareholder, Mark Zuckerberg, from paying damages personally.

But it occurred to me: That's an awful lot of unnecessary procedure. Wait for the captured board to resolve the litigation, and then bring a whole new lawsuit challenging the resolution. What if shareholders could intervene from the get-go, establish that the board is too conflicted to *defend* against a particular action, and step into the board's shoes in the original (hypothesized) Musk v. Tesla litigation? After all, a derivative lawsuit involves shareholders

acting on behalf of the company to bring claims that the board cannot manage; why not let shareholders act on behalf of the company to *defend* claims that the board cannot manage? We can call it a derivative anti-lawsuit.

Anyway, I offered this suggestion on social media, at which point a little birdie pointed out that Canada has *exactly this thing*, codified in its corporate law, CBCA section 239:

a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

I therefore propose, at least semi-seriously, that Delaware develop a similar equitable tool. It may not come up much; the Meta case is really the only one like it that I can identify, namely, a company intentionally taking on additional liability in a lawsuit naming the company as a defendant, in order to benefit a controller. But if we do end up with some version of Musk v. Tesla, it might save some additional legal maneuvering.

The Caremark Thing

As I've previously blogged, when it comes to *Caremark* claims, Delaware courts distinguish between oversight failures that concern *business risks*, and oversight failures that concern *legal risks*. The point being, directors are permitted to choose to take business risks – and therefore choose consciously *not* react to red flags of a potential problem – but they are not permitted to take legal risks, i.e., risk that they can get away with corporate misconduct, and therefore are prohibited from choosing not to react to a problem.

Which is why VC Zurn's new opinion in *Conte v. Greenberg* is striking for what it *didn't* do. There, plaintiffs alleged that corporate officers violated company policy by abusing their corporate jet privileges. The directors were aware of the problem, even asked management for proposals to amend the policies, but did nothing further, even when those proposals were not forthcoming. The plaintiffs alleged that the directors' *inaction* constituted a failure of oversight under *Caremark*.

VC Zurn rejected the claim, but did *not* do so on the grounds that *Caremark* is limited to violations of law. Instead, she simply held that under the particular facts of this case, the complaint did not allege that the directors' failures to act were so egregious as to suggest bad faith.

Hear that dog not barking? That, I think, is the sound of a potential expansion of *Caremark*. We will have to see if future decisions follow in its footsteps.

The Future Thing

Under the federal securities laws, statements that are labeled “forward-looking” – that make predictions about the future – receive special protection that insulate them from fraud claims. That, of course, only results in disputes about what counts as “forward-looking,” and, as I’ve previously blogged, courts can try to massage the definition to ensure bad actors don’t escape liability.

More common, though, is something like the opinion in *In re Lottery.com, Inc. Sec. Litig.*, 2024 U.S. Dist. LEXIS 20645 (S.D.N.Y. Feb. 6, 2024):

The 10/21/21 Press Release’s statements regarding Lottery’s preliminary revenue results are nonactionable under the bespeaks-caution doctrine because they, too, are “statements whose truth [could not] be ascertained until some time after the time they [we]re made.” *In re Philip Morris*, 89 F.4th at 428 (citation omitted). Plaintiffs contend that these statements were “simply not forward-looking” because they “concern[ed] revenue results for Q3 2021, a quarter that had already closed when the statement was made.” Lottery Class Opp. at 13. Although this line of reasoning has some intuitive appeal, the Court disagrees. When applying the bespeaks-caution doctrine, courts in the Second Circuit generally treat “corporate statements of projections as to corporate earnings” as forward-looking statements, “without regard to whether the last day of the covered earnings period had passed.” *Lopez v. Ctpartners Exec. Search Inc.*, 173 F. Supp. 3d 12, 39 (S.D.N.Y. 2016).

Lopez is on point. In relevant part, the case involved a press release issued on January 21, 2015, announcing the company’s “preliminary earnings results.” *Id.* “[T]he release said that the [c]ompany ‘expected’ earnings per share of \$0.06 to \$0.08 per share for [the fourth quarter of 2014].” *Id.* The court rejected as “incorrect” the plaintiff’s argument that these preliminary results did not “qualify as a forward-looking statement, because they addressed a quarter that was complete.” *Id.* It noted that just because “a quarter has concluded does not mean that the quarter’s results have yet been tabulated.” *Id.* And it explained that the press release’s statement of preliminary results “was a forward-looking projection, insofar as it gave a ‘preliminary’ calculation of what the final quarterly financial results would be ‘based on currently available financial and operating information and management’s preliminary analysis of the unaudited financial results for the quarter.’” *Id.* at 40 (quoting the press release at issue). “In other words, the preliminary results were a prediction, based on incomplete or provisional information, of what the [c]ompany would ultimately declare its financial performance to have been.” *Id.*

The Court agrees with *Lopez*’s reasoning and adopts it here. Accordingly, the Court holds that the 10/21/21 Press Release’s revenue-related statements were forward-looking statements.

Get it? The announcement of a *completed quarter's earnings* are, in fact, projections of the future if the numbers are still being tabulated. The past is never dead. It's not even past.

The Disney Thing

Disney has put up a website with a short video urging shareholders to back the Disney board in its proxy fight with Trian and Blackwells. (Pro tip for professors: You can right click to save the video pretty easily, which may come in handy when the webpage goes down after the meeting on April 3).

What immediately comes to mind is that other time an internet video was used as a proxy solicitation – namely, Third Point's video criticizing the Campbell's board. One big difference between the two, though, is that Disney has a whole staff of professional cinematographers, editors, and animators, and access to a back catalog of culturally-beloved IP, so I imagine its video was a lot easier to produce. (Apparently, the narration is provided by the same dude who does the voiceovers for the Disney theme parks; I really hope someone writes up a full account of who else at Disney worked on this and how they were approached).

The other difference, though, is audience: Disney's video is clearly aimed at retail shareholders who – Disney assumes – will be inclined to vote for management, and only need to be instructed *how* to vote. The video itself makes no actual case for incumbent management over the dissident slates, and seems to really be intended as instructional, for a particular group of baffled shareholders. Third Point's video, by contrast, offered a shallow but substantive critique of Campbell's management, and *may* have been aimed at retail, but was also probably intended to catch attention more generally – among institutional shareholders, the business press, and the Campbell's board itself.

One thing I'm a little confused about: Disney repeatedly urges its shareholders not only to vote for management nominees, but to use Disney's proxy card. It even instructs shareholders to send in a new Disney proxy card if they inadvertently voted on a Trian or Blackwells card. But in the age of universal proxies, why is this necessary? Are they just concerned that a pro-incumbent shareholder would be confused by the Trian/Blackwells cards? (Not unreasonable; even with universal proxy, each contestant's card is different and emphasizes its own nominees). Or is it an advance access to vote thing – will Disney get a peek at votes coming in on the company proxy, but not those coming in on dissident proxies? If you know, please comment.

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Matt Levine's Money Stuff: What If Tesla Can't Leave? (Correct)

By Matt Levine
Opinion

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Matt Levine's Money Stuff: What If Tesla Can't Leave? (Correct)

By Matt Levine 2024-02-12T14:53:44587-05:00

Hotel Delaware

Oh man, I want to tell you about the funniest Money Stuff item of, like, summer 2024. Here's what it will be:

- 1. Elon Musk is going to ask Tesla Inc.'s board of directors to change its state of incorporation from Delaware, which just [invalidated Musk's \\$55 billion pay package](#) , to [Texas](#) , which loves Musk and is begging him to move and would probably let him pay himself whatever he wants.
- 2. Tesla's board is going to be like "sure yes of course, whatever you want."
- 3. Then Tesla will ask shareholders to vote to approve the relocation, as Musk has already said it will do.
- 4. Some shareholders will sue Tesla, asking a *Delaware* court to stop Tesla from moving.
- 5. They might win?

It cannot really be the case that a Delaware court can stop any Delaware corporation from moving its state of incorporation to Texas. But it *might* be the case that a Delaware court could stop *Tesla* from moving to Texas.

Today the Wall Street Journal has a story previewing this news:

Three powerful shareholders are trying to loosen Delaware's long-held grip over public companies.

Tripadvisor, under media executive Greg Maffei, wants to reincorporate in Nevada, over the objection of minority shareholders. Billionaire Barry Diller is awaiting a ruling that could relax Delaware's scrutiny of transactions like the 2020 split of some of his online businesses. And Elon Musk, who reincorporated Twitter as X in Nevada last year, has said he would ask shareholders about reincorporating Tesla in Texas.

The stuff about Musk and Tesla and Texas, sure. But I want to focus on TripAdvisor, because that is the real preview of what could happen with Tesla. TripAdvisor Inc., and its parent company, Liberty TripAdvisor Holdings Inc., are Delaware public companies that are run and controlled by Greg Maffei, who has supervoting stock and does, uh, fun stuff with his voting power. He gets sued by shareholders sometimes, and apparently wanted to reincorporate his companies to Nevada to get sued less: Nevada's corporate law seems to be friendlier to corporate officers and controlling shareholders, with "broad protections for directors and officers in many cases that Delaware wouldn't, including involving improper personal gain," according to the Journal.

And the companies' boards of directors considered moving to Nevada, and the directors decided it was a good idea, and they asked shareholders to vote to approve the move, and the shareholders approved. Well, *Maffei* approved, and he has supervoting shares; a majority of the independent shareholders voted against the proposals to move, but they passed anyway.

But some shareholders sued to stop Maffei from doing this. Here is their complaint. The argument is essentially:

- 1. Under Delaware corporate law, a company's board of directors and controlling shareholder have fiduciary duties to the ordinary shareholders, and they can't do something – even something otherwise legal, like reincorporating to Nevada – if it violates their fiduciary duties.
- 2. Where the board and controlling shareholder have a conflict of interest – where they get something from a transaction at the expense of ordinary shareholders – then Delaware will review the transaction for "entire fairness": The transaction is a breach of fiduciary duties, and so not allowed, unless the court finds that it is "entirely fair" to the ordinary shareholders.
- 3. Maffei and his board of directors get something out of moving to Nevada (they get to not be sued for doing creative stuff with their control of the companies), and this comes at the expense of the ordinary shareholders (they don't get to sue if Maffei does creative stuff to them).
- 4. But the ordinary shareholders were not compensated for this, and voted against it, and the board did not have a special committee of independent directors to consider the move: It just did what Maffei wanted. So the move is surely not "entirely fair" to them.
- 5. So a Delaware court can and should stop TripAdvisor and Liberty TripAdvisor from moving to Nevada, so that Delaware can continue to keep an eye on Maffei for the benefit of the ordinary shareholders.

And that kind of *is* how Delaware law works. In fact, this is more or less the same reasoning that a Delaware court applied last month to [strike down Musk's pay package](#) :

- 1. Tesla's directors – and Musk, who the court found is the "controlling shareholder" of Tesla even though he doesn't own supervoting shares or a majority of the stock – have fiduciary duties to Tesla's ordinary shareholders.
- 2. Conflicted transactions need to be entirely fair to those shareholders.
- 3. Musk got something out of his pay package (options worth more than \$55 billion), at the expense of ordinary shareholders (who got diluted).
- 4. The ordinary shareholders *did* actually vote to approve the pay package, but the judge found that their vote was not fully informed.
- 5. And the judge found that the pay package wasn't entirely fair to shareholders – basically, Musk wasn't worth what he was paid – so she blocked it.

And Maffei doesn't really argue against this framework. Instead, his lawyers argue that there is no conflict of interest here, because Maffei and the directors want to move to Nevada for good corporate governance reasons, and they aren't getting any personal benefits. From their motion to dismiss:

Plaintiffs ask this Court to do something that has never been done before – prevent a corporation from leaving the state of Delaware notwithstanding its undisputed compliance with the provisions of the [Delaware General Corporation Law] that allow the corporation to do so.

Section 266 of the DGCL gives corporations the right to leave Delaware and reorganize under the laws of another jurisdiction. Plaintiffs seek to limit that right, if not do away with it altogether. Specifically, Plaintiffs argue that where, as here, a corporation decides to move from Delaware to a state that potentially provides officers and directors with greater protection from future litigation based on conduct that has not yet occurred – and thus claims that do not yet exist—the Court should enjoin the move as a breach of the directors' (and, in this case, an alleged controller's) fiduciary duty.

Because there's no conflict, Maffei argues, the Delaware court should defer to the board's business judgment rather than conduct its own review of the fairness of moving to Nevada:

Plaintiffs theorize that the Directors were conflicted because there might be future board decisions that might give rise to litigation claims and such claims might survive a motion to dismiss in Delaware, but not in Nevada. As explained below, Plaintiffs' speculation is too hypothetical and remote to constitute a unique benefit today. The Amended Complaint does not allege any existing or even inchoate litigation claim that the Conversions would extinguish. Plaintiffs' hypothesized conflict arises from the mere possibility that the Boards might take some unidentified action in the future—after the Companies have moved to Nevada – that could give rise to a future stockholder claim. But the risk of a future unknown stockholder claim is one every board faces and is not sufficient to require entire fairness review, much less prevent a corporation from electing to move to another state. ...

The Amended Complaint does not contain factual allegations supporting a reasonably conceivable inference that the Directors or Maffei have a financial interest in the transaction or that Maffei would obtain some unique benefit from the Conversions.

And that's reasonable. But later this year, when we talk about Elon Musk moving Tesla to Texas, *he* won't be able to make that argument. He will have a *very very clear financial interest* in the transaction: A Delaware court just struck down his \$55 billion pay package, and even before that he was [going around posting](#) that he wanted another enormous stock grant so that he can control at least 25% of Tesla's stock. And if he can't get it in Delaware, he'll go to Texas.

I am sure that, when Tesla actually asks its shareholders to approve reincorporating in Texas, it will have good lawyers write a proxy statement emphasizing the many corporate benefits of Texas, the importance of attracting and retaining talent and the value that Musk provides to Tesla. I don't even think that will be wrong; I think there is something odd, and perhaps shareholder-unfriendly, about a Delaware judge striking down a pay package that Tesla's board *and shareholders* thought was a good idea. I just think that Elon Musk is not the most carefully lawyered guy in the world in his personal statements, and he will have made – he has already made – a very clear record proving that he wants to move to Texas *so that he can make Tesla give him \$75 billion worth of stock*.

So shareholders will go to the Delaware judge saying "Elon Musk tried to pay himself \$55 billion, and you stopped him from doing that because it was unfair to shareholders, and now he is trying to move Tesla to Texas so that he can (1) get rid of you and (2) pay himself *\$75 billion*, so you have to stop him again." And I think that is an argument that the Delaware judge might find compelling? I mean, she *did* stop Musk from paying himself \$55 billion. Presumably this move will be even more offensive.

And Tesla *is* a Delaware corporation, so it *is* subject to the orders of the Delaware court, even if those orders are "where do you think you're going? Get back here you little scamp!" And so maybe Tesla really can't leave?

Anyway, that's the news from six months from now, and I suppose when it actually happens I will just write some comical imagined dialogue for Musk and say "see previous column." There are some risks to this thesis:

- Musk could appeal the decision about his compensation and win, and then he might lose interest in moving to Texas. I kind of think that he'll want to move even if he wins on appeal, though.
- Maffei could win such a comprehensive victory in the TripAdvisor case that nobody will even be able to argue that a court can stop Musk from leaving Delaware, so Tesla will just leave with no problem.
- Maffei could lose so comprehensively that Musk's lawyers will tell him "you've got no shot at leaving Delaware, don't even bother," and he'll believe them and give that up. I assign 0% probability to this one.
- Moving to Texas might be a thing that Musk posts about but does not actually plan to do?

I don't know; I think it's gonna happen. Last week [Musk moved Neuralink Corp.](#), his brain implant company, from Delaware to Nevada, and he previously moved Twitter to Nevada (and renamed it X). Those deals were easy, though: Those are private companies with smallish groups of shareholders, none of whom are all that jazzed to sue Elon Musk, so he can kind of do what he wants. [Tesla is different](#). It does make sense that Musk would want to [pursue his next idea](#) at one of his other, private, Nevada companies. He just has a lot more control over them.

I [said last month](#) that "there is something awkward about a judge second-guessing the CEO compensation decisions of the board of directors of a \$600 billion company, even if, yes, it's the board of Tesla." But that is nothing compared to how awkward it will be for a Delaware judge to *prevent the company from leaving Delaware* because Musk doesn't like Delaware judges. It seems like the world can't really work that way, that Delaware can't *really* prevent its companies from leaving. And yet ... maybe? It's gonna be a fun time here at Money Stuff when it happens.

Multistrategy

I [wrote the other day](#) that Bill Ackman's hedge fund, Pershing Square LP, "is kind of what you think of when you think of a hedge fund." But then I realized (in a footnote) that I needed to qualify that statement. I don't know what you think of when you think of a hedge fund. I think there are two main models. There is what I think of as the old-school classic hedge fund, like Pershing Square, where one high-profile manager makes a handful of concentrated high-conviction market bets using his natural talent and hard work and market experience and gut instinct.

But then there is the newer model of multimanager, multistrategy hedge funds, or "pod shops," like Citadel or Millennium or Point72, that have a bunch of different portfolio managers each making bets in some particular sector or strategy. Unlike the old-school managers, the pod-shop portfolio managers don't usually go on television that much.

Also unlike the classic funds, the pod shops are run on, as it were, scientific lines. I mean, the portfolio managers might trade on gut instinct, but they are *managed* scientifically. Each portfolio manager will generally be tasked with producing returns that are not correlated with the broader market or the sector she invests in: The consumer discretionary manager won't get a bonus just because consumer discretionary stocks do well; she'll only get paid if she buys the best consumer discretionary stocks and shorts the worst ones. She will be required to be more or less factor-neutral, to run a portfolio that makes money on the strength of her ideas rather than on broad market trends. And her bosses will have quite sophisticated techniques to measure her performance and her skill, to neutralize standard market factors and to extract only alpha, only the returns to skilled investing.

The appeal of the multimanager funds, to institutional investors, is obvious: They can offer *true alpha*, true uncorrelated returns. They can tell allocators: "Okay, you can get your stock-market exposure from stock index funds, your bond-market exposure from bonds, your real estate exposure from buying real estate, whatever, and then you can diversify your portfolio by putting some money into our fund and we'll just pay you 12% per year with very little volatility." This is not a pitch that appeals to everyone: Plenty of people want the charismatic gut-instinct-driven single manager who might put all her money on one big bet that returns 300%. But it is a pitch that appeals to sober, sensible institutional asset allocators with a lot of money.

(Incidentally, one model of why Ackman is launching a public closed-end fund designed to appeal to US retail investors now is precisely that institutional investors increasingly want the scientific multimanager model, and the classic charismatic-manager model is maybe a bit outdated. But it's still popular with retail investors on Twitter/X!)

There is, however, a downside for investors from all of this scientific management. The downside is that the multimanager funds might get too *good* at scientifically analyzing performance, and at attributing it to skill. The fund manager might be able to say something like “okay this portfolio returned \$47 million last year, of which \$13 million is attributable to the analysts’ research, \$14 million to the portfolio manager’s stock-picking, \$11 million to our firm’s risk management and \$9 million to our investors’ capital.” And then the investors get the \$9 million and the fund manager and analysts and portfolio manager get the rest. If you get too good at measuring the returns to investment skill, you might, uh, pay all of those returns to the people whose skill generated them? And what does that leave for investors?

Bloomberg’s [Nishant Kumar and Liza Tetley report](#) :

The priciest multistrategy hedge funds are now keeping most of the profits they generate, while clients shoulder their costs.

Clients received 41 cents of every \$1 made by multistrategy funds that passed on all their costs last year, according to a survey by the prime brokerage unit of BNP Paribas SA. Their share is down from 54 cents in 2021, reflecting a startling new reality where the most popular funds effectively have a blank check for expenses.

These funds outperformed peers, and most of the wider industry, on investment returns. However, gains measured after fees are the lowest among multistrategy funds, the poll of 238 allocators managing or advising on \$1.2 trillion in hedge fund assets found.

Yes, right, in the olden days a charismatic manager would take big swings on a handful of stocks and would make a lot of money. Nobody would be sure – or would even *ask* – how much of the returns were due to the manager’s skill and how much were just, like, the stock market went up. But the crude compromise would be that the manager paid herself 2% of assets and 20% of profits and the investors got the rest. In modern multimanager funds, the fund can say “well 59% of this performance is clearly attributable to our skill so we’re keeping it.”

Meanwhile it’s not all great for the portfolio managers either. At Business Insider, Bradley Saacks reports:

Former Point72 president Doug Haynes is looking to revive a strategy he previously ran for billionaire Steve Cohen for his new fund launch.

The quantamental strategy – which blends fundamental stockpicking and algorithm-based number crunching – was internally known at Point72 as Idea Lab while under Haynes and then eventually became Latitude before shuttering in 2020. ...

It’s an alpha capture-type strategy in which 12 West Palm Beach-based analysts will come up with investment ideas, and a systematic algorithm will create a portfolio based on the ideas and analytical tools that focus on position sizing and risk management. The firm – which hopes to raise \$1 billion – has “substantial investor interest,” according to a spokesman for the firm, and is set to launch on April 1.

If your scientific management determines that the analysts add most of the value and that the portfolio managers can just be automated away, that’s what you do.

More cell phones

I guess if you ran a business and you invented some new product that you knew would prove essential to every employee of every investment bank, asset manager and other financial services firm, you might start by selling it to the big banks. The big banks have lots of money and can afford your product, winning their business will validate your product in the eyes of smaller firms, and you just get a lot of bang for your marketing buck: Big banks have thousands of employees, you probably price your product by the seat, and so you can get a lot of money by selling to a large company. But later, after you saturate that market, you will move on to other, smaller firms. Eventually you’ll get around to charging a two-person hedge fund for two copies of your product. There’s still money to be made.

The US Securities and Exchange Commission does various things, but one thing that it does these days is charge financial services firms large fees for using mobile phones. I mean, it doesn't provide the phones or anything. But the SEC has developed a theory that it is illegal for employees of securities brokerages and investment managers to use WhatsApp or personal text messages to talk about work, and it has applied that theory retroactively to fine firms whose employees did that. And since, as far as I can tell, every single employee of every single securities brokerage and asset manager has at some point at least texted their boss to say "hey sorry I'm running late for this meeting," the SEC can more or less fine every financial firm for doing this. It's not exactly a flat per-seat fee, but the fines do seem to scale with the size of the firm.

And the SEC did [start with the big banks](#), because (1) they'll pay the biggest fines and (2) extracting \$125 million each from Goldman Sachs, Morgan Stanley, Citigroup, BofA Securities, etc. (and \$200 million from JPMorgan) definitely validates the business model: If you run some small securities brokerage and the SEC comes to you with its hand out because you texted your colleagues, who are you to say no after Goldman paid \$125 million? And then it [moved on](#) to smaller brokerages and investment banks, as well as credit rating firms, and is apparently also [looking into hedge funds](#). The fines there are smaller – fewer employees, fewer phones, less money – but it's a reliable business.

And so last week:

The Securities and Exchange Commission [Friday] announced charges against five broker-dealers, seven dually registered broker-dealers and investment advisers, and four affiliated investment advisers for widespread and longstanding failures by the firms and their employees to maintain and preserve electronic communications.

The firms include Northwestern Mutual, Lincoln Financial, Guggenheim Securities, a bunch of others; the fines ranged from \$1.25 million to \$16.5 million. There is no suggestion that anyone at any of these firms used their personal phones to do crimes, just that using their personal phones to talk about business is itself illegal. They're gonna keep going with this. Eventually I'm going to be fined \$12.95 for texting a colleague about my work.

Bill Ackman took the FT's 'Bill Ackman or American Psycho?' quiz

"I got a perfect score," he tells Reeves Wiedeman at New York Magazine, in a profile that also features "a demon child named Ackman who harvests souls for the Great Demon King." Also quoted in this profile: "There's a meme going around that apparently I'm causing a lot of marriages to have trouble." And: "I am an extremely fast writer, and I am powered by a profound love that is infinite." And: "a WhatsApp group with probably 50 billionaires." I hope they don't talk about work.

Things happen

David Solomon Strengthens His Grip on Goldman Sachs. New York Community Bancorp Went From a Crisis Winner to Banking's Next Worry. Private equity chiefs enjoy \$40bn gain in share value as assets surge. Private Equity [Returns Plunge](#) to Global Financial Crisis Levels. Diamondback to Buy Endeavor for \$26 Billion in [Oil Megadeal](#). The Priciest Shareholder Fight Ever Is Headed to Disney's Boardroom. HP Seeks \$4 Billion in Losses From Lynch Over [Autonomy Fraud](#). EY took on \$700mn in debt for doomed 'Project Everest' spin-off plan. Elon Musk Must Testify in [SEC Twitter Probe](#), Court Rules. Military Medals and a Famous Last Name: How a Con Man Made Off With Millions in Texas. Six Years After [Volmageddon](#), Volatility Fears Resurface in US Stocks. "It was hugely important to me that [investing be the fabric of the novel](#), not the backdrop." Inside European finance's most secretive society. How Companies [Say 'Layoffs'](#) Without Saying 'Layoffs.' The Groucho Marx Theory of Efficient Markets. Citi Tells Dealmakers to [Control Their Drinking](#) at Client Events.

If you'd like to get Money Stuff in handy email form, right in your inbox, please subscribe at this link. Or you can subscribe to Money Stuff and other great Bloomberg newsletters here. Thanks!

(Corrects the spelling of the surname of Business Insider reporter Bradley Saacks in the 26th paragraph.)

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- 1. Actually that is the amended complaint after Maffei won the shareholder votes; the first complaint – before the votes – is [here](#).
- 2. From the initial complaint: “‘Nevada has reformed its laws to free officers and directors from virtually any liability arising from the operation and supervision of their companies. This strategy has allowed Nevada to attract ... firms with a preference for strong management protection that is not satisfied by Delaware law.’ It is for this reason that many observers recognize that Nevada sells itself as offering a ‘no liability regime.’ As prominent corporate law professor Ann Lipton recently observed, ‘I tell my students, Nevada is where you incorporate if you want to do frauds.’ Plaintiffs respect the Nevada legislature’s prerogative to distinguish its corporate law from that of Delaware (and the dozens of legal systems around the world that structure their corporate law on Delaware’s model) by appealing to fiduciaries who prefer a no-liability regime. But no rational minority stockholder would voluntarily agree to give up the benefits of the duty of loyalty, particularly in a controlled company where they face an omnipresent risk of self-dealing by a controller who has a history of abusive transactions. Yet that is effectively what Maffei and the other Defendants are imposing on their minority stockholders.”
- 3. The crude math there is: Tesla has 3.2 billion shares outstanding, Musk owns 411 million of them (assuming his big options package is canceled), or 12.9%, and he [says he needs 25% control](#), or another 12.1%. Tesla’s equity market capitalization, per Bloomberg, was \$616.5 billion as of the close last Friday; holding that constant, getting him another 12.1% would require transferring \$74.6 billion of value from other shareholders to Musk. (Alternate math might be: Getting him to 25% would require issuing 513 million new shares, since the new shares would change the denominator. Tesla’s stock closed at \$193.57 on Friday, making 513 million shares worth about \$99.3 billion. This seems wrong – the new shares would be dilutive – but it’s more fun to say that he wants a \$100 billion pay package.)

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@annmlipton@esq.social @AnnMLipton · 4h

ngl this is genuinely weird. weren't they supposed to file an 8-k?

"Tesla hasn't yet issued an SEC filing to notify shareholders of the ruling."



From nbcnews.com

11

22

79

22K



@annmlipton@esq.social @AnnMLipton · 4h

I mean, within 4 business days -

sec.gov/files/form8-k...

A normal company would say the spirit of the requirement was met, but Tesla is not normal.

it enters into, adopts, or otherwise commences a mater
ment (whether or not written), as to which the registra
pal financial officer, or a named executive officer part
tory plan, contract or arrangement is materially amend
d under any such plan, contract or arrangement to any

28 of 40

is thereto) made p
equity), that are m
contract or arrange
has previously dis
Item 402 of Regul

ified, then the registrant shall provide a brief descripti
contract or arrangement and the amounts payable to th

2

4

25

1.7K



Marks the spot @skramja · 3h

Could they make a colorable argument that since they (presumably) plan to appeal, there's no modification yet?

2

107





@annmlipton@esq.social @AnnMLipton · 3h

...

of course they could. they shouldn't! this is basic "i am a public company" stuff, you inform your shareholders officially of stuff that's material to them. only musk makes every reasonable regulatory requirement - public co responsibility - pulling teeth

2



4

162



@annmlipton@esq.social @AnnMLipton · 3h

...

the sec can't function - markets can't function - if a company's response to every legal requirement is "i won't do it until there's a court order" tesla should have made a perfunctory announcement as a matter of basic corporate manners



3

7

525



Anthony Rickey @anthonyrickey · 2h

...

My question would be if any clock starts running from the day of an opinion or the day of the order implementing it.



14



@annmlipton@esq.social @AnnMLipton · 2h

...

my question would be: who cares? i'm not complaining about technical violations of 8-k. i think the spirit here matters. public companies should communicate promptly with investors about material developments. this is material and there has not been prompt communication.



1

19



Anthony Rickey @anthonyrickey · 2h

...

If we're going to throw consideration of the law out the window in favor of vibes, I'd equally ask: who cares? Find me the stockholder who learns about the decision from an 8-K and I'll show you the world's largest rock they've been hiding under.



15





(e) If the registrant enters into, adopts, or otherwise commences a material compensatory plan, contract or arrangement (whether or not written), as to which the registrant's principal executive officer, principal financial officer, or a named executive officer participates or is a party, or such compensatory plan, contract or arrangement is materially amended or modified, or a material grant or award under any such plan, contract or arrangement to any such person is

made or materially modified, then the registrant shall provide a brief description of the terms and conditions of the plan, contract or arrangement and the amounts payable to the officer thereunder.

2. Grants or awards (or modifications thereto) made pursuant to a plan, contract or arrangement (whether involving cash or equity), that are materially consistent with the previously disclosed terms of such plan, contract or arrangement, need not be disclosed under this Item 5.02(e), provided the registrant has previously disclosed such terms and the grant, award or modification is disclosed when Item 402 of Regulation S-K (17 CFR 229.402) requires such disclosure.

Tesla board silent as investors await next steps after court revokes Elon Musk's \$56 billion pay package

 [nbcnews.com/tech/tech-news/tesla-board-silent-investors-await-steps-court-revokes-elon-musks-56-b-rcna138584](https://www.nbcnews.com/tech/tech-news/tesla-board-silent-investors-await-steps-court-revokes-elon-musks-56-b-rcna138584)

Lora Kolodny, CNBC

Feb. 13, 2024, 7:22 AM PST / Source: CNBC.com

By Lora Kolodny, CNBC

Two weeks after a Delaware court ruled that Tesla must rescind Elon Musk's \$56 billion pay package, the company's board remains mum on what the decision means for shareholders or what's next for the mercurial CEO.

In her 200-page opinion on Jan. 30, Chancellor Kathaleen McCormick called the pay plan the largest in public corporate history, and said it was agreed upon by people "who were beholden to Musk." Since then, Musk has lashed out at the court, posted "Never incorporate your company in the state of Delaware" on his social media platform X, and said Tesla would hold a shareholder vote to move its site of incorporation to Texas.

Tesla hasn't yet issued an SEC filing to notify shareholders of the ruling.

The decision came shortly after Musk indicated that he's pushing for even more control of Tesla, posting on X in mid-January that he wanted roughly 25% voting control before turning the company into a leader in artificial intelligence and robotics. Musk is already building an AI company called xAI outside of Tesla.

The next step in the compensation case is an "implementing order" that will be hashed out between the court, Musk's team and the lawyers representing shareholder Richard Tornetta, a former heavy metal drummer who was the plaintiff in the 2018 lawsuit filed on behalf of all Tesla investors.

As shareholders await answers, Tesla's eight-person board, which includes Musk, his brother Kimbal, Chairwoman Robyn Denholm and former Tesla technology chief JB Straubel, has stayed silent, avoiding any public comments.

CNBC sent requests for additional information to Tesla investor relations, Musk and some board members. They all went unanswered.

Greg Varallo, who was lead counsel for Tornetta and is head of the Delaware office of Bernstein Litowitz Berger & Grossmann, told CNBC that theoretically Musk and his legal team could still pursue a last-minute settlement. While Varallo said he has no knowledge of Musk's plans, he said he expects Musk to appeal the decision to the Delaware state Supreme Court.

"I'd give you very high odds on that," Varallo said.

Kobi Kastiel, a law professor at Tel Aviv University, also predicts that Musk will appeal the ruling. Kastiel wasn't involved in the litigation but he co-authored a 2023 paper in the Washington University Law Review titled "Superstar CEOs and Corporate Law" that was cited in McCormick's ruling.

"Given the high stakes involved, it is likely that Tesla will appeal the decision," Kastiel said in an email. In the absence of a successful appeal, "any new compensation arrangement with him will have to be assessed" in light of McCormick's decision, Kastiel said.

In the 2018 CEO compensation plan, Tesla's board awarded Musk a dozen tranches of stock options that would finish vesting in 2022 and were based on milestones, including many focused on stock price increases.

Between the beginning of 2018 and the end of 2022, Tesla shares soared almost 500% as Musk promised to turn Tesla into not just a dominant EV brand, but a robotaxi company and solar juggernaut, among other things. The S&P 500 gained 44% over that stretch, while the Nasdaq rose 52%.

Eric Talley, a professor at Columbia Law School, told CNBC that, should the ruling stand, Musk will lose his options but not any shares he previously held. The move would decrease the number of shares outstanding, potentially bolstering the value of each share held by investors.

"A bunch of options would be returned to Tesla's coffers, which is hugely accretive to stock value," said Talley, who wasn't involved in the case. On the other hand, Talley pointed out, "Tesla has a very grumpy CEO who might want to take his ball and go home. Thus far, trading suggests those two factors have been a wash."

Tesla shares are down slightly since the Delaware court's decision in late January. They're down close to 25% for the year, while major indexes are up.

Musk voiced a strong preference for moving his businesses out of Delaware following the court's decision, and encouraged others to do so as well.

He moved the incorporation location for his brain computer interface company, Neuralink, from Delaware to Nevada, filings revealed last week. He's also been a big proponent of Texas in recent years, personally relocating there from California, and building massive complexes for SpaceX and Tesla in the state, which has no personal income taxes and a much lower business tax rate.

Author Walter Isaacson, who published a 688-page biography on Musk last year, told CNBC's "Squawk Box" on Monday that if the ruling doesn't get overturned, "it's going to hurt Delaware."

"People will say, 'Wait, wait, you mean five years after something happens, eight years after something happens, you'll go back and undo it?'" Isaacson said.

Tulane Law School professor Ann Lipton had a different take.

"It's a very thorough opinion and the Supreme Court should give great deference to the factual findings of the trial court," Lipton said.

In terms of what shareholders should ask of Tesla's board now, Kastiel said, "Tornetta and recent media reports on Musk have emphasized the importance of accurate and detailed disclosure of the ties between controlling shareholders and directors."

There's a more fundamental concern at play, Kastiel said, regarding corporate governance in cases where a "superstar CEO" is running the show.

"As long as the CEO is perceived as a star and the company depends on the CEO's vision and leadership, even nominally independent directors — those without strong ties to the CEO — will have difficulty monitoring the CEO's conduct," he said.

Kastiel also said that the decision likely makes Musk and Tesla more vulnerable to other types of lawsuits.

"Plaintiffs may have a better chance of advancing their claims by potentially leveraging the Tornetta findings to argue that the majority of the Tesla board is not independent of Musk," he said. "To mitigate this risk, Tesla will need to significantly enhance the independence of its board and nominate new independent directors who do not have strong ties to Musk."

Lora Kolodny, CNBC

Elon Musk asks Texas court to bar deposition in defamation lawsuit

 [reuters.com/legal/transactional/elon-musk-asks-texas-court-bar-deposition-defamation-lawsuit-2024-02-13](https://www.reuters.com/legal/transactional/elon-musk-asks-texas-court-bar-deposition-defamation-lawsuit-2024-02-13)

Mike Scarcella

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

Feb 13 (Reuters) - Elon Musk has asked a judge to block a bid to question him in a lawsuit that claims he spread lies on his social media platform X that a California man participated in an extremist group's street brawl.

The billionaire CEO in a filing in Texas state court [↗](#), opens new tab on Monday called the move to depose him a "transparent effort to harass" him and drive up his litigation costs. The October lawsuit by 22-year-old Benjamin Brody said Musk falsely trumpeted on X that Brody took part in a violent street brawl in Oregon on behalf of a neo-Nazi group in June.

Brody claimed users on X misidentified him as a participant, and that Musk, whose account on the site has tens of millions of followers, amplified that misinformation in a post that said "Looks like one is a college student (who wants to join the govt)." Brody asserts that reference was about him.

The lawsuit seeks more than \$1 million in damages for what Brody called Musk's "astonishingly reckless conduct," and said he should be allowed to question [↗](#), opens new tab Musk as part of the lawsuit "to explore concepts of negligence and malice."

"Musk is the only source of direct evidence as to his state of mind when making the statement, and Musk will be able to testify about issues involving his level of care," Brody argued.

Musk has denied [↗](#), opens new tab making any defamatory statement about Brody and asked the court to dismiss the case. He argued that his post was phrased generically and "did not reference Brody, directly or indirectly."

Two lawyers representing Musk at law firm Quinn Emanuel Urquhart & Sullivan did not immediately respond to a request for comment.

An attorney for Brody did not immediately respond to a similar request.

The litigation comes amid heightened scrutiny of extremist rhetoric on Musk's platform, which he purchased in 2022 for \$44 billion.

Musk's X is separately suing media watchdog Media Matters over its reporting showing ads on X appearing next to antisemitic content. X also has sued the Center for Countering Digital Hate, accusing it of "false and misleading" research reports about harmful content on the platform.

Advertisement · Scroll to continue

The case is Benjamin Brody v. Elon Musk, District Court of Travis County, No. D-1-GN-23-006883.

For plaintiff: Mark Bankston of Farrar & Ball

For defendant: Alex Spiro and John Bash of Quinn Emanuel Urquhart & Sullivan

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US judge tentatively rules Musk must testify again in SEC's Twitter probe
Grilling Musk: use CEO's tweets, thin skin against him, trial experts say
Reporting by Mike Scarcella

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Musk Must Testify in SEC Twitter Probe, Court Rules (1)

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Feb. 11, 2024, 7:58 AM PST

Guillermo Molero

A federal court in California is enforcing a subpoena for Elon Musk to testify before the US Securities and Exchange Commission regarding potential violations of federal securities laws in connection with his purchase of Twitter.

The court ruled the evidence gathered is relevant and material to the SEC's investigation and the testimony required of Musk is not unduly burdensome, a court filing Saturday said. The two parties were ordered to meet within one week and decide on a date and location for the testimony.

Musk had testified before the SEC twice in half-day sessions on July of 2022. But the agency, having since received "thousands of new documents" from various parties, including some authored by Musk, wants to ask him about new information. Musk's counsel agreed with the SEC to testify last September before requesting to postpone the meeting by one day and later refusing to appear, according to the filing dated Saturday.

The SEC is seeking information about Musk's purchases of Twitter stock ahead of the company's acquisition and statements he made about his investments. The SEC sent Musk a letter in 2022 asking for information about the delayed disclosure of his Twitter stake, which he reported a week late.

The Tesla CEO and co-founder, whose purchase of Twitter, now known as X, concluded in October of 2022, refutes the grounds for the SEC's investigation, calling it baseless and claiming it seeks irrelevant information, court filings say.

Musk also contends the subpoena exceeds the SEC's authority because it was issued by an SEC staffer appointed by the agency's director of enforcement, not by an officer appointed by the president, a court or the head of a federal department. The court denied this on Saturday, saying the subpoena is authorized by the Exchange Act, which primarily regulates transactions of securities in the secondary market.

Read more: Musk Must Testify in SEC Twitter Stock Probe, Judge Signals

US judge orders Elon Musk to testify in SEC's Twitter probe

 [reuters.com/legal/elon-musk-ordered-testify-secs-twitter-probe-2024-02-11](https://www.reuters.com/legal/elon-musk-ordered-testify-secs-twitter-probe-2024-02-11)

Jody Godoy

Elon Musk, Chief Executive Officer of SpaceX and Tesla and owner of X, formerly known as Twitter, attends the Viva Technology conference dedicated to innovation and startups at the Porte de Versailles exhibition centre in Paris, France, June 16, 2023. REUTERS/Gonzalo Fuentes/File Photo Purchase Licensing Rights , opens new tab

Feb 11 (Reuters) - A federal judge ordered Elon Musk to testify again in the U.S. Securities and Exchange Commission's probe of his \$44 billion takeover of Twitter, giving the regulator and the billionaire a week to agree on a date and location for the interview.

U.S. Magistrate Judge Laurel Beeler's order, issued on Saturday night, formalized a tentative ruling she made in December that sided with the regulator.

The SEC sued Musk in October to compel the Tesla (TSLA.O) , opens new tab and SpaceX CEO to testify as part of an investigation into his 2022 purchase of Twitter, the social media giant that he subsequently renamed X. Musk refused to attend an interview in September that was part of the probe, the SEC said.

The agency is examining whether Musk followed the law when filing the required paperwork about his purchases of Twitter stock, and whether his statements in relation to the deal were misleading.

Musk fought the SEC's bid to interview him, saying it had already done so twice, and accused the regulator of harassment.

Beeler rejected that argument. The SEC had authority to issue the subpoena, which sought relevant information, she said in the ruling.

If the SEC and Musk cannot agree on a date and time for the interview, Beeler said she will hear from both sides and decide for them.

Friction between Musk and the SEC began when the regulator sued him after he tweeted "funding secured" in 2018 in reference to a possible plan to take Tesla private. To settle that case, Musk agreed that a Tesla lawyer would vet his tweets about the electric vehicle maker. The SEC sued him again in 2019 for allegedly breaching that provision.

Musk has asked the U.S. Supreme Court to review the agreement, saying it violates his constitutional right to free speech.

Reporting by Jody Godoy in New York; Editing by Lisa Shumaker and Paul Simao

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News from Bloomberg Terminal
Feb. 9, 2024, 3:19 PM PST
Musk's Neuralink Ditches Delaware, Reincorporates in Nevada

- Billionaire has fraught history with Delaware legal system
- Musk has said he'll move Tesla's incorporation from the state

By Sarah McBride

(Bloomberg) --

Elon Musk's brain implant company, Neuralink Corp., switched the location of its business incorporation to Nevada from Delaware, taking steps to cut ties to a state where Musk has suffered significant legal setbacks – one over pay and another over his acquisition of Twitter.

The change was completed Thursday, according to the office of the Nevada secretary of state and a notice sent to shareholders in the company. Last week, a Delaware judge struck down Musk's \$55 billion Tesla Inc. pay package. In a post on X, the social network he owns, Musk advised founders not to incorporate in the state.

Elon Musk

@elonmusk · Follow

Never incorporate your company in the state of Delaware

2:14 PM · Jan 30, 2024

170.2K

Reply

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Read 14.2K replies

The notice sent to shareholders, which was reviewed by Bloomberg, informed them that their outstanding shares in the Delaware corporation would now be incorporated into outstanding shares in the Nevada corporation.

Neuralink lawyer Philip Mao declined to comment.

Last week, Musk tweeted that Neuralink had implanted a device in a human patient for the first time. The startup's technology aims to help people with traumatic injuries operate computers using only their thoughts. Eventually, Musk has said Neuralink's device will give people "control of your phone or computer, and through them almost any device, just by thinking."

Neuralink isn't the first business Musk has reincorporated outside of Delaware and may not be the last.

Musk previously moved the incorporation of X from Delaware to Nevada when he renamed the company from Twitter. Nevada's corporate laws offer more protections for executives against investor suits.

Tesla, which is headquartered in Austin, was incorporated in Delaware in 2003. Last week, Musk vowed to try to shift Tesla's incorporation from Delaware to Texas, but such a move would require a shareholder vote.

Musk has a long history of legal disputes in Delaware, which is known as the country's incorporation capital. The state is the corporate home to more than 70% of Fortune 500 companies and its chancery court judges are recognized as business-law experts who can hear cases on a fast-track basis. Most high-profile merger-and-acquisition disputes are litigated in the state in non-jury cases. Even foreign companies come to Delaware to have corporate disputes decided.

Two years ago, a Delaware judge rebuffed an investor suit challenging Musk's \$2.6 billion acquisition of renewable-power provider SolarCity, finding the billionaire entrepreneur didn't improperly force fellow directors to accept an overpriced buyout of SolarCity.

Later in 2022, Musk didn't have as much luck when he tried to back out of his bid to buy the social media platform once known as Twitter. He was repeatedly dealt setbacks in pretrial rulings by Judge Kathaleen St. Jude McCormick – the same judge who would go on to zap his 2018 pay plan.

Read More: Musk Slams Delaware, Hints at Tesla Texas Move After Pay Snub

(Updates with context starting in the first paragraph.)

--With assistance from Dana Hull and Jef Feeley.

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Jillian Ward

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Talis Biomedical Investors Get Class Status in Covid Test Suit

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Litigation

A scientist works in a research lab.

Photographer: Tim Boyle/Bloomberg

A lawsuit against Talis Biomedical Corp. alleging it misled investors about the progress of its diagnostic platform for Covid-19 testing can proceed as a class action, a federal court in California ruled.

Judge Susan Illston limited the class definition, for now, to investors who purchased shares within the initial public offering lock-up period. Illston, of the US District Court for the Northern District of California, said Feb. 9 that individualized issues about the stock purchases wouldn't predominate for those investors "as there is no question that those purchases were pursuant to the IPO."

- Lead investor Martin Dugan said that the company wasn't capable of producing the platform, Talis One, to scale, and that Talis botched its application for an emergency use authorization from the Food and Drug Administration
- Dugan can ask again for class status for those who purchased shares after the Feb. 11, 2021 to Aug. 11, 2021, inclusive, lock-up dates, after he receives documents in discovery, Illston said
- Talis in November 2023 announced it was exploring options, reducing costs, and cutting its workforce by about 90%, Bloomberg News reported

Pomerantz LLP and Bleichmar Fonti & Auld LLP are lead counsel for the class. Cooley LLP represents Talis.

The case is In re Talis Biomedical Corp. Sec. Litig. , 2024 BL 44026, N.D. Cal., No. 22-cv-00105, 2/9/24 .

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\$1.16 Million Crypto Platform Class Settlement Approved by Judge

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Litigation

A replica cryptocurrency coin is seen in this photo illustration Nov. 8, 2017. Ether is a token in a distributed network computing system named Ethereum that allows the cryptocurrency to be used and traded.

Jaap Arriens/NurPhoto via Getty Images

Maker Ecosystem Growth Holdings Inc. will pay \$1.16 million to settle claims by cryptocurrency account holders, following a federal judge's approval of a class action accord on Friday.

Judge Maxine M. Chesney of the US District Court for the Northern District of California approved the settlement ending the lawsuit by "Vault" holders on the Maker platform. Plaintiffs alleged Maker, also called Metronym, misrepresented the risks associated with the decentralized finance platform by promising that its own digital currency, DAI, was shored up by other digital assets.

- Vault holders lost approximately 120,000 Ethereum cryptocurrency, or ETH, which served as Maker's collateral, when the stock dropped in March 2020 amid pandemic concerns, triggering an auction
- Chesney, last August, granted preliminary approval of the settlement, which covers a class of those who had a collateralized debt position or Vault on the Maker protocol and were forced to liquidate their ETH on March 12 or 13, 2020, and received zero compensation, meaning \$10 per ETH or less, as part of any related auction
- The court also approved \$348,000 in plaintiffs' attorneys' fees and \$17,912 in costs

JurisLaw LLP represents the class. Skadden, Arps, Slate, Meagher & Flom LLP represents Maker.

The case is Johnson v. Maker Ecosystem Growth Holdings, Inc. , N.D. Cal., No. 3:20-cv-02569, order 2/9/24 .

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VoIP-Pal Shareholders, CEO Agree to Dismiss Short-Swing Lawsuit

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Litigation

Photo: imaginima/Getty Images

Feb. 13, 2024, 8:27 AM PST

Tre'Vaughn Howard

The CEO and shareholders of VoIP-Pal.com Inc. agreed to dismiss with prejudice a lawsuit that alleged CEO Emil Malak made \$1.4 million from short-swing trading shares of company stock his wife owned.

- Revive Investing LLC and Calenture LLC sued Malek for allegedly violating the Securities Exchange Act by using his wife Barbara Baggio's shares to complete short-swing trades from October 2021 through May 2023 to unjustly enrich himself
- According to the complaint filed in the US District Court for the Southern District of New York, Baggio reported at least 10 instances of trading between May and July 2023. Malak allegedly traded the shares on the OTCQB Venture Market and benefited as the owner since he and Baggio were married and shared a household during those transactions
- The shareholders said they sought to recover the \$1.4 million in profits for the company, plus interest and legal fees after VoIP's board didn't respond to Calenture's demand letter to prosecute Malak over the alleged claims

A Tuesday docket entry said the voluntary dismissal filing was deficient because it hadn't been signed by all parties who have appeared in the case.

Daniel E. Doherty of Overland Park, Kan., Sterlington PLLC, and James A. Hunter of West Conshohocken, Pa., represented Revive and Calenture.

Crone Law Group represented Malak.

The case is Revive Investing LLC v. Malak , S.D.N.Y., No. 1:23-cv-07281, 2/12/24 .

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This Week in Chancery Court: Maxim, Analog Dispute Gets Appeal

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Defense contractor Anduril Industries Inc. faces off with a drone maker in the Delaware Court of Chancery this week, while a former Maxim Integrated Products Inc. shareholder will ask the state's highest court to revive a challenge to the circuit maker's \$21 billion sale to Analog Devices Inc.

A look at more from the calendars for both courts this week:

Monday: Whitestone REIT Operating P'ship LP v. Pillarstone Cap. REIT, Del. Ch., No. 2022-0607, teleconference 2/12/24.

At issue: Court of Chancery Vice Chancellor Lori Will ruled Jan. 25 that a real estate investment trust's shareholder rights agreement improperly deterred its partner's ability to redeem its shares. The agreement created an "economic disincentive" that harms Whitestone REIT Operating Partnership LP's rights under its partnership with Pillarstone Capital REIT, she said. Whitestone has requested an order clarifying that Will's opinion "requires the parties to submit a proposed implementing order, instead of a proposed final order, that contemplates further proceedings for entry of a monetary judgment against" Pillarstone, according to a filing. Pillarstone objects to Whitestone's motion.

Court action: Teleconference.

'Poison Pill' Said Aimed at Thwarting REIT's Redemption Option

Wednesday: Ryan v. Accardi, Del., No. 224, 2023, oral argument 2/14/24.

At issue: Vice Chancellor Morgan Zurn, in a May 2023 ruling, granted a motion to dismiss a former shareholder's lawsuit alleging Maxim's sale to Analog, a semiconductor company, wrongly suspended \$500 million in dividends in an effort to pressure investors into quickly approving the deal. The ex-shareholder now wants the Delaware Supreme Court to overturn Zurn's ruling, arguing in a brief that the Chancery Court made "a legal error" in finding that the actions of Maxim's board "gave rise at most to breach of a duty of care which was exculpated under Maxim's articles of incorporation." Maxim and Analog board members argue Zurn's ruling should stand because she "correctly held that plaintiffs did not allege that the directors acted in bad faith," according to their answering brief.

Court action: Oral arguments before the Delaware Supreme Court in Dover.

Analog's \$21 Billion Maxim Acquisition Draws Investor Lawsuit

Thursday: Alley v. Anduril Indus. Inc., Del. Ch., No. 2023-0958, remote hearing 2/15/24.

At issue: Anduril faces claims that it's driving down post-deal payments to a drone maker by cannibalizing that company's resources for a cutting-edge weapons project. Area I CEO Nicholas Alley seeks at least \$15 million from Anduril on behalf of former stockholders of the drone maker that specializes in the ALTIUS system of tube-launched military drones used in the war in Ukraine, and also in hurricane forecasting and research. Anduril seeks to stay the proceedings until March 31, arguing in a brief that on that date, Alley "will obtain all the monetary earnout relief he seeks and that his claim will be moot." Alley wants to keep the case moving, arguing in his own brief that Anduril's motion is based on "promises and assurances about revenue without a scintilla of documentary support." Anduril also has separately moved to dismiss the amended complaint.

Court action: Arguments on the motion to stay will be heard remotely by Delaware Superior Court Judge Eric Davis. Certain Superior Court judges have been designated to hear breach of contract cases to help alleviate the Chancery Court's busy caseload.

Anduril Industries Hit With \$15 Million Lawsuit Over Drone Deal

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Securities Law Prof Blog

 lawprofessors.typepad.com/securities/2024/02/new-securities-law-articles-in-print-1.html

Friday, February 9, 2024

New Securities Law Articles in Print

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

Sandeep Singh Dhaliwal, *Investing in Abolition*, 112 Geo. L.J. 1 (2023).

Fernan Restrepo, *The Capital Market Effects of Introducing Private Rights of Action in Securities Regulation: Evidence from the United Kingdom*, 66 J.L. & Econ. 183 (2023).

California Company Releases Are Commercial, Not Protected Speech

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- Company statements on overdose treatment served core business
- Commercial exception to anti-SLAPP applies, appeals judge says

An addiction treatment company's press releases about an in-development opioid overdose treatment, which allegedly misrepresented the product and broke confidentiality agreements, don't qualify as protected speech, a California appeals court ruled.

BioCorRx Inc. isn't entitled to free speech protections for the releases because they count as commercial speech, wrote Associate Justice Eileen C. Moore in a published Friday opinion for California's Fourth District Court of Appeal.

Moore wrote that the releases are commercial speech because they were written directly about a core business operation to attract investors, not the general public. The appeals court overturns a trial court ruling that had granted BioCorRx's anti-SLAPP motion against VDM Biochemicals Inc.

BioCorRx had argued that its statements were protected by the anti-SLAPP statute, which lets defendants dismiss unfounded suits filed against them for exercising First Amendment rights.

But California's law has a commercial speech exception because the legislature found companies, which had argued their advertising was in the public interest, were engaging in "disturbing abuse" of anti-SLAPP, Moore wrote.

"For instance, if a company makes misrepresentations while promoting its securities sales and is sued, the resulting lawsuit 'does not involve a plaintiff attempting to limit a defendant's constitutionally protected free speech rights,'" Moore wrote. "Rather, it involves bad advertising."

BioCorRx had filed the anti-SLAPP motion to guard against a cross-complaint from VDM Biochemicals. BioCorRx first sued VDM Biochemicals in Orange County Superior Court after alleging VDM violated the terms of an agreement between the companies. VDM denied that it entered into a valid agreement with BioCorRx.

The appeals court sent the case back for proceedings in trial court, with the allegations about the press releases to be kept in VDM Biochemicals' cross-complaint. Each party will pay for their own appeals costs, the court said.

Vegh IP Legal and Amin Talati Wasserman LLP represent VDM Biochemicals. Samini Baric Katz LLP and Katz Law Office PC represent BioCorRx.

The case is BioCorRx Inc. v. VDM Biochemicals Inc. , Cal. Ct. App., 4th Dist., No. G061535, 2/9/24 .

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Federal Judge Approves More Than \$1 Billion DuPont PFAS-Related Settlement

 [law.com/2024/02/12/federal-judge-approves-1-1b-dupont-pfas-water-contamination-settlement](https://www.law.com/2024/02/12/federal-judge-approves-1-1b-dupont-pfas-water-contamination-settlement)

NEWS

Federal Judge Approves \$1.1B DuPont PFAS Water Contamination Settlement

"The court finds that the settlement agreement is reasonable," U.S. District Judge Richard Gergel said. "As discussed at length ... success against defendants, which 'are responsible for only three to seven percent of the MDL defendants' total alleged PFAS-related liabilities,' is not guaranteed and would only come, if ever, after years of protracted, expensive, complex litigation."

February 12, 2024 at 12:06 PM

Environmental Law

Colleen Murphy

A federal judge granted final approval of a \$1.19 billion settlement last week in 90 civil actions filed against DuPont and its related companies for claims that per- and polyfluoroalkyl substances had contaminated local groundwater and drinking water supplies in numerous communities across the United States.

A judicial panel on multidistrict litigation centralized the 90 civil actions from eight judicial districts in *City of Camden v. E.I. DuPont De Nemours* in the U.S. District Court for the District of South Carolina in December 2018. The claims were filed by cities across the U.S. against The Chemours Co.; The Chemours Co., FC; DuPont de Nemours; Corteva; and E.I. DuPont de Nemours and Co., now known as EIDP, according to the order and opinion filed Feb. 8.

The suits were filed over a type of PFAS that contaminated the cities' drinking water wells and supplies. The contaminant named in the suit is aqueous film-forming foams (AFFF), a fire suppressant used to extinguish flammable liquid fires such as fuel fires.

A class action, filed on July 12, 2023, on behalf of the named plaintiff, Camden, New Jersey, and other similarly situated public water systems, claimed one or more of several types of damage—the costs of testing and monitoring of the ongoing contamination of their drinking water wells and supplies, the costs of designing, constructing, installing and maintaining a filtration system to remove or reduce levels of PFAS detected in drinking water, the costs of operating that filtration system, and the costs of complying with any applicable regulations requiring additional measures, according to the opinion.

The defendants have agreed to pay the settlement in exchange for receiving releases, covenants not to sue, and dismissals from settlement class members which are specified in the settlement agreement, according to the opinion.

“The court finds that the settlement agreement is reasonable,” U.S. District Judge Richard Gergel said. “As discussed at length ... success against defendants, which ‘are responsible for only three to seven percent of the MDL defendants’ total alleged PFAS-related liabilities,’ is not guaranteed and would only come, if ever, after years of protracted, expensive, complex litigation.”

Gergel addressed the objections to the settlement agreement, which he said overlap substantially and were most “fully expressed” in the Washington state cities of Vancouver, DuPont and Tacoma, and the North Texas Municipal Water District’s filings. The judge noted that all of those entities are represented by the same firm—Marten Law.

An attorney from the firm, Jeff B. Kray, said he was not recommending that the court reject the settlement, but that there were “a few things that should be addressed.” Gergel took each of the objections in turn and dismissed them, most notably one which alleged that there was not enough time for interrelated systems to meaningfully evaluate the settlement agreement.

“The settlement agreement was filed on the docket on July 10, 2023 and the notice plan began on September 5, 2023,” Gergel said. “The opt-out deadline was December 4, 2023, giving parties 91 days between the beginning of the notice period and the opt-out deadline to decide whether to accept the settlement agreement.”

In evaluating the class counsel’s separate motion on attorney fees totaling 8% of the settlement, Gergel said that award would be addressed at a later date. However, the judge said that no party objected to class counsel’s request.

The AFFF MDL plaintiff’s executive committee co-lead counsel, Michael London of Douglas & London, Paul Napoli of Napoli Shkolnik, Joe Rice of Motley Rice, Scott Summy of Baron & Budd, and class counsel Elizabeth Fegan of Fegan Scott, issued a statement on the settlement.

“The DuPont final approval order signifies a critical step towards accountability and addressing PFAS-related challenges for water service providers and the communities they serve,” the statement said. “We look forward to the next steps in the claims process and continued collaboration with the remaining defendants to expedite relief in this matter.”

Sundee Addy, Amy Rachel McCalib and Joseph C. Smith Jr. of Bartlit Beck represented Corteva and DuPont De Nemours Inc. Joshua P. Ackerman of Bartlit Beck represented E.I. du Pont de Nemours. Molly Hood Craig of the Hood Law Firm served as counsel to DuPont De Nemours, E.I. du Pont de Nemours & Co., The Chemours Co., The Chemours Co. FC, and Corteva.

David R. Erickson of Shook, Hardy and Bacon and James B. Hood of the Hood Law Firm served as counsel to E.I. du Pont de Nemours & Co., The Chemours Co., and The Chemours Co., FC. Kimbrilee M. Weber, Margaret Raymond-Flood and Martha N. Donovan of Norris McLaughlin and David B. Dwerlkotte of Shook Hardy represented The Chemours Co. and The Chemours Co., FC.

Defense counsel did not immediately respond to requests for comment.

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January 31, 2024

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

By Amanda Bronstad

5 minute read

Google Hit With Class Action Over Pixel Pro 6 Smartphone Overheating Defect

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Google was hit with a consumer class action lawsuit this week, claiming it falsely advertised its Google Pixel Pro 6 smartphone as a functional device, when it was actually prone to overheating and an inability to use, according to a California woman's allegations.

This suit was surfaced by Law.com Radar, ALM's source for immediate alerting on just filed cases in state and federal courts. Law.com Radar now offers state court coverage nationwide. Sign up today and be first to know about new suits in your region, practice area or client sector.

The firms, Kazerouni Law Group and Assassi & Cruz Law Firm, filed the complaint Feb. 7 in Los Angeles County Superior Court on behalf of Jennifer Hyatt and others similarly situated, seeking damages against Google for alleged violations of California's consumer, false advertising, unfair competition, as well as the Song-Beverly Consumer Warranty Act, among others.

Hyatt claims she purchased the Google Pixel Pro 6 smartphone in December 2021 for \$899.99 based on advertisements of the phone's functions and quality. Immediately after purchasing the device, Hyatt claims the phone was prone to overheating to the point that she was unable to hold it in her bare hands. Due to this defect, the phone would shut down or stop working. While the plaintiff requested a replacement Pixel Pro 6 phone, the new phone had the same issues, the complaint said.

Hyatt requested several replacement phones over the next several months, all which had the same overheating defect, she alleged.

Hyatt claims Google knew it was providing a product that was "defective" and "prone to overheating and unusable which renders the Product's functionally useless and unreliable by inhibiting the Product's most basic functions; such as making calls and keeping the device powered on," the complaint said.

"Google is well aware of the Product's Defect; Google has included a section on its website entitled 'Help keep your Pixel phone from feeling too warm or hot,'" the complaint said.

"Google has failed to initiate a campaign informing consumers of the Defect and/or recalling the Product and removing it from the market. Plaintiff valued that the Product was to be a functioning phone. Had Plaintiff been aware that the Product overheated and did not actually function, she would not have purchased the Product."

While Hyatt's allegations are specifically targeted against the Pixel Pro 6, her complaint seeks relief on behalf of consumers who purchased any Google phone that also overheats and is unusable. It is unknown how many members would be part of the class.

Plaintiff's counsel, Abbas Kazerounian, a founding partner at Kazerouni Law Group in Costa Mesa, California, declined to comment.

Counsel for Google had not yet entered an appearance. A message seeking comment from its corporate office was not immediately returned.

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Meta Can't Dodge Mental Health Patients' Pixel Privacy Claims

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- Lawsuit alleges online tracking of Facebook non-users
- Judge allows California, common law claims to stand

Meta Platforms Inc. lost its bid for an early escape from a proposed class action accusing it of tracking mental health patients online even though they didn't have Facebook accounts.

Two anonymous plaintiffs who said they were unaware Meta was collecting their sensitive health data from digital therapy provider Cerebral sufficiently alleged violations of California statutes and common law to proceed, Judge William H. Orrick said Monday in denying the company's dismissal motion in the US District Court for the Northern District of California.

Online tracking class action filings have exploded in volume in courts across the country in recent years, with a particular focus on Meta's pixel. Orrick, who has presided over pixel tracking technology cases, cited several of his previous rulings including an order allowing a consolidated lawsuit alleging Meta illegally incentivized health-care providers to install the pixel to move forward.

The patients sued the company in September 2023 over their data being shared through its embedded Meta Pixel tracking technology. They filed suit after Cerebral alerted the US Department of Health and Human Services earlier that year that it had been inadvertently sharing information covered by federal health privacy law via the pixel.

Meta's motion argued that the suit's privacy claims failed because the plaintiffs didn't allege which specific categories of sensitive information it collected. Orrick, however, found that even "otherwise somewhat innocuous information like name and zip code" allegedly collected was sensitive in the context of seeking mental health services.

The judge also disagreed with Meta's contention that it didn't violate California's Unfair Competition Law, finding the allegations that it fraudulently failed to disclose its pixel collection practices plausible, "especially considering that plaintiffs are not Facebook users and would have no reason to review Meta's terms and conditions."

It's an open question as to how far the claim against Meta under California's Consumers Legal Remedies Act will stretch, considering the plaintiffs didn't knowingly have a consumer relationship with Meta, Orrick said, but he allowed it to stand for now.

“Plaintiffs have plausibly alleged lost money or property and CLRA damage to state claims against Meta based on their payments to Cerebral and Cerebral paying Meta for its services,” the order said.

The judge also ruled in favor of plaintiffs’ conversion claim for damages, finding internet tracking could deprive individuals control over their data. But his order noted that their dissemination of personal data could undercut “their ability to show ownership” on a motion to summary judgment.

The case is E.H. v. Meta Platforms Inc. , N.D. Cal., No. 23-cv-04784, motion to dismiss denied 2/12/24 .

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US judge blocks Ohio law restricting children's use of social media

 [reuters.com/legal/us-judge-blocks-ohio-law-restricting-childrens-use-social-media-2024-02-12](https://www.reuters.com/legal/us-judge-blocks-ohio-law-restricting-childrens-use-social-media-2024-02-12)

Nate Raymond

[1/3]Children playground miniatures are seen in front of displayed Meta logo in this illustration taken April 4, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

Feb 12 (Reuters) - A federal judge on Monday prevented Ohio from implementing a new law that requires social media companies, including Meta Platform's (META.O) , opens new tab Instagram and ByteDance's TikTok, to obtain parental consent before allowing children under 16 to use their platforms.

Chief U.S. District Judge Algenon Marbley in Columbia agreed , opens new tab with the tech industry trade group NetChoice that the law violated minors' free speech rights under the U.S. Constitution's First Amendment.

It marked the latest court decision blocking a state's law designed to protect young people online as federal and state lawmakers look for ways to address rising concerns about the dangers posed by social media to the mental health of children.

Ohio's Republican attorney general, Dave Yost, had argued that the state's Social Media Parental Notification Act, which the legislature passed in July, was a valid measure aimed at protecting minors from damage to their mental health and sexual predators.

But Marbley agreed with NetChoice, whose members include TikTok, Elon Musk's X, Alphabet's (GOOGL.O) , opens new tab YouTube, and Meta's Facebook and Instagram, that the law was "not narrowly tailored to those ends."

"Foreclosing minors under sixteen from accessing all content on websites that the Act purports to cover, absent affirmative parental consent, is a breathtakingly blunt instrument for reducing social media's harm to children," he wrote.

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Monday's ruling put Ohio's law on hold indefinitely while the litigation continues after the judge last month issued an order that temporarily blocked it from taking effect on Jan. 15 as scheduled.

Ohio Governor Mike DeWine, a Republican, called the ruling disappointing. He cited "overwhelming evidence that social media has a negative effect on the mental health of minors, including increases in depression and suicide-related behavior."

"Since the federal courts are interpreting federal constitutional law as preventing the state of Ohio from protecting Ohio's children, then Congress needs to act to protect our country's children," he said in a statement.

NetChoice last year won court rulings blocking a similar social media parental consent law in Arkansas and a children's digital privacy law in California. It is challenging restrictions adopted in Utah as well.

Reporting by Nate Raymond in Boston; Editing by Alexia Garamfalvi and Jonathan Oatis

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Lead Paint Rulings for Paintmakers Affirmed, 3 Cases Remanded

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A federal appeals court affirmed summary judgment for E.I. du Pont de Nemours and Co., Sherwin-Williams Co., and Armstrong Containers Inc. for successive waves of plaintiffs who accused the paintmakers of exposing them to lead paint.

Approximately 170 plaintiffs brought claims and joined in the same complaint together before the same court and judge, and with the same counsel. A handful of plaintiffs who filed their own cases separately, can proceed with their cases alleging the paintmakers failed to warn them of lead dust, the US Court of Appeals for the Seventh Circuit said.

The 170 plaintiffs all alleged injuries due to exposure to white lead carbonate during their childhood in the 1990s and 2000s. Their cases were never formally consolidated, but proceeded in a piecemeal fashion where several “bellwether” trials of representative cases were conducted. A jury found Dupont, Sherwin-Williams, and Armstrong liable in the first wave of cases and awarded \$2 million in damages to each of the plaintiffs in those suits, which was overturned on appeal. The defendants won summary judgment on negligent failure-to-warn claims during Wave 2, but were denied judgment on that group’s strict liability claims. Following an appeal over the first wave, the defendants also won summary judgment on the strict liability claims.

The defendants argued that a third group of plaintiffs who didn’t participate in the second wave should have the court’s duty-to-warn determination applied to them since they came from the same case as that wave. The district court said binding this group to the Wave 2 rulings was fair because the rulings were on a common question and allowing Group 3 to relitigate it would undermine the efficiency of the joinder.

The fourth group of plaintiffs were from cases who had not been represented in the litigation yet, and the defendants argued their claims were precluded because the issues they presented had been fully litigated in earlier waves.

The Seventh Circuit rejected Wave 2’s argument that the district court erred in rejecting their motion to reconsider in light of new evidence regarding lead dust.

“The lead dust evidence undeniably falls into the category of preexisting-but-newly-desirable evidence,” Judge Amy J. St. Eve said. “It is therefore inert on reconsideration.”

The Wave 2 rulings were also properly applied to Group 3 because they chose to bring their claims within the Wave 2 cases.

“The plaintiffs may not seek relief from the consequences of streamlined litigation that they themselves initiated, promoted, and defended,” the appeals court said. St. Eve noted that the impact of affirming the summary judgment against Group 3 “is not lost on us” since doing so leaves only three plaintiffs.

But that result is “unavoidable” because, in making the choice to proceed together, the Wave 2 and Group 3 plaintiffs “entered an all-for-one, one-for-all arrangement on common issues, and at all times remained tethered under their jointly filed complaints.”

The district court wrongly denied the Group 4 plaintiffs their opportunity to litigate their duty-to-warn claims under the lead dust theory, the appeals court said. This group wasn’t part of an earlier wave of litigation and their claims weren’t precluded.

“There is no evidence the Group 4 plaintiffs explicitly agreed to be bound by the district court’s duty-to warn determination in the Wave 2 cases,” St. Eve wrote. The defendants argued that the plaintiffs acknowledged threshold legal issues applicable to all cases should be dealt with only once and the duty-to-warn question was a common question of law. The Seventh Circuit rejected that argument.

“It would be one thing to hold Group 4 to the court’s determination of how that duty is defined in negligence cases,” St. Eve wrote. “It is entirely another to deny them the chance to present their own evidence showing that such a duty existed.”

St. Eve noted that “it is important that the efficient pursuit of finality not lose sight of the day-in-court guarantee and the due process protections available to all parties.”

Judges Diane P. Wood and Michael Y. Scudder Jr. joined the opinion.

The plaintiffs are represented by Motley Rice LLC, Warshafsky Rotter Tarnoff Gesler Reinhardt & Bloch, Wallace Miller, and Law Office of Peter Earle LLC.

The defendants are represented by Jones Day, Quarles & Brady LLP, Morris Manning & Martin LLP, and Bascom Budish & Ceman SC.

The case is Cannon v. Armstrong Containers Inc. , 7th Cir., No. 22-02636, 2/9/24 .

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Litigation funder Burford loses bid to take over Sysco antitrust cases

 [reuters.com/legal/legalindustry/litigation-funder-burford-loses-bid-take-over-sysco-antitrust-cases-2024-02-09](https://www.reuters.com/legal/legalindustry/litigation-funder-burford-loses-bid-take-over-sysco-antitrust-cases-2024-02-09)

Mike Scarcella

A Sysco sign is shown outside one of their distribution centers in Poway, California, U.S. February 6, 2017. REUTERS/Mike Blake Purchase Licensing Rights , opens new tab

Feb 9 (Reuters) - Litigation funder Burford Capital (BURF.L) , opens new tab cannot be named as the plaintiff in antitrust lawsuits brought by its financing client Sysco (SYY.N) , opens new tab, a U.S judge ruled on Friday, in a decision that questioned Burford's motives and authority to steer the food distributor's cases.

Minnesota-based U.S. Magistrate Judge John Docherty in a 29-page ruling , opens new tab said Burford had no interest beyond a financial stake in Sysco's lawsuits, which accuse major beef and pork suppliers of price-fixing, and could not be a party.

Docherty said Burford's bid to take Sysco's place as the plaintiff, which Sysco supported, went against public policy because such arrangements could discourage settlements.

Houston-based Sysco did not immediately respond to a request for comment.

Burford said in a statement that it would contest the order, which it called "illogical" since Burford last year purchased Sysco's antitrust claims.

The ruling was the latest development in the unusual clash involving onetime collaborators Sysco and Burford, one of the country's biggest financiers of litigation. Burford and its rivals invest in cases with the intent to take a chunk of an eventual settlement or judgment.

Burford had spent \$140 million since 2019 supporting Sysco's antitrust cases, according to court documents.

Burford last year accused Sysco of moving to settle claims for insufficiently high amounts. The financier won an arbitration order in New York in March barring Sysco from finalizing any deals.

Docherty's order came after months of legal wrangling between Sysco, Burford and major producers of beef and pork over whether and how a litigation funder can override decisions of a client that wants to settle claims.

The meat producers fought Sysco's bid to hand over its claims and let Burford affiliate Carina Ventures be named as the plaintiff.

They said substituting Carina for Sysco could "meaningfully frustrate any future attempts for settlement discussions."

Docherty in his order said “the litigation burden caused by Burford’s efforts to maximize return on investment has been enormous.”

Burford’s private financial interests, Docherty wrote, “cannot overcome the strong public policy in favor of settling lawsuits or the public policy in favor of allowing litigants to control their own cases.”

The case drew attention last year from the U.S. Chamber of Commerce, which has warned about consequences of third-party money supporting legal cases.

The Chamber had urged a judge to "allow Sysco to make its own litigation decisions."

The cases are In re: Pork Industry Litigation, U.S. District Court, District of Minnesota, No. 0:18-cv-01776-JRT-JF, and In re: Cattle and Beef Antitrust Litigation, same court, No. 0:22-md-03031-JRT-JFD.

Read more:

Burford litigation funder's Carina Ventures sues US turkey suppliers in antitrust case
Sysco's plan to cede antitrust claims to Burford entity draws opposition
Litigation funder Burford slams Sysco, as U.S. Chamber steps into court fight
Reporting by Mike Scarcella

US court approves \$104 mln in college admissions antitrust settlements

 [reuters.com/legal/litigation/us-court-approves-104-mln-college-admissions-antitrust-settlements-2024-02-12](https://www.reuters.com/legal/litigation/us-court-approves-104-mln-college-admissions-antitrust-settlements-2024-02-12)

Mike Scarcella

The Van Wickles stand at the edge of the main campus of Brown University in Providence, Rhode Island, U.S., August 16, 2022. REUTERS/Brian Snyder Purchase Licensing Rights , opens new tab

Feb 12 (Reuters) - A U.S. judge on Monday preliminarily approved more than \$104 million in settlements between major U.S. universities and a proposed class of students accusing the schools of favoring wealthy applicants for admission.

U.S. District Judge Matthew Kennelly in Chicago at a hearing said the students' previously disclosed agreements with Brown, Columbia, Yale and other schools were reasonable and can move forward.

The students' case is continuing against 10 other schools, including Massachusetts Institute of Technology, Dartmouth College and Georgetown University.

The lawsuit was brought in 2022, seeking billions of dollars in damages on behalf of a proposed class of hundreds of thousands of current and former students. It accused the schools of unlawfully considering applicants' financial backgrounds in admission decisions.

The lawsuit said the schools' admissions offices were not "need blind" as they had maintained.

Yale and Emory said last month they would each pay \$18.5 million to settle. Brown agreed to pay \$19.5 million, and Columbia and Duke both said they would pay \$24 million.

The schools have denied any liability as part of the settlements.

Average payouts to members of the class are expected to be \$750, according to a court filing.

The terms of an additional proposed settlement with Vanderbilt University have not yet been released. A representative from the school on Monday did not immediately respond to a request for comment.

A lawyer for the students, Berger Montague chairman Eric Cramer, said on Monday that the plaintiffs are negotiating with some schools on settlements while preparing for trial against others.

Cramer said it was in the students' best interest "to resolve the case at the right amount with those schools that are interested in doing so and to proceed to litigate and then ultimately go to trial against those schools that do not want to settle at a reasonable amount."

The plaintiffs have fought for months over access to student records and deposing senior leaders at major colleges.

The case is *Henry v. Brown University*, U.S. District Court for the Northern District of Illinois, No. 1:22-cv-00125.

Get the latest legal news of the day delivered straight to your inbox with The Afternoon Docket [↗](#), opens new tab.

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Brown, Yale, Columbia among latest to settle financial-aid lawsuit
Antitrust case against universities draws heavyweight defenders
U.S. college grads sue Yale, Columbia, other schools over financial aid
Reporting by Mike Scarcella

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SmileDirectClub Investor Won't Face Class in False Ad Lawsuit

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XABFNR2K000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XABFNR2K000000)

Dental care providers lost their pitch for class certification in a suit claiming that they were injured by SmileDirectClub LLC's allegedly false advertising.

The proposed class didn't satisfy the four requirements for class certification—numerosity, commonality, typicality, and adequacy of representation—and they couldn't show that common questions predominated over individual ones, the US District Court for the Middle District of Tennessee said Monday.

Two groups—individual consumers, and dentists and orthodontists—filed the case against SmileDirectClub and its largest shareholder, Camelot Venture Group, in 2019. The plaintiffs alleged that the firm falsely led consumers to believe that its teledentistry alignment services were superior to those offered by individual dentists and orthodontists.

The case was stayed with respect to SmileDirectClub in October 2023 after the company filed for bankruptcy, but proceedings continued against Camelot. The consumer claims were submitted to arbitration, but the dental professionals' claims based on the Lanham Act's false advertising provision are still proceeding.

The professionals sought class certification, arguing that they'd alleged claims that were common to and typical of a large group of dentists and orthodontists and, therefore, could be considered on a group-wide basis.

To succeed on the Lanham Act claim however, the professionals had to show that they each suffered economic or reputational injuries directly as a result of the defendant's allegedly deceptive statements, the court said. That is, each plaintiff had to show that the defendant's comments had an actual effect on consumer decision-making that affected their individual practices, rather than the profession as a whole, the court said.

It might be possible for a court to decide if the content of any SmileDirectClub statement or omission was false or misleading on a classwide basis, the court said. But whether and to what extent each individual plaintiff was actually injured by one or more of those statements depends on plaintiff-specific factors, it said.

Drawing a line between the statements and a professional's actual economic injury "is inherently difficult to do" and "would be particularly difficult to do on a class-wide basis," Judge Aleta A. Trauger said. After examining expert testimony that the plaintiffs claimed

simplified the injury and damages issues, Trauger said these issues couldn't be streamlined and that individual questions would predominate over shared ones, precluding class treatment.

Riley & Jacobson PLC and Benesch, Friedlander, Coplan & Aronoff LLP represent Camelot and SmileDirect Club. Spencer Fane LLP, Spotswood Sansom & Sansbury LLC, and Law Offices of Richard L. Stone PLLC represent the dental professionals.

The case is Ciccio v. SmileDirectClub LLC , M.D. Tenn., No. 19-cv-845, 2/12/24 .

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Sun-Maid Accused of Falsely Advertising Yogurt Raisins' Candy-Coated Topping

 [law.com/nationallawjournal/2024/02/12/sun-maids-yogurt-covered-raisin-accused-of-falsely-advertising-product-as-healthy-snack](https://www.law.com/nationallawjournal/2024/02/12/sun-maids-yogurt-covered-raisin-accused-of-falsely-advertising-product-as-healthy-snack)

Sun-Maid Growers of California is facing a false and deceptive advertising and labeling class action suit over its “yogurt-covered” raisin products that are coated in a candy shell.

This suit was surfaced by Law.com Radar, ALM’s source for immediate alerting on just filed cases in state and federal courts. Law.com Radar now offers state court coverage nationwide. Sign up today and be first to know about new suits in your region, practice area or client sector.

Attorneys with The Wand Law Firm in Long Beach, California, and Faruqi & Faruqi in Los Angeles, filed the lawsuit in San Diego Superior Court on behalf of Margaret McGarity and others similarly situated based on Sun-Maid’s intentional misrepresentation of its product being covered in yogurt, widely considered as a healthy food. McGarity filed the six-action complaint Feb. 9 against Sun-Maid and 10 unidentified individuals for violations of California Consumers Legal Remedies and the state’s false advertising law and unfair competition law, breach of warranty and implied warranty violations, and intentional misrepresentation.

“They are, in fact, raisins coated with a flavored candy shell,” the complaint said. “Therefore, they are more akin to candies such as Raisinets or Tootsie Rolls than they are to the healthy snack that Sun-Maid markets them as.”

McGarity purchased a six-box package of Sun-Maid’s Vanilla Yogurt Covered Raisins at Walmart for between \$2 to \$4, believing that they were in fact covered with yogurt. However, if she knew the coating was a “highly-processed candy coating,” that was “merely vanilla yogurt-flavored,” she would not have purchased the item, or she would have paid less for it, the complaint said.

The coating’s ingredients “does not offer any of the expected nutritional benefits of bona fide yogurt,” the complaint said.

“Rather, yogurt powder is a preservative that is used to extend shelf life in food such as condiments, dips, and spreads. In essence, it is a flavor supplement and emulsifier, not yogurt. Yogurt powder is also highly processed and heat-treated. The yogurt powder does not contain any viable cultures, as the heat in the drying process kills these helpful bacteria,” the complaint said, with a statement from the National Yogurt Association backing that because “heat-treated yogurts do not contain [live and active cultures] or provide the

functional benefits of [live and active cultures,] heat-treated yogurt products are inherently misleading to consumers and should be labeled with some other descriptive or fanciful name.’”

Sun-Maid’s coating is made from sugar, confectioner’s glaze, and it also contains hydrogenated palm kernel oil used to preserve consistency, soy lecithin as an emulsifier, and titanium dioxide to make the coating white—but is also on the banned list of substances under California’s Proposition 65.

McGarity is seeking certification of this case as a class action, and the appointment of her attorneys as class counsel. She is also requesting restitution and/or restitutionary disgorgement of all profits that Sun-Maid obtained from the plaintiff and proposed classes, along with damages.

Messages seeking comment were not immediately returned from plaintiff’s counsel, Aubry Wand of the Wand Law Firm, nor Lisa Omoto of Faruqi & Faruqi.

An attorney has yet to enter an appearance on behalf of Sun-Maid. A message seeking comment from the company was not immediately returned.

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L'Occitane sues US law firm over wiretapping law 'shakedown'

[reuters.com/legal/legalindustry/loccitane-sues-us-law-firm-over-wiretapping-law-shakedown-2024-02-09](https://www.reuters.com/legal/legalindustry/loccitane-sues-us-law-firm-over-wiretapping-law-shakedown-2024-02-09)

David Thomas

L'Occitane en Provence's logo seen at a store in Paris, France, August 10, 2023.

REUTERS/Stephanie Lecocq/File Photo Purchase Licensing Rights , opens new tab

Feb 9 (Reuters) - French skincare company L'Occitane is taking aim at a U.S. law firm's tactics in a new California federal lawsuit , opens new tab that seeks to undo portions of a state anti-wiretapping law.

The company on Thursday sued class action plaintiffs' law firm Zimmerman Reed for allegedly "manufacturing" mass arbitration claims by having people visit the L'Occitane website and claim their privacy was violated by third-party tracking software.

L'Occitane and its lawyers at ArentFox Schiff are seeking an injunction against Zimmerman Reed and an order that would declare parts of the California Invasion of Privacy Act unconstitutional. The act prohibits covertly eavesdropping or recording telephone conversations and includes a private right of action.

Zimmerman Reed is pursuing "an unlawful conspiracy to continue manufacturing frivolous arbitration claims," the lawsuit said.

Zimmerman Reed's managing partners -- June Pineda Hoidal, Caleb Marker and J. Gordon Rudd, Jr. -- did not immediately respond to a request for comment. The firm has about 27 lawyers and offices in Minneapolis, Los Angeles and Phoenix, according to its website.

The lawsuit said Zimmerman Reed contacted L'Occitane in September, alleging that it had claims under CIPA on behalf of 2,250 clients and wanted to discuss an "informal resolution." L'Occitane rebuffed the firm a month later and said the firm and its clients were no longer authorized to access its websites.

The law firm told L'Occitane it represented 3,144 people and had filed more than 100 arbitration claims with the American Arbitration Association, the lawsuit said. L'Occitane said it has received letters from both Zimmerman Reed and AAA to pay more than \$45,000 in total for fees relating to the arbitration claims.

The lawsuit said website operators have been flooded with CIPA claims that they are "wiretapping" their own websites by using third-party tracking software, like Google Analytics, following a 2022 9th Circuit U.S. Court of Appeals ruling.

"Under this view, because website operators like L'Occitane did not build their own Internet or develop other features used on modern websites, their hiring of third parties to provide these services gives rise to CIPA liability," L'Occitane said.

The skincare company said Zimmerman Reed's own website also uses third-party technologies.

The complaint asked the court to block Zimmerman Reed's actions "and put an end to these shakedown suits under this facially unconstitutional state penal law once and for all."

The 9th Circuit's 2022 ruling held that CIPA "applies to Internet communications," and anyone who accesses such communication "without the consent of all parties" can be held liable.

Plaintiffs' lawyers have also applied the ruling to lawsuits over so-called "chatbots" on websites, arguing to Reuters that vast amounts of private data are under threat of exploitation.

The case is L'Occitane, Inc. v. Zimmerman Reed LLP, et al., U.S. District Court for the Central District of California, 2:24-cv-01103.

Reporting by David Thomas

David Thomas

Thomson Reuters

David Thomas reports on the business of law, including law firm strategy, hiring, mergers and litigation. He is based out of Chicago. He can be reached at d.thomas@thomsonreuters.com and on Twitter [@DaveThomas5150](https://twitter.com/DaveThomas5150).

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Wisner Baum Roiled After Roundup MDL Leadership Firms Seek 81% of Fees

[law.com/nationallawjournal/2024/02/12/wisner-baum-roiled-after-roundup-mdl-leadership-firms-seek-81-of-fees](https://www.law.com/nationallawjournal/2024/02/12/wisner-baum-roiled-after-roundup-mdl-leadership-firms-seek-81-of-fees)

(L to R) Trial team Jennifer Moore, Moore Law Group and Aimee Wagstaff, Andrus Wagstaff after their \$80 Million verdict against Monsanto. (Photo: Jason Doiy/ALM)

NEWS

At least five plaintiffs' firms, including Wisner Baum, which won verdicts of \$289 million and \$2 billion in 2018 and 2019, are objecting to the allocation of common benefit fees in the Roundup multidistrict litigation.

February 12, 2024 at 06:19 PM

Cases and Courts



Amanda Bronstad [↗](#)
staff reporter

The original version of this story was published on The Recorder

What You Need to Know

- In 2021, U.S. District Judge Vince Chhabria substantially reduced the scope of the common benefit fees, which he found, at an estimated \$800 million allowed each co-lead plaintiffs' firm to 'buy their own island'
- The three co-lead plaintiffs firms -- Wagstaff Law Firm, Weitz & Luxenberg, and The Miller Firm -- allocated 81% of the estimated \$20.23 million in common benefit fees to themselves
- In addition to Wisner Baum, Andrus Anderson and Moore Law Group have objected to their share of the fees

Lawyers appointed to lead the Roundup multidistrict litigation have asked for more than 80% of the common benefit fees, drawing numerous objections from other plaintiffs' firms.

In 2021, U.S. District Judge Vince Chhabria, overseeing the Roundup multidistrict litigation in the Northern District of California, substantially reduced the scope of the common benefit fees, which he found, at an estimated \$800 million, were likely enough for the co-lead plaintiffs' firms to "each afford to buy their own island."

Last month, those same firms estimated there would be only \$20.23 million in common benefit fees, 81% of which they earmarked for themselves. The rest, they said, would go to four other firms.

On Feb. 9, at least five plaintiff's firms objected to the fee allocation, including San Francisco's Andrus Anderson, whose partner Lori Andrus served as co-liaison counsel in the Roundup multidistrict litigation, and Los Angeles-based Wisner Baum, where R. Brent Wisner won the first verdict of \$289 million in 2018 and a \$2 billion award in 2019.

"WB does not understand or appreciate how the MDL co-leads decided, without consultation, to divvy up the CBF [common benefit funds]—nor does WB understand how its contribution could be so easily discounted in light of WB's role in making this MDL a success," wrote Wisner, whose firm was allocated 10%.

Wisner did not respond to a request for comment.

Another objecting firm, Moore Law Group, based in Louisville, Kentucky, was co-lead counsel with Aimee Wagstaff, of Denver-based Wagstaff Law Firm, in the first bellwether trial over Roundup that ended in an \$80 million verdict in 2019 and was appealed all the way to the U.S. Supreme Court. Partner Jennifer Moore argued that 6% was not enough given her work in that case, which was the first Roundup trial in the multidistrict litigation, or the nearly \$3.4 million her firm contributed to the common benefit fund.

Wagstaff is co-lead counsel with Robin Greenwald, of New York's Weitz & Luxenberg, and David Dickens, who took over following partner Michael Miller's 2021 death, at the Miller Firm in Orange, Virginia, in the Roundup multidistrict litigation. In their fee allocation, they noted that they were among the few firms willing to invest in the Roundup litigation from the start. Their briefs served as a "template" for Monsanto's challenges involving experts and federal preemption, they wrote, and they provided a "trial package" for lawyers across the country.

"The opportunity costs and time limitations imposed by this MDL were onerous and potentially devastating to firms that shouldered the burden of litigation," they wrote in their Jan. 26 allocation filing. "The time and effort necessary to develop this litigation required

counsel to forego their involvement in other cases and potential fees that could be achieved in those litigations.”

Wagstaff, whose firm was allocated 30%, declined to comment to Law.com. Lead counsel's response to the objections is due this Friday.

‘Looking Out for Their Own Interests’

Common benefit fees are used in multidistrict litigation to compensate lead counsel for costs and fees associated with discovery, trials and settlement while preventing “free riders,” or lawyers who collect fees on cases they generate but don’t necessarily litigate.

In the past decade, lawyers in state courts, who often claim to have done work in their own cases, have challenged common benefit fees, which are funded through assessments against their settlements.

In the Roundup multidistrict litigation, the original proposed common benefit fees drew numerous objectors, many calling the request a “money grab” by lead counsel who already made \$2 billion in attorney fees from contingency fee contracts associated with settlements of their own cases.

Lead counsel countered that Bayer, which owns Monsanto, would not have entered into settlements but for their work, which included obtaining the first three Roundup verdicts. Bayer announced in 2020 that it planned to settle about 125,000 Roundup claims for an estimated \$10.9 billion. But lawyers, including lead counsel, conducted their own negotiations, and many cases remain unsettled.

Chhabria’s 2021 order, which generally chastised common benefit fees as “totally out of control,” sent shockwaves through the mass tort bar, though the U.S. Court of Appeals for the Ninth Circuit said it didn’t have jurisdiction to take up lead counsel’s appeal of his ruling.

In his order, Chhabria excluded certain legal work, including state court cases, from the common benefit fees.

Wisner Baum and its predecessor, Baum Hedlund Aristei & Goldman, focused heavily on the Roundup cases in California state courts, including the two successful verdicts, but that’s not the reason that lead counsel, in their allocation filing, reduced the firm’s potential share. Instead, they said its lawyers did not submit hours for common benefit work.

“The failure to submit time records could in and of itself preclude recovery by WB,” they wrote, although its contribution to the Roundup litigation was “undeniable.” They also called Wisner’s estimated billable hours “dubious” given that he would have had to work 12 hours a day, five days a week for 50 weeks of the year on the Roundup multidistrict litigation,



R. Brent Wisner, with Wisner Baum

In his objection, Wisner estimated that lawyers at his firm worked 28,625 hours “at breakneck pace on all facets” of the Roundup multidistrict litigation. He worked nearly every weekend, often more than 14 hours a day, and in the early hours of the night.

“MDL co-leads conceded that there is no legal prohibition on awarding common benefit fees when an applicant did not submit contemporaneous hours,” he wrote. “Surely, it can serve as a basis for denying compensation, but only when there is no basis for assessing the applicant’s contribution to the common benefit.”

Andrus, in her objection, said her firm should receive closer to \$550,000, not lead counsel’s allocation of about \$200,000, or 1% of the common benefit fees.

Another objection came from David Diamond, of Diamond Law in Tucson, Arizona, who insisted that he did not rely on lead counsel’s work in his Roundup cases. In fact, according to his objection, joined by David Bricker, of Thornton Law Firm in Beverly Hills, California, lead counsel provided scant leadership at all in the Roundup litigation.

“Leadership counsel, like in their prior common benefit pleadings, overreaches in its proposed allocation,” he wrote. “Doing what leadership counsel requests rewards leadership counsel for not reaching a global settlement, cutting a deal for their own clients, looking out for their own interests, and not helping other litigants.”

In a footnote, he referenced a May 23 defense verdict last year in a Roundup trial in Missouri’s St. Louis County Circuit Court, where Wagstaff was lead counsel. More recent plaintiffs’ verdicts, which include awards of \$175 million, \$332 million, \$1.56 billion and \$2.25 billion, were due to “non-leadership work, fresh ideas, and new strategies.”

He suggested returning money to lawyers like himself, who took their own risks.

“Objector, like other non-leadership counsel that worked up their cases and helped each other, was not a ‘free rider’ in this MDL,” he wrote.

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Expert Perspectives on Biggest Court Cases

 [law.com/litigationdaily/2024/02/12/litigation-leaders-brendan-johnson-of-robins-kaplan-on-driving-a-case-with-a-jury-in-mind](https://www.law.com/litigationdaily/2024/02/12/litigation-leaders-brendan-johnson-of-robins-kaplan-on-driving-a-case-with-a-jury-in-mind)

By Ross Todd

Brendan V. Johnson of Robins Kaplan. Courtesy photo

Q&A

Litigation Leaders: Brendan Johnson of Robins Kaplan on Driving a Case With a Jury in Mind

“Attorneys who have experience and confidence in their ability to try cases are more comfortable being creative and know better what issues will actually matter to a jury.”

February 12, 2024 at 07:30 AM

Ross Todd
Editor/columnist

Welcome to another edition of our Litigation Leaders series, featuring the litigation practice leaders at some of the biggest and most innovative law firms in the country.

*Meet **Brendan Johnson**, the chair of the national business litigation group at **Robins Kaplan**. Johnson, who served as the U.S. Attorney for the District of South Dakota prior to joining the firm in 2015, has offices in Sioux Falls and Minneapolis. He is also co-chair of the firm’s government and internal investigations group.*

Lit Daily: Tell us a little about yourself—perhaps even a thing or two your partners would be surprised to learn about you.

Brendan Johnson: My two oldest children were adopted from Ethiopia. My daughter was 10 and my son was eight when they arrived in the United States. About six months after they arrived and learned basic English, my daughter informed me that the two of them were NOT friends at the orphanage and were pretty upset when they discovered that they would become brother and sister. Fortunately, now everyone gets along, but we had several bloody noses in the house for the first few months.

You have offices in Minneapolis and Sioux Falls. How do you split your time between the two? And how much of your time is spent on the road for client matters?

South Dakota will always be home but the reality of being a trial lawyer in a large law firm is that I spend more nights traveling than I do at home. My youngest son will be attending college in Minnesota next year, so my wife and I are in the market for a Minneapolis condo. Until then, most weeks I leave Sioux Falls early Tuesday morning and stay in Minneapolis until Friday. On average, approximately half my time is spent on the road for client matters.

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You were previously U.S. Attorney for the District of South Dakota. What skills did you pick up in that role that are useful as chair of the firm's national litigation group? And are there challenges that are unique to this new role at the firm—ones that you might not have faced as U.S. Attorney?

You have to be intentional about setting priorities. If everything is a priority, then nothing is a priority. Regardless of whether you are in private practice or working for the Department of Justice, there are always limited resources, and it is important to focus on areas where you are going to make the most significant impact. The challenges that are unique to my new role involve working with our attorneys across the country to identify significant contingency cases that we anticipate will be profitable for the firm.

How big is the business litigation group you lead at Robins Kaplan and how does it fit into the firm's overall litigation structure?

The national business litigation group at Robins Kaplan covers a lot of ground within the firm. There are more than 100 attorneys in the group, and we have a history of driving cases that are highly profitable for the firm. We have a lot of different groups in the firm, ranging from antitrust and trade regulation to American Indian law and policy.

Where are most of your litigators concentrated geographically?

Minneapolis is our largest office, but we continue to grow on both the East and West Coasts.

What do you see as hallmarks of Robins Kaplan litigators? What makes you different?

What makes our law firm unique is our deep bench of experienced trial lawyers. Of course, not every case we handle goes to trial, but every action we take from the moment we prepare the initial complaint or an answer is focused on our trial strategy. Attorneys who have experience and confidence in their ability to try cases are more comfortable being creative and know better what issues will actually matter to a jury.

In what three areas of litigation do you have the deepest bench? (I know it's hard, but please name just three.)

Within our national business litigation group, three areas where we are seeing particularly strong growth include financial litigation, including representation of financial institutions as well as pursuing fraud and mismanagement cases; healthcare-related litigation; and antitrust litigation.

What were two or three of the firm's biggest in-court wins in the past year, and can you cite tactics that exemplify your firm's approach to success?

Our largest victory was attorney **Mike Collyard**'s case against BMO Harris Bank, which at \$563 million was the largest verdict in the history of Minnesota. The award grew substantially in June 2023, when a federal judge in St. Paul ordered the bank to pay pre- and post-judgment interest, bringing the award and BMO's total liability to over \$1 billion. On a personal note, I was proud of my multimillion-dollar jury verdict against Sanford Health in South Dakota this past summer. Our firm also partnered with the state of Minnesota in a trial against JUUL that produced a tremendous result. The tactics we employ are the product of our experience in actually trying cases to a jury. We are immediately analyzing and driving a case forward with a jury in mind. In short, we are thinking of the story we will be telling to the jury from the moment we accept a new case.

What does the firm's coming trial docket look like?

The best marketing for any law firm is success at trial. We've had great success over the past year, and as a result, we are as busy as I can remember. The market for lawyers who have experience and success at trial is extremely strong.

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Ex-Levi & Korsinsky partner resolves workplace lawsuit against firm

 [reuters.com/legal/legalindustry/ex-levi-korsinsky-partner-resolves-workplace-lawsuit-against-firm-2024-02-12](https://www.reuters.com/legal/legalindustry/ex-levi-korsinsky-partner-resolves-workplace-lawsuit-against-firm-2024-02-12)

Mike Scarcella

REUTERS/Yara Nardi Purchase Licensing Rights , opens new tab

Feb 12 (Reuters) - Securities class-action law firm Levi & Korsinsky has agreed to resolve a lawsuit accusing its founding partners of retaliating against a lawyer at the firm who sued for alleged sex discrimination, a court filing showed.

Plaintiff Amy Miller, the firm and founding partners Eduard Korsinsky and Joseph Levi on Friday said they had agreed , opens new tab to the dismissal of Miller's lawsuit in Manhattan federal court.

They agreed to dismissal "with prejudice," meaning that Miller can't refile her claims, but did not disclose further details.

Korsinsky, Levi and attorneys representing them at law firm Epstein Becker & Green did not immediately respond to requests for comment. Miller and her lawyer, Samuel Maduegbuna, did not immediately respond to similar requests.

Miller is now of counsel in New York to the plaintiffs' firm Cohen Milstein Sellers & Toll.

Miller, previously a partner at Levi & Korsinsky, filed her lawsuit in 2020, alleging she was terminated after requesting a fee-based bonus agreement in line with other male attorneys at the firm.

She also said in her lawsuit that she was removed from cases that were on track to generate significant fees and given smaller bonuses than attorneys she supervised.

Levi & Korsinsky countered that Miller had the highest base salary of any firm attorney and was terminated because she was actively searching for another job.

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The firm pointed to what it called Miller's "unrelenting belligerent, defiant and disruptive performance and behavior."

U.S. District Judge Loretta Preska ruled in September that Miller could proceed with the case. The judge also ruled that Levi & Korsinsky had brought counterclaims against Miller in retaliation for her lawsuit.

The case is Miller v. Levi & Korsinsky, U.S. District Court, Southern District of New York, No. 1:20-cv-01390.

For plaintiff: Samuel Maduegbuna of Maduegbuna Cooper

For defendants: Allen Roberts and Jessica Giambrone Palmese of Epstein Becker & Green

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Ex-Levi & Korsinsky partner wins retaliation claim against law firm

Reporting by Mike Scarcella

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Quinn Emanuel Surpasses \$2 Billion in Revenue in 'Historic' Year

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- Quinn Emanuel brought in \$2.1 billion in revenue in 2023
- Firm increased headcount by 12% to 1,050 lawyers

Quinn Emanuel Urquhart & Sullivan last year surpassed \$2 billion in revenue for the first time, as the Big Law litigation shop saw a boost in fees from clients settling and winning cases.

The Los Angeles-founded firm's \$2.1 billion in revenue marked a 28% increase from 2022, Michael Carlinsky, Quinn Emanuel's co-managing partner, said in an interview. The firm collected more than \$1.6 billion in revenue in 2022, according to The American Lawyer.

"Last year was really extraordinary in how successful we were," Carlinsky said, calling the results "historic" for the firm.

Quinn Emanuel, one of the largest litigation-only firms in the world, is known for taking on high profile cases. The firm's fee income rose 26% in 2023, as Quinn boosted its revenue with more full-time lawyers working, Carlinsky said. The firm's full-time lawyer headcount rose 12% to 1,050.

Carlinsky, who also serves as the global head of Quinn Emanuel's complex litigation and chair of insurance litigation, credits the firm's brand and reputation for litigation as driving the results. "We really have lawyers who are busy and handling the best, the biggest and most important cases for our clients," he said.

Last year, General Motors Co.-owned Cruise LLC, a robotaxi company that suspended its service after an accident in October, tapped the firm to conduct an internal investigation that put much of the blame on Cruise's senior leadership.

The firm on Jan. 31 filed a complaint against Iran on behalf of more than 60 US citizens and their family members who were killed, injured or taken hostage in the Hamas attack on Israel.

The University of Tennessee recently retained Quinn Emanuel's global co-managing partner William Burck, Quinn Emanuel, Quinn Emanuel to represent the school in a lawsuit challenging the regulatory authority of the National Collegiate Athletic Association.

Quinn partner Alex Spiro, a longtime outside lawyer to billionaire Elon Musk, is aiding WeWork co-founder Adam Neumann in a potential bid to acquire the co-working company out of bankruptcy.

Michael Carlinsky

"We are off to a great start" and 2024 can be "as good if not better than 2023," Carlinsky said, as the firm looks to increase its headcount by another 10%.

Quinn Emanuel looks to add both to its existing practice areas, such as restructuring and bankruptcy, as well as in its antitrust and white collar group, he said. The firm added restructuring partner David Ereira from Paul Hastings' London office last month.

As artificial intelligence and data issues arise, the firm will look to add bench strength in the technology space as well as biologics, Carlinsky said.

Opportunistic Growth

The firm named Carlinsky and Burck as co-managing partners in May 2022, when co-founder and longtime managing partner John Quinn transitioned to the role of chair.

Carlinsky and Burck since then have looked at areas where the firm should be investing or opening a new office. That led to a string of office openings over the last 12 months.

Quinn Emanuel opened an office in Beijing in May, then announced a pair of openings in Dubai and Abu Dhabi in September. A month later, the firm announced plans to open an office in Singapore.

The firm also signed a 132,000 square-foot lease in New York's Midtown South Textile Building in November, where it will build out an office to match its work-from-anywhere policy.

The firm last month announced it would be opening an office in Wilmington, Delaware with the addition of Michael Barlow, former chief of staff to former Delaware Gov. Hack Markell (D).

"We either spot an opportunity or an opportunity presents itself," Carlinsky said. "We're nimble and we're decisive, and we can seize upon it."

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U.S. Consumers Lost More Than \$10B to Fraud in 2023, FTC Says

 [law.com/nationallawjournal/2024/02/09/u-s-consumers-lost-more-than-10b-to-fraud-in-2023-ftc-says](https://www.law.com/nationallawjournal/2024/02/09/u-s-consumers-lost-more-than-10b-to-fraud-in-2023-ftc-says)

By Maydeen Merino

The Federal Trade Commission said Friday that it plans to boost efforts to address scammers amid FTC data showing U.S. consumers lost more than a record \$10 billion to fraud in 2023, a 14% increase from 2022.

Investment scams took the most money, with consumers reporting losses of more than \$4.6 billion last year. Imposter scams—conducted by those posing as business representatives or government agents—accounted for nearly \$2.7 billion in losses, the FTC reported.

“Digital tools are making it easier than ever to target hard-working Americans, and we see the effects of that in the data we’re releasing today,” Samuel Levine, director of the FTC’s Bureau of Consumer Protection, said in a statement. “The FTC is working hard to take action against those scams.”

The FTC uses the Consumer Sentinel Network, a database that receives reports directly from consumers; federal, state and local law enforcement agencies; the Better Business Bureau; industry members; and nonprofit organizations. In 2023, the agency said it received fraud reports from 2.6 million consumers, about the same number as in 2022.

Imposter scams were the most commonly reported last year, followed by online shopping; prizes, sweepstakes and lotteries; investments; and business and job opportunity scams, the agency stated.

The FTC has taken action to address consumer fraud, including its nationwide initiative “Operation Stop Scams Calls” aimed at stopping telemarketers, lead generators and Voice over Internet Protocol (VoIP) service providers from making illegal calls.

The FTC is also working on finalizing a rule to enable the FTC to recover money or seek civil penalties against scammers who harm consumers by posing as government agents or business representatives. In addition, the has taken legal action against investment and business opportunity schemes.

Daniel Kaufman, a partner at Baker & Hostetler who focuses on consumer protection, said the FTC has been bringing more fraud-related cases and must continue “to make it clear that they’re going to prosecute fraud cases.”

The agency's lack of resources could make addressing fraud challenging, Kaufman said, adding that scammers have become more skilled in the use of fake online identities, phony email addresses and artificial intelligence.

"The more realistic you can make your appeals to somebody, the more likely they are to fall victim to it," Kaufman said.

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Time Has Come for Special Masters to Streamline Bankruptcy Cases

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Since the first Johnson & Johnson talc bankruptcy was filed in 2021, Judge Michael Kaplan has faced countless disagreements in the US Bankruptcy Court. These range from discovery fights, disputes over administration of tens of thousands of individual claims, and all-out conflict over the total amount in controversy.

Had Kaplan been a district court judge presiding over a mass tort action, the solution would have been obvious: appoint a special master to efficiently manage the increasingly contentious parties. But there was one problem: Kaplan is a bankruptcy judge, and was therefore barred by the Rules of Bankruptcy Procedure from appointing a special master.

Last month, Kaplan prepared his first broadside against this antiquated rule.

Special Masters

In federal district courts, it's fairly common for judges to appoint special masters—also known as court-appointed neutrals. Retired judges, practicing attorneys, and law professors are the conventional candidates to fill these positions.

The powers authorizing appointment of special masters derive from Rule 53 of the Federal Rules of Civil Procedure. Under this rule, the court may appoint a special master to:

- Perform duties “consented to” by the parties
- Hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by “some exceptional condition” or “the need to perform an accounting or resolve a difficult computation of damages”
- Address pre-trial and post-trial matters “that cannot be effectively and timely addressed” by a judge of the court.

Many state courts, including in New York, have adopted their own versions of Rule 53. District courts have discretion to appoint special masters to address any role the court believes would expedite the litigation and achieve a just resolution. Some more common uses of special masters include resolving privilege and highly technical e-discovery disputes, managing discovery, general case management, resolving fee disputes, facilitating settlement discussions, and acting as monitors or receivers.

Once appointed, the judge outlines the special master’s specific duties and determines the scope of their role in the litigation. The special master can issue orders and recommendations, which the court can choose to adopt reject, or modify. The parties can

also choose to contest the special master's determinations.

Bankruptcy Rule 9031

Unlike the Federal Rules of Civil Procedure, Rule 9031 of the Federal Rules of Bankruptcy Procedure pithily prohibits the appointment of special masters in bankruptcy proceedings: “Masters Not Authorized. Rule 53 [of the Federal Rules of Civil Procedure] does not apply in cases under the [Bankruptcy] Code.”

Amendments to Rule 9031 were last considered in 1996. At the time, the Advisory Committee on Bankruptcy Rules declined changes, providing two primary rationales: the appointment of special masters would infringe on the bankruptcy judge's authority, and special masters were unnecessary and inefficient.

Kaplan's Fight

Last month, one federal judge decided that the time had finally come to amend Rule 9031. Kaplan, a New Jersey bankruptcy judge who recently made headlines by overseeing the Chapter 11 case of Johnson & Johnson's subsidiary, LTL Management, wrote a letter to the Federal Committee on Rules of Practice and Procedure in support of a change to the Bankruptcy Rules.

In his Jan. 10 letter, Kaplan recommended a simple change—that the title of Bankruptcy Rule 9031 be changed from “Masters Not Authorized” to “Masters Authorized,” and the word “not” be struck from the text of the rule. Appending an analysis prepared by the John Rabiej Litigation Law Center, Kaplan argued that allowing special masters in bankruptcy proceedings would relieve some of the burden on bankruptcy courts.

Kaplan's letter provides some relevant flavor of his own personal experience as a bankruptcy judge, painting a picture of an increasingly onerous caseload rife with complex issues like cryptocurrency filings, mass torts, and corporate asset valuations. He argues that the current tools available to bankruptcy judges under existing rules are insufficient to address this deluge of filings, causing bankruptcy cases to be “held hostage to litigation/discovery ‘overload.’” Special masters, Kaplan says, are essential to lighten the load.

The accompanying Rabiej memorandum specifically addressed the two concerns raised in 1996.

Interim changes to Rule 53 have mooted the concerns of the Advisory Committee. In 2003, amendments provided district judges with authority to review de novo any findings of a special master, in contrast to the previous, highly deferential “clearly erroneous” standard.

And the memorandum emphasized the increasing complexity of a subset of bankruptcy cases, which would recognize the same efficiency benefits from special masters that have been amply demonstrated in district court.

Call for Change

Kaplan isn't the only voice calling for change. Last year, the ABA House of Delegates adopted a resolution urging the amendment of Rule 9031 to permit the use of court-appointed neutrals in bankruptcy proceedings.

And Merrill Hirsh, executive director of the Academy of Court-Appointed Neutrals, has repeatedly beaten the drum for updating Rule 9031, calling it a "relic": one that "serves only as an artifact that deprives bankruptcy judges of a useful tool for no genuine reason." Hirsh announced plans to submit a letter in support of Kaplan's proposal.

As bankruptcy cases become more complex and expensive, combined with the evaporation of the original justifications for Rule 9031, proponents of special masters in bankruptcy proceedings have reason to believe they will succeed this time around.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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Wells Fargo nemesis sues over American Arbitration Association's rules for mass disputes

 [reuters.com/legal/transactional/column-wells-fargo-nemesis-sues-over-american-arbitration-associations-rules-2024-02-12](https://www.reuters.com/legal/transactional/column-wells-fargo-nemesis-sues-over-american-arbitration-associations-rules-2024-02-12)

Alison Frankel

A Wells Fargo logo is seen in New York City, U.S. January 10, 2017. REUTERS/Stephanie Keith Purchase Licensing Rights , opens new tab

Feb 12 (Reuters) - A law firm that represents thousands of alleged Wells Fargo customers who claim they were misled about the bank's overdraft fee policies has filed a class action contending that the American Arbitration Association has allowed Wells Fargo (WFC.N) , opens new tab to evade accountability.

The new lawsuit , opens new tab, filed last week by plaintiffs' lawyers at McCune Law Group in federal court in San Francisco, asserts that Wells Fargo has capitalized on AAA's recently adopted , opens new tab mass arbitration protocols to win the dismissal of thousands of arbitration claims arising from allegedly improper overdraft fees.

AAA is not named as a defendant in the new lawsuit, but the McCune firm blamed the arbitration forum for acceding to Wells Fargo's demand that its clients be required to provide information about their accounts — including proof that they were enrolled in the overdraft protection program and paid overdraft fees — before they can proceed with individual cases.

The order requiring claimants to provide that information was entered by a so-called AAA process arbitrator, who was appointed under AAA's new rules addressing mass arbitration, in which dozens, hundreds or even thousands of claimants file substantially similar arbitration demands.

As you know, corporations that have been socked with mass arbitration demands often argue that plaintiffs lawyers are improperly trying to leverage initial arbitration fees — which can total tens of millions of dollars when thousands of customers or employees demand arbitration — to extract unwarranted settlements.

Under the mass arbitration protocols AAA adopted last August, a so-called process arbitrator can be appointed to rule on casewide administrative issues, including filing requirements for claimants and initial arbitration fees in individual cases. For defendants, the process arbitrator can serve as a sort of gatekeeper to assure that companies are not forced to pay thousand-dollar case initiation fees when cases are obviously deficient.

But in the new class action, the McCune firm argued that the AAA's revamped rules effectively give companies like Wells Fargo the best of both worlds: Companies can use mandatory arbitration requirements to preclude customers from banding together to sue as a

group, yet once they're hit with a mass of demands by customers seeking to exercise their right to arbitrate claims individually, corporations can ask an AAA process arbitrator to impose classwide requirements to cull cases.

"The cooperation between AAA and Wells Fargo creates a kind of toggle switch Wells Fargo can operate at a whim," the class action contends. As soon as arbitration demands become "inconvenient, expensive or difficult," the complaint argued, the bank and the arbitration forum can "flip the switch" to adopt classwide rules to eliminate purportedly unworthy claims.

As a result, the McCune firm alleged, thousands of its clients have been wrongly shut out of arbitration and have no choice but to bring their claims in court.

The firm did not specify how many of its clients' arbitration demands have been dismissed, but Wells Fargo's lawyers at McGuireWoods have said in a court filing [\[1\]](#), opens new tab that the McCune firm was able to provide the requisite information about only 432 of its 3,900 clients. AAA, according to Wells Fargo, has dismissed arbitration demands by the other 3,500 clients, albeit without prejudice.

If you do the math, those numbers suggest that the McCune firm failed to provide AAA with required information about nearly 90% of the clients for whom it has demanded arbitration.

AAA did not respond to a request for comment on the lawsuit. Wells Fargo declined to comment. Lawyers from the McCune firm, including name partner Richard McCune, did not respond to my query.

The new lawsuit is significant because it's a public challenge to an attempt by AAA to respond to mass arbitration critics who carp about paying thousands of dollars in fees for patently frivolous demands. But I should warn you that the McCune lawsuit omits quite a bit of context, including a previous McCune case challenging the AAA's appointment of a process arbitrator in the Wells Fargo overdraft fee dispute and an appeal of the decision in that previous case.

Last year, after the AAA process arbitrator first issued an order setting out which information McCune's clients were required to supply before they could proceed with their individual arbitration cases, the McCune firm filed a lawsuit in San Diego to enjoin the AAA proceeding, deriding Wells Fargo for relying on a classwide device after barring customers from suing as a class.

U.S. District Judge Dana Sabraw denied [\[2\]](#), opens new tab the McCune firm's request for an injunction in May 2023, holding (among other things) that the Wells Fargo arbitration agreement delegates threshold disputes to the arbitrator. Sabraw granted Wells Fargo's motion to compel arbitration, which continued before the process arbitrator.

The McCune firm appealed the decision, arguing [\[3\]](#), opens new tab that the use of a process arbitrator to set classwide requirements for individual claimants amounts to improper

interference with its clients' contractual rights.

Wells Fargo's counsel at McGuireWoods responded [↗](#), opens new tab that the bank has scrupulously followed AAA rules, paying about \$500,000 in fees for the process arbitrator, whose appointment was approved by the McCune firm. The process arbitrator, the bank said, did not create a class proceeding but only set out basic standards for each individual claimant to meet. And the information that claimants were ordered to supply, Wells Fargo said, should be easy to obtain: It's all on customers' bank statements.

Last month, after Wells Fargo submitted a supplemental statement [↗](#), opens new tab noting that the process arbitrator had tossed about 3,500 McCune arbitration cases for failing to include basic information, the 9th Circuit said it did not need to hear oral argument in the case but would decide the matter on the briefs.

The McCune firm filed the new class action in San Francisco several days later. As I mentioned, the complaint does not refer to the firm's previous lawsuit in San Diego or to the 9th Circuit appeal.

I'm guessing that Wells Fargo will soon provide that context.

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Reporting By Alison Frankel

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Alison Frankel

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Wells Fargo Fails to Sink Whistleblower Suit Over Fake Accounts

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- Exec fired after disclosing millions of unauthorized accounts opened
- Partial summary judgment in whistleblower retaliation lawsuit

Wells Fargo Bank N.A. lost a move to dismiss a former executive's lawsuit alleging the bank fired him just prior to his giving testimony to federal investigators probing a national scandal that cost the bank \$5 billion in fines and settlements.

Magistrate Judge Donna M. Ryu of the US District Court for the Northern District of California on Monday denied the bank's summary judgment motion and granted John Sotoodeh—a former Wells Fargo regional chief for the national consumer banking division—partial summary judgment on his suit alleging retaliation and wrongful firing.

Wells Fargo failed to submit evidence supporting its claim that Sotoodeh was an officer hired or fired by the bank's board of directors, one of the required elements of a provision under the National Bank Act that would have allowed the bank to dismiss him at will, or "at-pleasure," Ryu said. The bank "failed to demonstrate a dispute of material fact as to Sotoodeh's appointment," Ryu said.

Sotoodeh sued the San Francisco-based bank in 2021 after it was revealed Wells Fargo opened millions of unwanted customer accounts. The case was moved from California state court to federal court in February 2022.

Sotoodeh claimed he was a whistleblower who was illegally fired in violation of whistleblower protection statutes in November 2017, a week before he was scheduled to testify about the bank's account management practices to Congress before representatives of the US Department of Justice, Securities and Exchange Commission, Federal Deposit Insurance Corp., and Federal Bureau of Investigation. Testimony during the congressional hearing also focused on the NBA's at-pleasure dismissal privileges.

The lender has argued that the act preempts Sotoodeh's state law claims. Sotoodeh says Wells Fargo's at-pleasure dismissal rights don't apply to him because it wasn't the board, but the company, that fired him.

The court has scheduled a March 20 case management conference for follow-up discussions between attorneys for the bank and Sotoodeh.

Wells Fargo in May agreed to pay \$1 billion to settle a shareholder lawsuit over the allegations of account mismanagement. The bank in December 2022 settled with the Consumer Fraud Protection Bureau for \$3.7 billion in restitution and civil penalties for mistreating customers.

Munger, Tolles & Olson LLP represents Wells. The Dolan Law Firm PC represents Sotoodeh.

The case is Sotoodeh v. Wells Fargo Bank, N.A. , N.D. Cal., No. 4:22-cv-00950, order 2/12/24 .

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Former FirstEnergy Execs Indicted in Ohio Corruption Probe (5)

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An Ohio grand jury indicted the former CEO and an ex-vice president of FirstEnergy Corp., marking the first time anyone from the utility has been criminally charged in a wide-ranging corruption probe.

The indictment, filed in secret Friday in Summit County Common Pleas Court, names ex-CEO Charles Jones and Senior Vice President of External Affairs Michael Dowling as defendants. Both were fired from the Akron-based utility in the wake of a related federal probe that became public in 2020.

Attorney and former state Public Utilities Commission Chairman Samuel Randazzo was also indicted, months after a federal grand jury also issued charges against him. Two entities controlled by Randazzo that prosecutors have labeled “sham companies” were also named as defendants.

All three were booked into the Summit County Jail and released.

The indictment includes 27 counts, with Ohio’s racketeering statute leading the pack. Other charges include bribery, aggravated theft, telecommunications fraud, and money laundering.

It focuses on the relationship between Randazzo and the utility executives, which lasted more than a decade. While Randazzo worked with a group of companies that bought large amounts of electricity from FirstEnergy, he also worked with the utility and received millions for “consulting services,” according to the indictment.

This included a \$4.3 million payment that authorities consider a bribe, which Randazzo received right before he became the state’s top utility regulator in 2019.

The three men worked together to steal money from FirstEnergy, write provisions of what became a \$1.3 billion legislative package, and scuttle a rate case that could’ve hurt the utility’s bottom line, the indictment said.

Jones and Dowling, meanwhile, profited as FirstEnergy's stock price rose, the indictment alleged.

'Jones Racket'

Ohio Attorney General Dave Yost (R), calling it the "Jones racket," said near the outset of an online news conference Monday morning that the charges are "related to their joint enterprise to hijack Ohio's regulatory structure for the benefit of FirstEnergy Corp. and for themselves.

The case stems from a probe conducted by an anti-organized crime task force, led by the Attorney General's Office. Carol O'Brien, the office's deputy attorney general for law enforcement, said at the news conference that "the indictment tells a story that could be the basis for a fiction novel.

"Unfortunately for all of us in Ohio, the facts of this case tell the true story of greed and corruption by three men and two sham organizations," she said.

The trio is set to be arraigned on Tuesday.

Attorneys for Dowling and Randazzo didn't respond to voicemails.

Carole S. Rendon, a BakerHostetler partner representing Jones, said in a statement that Jones and other current and former FirstEnergy employees have been the subject of "a false and unfair narrative." They said prosecutors never spoke with Jones or his attorneys.

"Most importantly, the facts necessary to understand what actually happened have not yet been made public," Rendon said. "When those facts are presented, they will set the record straight and restore the excellent reputation that Mr. Jones built over a lifetime of service to Ohio electric customers, FirstEnergy employees, his industry, and his community."

John F. McCaffrey, a Tucker Ellis LLP attorney representing Dowling, released a statement that said "the allegations of this indictment are completely false and are not supported by any credible evidence whatsoever. It is shocking that a public prosecutor's office would return an irresponsible indictment and have no evidence to support the charges in the indictment."

The charges are the latest arising from what began as a federal probe into the passage of a 2019 legislative package that bailed out two nuclear power plants FirstEnergy owned at the time. The probe has since expanded beyond the legislation.

Friday's indictment means eight people have been charged because of the myriad investigations. Among those implicated was former Ohio House Speaker Larry Householder (R), who was convicted for leading an operation that involved accepting about \$60 million in

bribe money from FirstEnergy to help bankroll his political operation. He was sentenced last June to 20 years in federal prison.

The new indictment also runs parallel to a lawsuit Yost filed in 2020 against many of the players named in the probe.

FirstEnergy admitted to federal violations, agreeing to pay \$230 million and cooperate. The utility's deferred prosecution agreement included an admission to bribing Randazzo.

A company spokeswoman declined comment on the new indictment but said the utility will continue to cooperate with Yost's office and "has taken significant steps to move forward, including reconstituting our senior leadership team and instilling a culture of ethics, integrity and accountability at every level of the organization."

The case is Ohio v. Randazzo , Ohio Ct. Com. Pl., No. CR-2024-02-0473, indictment filed 2/9/24 .

(Adds Dowling's statement in the seventeenth paragraph.)

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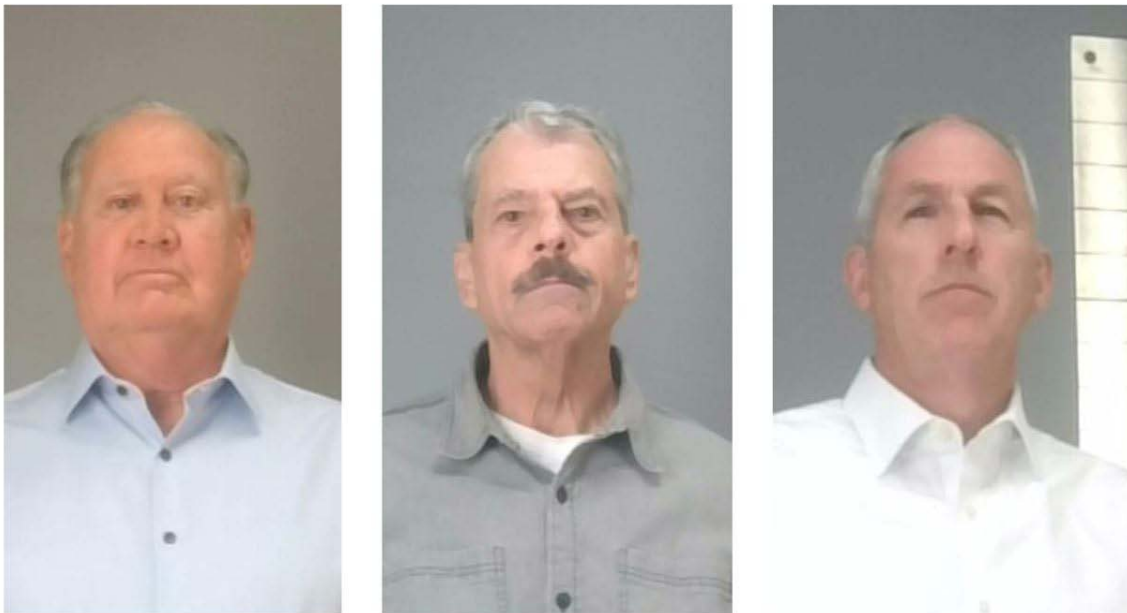
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Did you ever think you'd see these mug shots?

Ex-FirstEnergy CEO, top lobbyist and former top Ohio utility regulator booked in Summit County Jail; released on bond



Sent via Newswhip.

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Fired FirstEnergy execs indicted in \$60 million Ohio bribery scheme; regulator faces new charges

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By JULIE CARR SMYTH and SAMANTHA HENDRICKSON

COLUMBUS, Ohio (AP) - Two fired FirstEnergy Corp. executives were indicted Monday in the long-running investigation into a \$60 million bribery scheme in Ohio that has already resulted in a 20-year prison sentence for a former state House speaker.

Former FirstEnergy CEO Chuck Jones and former FirstEnergy Services Corp. Senior Vice President Michael Dowling were charged in relation to their alleged roles in the massive corruption case, Republican Ohio Attorney General Dave Yost announced in an online news conference.

"Their actions over a period of years have undermined confidence in state governments, the rule of law, and very nearly made them even richer men than they already are," Yost said of Jones and Dowling, who are facing criminal charges for the first time since the scandal began. "There can be no justice without holding the check writers and the masterminds accountable."

Jones and Dowling were fired in October 2020 for violating company policies and code of conduct, and - given their numerous mentions in earlier indictments and court proceedings - the lack of indictments had been notable as a 5-year statute of limitations nears.

Both pushed back forcefully Monday, denying any wrongdoing and accusing Yost of false assertions.

"For more than three years, a false and unfair narrative has surrounded Chuck Jones and other current and former employees of FirstEnergy, the company to which Mr. Jones devoted his entire 42-year career. That ends today," his attorney Carole Rendon said in a statement. "Mr. Jones did not violate the law. He did not bribe anyone. He acted in the best interests of FirstEnergy's customers as well as its employees and investors, and never betrayed their trust."

Yost said a grand jury in Summit County, home to Akron, indicted Jones and Dowling on Friday and that the two men promised to turn themselves in Monday to the Summit County Jail but then did not. Jones said through his attorney that he was in Akron when the comment was made, awaiting instructions from the court as to how to proceed. Both he and Dowling were scheduled to be arraigned Tuesday.

Monday's announcement also included additional charges against Sam Randazzo, former chair of the Public Utilities Commission of Ohio, who is already facing 11 counts of charges centered around allegations he accepted bribes from Akron-based FirstEnergy Corp. in exchange for regulatory favors.

Jones, Dowling and Randazzo face a combined 27 new felony counts announced by Yost, including bribery, theft, engaging in corrupt activity, tampering with records and money laundering.

Randazzo resigned in November 2020 after FBI agents searched his Columbus townhome and FirstEnergy revealed in security filings that it had paid him \$4.3 million for his future help at the commission a month before Republican Gov. Mike DeWine nominated him as Ohio's top utility regulator. The indictment names two businesses he led: Industrial Energy Users-Ohio, and Sustainability Funding Alliance of Ohio, the entity through which the \$4.3 million payment was made.

Dowling disputed Yost's allegations that the payment represented any kind of a bribe, vowing to prove his innocence at trial.

He said the sum represented the final annual installment from a 2015 settlement agreement between FirstEnergy and IEU-Ohio, a trade association of large commercial energy users represented by Randazzo, and that the decision to make those payments through SFA was made by FirstEnergy's legal and rates departments, not by Dowling himself.

"The allegations of this indictment are completely false and are not supported by any credible evidence whatsoever," John McCaffrey, one of his lawyers, said in a statement. "It is shocking that a public prosecutor's office would return an irresponsible indictment and have no evidence to support the charges in the indictment."

Monday's indictments mark the latest development in what has been labeled the largest corruption case in Ohio history.

Former Ohio House Speaker Larry Householder was sentenced in June to 20 years in prison for his role in orchestrating the scheme, and lobbyist Matt Borges, a former chair of the Ohio Republican Party, was sentenced to five years.

The U.S. attorney's office in Cincinnati indicted three others on racketeering charges in July 2020. Lobbyist Juan Cespedes and Jeffrey Longstreth, a top Householder political strategist, pleaded guilty in October 2020 and await sentencing. The third person arrested, statehouse lobbyist Neil Clark, pleaded not guilty before dying by suicide in March 2021. The dark money group used to funnel FirstEnergy money, Generation Now, also pleaded guilty to a racketeering charge in February 2021.

All were accused of using the \$60 million in secretly funded FirstEnergy cash to get Householder's chosen Republican candidates elected to the House in 2018 and then to help him get elected speaker in January 2019. The money was then used to win passage of the tainted energy bill, House Bill 6, and to conduct what authorities have said was a \$38 million dirty-tricks campaign to prevent a repeal referendum from reaching the ballot.

Yost asked a judge in Columbus to add Jones, Dowling and Randazzo to a state-level lawsuit by his office against FirstEnergy in July 2021.

"This indictment is about more than one piece of legislation," Yost said Monday. "It is about the hostile capture of a significant portion of Ohio's state government by deception, betrayal and dishonesty."

An 81-page FBI criminal complaint from July 2020 detailed how executives of Akron-based FirstEnergy interacted with Householder and others indicted in the scheme, as well as identifying 84 phone contacts between Jones and the former speaker and 14 phone contacts between Dowling and Householder.

FirstEnergy admitted to its role in the bribery scheme as part of a July 2021 deferred prosecution agreement with the U.S. Department of Justice. The company agreed to pay \$230 million in penalties and to accomplish a long list of reforms within three years in order to avoid being criminally prosecuted on a federal conspiracy charge.

A statement of facts signed by current FirstEnergy CEO and President Steven Strah lays out in detail the involvement of Jones, Dowling, Randazzo and others in the bribery scheme. Randazzo's attorneys have called claims contained in the document mere "hearsay" designed to keep the energy giant out of legal hot water.

Hendrickson is a corps member for the Associated Press/Report for America Statehouse News Initiative. Report for America is a nonprofit national service program that places journalists in local newsrooms to report on undercovered issues.

[Editor notes: Eds: UPDATES: Updates Media.]

HP Seeks \$4 Billion in Losses From Lynch Over Autonomy Fraud

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- Mike Lynch and his CFO face \$4 billion bill for Autonomy sale
- Extradited tycoon currently awaiting criminal trial in the US

Hewlett Packard Enterprise Co. is seeking as much as \$4 billion from Autonomy Corp.'s former bosses following a London judge's finding that they fraudulently boosted the value of the company before its sale.

Founder **Mike Lynch** was found to have inflated Autonomy's revenue alongside his chief financial officer **Sushovan Hussain** and induced HP to buy the firm for \$11 billion, according to a London civil judgment in 2022.

The British tech tycoon is currently waiting to face a criminal trial in the US over the sale after being extradited last year. He was previously investigated by the UK's Serious Fraud Office but the agency dropped its case. Hussain was convicted in the US for his role in the saga.

Mike Lynch

Photographer: Simon Dawson/Bloomberg

Lawyers for HP calculated the total losses that Lynch and Hussain must pay back as over \$4 billion, according to court documents prepared for a hearing Monday. This was revised from a previous calculation of \$5 billion at trial due to further evidence.

"The fraud was consistent and clear: to inflate Autonomy's ostensible software revenues," said Conall Patton, HP's lawyer, in the documents. The company sought to "maintain its reputation as a highly successful pure software company with beat-and-raise financial results and so ultimately to sustain its share price."

Lawyers for Lynch argued that even if accurate information had been given, HP would have still purchased Autonomy. They said the loss amount should be the difference between the price paid in a "counter-factual world" and the actual price.

Read More: Autonomy Was No Theranos But Still a Fraud, UK Judge Rules

The nine-month, £40 million (\$50 million) civil trial was among the longest and most expensive in modern British history. The judge described the length of his ruling as “unparalleled” and cautioned that the final amount of damages awarded was likely to be “substantially less” than HP had claimed, he said.

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Matt Levine's Money Stuff: Insider Betting Can Make Things Weird

By Matt Levine
Opinion

Bloomberg Law News 2024-02-13T14:24:22343551441-05:00

Matt Levine's Money Stuff: Insider Betting Can Make Things Weird

By Matt Levine 2024-02-13T13:56:02081-05:00

'Sports' betting

Sometimes people argue that insider trading is good. We want market prices to be accurate, to reflect all available information; that way the best projects will get financed and people will be able to buy and sell assets at prices that reflect their real values. Letting, say, corporate executives buy their stocks when they know good news is coming, or sell them when they know bad news is coming, makes prices more accurate. So we should encourage it. That is the theory. You don't hear it a lot these days about the stock market, but you do hear it sometimes. Here's a recent Planet Money episode halfheartedly making the case.

Outside of the stock market, though, this idea is more popular. "In boxing, it's generally accepted – if not condoned – that [managers] sometimes bet on their fighters to win," the Wall Street Journal noted last month, though other bets can lead to suspicions of manipulation. Other sports sometimes have [stricter rules](#) about insider betting, but not always.

And people who set up prediction markets are more likely to argue that insider trading is good. The point of a prediction market is not really to give people a good place to invest their retirement money; the point of a prediction market is to make accurate predictions. In the stock market, you want outsiders to feel comfortable that they can invest their money and have a fair chance, and you might think that's more important than price accuracy. In a prediction market, you don't really care about fairness to outsiders at all; your goal is to get a good prediction. You'd be totally happy with a prediction market consisting only of (1) insiders and (2) outsiders who know they are betting against insiders but have reason to believe that they have a better model.

Last year I [wrote about Manifold Markets](#), "a sort-of-play-money prediction market that allows people to propose questions and bet on the answers." Specifically, there was a market on Manifold about whether I would mention Manifold. I wrote:

The odds when I looked yesterday were about 40%. The odds at 11:30 a.m. today were 84%. The odds when I publish this will, of course, be 100%. Did I insider trade on this market? No. Was I tempted? For pedagogical and comedic purposes, I mean, not to win play money? A little.

But of course the person who *emailed* me about the market *surely* insider traded: He knew he had emailed me, so he knew I had seen it, so he knew the odds had increased. Perhaps he "insider traded," in the sense that he knew something nonpublic and traded based on it, or perhaps he "manipulated the market," in the sense that he traded in the prediction market and then took steps in the real world (emailing me) to make his trade pay off.

After I wrote that paragraph, several people emailed me to be like “no, it’s cool, Manifold specifically encourages insider trading.” It’s true: “Unlike many other places,” say Manifold’s community guidelines, “Manifold *encourages* you to make markets more accurate by trading based on private information you might have.” Worse for fairness but better for accuracy, and they prefer accuracy.

But also, I mean, that particular case – me writing about Manifold Markets – was not a particularly important event in the world. That was not the outcome of a presidential election or something. Nobody needed an accurate prediction of whether I would write about Manifold; no one was making business decisions based on that probability. That was a small dumb possibility that *became more likely because there was betting on it*. It was possible to bet on me writing about Manifold, so people did, so someone emailed me to be like “lol you should write about this,” so I did. The existence of the prediction market called forth the event.

One worry that people have about prediction markets is that they will call forth events. Those events might be bad: If you can bet on terrorist attacks, terrorism might become profitable, which is a bad outcome. Also, though, prediction markets – and, more broadly, widely available proposition betting, sportsbooks offering bets on weird stuff – might just call forth more *weird* events. If you can bet on some long-shot event happening, and then make it happen, somebody will. Particularly if it is relatively harmless and effortless.

Leading up to the Super Bowl, there were a lot of news stories about how sportsbooks were offering various Taylor Swift-related proposition bets. The New York Times quoted one bookmaker saying “You can ask me the next day who won the game, and I won’t even know. But I’ll know how many times Taylor Swift was shown on TV.” But [Bloomberg’s Ira Boudway pointed out](#) on Friday that those sportsbooks are not exactly allowed to offer those prop bets in the US:

“There are no states that have approved bets related to Taylor Swift for the Super Bowl,” says Cait DeBaun, a spokesperson for the American Gaming Association, which advocates for the casino industry. “If you’re seeing a website offering them, it’s an illegal offshore website that is not overseen by any US regulator.” ...

Offshore books exist in a legal gray area: They’re headquartered in jurisdictions where their activity is legal but take bets from places where it’s not. ...

Gambling regulators in every state limit the scope of this betting to the action on the field. Books can take bets on how many touchdowns [Travis] Kelce will score but not whether he will be shown kissing Swift. The reason is to avoid bets that can be easily manipulated. Swift and Kelce, after all, could arrange ahead of time whether or not to smooch on the field. And if they do, producers for CBS—which is airing the game—would have a say in whether to show it. “When states legalized sports betting, they legalized sports betting, not betting on random events,” DeBaun says.

Aww. I love the idea of Taylor Swift putting on a wig and a fake mustache and walking into a sportsbook to bet \$10,000 on whether she’ll be shown on TV kissing Travis Kelce. *She* is probably not economically incentivized to manipulate that market. But the producers cutting between shots? Maybe. If you have enough prop bets, somebody will have the right incentives to manipulate them.

So here’s a funny TikTok from a guy pretending that he was “the Super Bowl streaker,” for arbitrage reasons:

I live here in Vegas and when I saw that you could bet on whether or not there would be a streaker during the Super Bowl, I knew I had to go down to the casino and place a \$20,000 bet. After I placed the bet, I went and bought a ticket for \$10,000 so that I could control my own destiny. ... It was honestly totally worth it, I spent \$10,000 on the ticket but I made 20 back on the wager, so I’m up \$10,000. Yeah I had to spend a night in jail but I absolutely had a ball being center stage in front of 80,000 people.

I don’t think this is true; he seems to be a TikTok comedian and doesn’t appear to be one of the actual streakers at Sunday’s Super Bowl. But the math kind of works? An online sportsbook did apparently offer +300 odds (a \$100 bet returns \$400) on “unauthorized person will enter field of play,” so you could bet \$5,000, pay \$10,000 for the ticket, run onto the field and make a profit. The more people can bet on random events, the more random events there might be.

This meeting could have been an AI-generated summary

The basic question with the current crop of artificial intelligence tools is: Will they automate the less valuable parts of white-collar jobs, allowing lots of knowledge workers to be more productive and do more interesting work? Or will they automate the *most* valuable parts of white-collar jobs, or all the parts, putting employees out of work or reducing them to executing the machines' instructions?

For instance, there is a standard view that large language models will be able to replace some of the work of hedge fund analysts, giving portfolio managers the ability to generate and test and analyze more ideas and do their jobs better. But we [talked yesterday](#) about a hedge fund that plans to employ human analysts to generate ideas, but then "a systematic algorithm will create a portfolio based on the ideas." You automate out the boss who makes the final decision, but you keep the human grunt workers who provide the inputs to that decision.

Anyway here is a fun Wall Street Journal article about how "Early Adopters of Microsoft's AI Bot Wonder If It's Worth the Money." Apparently some early testers have been unimpressed by how much value they can get out of Copilot for Microsoft 365, the AI plug-in for Microsoft office software. It does not seem particularly close to replacing, say, an investment banking analyst:

Testers said Excel was one of the programs on which they were less likely to use the AI assistant because asking it to crunch numbers sometimes generated mistakes. ...

Other features that Microsoft has touted, including the ability for Copilot to generate PowerPoint slides, have also been disappointing, some users said.

Guido Appenzeller, a partner at investment firm Andreessen Horowitz, posted a thread on X showing the mistakes it makes when prompted to make a presentation.

There are a lot of jobs where the main functions are "don't make mistakes in Excel or PowerPoint," so this is not that helpful. On the other hand, Copilot is apparently excellent at enabling another important skill for knowledge professionals, which is skipping large meetings without guilt:

Early testers who spoke with The Wall Street Journal said the AI add-ons for Microsoft's workplace communication software Teams were most useful.

Some had already become reliant on Copilot if they were late to a meeting, to get a summary of what had been said. Those in different countries and time zones now have the option to skip meetings and just read summaries.

"It has allowed people to say, 'You know what, there is already 10 other people on the call. I'm going to skip this one. I'm going to catch up in the morning by reading the digest and skipping to the parts of the meeting I really needed to hear,'" said Art Hu, the global chief information officer at Lenovo.

Yes, it has allowed them to say that they'll skip the meeting and then read the digest. I suspect it also allows them to skip the digest. Also the digest is wrong:

At one ad agency, a Copilot-generated summary of a meeting once said that "Bob" spoke about "product strategy."

The problem was that no one named Bob was on the call and no one spoke about product strategy, an executive at the company said.

Yeah, but you see how that happened, right? If I told you "write a summary of a meeting at an ad agency," you'd probably include the sentence "Bob spoke about product strategy" too. Maybe even if you went to the meeting! You probably weren't paying attention the whole time either; the AI model can half-listen to the meeting just as well as you can. Large language models are not in the business of interpreting reality and summarizing it accurately; they're in the business of completing texts in plausible ways. That is a risky approach to financial modeling but an *incredibly efficient* approach to summarizing meetings.

Elsewhere: "AI Is Starting to Threaten White-Collar Jobs. Few Industries Are Immune."

PE pay for performance

We [talked the other day](#) about Carlyle Group Inc.'s plan to pay its employees more out of performance fees (which vary from year to year depending on how successfully Carlyle's funds exit their investments) and less out of management fees (which are pretty stable from year to year). My point was that there is a sort of arbitrage: Carlyle's *shareholders* prefer stable recurring fees, so they place a higher multiple on the management fees than the performance fees, while Carlyle's *employees* really ought to be motivated to deliver good performance, so Carlyle should pay them mostly out of performance fees. It's a win-win: Give the shareholders the management fees to satisfy their desire for stability, and give the employees the performance fees to motivate them.

But of course there was a bit of sleight of hand in that argument: Carlyle's shareholders *value* stable management fees more, I said, while Carlyle's employees are *motivated* by variable performance fees. Those things are not parallel. It's not a real arbitrage. Carlyle's shareholders value stable income more than risky performance, and Carlyle's employees *also* probably value stable income more than risky performance. They don't want to be motivated! They want to be paid. If you're taking some stable management fees away from the employees, and replacing them with at-risk performance fees, you have to give the employees more to make it worth their while.

Bloomberg's [Dawn Lim ran the numbers](#) for Carlyle (and also KKR & Co., which has made similar changes):

Staff across Carlyle and KKR would have earned some \$170 million less last year had the changes already been in place, Bloomberg calculations show. Total pay would have expanded in 2021 and 2022 by roughly \$300 million. ...

"This is not about changing the overall level of compensation," Carlyle's new finance chief, John Redett, told analysts. It's about having a higher chunk of pay driven by performance, he said.

The moves push more volatility in profits from shareholders to employees.

If Carlyle's new pay system had been rolled out years ago, employees would have made about \$190 million – some 8% – more in 2021, and roughly \$40 million – about 2% more in 2022, according to Bloomberg estimates. KKR employees would have made an extra \$20 million or 1% of pay in 2021.

You have to pay them \$300 million more in the good years to make up for paying them \$170 million less in the bad years. It's still a good arbitrage if the shareholders value stability *more* than the dealmakers do, which seems plausible. But the dealmakers do value stability.

Indian options trading

In general, if someone tells you that they know how to make a fortune trading in the stock market, and that, for a fee, they will use that skill to make *you* a fortune in the stock market (or to teach you how to make a fortune), you should ask: Why? What's in it for them? They can just make money for themselves in the stock market; why do they need *your* money?

Sometimes there is a satisfactory answer. We [talked yesterday](#) about multistrategy hedge funds, which have a pretty good reputation these days, and which answer the question by saying "we will take 59 cents of every dollar that we generate with your money." What's their incentive to make profits for you in the stock market? They take most of the profits! Very satisfactory answer.

But a lot of the time, particularly if they are advertising investing courses to retail investors on social media, the answer is pretty obviously that they *can't* make a fortune in the stock market, but they *can* make a fortune by persuading you to give them your money. Here's a [Bloomberg News story](#) about retail options trading in India, which is mostly hopeless gambling:

"If you want to gamble, if you need diabetes and high blood pressure, then go into this market," Ashwani Bhatia, a board member on the nation's top stock market regulator, said last year.

His agency, the Securities and Exchange Board of India, known as Sebi, says 90% of active retail traders lose money trading options and other derivative contracts. In the year ended March 2022, the latest for which figures are available, investors lost \$5.4 billion.

But there are a lot of options-trading promoters who will, for a fee, teach you how to do it:

Like a movie star at a premiere, Mohammad Nasiruddin Ansari steps out of the back seat of a white Mercedes. Flanked by a phalanx of black-clad bodyguards, he strides into the lobby of a luxury hotel and takes center stage in a ballroom as indoor fireworks machines spew fountains of sparks. "If you don't make money in three months, I will give you 2 million rupees [\$24,000]," he declares to cheers from the adoring crowd in a scene that's still playing on YouTube.

But they are lying:

Sebi took action against Ansari in October, citing him for improperly promoting himself as a stock market expert, promising near-certain profits and acting as an unregistered investment adviser. The agency ordered him and an associate to refund 172 million rupees they'd charged for online training courses. Ansari and his company didn't respond to messages seeking comment.

Sebi examined Ansari's personal brokerage account to reveal how successful he was in his own trading. Regulators tallied up the results from January to July 2023. Ansari lost \$347,695.

He lost \$347,695 trading and made 172 million rupees (roughly \$2 million) selling courses. Good trade, for him, until he had to give the fees back.

I have to say, I love the regulatory strategy of just reporting the actual trading results of online trading influencers? Sebi must have had fun reading those brokerage statements. I feel like the US Securities and Exchange Commission should do that. Like if you sell investment courses and post online about your trades, the SEC should just reply to all of your posts "you lost \$37,000 last month and have never been profitable." Dispel the mystique a little.

Things happen

Activist Carl Icahn Takes Stake in [JetBlue](#) , Eyeing Board Seat. [Annuities](#) are driving credit demand. Tougher Rent Laws Are Behind Trouble at NYCB. MSCI to Remove Swath of [China Stocks](#) From Indexes as Markets Sink. It's Crunch Time for One of Europe's Last Big Wall Street Players. Raising Trillions of Dollars Might Be the Easy Part of Altman's Chip Plan. Endeavor's Autry Stephens Is [Richest US Oilman](#) After Diamondback Deal. [IPOs](#) Broaden in Busy Week With Goldman Bullish on More Deals. Bitcoin Surges to [\\$50,000](#) for the First Time Since 2021 on ETF Demand. [Macquarie Banker](#) Who Earned More Than Jamie Dimon Steps Down. Tankers Tied to the [Russian Oil Trade](#) Grind to a Halt Following US Sanctions. Cash-Flush Buyers Dip Into Distressed Commercial Real Estate. Brazilian football: the next frontier in global sport? [Snowstorm](#) Will Disrupt NYC Commute and Close Schools on Tuesday.

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- 1. Does it? The argument against is something like "Carlyle's performance represents a much smaller percentage of an outside shareholder's net worth than it does of a Carlyle managing director, so the Carlyle MD should be more afraid of volatility." The argument for is something like "a Carlyle MD probably is more optimistic about Carlyle's performance than an outside investor is."
- 2. I suppose this means that, if you are trying to run an investing fraud on *me*, the trick is to charge really high fees. I do not know if this generalizes.

SEC sues Tron founder Justin Sun, Lindsay Lohan, other celebrities over crypto sales

 [reuters.com/legal/sec-sues-justin-sun-others-over-illegal-crypto-sales-2023-03-22](https://www.reuters.com/legal/sec-sues-justin-sun-others-over-illegal-crypto-sales-2023-03-22)

Chris Prentice, Jonathan Stempel

[1/2]Chinese cryptocurrency entrepreneur Justin Sun speaks at a financial forum in Beijing, China November 4, 2015. REUTERS/Stringer Purchase Licensing Rights , opens new tab

NEW YORK, March 22 (Reuters) - The U.S. Securities and Exchange Commission on Wednesday charged Chinese cryptocurrency entrepreneur Justin Sun with fraud, and accused eight celebrities including actress Lindsay Lohan and rapper Soulja Boy with illegally promoting his crypto assets.

Sun and his companies Tron Foundation, BitTorrent Foundation and Rainberry were accused of having since August 2017 schemed to distribute billions of crypto assets known as Tronix (TRX) and BitTorrent (BTT) and artificially inflated trading volume.

He was also accused of concealing payment to celebrities to promote TRX and BTT on social media accounts, misleading the public into thinking they had "unbiased interest in TRX and BTT, and were not merely paid spokespersons."

The SEC said Sun's activity generated tens of millions of dollars of illegal profit at other investors' expense.

"This case demonstrates again the high risk investors face when crypto asset securities are offered and sold without proper disclosure," SEC Chair Gary Gensler said in a statement.

Sun did not immediately respond to a request for comment via Twitter. A lawyer for him could not immediately be identified.

The other celebrities charged included the singers Akon, Austin Mahone and Ne-Yo, social media personality and boxer Jake Paul, rapper Lil Yachty and porn actress Kendra Lust.

All but Soulja Boy and Mahone agreed to settle, without admitting wrongdoing, and together paid more than \$400,000.

Andrew Brettler, a lawyer for Lohan, said the actress did not know about the disclosure requirements until last March.

"From the outset, she cooperated with the SEC's investigation and ultimately agreed to disgorge the small amount of money she received and paid a fine to resolve this matter," her attorney Andrew Brettler said in an emailed statement.

A lawyer for Kendra Lust declined to comment. Lawyers for the other celebrities did not respond immediately to requests for comment.

The SEC has been ratcheting up efforts to crack down on the crypto industry, which Gensler has called a "Wild West" riddled with misconduct. Its efforts gathered pace after November's collapse of Sam Bankman-Fried's cryptocurrency exchange FTX.

In its complaint filed in Manhattan federal court, the SEC said Sun sold TRX and BTT as securities, and thus their sale needed to be registered with the agency.

It said Sun inflated apparent trading volume in TRX through extensive "wash trading," involving simultaneous or near-simultaneous purchases and sales with no real change in ownership.

From at least April 2018 to February 2019, Sun ordered employees to conduct hundreds of thousands of wash trades between two accounts he controlled, the SEC said.

By creating a false and misleading appearance of legitimate trading, Sun made it easier to sell TRX while maintaining stable prices, and generated \$31 million of proceeds from illegal, unregistered offers and sales of TRX, the SEC said.

Reporting by Chris Prentice and Jonathan Stempel in New York; Editing by Lisa Shumaker and Lincoln Feast.

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Chris Prentice

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Chris Prentice reports on financial crimes, with a focus on securities enforcement matters. She previously covered commodities markets and trade policy. She has received awards for her work from the Society for Advancing Business Editing and Writing and the Newswomen's Club of New York.

SEC's Gensler Warns Public Companies Against Overblown AI Claims

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Securities Law

Feb. 13, 2024, 10:16 AM PST

Lydia Beyoud

Bloomberg News

- SEC chair says need to be specific about AI use in disclosures
- New rules proposed by the regulator have drawn pushback

Publicly traded companies need to avoid “AI washing” when talking to investors about their use of the technology, according to the head of the US

SEC Chair Gary Gensler said Tuesday that companies must clarify for investors what they mean when referring to artificial intelligence. Corporations need to be specific about how they’re using it, risks to operations, and decide if executives’ comments regarding the technology must be disclosed to investors.

“As AI disclosures by SEC registrants increase, the basics of good securities lawyering still apply,” Gary Gensler said in a speech at

Gary Gensler, chair of the US Securities and Exchange Commission

Photographer: Samuel Corum/Bloomberg

Companies from a range of industries have been advertising how they’re harnessing AI to improve operations. More than 40% of S&P 500 companies discussed the technology in their annual reports to the SEC,

a recent Bloomberg Law analysis. Financial firms are also harnessing the technology in everything from lending to trade recommendations.

Gensler has previously called AI the “transformative technology of this generation,” but he has also warned about dangers it could pose to financial stability. The SEC recently proposed new regulations to crack down on how brokerages and investment firms use the technology.

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Industry groups like the American Securities Association, which represents financial advisers, have critiqued the proposal as being so broad as to prevent most firms from communicating with their clients.

Systemic Risks

During his speech on Tuesday, the SEC chair again warned about the technology's potential impact on financial stability. He expressed concerns about the prospect of thousands of financial institutions all using the same underlying AI models furthering biases. Concentration in AI providers is almost certain to happen due to economics of scale and network effects, he cautioned.

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The SEC's Watchful Eye: Ensuring Accuracy in Non-GAAP Financial Disclosures

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By Shari L. Klevens and Alanna Clair

Financial statements are one mechanism in which to provide insight into a company's financial health. However, management may not be satisfied that this information clearly reflects their business, including how it is run. Therefore, to supplement financial statements, management may provide another view of their company by disclosing alternative financial measures. This alternative information cannot be used to distort reality and must be presented in accordance with specific rules and guidelines.

All publicly traded companies are required to prepare their financial statements in accordance with generally accepted accounting principles, or "GAAP." GAAP are standardized principles created by the Financial Accounting Standards Board and governed by the U.S. Securities and Exchange Commission (SEC). There may be instances when the information presented in a public company's GAAP-based financial statements and footnotes to the financials are not deemed by Management to represent a complete picture of the company's business and financial performance. Therefore, non-GAAP measures complement what is disclosed in a company's GAAP-based financial statements.

These non-GAAP financial measures are defined by federal regulation as numerical measures of a company's historical or future performance, financial position, or cash flow that exclude or include amounts or are subject to adjustments that have the effect of excluding or including amounts from the most directly comparable measure calculated in accordance with GAAP. Non-GAAP measures often enable management to communicate to stakeholders its perspective on the company's financial performance or business strategy. More specifically, it can value the company, determine executive compensation, and assist in peer comparisons. One commonly used financial metric is earnings before interest, taxes, depreciation, and amortization (EBITDA), which reflects a company's operating profitability and can be used instead of net income. Other frequently used non-GAAP financial measures include adjusted earnings, adjusted earnings per share, adjusted revenues, core earnings, funds from operations and free cash flows.

The purpose of non-GAAP financial measures is not to allow companies to change the narrative of the company's financial performance intentionally. Non-GAAP financial measures must be accurate, faithfully represent the company's financial performance, and cannot be misleading. So, while companies are permitted to present non-GAAP measures, it is of utmost importance that they are not inaccurate or misleading.

Non-GAAP rules are governed by the SEC. These rules can be found in Regulation G and Item 10 of Regulation S-K and Regulation S-B. In accordance with Regulation G, public companies must present a reconciliation identifying the differences between the non-GAAP measure and the most directly comparable GAAP measure. This reconciliation process is relevant for stakeholders to understand what is included and excluded from the non-GAAP measures. The SEC has provided that though certain adjustments are not explicitly prohibited, they could result in a misleading non-GAAP measure. Whether or not an adjustment results in a misleading non-GAAP measure depends on a company's facts and circumstances. As the SEC has explained, "Presenting a non-GAAP performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business is one example of a measure that could be misleading."

Non-GAAP measures can also be misleading if the adjustments are designed to use individually tailored accounting policies that have the effect of changing GAAP recognition and measurement principles. Specifically, the SEC considers non-GAAP financial measures that unwind the impact of a newly adopted accounting principle to be misleading, even when presented to discuss comparability with prior periods. Non-GAAP measures may further be misleading if the company fails to identify and describe the non-GAAP measure and if the non-GAAP measure is presented with a label that does not reflect its nature.

Public companies' use of non-GAAP measures has grown in recent years. For instance, Harvard Business Review presented that as of 2021, over 95% of S&P 500 companies were disclosing non-GAAP earnings. Based on the growth of companies disclosing non-GAAP measures, as well as the SEC's recognition of the potential for non-GAAP measures being misleading and the differences between the amounts reported for non-GAAP and GAAP becoming larger, the SEC has heightened its scrutiny over non-GAAP financial measures.

In December 2022, the SEC issued new and updated guidance providing greater insight into how it considers a non-GAAP measure misleading and recent examples of when it may deem a non-GAAP measure to be presented more prominently than the most directly comparable GAAP measure. The SEC has also emphasized that companies should have controls and processes in place to provide timely information to Management to allow for timely decisions regarding required non-GAAP disclosures.

The SEC's Division of Corporation Finance continues to provide comments to issuers about non-GAAP financial measures, and the SEC's Division of Enforcement continues to investigate the accuracy of such non-GAAP metrics and, when necessary, will enforce charges against a company for providing misleading non-GAAP financial measures. Specifically, in 2023, the SEC charged a several companies for providing misleading non-GAAP measures. For example, DXC Technology Co. was charged with materially misstating its reporting and disclosures of non-GAAP financial performance measures, including its non-GAAP net income and diluted earnings per share, in multiple quarterly and annual SEC

filings and earnings releases. As described in the cease-and-desist order, “DXC materially increased its non-GAAP earnings by negligently misclassifying tens of millions of dollars of expenses as transaction, separation, and integration-related (TSI) costs and improperly excluding them in its reporting of non-GAAP measures.” Newell Brands Inc. and its CEO were also charged in 2023 for allegedly misleading investors about core sales growth, a non-GAAP financial measure.

While a company may want to disclose non-GAAP measures to present a more complete picture of its business, there are rules that must be followed to ensure that financial information is not misleading. Due to the growth and prominence of such measures by companies, it appears that the SEC Division of Corporation Finance and Division of Enforcement will remain focused on reviewing and evaluating companies’ use and presentation of non-GAAP measures.

Kirsten Ulzheimer *is an advisory partner at Marcum LLP and a member of the valuation, forensic and litigation support group. She has more than 25 years of experience applying generally accepted accounting principles (GAAP), generally accepted auditing standards (GAAS), Public Company Accounting Oversight Board (PCAOB) standards, and SEC requirements.*

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Bribery Is Not Securities Fraud, FirstEnergy Tells 6th Circ.

By **Jessica Corso**

Law360 (February 12, 2024, 9:54 PM EST) -- FirstEnergy Corp. is asking the Sixth Circuit to overturn class certification in a case accusing the company of committing securities fraud in connection with a multimillion-dollar bribe made to a convicted politician, arguing that "half-truths" about the company's aging power plants cannot be the basis of class-wide claims.

The utility company is seeking to shake off a potential multibillion-dollar lawsuit led by investors who claim that FirstEnergy kept its stock price inflated for years by hiding a scheme to bribe former Ohio House Speaker Larry Householder into pushing for a \$1 billion bailout package for two of the company's nuclear plants.

Householder **has been convicted** of accepting the \$60 million from FirstEnergy, and the company **has itself admitted** to bribing public officials for their support in propping up the plants.

But FirstEnergy **told** the Sixth Circuit Friday that making illegal political contributions is not the same thing as committing securities fraud.

"Under settled law, FirstEnergy had no freestanding duty to affirmatively disclose wrongdoing, and making illegal political contributions is not, in itself, a fraud 'in connection with the purchase or sale of any security,'" the company said, citing federal securities law.

It said that the lower court's decision to certify the class was out of step with eight other circuit courts that have interpreted a U.S. Supreme Court precedent known as **Affiliated Ute Citizens of Utah v. United States** as disallowing class-wide claims based on so-called half-truths.

The Affiliated Ute presumption is narrow and only "allows courts to presume reliance on a classwide basis only if the class's claims are primarily based on the wholesale omission of material information by someone owing a special duty to disclose," FirstEnergy said.

The class pointed to nearly 50 statements made over a three-and-a-half year period by FirstEnergy and its executives as containing omissions because, for example, the company did not disclose the illegal payments when telling investors that it was pursuing legislative and regulatory solutions to address the costs of the aging plants.

Because those are affirmative statements, or "half-truths," they cannot be relied upon to form a class under the Affiliated Ute presumption, FirstEnergy said.

"If FirstEnergy misled investors, it did so by speaking," the company told the appellate court.

The Sixth Circuit has never addressed the Affiliated Ute presumption, which may have been one of the reasons why it **took the rare step** of granting interlocutory review in the case, according to FirstEnergy.

"The court's resolution of those questions will have significant implications for this case — a securities class action in which plaintiffs seek billions in damages — and for class-action litigation more generally in this circuit," the company said.

The company has also brought the question of damages before the court, saying that the plaintiffs

cannot come up with a model for calculating financial harm, and that it would be "difficult, if not impossible" to do so for each of the "861 trading days" that the fraud was alleged to have occurred.

The class urged the circuit court not to take up the appeal, noting that FirstEnergy's arguments were already addressed by the lower court judge and found to be lacking merit.

In objecting to the appeal, the investors told the Sixth Circuit the company did more than speak "half-truths" in its effort to cover up the scheme and accused FirstEnergy of playing "fast-and-loose with the record in attempting to manufacture judicial error."

Representatives for the class didn't immediately respond to a request for comment late Monday afternoon.

FirstEnergy has **agreed** to a \$180 million settlement to end a derivative lawsuit tied to the bribery scandal, though the settlement has not yet been finalized as an objector is currently **pursuing an appeal**.

FirstEnergy is represented by Robert Giuffra, Sharon Nelles, David Rein, Morgan Ratner and Kathleen O'Malley of Sullivan & Cromwell LLP and Geoffrey Ritts, Adrienne Ferraro Mueller, Marjorie Duffy and M. Ryan Harmanis of Jones Day.

The class is represented by Darren Robbins, Mark Solomon, Tor Gronborg, Joseph Daley and Hillary Stakem of Robbins Geller Rudman & Dowd LLP and Joseph F. Murray of Murray Murphy Moul + Basil LLP.

The case is In re: FirstEnergy Corp., case number 23-0303, in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Dave Trumbore.

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Like 'Fiction': 3 Netted In FirstEnergy Plant Bailout Scandal

By **Ryan Harroff**

Law360 (February 12, 2024, 11:12 AM EST) -- Two former FirstEnergy Corp. executives and the onetime chair of Ohio's utility regulator allegedly stole money from the company as they helped carry out the massive bribery scheme behind a controversial \$1.3 billion bailout for two nuclear energy plants, according to an indictment one prosecutor on Monday said read like fiction.

Ex-FirstEnergy CEO Chuck Jones and former Senior Vice President of External Affairs Michael Dowling are accused of working with onetime Ohio Public Utilities Commission chair Sam Randazzo to funnel bribes and help push the legislation behind the bailout, known as House Bill 6, Attorney General Dave Yost announced Monday. Between them, the three men face 27 felony charges in their indictment from a special grand jury in Summit County.

Former Ohio House Speaker Larry Householder and Republican lobbyist Matt Borges were **convicted** for their own roles in the scheme in June 2023.

Randazzo, who is also facing **federal charges** stemming from the House Bill 6 scandal, allegedly worked as a FirstEnergy lobbyist without properly registering as one and worked for the benefit of the company when he was meant to be working for the public, Yost told reporters Monday.

"[Randazzo] was covered with FirstEnergy pocket lint," Yost said. "He was paid by the taxpayers and was supposed to work for you, but instead he worked for them as their agent, their lobbyist, their ally."

The indictment also names Randazzo's companies the Sustainability Funding Alliance of Ohio and IEU-Ohio Administration Co. as defendants and alleges they were formed for the sole purpose of funneling money misappropriated from FirstEnergy by Jones and Dowling to Randazzo in exchange for regulatory favors.

Ohio Deputy Attorney General Carol O'Brien said the conduct described in the indictment "could be the basis for a fiction novel" were it not "a true story of greed and corruption by three men and two sham organizations."

"Charles 'Chuck' Jones, Michael Dowling and Sam Randazzo were literally as thick as thieves," the indictment states. "Together, they would steal money from FirstEnergy, write legislative provisions worth unearned millions of dollars to FirstEnergy, legally guarantee continued FirstEnergy's profitability and take over the state government in a way that allowed FirstEnergy to regulate itself."

Jones and Dowling face largely the same felony counts, including aggravated theft of \$1.5 million or more, money laundering and bribery, with Dowling getting two more counts than Jones for allegedly tampering with records. Randazzo got hit with 22 felony counts in the Friday indictment, including aggravated grand theft on top of the 11 counts he was already facing from his separate November **indictment**.

The indictment states that the trio were operating an unlawful criminal enterprise with the goal of taking money from both FirstEnergy and the Ohio taxpayers despite their responsibilities to those groups. All three men have warrants out for their arrest, and Yost said they had promised to turn themselves in but failed to actually do so.

"Over the weekend, the counsel representing these men were in contact with our office and assured us that they would turn themselves in this morning at 8:30 a.m. at the Summit County jail," Yost told reporters Monday. "They did not fulfill that promise, and I suppose I am unsurprised they would not keep this promise either."

Carole Rendon, counsel for Jones, pushed back harshly on the accusations against her client in a Monday statement emailed to Law360 that included the assertion that Jones had never promised to surrender himself and that Yost made that allegation up as part of a "false and unfair narrative" that has plagued her client and other former FirstEnergy employees.

"Mr. Jones did not violate the law," Rendon said. "He did not bribe anyone. He acted in the best interests of FirstEnergy's customers as well as its employees and investors, and never betrayed their trust. We are disappointed that the Ohio Attorney General and Summit County Prosecutor chose to obtain an indictment without ever speaking with Mr. Jones or his counsel or otherwise attempting to understand the full context of the one-sided information on which the indictment is based."

Yost said that the arrest warrants against Jones, Dowling and Randazzo are still in effect and that he expects the trio will be taken into custody Monday.

Dowling and Randazzo could not immediately be reached for comment Monday. Representatives for Randazzo's companies did not immediately reply to requests for comment.

Ohio is represented by Carol O'Brien and Matthew Meyer of the Ohio Attorney General's Office and Brad Gessner of the Summit County Prosecutor's Office.

Jones is represented by Carole S. Rendon of BakerHostetler.

Counsel information for Dowling and Randazzo was not immediately available.

The indictment was filed in the Ohio Court of Common Pleas for Summit County. The case number and title was not immediately available.

--Editing by Alyssa Miller.

Update: This story has been updated with more details and with a comment from Jones' counsel.



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Rite Aid Investors' Attys Get \$58M As Walgreens Deal OK'd

By **Henrik Nilsson**

Law360 (February 9, 2024, 10:28 PM EST) -- Counsel representing a class of Rite Aid investors will take home nearly \$58 million in attorney fees after a Pennsylvania federal judge granted final approval to the \$192.5 million deal resolving claims that Walgreens' executives lied about the likelihood of an ultimately unsuccessful merger between the two drugstore chains.

U.S. District Judge Jennifer P. Wilson on Wednesday signed off on the \$192.5 million deal that a class of certified Rite Aid Corp. **investors reached** with Walgreens Boots Alliance in October. Judge Wilson also awarded Robbins Geller Rudman & Dowd LLP \$57.75 million in attorney fees, which equals 30% of the settlement fund, and \$1.4 million in expenses, according to two orders.

The court also awarded \$29,000 and \$21,000 to lead plaintiffs Douglas S. Chabot and Corey M. Dayton, respectively.

The judge noted that over 149,400 copies of the settlement notice have been distributed to potential class members. The certified class consists of investors who owned Rite Aid stock from Oct. 20, 2016, to June 28, 2017.

In a declaration in support of the settlement, Robbins Geller said the firm spent over 31,400 hours and \$1.4 million in expenses in litigating the case.

"There are not many securities cases where target stockholders obtain a recovery from the acquirer for alleged misrepresentations impacting the target's stock price in connection with a busted merger, and this appears to be the largest such recovery in history," David Knotts of Robbins Geller told Law360 in an email Friday. "We are pleased to obtain such a rare and unprecedented recovery on behalf of the class of Rite Aid investors."

The Rite Aid investors sued in 2018, **accusing** Walgreens' executives of making false representations about how likely regulators were to OK a proposed merger announced in 2015 between the two drugstore chains. The result was an artificially inflated stock price and an eventual drop when the merger failed that cost investors money, according to the suit.

Philadelphia-based Rite Aid admitted this, according to the investors, who pointed to a 2017 proxy statement stating that, "The January 27, 2017 stock price is not an accurate reflection of the value of Rite Aid, because such stock price reflected market expectations of the likelihood that the merger would occur on the terms of the original merger agreement."

Walgreens first unveiled its intentions to buy Rite Aid in 2015 for around \$17.2 billion, according to the complaint, but plans dragged on, hitting **setback after setback**.

Walgreens executives kept expressing confidence that the two retail pharmacy giants' merger would be approved, but they eventually called off the deal, and Rite Aid stock plummeted again, the investors said.

Walgreens later announced it would buy more than 1,900 stores from Rite Aid, but would also be paying a \$325 million cancellation fee for backing out.

U.S. District Judge John E. Jones III **granted class certification** in January 2020.

Rite Aid and several dozen affiliates **filed for Chapter 11** protection in October.

Counsel and representatives for Walgreens did not immediately return a request for comment on Friday.

The investors are represented by Randall J. Baron, David A. Knotts, Rick Atwood and Teo A. Doremus of Robbins Geller Rudman & Dowd LLP.

Walgreens and its executives are represented by Thomas G. Collins of Buchanan Ingersoll & Rooney PC and Jonathan D. Polkes and Caroline Hickey Zalka of Weil Gotshal & Manges LLP.

The case is Chabot et al. v. Walgreens Boots Alliance Inc. et al., case number 1:18-cv-02118, in the U.S. District Court for the Middle District of Pennsylvania.

-- Additional reporting by Nadia Dreid and Matthew Santoni. Editing by Jeremy Abrams.

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2nd Circ. Revives Investors' Mexican Bond-Rigging Claims

By **Jon Hill**

Law360 (February 9, 2024, 7:35 PM EST) -- The Second Circuit on Friday reinstated U.S. investor claims accusing major banks of a yearslong collusion to rig Mexican government bond prices, saying a New York district court wrongly found it didn't have jurisdiction over the matter.

The three-judge panel's **opinion** vacates U.S. District Judge J. Paul Oetken's dismissal of a 2018 case by U.S. pension funds against Mexico-based units of global banking giants, including Bank of America, Deutsche Bank and HSBC.

The case alleged these banks collectively sold billions of dollars worth of price-fixed bonds to U.S. investors through affiliated brokers in New York, transactions Judge Oetken viewed as insufficient to create personal jurisdiction in New York for alleged collusion that "occurred in Mexico alone."

However, the Second Circuit panel said the plaintiffs plausibly alleged the brokers were "mere pass-throughs" for the banks, meaning the bond sales at issue weren't disconnected from the purported conspiracy and instead qualified as the kind of "in-forum contacts" needed for jurisdiction.

"Once the brokers are established as defendants' agents for jurisdictional purposes, the agents' contacts can be 'imputed' to defendants," the panel said. "Perhaps unsurprisingly, using a New York agent as the sales hub for billions of dollars' worth of bonds subjects the principal to specific jurisdiction for claims arising from or related to that conduct."

The panel also cautioned against drawing sweeping conclusions, noting that it was not taking the position that an affiliate's in-forum marketing and sales activity "can always be pinned to an out-of-state defendant." There are still several factors that have to be considered, the panel stressed.

According to the panel, the pension funds' case "does not involve any difficult line-drawing questions. The complaint alleges that defendants were in charge of every step of every deal, thousands of times over during the alleged class period."

The opinion, written by U.S. District Judge Arun Subramanian, who sat by designation on the panel, comes just a week after a separate Second Circuit panel **affirmed the dismissal** of a different bond-rigging case against big banks, which includes units of some of the same financial institution families.

That case, also brought by pension funds, alleged manipulation of the U.S. Treasury market and was rejected for what the panel said was a failure to plausibly tie defendant banks together in a conspiracy.

Meanwhile, Friday's case focused on alleged manipulation of the Mexican government bond market. The pension funds plaintiffs claimed banks had rigged government auctions for these bonds through information sharing and collusive bidding during a proposed class period between 2006 and 2017.

Among the defendants are named subsidiary banking families, including Santander, BBVA, Citigroup, Deutsche Bank, HSBC, Bank of America, JPMorgan Chase and Barclays. Several other banks were dropped from the litigation following a 2019 **dismissal ruling**.

In June 2020, JPMorgan and Barclays agreed to settle out for a combined **\$20.7 million** in a deal the plaintiffs pitched as potential "catalysts" for other banks to settle as well.

Although no further settlements were announced, Judge Oetken dismissed the case several months later.

The district court's dismissal and Friday's opinion reversing the ruling, both relied heavily on **Charles Schwab Corp. v. Bank of America Corp.** , a **key 2018 ruling** by the Second Circuit addressing jurisdiction in the context of a rate-rigging cases.

The "upshot of Schwab," according to Judge Oetken, was that there needed to be "in-forum contacts that bear a causal relationship to defendants' wrongdoing, not merely to plaintiff's harm," a standard he did not believe the plaintiffs had met by invoking the affiliate brokers' sales activity in New York.

Even if the defendant banks "established contacts" with New York through the alleged activity, the judge said, "a conspiracy does not 'arise from' an ex post attempt to profit from the conspiracy."

The different components of the conspiracy alleged by the plaintiffs were all based in Mexico, he added.

However, the Second Circuit panel found Schwab "expressly rejected" the idea that the alleged collusion also needed to take place in-forum for there to be jurisdiction. Schwab "held instead that there was jurisdiction over claims connected to the defendants' 'sales and solicitation' in the forum," the panel said.

"Indeed, the facts here present an even stronger case for jurisdiction than those in Schwab," the panel added. "Plaintiffs want to sue defendants where defendants have allegedly elected to conduct their U.S. sales operations. New York has a strong interest in regulating businesses in the state, of course, and defendants chose to take advantage of New York's market and laws. So they can't complain."

Representatives for Bank of America, Citigroup, Deutsche Bank and Santander declined to comment. Counsel for the plaintiffs and representatives for BBVA and HSBC did not immediately respond to requests for comment Friday.

U.S. Circuit Judges Gerald Lynch and Michael Park and U.S. District Judge Arun Subramanian sat on the panel for the Second Circuit.

The pension fund plaintiffs are represented by Margaret C. MacLean and Vincent Briganti of Lowey Dannenberg PC.

The banks are represented by law firms, including Skadden Arps Slate Meagher & Flom LLP, Shearman & Sterling LLP, WilmerHale, Davis Polk & Wardwell LLP, Cleary Gottlieb Steen & Hamilton LLP and Simpson Thacher & Bartlett LLP.

The case is *In re: Mexican Government Bonds Antitrust Litigation*, case number 22-2039, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Drashti Mehta.



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2nd Circ. Won't Revive Credit Suisse Delisted Trade Note Suit

By **Katryna Perera**

Law360 (February 9, 2024, 8:58 PM EST) -- The Second Circuit declined on Friday to revive a proposed class action accusing Credit Suisse of causing retail investors substantial losses by delisting a popular exchange-traded note, saying the bank gave adequate warnings of the risks investors faced and cautioned them against holding the note for more than a day, among other things.

A three-judge panel for the Second Circuit issued a **summary order** saying the district court correctly concluded **last March** that plaintiff Adelina Gomez failed to plausibly allege scienter in connection with her claims of fraudulent misrepresentation or market manipulation.

In her appeal, Gomez put forth two potential motives for Credit Suisse to support her scienter claim. She said the bank had a "potential" interest in "sell[ing] into the short squeeze" that occurred when the price of the exchange-traded note, known as DGAZ, spiked in 2020, or it had an interest in possibly "receiv[ing] continued fees instead of having to pay to accelerate all of the outstanding notes."

DGAZ is an ETN that tracks the price of an underlying index or the numerical average of a securities price. ETNs do not pay interest, and their value is determined by the return of their underlying market index, according to the suit's complaint.

In DGAZ's case, it was listed by Credit Suisse in 2012 on the NYSE Arca Exchange, and its underlying index was the S&P's GSCI Natural Gas Index.

On Friday, the panel said neither motive Gomez asserted is plausible. The complaint alleges that Credit Suisse did not sell any of its roughly 431,000 units of DGAZ between June 22, 2020, and Aug. 12, 2020, even though the market price for the note increased from less than \$600 to approximately \$25,000 per note during that period, the order states.

Therefore, Credit Suisse's decision not to sell the DGAZ units it held during that period "was a decision to abstain from making a potentially multi-billion dollar profit," the panel said.

Additionally, Credit Suisse only received about \$135,000 in investor fees during that period, according to the order.

"The inference that Credit Suisse engaged in securities fraud to collect this sum — particularly when it could have made more than \$10 billion by selling its DGAZ units — is not one that we find plausible. In short, neither motive is consistent with the facts as alleged in the complaint," the panel said.

Gomez also argued in her appeal that an inference of scienter can be drawn from the bank's alleged recklessness in failing to disclose certain information to investors.

The Second Circuit panel once again disagreed, saying the offering documents for DGAZ had "detailed warnings" of the risks involved with holding the note, including that holding it for more than one day could result in the loss of the full value of the investment and that a decision by Credit Suisse to delist the note could cause it to trade at a premium price.

The panel also noted that many of these warnings "were in bold or otherwise emphasized" in the

offering documents.

Credit Suisse also issued a press release in June 2020 announcing the note's delisting and "reiterated the warning" that this action could impact the trading price of DGAZ. According to the order, the release also cautioned that the development of a price premium or the market's illiquidity could lead to substantial losses for investors.

Gomez also had access to other press reports "indicating that conditions were ripe for the development of a price premium which would put pressure on investors, such as herself, with short positions in DGAZ," the order states.

All of these warnings adequately captured and disclosed the "range" of risks DGAZ investors faced, and an issuer cannot be expected to predict and disclose all potential negative results, the panel said.

According to the order, Gomez also suggested in her appeal that Credit Suisse should have known that its actions posed a "very likely, almost certain risk" of a price premium developing.

But the panel disagreed, saying notes that have been delisted have historically traded at a discounted price, not an inflated one. The panel also noted that even in the current action, DGAZ continued to trade at a stable price for nearly one month after its delisting.

Credit Suisse declined to comment on Friday, and counsel for Gomez did not immediately respond to requests for comment.

Gomez sued in **January 2022**, claiming Credit Suisse "destroyed" DGAZ and sent retail investors scrambling to cover short positions at wildly inflated prices.

Gomez herself engaged in the risky "short selling" practice, in which she borrowed DGAZ ETNs to sell on the open market with the intention of repurchasing the security at a lower price than when she first sold it to return it to the creditor.

But when Credit Suisse announced it would be delisting DGAZ, the price of the security spiked, forcing some short sellers, including Gomez, to cover their positions at a loss — otherwise known as a "short squeeze."

U.S. Circuit Judges Robert D. Sack, Reena Raggi and Joseph F. Bianco sat on the panel for the Second Circuit.

Gomez is represented by Daniel B. Centner of Peiffer Wolf Carr Kane Conway & Wise LLP, and Daren A. Luma of Daren A. Luma PLLC.

Credit Suisse is represented by Herbert S. Washer, Sheila C. Ramesh and John MacGregor of Cahill Gordon & Reindel LLP.

The case is *Adelina Gomez v. Credit Suisse AG*, case number 1:22-cv-00115, in the U.S. District Court for the Southern District of New York.

—Additional reporting by Lauren Berg. Editing by Michael Watanabe.



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A Closer Look At Novel Jury Instruction In Forex Rigging Case

By **Michael Longyear, John Siffert and Zachary Shemtob** (February 12, 2024, 4:20 PM EST)

The recent **conviction** of Neil Phillips, a U.K.-based hedge fund executive, for commodities fraud highlights the issue of whether the court's novel jury instruction incorrectly defined the level of intent required to support a conviction for open market manipulation under the Commodity Exchange Act.

In *U.S. v. Phillips*, the U.S. District Court for the Southern District of New York instructed the jury that it could find that the alleged transaction was manipulative only if it "would not have been done at the same time and in the same manner" as a legitimate trade, "except for the intent to mislead." [1]

This instruction — the substance of which is still being litigated in the parties' post-trial briefing — should inform both the government and defense counsel in future open market manipulation cases. [2]

Case Background

On Sept. 1, 2022, an **indictment was unsealed** in the Southern District of New York charging Phillips with, among other things, commodities fraud, in violation of Title 7 of the U.S. Code, Section 9, and conspiracy to commit commodities fraud, in violation of Title 18 of the U.S. Code, Section 371.

Phillips, the co-founder and co-chief investment officer of Glen Point Capital, focused on forex trading of currency pairs, in which one currency's value is compared to the value of another currency. Phillips had traded the currency pair of U.S. dollars to the South African rand.

As part of his trading strategy, Phillips also purchased an option for the dollar/rand currency pair so that if the exchange rate fell below 12.50 at any point prior to a particular date, Phillips' fund would receive a \$20 million payment.

The government alleged that, on Dec. 26, 2017 — several days before the option was set to expire — Phillips manipulated the foreign currency exchange market to cause the dollar/rand exchange rate to fall below 12.50 by selling \$725 million U.S. dollars in exchange for the rand, thereby triggering the \$20 million payment under the option.

Phillips advanced several arguments in his defense at his eight-day trial before U.S. District Judge Lewis J. Liman. Among them, Phillips denied that his trade was motivated by an intent to trigger the option payout, as opposed to for **legitimate economic reasons**.

According to Phillips, such transactions were commonly entered into by traders to manage internal risk, and Phillips faced a delta — a risk in price movement — of \$759 million concerning the option.

At trial, the government characterized these justifications as cover stories, arguing that Phillips' goal was not to manage risk, but to trigger the \$20 million option payout by driving down the exchange rate.



Michael Longyear



John Siffert



Zachary Shemtob

The Contested Jury Instruction

The question of whether Phillips traded for legitimate or manipulative purposes (that is, to manage internal risk or drive down the USD/ZAR exchange rate) was not only argued as a factual question to the jury, it also was a central disagreement at the charging conference.

Phillips submitted requests to charge that commodities fraud required a jury finding that he "traded solely to affect the USD/ZAR exchange rate, and not for any investment purpose." [3]

Under Phillips' proposed instructions, the jury should have been informed that it could not convict if there was any legitimate economic rationale for Phillips' actions, such as to manage the hedge fund's internal exposure. According to Phillips, if he had traded for both legitimate and manipulative purposes, then he had not acted with the requisite intent to defraud.

Phillips provided authority for his proposed sole-intent standard. In December 2017, [4] U.S. District Judge Paul Gardephe instructed the jury in *U.S. v. Tuzman*, a market manipulation case brought under the Securities Exchange Act, that it must find the defendant had engaged "in conduct with the sole intent to ... create a false impression of market activity." [5]

Phillips argued that this position was also supported by a 2007 case in the Southern District of New York, *U.S. Securities and Exchange Commission v. Masri*. [6] In *Masri*, U.S. District Judge Richard Holwell conducted an exhaustive analysis of the requisite intent necessary for the SEC to prove market manipulation, concluding, according to Phillips, that it must show "that the [defendant's] sole intent [is] to artificially affect the price of the stock." [7]

Phillips also argued that the cited precedents made good sense and were consistent with sound policy. The sole-intent standard was appropriate because it would always be difficult, if not impossible, for a finder of fact to distinguish whether one acted on a legitimate or manipulative purpose when both trading rationales were seemingly present in a person's mind. Moreover, "principles of due process, fair notice, and the rule of lenity militate[d]" in his favor. [8]

The government disagreed. According to the government's proposed instructions, it "need not prove that the intent to defraud was the only intent of the defendant." [9] Rather, a "defendant may have the required intent to defraud even if the defendant was motivated by other lawful purposes as well." [10]

The government argued that this was simply black-letter law; in practically no other offense could one escape criminal liability because he also had noncriminal motivations for his actions. [11]

The government further contended that Judge Gardephe had been mistaken in *Tuzman*, citing U.S. Court of Appeals for the Second Circuit cases involving, among other crimes, wire fraud. [12]

The prosecutors also argued that *Masri* did not support a sole-intent standard, but instead required a determination of manipulation where "the actor would not have engaged in the same conduct 'but for' the forbidden intent." [13]

Judge Liman's Middle Path

Judge Liman recognized that there may be both legitimate and manipulative motivations for a given transaction, and a defendant does not necessarily act with an intent to defraud if motivated by both purposes. Nevertheless, the court instructed the jury that "if the transaction would not have been done at the same time and in the same manner, except for the intent to mislead," the transaction was improper. [14]

In other words, "if but for an intent to deceive, the defendant would not have conducted the transactions in the dollar-rand foreign exchange spot market at the times and in the amounts he did, then those transactions were manipulative." [15]

On Oct. 25, 2023, following a day of deliberations, the jury found Phillips guilty of commodities fraud and acquitted him of conspiracy to commit commodities fraud.

Implications

Judge Liman's adoption of a "but for" standard in Phillips has several important takeaways for defense counsel.

First, defense counsel should be vigilant to cite Phillips if the government persists in advocating that a judge should instruct the jury that a dual intent satisfies the scienter standard. Dual intent not only was rejected by Judge Liman, but we have also found no court in any district that has adopted this standard in cases involving open market manipulation.

Second, defense counsel should note, as Phillips' attorneys correctly recognized, that Judge Gardephe had previously adopted the sole-intent instruction in Tuzman, although the Second Circuit has not had an opportunity to rule on the correct standard.

Third, the dual intent and "but for" instructions may be in tension with the government's burden to prove scienter beyond a reasonable doubt.

Where the facts establish that the defendant had a legitimate reason as well as an improper reason, the "but for" or dual intent instruction could be seen as an invitation for the jury to divine the defendant's motive for the conduct, as opposed to whether the defendant formed the requisite criminal intent.

Indeed, in such cases, counsel might argue that the guilty verdict was as much a result of confirmation bias as it was the result of the jury deciding that the improper purpose was the prevailing reason for the charged conduct.

The sole-intent standard avoids this conjecture, and puts the government to its proper burden at trial to prove beyond a reasonable doubt that the defendant acted with the intent to defraud.

Michael D. Longyear is a partner at Lankler Siffert & Wohl LLP. He previously served as an assistant U.S. attorney in the Southern District of New York's Criminal Division.

John S. Siffert is a founding partner at Lankler Siffert. He is also co-author of "Modern Federal Jury Instructions."

Zachary Baron Shemtob is an associate at Lankler Siffert.

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[1] United States v. Neil Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), Oct. 24, 2023, Trial Transcript ("Tr.") at 1351.

[2] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 102. The defendant's motion for acquittal was filed on December 8, 2023. *Id.*, ECF No. 94.

[3] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 54 at 21.

[4] No. 15 Cr. 536 (PGG) (S.D.N.Y. Jan. 11, 2018).

[5] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 57 at 4.

[6] 523 F. Supp. 2d 361 (S.D.N.Y. 2007).

[7] Masri, 523 F. Supp. 2d at 372; Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 57 at 2.

[8] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 57 at 6.

[9] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 50 at 12-13.

[10] Id.

[11] Phillips, 22 Cr. 138 (LJL) (S.D.N.Y.), ECF No. 56 at 13 (citing [United States v. Technodyne LLC](#) , 753 F.3d 368 (2d Cir. 2014) (collecting cases)).

[12] Id. (citing [United States v. Gatto](#) , 986 F.3d 104 (2d Cir. 2021) (concerning a violation of 18 U.S.C. § 1343)).

[13] Id. at 14.

[14] Tr. at 1351.

[15] Id at 1351-52.

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AI Drugmaker Wants Investor Suit Over Botched Trial Tossed

By **Sydney Price**

Law360 (February 9, 2024, 5:56 PM EST) -- Artificial intelligence-based drugmaker BioXcel Therapeutics Inc. is urging a Connecticut federal court to drop a suit accusing it of failing to disclose stumbles that allegedly affected the integrity of a dementia drug study, arguing it took necessary steps to inform the public and the government that the trial had been jeopardized.

In a suit filed last July and most recently amended in December, investors said BioXcel shares fell when the company acknowledged issues affecting a clinical trial for a drug used to sedate agitated seniors with dementia, which showed that the company lacked control over adherence to its protocols. But BioXcel argued in its motion to dismiss Tuesday that it took quick action when it learned of data collection issues at a contractor's site where the trials occurred.

"As soon as BioXcel discovered an issue that had the potential to present a data integrity concern, it promptly investigated and disclosed its findings," BioXcel said Tuesday. "This is not fraud; it is exactly what BioXcel should have done."

On June 29, 2023, before the market opened, BioXcel publicly acknowledged the probe from the U.S. Food and Drug Administration for the first time, according to the complaint. On that day, the company also disclosed that its principal investigator for its clinical trial, called Tranquility II, had failed to adhere to certain requirements and did not adequately maintain case histories for certain patients. BioXcel also said the investigator may have lied about submitting certain vendor reports.

According to the suit, BioXcel had received a warning letter known as a Form 483 from the FDA about the trial's conditions in December 2022. BioXcel said courts have routinely held that pharmaceutical companies do not have an affirmative to disclose they have received a form 483.

"Plaintiffs must specifically and plausibly allege how the Form 483 rendered each statement false or misleading, at the time and in the context it was made," BioXcel said. "They have not done so here."

In addition to BioXcel, the suit's individual defendants are BioXcel cofounder and CEO Vimal Mehta, Chief Financial Officer Richard Steinhart and Chief Medical Officer Robert Risinger.

The BioXcel defendants also said Tuesday that the statements they made regarding the trial's enrollment and the company's optimism about the trial were true and remain true today. The investors have not established BioXcel knew any forward-looking statements were false at the time they were made, they said. BioXcel said it told investors that its products could fail to receive regulatory approval "for many reasons."

"None of these statements make any representation about the trial results, or whether they would support FDA approval," BioXcel said. "In fact, BioXcel made quite clear they may not."

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

The investors are represented by Shannon Hopkins and Adam M. Apton of Levi & Korsinsky LLP and Daniel L. Berger and Caitlin M. Moyna of Grant & Eisenhofer PA.

The BioXcel defendants are represented by Colleen C. Smith, Jessica Bengels, Michele D. Johnson, Sarah Tomkowiak and Meryn C.N. Grant of Latham & Watkins LLP.

The case is Martin v. BioXcel Therapeutics Inc. et al., case number 3:23-cv-00915, in the U.S. District Court for the District of Connecticut.

--Editing by Vaqas Asghar.

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Apache Investors Get Class Cert. In Suit Over Natural Gas Play

By **Spencer Brewer**

Law360 (February 9, 2024, 6:48 PM EST) -- A group of Apache Corp. investors received class certification in their suit against the Houston oil and gas company on Friday, with a Texas magistrate judge saying there's enough evidence the company misrepresented a specific natural gas play to go forward with a lawsuit.

U.S. Magistrate Judge Andrew M. Edison granted the certification in part, but also limited the class period to Sept. 7, 2016, to Feb. 22, 2018, as opposed to the full period the investors had asked for.

The case stems from a dispute that the investors say stretches back to 2016, when Apache and its executives allegedly misrepresented the prospects of a hydrocarbon play in the Permian Basin known as Alpine High.

The company and its leadership repeatedly told the investors that even under so-called conservative models, Alpine High held more than three billion barrels of oil and large amounts of "really rich gas," the suit says, but Apache ultimately announced a temporary deferral of natural gas production from the site in 2019.

"I appreciate both sides' arguments," Judge Edison said Friday. "But common sense tells me that investors expected the deferral, and any decline in stock price was due to uncertainty about low gas prices generally, not Alpine High specifically."

In this case, "rich gas," or "wet gas," is natural gas that has liquid hydrocarbons in solution. "Dry gas," in comparison, lacks those liquid hydrocarbons and is less profitable.

The investors say Apache made a series of partial corrective disclosures about Alpine between October 2017 and March 2020, but nevertheless continued to vigorously promote the play. The company's stock then took a nosedive when problems began to surface, falling from \$39.07 a share on April 22, 2019, to \$7.76 on March 12, 2020, according to the complaint.

A Massachusetts-based pension group, Plymouth County Retirement System, filed suit against Apache in 2021. In April of last year, the group, joined by trustees of the Teamsters Union No. 142 Pension Fund, asked a judge to certify its class of shareholders.

The investors sought certification for themselves and anyone else that had bought Apache stock between late 2016 and early 2020 and were damaged by that purchase.

The proposed class size would have been large, Judge Edison wrote, as the company had between 375.4 million and 382.5 million shares outstanding during the proposed class period. While Judge Edison agreed that the class period between 2016 and 2018 made sense, he said that for the period between 2018 and 2020 the drop-off in stock prices were the result of market factors rather than statements about Alpine.

Apache had **argued in its response** that Feb. 22, 2018, should be the cutoff date for the class certification. On that day, the company says, Apache CEO John Christmann told analysts that the project would really "hum" even with lower gas prices at the time, and another executive said the project would generate positive returns even with dry gas.

"There was no front-end price impact attributable to the 15 alleged misrepresentations made during the Focus Period, and Defendants have rebutted the Basic presumption as to each of the three corrective disclosures alleged during the Focus Period," Edison said.

Judge Edison agreed that Feb. 22, 2018, should be the cutoff date, citing case law that in an alleged securities fraud, class certification ends when the truth has been disseminated to the market.

Counsel for Plymouth County Retirement System, the Teamsters Union No. 142 Pension Fund and Apache Corp. didn't immediately respond to a request for comment.

Plymouth and Teamsters 142 are represented by Austin W. Manning, Daniel Rotko, Gregory M. Castaldo, Johnston de Forest Whitman Jr., Joshua Edward D'Ancona, Michelle M. Newcomer and Richard A. Russo Jr. of Kessler Topaz Meltzer & Check LLP, David R Kaplan and Hani Farah, Steven B. Singer, Maya Saxena, Joseph E. White III and Joshua H. Saltzman of Saxena White PA, and John S. Edwards Jr. and Thomas R. Ajamie of Ajamie LLP.

Apache is represented by David D. Sterling, Amy Pharr Hefley, J. Mark Little, Anthony J. Lucisano, Frank Mace and John B. Lawrence of Baker Botts LLP.

The case is in re: Apache Corp. Securities Litigation, case number 4:21-cv-00575, in the U.S. District Court for the Southern District of Texas.

--Additional reporting by Renee Hickman. Editing by Alanna Weissman.

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Eargo Investors Sue In Del. For Patient Square Merger Docs

By **Leslie A. Pappas**

Law360 (February 9, 2024, 2:31 PM EST) -- Two shareholders of California medical device company Eargo Inc. sued in Delaware's Court of Chancery on Thursday, seeking books and records to investigate potential wrongdoing and breaches of fiduciary duties in connection with a pending buyout by controlling shareholder Patient Square Capital LP.

Eargo stockholders Donald H. Nau and Donald W. Hansen say they need the records ahead of a stockholder vote on the proposed \$2.55-per-share cash deal to make an informed decision about whether it is fair to minority stockholders. Stockholders are expected to vote on the merger at a special meeting Feb. 13, according to the complaint.

The merger price appears to be "a significant discount" to the company's fair value, given the 52-week average stock price per share is \$6.32 and it has gone as high as \$14.60 per share during that time, the complaint says.

San Jose, California-headquartered Eargo makes and directly sells air-conduction hearing aids to the public.

Patient Square, a health care investment firm headquartered in Menlo Park, California, became Eargo's majority shareholder in November 2022 through a rights offering and notes conversion that netted Eargo \$32.3 million, according to a company announcement at the time.

As a result of the transaction, Patient Square now owns or controls about 76.2% of the company's outstanding stock.

The notes conversation came a few months after Eargo entered into an agreement with Patient Square in June to raise approximately \$100 million through the sale of senior secured convertible notes, the complaint says. As part of that transaction, Eargo signed an agreement with Patient Square that allowed it to nominate six directors to Eargo's six-member board.

Patient Square has since nominated three board directors, including Justin Sabet-Peyman, who is chair of both the compensation committee and the nominating and corporate governance committee.

The proposed merger stems from Eargo's decision to explore strategic alternatives for the company in September 2023, the complaint says. The board formed a three-member special committee — none of whom were Patient Square nominees — to explore potential offers. The committee engaged Davis Polk as counsel and Perella Weinberg as financial adviser.

On Oct. 27, Patient Square offered \$2.00 per share and demanded a final agreement by Oct. 30.

The committee rejected the offer as too low and asked Patient Square to come back with a better offer that included a "go-shop" provision, which would have allowed the committee to solicit competing bids before putting the vote to shareholders.

Sabet-Peyman called Perella Weinberg on behalf of Patient Square later that day, revising the offer to \$2.25 and rejecting the idea of a "go-shop" provision, the complaint says.

The committee countered with \$2.85 a day later. Sabet-Peyman raised Patient Square's offer to \$2.55

without a "go-shop" provision and demanded a final answer by Oct. 30.

The board unanimously voted on Oct. 29 to accept the offer, with Sabet-Peyman abstaining, the complaint says.

Nau and Hansen argued the price should have been somewhere between \$3.77 to \$5.69 per share and is "heavily discounted" given that the hearing aid market is projected to grow globally from \$11.98 billion in 2023 to \$21.09 billion by 2030.

The steep discount calls into question whether the special committee did its job in negotiating the merger, the complaint says.

"Based on the foregoing, there is a credible basis to believe that Patient Square, as controlling stockholder, and the special committee members have breached their fiduciary duties," the complaint says.

None of the parties immediately responded to Law360's requests for comment.

The plaintiffs are represented by Carl L. Stine, Joshua W. Ruthizer and Emer C. Burke of Wolf Popper LLP and Carmella P. Keener of Cooch and Taylor PA.

Counsel information for the defendants was not immediately available.

The case is Donald H. Nau et al. v. Eargo Inc., case number 2024-0113, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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Generator Co. Brass Accused Of Lying About Finances

By **Jonathan Romeo**

Law360 (February 12, 2024, 9:03 PM EST) -- Top executives and board members of Generac, a power generation equipment manufacturer, were hit with a shareholder derivative lawsuit filed in Delaware federal court on Monday, accusing them of lying about the company's financial outlook and the reliability of its products.

The lawsuit, initiated by plaintiff Joe Chan on behalf of the company, said Generac Holdings Inc.'s leadership failed to disclose decreasing demand for its generators post-COVID-19. It also hid a major defect in its solar product line that led to residential fires and an overreliance on a single distributor, which ceased operations, the complaint said.

"The individual defendants breached their highest obligations of good faith, candor, loyalty, and due care to Generac and its stockholders, allowing the dissemination of materially false and misleading statements about the company's business prospects," the lawsuit said.

According to the complaint, on Feb. 16, 2022, Generac announced its 2021 earnings, revealing a 50% increase in sales to \$3.75 billion for the year. The announcement included a statement from CEO Aaron Jagdfeld, highlighting strong demand and record shipments in the last quarter of 2021. Jagdfeld expressed optimism for 2022 due to continued high demand for home standby generators, a growing energy technology product line, and strong worldwide demand for commercial and industrial products.

However, the complaint said as more information came out about the company's real situation and product issues, Generac's stock price dropped from \$506 per share to \$106 per share between November 2021 and November 2022.

"Generac's leadership was aware of, but did not disclose, significant negative trends in its core businesses, exposing the company and its shareholders to unprecedented risk," the lawsuit said.

Of particular concern was the SnapRS component of Generac's solar power systems, which was found to have a dangerous defect causing it to overheat, melt and, in some cases, start fires, according to the lawsuit. Despite growing complaints and service calls warning of the issue, Generac allegedly continued to highlight the safety and increasing sales of its products without adequately addressing the defect.

The lawsuit said Generac reported an estimated \$155 million in lost revenue from the defective SnapRS, and "hundreds of millions" in reputation and brand damage caused by the defect.

The complaint further accused Generac of breaching its fiduciary duties by failing to address and correct obvious deficiencies in the company's internal controls and practices. This alleged misconduct not only led to financial losses for the company but also damaged its corporate image and goodwill, the lawsuit said.

The actions of Generac leadership have not only led to financial losses for investors, the lawsuit said, but also caused significant damages to Generac, including defense costs in the securities action and reputational harm. The company is exposed to potential class-wide damages due to these violations.

Chan has asked the court to order payment to the company for the money it lost because of the

actions of the defendants. He is also requesting the court to require Generac to make big changes in how the company is run, including better oversight by the board, improved financial reporting, more input from shareholders and better internal checks to fix issues and avoid future problems.

The lawsuit is also seeking extra damages to punish the defendants and to warn others against doing similar things in the future.

"This lawsuit seeks not just financial restitution but comprehensive reforms in Generac's corporate governance and internal controls to prevent future misconduct and to safeguard the interests of the company and its shareholders," Chan said.

An attorney for Chan declined to comment.

A representative for Generac didn't immediately respond to a request for comment late Monday.

The plaintiff is represented by Seth D. Rigrotsky, Gina M. Serra, and Herbert W. Mondros of Rigrotsky Law, PA. and Joshua H. Grabar of Grabar Law Office.

Counsel information for Generac was not immediately available Monday.

The case is Joe Chan v. Aaron Jagdfeld, et al., case number 1:24-cv-00182, in the U.S. District Court for the District of Delaware.

--Editing by Alex Hubbard.

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Investors Win Class Cert. Against Failed COVID Test Maker

By **Emilie Ruscoe**

Law360 (February 12, 2024, 10:16 PM EST) -- Investors suing biotech company Talis Biomedical Corp. have received class certification in a suit alleging the company hurt investors when trading prices sank a month after its initial public offering when the company failed to secure U.S. Food and Drug Administration approval for its flagship testing platform.

In an **order filed Friday**, U.S. District Judge Susan Illston granted certification to the investors' proposed class of those who purchased Talis shares in a six-month period between February 2021, when the IPO launched, and August 2021. Bleichmar Fonti & Auld LLP and Pomerantz LLP were appointed co-class counsel, and lead plaintiff Martin Dugan was named class representative.

Dugan's class certification bid proposed a class that would include all those who'd purchased their Talis shares in reliance on claims in the company's IPO filings between February 2021 and the date relevant litigation kicked off in January 2022.

But Talis had pushed back against that proposed class definition, arguing that Judge Illston should limit the class to Talis shareholders who'd purchased their stock before the August 2021 date that Talis shares began trading on the open market.

In the suit, the investors took aim at Talis and some of its officers and board members, claiming that leading up to its \$253.9 million IPO, the company made misrepresentations about its COVID-19 testing device Talis One, which was intended to provide point-of-care diagnostic testing.

"In truth, at the time of the IPO, Talis One was merely an unreliable prototype that generated unusable results up to 20% of the time — not an accurate, reliable device that could be manufactured and sold," the investor said in their **class certification motion** in October.

According to the investors, the truth was partially revealed in March 2021 when Talis said it would withdraw the emergency use authorization application it had submitted to the FDA after the regulator found issues with the application. By the time the suit kicked off, the investors claimed, Talis shares were trading at just over \$3.

In the October class certification bid, the investors said their proposed class potentially included "hundreds, if not thousands" of members, since Talis sold nearly 15.9 million shares in its IPO and traded actively on the Nasdaq Stock Market during the proposed class period.

"Talis was a fundamentally different — and far less valuable — business than investors were led to believe," investors argued at the time.

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

The investors are represented by Jennifer Pafiti, Jeremy A. Lieberman, J. Alexander Hood II, James M. LoPiano and Jonathan D. Park of Pomerantz LLP, Joseph A. Fonti, Evan A. Kubota and Lesley E. Weaver of Bleichmar Fonti & Auld LLP, and Brian Schall of the Schall Law Firm.

Talis and the individual defendants are represented by Patrick E. Gibbs, Shannon M. Eagan, Samantha A. Kirby, Jessie Simpson LaGoy and Zachary Sisko of Cooley LLP.

The case is In Re: Talis Biomedical Securities Litigation, case number 3:22-cv-00105, in the U.S. District Court for the Northern District of California.

--Additional reporting by Mark Payne, Sydney Price and Katryna Perera. Editing by Lakshna Mehta.

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Labaton, Rolnick Clash Over Legal Fees In Materials Co. Deal

By **Jeff Montgomery**

Law360 (February 9, 2024, 6:39 PM EST) -- Law-firm battling has sharpened over multimillion-dollar legal fee claims linked to a proposed \$19 million Delaware Court of Chancery settlement for a stockholder suit challenging a \$3.1 billion materials company sale in 2019, court records show.

The face-off pits Labaton Keller Sucharow LLP and Andersen Sleater Sianni LLC against Rolnick Kramer Sadighi LLP and Heyman Enerio Gattuso & Hirzel LLP for shares of a proposed class award now before Vice Chancellor Nathan A. Cook and slated for a public hearing May 15.

The two teams represent different investor clients who challenged the same deal in which Apollo Global Management orchestrated a purportedly conflicted \$3.1 billion "take-under" sale of Momeni Performance Materials Inc. to a consortium led by a South Korean building firm for \$32.50 per share when its stock was trading at \$42.

The Labaton Keller team, representing lead plaintiff Frank Funds and selected by the court last year to lead a consolidated suit seeking damages for fiduciary breaches, recently sought about \$4 million in fees plus \$39,401 in expenses after reports of the settlement emerged in October.

The RKS team, representing Highland Global Allocation Fund and its affiliates and Three Court Master LP, lost its bid for court approval to co-lead the fiduciary claims last year. In a court brief on Jan. 3, it cited about \$5 million in expenses for work on both fiduciary and appraisal claims, and requested about \$3.75 million, or roughly 75%, for the fiduciary-only part of its suit, despite losing a right to co-lead the case under a court ruling.

"Respectfully, the court should condemn" RKS and its petitioner-clients' conduct, "not reward it — to ensure that similar behavior does not happen in Delaware again," Labaton Keller said in a brief filed on Thursday.

The RKS application "is but their latest shameless act," Labaton Keller wrote. It added that RKS's brief seeks 75% credit "for an accord they nearly prevented and still seek to block," adding: "Rather than own up to their transgressions, petitioners effectively double down."

RKS acknowledged in its brief that the request would consume the lion's share of the up to \$5 million maximum attorney fee amount that those who were sued agreed that they would not contest.

"Just as we do not in any way seek to diminish the important contributions made by Labaton, there is no basis on which to diminish the credit" that Highland/Three Court and their attorneys deserve "for their substantial efforts," the RKS brief said.

Labaton Keller painted a different picture for the court, saying in its brief on Thursday that, immediately after losing co-lead status, according to Labaton Keller, RKS began rocking the boat vigorously.

RKS initially "sought to leverage the class for their personal benefit, declining to consider any global settlement of the action that would not enable them to pursue a double recovery or provide them more consideration than other class members," Labaton Keller said in its opposing brief.

The additional, individual recoveries that RKS sought, according to Labaton, were related to actions

for court appraisal of individual stockholder shares, a pursuit that Labaton Keller argued was inconsistent with litigation for class-wide recoveries.

Labaton Keller said that after it "took the unprecedented step of asking the court to disqualify petitioners [RKS] and their counsel as class representatives," the RKS-led parties "resorted to obfuscations and threats" and "warned the court that they would, in petitioner's words 'pursue a death knell' to any class settlement" unless the disqualification was resolved in their favor.

Steven M. Hecht of RKS, in a fee affidavit filed on Jan. 3, noted that Vice Chancellor J. Travis Laster, presiding over the case at the time, originally appointed both teams to the consolidated suit.

The brief filed by the RKS and Heyman Enerio on Jan. 31 said Labaton's selection as best-suited for class lead "should in no way diminish the hard work and substantial investment" by RKS and its co-counsel.

Just as we do not in any way seek to diminish the important contributions made by Labaton, there is no basis on which to diminish the credit" that Highland/Three Court and their attorneys deserve "for their substantial efforts," the RKS brief said.

The vice chancellor was aware at the time that RKS was asserting both class fiduciary and individual appraisal claims, Hecht wrote, "and never suggested or raised a concern at the time that Highland/Three Court, RKS, or HEGH were inadequate class representatives, held atypical interests, or had a potential conflict."

During an argument July 28 on Frank Funds' motion to amend an order designating lead plaintiffs and lead counsel, Vice Chancellor Cook, who took over the case, said that if he was told that a co-lead counsel candidate would seek additional consideration as part of any resolution of the case, "I find it difficult to imagine a scenario where I would appoint that counsel as co-lead counsel."

Hecht said "it became apparent to us that the court did not agree and had concerns about our continued role as co-lead counsel. Accordingly, we agreed to step down and allow Labaton to continue the settlement discussions."

Hecht pointed out in his brief that he and his firm handled the oral argument against dismissal of the suit while it was still before Vice Chancellor Laster. He said HKS also advanced theories of the case that have been retained going forward.

Launched in 2019 as a suit for post-deal court appraisal of MPM stock by stockholders unsatisfied with the \$32.50-per-share terms, the Chancery Court suit morphed during the initial investigation into a hybrid, consolidated suit seeking damages for fiduciary breaches and a court determination of the company's price per share value.

The difference between the \$42-per-share trading price when the merger agreement was signed and the \$32.50 deal price added up to a gap of more than \$275 million, according to court records.

Central to the breach claims are allegations in the suit that "Apollo manipulated the merger process, at the expense of other shareholders," in order to free \$168 million in management performance fees that, without a sale, would be trapped in an Apollo investment fund holding MPM stock and overdue for a cash-out.

Counsel for Frank Funds and Highland Global did not immediately respond to a request for comment.

Oaktree Capital Management, D.E. Shaw and Pentwater Capital Management also held shares of Momentive, and, with Apollo, held a combined 75% stake.

The Highland/TC funds are represented by Samuel T. Hirzel II and Elizabeth A. DeFelice of Heyman Enerio Gattuso & Hirzel LLP and Sheila Sadighi, Steven M. Hecht and Joseph R. Sparacio of Rolnick Kramer Sadighi LLP.

Frank Funds are represented by Ned Weinberger, Mark Richardson, Jiahui (Rose) Wang, Jonathan Gardner, Alfred L. Fatale III, David J. Schwartz, Joseph N. Cotilletta and Charles Wood of Labaton

Keller Sucharow LLP and Eric M. Andersen of Andersen Sleater Sianni LLC.

MPM Holdings Inc. is represented by Daniel A. Mason and Matthew D. Stachel of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In re MPM Holdings Inc. Appraisal and Stockholder Litigation, case number 2019-0519, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.

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Pharma Co. Beats Investor Suit Over Licensing Agreement

By **Sydney Price**

Law360 (February 9, 2024, 8:37 PM EST) -- A New York federal judge has dismissed a proposed investor class action against pharmaceutical company Molecular Partners, ruling the plaintiff failed to show the company misled investors about its progress in the development of a cancer treatment.

According to U.S. District Judge Arun Subramanian's Monday order, James Merritt has until Feb. 19 to refile his suit.

Merritt's suit, which was initially filed in July 2022 and most recently amended in May 2023, alleges Molecular Partners AG's initial public offering registration statement misled investors by failing to disclose that competitor Roche Holding AG was producing a similar drug treatment, and that it was further along in development. In April 2022, Molecular Partners announced it had terminated a licensing agreement with Amgen for the drug, leading to a nearly 40% decline in company shares, according to the suit.

But Merritt fails to show the company's omissions are misleading, Judge Subramanian said in a Feb. 5 order that was entered into the docket Thursday. The competitor's trials did not necessarily contribute to the end of the Amgen agreement, Judge Subramanian said.

"The complaint here does not even allege that the Roche trials were the reason Molecular Partners' expectations about the Amgen agreement were frustrated ... Without facts showing a significant clash between Molecular Partners' expectations and Roche's progress, Merritt's case cannot go forward," Judge Subramanian said.

In December 2018, Molecular Partners entered into a licensing agreement with biotechnology company Amgen to develop a cancer treatment known as MP0310. Molecular Partners went public in June 2021, and the associated registration statement included information about MP0310, the Amgen licensing agreement and the trial, according to Monday's order.

Judge Subramanian said allegedly omitted facts regarding a patent expiration and Roche's drug trial were actually disclosed in the registration statement and within the public domain through government filings and reports. However, the mere existence of information within the public domain does not mean the information is necessarily "widely known," so the suit cannot be dismissed on that basis alone, the judge said.

Merritt also claims Molecular Partners told investors that it would use its IPO proceeds to fund trials for a different drug, but this was misleading because, with the Amgen agreement in jeopardy, there was a "material likelihood" the company would need to use the proceeds for the development of MP0310.

But Merritt also does not successfully show that Molecular Partners' forward-looking statements about its IPO funding were misleading, Judge Subramanian said.

"For one thing, the complaint does not even allege that Molecular Partners used the IPO proceeds differently from how the registration statement suggests," Judge Subramanian said, adding that "even if it did, the complaint alleges no facts suggesting that Molecular Partners knew that it would do so at the time of the registration statement."

Counsel for both parties declined to comment Friday.

Merritt is represented by Jacob A. Goldberg, Leah Heifetz, Leah Heifetz and Phillip C. Kim of The Rosen Law Firm PA.

Molecular Partners is represented by Luke T. Cadigan, Brian Michael French, Elizabeth Wright, Koji Francis Fukumura and Zachary Sisko of Cooley LLP.

The case is Freudiger v. Molecular Partners AG et al., case number 1:22-cv-05925, in the U.S. District Court for the Southern District of New York.

--Editing by Caitlin Wolper.

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Viking Energy Shareholder Says Merger Was For CEO's Gain

By **Madeline Lyskawa**

Law360 (February 12, 2024, 2:54 PM EST) -- The former CEO of Texas energy company Viking Energy Group Inc. has been slapped with a proposed shareholder class action claiming he pursued a merger with a "financially troubled" shell company in order to provide himself with an exponentially greater claim of Viking's economic value.

Former Viking Energy shareholder Lawrence Rowe, on behalf of himself and other former minority shareholders, sued James A. Doris and Camber Energy Inc., in a complaint filed in Texas federal court on Friday, saying Doris, aided and abetted by Camber, executed a merger scheme to grant himself a substantial portion of Viking's equity at the expense of all other shareholders by securing special treatment for his shares.

"In sum, Doris willfully and disloyally acted to favor his economic interests by providing himself with an exponentially greater claim to the economic value of Viking's business through a maneuver that offered no value to the company or its unaffiliated stockholders," Rowe said. "Adding insult to injury, Doris signed this unfair deal with himself, unchecked by even the self-interest of insiders on the other side of the negotiating table."

Prior to the merger, Rowe said Doris' financial and control interests directly conflicted with those of Viking's unaffiliated stockholders because Doris ultimately held near total control over the voting power of the company's shares as the owner of a "unique class of ultra-powerful convertible preferred stock," entitling him to 37,500 votes per share, known as Viking's Series C convertible preferred stock.

Doris exercised this control despite personally owning less than 0.2% of the company's common stock, which left him with "no strong financial reasons to protect the value of the company's common stock" and allowed him to favor his own economic interests to the detriment of Viking's unaffiliated common stockholders, Rowe said. Moreover, since late December 2022, Doris had stood at the helm of both Viking and Camber, further complicating his financial and control interests, Rowe said.

As a result, in negotiating the merger, Rowe said Doris was able to secure special treatment for his Viking Series C shares by arranging the transaction to convert those shares into newly issued Camber Series A convertible preferred stock under the companies' February 2021 merger agreement. This new stock "possessed orders of magnitude greater economic value," Rowe said.

"Unlike Doris's Viking Series C shares – which could only be exchanged for one newly-created share of Viking common stock – each Camber Series A share could be converted into 890 newly-created shares of the combined company's common stock," Rowe said. "Moreover, this conversion could be effected entirely at Doris's option, granting Doris the right to obtain significant ownership of the combined company's common stock."

On the flip side, the deal offered little value to Viking's minority stockholders and failed to fully compensate them for their shares, Rowe said. Even so, the merger was ultimately approved on July 20, 2023, and completed on Aug. 1, with more than 1 billion of the Viking shareholder votes cast by Doris through his preferred shares, and following Viking's filing of a materially incomplete, misleading and fraudulent joint proxy statement with the U.S. Securities and Exchange Commission, Rowe said.

The end result saw Viking, which was once a "growing energy exploration and production company,"

become a subsidiary of Camber, a company with a history of struggling to comply with the New York Stock Exchange's listing standards, at the detriment of Viking's unaffiliated minority stockholders, Rowe said.

Since the merger's completion, Camber's stock price has plummeted from \$0.81 to \$0.16. Meanwhile, Camber has successfully evaded being delisted from the NYSE and Doris has substantially increased his claims on the combined company's common equity and economic value, Rowe said.

In his complaint, Rowe urged the court to award a proposed class of former Viking minority shareholders all damages sustained as a result of Doris and Camber's wrongdoing, and order Doris and Camber to disgorge all ill-gotten gains obtained as a result of the merger.

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

Rowe is represented by Juan E. Monteverde of Monteverde & Associates PC and Michael J. Palestina and Craig J. Geraci of Kahn Swick & Foti LLC.

Counsel information for Doris and Camber Energy was not immediately available.

The case is Rowe v. Doris et al., case number 4:24-cv-00489, in the U.S. District Court for the Southern District of Texas.

--Editing by Patrick Reagan.



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Del.'s Tesla Pay Takedown Tells Boards What Not To Do

By **Julia Petty, Michael Albano and Erin McKissick** (February 9, 2024, 2:59 PM EST)

On Jan. 30 in *Tornetta v. Elon Musk*, the Delaware Court of Chancery **struck down** the Tesla CEO's \$55 billion performance-based stock option package, ruling that Tesla's directors did not satisfy the stringent "entire fairness" standard in approving his compensation.

This case comes on the heels of a July 2023 \$735 million **settlement** in which Tesla directors disgorged previously received compensation after shareholders made claims of unjust enrichment and breach of fiduciary duty.[1]

The court in the *Tornetta* opinion applied the entire fairness standard because of Musk's enormous control over the transaction, referring to him as a "superstar CEO" who wielded maximum possible influence over the board.[2] While the compensation package was approved by a majority of disinterested shareholders, the court concluded the proxy disclosure was deficient and therefore shareholders were not fully informed.[3]

Ultimately, the Tesla board was not able to prove that the benefit Tesla received from Musk's leadership was worth the \$55 billion Tesla paid for it.

This case voids the largest compensation package in corporate America, yet it will likely prove exceptional for a number of reasons. In her opinion, Chancellor Kathaleen St. J. McCormick was unabashedly critical of Tesla's board, highlighting with pointed language their repeated failures to properly approve Musk's compensation.

The Tesla board fell short on many — seemingly, all — levels: Directors were not independent, and their process was flawed in terms of timeline, negotiation etiquette and a failure to conduct appropriate benchmarking. They did not fully inform their shareholders, and they did not properly justify the scope of Musk's staggering compensation. Chancellor McCormick's opinion, rehashing each of these errors, reads as a guidebook for how not to approve executive compensation.

In this article, we will highlight key takeaways from the decision and draw a contrast to standard practice for Delaware public companies.

While the prospect of a judge overturning the business discretion of a board and compromising the retention and incentive structure of key leadership is understandably alarming, we hope to show that extreme circumstances specific to Tesla prompted this result.

Delaware issuers should take comfort that Chancellor McCormick is not setting a new standard of corporate governance; she is holding one issuer accountable for woeful failures.

Board Independence

At its core, *Tornetta v. Musk* reflects the power of shareholders to challenge the actions of an



Julia Petty



Michael Albano



Erin McKissick

interested board and controlling stockholder. Had truly independent and disinterested directors granted a noncontrolling stockholder a \$55 billion compensation package, their decision would have been protected by the business judgment rule, and a legal challenge would largely be limited to assessing the approval process, not the resulting substance.[4]

While independent and disinterested board or committee approval alone would not have been sufficient in Tornetta, it was a necessary element, and Chancellor McCormick found it lacking.

At Tesla, members of the board had strong business and personal relationships with Musk. Members owed their generational wealth to investments made in Musk's private companies. They vacationed with Musk and were friendly with his extended family. Some members used their connection to Musk to raise funds for their own businesses, resulting in massive profits. One member of the board, Kimbal Musk, was Elon Musk's brother.

The strong ties between Musk and members of the board rendered the board beholden to Musk's decision making and compromised their ability to participate in meaningful negotiation. The Tornetta opinion found that Musk had transaction-specific control over the approval of his compensation package, in part because of these relationships with board members.

The board also lost its independence through Musk's broader influence over managerial decisions. Chancellor McCormick noted that the "avalanche of evidence" surrounding Musk's authority at Tesla is "so overwhelming that it is burdensome to set out in prose." [5]

Tesla and Musk are "intertwined, almost in a Mary Shelley ('You are my creator..') sort of way," according to the decision.[6] Chancellor McCormick added that Musk's CEO superstardom,[7] stemming from his occupation of high-status roles — which included, at relevant times, CEO, chair and founder — contributed to this impartiality: "When directors believe a CEO is uniquely critical to the corporation's mission, even independent actors are likely to be unduly deferential." [8]

This case underscores the importance of maintaining independent directors, especially when it comes to compensation decisions and in the face of such a singularly powerful executive.

Lack of Process

The entire fairness test requires a board to engage in "fair dealing" on behalf of the company,[9] which was compromised by the glaring lack of process prior to the approval of Musk's grant. Chancellor McCormick was disturbed by Musk's manipulation of the timeline of the approval process, the lack of true negotiations and the board's failure to conduct a traditional benchmarking analysis.

Initially, Musk proposed a "recklessly fast approach"[10] that would have resulted in approval of his grant within less than three weeks. Though the process ultimately took nine months, the pace was unilaterally set by Musk, who "artificially [compressed] the work into short bursts that took place when he wished to move forward,"[11] prompting the court to note, "Time spent only matters when well spent." [12]

Musk would often make last-minute proposals prior to board or compensation committee meetings, which the court found made it "tough for the committee and its advisors to be prepared." [13] Beyond the timeline of events leading up to approval, the so-called negotiations that took place during that timeline were woefully insufficient. The court found that the board, rather than negotiating against Musk, cooperated with him, working alongside him "almost as an advisory body." [14]

Neither Musk nor the compensation committee had independent legal counsel — both seemingly relied on Tesla's general counsel during the process. Musk's initial proposal was the only one seriously considered until Musk's second proposal, which he unilaterally offered.

Musk completely dictated the terms of his grant and faced no pushback on its size or difficulty of achievement. Musk himself even approved the projections of his grant that would be presented at the meetings, and the compensation committee did not include valuations for any other alternatives.

Lastly, the board failed to engage an independent compensation consultant or conduct a traditional benchmarking analysis, even though the extraordinary nature of Musk's grant makes the

benchmarking process more critical, not less, because it could have called attention to the orders of magnitude between Musk's grant and market comparables.

By all metrics, the Tornetta opinion concluded, the Tesla board failed to engage in uncompromised, arm's-length negotiations to arrive at Musk's compensation plan. The board operated on Musk's erratic timeline, participated in a collaborative process that served to advance Musk's interests ahead of Tesla's and included no benchmarking from advisers, as is standard in a negotiation of this nature and magnitude.

Faulty Disclosure

In the face of an interested or nonindependent board, the board's discretion will generally prevail if a fully informed and uncoerced vote of disinterested shareholders approves the compensation offered to the controlling stockholder.

Although Musk's compensation package was approved by a majority of disinterested shareholders, Tornetta found that vote ineffective because Tesla failed to disclose the board's potential conflicts and repeatedly described directors as independent despite their close relationships with Musk.

Further, the proxy omitted material information on the process that led to board approval of Musk's compensation. Shareholders were not told that Musk dictated the timeline, terms of the initial offer and subsequent changes to the initial offer. As Musk himself admitted, he was "negotiating against [himself]."[15] The proxy also did not mention the striking lack of negotiation between Musk and the board, and failed to disclose that the board did not engage in traditional benchmarking analyses against peer companies.

In cataloging these issues, Chancellor McCormick highlighted that merely disclosing director compensation or director investment in particular entities is insufficient in situations where there are such deep personal ties between board members and executive officers; companies must disclose relevant relationships in the proxy for full transparency.

Further, companies must take care to disclose more than the "key terms"[16] or economic details of a compensation package when seeking a shareholder vote. Shareholders are entitled to a full and accurate description of all material steps in the process, including, sometimes, extra disclosure to ensure that the necessary information presented is in no way misleading. A materially deficient proxy simply cannot save an interested board from the court's scrutiny.

Magnitude of Compensation

Chancellor McCormick described Musk's \$55 billion compensation plan, the largest ever observed in the public markets, as "an unfathomable sum." [17] Musk's plan was 250 times larger than median peer compensation, and over 33 times larger than his plan's closest comparison — Musk's own prior compensation plan. [18]

The entire fairness test requires a board to negotiate a fair price on behalf of the company, [19] which was challenging in light of the magnitude of Musk's compensation. In justifying this compensation as fair, the defendants made numerous arguments, including that one should compare what Tesla gave versus what Tesla got, that the milestones set were ambitious and difficult to achieve, that the shareholder approval proves the price was fair, and even that the grant was fair because it worked — Tesla thrived during the time of Musk's enormous grant.

Chancellor McCormick devoted ample space to debunking each of these arguments, but ultimately takes issue with two central themes.

First, given Musk's sizable 21.9% equity stake in Tesla and his public declaration that he had no intent to leave the company, such a large grant was unnecessary to drive his performance and retention; Musk was naturally aligned with shareholder interests and the plan's goals.

Second, though the board claimed to be concerned about keeping Musk fully engaged at Tesla, it made no effort to condition compensation upon Musk providing a set amount of time or attention to Tesla over his other projects. Essentially, as Chancellor McCormick pointed out, there was no relation

between what Tesla got out of Musk via the \$55 billion compensation package and Tesla's stated goals — they could have "gotten" the same result from "giving" much less.

The opinion also highlights that although the board claims to have set ambitious milestones that would be difficult to achieve, by their own conservative accounting metrics, some milestones were 70% likely to be achieved soon after the grant was approved.

To be clear, the \$55 billion on its own is not the issue. The Tornetta opinion states that there is "no absolute limit on the magnitude of a compensation grant that could be considered fair."^[20] However, the issues identified in Musk's compensation make it clear that, regardless of amount, compensation must be tailored to specifically drive achievement of the board's goals, not to provide compensation for an executive already financially motivated to maximize company profit.

Companies must be able to justify their compensation decisions in light of the particular facts and circumstances, both in terms of quantity of compensation and difficulty of achieving milestones, in a more cogent and convincing manner than Tesla.

Conclusion

Tesla's failures provide a near-textbook case of worst practices when it comes to board approval of executive compensation. At every turn, companies, regardless of how much they'd like to pay their executives, have the opportunity to avoid Tesla's fate.

Insisting that directors who approve noncontrolling stockholder compensation follow appropriate processes and remain disinterested and independent will shield the board from most judicial scrutiny. Even in the case of an interested or nonindependent board, or a controlling stockholder, following an appropriate compensation approval process and seeking a proper shareholder vote, with full disclosure of both conflicts and processes, can provide significant protection to the approved transaction.

Directors should ensure the board retains control over the entire process of approval. This includes retaining control of the timeline — by, for example, ensuring that the appropriate members of management and external advisers are preparing helpful materials and providing the board with ample time for review and discussion. They must properly document and memorialize the board's deliberations and decisions, the sufficiency of negotiations, the engagement of independent legal advisers and compensation consultants, and the use of benchmarking analyses.

Lastly, directors must design compensation plans to actually drive the board's goals. The exceptional set of circumstances that led to the ruling in Tornetta can be avoided simply by adhering to industry best practices when setting compensation.

Julia L. Petty and Michael Albano are partners, and Erin McKissick is a law clerk, at Cleary Gottlieb Steen & Hamilton LLP.

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[1] Julia Petty, Michael Gao and Michael Albano, \$735M Tesla Settlement Drives Home Lessons For Boards, Law360 (Aug. 30, 2023, 11:24 AM), <https://www.law360.com/articles/1714134>.

[2] **Tornetta v. Musk** , C.A. No. 2018-0408-KSJM at *120 (Del. Ch. Jan. 30, 2024).

[3] Whether either (a) independent and disinterested board or committee approval or (b) a fully informed and uncoerced vote by a majority of disinterested stockholders would have been sufficient, by itself, to "cleanse" a controlling stockholder transaction like the Musk grant, thereby lowering the standard of review from entire fairness to the deferential business judgment rule, is an issue currently before the Delaware Supreme Court. See **In re Match Gp. Inc. Deriv. Litig.** , C.A. No. 368, 2022, order at 2 (Del. May 30, 2023). In this case, the Court of Chancery applied the road map

developed in **Kahn v. M & F Worldwide Corp.** , 88 A.3d 635 (Del. 2014), requiring approval of both an independent and disinterested special committee and informed and uncoerced approval of holders of a majority of the disinterested shares in order to invoke the business judgment rule.

[4] In addition, a compensation package of this quantum may also be subject to a corporate waste claim.

[5] *Tornetta v. Musk*, C.A. No. 2018-0408-KSJM at *117 (Del. Ch. Jan. 30, 2024).

[6] *Id.*

[7] *Id.* at *121.

[8] *Id.*

[9] *Id.* at *159.

[10] *Id.* at *129.

[11] *Tornetta v. Musk*, C.A. No. 2018-0408-KSJM at *133 (Del. Ch. Jan. 30, 2024).

[12] *Id.* at *5.

[13] *Id.* at *133.

[14] *Id.* at *129.

[15] *Id.* at *66.

[16] *Id.* at *156.

[17] *Tornetta v. Musk*, C.A. No. 2018-0408-KSJM at *180 (Del. Ch. Jan. 30, 2024).

[18] *Id.* at *1.

[19] *Id.* at *171.

[20] *Id.*



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Del. Justices Refuse Deutsche Bank's Vik Case Appeal

By **Jeff Montgomery**

Law360 (February 12, 2024, 6:05 PM EST) -- A missed deadline has sunk Deutsche Bank's hopes for Delaware Supreme Court review of a Chancery Court ruling rejecting its midcase appeal in a long-running recovery suit targeting \$50 million allegedly controlled by holdings of Norwegian billionaire investor Alexander Vik.

The **ruling** by a three-justice panel found that the bank's Oct. 31 appeal of a ruling by Vice Chancellor Sam Glasscock III missed, by more than a month, a requirement to appeal within 10 days. The lower court decision denied claims that might have pulled two foreign parties into a pending action against Delaware-chartered Devon Park Bioventures LP and its general partner, Devon Park Associates LP.

The justices focused on Vice Chancellor Glasscock's ruling rejecting Deutsche Bank's call for a finding that Chancery Court has jurisdiction over claims involving Sebastian Holdings Inc., or SHI, chartered under Turks and Caicos law, and Panama-chartered CPR Management SA, based on fraud and conspiracy allegations.

The Chancery case accuses Vik of shuffling more than \$50 million to Devon Park interests in Pennsylvania to duck collection on part of a more than \$235 million judgment — which has since grown to more than \$320 million — arising from failure to pay debts after a series of losing foreign exchange bets during the 2008 financial crisis.

Vice Chancellor Glasscock's decision found he lacked the jurisdiction Deutsche Bank wanted the court to exercise. The case in Delaware, he concluded, "is about nothing more than an allegedly fraudulent transfer of equity in a Delaware entity between two foreign citizens, to frustrate a judgment debt obtained by a third foreign entity in a foreign jurisdiction. Accordingly, due process dictates that this court must stand aside."

On Jan. 2, the vice chancellor declined to certify a midcase appeal to the state Supreme Court, and Deutsche Bank filed its uncertified appeal the same day. On Friday, Justice N. Christopher Griffiths' opinion for the panel found that Deutsche Bank missed the window.

"Deutsche Bank's application for certification, which it filed more than a month after the [October] interlocutory decision, was untimely, and Deutsche Bank neither requested an extension nor established good cause for the untimely filing," the opinion said.

In the works since 2017, the suit claimed that Vik directed a sham transfer of 23% of his purported interest in Delaware-chartered Devon Park into other Vik-tied interests held in a Pennsylvania bank.

Devon Park argued that the vice chancellor should dismiss fraudulent transfer and conspiracy claims against it and accept "interpleader" arguments that would pull CPR and SHI into the wider Deutsche Bank claim.

But Deutsche Bank also asserted fraud and conspiracy claims against Devon LP in connection with the transfer of the Devon Park Interest from Sebastian to CPR. Those claims are still pending in the Court of Chancery.

"Deutsche Bank appears to suggest, without explanation," that a letter decision by the vice chancellor on Dec. 1, 2023, "somehow made Deutsche Bank's application timely," Justice Griffiths wrote. "We discern no such effect" of the letter decision.

The Dec. 1 letter from the vice chancellor acknowledged receipt of submissions by the parties after his Oct. 31 decision dismissing a Devon interest's motion to pull Sebastian and CPR into the case. It also said the court would not consider lifting the restraining order pending a motion and stayed further briefing pending Deutsche Bank's action on midcase appeal.

Vik has, for years, avoided paying judgments in U.K., U.S. and Norwegian courts.

The fight reached Chancery Court in November 2017, when Deutsche Bank filed a lawsuit alleging Vik and Sebastian Holdings used Devon Park Bioventures and Devon Park Associates to transfer funds beyond the bank's reach to Panama-based CPR Management SA, previously Universal Logistic Matters SA.

Representatives of Deutsche Bank, Sebastian and CPR did not immediately respond to requests for comment.

Chief Justice Collins J. Seitz Jr. and Justices N. Christopher Griffiths and Justice Abigail M. Legrow sat on the panel for the Supreme Court.

Deutsche Bank AG is represented by Stephen C. Norman and Aaron R. Sims of Potter Anderson & Corroon LLP and David G. Januszewski and Sheila C. Ramesh of Cahill Gordon & Reindel LLP.

Devon Park Bioventures and Devon Park Associates are represented by James M. Yoch Jr. and Kevin P. Rickert of Young Conaway Stargatt & Taylor LLP and Kevin C. Maclay, Todd E. Phillips, Quincy M. Crawford and Nathaniel R. Miller of Caplin & Drysdale Chtd.

CPR Management SA is represented by P. Clarkson Collins Jr., K. Tyler O'Connell, Albert J. Carroll and R. Eric Hacker of Morris James LLP.

Sebastian Holdings Inc. is represented by William M. Kelleher and Phillip A. Giordano of Gordon Fournaris & Mammarella PA and Ira S. Zaroff and Richard M. Zaroff of Zaroff & Zaroff PLLC.

The case is Deutsche Bank AG v. Devon Park Bioventures LP et al., case number 2017-0822, in the Court of Chancery of the State of Delaware.

--Editing by Dave Trumbore.

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Chancery Partly Shoots Down Moelis Founder Control Suit

By **Jeff Montgomery**

Law360 (February 12, 2024, 10:05 PM EST) -- Global investment bank Moelis & Co. lost much of its bid Monday for summary dismissal of a stockholder suit seeking to invalidate stockholder agreements said to have wrongly ceded board powers to company founder and CEO Kenneth Moelis, Delaware's Court of Chancery ruled late Monday.

In a 60-page decision, Vice Chancellor J. Travis Laster said the case raised fundamental issues of corporate control, but rejected the company's dismissal call in part after turning aside a narrower finding that the suit was filed beyond the statute of limitations.

Moelis put the agreements in place as part of its initial public offering in 2014, when the company began issuing public stock, well beyond the ordinary three-year "laches" window that applies to many claims.

Laches, the vice chancellor wrote, does not apply to the Moelis provision, adding that "the illegality of the challenged provisions is not a discrete event that occurred and became complete when adopted." Instead, "the illegality began then and has persisted ever since" and remains subject to challenge, including under the proposed class claim led by the West Palm Beach Firefighters Pension Fund.

Also rejected, the vice chancellor said, were Moelis & Co. arguments for summary judgment that stockholders had acquiesced in the provision by failing to sue, while also suing prematurely because the control powers had not yet been exercised.

The provisions gave Kenneth Moelis veto power over company contracts, amendment of governing documents, termination and hiring of executive officers, dividend payments and litigation settlements, among other ceded powers.

Underlying the suit, the vice chancellor wrote, are "fundamental" provisions of Delaware's General Corporation Law that reserve to a company's board of directors decisions about the business and affairs of every Delaware corporation.

Although those doctrinal control concerns loom, the vice chancellor wrote, the summary dismissal decision revolved around Moelis & Co. claims that the proposed class sued too late, given the 2014 origins of the concessions, or too early, because the disputed powers had yet to be deployed.

Regardless, the vice chancellor wrote, "corporate action is twice-tested, once at law and again in equity. The two challenges are separate and distinct, so the potential availability of one claim does not defeat another." The stockholders could choose to wait for Moelis to act on the control provisions, or directly challenge the legality.

"The company might want the plaintiff to wait, but the plaintiff is the master of the complaint. The facial challenge is ripe," the vice chancellor wrote.

Under Moelis' laches argument, stockholder rights could expire and the corporation could operate legally "if the arrangement managed to evade stockholder challenge for three years."

Although the vice chancellor rejected summary dismissal on the laches and acquiescence claims, he

wrote in a footnote that he plans to issue a separate summary judgment ruling on dueling arguments over claims that the provisions are invalid on their face. An order putting into effect the decisions on Monday, he said, will await the decision on the merits of the invalidity arguments.

During arguments in October, counsel for Moelis argued that the attorneys for the stockholders incorrectly argued that "the company is being managed by a board that thinks it's disempowered" and provided no evidence "that this board has been put in a position where it doesn't believe it's acting in the best interests" of the company.

The case was described at times during arguments last year as the pointy tip of a widening debate over shareholder agreements that contract away regular board control of Delaware corporations.

The stockholder complaint referred in part to a study published in 2020 by University of Michigan Law School professor Gabriel V. Rauterberg, detailing what Rauterberg said was the "dramatic" extent to which shareholder agreements had recently contracted away traditional corporate and board control of companies.

The opinion indicated that the outcome of the case could have far-reaching effect.

"If a provision is invalid under the DGCL, the appropriate claim is a statutory one," the vice chancellor wrote. "If a laches defense has eliminated the statutory challenge, a fiduciary challenge may be impossible."

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

West Palm Beach Firefighters' Pension Fund is represented by Thomas Curry, Taylor D. Bolton, David Wales and Adam Warden of Saxena White PA.

Moelis & Co. is represented by John P. DiTomo and Miranda N. Gilbert of Morris Nichols Arsht & Tunnell LLP and William Savitt, Anitha Reddy and Emma S. Stein of Wachtell Lipton Rosen & Katz.

The case is West Palm Beach Firefighters' Pension Fund et al., v. Moelis & Co., case number 2023-0309, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.



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Social Media Addiction MDL Gets Date For First Bellwether

By **Jonathan Capriel**

Law360 (February 9, 2024, 10:45 PM EST) -- The California federal judge overseeing multidistrict litigation accusing Facebook and other social media platforms of harming young people by purposely making their platforms addictive has set a late 2025 date for the first bellwether trial.

U.S. District Judge Yvonne Gonzalez Rogers handed down a comprehensive **scheduling order** Thursday that set dozens of dates leading up to the first bellwether trial, which she plans to kick off with jury selection on Oct. 14, 2025.

But she hasn't decided which case will serve as the bellwether. That will happen during a three-step process that Judge Rogers laid out in her order.

The first step is to create "bellwether discovery pools" for the two types of cases in the MDL: personal injury cases brought by parents, and cases brought by school districts, according to Judge Rogers' order. The idea is to have a dozen cases in each pool, with the plaintiffs and defendants from each side choosing six cases, she said.

That should be done by mid-April, the order said.

Then Judge Rogers said she'll trim each pool down from 12 cases to 10 herself, helped in part by the parties' filings and oral arguments. And as a final step, the judge said she'll hear arguments toward the end of June 2025 as to what order the cases should be heard.

The MDL has been working its way through Judge Rogers' court since early October, when the Judicial Panel on Multidistrict Litigation combined what were then 28 suits spread across 17 federal courts around the country. The cases will be lumped together for pretrial purposes in the Northern District of California.

There were also 56 related actions that could be shipped to Northern California as tagalongs at some point, the JPML said at the time.

But that isn't what Meta wanted, as it had hoped to have the suits shipped to Kentucky, Florida or Georgia. It was in favor of consolidation though, saying that putting the suits all in one place would allow certain issues to be resolved more quickly, such as whether it can duck the claims entirely under Section 230 of the Communications Decency Act, which generally makes websites immune from suits over content posted to their platforms.

All the lawsuits accuse the social media platforms of failing to properly warn users about the mental health risks associated with using them, particularly the risk of addiction, suicidal ideation, anxiety, depression and eating disorders.

The plaintiffs are represented by Lexi Hazam of Lieff Cabraser Heimann & Bernstein LLP, Previn Warren of Motley Rice LLC, and Chris Seeger of Seeger Weiss LLP.

Meta is represented by Mark W. Mosier, Paul W. Schmidt, Phyllis A. Jones, Ashley Simonsen and Emily Johnson Henn of Covington & Burling LLP.

TikTok is represented by Geoffrey M. Drake and David Mattern of King & Spalding LLP, and Andrea

Roberts Pierson and Amy Fiterman of Faegre Drinker Biddle & Reath LLP.

Snap is represented by Jonathan H. Blavin, Rose L. Ehler, Victoria A. Degtyareva, Ariel T. Teshuva and Lauren A. Bell of Munger Tolles & Olson LLP.

Google is represented by Brian M. Willen, Lauren Gallo White, Andrew Kramer, Carmen Sobczak, Christopher Chiou, Samantha Machock and Matthew K. Donohue of Wilson Sonsini Goodrich & Rosati PC.

The case is In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, case number 4:22-md-03047, in the U.S. District Court for the Northern District of California.

--Editing by Adam LoBelia.

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Meta Can't Trim Non-Facebook Users' Health Privacy Suit

By **Lauren Berg**

Law360 (February 12, 2024, 11:25 PM EST) -- Meta Platforms can't cut down a proposed class action alleging it illegally received consumers' sensitive health information through its Meta Pixel tool, a California federal judge ruled Monday, saying the consumers have provided specific enough allegations of the kinds of sensitive information they claim was intercepted.

U.S. District Judge William H. Orrick, in a 16-page **order**, denied Meta's **motion to dismiss** parts of the lawsuit brought by two nonusers of Facebook, finding that the consumers have identified specific types of information they provided to create accounts with mental telehealth provider Cerebral, from which they claim the Pixel tool intercepted the information.

Meta argued the invasion of privacy claims should be tossed, just **as they were in** *In Re: Meta Pixel Healthcare Litigation*, when Judge Orrick told those plaintiffs, a group of Facebook users, to amend their suit and describe the types of sensitive health information they alleged was illegally transmitted to Meta, according to the order.

"In that case, plaintiffs had alleged that both unprotected and protected healthcare information had been intercepted, but had not identified the type of sensitive healthcare information they provided to their healthcare provider that they believed was intercepted by Meta," Judge Orrick said. "This case is different."

Here, the nonusers allege they weren't just surfing the web looking for information about general healthcare topics, the order states. Instead, they claim the information was secured by Meta from Cerebral in the process of accounts being created by people who sought treatment from the telehealth provider.

"Plaintiffs have identified the specific types of information required by Cerebral in order to open their accounts," Judge Orrick said. "That information, some of which would ordinarily not be protected, plausibly becomes sensitive or private considering that plaintiffs were seeking mental health services."

"Meta provides no caselaw regarding disclosure of personally identifying information from individuals seeking mental health services or other caselaw that would preclude this type of invasion of privacy claim as a matter of law at the motion to dismiss stage," he added.

The nonusers, identified as E.H. and C.S., filed their suit in September, alleging that the Meta Pixel — which third-party businesses can place on their websites — can transmit any number of details about consumers to the social media behemoth for its advertising business. They said Meta has been collecting consumers' detailed sensitive health information, even when they don't have Facebook accounts.

Meta has publicly acknowledged that it uses data from nonusers for a variety of business reasons, including consumer analytic reports and product development, but the company's lack of internal data controls means it can't constrain this nonuser data to just those uses, according to the suit.

Meta, which moved to trim the case in November, acknowledged Judge Orrick's **prior orders** in the case brought by Facebook users and did not seek the dismissal of the nonusers' Federal Wiretap Act, California Invasion of Privacy Act and unjust enrichment claims, according to the order. But it did

challenge the consumers' claims for invasion of privacy, violations of California's Unfair Competition Law and Consumers Legal Remedies Act and conversion.

In his order Monday, Judge Orrick also rejected Meta's bid to dismiss the UCL and CLRA claims, rejecting the tech giant's argument that the plaintiffs have to show some kind of economic injury. The judge said the damage allegations are not limited to lost money or property because they "can include 'transaction costs to avoid the consequences of a deceptive practice' as well as 'opportunity costs.'"

"Here, plaintiffs allege that they paid more for their services for Cerebral than they otherwise would have had they known about Meta's interception of their information and they allege that 'they paid the covered entity [Cerebral], which used plaintiffs' payments to fund its purchase of targeted advertising from Meta,'" Judge Orrick said.

The judge also rejected Meta's argument that E.H. and C.S. can't bring a CLRA claim because they are not consumers of Meta's product, finding that it's too early to toss the claim.

"How far the CLRA transaction requirement stretches, and whether the allegedly 'unfair or deceptive acts or practices' of Meta were adequately 'undertaken' by Meta through 'a transaction intended to result or that results in the sale or lease of goods or services' — here the creation of accounts for mental telehealth services — is better considered on an evidentiary record," Judge Orrick said.

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

The consumers are represented by James M. Wagstaffe and Frank Busch of Wagstaffe Von Loewenfeldt Busch & Radwick LLP and Previn Warren, Abigail Burman and Mathew P. Jasinski of Motley Rice LLC.

Meta is represented by Lauren Goldman, Darcy C. Harris, Elizabeth K. McCloskey and Abbey A. Barrera of Gibson Dunn & Crutcher LLP and Michael Rhodes, Kyle Wong and Caroline Lebel of Cooley LLP.

The case is E.H. et al. v. Meta Platforms Inc., case number 3:23-cv-04784, in the U.S. District Court for the Northern District of California.

--Additional reporting by Gianna Ferrarin and Hailey Konnath. Editing by Michael Watanabe.

Boy Scouts' Abuse Victims Ask Justices To Halt Ch. 11 Plan

By **Hilary Russ**

Law360 (February 9, 2024, 2:11 PM EST) -- Childhood sexual abuse survivors on Friday asked the U.S. Supreme Court to halt the Boy Scouts' bankruptcy plan and its fast-approaching claims deadline because they would be forced to waive liability for third parties, saying the high court is considering the same issue in the Purdue Pharma appeal.



Abuse survivors asked the U.S. Supreme Court to halt the Boy Scouts' bankruptcy plan, arguing that third parties who allegedly abused them or allowed the abuse to take place should not escape liability. (iStock.com/AmyKerk)

Victims said an immediate pause is warranted because they are up against a critical deadline next week: They must pay a nonrefundable, \$10,000 initial fee by Feb. 16 if they want the \$2.5 billion bankruptcy settlement trust to perform an "independent review" of their abuse claims, which is the most in-depth review option for more serious and higher dollar value claims.

As the Boy Scouts' bankruptcy plan marches on, some of the 82,200 survivors have already begun getting payments from the trust. But others argued in their application that third parties who allegedly abused them or allowed the abuse to take place should not escape liability through the Chapter 11 plan.

The survivors said the question of whether the Bankruptcy Code allows debtors to cram down third-party releases is exactly the same one before the high court in the case of Purdue, which the justices **heard** in December, and that their case should be put on hold until that one is resolved.

"This court stayed the bankruptcy plan in Purdue Pharma to enable victims of the opioid crisis to challenge the non-consensual, non-debtor third-party releases invalidating their claims without the risk of the equitable mootness doctrine taking away that right," the applicants said. "Sexual abuse victims deserve just as much an opportunity to litigate their claims as do opioid victims."

The applicants — 75 people who suffered Scouting-related childhood sexual abuse in Guam as early as 1955, and 69 others from around the country — already have pre-petition claims filed against non-debtors, they said.

Without a temporary stay, they may "lose their ability to pursue their claims outside of bankruptcy proceedings," which would be "a blatant violation of their due process rights," they said.

The Boy Scouts filed for Chapter 11 bankruptcy in **February 2020** as it faced a wave of lawsuits from people who say they were sexually abused as children, after a number of U.S. states relaxed statutes of limitations on sexual abuse claims.

However, insurers and 250 local councils against whom some victims may have claims did not file for bankruptcy, but they would be protected under the plan's waivers in part because those entities agreed to contribute cash and property to fund the \$2.5 billion trust — believed to be the largest sexual abuse compensation trust in U.S. history, according to the application.

More than 100,000 non-debtor chartered organizations — the religious and civic groups that own and operate Boy Scout troops and Cub Scout packs — are also protected by the releases but did not put cash into the trust.

What's more, other claims — for wrongful death and personal injury, for instance — are funneled to the trust, not just sexual abuse claims, according to the application.

The Boy Scouts' Chapter 11 plan was **confirmed** in September 2022 and **went into effect** in April 2023 after the Third Circuit refused to issue a stay. However, a Third Circuit panel also left some **appeals alive** and is likely to schedule oral arguments for April as it waits for the Supreme Court to decide the Purdue case, according to the application.

"Given the complexity of this bankruptcy appeal, a genuine chance exists that over a year could pass before the Third Circuit issues a decision on the merits," the claimants said.

In the meantime, the Boy Scouts **filed a brief** in the Purdue case, arguing that non-consensual third-party releases have been critical in settling bankruptcies brought on by waves of sexual assault claims.

Earlier this week, the Delaware bankruptcy judge ruled that a group of survivors who say they **inadvertently elected** for a quicker but smaller claims payout **can't reverse** their selection.

The Boy Scouts did not immediately respond to a request for comment on the Supreme Court application Friday.

Applicants are represented by Delia Lujan Wolff of Lujan & Wolff LLP, Gilion C. Dumas of Dumas & Vaughn LLC and John M. Reeves of Reeves Law LLC.

Boy Scouts of America is represented by Jessica C. Lauria, Glenn M. Kurtz, Michael C. Andolina, Matthew E. Linder, Laura E. Baccash, Blair M. Warner, Ronald K. Gorsich and Doah Kim of White & Case LLP and Derek C. Abbott, Andrew R. Remming and Sophie Rogers Churchill of Morris Nichols Arsht & Tunnell LLP.

The case is Lujan Claimants and Dumas & Vaughn Claimants v. Boy Scouts of America et al., case number 23A741, in the Supreme Court of the United States.

—Additional reporting by Jeff Montgomery and Clara Geoghegan. Editing by John C. Davenport.

Update: This story has been updated with additional details and background information.

Burford Can't Sub For Sysco In Pork, Beef Price-Fixing Suits

By **Jack Karp**

Law360 (February 9, 2024, 4:22 PM EST) -- Legal investment firm Burford Capital cannot substitute for Sysco in sprawling price-fixing lawsuits against pork and beef producers because doing so would extend the litigation just so Burford can maximize its return on investment, a Minnesota federal judge ruled Friday.



The judge said that Sysco and Burford affiliate Carina Ventures "frankly admit that their motive to substitute Carina for Sysco is that Sysco was planning to settle these antitrust claims for lower amounts than Burford wanted." (Sipa via AP Images)

Allowing Burford affiliate Carina Ventures LLC to step into Sysco's place in the antitrust cases would also remove control over the decision to settle the suits and on what terms from the parties who claim to have actually been harmed and from those accused of doing that harm, according to the ruling from U.S. Magistrate Judge John F. Docherty.

Such a substitution would be against public policy, as Carina is looking to extend the litigation not only in hopes of extracting larger settlements from the parties, but also because if the lower settlements go through, they would set benchmarks for other settlements that have yet to be finalized, according to the ruling.

"Sysco and Carina frankly admit that their motive to substitute Carina for Sysco is that Sysco was

planning to settle these antitrust claims for lower amounts than Burford wanted," Judge Docherty said. "Put more starkly, a non-party has interfered with the decision of a party to settle that party's claims, because of reasons specific to the non-party."

The policy in favor of leaving litigation decisions in the hands of the litigants is particularly important in large, expensive antitrust cases like these, where "antitrust standing" limits the pool of potential plaintiffs, according to the judge.

Antitrust standing requires a plaintiff to show not just injury but an antitrust injury that Congress intended to prevent with antitrust laws, Judge Docherty explained.

Antitrust standing, like Article III standing, can be obtained by an assignment, the judge said.

But the doctrine's rationale "counsels against this court exercising its discretion to allow a special purpose vehicle created by a litigation funder whose Article III and antitrust standing comes only from assignment — Carina — to be substituted for a party who had both types of standing ab initio — Sysco," he added.

"Burford's role here was made necessary by a set of unique circumstances around prior violations of a financing agreement. Just like any finance provider, Burford would have preferred this issue never to have arisen and that its original financing arrangement had simply performed as agreed," a Burford spokesperson told Law360 on Saturday.

"This has nothing to do with litigation funding and everything to do with creditors' rights, and we will seek review of the decision as it is illogical to have Burford owning the claims but not being the party in the litigation," the spokesperson added.

Attorneys for Sysco and Carina did not immediately respond to requests for comment Friday.

Carina and Sysco sought the substitution in the price-fixing cases under Rule 25(c) of the Federal Rules of Civil Procedure, with Carina **saying in a July court filing** that Sysco had "fully assigned its claims in this matter to Carina," leaving Carina with "the sole right to prosecute those claims."

The substitution request came after Sysco and Burford agreed to **voluntarily dismiss** their respective suits against each other in a heated dispute in which Sysco claimed Burford **blocked the food distributor** from settling price-fixing claims.

A London Court of International Arbitration tribunal had previously found that Sysco gave Burford settlement approval authority and thus couldn't move forward with the deals without Burford's approval.

According to that decision, Burford agreed to invest \$140 million in Sysco's antitrust cases in exchange for a share of the proceeds. But after Sysco assigned a significant portion of its Burford-backed claims to customers, the parties amended the funding deal, with Sysco agreeing not to accept settlement offers without Burford's consent.

Sysco and Carina have pointed to the public policy favoring energetic antitrust enforcement to support their substitution request, according to Judge Docherty.

"However, a policy of strict enforcement is not the same as a policy that allows anyone at all to go to federal court to wage unrestricted warfare on alleged monopolists and price-fixers," the judge said.

No court has ever been asked to approve the substitution of a party with Article III and antitrust standing with "a newly formed shell company created mid-suit" to litigate assigned claims on behalf of a litigation funder that has no stake in the case, according to the ruling.

"The central question is whether this court will allow a mid-litigation Rule 25(c) substitution that will let a litigation funder be substituted for its client in order to try and negotiate larger settlements," Judge Docherty said. "The answer to that central question is no."

Carina is represented by Scott E. Gant, Michael S. Mitchell, Colleen A. Harrison and Sarah L. Jones of Boies Schiller Flexner LLP, Derek Ho and Dustin G. Graber of Kellogg Hansen Todd Figel & Frederick PLLC, and Christopher A. Seeger and Jennifer R. Scullion of Seeger Weiss LLP.

Sysco is represented by Michael Calhoon, Julie B. Rubenstein, Brian C. Kerr, Christopher P. Wilson,

Danielle Morello and Wyatt M. Carlock of Baker Botts LLP.

The cases are In re: Pork Antitrust Litigation, case number 0:18-cv-01776, and In re: Cattle and Beef Antitrust Litigation, case number 0:22-md-03031, both in the U.S. District Court for the District of Minnesota.

–Additional reporting by Andrew Strickler, Hailey Konnath and Bryan Koenig. Editing by Amy French.

Update: This story has been updated with comment from Burford.

Correction: A previous version of this story misidentified Judge Docherty as a district judge rather than a magistrate judge. The error has been corrected.

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Frank Execs Say JPMorgan Is Withholding Communications

By **Andrea Keckley**

Law360 (February 12, 2024, 4:39 PM EST) -- Charlie Javice and Olivier Amar, the indicted former executives of student loan startup Frank, asked a Manhattan federal judge Saturday for an extension of time to decide on raising an advice-of-counsel defense at their trial, saying they can't make a decision yet because JPMorgan is withholding discovery of their communications with Frank's general counsel.

The **request** came after JPMorgan Chase **told the court** in December that the defendants' subpoenas included requests for information that was, in large part, unspecific or irrelevant to the criminal case.

In their joint motion, Javice and Amar accuse JPMorgan of withholding nearly all of their communications with Matt Glazer, who worked as Frank's chief legal officer during the now-defunct startup's merger conversations with the bank. They are asking U.S. District Judge Alvin K. Hellerstein to extend the Feb. 12 deadline for giving notice of an advice-of-counsel defense by 120 days.

"Raising an advice-of-counsel defense has a myriad of consequences, including the potential waiver of the attorney-client privilege," their filing states. "It is premature and unfair to require that defendants notice a defense — eight months ahead of trial — that would potentially waive privilege over communications that they and their defense counsel have not even seen."

Counsel for JP Morgan and the government declined to comment.

The defendants face a variety of fraud charges for allegedly fabricating data in an effort to talk JPMorgan Chase into a \$175 million acquisition of Frank, which helped college students access federal financial aid. The two are scheduled to go to trial in October. In addition, two civil cases are pending against Javice and Amar: a parallel civil suit filed by the U.S. Securities and Exchange Commission and a civil suit by JPMorgan.

According to Saturday's defense motion, JPMorgan gained possession of Glazer's communications with Javice and Amar upon acquiring the startup. The two lost access to those conversations when they were fired just months before being **criminally charged**.

In December, prosecutors asked the court to kill the subpoenas, calling them "little more than a fishing expedition."

"The subpoenas do not seek specific evidence, but rather contain a staggering 65 requests ... the vast majority of which seek 'all' documents and communications concerning the stated topic," the prosecutors said. "Many of the requests in the subpoenas do not identify specific custodians appropriate for each request; instead, they neglect to specify any custodians whatsoever or, at times, seek documents from as many as 84 custodians."

Counsel for the defendants did not immediately respond to Law360's request for comment.

Olivier Amar is represented by Sean S. Buckley, Steven G. Kobre, Alexandria E. Swette, Sydney Sgambato Johnson and Ana Frischtak of Kobre & Kim LLP.

Charlie Javice is represented by Alex Spiro, Samuel Nitze, Erica Perdomo and Sara Clark of Quinn

Emanuel Urquhart & Sullivan LLP.

JPMorgan Chase is represented by Allison Wuertz of Hogan Lovells and Michelle Adler, Katherine Swan, Sidney Bashago and Greg D. Andres of Davis Polk & Wardwell LLP.

The government is represented by Dina McLeod and Micah Fergenson of the U.S. Attorney's Office for the Southern District of New York.

The case is U.S. v. Javice, case number 1:23-cr-00251, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Elliot Weld. Editing by Linda Voorhis.

Update: This story has been updated to add that counsel for JP Morgan declined to comment.

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Musk Can't Dodge SEC Questions About \$44B Twitter Buy

By **Jessica Corso**

Law360 (February 12, 2024, 6:00 PM EST) -- A California federal judge has told Elon Musk that he must appear before the U.S. Securities and Exchange Commission to testify about his \$44 billion purchase of the social media platform formerly known as Twitter, waving off the billionaire's assertions that the agency was harassing him via a series of seemingly endless investigations.

U.S. District Judge Laurel Beeler **ruled** on Saturday that the SEC could enforce a subpoena calling on Musk to answer the agency's questions about statements made in connection with the 2022 purchase of Twitter, which he has since renamed X. She gave the parties one week to settle on a time and date for the testimony.

Musk argued that he had already appeared by videoconference twice to answer SEC investigators' questions about those statements, and he complained that the agency was harassing him because it had previously opened investigations into statements he made about two of his other companies, Tesla and SpaceX.

"The other investigations are not demonstrably harassment: they are legitimate government investigations," Judge Beeler said over the weekend.

She told Musk that his objections to the Twitter investigation were also invalid because "the SEC has broad authority to issue subpoenas."

"In sum, the respondent's claims of harassment generally are challenges to the relevancy of the SEC's continued investigation," Judge Beeler said. "But the SEC's subpoena is within its authority, definite, and seeks relevant information."

The SEC declined to comment on the judge's order Monday. An attorney for Musk didn't immediately respond to a request for comment.

The dispute started in October, when the SEC sued to **enforce a subpoena** after Musk allegedly reneged on a promise to appear at the agency's San Francisco office to testify in the ongoing investigation into potential violations of federal securities laws.

In addition to information about Musk's **take-private purchase** of the social media platform, the SEC was also seeking information about Twitter stock that the businessman bought before the proposed takeover was announced.

The regulator claims it offered several later dates and a location in Texas, where Musk resides, as alternatives when it became clear that the meeting in San Francisco wasn't going to take place.

Musk told the court in a written filing in November that the subpoena "is the latest in a litany of duplicative and harassing demands" the SEC has made in its "never-ending investigations" into Musk and his companies.

He was also upset that an SEC staffer allegedly leaked information about him to the media, although he didn't describe what information or which media outlet when he made that claim to the court in November. Musk accused the SEC in that document of resorting to "dirty tactics" and "foul play" by leaking the information.

In addition to finding that the SEC had legitimate reasons for pursuing the subpoena, Judge Beeler also rejected Musk's arguments that the agency attorneys who issued the subpoena lack that power in the first place.

An attorney for Musk told the judge in December that the demand for the administrative subpoena is an **act of governmental authority** that can only be performed by an "officer of the United States" appointed by the president, a court, or the head of a governmental department.

But the attorneys who sign subpoenas and are appointed by the SEC's director of enforcement are not inferior officers of the U.S. subject to the Appointments Clause of the Constitution, Judge Beeler said.

They lack the powers of a federal judge, including the power to compel compliance with a subpoena, the judge said.

The U.S. Supreme Court's eventual ruling in **SEC v. Jarkesy** , a **dispute** over the constitutionality of the SEC's in-house court system, which questions the way administrative law judges are appointed, is "unlikely to affect the outcome here," Judge Beeler said.

The SEC is represented in-house by Melissa Armstrong, Monique Winkler, Bernard B. Smyth and Robin Andrews.

Musk is represented by Alex Spiro, Christopher Michel and Rachel G. Frank of Quinn Emanuel Urquhart & Sullivan LLP.

The case is U.S. Securities and Exchange Commission v. Musk, case number 3:23-mc-80253, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger. Editing by Adam LoBelia.

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'Pig Butchering' Scheme Took Down Small Bank, Fed IG Says

By Aislinn Keely

Law360 (February 12, 2024, 11:10 PM EST) -- The July collapse of a Kansas community bank appears tied to a type of crypto scam known as pig butchering, enabled by a failure of internal controls that allowed its former CEO to allegedly siphon off enough money to force the bank's closure, according to a new report by a bank regulatory watchdog.

Heartland Tri-State Bank collapsed last summer after its then-CEO, Shan Hanes, apparently fell prey to the crypto scam that allegedly led him to transfer some of his own funds and then wire roughly \$47.1 million of the bank's funds, draining it of its liquidity and forcing bank regulators to shutter it, said the report by the Office of Inspector General for the Federal Reserve Board.

The postmortem of the bank's collapse said Hanes' influence likely made bank employees hesitant to question his activities until he had already transferred millions of dollars. Hanes worked at the bank and its predecessor bank for about 30 years and was one of the larger shareholders in its holding company, the report noted.

"In our view, the CEO's role and reputation, as well as the fact that the bank employees who approved the wires were the CEO's subordinates, contributed to the employees' reluctance to raise questions or report the suspicious activity sooner," said the **report**, which was revealed the same day prosecutors announced charges against Hanes.

Hanes allegedly made 10 wire transfers of the bank's funds after apparently getting ensnared in a so-called "pig butchering scam," which occurs when a scammer convinces a victim to send funds to a purported crypto investment opportunity with the promise of high returns before absconding with the money, the inspector general's report says.

The U.S. Attorney's Office for the District of Kansas announced on Monday that it had charged Hanes with one count of bank embezzlement. His initial court appearance is scheduled for Feb. 28, authorities said, and he faces up to 30 years in prison if convicted.

A **criminal information** dated Feb. 2 said that Hanes appeared to begin purchasing crypto in December 2022 with his personal funds, before using embezzled funds from a local church and investment club in early 2023 to make the purchases. He then allegedly began wiring bank funds to accounts believed to be controlled by the scammer in May 2023.

As the inspector general report noted, crypto scams like pig butchering are on the rise, according to the FBI's Internet Crime Complaint Center. For that reason, the report recommended that the Fed's Division of Supervision and Regulation focus on making state member banks more aware of crypto scams, and on training examiners to be on the lookout for the schemes and compliance measures that can prevent them.

Hanes' status as a community leader in addition to his seasoned career may have contributed to employees being more lax in questioning his wire transfers or reporting them as suspicious, according to the watchdog. The report said the alleged transfers were met with a "significant breakdown of internal controls" as senior bank employees "circumvented" the bank's wire policy and daily limits to approve the CEO's transfers, according to the report.

The bank's board had previously set its wire limits at \$5 million per day per sender, then reduced it to

\$3 million. Bank policy also called for multiple employees to oversee the transfers. However, several of Hanes' 10 wire transfers to cryptocurrency exchanges exceeded the dollar amount and didn't follow the procedures.

If Heartland had a policy that required board approval if an officer requested a wire transfer above a certain amount, the transfers may have been caught before they starved the bank's liquidity, said the report.

"We believe if Heartland had implemented a tiered wire policy, Heartland's board of directors may have had an opportunity to detect and potentially prevent the unusual activity that eventually caused the bank's failure," it said.

Employees also failed to file suspicious activity reports on Hanes' alleged transfers despite the dollar amount and recipient being a cryptocurrency platform, which would trigger reporting obligations under Heartland's Bank Secrecy Act and anti-money laundering policies. The bank's chief financial officer filed a SAR only after Heartland had processed 10 of Hanes' wire transfers, multiple of which exceeded the limits.

However, the lapse in reporting may have been related to his status at the bank, the report noted.

"The CEO evaded the applicable wire transfer policy limits by allegedly instructing bank employees to execute transactions for his apparent benefit," said the report. "An interviewee noted that typically when suspicious activity involving insider abuse occurs at a bank with a dominant official, most employees involved explain that they were following the orders of that dominant official."

Heartland failed in July 2023 after the wire transfers, which were funded through lines of credit at a correspondent bank and borrowing from a federal home loan bank. Kansas-based Dream First Bank assumed the bank's deposit accounts and assets in the wake of its collapse.

The Office of Inspector General traced Heartland's failure to Hanes' alleged activity rather than any failure of oversight by the bank's board or examiners. The report noted that the Fed "had no reason to suspect that the events that led to Heartland's failure were likely or probable given its prior history as a satisfactorily rated bank." It also highlighted that Heartland's board and the Federal Reserve Board of Kansas City acted "promptly" once the issues became apparent.

Counsel for Hanes was not immediately available on Monday. The U.S. Attorney's Office for the District of Kansas and the OIG declined to comment.

The government is represented by Aaron L. Smith of the U.S. Attorney's Office for the District of Kansas.

Counsel information for Hanes was not immediately available.

The case is U.S. v. Hanes, case number 6:24-cr-10013-JWB, in the U.S. District Court for the District of Kansas

--Editing by Adam LoBelia.



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Robinhood Inks \$9M Deal To End Promotional Text Suit

By **Lauren Berg**

Law360 (February 9, 2024, 9:40 PM EST) -- Stock-trading app Robinhood has agreed to pay \$9 million to resolve proposed class claims that its "Refer a Friend" program caused non-users to receive unsolicited promotional texts, in violation of Washington state law, consumers told a Seattle federal judge Thursday.

In a motion for preliminary approval, consumers Cooper Moore and Andrew Gillette asked Senior U.S. District Judge Barbara J. Rothstein to give her initial blessing to the proposed deal, which they called an "excellent result" for the settlement class. The class likely includes more than 1 million consumers whose phone numbers contain an Evergreen State area code.

The proposed settlement class includes all people who received a Robinhood Financial LLC referral program text message and were Washington state residents at the time: from Aug. 9, 2017, through the date of preliminary approval, according to the motion. The class excludes all those who "clearly and affirmatively consented in advance to receive Robinhood referral program text messages."

To receive a portion of the settlement, class members will need to submit a "valid and timely" claim form attesting they received the promotional text messages from Robinhood and did not consent to receive them, the motion states.

Moore and Gillette each intend to seek a \$10,000 class representative award, while their counsel at Terrell Marshall Law Group and Berger Montague intend to seek fees of up to 25% of the settlement fund, as well as \$151,000 in expenses, according to the motion. If any money is left over in the fund, the parties said it will not revert to Robinhood: it will be given to the Legal Foundation of Washington.

"We are pleased to have resolved this matter and look forward to continuing to break down barriers to investing, including for our customers in Washington State," Lucas Moskowitz, Robinhood's deputy general counsel and head of government affairs, told Law360 in a statement Friday.

Counsel for the plaintiffs did not immediately respond to a request for comment.

The 2021 suit alleged Robinhood's "Refer a Friend" program's promotional texts violated Washington state's Commercial Electronic Mail Act and Consumer Protection Act.

The program allows Robinhood users to, via the app, generate and send texts to their phone contacts that invite them to join the platform, according to the complaint. Successful referrals could earn the user and the contact \$5 or a randomly selected stock, with the potential worth going up to \$225, the consumers said.

Moore received one such text promising "a stock like Apple, Ford or Sprint for free," while Gillette got a text offering a stock such as Apple, Ford or Facebook, according to the complaint.

Robinhood sought to dismiss the suit, but Judge Rothstein **rejected** the bid in August 2022, finding Moore and Gillette had adequately alleged Robinhood helped its users send unsolicited, commercial text messages to their contacts.

"Contrary to its claim of 'nominal involvement,' Robinhood developed and ordered the entire 'chain of events' leading to the messages' formulation and transmission," the judge said, adding

that "specifically, the Robinhood app prompts users to refer contacts with the promise of free stocks, pre-composes the messages, and then automatically generates them within the users' cellphone in such a way that enables them to be sent by the users with as few as four total clicks."

The plaintiffs are represented by Beth E. Terrell and Jennifer Rust Murray of Terrell Marshall Law Group and Sophia M. Rios, E. Michelle Drake, Mark Desanto and Zachary M. Vaughan of Berger Montague.

Robinhood is represented by Kenneth E. Payson, Lauren Burdette Rainwater, Eric Franz and Theo A. Lesczynski of Davis Wright Tremaine LLP.

The case is Cooper Moore et al. v. Robinhood Financial LLC, case number 2:21-cv-01571, in the U.S. District Court for the Western District of Washington.

--Editing by Caitlin Wolper.

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The Corporate Disclosure Tug-Of-War's Free Speech Issues

By **Colin Pohlman, Jane Luxton and Paul Kisslinger** (February 9, 2024, 2:45 PM EST)

Corporate disclosure provisions requiring corporations to convey information represent a shifting and sometimes uncomfortable space in First Amendment jurisprudence.

The First Amendment protects the right to speak and the right not to speak. [1] One ongoing case highlights the confusing space occupied by mandatory corporate disclosures, particularly where those disclosures intersect with flash points in the ongoing culture wars, like environmental, social and governance, and diversity, equity and inclusion initiatives.

In Securities Industry and Financial Markets Association v. Ashcroft in the U.S. District Court for the Western District of Missouri, a judge **recently rejected** the state of Missouri's bid to dismiss a case brought by SIFMA challenging rules promulgated by the state that obligate financial services professionals to specifically disclose if they "incorporate[] a social objective or other nonfinancial objective into a discretionary investment decision." [2]

The continuing conflict over corporate disclosure requirements has important implications not just for investors and regulated entities but also for broader questions about the scope and protections of the First Amendment's freedom of speech clause.

A Proliferation of Mandatory Disclosure Schemes

The rapidly proliferating ranks of new disclosure schemes grow each year. Jurisdictions across the U.S. and worldwide have introduced various laws and regulations to mandate new and often very specific disclosures, referencing a trend toward greater transparency and accountability in corporate reporting, often tied to specific social or political objectives.

For example, as concern over climate change has grown, many have argued for increased corporate transparency and accountability regarding environmental and climate impacts. Some jurisdictions have implemented regulations requiring companies to disclose information about their ESG practices. A related trend includes increased focus on human capital management-related disclosures, especially in the realms of forced labor and DEI.

One prominent example is the U.S. Securities and Exchange Commission's proposed climate disclosure rule, signaling the commission's intention to enhance climate-related disclosure requirements for public companies. [3] Although final adoption of the rule has been delayed until at least spring 2024, the SEC's proposal would require companies to provide an accounting of their greenhouse gas emissions, the potential environmental risks they face, and measures they are taking in response to climate-related risks. The proposed rule remains highly controversial, as evidenced by a **congressional hearing** last month. [4]

Other disclosure requirements, like the California Transparency in Supply Chains Act, seek to address



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human rights concerns.[5] California's law requires companies that do business in the state to provide information on their public-facing website or through written disclosures about their efforts to eradicate human trafficking and slavery in their supply chains. Prominent corporations, including Nestlé USA Inc. and The Hershey Co., have been brought to court in California by plaintiffs alleging violations of the law.[6]

Foreign jurisdictions are not shy about adding disclosure requirements either.

The U.K.'s Modern Slavery Act, enacted in 2015 and modeled on the California Transparency in Supply Chains Act, seeks to regulate and address the issues of modern-day slavery in business operations and their global supply chains.[7] Certain U.K.-based companies and other commercial organizations doing business above a certain value threshold in the U.K. have annual reporting requirements mandating that they publish a statement outlining specific steps taken to ensure that slavery and human trafficking are not present anywhere in the business or its supply chain.[8]

The European Union has also created new mandatory reporting requirements for corporations, in the form of the Conflict Minerals Regulation, requiring regulated entities to report annually on supply chain due diligence for certain conflict minerals.[9] More recently, in 2023, the EU launched the Corporate Sustainability Reporting Directive, obligating large and listed companies to publish regular reports on the social and environmental risks they face, and on how their activities affect people and the environment.[10]

Missouri's rules, discussed in *SIFMA v. Ashcroft*, requiring financial services firms in the state to specifically disclose if they "incorporate a social objective or other nonfinancial objective into a discretionary investment decision," are yet another example of the trend toward more disclosure requirements.

While these rules are on the other side of the political divide over ESG- and DEI-related disclosures and are designed to discourage financial services professionals from focusing on ESG-related goals in their work, they represent implicit acknowledgment by Missouri regulators that mandatory disclosures have the power to drive behavior changes by regulated entities. As such, the rules demonstrate a growing trend toward the use of mandatory disclosure schemes to further preferred policy outcomes.

Implications of Increasing Disclosures

The implications of environmental and social disclosures are far-reaching, particularly where those disclosures intersect political controversies of the day, such as environmental policy, corporate responsibility, free speech, and the scope of the government's role in regulating business activities.

Proponents of increasing the scope of disclosures argue that they are essential for promoting corporate accountability and reflect society's interest in propelling positive change in corporate behavior. Disclosures provide important information for investors, consumers and other stakeholders, enabling them to evaluate a company's impact alongside metrics that may be deeply relevant to them so they can make informed decisions about their engagement.

When it comes to ESG-related disclosures, some proponents argue that climate change disclosures can help to mitigate systemic risks associated with climate change, such as regulatory changes, physical impacts and shifts in consumer preferences. For example, Cecilia Bremner in a recent law review article argues that a "duty to disclose climate-related information would ... provide the capital market with long term protection from climate change" and provide incentives to build resilience of companies and financial markets.[11]

Indeed, Bremner argues that "capital market participants" themselves "are increasingly requesting SEC registrants to disclose climate-related information as they become more aware of climate risks." [12]

Opponents of an expanded disclosure regime raise concerns about the potential burdens and costs imposed on companies. They argue that excessive reporting requirements may divert resources away from productive activities, hampering competitiveness — including from foreign competition — and innovation.

To the extent, as noted above, that market pressures are spurring disclosures, questions arise as to whether government intervention is needed, particularly when the SEC already requires disclosure of factors that are material to investor decision making. Additionally, opponents question the efficacy of disclosures in driving meaningful change, suggesting that reporting alone may not necessarily lead to improved environmental performance or better decision making.

Furthermore, opponents express concern about the subjectivity, complexity, and lack of universality of ESG metrics and the potential for confusion and greenwashing, or misleading claims about environmental performance.[13]

Conflict over ESG-related topics illustrates the complexity of this area of regulation in a particularly stark fashion. As the SEC works toward publishing a final rule for its own climate disclosure scheme, other political authorities push back strongly against the very notion of incorporating ESG-related criteria in investment decision making.

For example, in addition to the Missouri regulation noted above, lawmakers in New Hampshire have introduced a bill that would make it a felony to knowingly invest state or taxpayer funds using ESG criteria that violates what legislators would define as fiduciary duty.[14] And most recently, a group of plaintiffs spearheaded by the U.S. Chamber of Commerce and American Farm Bureau Federation **sued the state of California** for its recently enacted corporate climate disclosure laws, arguing the state is unconstitutionally compelling speech to combat climate change.[15]

Legal Analysis

Mandatory disclosures have long been a fact of American corporate life. The SEC requires corporations to disclose "material information" to investors.

Rule 12b-20 of the Securities Exchange Act of 1934 requires that companies must, in addition to providing the information expressly required in a report or other statement to the SEC, include any additional material information that may be necessary to make the required statements not misleading in light of all the circumstances.

Section 10(b) and Rule 10b-5 go on to broadly prohibit fraudulent and deceptive practices and untrue statements or omissions of material facts in connection with the purchase or sale of any security.

It is well established that the rights "protected by the First Amendment against state action include[] both the right to speak freely and the right to refrain from speaking at all," as stated by the U.S. Supreme Court in its 1977 *Wooley v. Maynard* decision.[16] In practice, however, government regulation of commercial speech and the ability of the government to compel certain disclosures by corporations has strong precedent.

The Supreme Court has held that "'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'"[17]

State courts, even where the state constitution has a more protective standard than the U.S. Constitution, seem to agree.[18] In California, for example, laws "requiring a commercial speaker to make purely factual disclosures related to its business affairs" are believed to "facilitate rather than impede the free flow of commercial information" and are not looked upon with great suspicion, as stated by the California Supreme Court in its 2013 decision in *Beeman v. Anthem Prescription Management LLC*.[19]

Therefore, many commercial speech regulations are subject to a relatively lax standard of judicial scrutiny. Laws that compel only "factual and uncontroversial information" related to the goods or services the speaker provides or the "terms under which" the goods or "services will be available," are typically upheld if they are "reasonably related" to a sufficient government interest.[20]

Specifically, the U.S. Court of Appeals for the Eighth Circuit held 10 years ago in *1-800-411-Pain Referral Service LLC v. Otto* that "[u]nder *Zauderer*, disclosure requirements for commercial speech are constitutional so long as they are 'reasonably related to the State's interest in preventing

deception of consumers' and are not so 'unjustified or unduly burdensome' that they 'chill [] protected commercial speech.'"[21]

The U.S. Supreme Court's 1985 ruling in *Zauderer v. Office of Disciplinary Counsel* is applied primarily in the context of challenges to the regulation of voluntary commercial advertising and thus ultimately stands for the proposition that when a law or regulation mandates disclosure of "particular factual information" about a company's product, the company has only a "minimal" cognizable interest in withholding public disclosure and is therefore required to disclose the information if the government can articulate a reasonable interest in them doing so.[22]

Beyond the context of voluntary commercial advertising, the Supreme Court has been clear that a "speaker has the right to tailor" his or her speech under the First Amendment, and that this right "applies ... equally to statements of fact the speaker would rather avoid." [23] The court has also stated plainly that this right is "enjoyed by business corporations generally." [24]

Mandatory financial and corporate governance disclosures, therefore, become more susceptible to a challenge on First Amendment grounds if they are "inextricably intertwined" with noncommercial, controversial, or opinion-based speech or bear a speculative connection to the government's interest. [25]

This was the case in the so-called conflict minerals rule case, wherein the U.S. Court of Appeals for the D.C. Circuit held that an SEC rule "violate[s] the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be 'DRC conflict free.'" [26]

As the Supreme Court stated in its 1988 decision in *Riley v. National Federation of the Blind of North Carolina Inc.*, cases dealing with ideological messages "cannot be distinguished simply because they involved compelled statements of opinion" while others "deal with compelled statements of 'fact.'" [27]

In the recent *SIFMA v. Ashcroft* decision, the district court held that "SIFMA adequately allege[d] that the Rules violate the First Amendment" because the compelled disclosure about the use of ESG-related criteria is not purely factual but rather "controversial 'because the Rules' required scripts express only one side of a debate over the merits of 'social objectives' [when] investing.'" [28]

Conclusion

Tensions around corporate disclosures relating to ESG and DEI continue to rise. While some jurisdictions legislate to require additional ESG- and DEI-related disclosures, others take steps to signal their rejection of these disclosure schemes — sometimes through their own disclosure requirements.

Amid this tug-of-war, important questions of free speech and the scope of the First Amendment continue to play out in litigation over required disclosures. In the meantime, public companies should work to ensure that their disclosures take careful account of this evolving area of the law.

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[1] U.S. CONST. amend. I ("Congress shall make no law... abridging the freedom of speech."). The Free Speech Clause of the First Amendment is "among the fundamental personal rights and liberties protected ... from impairment by the States." *Gitlow v. New York* , 268 U.S. 652, 666 (1925).

[2] SIFMA v. Ashcroft, No. 2:23-cv-04154-SRB (W.D. Mo. Jan. 5, 2024) at 1(citing Mo. Code Regs. Ann. tit. 15, § 30-51.170(3)(A) (2023)).

[3] The Enhancement and Standardization of Climate-Related Disclosures for Investors, Proposed Rule, 87 Fed. Reg. 21,334 (Apr. 11, 2022).

[4] House Financial Services Committee, Oversight and Investigations Subcommittee, "Hearing Entitled: Oversight of the SEC's Proposed Climate Disclosure Rule: A Future of Legal Hurdles" (Jan. 18, 2024), <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=409109>.

[5] The California Transparency in Supply Chains Act, State of California Department of Justice (last visited Jan. 23, 2024), <https://oag.ca.gov/SB657>.

[6] Oliver Nieburg, Mars, Nestle and Hershey face fresh cocoa child labor class action lawsuits, Confectionary News (2015), <https://www.confectionarynews.com/Article/2015/09/30/Mars-Nestle-and-Hershey-face-fresh-cocoa-child-labor-lawsuits#>.

[7] Modern Slavery Act 2015 § 54 (Gr. Brit.).

[8] Id.

[9] Conflict Minerals Regulation: The regulation explained, European Commission (last visited Jan. 23, 2024), https://policy.trade.ec.europa.eu/development-and-sustainability/conflict-minerals-regulation/regulation-explained_en.

[10] "Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting" available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464>.

[11] Cecilia Bremner, The Value of Regulating Climate Disclosures, 53 Lewis & Clark Env't L. Rev. 107, 144 (2023).

[12] Id. at 109.

[13] Are You Concerned About Greenwashing?, S&P GLOB., <https://perma.cc/84KB-56GC> (last visited Jan. 18, 2024).

[14] Robert Steyer, It's a felony: N.H. bill would make it a crime to knowingly use ESG criteria in investing taxpayer dollars, Pensions&Investments (Jan. 16, 2024), <https://www.pionline.com/esg/new-hampshire-bill-would-make-it-felony-knowingly-use-esg-criteria-investing-taxpayer-dollars>.

[15] Chamber of Commerce of the United States of America v. California Air Resources Board, et al., No. 2:24-cv-00801 (C.D. Ca. January 30, 2024).

[16] Wooley v. Maynard, 430 U.S. 705, 715 (1977).

[17] *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (alteration in original) (quoting *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978)).

[18] *Crossley v. California*, 479 F. Supp. 3d 901, 917 (S.D. Cal. 2020).

[19] *Beeman v. Anthem Prescription Mgmt.*, 315 P.3d 71, 89 (Cal. 2013) (internal quotation marks omitted).

[20] *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

[21] *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1053 (8th Cir. 2014) (quoting

Zauderer, 471 U.S. at 651).

[22] Zauderer, 471 U.S. at 651.

[23] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* , 515 U.S. 557, 573-4 (1995).

[24] *Id.* at 574.

[25] *Riley v. Nat'l Fed'n of Blind* , 487 U.S. 781, 796 (1988).

[26] *Nat'l Ass'n of Mfrs., v. SEC* , 800 F.3d 518, 530 (D.C. Cir. 2015) (citing *Nat'l Ass'n of Mfrs., v. SEC* , 748 F.3d 359, 373 (D.C. Cir. 2014)).

[27] *Riley v. National Federation of the Blind of North Carolina, Inc.* , 487 U.S. 781, 797 (1988).

[28] *SIFMA v. Ashcroft* at 20. To balance the rights of corporations not to speak with the practical utility of certain categories of mandatory disclosures, jurisprudence has developed a standard of intermediate scrutiny for disclosure requirements. The test developed in *Central Hudson* is typically performed at this intermediate level of scrutiny "to evaluate whether disclosure requirements violate the First Amendment." *SIFMA v. Ashcroft* at 19. A test under *Central Hudson* assesses "(1) whether the commercial speech at issue concerns unlawful activity or is misleading; (2) whether the governmental interest is substantial; (3) whether the challenged regulation directly advances the government's asserted interest; and (4) whether the regulation is no more extensive than necessary to further the government's interest." *Otto*, 744 F.3d at 1055.

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