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- **COURT:** D. Del.
- **TRACK DOCKET:** 1:24-cv-00192

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Ambrx has an ADC currently in trials for prostate cancer treatment, which J&J plans to accelerate development of after the deal's anticipated close date in the first half of 2024, according to a press release.

Shareholders Bruce Miller and John Carroll seek to block the proposed transaction until the missing information is disclosed to investors, or otherwise to rescind the deal once it closes and collect rescissory damages for the alleged Securities Exchange Act violations. They also seek legal fees in their respective cases, the complaints say.

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

Long Law LLC represents Miller and Carroll in their respective suits. Acocelli Law PLLC also represents Carroll.

The cases are Miller v. Ambrx Biopharma Inc. , D. Del., No. 1:24-cv-00192, complaint filed 2/13/24 and Carroll v. Ambrx Biopharma Inc. , D. Del., No. 1:24-cv-00185, complaint filed 2/12/24 .

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Musk, Tesla Investor to Discuss Putting Pay Decision on Hold (1)

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Feb. 14, 2024, 8:55 AM PST

Jef Feeley

Bloomberg News

Billionaire Elon Musk and the Tesla Inc. investor who successfully challenged the chief executive officer's \$56 billion pay package will discuss asking the judge who ruled against Musk to put her decision on hold.

Greg Varallo, the lawyer for Tesla shareholder Richard Tornetta, said Wednesday in a letter that lawyers for both sides have agreed to try to hammer out an agreement on the terms of the final judgment. Varallo said they would also discuss requesting

Judge **Kathleen St. J. McCormick** stay her decision if Musk appeals.

"The parties will seek to agree on the form of the final order and judgment, including a stay pending appeal of the final judgment and an award of fees and expenses," Varallo said in the letter.

The letter also specifies Tornetta's request for legal fees in the case will be filed by March 1.

Musk hasn't said whether he plans to appeal the judge's ruling. Evan Chesler, one of Musk's lawyers in the pay case, didn't immediately return an email seeking comment on whether the billionaire will appeal the pay ruling.

McCormick last month sided with Tornetta in finding conflicts of interest marred the board's consideration of Musk's Tesla pay deal, the largest in US history.

Musk has repeatedly urged Tesla's board to arrange another massive stock award for him, years after he sold a significant chunk of his shares in the company to acquire the social-media company once-known as Twitter.

The billionaire has said he needs a large Tesla stake to maintain control of the electric-carmaker and expand further into artificial intelligence. Some experts have questioned whether Musk's focus on Tesla will be weakened without another super-sized pay package.

The case is Tornetta v. Musk, 2018-0408, Delaware Chancery Court (Wilmington).

Musk, Tesla shareholder to propose a stay of pay ruling during appeal

 [reuters.com/legal/musk-tesla-shareholder-propose-stay-pay-ruling-during-appeal-court-filing-2024-02-14](https://www.reuters.com/legal/musk-tesla-shareholder-propose-stay-pay-ruling-during-appeal-court-filing-2024-02-14)

Tom Hals, Jody Godoy

Elon Musk, CEO 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 14 (Reuters) - Elon Musk and the Tesla shareholder who won a verdict last month voiding the CEO's \$56-billion pay package will ask a judge to pause her ruling until an appeal is resolved, according to a Tuesday letter to the court from the shareholder's attorney. Greg Varallo, the shareholder's attorney, told Reuters the two sides will agree to a stay if they can reach a deal on an appeal bond.

The letter is the first indication that Musk intends to appeal the ruling, which the billionaire has criticized on social media, saying he will seek shareholder approval to move Tesla's state of incorporation to Texas, where it has its headquarters.

Before Musk can appeal, the two sides will propose a final order for approval by the judge, Kathaleen McCormick, which will include a petition for a legal fee.

That fee will be paid by Tesla and given the enormous verdict, it is likely to be among the largest ever. It will likely be opposed by Tesla.

Musk and the shareholder will tell the court their position on fees by March 1, according to the court filing.

If McCormick approves the fee and final order, Musk would have 60 days to file an appeal with the Delaware Supreme Court, which would likely take at least six months to resolve.

An attorney for Musk did not immediately respond to a request for comment.

An appeal bond protects a plaintiff who prevailed in court by ensuring that the losing party will pay up if they fail to overturn the verdict.

The Jan. 30 ruling rescinded Musk's \$56-billion pay package, which consisted of stock options. Musk has not exercised the options, which allow him to buy Tesla stock at a deeply discounted price. Once he buys the stock he must hold it for five years.

The case was brought by shareholder Richard Tornetta, who was pursuing it on behalf of Tesla. Shareholders benefited from the return of the stock options to Tesla.

McCormick said in her ruling that Musk improperly controlled the pay negotiation process and that the shareholders lacked information when they voted in 2018 to approve the package.

Reporting by Tom Hals in Wilmington, Delaware, and Jody Godoy in New York; Editing by Mark Porter and Nick Zieminski

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

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Explainer: Did Delaware 'lock the doors' to stop companies from leaving, as Musk claims?

 [reuters.com/business/autos-transportation/did-delaware-lock-doors-stop-companies-leaving-musk-claims-2024-02-14](https://www.reuters.com/business/autos-transportation/did-delaware-lock-doors-stop-companies-leaving-musk-claims-2024-02-14)

Jody Godoy

Tesla CEO Elon Musk and his security detail depart the company's local office in Washington, U.S. January 27, 2023. REUTERS/Jonathan Ernst/File Photo Purchase Licensing Rights , opens new tab

Feb 14 (Reuters) - Elon Musk has claimed that Delaware, home to much of corporate America, is trying to prevent businesses from heeding his call to leave the state, where a court invalidated his \$56 billion Tesla pay package.

Since the Delaware Court of Chancery ruled to rescind Musk's record pay package on Jan. 31, the Tesla (TSLA.O) , opens new tab CEO has posted on social media about reincorporating the electric vehicle maker in Texas, where it has its headquarters, and encouraging others to follow.

"Move your company out of Delaware before they lock the doors, as they just did with Tripadvisor," Musk tweeted on Monday.

Here are the facts behind the billionaire's claim.

WHAT IS HAPPENING WITH TESLA?

Musk said on the X social media platform on Feb. 1 that Tesla would "move immediately to hold a shareholder vote" to reincorporate the company in Texas.

It is not clear that Tesla's board will recommend such a vote, or that it would garner the necessary support from shareholders. Many are retail investors , opens new tab who, research shows, typically fail to vote their shares.

DOES DELAWARE BLOCK COMPANIES FROM LEAVING?

The vast majority of large publicly traded companies incorporate in Delaware, even when they have no physical presence in the state, in part because of the predictable court system, which has specialist judges and non-jury trials.

Delaware has actually made it easier to reincorporate elsewhere. State law had required a unanimous shareholder approval. Since a change in 2022, companies can leave Delaware with the approval of a majority of shareholders.

But Delaware's Chancery Court is now considering how closely to scrutinize moves that arguably benefit a controlling shareholder.

WHAT DOES TRIPADVISOR HAVE TO DO WITH IT?

A shareholder lawsuit against TripAdvisor's (TRIP.O) [opens new tab](#) board seeks to block the online travel guide company's planned reincorporation in Nevada.

The shareholders argue the move was designed to let Gregory Maffei, head of TripAdvisor's parent company, avoid accountability for potential self-dealing. Nevada sets a lower bar for such transactions, they argued.

At a November hearing in Delaware Chancery Court, Vice Chancellor Travis Laster seemed open to scrutinizing whether the move was fair to minority shareholders. But he expressed "discomfort" with the idea of blocking it.

"The idea that Delaware is going to block people from leaving, I think, is pretty strained," the judge said, according to a transcript of a hearing in the case.

An attorney for the TripAdvisor shareholders told the judge that only a "small subset" of Delaware companies could have moves scrutinized - those with controlling shareholders heading to a state with fewer legal protections for minority shareholders.

In a non-controlled company, "the stockholder vote would carry the day," the attorney, Andrew Blumberg, said.

COULD THE CASE AFFECT TESLA?

Musk does not have a controlling stake in Tesla, though he was found to have controlled the process that led to his 2018 pay package.

The shareholders who voted to approve the package lacked information about the process, the judge in that case ruled.

Texas does not shield corporate leaders in the same way as Nevada - meaning it could be harder for Tesla shareholders to argue a move there is designed to let Musk escape liability.

Still, a ruling expected this month in the TripAdvisor case could have implications, as it will show how closely Delaware judges will review out-of-state moves to determine if they are fair to minority shareholders.

Reporting by Jody Godoy in New York; Editing by Tom Hals and Matthew Lewis

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Musk must testify before SEC for 3rd time, jurist says

DJ [dailyjournal.com/articles/377142-musk-must-testify-before-sec-for-3rd-time-jurist-says](https://www.dailyjournal.com/articles/377142-musk-must-testify-before-sec-for-3rd-time-jurist-says)

Feb. 13, 2024

After the Tesla founder purchased Twitter in April 2022, the SEC opened a probe as to whether Musk buying the social media company's shares in the preceding months violated federal securities laws.

Elon Musk is under investigation by the SEC for his purchase of Twitter shares. (New York Times News Service)

Elon Musk must testify for the third time before the U.S. Securities and Exchange Commission as the agency investigates the billionaire investor's purchase of Twitter Inc., now X Corp., for potential civil fraud.

"The evidence is relevant and material to the SEC's investigation, and the testimony is not unduly burdensome," U.S. Magistrate Judge Laurel Beeler in San Francisco wrote in her order Saturday. She asked the parties to confer within one week and settle on a date and location for the deposition.

The SEC's media relations department said in an email Monday that it had no further comment beyond public filings. Musk's attorneys at Quinn Emanuel Urquhart & Sullivan LLP did not respond to a request for comment. Securities and Exchange Commission v. Musk, 3:23-mc-80253-LB (N.D. Cal., filed Oct. 5, 2023).

After the Tesla founder purchased Twitter in April 2022, the SEC opened a probe as to whether Musk buying the social media company's shares in the preceding months violated federal securities laws. Musk sat for two depositions by videoconference in July of that year but SEC attorney Bernard B. Smyth wrote in court filings that the commission has received thousands of new documents from various parties since that time.

Despite initially agreeing to a third session, Musk had a change of heart and raised several objections, including San Francisco as the location for testimony, Smyth continued. As the SEC has established that its subpoena was lawfully issued, Musk cannot meet "the high burden" of an affirmative defense for noncompliance, said Smyth.

In his opposition motion, Quinn Emanuel partner Alex Spiro said the subpoena was the latest in "a litany of duplicative and harassing demands" by the commission under the guise of investigating his client and his companies.

Spiro added that the subpoena “reflected bad faith” rather than a legitimate investigatory purpose as the SEC wanted Musk to testify for the third time in 18 months. Furthermore, the agency sought “irrelevant and immaterial information” beyond the scope of reason, the attorney wrote.

Beeler heard the motion in December but was not convinced by Musk’s arguments, noting that the SEC has broad authority to issue subpoenas. “The respondent is the person who made the securities purchases, statements, and SEC filings, and the SEC may question him on those topics. This is an investigative subpoena. Minimal relevance is required to enforce it,” the judge wrote.

#377142

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Podcast: What's Really Behind Tesla's Slowdown

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By Max Chafkin and Reyhan Harmanci

(Bloomberg Businessweek) --

Photo illustration by 731. Photos: NASA (1). Getty Images (7)

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Omny Studio: How Wall Street Sees Elon and the Aut...

Elon Musk's car company has a demand problem. Or as Musk put it somewhat euphemistically during his company's most recent earnings call, Tesla is "between two major growth waves." The slowdown (or whatever you want to call it) has been caused partly because of sliding growth in the electric vehicle sector, partly because of competition from mainstream automakers and partly because of the controversy that's swirled around the brand and its chief executive.

Super Bowl Sunday presented an illustration of the latter two points. During the game, several big car companies attempted to use sentimentality, nostalgia, and in the case of BMW Christopher Walken impersonations to sell new EVs. Tesla doesn't advertise on TV, but Tesla critics do. And so, in addition to the usual car ads, football fans in several US markets also saw an ad urging consumers to "boycott Tesla to keep your kids safe."

The anti-Tesla ads pointed to concerns about the company's driver assistance software, which it calls Autopilot and Full Self-Driving. The ads were bought by the Dawn Project, an advocacy group founded by software entrepreneur Dan O'Dowd. In the past, the group has conducted demonstrations intended to call attention to the challenges that self-driving systems have in spotting and braking for children.

On this week's episode of *Elon, Inc.*, the crew discusses the challenges (and opportunities) presented by Tesla's automated driving software. Then we welcome Barry Ritholtz, host of the Bloomberg podcast *Masters in Business*, for a wide-ranging conversation about Musk's prowess as a manager and as a marketer. Among the highlights:

- Unlike the ads aired by BMW and the other carmakers, O'Dowd's Super Bowl ad wasn't aimed at the nation's car buyers. Instead it was narrowly pitched in mostly small markets in a bid to create a stir in the press. Besides Washington, it aired in Santa Barbara, California, Dover, Delaware, and Traverse City, Michigan (population: just 16,000 or so, though one of those people is Transportation Secretary Pete Buttigieg).

- O'Dowd isn't exactly a disinterested activist. His company, Green Hills Software, makes driver assistance software and is, in some broad sense, a Tesla competitor. Musk has long said that automation makes its cars safer.
- On the other hand, one of O'Dowd's key points—that Tesla's marketing has overrun the actual capabilities of his software—is one that has been raised repeatedly by Tesla critics, as well as by families of those killed in crashes involving Tesla's vehicles. The latest example: The *Washington Post* reported on a Musk employee who died in a crash when he was drunk and apparently using the Full Self-Driving system in his Tesla. His car, according to the surviving passenger, drove off the road and into a tree. The employee's widow alleges that her late husband (and other Tesla enthusiasts) have been "sold a false sense of security."
- Separately, the National Highway Traffic Safety Administration has been investigating Tesla's automation for years, and in December Tesla announced a sweeping recall to make sure that drivers are paying attention and aren't using the software in unsafe situations.
- If Tesla's critics say that crashes attributed to Autopilot and Full Self-Driving underscore the dangers of Musk's tendency to make wild claims, Tesla shareholders have also profited handsomely from Musk's at times wild optimism.
- The Musk reality distortion field has meant that the company is wildly overvalued compared to other car companies. Of course, that's because Tesla true believers don't see it as a car company.

About the show: Each week, listen in as host David Papadopoulos convenes a panel of Bloomberg journalists who are tracking Elon Musk's companies and the surprising ways they intersect, breaking down his latest moves and what it could mean for us all.

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Tesla Argues Vehicle Range Suits Should Shift to Arbitration (1)

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- Batteries allegedly have much lower miles per charge
- Court asks how public injunctive relief could be split

Tesla Inc. urged a US judge to send to arbitration claims that it fudges the distance people can drive its electric vehicles on a single full-battery charge.

Judge Yvonne Gonzalez Rogers of the US District Court for the Northern District of California focused questions on consumer sophistication, whether it has the authority to decide the issue of arbitrability, and a California contracts rule during a hearing Tuesday in an Oakland federal court.

“All consumers buy cars, but not all consumers buy Teslas,” Gonzalez Rogers said. Trademark cases also look at sophistication. “So, it’s not as if the law doesn’t take that into account. A run-of-the-mill consumer and a run-of-the-mill, off-the-shelf product is different.”

Separate proposed class actions claim Tesla falsely advertises its EVs’ range, which the company “grossly overvalued” by as much as 26% over the actual range in marketing them to consumers.

Tesla recommends buyers only sparingly fully charge their vehicles while the advertised total range of its vehicles are based on a full charge, according to one filed complaint. “However, because Tesla discourages owners from ever charging their vehicles to 100%, it is increasingly difficult—if not impossible—to ever reach that advertised range,” the filing said.

The plaintiffs seek injunctive relief to force the automaker to “eliminate the deceptive practices and require Tesla to warn consumers” that the ranges advertised are not under normal driving conditions, such as using air conditioning and other features, said William A. Ladnier with Milberg Coleman Bryson Phillips Grossman PLLC.

The company argues each plaintiff agreed to arbitrate any disputes when they ordered their vehicles, entered into order agreements, financed, and took delivery of their cars. Any questions about the arbitrability of plaintiffs’ claims must be delegated to the arbitrator, the automaker said.

Under the Federal Arbitration Act, the court “must compel Plaintiffs’ claims to where they belong—individual, non-class arbitration,” Tesla argues. The arbitration agreements “uniformly have been enforced,” including by three judges in the Northern District, the

company said in a motion filed with Gonzalez. The cases should be dismissed or stayed pending arbitration, Tesla said.

The judge took the arguments under advisement.

The claims are one in a wave of headwinds facing Tesla—including decreased demand for its vehicles and controversies swirling around CEO Elon Musk—which warned of “notably slower” growth during an earnings call in January. Shares are down more than 25% this year despite a runup in the broader market.

California’s *McGill* Rule

Three Californians led by James Porter sued Aug. 2 and two more, led by Samuel Van Diest, sued Aug. 11 alleging Tesla, which produces the four most popular electric vehicles sold in the US, artificially inflates how far vehicles can be driven on a single charge.

The Porter suit was amended in October to include consumers in New York, Florida, Illinois, Washington, and Massachusetts. A third case removed to California Superior Court, which only seeks injunctive relief, was refiled in the Northern District and related to the actions argued Tuesday.

Still another case is pending in California’s Alameda County Superior Court.

The judge questioned how this case is different than a California Supreme Court ruling *McGill v. Citibank, N.A.*, which held on public policy grounds that an arbitration provision barring the plaintiff from seeking public injunctive relief in any forum was unenforceable.

Tesla’s arbitration agreement provides that the arbitration may only resolve individual questions and not as a class or representative matter, said Tesla attorney David L. Schrader.

Schrader, with Morgan Lewis & Bockius LLP, said other courts have handled the issue of whether injunctive relief is a remedy by staying claims pending the result of the arbitration.

“How is a court supposed to impose injunctive relief without making the findings that one that would be necessary to understand the equities involved?” the judge said. “You would have to retry the entire case, which is contrary to the whole point of arbitrating.”

Tesla is not advocating for severing injunctive relief claims, but other courts have done so, Schrader said.

Plaintiffs’ attorney Sophia Goren Gold pointed to the US Court of Appeals for the Ninth Circuit decision in *Blair v. Rent-A-Ctr.*, which held that the *McGill* rule is a generally applicable contract defense and therefore isn’t preempted by the Federal Arbitration Act. That consumer case also sought injunctive relief.

The Tesla plaintiffs' breach of contract, California False Advertising, unfair competition, and Consumer Legal Remedies Act claims would get to stay in court under the arbitration provision Tesla drafted because that is what the *Blair* decision held, said Gold, with KalieGold PLLC.

Sometimes judges punt, Gonzalez Rogers said. Courts have separated findings of liability in summary judgment and go to trial on damages. "In patent cases we do it all the time. But injunctive relief is different than damages," she said.

Watts Guerra LLP also represents Samuel Van Diest.

The cases are Porter v. Tesla, Inc. , N.D. Cal., No. 4:23-cv-03878, hearing 2/13/24 and Van Diest v. Tesla Inc. , N.D. Cal., No. 4:23-cv-04098, hearing 2/13/24 .

(Updates with additional context about Tesla in paragraph 10 of Feb. 13 story. A previous version corrected the spelling of attorney Schrader's surname in the 15th and 17th paragraphs.)

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German labour court finds Tesla broke union election rules

 [reuters.com/business/autos-transportation/german-labour-court-finds-tesla-broke-union-election-rules-2024-02-13](https://www.reuters.com/business/autos-transportation/german-labour-court-finds-tesla-broke-union-election-rules-2024-02-13)

Reuters

[1/2]A general view of Tesla's Gigafactory Berlin-Brandenburg, the electric car manufacture, in Gruenheide, Germany July 18, 2023. REUTERS/Annegret Hilse/File Photo Purchase Licensing Rights , opens new tab

BERLIN, Feb 13 (Reuters) - Tesla's works council (TSLA.O) , opens new tab violated German union election rules, a labour court ruled on Tuesday, in the latest example of the U.S. EV maker clashing with German regulation.

Unions lauded employees two years ago for forming a works council when Tesla was just starting to build its plant near Berlin. They warned the group would be top heavy because only middle and senior management had been hired.

The works council, a group of employees that mediates with management, called a new election this month, asking for candidates to be put forward by Feb. 15, but the labour court ruled on Tuesday this was too soon because German regulation stipulates there should be a two-year gap between election campaigns.

The previous election began on Feb. 28, 2022, meaning Tesla must wait until Feb. 29 to proceed with its plans, the court said, according to media reports from rbb24 and others in the courtroom.

Tesla and its Chief Executive Elon Musk have long criticised German bureaucracy, which Musk once said was at odds with the urgency of fighting climate change.

Musk has also clashed with unions, including in the United States, where he is embroiled in numerous cases around federal labour law.

Works councils are not mandatory in Germany, but they are common particularly in industrial firms and represent a powerful force at rival carmakers including Volkswagen (VOWG_p.DE) , opens new tab, where the head of the works council sits on the supervisory board.

Tesla's workforce has grown to more than 12,000 from around 2,000 at the time of the previous election. Any full-time worker at the plant for at least six months can stand for election, provided their nomination secures 50 backers.

Tesla did not immediately respond to a request for comment on whether it will accept the decision or whether its works council will try to appeal.

Reporting by Victoria Waldersee; editing by Barbara Lewis

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QuarterNorth Warrant Holders Sue for Protection in Talos Merger

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThkLTg0YTMtZGNkMC1hN2ZmLWFIzjc5ZGMxMDAwMSIsImN0eHQiOiJTTE5XliwidXVpZCI6ImRtZkkuUzZLSElCdFlpbWhHUE84VGc9PWtBRk1pdIA0c015L2V6VldHUHh5THc9PSIsInRpbWUiOiIxNzA3OTEyNzA4ODM0Iiwic2lnIjojSGN0eFNSY1JOUWFuZ1NRbkdpUIFBc0dIVIR3PSIsInYiOiIxIn0=

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0106

About two dozen investment funds are seeking to block their warrants in QuarterNorth Energy Inc. from being forcibly converted if the oil and gas exploration company closes a proposed \$1.29 billion sale to Talos Energy Inc.

Investment funds that said they loaned money to a QuarterNorth predecessor and acquired warrants after the predecessor's emergence from bankruptcy requested a preliminary injunction Monday in the Delaware Chancery Court attempting to stop a forced exercise of their warrants and an allegedly incorrect valuation of the stock they would obtain in exchange when the merger closes.

QuarterNorth's impending merger with Talos would impair two protective measures in their stock warrant agreements, which gave the investors the right to buy stock prior to a certain date, the funds said in their complaint.

The funds had requested a temporary restraining order "to preserve the status quo" on Feb. 7, the day the lawsuit's complaint was filed under seal. A redacted version of the complaint was later filed on Monday.

The defendants include QuarterNorth and numerous Franklin Templeton, Nuveen LLC, Invesco Ltd., and Avenue Capital Group funds that were allegedly first-tier lenders to QuarterNorth's predecessor and became controlling stockholders.

QuarterNorth's board notified warrant holders in January that under a "drag-along sale" provision of the merger, all warrants would be cashed out just before the merger closed, according to the complaint. The investment funds say their warrants are entitled to a lower exercise price than the board announced.

"QuarterNorth's board declared that the exercise price for Warrants resulting from the June 2023 dividend distribution would not be adjusted based on the \$136.50 to \$140.50 actual trading price for one share of QuarterNorth common stock as of June 16, 2023—the trading

day immediately before the ex-dividend date, as required by the Warrant Agreements,” the investment funds say. “Instead, the exercise price would be adjusted based on a non-existent trading price of \$209.79.”

Talos announced it would acquire QuarterNorth on Jan. 16 for 24.8 million shares of Talos’s common stock and about \$965 million in cash. The deal is expected to close by the end of the first quarter this year. Talos shares closed at \$12.63 a share on Monday on the New York Stock Exchange.

Mexican billionaire Carlos Slim said he’s considering increasing his stake in Talos Energy, depending on conditions, Bloomberg News reported Monday.

The suit seeks declaratory judgment and injunctive relief on contract-related claims. QuarterNorth, Franklin, and Nuveen didn’t respond to requests for comment on the complaint. Invesco and Avenue declined to comment last week.

Ross Aronstam & Moritz LLP and Selendy Gay PLLC represent the warrant holders.

The case is Mudrick Cap. Mgmt. L.P. v. QuarterNorth Energy Inc., Del. Ch., No. 2024-0106, redacted complaint 2/12/24 .

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D&O coverage for DEI-related ESG claims

 [reuters.com/legal/legalindustry/do-coverage-dei-related-esg-claims-2024-02-13](https://www.reuters.com/legal/legalindustry/do-coverage-dei-related-esg-claims-2024-02-13)

Evan Knott, Adrienne Kitchen

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February 13, 2024 - ESG (Environmental, Social, and Governance) initiatives are a top concern of many corporations and their boards.

The "Social" element encompasses labor standards, wages and benefits, diversity, human rights, community relations, privacy and data protection, health and safety, supply chain, and other social justice issues. Accordingly, the "Social" element overlaps with corporate efforts to promote diversity, equity and inclusion ("DEI"). Likewise, DEI also falls within the "Governance" element of ESG — any public statements relating to DEI may face increased scrutiny and result in lawsuits.

Companies increasingly have faced legal scrutiny as they push and promote DEI efforts, and exposure to employee claims and other types of liability. Where corporate directors and officers fail to take steps to end discrimination, or participate in it themselves, they may face litigation. Regulators are increasingly interested in diverse leadership of corporations.

Directors owe their companies (and shareholders) a duty to promote the company's success. Companies and directors who fail to consider or take action on societal issues could face claims sounding in breach of fiduciary duty and for other wrongful acts, opening them to allegations of wrongdoing and the risk of derivative actions brought by the company's shareholders.

Lawsuits alleging misleading statements about DEI commitments have increasingly been on the rise. For instance, shareholders have brought actions alleging liability arising from diversity issues against the boards of public companies.

These suits typically are filed in federal court, brought under SEC Rule 14a-9 or 10(b) and 20(a), and allege that the company and its board failed to meet promises made in proxy statements to increase racial or gender diversity, or that the company and its directors and officers allowed sexual harassment or gender discrimination to persist in the workplace.

Shareholder actions relating to diversity issues specifically have alleged violation of fiduciary duties due to alleged failures to address diversity among officers and directors, or making misleading statements of company commitments to diversity. These shareholders seek not only monetary damages but also injunctive relief including diversity training, initiatives to hire diverse employees, and the like.

While most have been derivative shareholder actions, at least one was a direct shareholder action resulting in a large settlement. In *re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *3 (S.D.N.Y. July 21, 2020). There also are cases alleging reverse discrimination under Title VII, Section 1981, and state antidiscrimination laws. With the increase in lawsuits, a rise in derivative demand letters made to corporate management inevitably will follow.

Regulatory investigations regarding DEI initiatives also are on the rise. Some states have enacted or started the process of enacting statutes to tackle boardroom diversity; some have strict quotas, others rely on disclosure requirements. NASDAQ-listed companies [\[1\]](#), opens new tab must all have at least two diverse directors or explain why they do not — failure to comply could lead to delisting.

Directors and Officers coverage

Generally, Directors and Officers Liability ("D&O") insurance covers claims — including written demands for monetary or non-monetary relief that allege wrongful acts broadly defined to include errors, misstatements, misleading statements, acts, or omissions, neglect or breach of duty committed, attempted, or allegedly committed or attempted by a company's directors or officers.

Claims covered by D&O insurance often include civil lawsuits, criminal actions, investigations and written demands for relief (including shareholder derivative demands), and damages, judgments, settlements and defense costs typically constitute covered "Loss." Additionally, insurers also may offer enhancements to standard policy forms that attempt to fill potential coverage "gaps." D&O insurance generally provides three coverage types.

First, it covers directors and officers for non-indemnifiable claims made against them ("Side A" coverage). This protects the personal assets of directors and officers when there are claims of wrongful acts and the company cannot or will not indemnify them, including when the company is insolvent.

Second, it covers the company for amounts it pays or advances to directors and officers for indemnifiable claims made against them ("Side B" coverage). Side B coverage thus addresses instances where a company indemnifies its insured directors or officers for defending against allegations of wrongful acts.

Third, it covers the company for securities claims, including shareholder derivative actions, made against it as well as regulatory investigations so long as they name the company ("Side C" coverage). Side C coverage is most frequently purchased by publicly listed companies, and also provides broad "entity" coverage for privately held companies for alleged "wrongful acts" other than claims based on violations of state or federal securities regulations.

Directors and officers should ensure that their D&O coverage includes pre-claim coverages for expenses incurred before the issuance of an official target letter or subpoena. It also is important to review policies to see if the insurer will advance defense costs within a retention (subject to a right to reimbursement from the company) if the company disputes an obligation to indemnify its directors and officers implicated by a claim.

D&O policies also contain exclusions that may limit or preclude coverage for certain types of claims, and other terms and conditions affecting coverage that should be carefully reviewed. Directors and officers concerned about DEI-related exposures should make sure their D&O coverage applies to or contains enhancements protecting against claims arising from employment practices, and that claims for discrimination and harassment are not excluded.

Most D&O policies contain "conduct" exclusions precluding coverage for intentional acts or wrongdoing, which also may come into play for claims alleging violations of DEI initiatives and mandates. Insureds should carefully ensure that any such "conduct" exclusion contains language prohibiting an insurer from avoiding coverage for such "conduct" until there has been a "final adjudication" finding that an insured's wrongful actions were willful or intentional.

Insured directors and officers also should be mindful that some companies may take action against their own directors for alleged wrongdoing — and this may be excluded by the policy.

D&O coverage has another limitation: It does not address damage to a corporation's reputation. Poor DEI performance can ruin a company's reputation (and drop its share prices). Most D&O policies exclude coverage for dishonesty, fraud, and for unlawful profit, but should cover defense costs until final disposition of those issues in legal proceedings.

In procuring D&O policies and ensuring coverage for ESG and DEI issues, companies should engage in good governance and be prepared to provide underwriters of D&O policies with evidence that the boards either have assumed responsibility for ESG issues or designated that responsibility to a specific person.

Whenever a claim (or potential claim) is made against a company, or its directors or officers, the following guidelines should be followed:

- Provide timely notice to all potentially applicable insurers;
- Keep the insurers apprised of claim developments;
- Obtain the insurer's consent to incurring defense costs;
- Obtain the insurer's consent to settle;
- Promptly respond to reservation-of-rights or denial letters from the insurer;

- Review the policy for other conditions, and determine if mediation or arbitration is required by the policy (as opposed to litigation) to resolve coverage disputes; and
- Seek experienced coverage counsel to review the pertinent policy language, including any exclusions.

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Customers Claim Whirlpool Knows It's Been Selling Defective Fridges for 10 Years

 [law.com/delawarelawweekly/2024/02/13/customers-claim-whirlpool-knows-its-been-selling-defective-fridges-for-10-years](https://www.law.com/delawarelawweekly/2024/02/13/customers-claim-whirlpool-knows-its-been-selling-defective-fridges-for-10-years)

By Ellen Bardash

Whirlpool logo on a refrigerator. Photo: Diego M. Radzinski/ALM

NEWS

The class seeks to represent Whirlpool customers who, plaintiffs say, have seen ice makers, water dispensers and other features stop working because of the quality of wiring that runs through their freezer doors.

February 13, 2024 at 04:44 PM

Class Actions

Ellen Bardash

A new class action suit claims Whirlpool Corp. has knowingly been selling refrigerators with faulty wiring for at least 10 years, leading nearly everyone who purchases a fridge from one of Whirlpool's brands to need costly repairs or replacements within a few years.

Chimicles Schwartz Kriner & Donaldson-Smith filed the complaint Feb. 12 on behalf of three plaintiffs who claim they're among the many Whirlpool customers who saw their ice makers, water dispensers and other features stop working because of the quality of wiring that runs through their freezer doors.

The complaint states while those wires are intended to be flexible enough to hold up as the door is opened and closed, they instead become frayed and broken with ordinary use, often soon after a one-year warranty has expired. That defect both makes features of the refrigerator unusable and presents a safety hazard, the class action claims.

"Whirlpool has been aware of this defect for at least a decade. Hundreds, if not thousands, of consumers have complained directly to Whirlpool about the defect, including on Whirlpool's social media accounts and on public forums that Whirlpool personnel monitor. Those complaints also necessitated Whirlpool's communications with repair technicians and service representatives about the Defect, which further evidences Whirlpool's awareness of the problems."

The complaint alleges the defect is present in all French door-style refrigerators made by Whirlpool, which includes Whirlpool, Maytag, KitchenAid and Kenmore-branded refrigerators, and claims all or nearly all of those refrigerators will eventually break, most within the first few years after purchase.

The complaint proposes a class that would include anyone in the United States who purchased that style of refrigerator as well as subclasses for customers in California, Florida and North Carolina. The plaintiffs are seeking relief including Whirlpool offering customers buybacks, free repairs or replacements and compensating them for any repair costs they may have already incurred.

The proposed class size is undetermined, but with roughly a third of Whirlpool's sales earnings generated from refrigerators annually and the allegations stating the defect has been an issue for at least a decade, the lawsuit has the potential to put Whirlpool on the hook for tens of billions of dollars' worth of refrigerators, if the case results in Whirlpool being found liable.

"As Whirlpool technicians have acknowledged, the only way to restore functionality is to replace the entire freezer door, but the replacement doors suffer from the same defective wiring, meaning the defect will simply manifest again in a few years. Moreover, replacement doors are often unavailable or on a months-long backorder, and, even if they are available, the cost of a new door is typically more than \$1,200. As a result, most consumers are forced to purchase an entirely new refrigerator."

A spokesperson for Whirlpool did not immediately respond for comment.

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- Latest
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Judge's Order Deals Blow to Sysco, Burford Capital in Pork Suits

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- Sysco cannot transfer its antitrust claims to funder
- Ruling is subject to district court judge's review

A federal judge's decision to stop plaintiff Sysco Corp. from handing off its claims in ongoing price-fixing lawsuits to litigation funder Burford Capital Ltd deals a setback to the funder and puts the opaque litigation financing industry in an increasingly glaring spotlight.

Magistrate Judge John F. Docherty of the US District Court for the District of Minnesota said in a Feb. 9 order that a Burford Capital affiliate can't take over as plaintiff in two pork and beef price-fixing lawsuits it funded for food distributor Sysco Corp. Burford provided Sysco \$140 million to pursue the lawsuits, according to court documents from Sysco's initial suit against Burford, but they sparred over Sysco's attempt to settle with some defendants on terms Burford deemed too low.

The meat-producer defendants have strongly opposed the motion to substitute, saying in a court document that the assignment turns the claim into an "instrument of financial speculation for a litigation funder with no connection to the underlying claim."

"It absolutely isn't a positive for the [litigation funding] industry just as a general matter," said Maria Glover, civil procedure and civil justice professor at Georgetown Law School. "This is sort of a cascade of things going wrong."

The judge said that it went against public policy to allow the substitution of the Burford affiliate as the plaintiff. "The substitution sought here is different from any other case to which the court's attention has been directed by the parties, because this substitution would have a litigation funder, in order to prevent settlement of litigation, step into the shoes of the party to whom it was providing financing after litigation was well underway."

"The litigation burden caused by Burford's efforts to maximize return on investment has been enormous," he wrote.

Docherty's decision is subject to review by the district judge before any further appeal.

Burford said in a statement that its "role here was made necessary by a set of unique circumstances around prior violations of a financing agreement." The funder said it will seek review of the decision "as it is illogical to have Burford owning the claims but not being the party in the litigation."

Watch Video At: <https://youtu.be/z3Bd4IWO460>

Video: Making Millions Off Others' Lawsuits: How Litigation Funding Works

Sysco declined to comment. Representatives for defendants Tyson and JBS did not respond to requests for comment.

Litigation funding is a \$13.5 billion industry in which investors pay for lawsuits in exchange for a portion of the award. Though there is no data on how often plaintiffs like Sysco are seeking funding and contractual terms are not made public, antitrust claims are a very common area for financing, says Rebecca Berrebi, a litigation finance broker.

Private antitrust cases are especially expensive, notes William Kovacic, a former Federal Trade Commission chair and current law professor with George Washington University.

"It can be years before you see a penny," Kovacic said. "The class counsel has to spend a lot of money before you get into the world of a potential settlement or even a favorable verdict."

Call for More Transparency

The industry has faced little state or federal regulation, but in recent years the US Chamber of Commerce has rallied legislators in various states to introduce bills that would require disclosure of litigation finance to all parties in a case. Litigation finance detractors have used the issue between the funder and Sysco as an example of a funder having undue influence on a litigation.

"Courts exist to resolve disputes and provide justice," said Nathan Morris, senior vice president of legal reform advocacy at the chamber. "Burford exists to control litigation and maximize its own profit. The judge is right, and the decision is correct."

At a Florida senate hearing last week to discuss a pending disclosure bill, state senator Jay Collins brought up the clash between Sysco and Burford as one reason he introduced the legislation.

"What we're concerned about here is like in Sysco versus Burford, where they were essentially pressing and interfering with the outcome and how the court proceedings went," said Collins. "Those are investors putting their thumb on the scale and shifting justice. So that's a concern and that's why we're trying to clean that part of it up."

Tom Baker, a law professor at the University of Pennsylvania, says that though the judge ruled this claim couldn't be reassigned to Burford's affiliate, he didn't rule whether a litigation funder could be assigned a claim from the beginning of the litigation.

Going forward, he expects that litigation funders will now view the assignment of a claim as riskier and it could chill some transactions. He also says that this will give more fuel to industry opponents.

“From a big picture perspective, this will be something that the anti litigation funders will use to try to promote what the industry will regard as restrictive regulation,” said Baker.

“The Sideshow”

People in the industry see the cases as more of an anomaly.

The ruling is less of a step back and more an inconvenience, said Dai Wai Chin Feman, managing director at litigation funder Parabellum Capital.

“It’s just more of the sideshow,” said Chin Feman, and “a huge distraction from the underlying case.”

“This is not what the industry looks like. It’s the result of a series of unfortunate events and it is not typical,” said Berrebi.

The cases are: In re Pork Antitrust Litig., D. Minn., No. 18-cv-1776, 2/9/24 and In re Cattle and Beef Antitrust Litig., D. Minn., No. 22-md-3031, 2/9/24 .

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Judge OKs big DuPont PFAS settlement; Lawyers wait on fees decision

 legalnewsline.com/stories/654779389-judge-oks-big-dupont-pfas-settlement-lawyers-wait-on-fees-decision

February 14, 2024

Attorneys & Judges

Richard M. Gergel | lapa.princeton.edu

CHARLESTON, S.C. (Legal Newsline) - A federal judge is approving a \$1.185 billion settlement with DuPont over chemicals known as PFAS, paving the way for lawyers to take about \$935 million in fees from it and a related agreement with 3M.

South Carolina federal judge Richard Gergel on Feb. 8 gave final approval of the class action settlement with DuPont, from which lawyers are seeking 8%. Firms leading the litigation are Douglas and London of New York; Napoli Shkolnik of Puerto Rico; Baron & Budd of Dallas; Fegan Scott of Chicago; and Motley Rice of South Carolina.

Gergel did not give final approval of the fees request, which amounts to \$94.8 million.

"Though the Court will address an award of attorneys' fees at a later date, it bears noting that no party objected to Class Counsel's request for attorneys fees and that the settlement agreement itself does not provide a set amount or even a range of attorneys fees, placing the matter entirely into the Court's hands for determination," Gergel wrote.

PFAS are a group dubbed "forever chemicals" because they persist in groundwater and human tissue for years. They are found in firefighting foam and consumer products.

The federal government is attempting to set a maximum contaminant level for PFAS, even as groups call the move premature. Much of the research regarding their effect on the human body is disputed.

Class members are local water districts that will implement PFAS remediation measures. It is estimated that DuPont is responsible for only 3% to 7% of the total PFAS liabilities.

Plaintiff lawyers claim to have spent more than 430,000 hours pursuing the cases, which are consolidated in a multidistrict litigation proceeding in South Carolina federal court.

If Gergel finds the 8% fee request reasonable, it would be an indication that the same figure would be approved in the \$10.5 billion settlement with 3M. That would pay out \$840 million in fees.

"This colossal achievement was the result of a sustained and concerted effort directed against all Defendants, whose liability is undeniably intertwined and interrelated," the Dec. 18 motion for fees in the 3M case says.

ORGANIZATIONS IN THIS STORY

U.S. District Court For The District Of South Carolina

Win for AstraZeneca, Bristol-Myers Upheld in Diabetes Drug MDL

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AstraZeneca Pharmaceuticals LP, Bristol-Myers Squibb Co., and McKesson Corp. won't face revived claims in multidistrict litigation over diabetes drugs because they were properly dismissed for a lack of expert evidence linking the medication to heart failure, the Sixth Circuit said.

The drugs are Onglyza and Kombiglyze, both of which contain saxagliptin as an active ingredient. The plaintiffs alleged saxagliptin caused heart failure. The district court granted summary judgment to the defendants.

The US District Court for the Eastern District of Kentucky didn't err when it excluded the plaintiffs' causation expert, cardiologist Parag Goyal, and refused to give the plaintiffs additional time to identify a new general causation expert, the US Court of Appeals for the Sixth Circuit ruled Tuesday in an opinion by Judge John B. Nalbandian.

After a *Daubert* hearing, the district court found Goyal's reliance on a single randomized-controlled trial to prove causation, while "disregarding all other human studies, was unreliable," Nalbandian said. Goyal's use of animal data was also unreliable "because he has no expertise in interpreting animal studies," the court said.

The trial court didn't abuse its discretion when it found that granting a delay to locate a new expert would prejudice the defendants, Nalbandian said.

"[G]ranteeing plaintiffs' request would essentially restart expert discovery, requiring depositions, briefing, hearings, and motions on plaintiffs' new expert," Nalbandian said. "This would delay the MDL's resolution for years," he said, which "would likely impose significant costs on defendants in the form of substantial legal expenses."

Judges Eugene E. Siler Jr. and Stephanie Dawkins Davis joined in the opinion.

Moore Law Group PLLC represented the plaintiffs. Covington & Burling LLP and Stites & Harbison PLLC represented Bristol-Myers Squibb, AstraZeneca, and McKesson.

The case is *In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prod. Liab. Litig.*, 6th Cir., No. 22-6078, 2/13/24.

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FirstEnergy Fraud Case Targets Arraigned, Confined to Ohio (1)

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Two former FirstEnergy Corp. executives and an ex-Ohio utility regulator they allegedly worked to bribe are confined to the Buckeye State while they await trial on corruption charges, a judge said Tuesday.

Attorneys for former FirstEnergy CEO Charles Jones, former company Senior Vice President of External Affairs Michael Dowling, and former state Public Utilities Commission Chairman Samuel Randazzo entered not guilty pleas on behalf of their clients during an arraignment in a packed Akron courtroom.

The arraignment on state racketeering and other charges was the first time the men set foot in a state courtroom for the indictment secretly filed against them on Friday.

The men each previously posted 10% of their \$100,000 bonds set by Summit County Common Pleas Judge Susan Baker Ross. The judge on Tuesday ordered that the men wear GPS monitors on their ankles and remain in Ohio while the case is pending. She also barred Jones, whose main residence is in Naples, Fla., from selling his home in suburban Akron.

The judge said she may revisit the order for the defendants to wear GPS monitors as the case proceeds.

The roughly 40-minute hearing mainly focused on discussions regarding bond conditions. The defendants sat stone-faced and mostly silent behind a table that faced prosecutors.

The judge set a pretrial hearing for April 19.

27 Charges

The combined 27 charges the trio face focus on the relationship between the three men over more than a decade and, as Ohio Attorney General Dave Yost (R) said Monday in a news conference, “their joint enterprise to hijack Ohio’s regulatory structure for the benefit of FirstEnergy Corp. and for themselves.”

While Randazzo worked with a group of companies that bought electricity from FirstEnergy prior to becoming a regulator, 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 commission chairman 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 from these activities as FirstEnergy’s stock price rose, the indictment alleged.

Their charging is the latest development that resulted from a series of probes into FirstEnergy and the outsized influence it played on Ohio politics. Eight men have been charged in state and federal court—with Randazzo also facing charges in federal court—and FirstEnergy entered a deferred prosecution agreement with the federal government that included a \$230 million penalty. Former Ohio House Speaker Larry Householder (R) was convicted as a result of the probe and is serving 20 years.

Principal Assistant Attorney General Matthew Meyer took a jab at a previously-released statement from Dowling’s attorneys during Tuesday’s hearing, saying, “We do not believe this is a \$4.3 million coincidence.”

Randazzo is represented by McDonald Hopkins LLC. Jones is represented by BakerHostetler and Ohio Defense Firm Attorneys at Law. Dowling is represented by Tucker Ellis LLP and Winston & Strawn LLP.

The case is Ohio v. Randazzo, Ohio Ct. Com. Pl., No. CR-2024-02-047, arraignment held 2/13/24 .

(Updates with additional information from the hearing in the fourth and fifth paragraphs.)

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Ohio indictments provide a better picture of squalid relationships that spurred massive scandal

ohiocapitaljournal.com/2024/02/14/ohio-indictments-provide-a-better-picture-of-squalid-relationships-that-spurred-massive-scandal

By Marty Schladen

February 14, 2024



Former Public Utilities of Ohio Chair Sam Randazzo at court. (Photo by WEWS.)

An Ohio grand jury has handed up a 44-count indictment against three players in what is likely the biggest bribery scandal in state history. And when the 50-page indictment was unveiled Monday, it provided new details about a decade of payoffs and conflicts as one of them — who became the state's top regulator — allegedly did a huge electric utility's bidding.

The indictment concerns a \$1.3 billion dollar bailout that Akron-based FirstEnergy has already admitted to the federal government that it paid more than \$60 million in bribes to purchase.

Former Ohio House Speaker Larry Householder, R-Glenford, and former state GOP Chairman Matt Borges are serving federal prison sentences for their roles in the 2019 passage of the bailout and the dirty-but-succesful fight to thwart a voter-led repeal.

When federal prosecutors in 2021 charged those two and three others, they said their investigation continued. But it wasn't until December that they charged another in the case — Sam Randazzo, a lawyer and longtime energy consultant whom Gov. Mike DeWine nominated to chair the state's top regulator, the Public Utilities Commission of Ohio.

That left the people who paid the alleged bribes — FirstEnergy's top executives — uncharged in a scheme that took place more than four years ago.

Double dealing

All that changed Monday when Ohio Attorney General Dave Yost announced state charges against Randazzo and former First Energy CEO Chuck Jones and former Vice President Michael Dowling for their alleged roles in the criminal conspiracy. The three were arraigned in Akron on Tuesday and each pleaded not guilty.

They were charged in an indictment that alleged shady dealings between the them stretching back 13 years.

"It all began with a well-lawyered theft in 2010," the indictment said.

It went on to describe how Randazzo was general counsel for a group of large FirstEnergy customers — the Industrial Energy Users of Ohio — while also working as a FirstEnergy consultant. Only, the Industrial Energy Users didn't know that Randazzo was also being paid by the company they were paying him to fight, the indictment said.

It accuses Randazzo of settling the industries' claims against FirstEnergy on terms acceptable to FirstEnergy and running the settlements through Randazzo-controlled shell companies where he took a skim — again, unknown to the industrial energy users.

"His clients, the industrial members of IEU-Ohio, did not know he was a consultant for FirstEnergy," the indictment said. "Randazzo did not tell them. Years later, some of the money would make its way to IEU-Ohio. Some of it would end up in Randazzo's pocket."

The Industrial Energy Users appear to have engaged in some cynical conduct of their own, however. The indictment describes a 2015 agreement in which FirstEnergy was to pay Randazzo's company \$8.5 million for "consulting services."

It was really a cash "side deal" in which FirstEnergy paid the industrial users to drop their objections to a rate hike FirstEnergy wanted, supposedly in the name of "energy security," the indictment said. In other words, prosecutors said that with Randazzo's facilitation, FirstEnergy paid off a wealthy, powerful group of electricity users in order to raise rates on everybody else.

Such arrangements proved quite profitable for Randazzo.

“Between 2016 and 2019, FirstEnergy paid... \$13,152,639.94 to Randazzo’s two shell companies,” the indictment said. “Of that total, Randazzo gave \$7,756,903.84 to his IEU-Ohio Client and kept \$5,395,736.10 for himself.”

Cozy relationships

This is the guy the incoming DeWine-Husted administration thought would be a good candidate to regulate utilities — companies to which Ohioans have little choice in paying their billions.

The state indictment describes how, on Dec. 18, 2018, FirstEnergy execs Jones and Dowling met with Gov.-elect DeWine and Lt. Gov.-elect Jon Husted at the Columbus Athletic Club and discussed whether the executives wanted Randazzo to regulate their massive electric utility.

The notion that a governor would ask a huge utility who might be acceptable as a regulator might itself seem startling. But after the dinner, according to the indictment, Jones and Dowling did something even more brazen.

They went to Randazzo’s German Village condo and pursuant to that, Randazzo solicited a \$4.3 million payment from Jones and Dowling, the indictment said. FirstEnergy paid the money “without ever having received an invoice for the payment and without any work or consulting services being performed,” the indictment said. It added that the executives made the payment over the objections of a company lawyer.

Randazzo told Laurel Dawson, DeWine’s chief of staff, about the payment, calling it a “consulting agreement.” But he didn’t tell her of the other millions he’d gotten from the utility he was seeking to regulate, the indictment said. Randazzo also never told the Ohio Ethics Commission about any of the money he’d gotten from FirstEnergy, the indictment said.

In Dawson, Randazzo might have had a sympathetic audience. Her husband, Michael Dawson, was a “paid FirstEnergy lobbyist” in 2016, when he’d gotten a \$10,000 loan from Randazzo, the indictment said.

But if his chief of staff told DeWine about the huge payoff Randazzo got from FirstEnergy, it must not have fazed the new governor. DeWine nominated Randazzo to be chairman of the Public Utilities Commission — the ratepayers’ supposed protector — on Feb. 4, 2019.

Versatile player

During Householder’s six-week trial in Cincinnati last year, federal prosecutors put on exhaustive evidence of how the FirstEnergy executives financed Householder’s bid to become speaker and to pass the notorious bailout known as House Bill 6.

“Together, Jones, Dowling, Randazzo and his shell companies worked in concert to steal the power of government and bend it to the will of FirstEnergy,” was the way the state indictment unveiled on Monday put it.

Most of the details of Randazzo’s involvement in the creation and passage of HB 6 are already known from the federal trial. They show him acting in multiple, conflicting, often-undisclosed capacities — similar to those the state indictment alleges he had already played with FirstEnergy and the industrial energy users.

Even though he was supposed to be a regulator, Randazzo drafted portions of the bailout legislation and passed them between FirstEnergy officials and a Householder employee who had recently worked for the PUCO. They sometimes only shared printed copies of the huge bill, out of an apparent apprehension about leaving electronic fingerprints.

According to text messages between Jones and Dowling, Randazzo went so far as to actively lobby for passage of the bailout — which would seem a big departure from the traditional duties of a disinterested regulator.

Jones and Dowling discussed a meeting about HB 6 that Randazzo had with Sen. Steve Wilson, R-Maineville, and the Senate’s counsel. “We have a good plan to help,” Dowling told his boss.

Other officials

Despite the fact that DeWine had reason to know Randazzo was connected to FirstEnergy, the governor made him the state’s top utility regulator and he signed the billion-dollar bailout that benefitted the company the day it passed. And on July 21, 2021 — the day Householder was arrested — DeWine said he wasn’t in favor of repealing the measure.

The governor subsequently walked that back, but HB 6 is still on the books and Ohio utilities are still getting hundreds of millions in ratepayer subsidies as a result.

DeWine wasn’t the only state official to act at least peripherally in the scandal.

Secretary of State Frank LaRose has refused to explain the “private” updates that FirstEnergy CEO Jones said the state’s chief elections official was providing during an attempt to gather signatures to put an HB 6 repeal on the ballot.

And Yost himself dealt a mortal blow to the signature gathering when he initially rejected the ballot language — cutting nearly in half the time HB 6 opponents had to gather a quarter-million valid signatures. And in text messages presented in the federal trial, Borges told a co-conspirator that Yost thought HB 6 was a bad law, but wouldn’t speak up because of help he’d gotten from FirstEnergy in the past.

Beyond the bailout

Randazzo's alleged help to FirstEnergy wasn't limited to HB 6. He also thwarted a PUCO look into the company's books that was likely to force a cut in electricity bills. That would have caused falling stock prices and a hit to Jones' and Dowling's portfolios, the indictment said.

The erstwhile regulator was apparently so helpful that Jones at one point told a FirstEnergy subordinate to back off for fear of being too obvious. In a text message included in the indictment, Jones told Dennis Chack that Randazzo's pro-FirstEnergy conduct "has a lot of talk going on in the halls of PUCO about does he work there or for us?"

Even so, Randazzo's behavior at the PUCO continued to be shameless, urging fellow regulators to join him in lobbying for the corrupt bailout, the indictment said.

Randazzo "began internally lobbying PUCO staff members between July 2020 and September 2020 to generate strategies to save HB 6, despite facing internal objections about the inappropriateness of the effort to save HB 6," it said.

The indictment included a Sept. 15, 2020 email in which Randazzo told subordinates, "One option (and I really think we need to get other commissioners and staff into a proactive mode): We could, on our own initiative, issue a show-cause order to (FirstEnergy) directing (FirstEnergy) to show that no costs associated with HB 6 have been included in any riders or base rates."

Had such an order been issued, the result would have been misleading. While the bill didn't raise consumer costs through riders or base rates, it included a provision that ensured FirstEnergy would collect at least as much as it did in one of its best years and it created a massive subsidy for money-losing coal plants.

Randazzo's efforts seemed finally to end two months later, when the FBI searched his condo.

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FirstEnergy customers furious as former CEO, VP plead not guilty in bribery scandal

ohiocapitaljournal.com/2024/02/14/firstenergy-customers-furious-as-former-ceo-vp-plead-not-guilty-in-bribery-scandal

By Morgan Trau

February 14, 2024



Former FirstEnergy CEO Chuck Jones (top left), former FirstEnergy VP Michael Dowling (top right), former PUCO Chair Sam Randazzo (bottom middle). Graphic by WEWS.

FirstEnergy customers remain furious at the former utility company executives who raised their bills to allegedly fund the largest bribery scheme in Ohio history — especially as the men pleaded not guilty on Tuesday.

Former FirstEnergy CEO Chuck Jones, former FirstEnergy Senior Vice President Michael Dowling and former chairman of the Public Utilities Commission of Ohio Sam Randazzo all pleaded not guilty during their arraignment in Akron. They are accused of masterminding the largest corruption scheme in Ohio history — and faced a Summit County judge for the first time.

They have been charged with a “combined 27 counts of felony violations, including engaging in a corrupt activity, all related to their joint enterprise to hijack Ohio’s regulatory structure for the benefit of First Energy Corporation and for themselves,” Attorney General Dave Yost stated in the indictment.

FirstEnergy as a company has already admitted to bribing public officials in Ohio, including a \$4.3 million bribe to Randazzo. Jones and Dowling allegedly paid this to him.

The two former executives face a dozen charges each, including engaging in a pattern of corrupt activity, bribery and fraud.

Randazzo has already been charged with federal racketeering, which he pleaded not guilty to in December. The state added 22 felony counts, including engaging in a pattern of corrupt activity, bribery and money laundering.

Summit County Court of Common Pleas Judge Susan Baker Ross is presiding over the case; she spent an hour with the defendants in the afternoon going over bond. As expected, each attorney fought for the least amount of restrictions for their client.

"The man is 74, 75," Randazzo's attorney Richard Blake said. "He's not going anywhere."

Matthew Meyer, principal assistant attorney with the attorney general's office, disagreed.

"Our concern is risk of flight," Meyer said. "Mr. Randazzo... faces charges that if convicted and sentenced, could send him to prison for decades, the rest of his natural life."

The federal charges Randazzo is facing, alone, could be 20 years if convicted. That doesn't even include the state charges.

His lawyer argues that if he is forced to wear the monitor, it would be "just downright unnecessary punishment," and also "mean."

Baker Ross ordered Randazzo to have a GPS ankle bracelet and said he can travel throughout the state. He was given a \$100,000 bond.

Dowling's bond was also set at \$100,000. He will be required to wear a GPS ankle monitor and cannot leave the state.

The hearing was relatively straightforward until Jones' attorney asked that the former CEO be able to return to his home in Naples, Florida before the trial. The government had a major problem with this.

"That's a relatively short boat ride to a country with no extradition jurisdiction to the United States," said Matthew Meyer, principal assistant attorney with the attorney general's office. "The prospect of decades in an Ohio state penitentiary makes the risk go up."

Although Jones' attorney, Carole S. Rendon, adamantly denied he was a flight risk, the judge agreed with the state. Jones is not allowed to return to Florida and has to stay in Ohio. A property asset freeze, as well as a \$100,000 bond, was issued for Jones. He also has a GPS tracker.

They are expected back in court in April. The three men continue to claim innocence. Meyer, once again, disagreed — citing the enormous surplus of evidence the indictment had in it, in addition to their own private information and evidence that came out from the FBI in the recent federal trial involving former Ohio House Speaker Larry Householder.

“We do not believe this is a \$4.3 million coincidence,” Meyer said.

Customers react

FirstEnergy customer John Makley says it’s about time.

“Give me my money back!” he said.

News 5 has been talking to Makley since the summer, when he was part of the class action lawsuit against FirstEnergy. Although the consumers won, he only got \$7 back.

He’s mad because he continues to pay. Since the Householder trial, dozens and dozens of News 5 viewers have reached out to share the same feelings as Makley.

“How do you feel that the people who raised your bills are now getting in trouble for it?” Statehouse reporter Morgan Trau asked.

“Well, I feel there’s at least some justice happening to them, so that we feel better about that,” Makley responded. “But it doesn’t help our pocketbooks in the long run.”

H.B. 6 isn’t completely off the books.

The corrupt legislation mainly benefited FirstEnergy’s struggling nuclear power plants, but those provisions were later repealed. There are aspects of the bill still in place.

The Ohio Valley Electric Corporation (OVEC) got a handout from the scheme. It expanded a bailout of the OVEC plants and required Ohioans to pay for two 1950s-era coal plants—one in the Southern area of the state and the other in Indiana. The main beneficiaries of this are American Electric Power Company (AEP), Duke Energy and AES Ohio.

Despite this scandal becoming public years ago, ethics laws in the state have not changed to prevent schemes like this from happening.

There are numerous bipartisan efforts to repeal H.B. 6 totally and to put forward ethics laws. None are going anywhere, it seems.

Makley’s bill has also continued to increase. There is only one way the industry could rebuild his trust, he said.

“Try to be transparent is one thing that would at least provide a little more confidence that you’re doing the right thing for the consumer,” he added.

He hopes the three men take responsibility eventually, he said. Just in the past day, Trau has received over 20 messages from viewers and readers wishing for the same thing.

“It just boils my blood,” Makley added. “Just being open and honest.”

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<https://www.wsj.com/business/earnings/lyft-earnings-typo-sends-stock-soaring-9b4ad02b>

BUSINESS | EARNINGS

Lyft Shares Surge as Strong Earnings Report Offsets Typo Confusion

Company's earnings release accidentally added an extra zero to a key number; shares hit 52-week high

By [Preetika Rana](#) [Follow](#)

Updated Feb. 14, 2024 12:50 pm ET



Lyft forecast better-than-expected bookings for the current quarter. PHOTO: LOREN ELLIOTT/BLOOMBERG NEWS

Lyft **LYFT 31.70% ▲** shares hit a 52-week high Wednesday following the company's strong fourth-quarter results and despite confusion caused by a mistake in its earnings release.

Lyft's release Tuesday said one of its profit margins was expected to expand by 500 basis points—or 5 percentage points—in 2024. That margin was only expected to expand by 50 basis points, the company's chief financial officer later clarified on a call with analysts.

The figure in question is a wonky but closely watched metric. The ride-sharing company was forecasting its adjusted earnings margin as a percentage of its

bookings. A higher margin signals that Lyft is earning a bigger cut from its bookings.

The company's stock soared over 60% when the release came out after the close of regular trading Tuesday. Many stock trades are done by computers, reacting in fractions of seconds to new information. The inflated margin likely triggered a buying frenzy before most people could digest the numbers.

"It was a bad error, and that's on me," Lyft Chief Executive David Risher said in an CNBC interview Wednesday. He said the company has a process to handle such releases that includes "thousands of eyes" and the extra zero was missed.

"Super frustrating for everyone and the team," Risher said. He added that he didn't want the mistake to take away from the company's delivering the best financial quarter in its history.

On Wednesday, Lyft shares rose as much as 38% to \$16.77 in morning trading as Wall Street was encouraged by the strong results.

The company forecast better-than-expected bookings for the current quarter and said it expects to be cash flow positive in 2024. Simply put, that means Lyft will generate more cash than it spends during the year. Companies often point to this metric to signal a path to future profits.

Lyft shares have been volatile in recent quarters. Four of the past five quarterly reports have sent its stock tumbling by double-digit percent declines, according to FactSet.

Lyft shares might have also been primed for a jump in trading on the back of unexpected good news. The stock has been more targeted by short sellers than its gig-economy counterparts, with short interest accounting for nearly 12% of Lyft's shares outstanding compared with less than 3% for rival Uber, according to data from FactSet.

Positive earnings reports typically drive short sellers to buy shares to cover their bets.

Earnings typos are rare but happen occasionally. Market watchers said they couldn't remember the last time a typo triggered such a big stock reaction.

A Lyft spokeswoman described the mistake as “a clerical error” and said the company worked to clarify it as soon as possible.

Some people reacted on X with surprise, jokes and memes. One user posted that the company “saved themselves \$7M by not paying for a Super Bowl commercial and got free marketing at tonight’s earnings call. Smart.”

“Your margin Lyft has unexpectedly cancelled, we apologize for the inconvenience,” another posted, referring to a notification riders see when drivers cancel a ride.

Lyft isn’t profitable, but it has been trimming its losses. Rival Uber reported its first full year of profit as a public company in 2023. Investors were encouraged by Lyft’s latest outlook because Uber also swung to profitability after becoming cash flow positive.

In a research note Wednesday, J.P. Morgan said it was encouraged by the moves that Lyft has made to drive stronger demand and profits, but that steady execution “will be required for Lyft to truly differentiate itself from a brand perspective and take share.”

Lyft has struggled to keep up with its larger competitor, and its stock has lost about 85% of its value since listing in 2019.

The company’s co-founders stepped down from day-to-day management last year, following eroding market share, a sliding stock price and low employee morale.

Under its new chief executive, David Risher, the company has cut hundreds of jobs, introduced new features for riders and drivers, and mandated that employees return to the office.

Risher is also looking to unload businesses that aren’t generating big returns, including Lyft’s bikes division.

“As we move in 2024, we have a foot on the pedal,” Risher said on the analyst call Tuesday.

—Dan Gallagher contributed to this article.

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Securities Law

Feb. 14, 2024, 9:37AM PST

Matt Levine's Money Stuff: Lyft Had an Earnings Typo

By Matt Levine

Bloomberg Law News 2024-02-14T13:11:21285227527-05:00

Matt Levine's Money Stuff: Lyft Had an Earnings Typo

By Matt Levine 2024-02-14T12:37:53358-05:00

Lyft typo

Ahahaha [oops](#) :

Lyft Inc. issued a massive correction to its outlook for earnings margin in 2024, saying its margin is expected to expand by 50 basis points – not the 500 basis points written into an earnings presentation released earlier on Tuesday.

“This is actually a correction from the press release,” Erin Brewer, Lyft’s chief financial officer, said in a call with analysts. “In my prepared remarks, I referenced 50 basis points of margin expansion.” A spokesperson for the company attributed the correction to a clerical error.

The blowout forecast may have contributed to a surge in Lyft’s shares in after-market trading on Tuesday. The stock jumped as much as 67% on the company’s outlooks before erasing gains during the call with investors. It was up 20% at 5:52 p.m. in New York.

Here’s the earnings release, predicting “Adjusted EBITDA margin expansion (calculated as a percentage of Gross Bookings) of approximately 500 basis points year-over-year” in 2024. That 500 was supposed to be 50. Ah well.

That earnings release went out at about 4:06 p.m. New York time yesterday; the earnings call was at 4:30; a corrected press release came out at about 5:51 p.m. It is customary to do these things after market hours for – well, not exactly for this reason, but kind of for this reason? You put out the press release just after the market’s regular trading session closes at 4 p.m., and investors have 17.5 hours to think about it before the market opens again at 9:30 a.m. the next day. They can ponder the earnings release at their leisure, update their models, ask questions on the earnings call, and generally take their time to digest the new information and formulate a price view before the market opens and they have to trade on it. If there’s anything ambiguous or surprising in the earnings release – or a typo! – the company and the investors have time to clarify it, and they can trade the next day with well informed views.

Except that they can also trade after hours, and they sure did here. Nasdaq reported that Lyft was the most active stock in after-hours trading yesterday. Bloomberg tells me that 45 million shares (\$713 million worth) traded after the earnings release, roughly three times as many shares as Lyft usually trades in a day. The stock closed yesterday at \$12.13, finished the after-hours session at about \$14.05 and opened today at \$14.98. (It was trading higher at noon.) After the press release, but before the correction on the call, it got as high as \$20.25. Some 21 million shares traded at prices above \$15; 1 million traded at prices above \$20. If you bought a million shares at \$20 when it was worth \$15, because of a typo, you might be, you know, \$5 million worth of aggrieved. If you bought 21 million shares at incorrect prices because of a typo, you'd be tens of millions of dollars of aggrieved.

Would you sue? Mehhhh. "Everything is securities fraud," I like to say around here, but I am exaggerating. By "everything is securities fraud," I mean that various nontraditional things – [sexual harassment](#) , [mistreatment of animals](#) , [pollution](#) , [bad passwords](#) – are sometimes treated as securities fraud. And [that's weird](#) : The core of "securities fraud" is, surely, tricking people into buying your stock by lying about your financial results or prospects; it is a troubling and creative expansion of the law to treat [defective aircraft doors](#) as a fraud on *shareholders*.

Meanwhile, traditional securities fraud has been around for a long time, long enough that lawmakers decided it didn't make sense for companies to get sued for every minor mistake they make about their financial results or prospects, and so there are limits on what counts as traditional securities fraud. US securities law explicitly allows companies to be wrong about their earnings forecasts: There is a "safe harbor" for "forward-looking statements," so if you predict that your Ebitda margin will expand by 500 basis points in 2024, but it actually expands by only 50 basis points, your shareholders can't sue you.

There is an exception if you had "actual knowledge" that the statement is false. Did Lyft? On the one hand, presumably the executives who approved this earnings release knew that they don't expect margins to expand by 500 basis points. On the other hand, presumably they didn't notice the typo. I think they're fine.

Also, though, they did the right thing here! They put the press release out after the market closed, and they corrected it quickly and publicly before the market opened again. That's kind of best practices for a public company, and also the best they can do. [Bloomberg News reports](#) :

"Lyft clearly did one thing right – it corrected the error quickly and decisively," said Brad Foster, a partner specializing in securities litigation at corporate law firm Haynes Boone. "The reality is that people make mistakes, and mistakes are not securities fraud."

Well, sometimes they are, but not like this. Lyft can't stop its shareholders from trading after hours, but in some rough sense that's not its responsibility. If you want to trade in the after-hours market the second the press release hits the tape, the risk of typos is on you.

ESG as a low-interest-rates phenomenon

I [wrote last month](#) that ESG – environmental, social and governance investing – might have been a low-interest-rates phenomenon. When interest rates are zero, discount rates are low, and in some sense what happens in 2050 is as important as what happens tomorrow. If a company's 2050 profits are as important as its 2024 profits, then it should spend a lot of time imagining the world in 2050, trying to make that world better and positioning itself to be profitable in 2050. Reducing greenhouse gas emissions now costs money now, but it might make you more profitable in 2050, and it's perfectly sensible to trade \$1 of profits now for \$2 of profits in 2050.

And then interest rates went up and now companies just want profits next quarter and care less about what happens in 2050, and so ESG has become a lot less popular not only among politicians but also among companies and shareholders. Here is a Wall Street Journal article titled "America's ESG Hiring Boom Is Starting to Cool":

Companies are reconsidering the priority given to ESG programs and their pursuit of top ESG scores in response to pressure from investors seeking faster returns on investments, [executive search firm employee Joe] Dubbin said. "In delivering meaningful environmental and carbon-reduction programs, the financial returns are a long way away," he said, adding energy transitions are necessary. "It's not gone away. It's just having a repricing and that's driving hiring trends."

Some CFOs are devoting more resources to the areas of the business generating those higher short-term returns, resulting in a smaller ESG team or people incorporating ESG into their roles in lieu of positions wholly devoted to it.

If ESG is “having a repricing,” is that good or bad? Well, if your view of ESG investing was that it was essentially *altruistic*, then you will be annoyed that investors pretended to care about the Earth a few years ago and now care only about the bottom line.

But to be fair, the investors never really said that. The *explicit pitch* for ESG investing has always been that ESG-focused investors want to *maximize long-term returns*, and they consider ESG factors as part of their value-maximizing investing process. “Climate change will cause the world to phase out fossil fuels, so we want to limit our fossil-fuel investments and buy companies that are ready for that transition,” is the typical argument. Lots of people never *believed* that, and there are tedious fights in which US [Republican politicians claim](#) that woke ESG investors are imposing their values on companies, while the [investors say](#) “no we are just acting as responsible fiduciaries.” But the investors have always *said* that they considered ESG factors as a way to maximize returns.

And *if that were true*, then what you would expect is that the investors would have some field in their model for like “will this company do well in the green energy transition,” and the model would ascribe some value to that field, and *that value would depend on the discount rate*. And as rates go up, the value goes down, and ESG investors who truly use ESG to maximize value would care less about climate change and more about short-term value. And that’s what happened. The proof that ESG is driven by investment reasons rather than wokeness is that it is repricing due to interest rates.

That’s bad news for the ESG hiring boom, though [here’s some good news](#) from Bloomberg: “There’s a renewed urgency among investors to work out the implications [of Scope 3 emissions] for the companies they invest in – as well as their own climate commitments.” “Scope 3 emissions are those produced by a company’s customers and supply chain,” and “integrating Scope 3 data with portfolio analysis and investment decisions is ‘often hobbled’ by the complexity of Scope 3 accounting.” That is bad news if you are an investor looking to use Scope 3 data in your investment decisions, but I guess it’s good news if you are an ESG professional looking for a job. In financial services, complexity is good for business.

2 and 20

My [crude model](#) of the hedge fund industry goes something like this:

- 1. The classic old-school hedge fund is run by a charismatic manager who seems to have skill at picking investments. Investors give her money, she picks investments, hopefully they go up and she charges fees of 2% of assets and 20% of profits. She seems to provide “alpha,” in the sense that her investments usually outperform her benchmark, but nobody is all that rigorous about examining what risks she is taking to achieve those returns or whether her investors are being properly compensated for them.
- 2. The modern hedge fund is a multimanager multistrategy fund that ruthlessly extracts and scientifically measures alpha, that hires many specialized portfolio managers and forces them to be factor-neutral, so that they make returns not from broad market or sector moves but from picking exactly the right investments to go long and exactly the right ones to short. It allocates capital to them based on their skill, it cuts them off if they lose money, it levers all of this up, and it provides a stream of steady uncorrelated returns that sophisticated institutional investors love. The sophisticated institutional investors give the hedge fund lots of money, so it can hire more portfolio managers, and they pay it fees of, like, 7% of assets and 20% of profits.
- 3. These days, the old-school model is in decline and the multistrategy model is ascendant.

One indicator of that third point would be if old-school hedge funds had to charge lower fees to compete for investor money, while the multimanager funds could keep raising their fees while still attracting money. Another indicator would be if money kept flowing to multimanager funds rather than old-school funds, even as the old-school funds kept cutting fees and the multimangers kept raising them. And the Financial Times reports:

Investor eagerness to allocate more money to the hedge fund industry’s costly mega-managers has driven up average fees for the first time in a decade.

Management and performance fees fell every year between 2014 and 2023, according to a survey by BNP Paribas of 238 hedge fund investors, except for 2020 and 2021 when the French bank did not record the data, as investors pulled money from the industry following often-lacklustre returns.

However, annual performance fees increased to 17.82 per cent this year from 16.91 in 2023, the survey showed, the highest level since 2016. Management fees increased to 1.54 per cent from 1.46 per cent last year.

Hedge funds have historically been known for a "two and 20" fee model, where investors pay 2 per cent in management fees every year and 20 per cent on any performance gains. In reality, investors rarely pay fees that high, especially for small to medium-sized hedge funds.

The 2024 increase in fees reflects how global investors are allocating billions of dollars to multi-manager hedge funds that emulate Ken Griffin's Citadel and Izzy Englander's Millennium and which have come to dominate the industry.

Roughly, average fees go down because the old hedge fund model is less attractive to investors; average fees go up because the new model is more attractive.

Prop bets

Yesterday I wrote about dumb sports and sports-adjacent proposition bets, and their susceptibility to manipulation, and people emailed me lots of examples that I found amusing and now want to share with you:

- 1. The players who win the Super Bowl traditionally dump Gatorade on their coach. This is televised, and there is an annual betting market on the color of the Gatorade. "Suspicious betting leads to questions about Super Bowl Gatorade color odds," is the terrific headline of this New York Post story from yesterday: A lot of people bet on purple in the day or two before the game, and then it was purple, raising questions about insider betting or manipulation. "Whether it was insider trading given by a select few on the sidelines is unknown, but the days of this popular market could be numbered." I wonder if the 49ers had different-colored Gatorade ready to go, and if you had to pick the winner of the game to get this market right?
- 2. Maybe the most famous case of prop bet market manipulation came when Sutton United played Arsenal on television in the FA Cup in 2017, and a UK sportsbook offered "odds of 8-1 that [Sutton United] substitute goalkeeper Wayne Shaw would finish an entire pie while the game was going on." He did do that thing, and was fined £375 and suspended for two months. "Piegate," it was called.
- 3. We talked about a guy on TikTok who pretended that he was the streaker at this year's Super Bowl, though he was pretty clearly joking. Apparently this is an old gag; here's a guy who streaked at the Super Bowl in 2021 and then claimed that he had bet \$50,000 that there would be a streaker. No one believed him: "No book in their right mind would take \$50K limits on that. Nowhere close," said a sportsbook. If you want to bet \$100 that there will be a streaker at the Super Bowl, a sportsbook will take your action. If you want to bet \$50,000 that there will be a streaker at the Super Bowl, that sportsbook knows full well that you are planning to streak at the Super Bowl, and it won't take your money.
- 4. In non-sports, I wrote, "One worry that people have about prediction markets is that they will call forth events ... If you can bet on terrorist attacks, terrorism might become profitable, which is a bad outcome." A reader reminded me that the US Defense Advanced Research Projects Agency did try a prediction market in the early 2000s, but it "was shut down in August 2003 after multiple US senators condemned it as an assassination and terrorism market."

Also in non-sports, Jeffrey Gordon of Columbia Law School emailed me about *actual* insider trading, like the kind where executives trade their companies' stocks using inside information:

The downside [of legalized insider trading] is not widening of the bid-ask spread because of greater presence of informed trading but the temptation to insiders – managers – to run the firm in a way that will produce more “information” on which they can trade – e.g., by choosing a more volatile operating style or capital structure. So insider trading will reduce allocational efficiency because it distorts managerial incentives to run the firm in a value-maximizing way. It's the streaker point you later make brought to the corporate setting.

Right, if you are the chief executive officer of a company and insider trading is legal, you will ... well, you'll buy a ton of stock, you'll put out a press release saying “our margins will expand by 500 basis points next year,” the stock will soar, you'll dump the stock, you'll put out another press release saying “whoops typo.” You'll make the stock as volatile as possible, because you can make more money predicting/causing stock moves, and trading ahead of them, than you can from running the company well.

Mob insider trading

My general opinion about insider trading is that you shouldn't do it, but I know my audience. Not to flatter you too much, but you probably have better ways of making money than insider trading, ways that do not have a high probability of landing you in prison. If you have an otherwise successful, lucrative, legitimate career, why ruin it by engaging in insider trading, a crime where enforcement seems to be pretty effective?

I do, however, have an extremely-not-legal-advice exception to this opinion, which is that if you are coming to insider trading not from the *financial services* industry but from the *crime* industry, then sure, fine, why not. Like if you are in the business of showing up at trucking companies with a crowbar and threatening them into giving you 10% of their revenue, maybe you *should* switch to the business of showing up at [Phebe's](#) with a crowbar and threatening junior investment bankers into giving you the names of merger targets. Insider trading is riskier and less lucrative than many forms of legal financial engineering, but safer and more lucrative than many forms of crime.

Anyway [here's this](#) :

UK finance investigators arrested three London-based individuals on suspicion of insider dealing and money laundering, ramping up investigations into possible links to organized crime.

The Financial Conduct Authority said Wednesday it conducted a “major operation” alongside police over two days in February and interviewed four suspects, one of whom wasn't arrested. The regulator said digital devices were seized from London residences.

The announcement came at the same time as the FCA warned in a separate notice that trading by organized crime forms a “significant component” of the suspicious trading activity it sees in equity markets. ...

In the notice, the FCA warned that mergers and acquisitions advisory firms should be alert to dealmakers being approached by members of gangs. The watchdog warned that it was “likely” that junior members of staff were being targeted and that firms should limit their social media references around deals.

I assume the gang approach is less like “give me the name of a merger target or I'll break your kneecaps” and more like befriending the junior bankers to earn their trust and make them more complicit in the insider trading. But I really don't know. It does seem like, if you are going to do organized crime, finding an illicit edge in equity trading has to be one of the safer and nicer and more lucrative ways to do it.

Things happen

The Brutal Reality of [Plunging Office Values](#) Is Here. How Wall Street Won a Battle Over Venezuelan Sanctions. SoftBank's [Vision Fund](#) Swaps Splashy Bets For ‘Timid’ Investing. U.S. Proposes Requiring Investment Advisers to Put in Place Anti-Money-Laundering Controls. A Tiny Hedge Fund Is Becoming a Thorn in the Side of Energy Giant BP. [Bezos](#) Sells \$4 Billion of Amazon Stock in Four Trading Days. StanChart [Weighs Break Up](#) of Corporate, Investment Bank. UniCredit Is Set to [Boost Bonus Pool](#) by 16% After Record Year. The Small University Endowment That Is Beating the Ivy League. Cyber Startup Armis Buys Firm That Sets [‘Honeypots’ for Hackers](#) . Mark Gorton and RFK Jr. I'm eating raw chicken every day for 100 days – or until I'm hospitalized.

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- 1. I'm using the "accepted" time stamps on the US Securities and Exchange Commission's Edgar website for the press release times here.
- 2. Nasdaq reports 48.1 million shares traded after hours, but I'm using Bloomberg's LYFT US Equity VAP function and setting the time limits from 16:06 (roughly when the press release hit) to 20:00 (the end of the after-hours session) to get 45.2 million shares traded at a volume-weighted average price of \$15.8428. The HP function tells me that the average volume of Lyft over the last six months was 16.2 million shares (\$176 million).
- 3. Crudely, 21.3 million shares changed hands above \$15, at a volume-weighted average price of \$17.90. So figure those trades lost an average of \$2.90 each (the difference between the trade price and the \$15 "correct" price), times 21 million is about \$60 million of losses. The stock traded above \$16 this morning, though, so that's a very crude "correct" price.
- 4. ESG stands for "environmental, social and governance," but everyone *kind of* uses it to mean "climate-focused investing," sorry. This form of argument about discount rates maybe also applies to social and governance factors, but less so.
- 5. I mean, maybe. Arguably ESG is also repricing because of the political backlash against it.

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Feb. 14, 2024, 7:32 AM PST

A 'Clerical Error' in Lyft Outlook Triggered 67% Jump (3)

By Antonia Mufarech

- Uber rival said it had highest annual ridership ever in 2023
- Bookings in fourth quarter rose 17%, beating analyst estimates

Bloomberg Law News 2024-02-14T13:01:56503528916-05:00

A 'Clerical Error' in Lyft Outlook Triggered 67% Jump (3)

By Antonia Mufarech2024-02-14T10:32:00718-05:00

Uber rival said it had highest annual ridership ever in 2023

Bookings in fourth quarter rose 17%, beating analyst estimates

It was, without a doubt, a strong earnings report.

Lyft Inc. projected adjusted earnings as much as 11% higher than analysts' estimates , and reported bookings ahead of expectations. And then there was the outlook for profitability: Margins, the ride-hailing provider said in an initial press release Tuesday, were set to expand this year by an eye-watering 500 basis points. Shares surged, jumping 67% in after-hours trading .

But the projection was off. Way off.

Less than an hour after issuing the statement, Lyft Chief Financial Officer **Erin Brewer** joined a call with analysts and said the company is actually expecting adjusted earnings margins, calculated as a percentage of bookings, to expand by 50 basis points – not 500 – acknowledging, when asked by an analyst, that the press release was incorrect. A company spokesperson later attributed the mistake to a "clerical error," and the company eventually [corrected](#) its statement and regulatory filings.

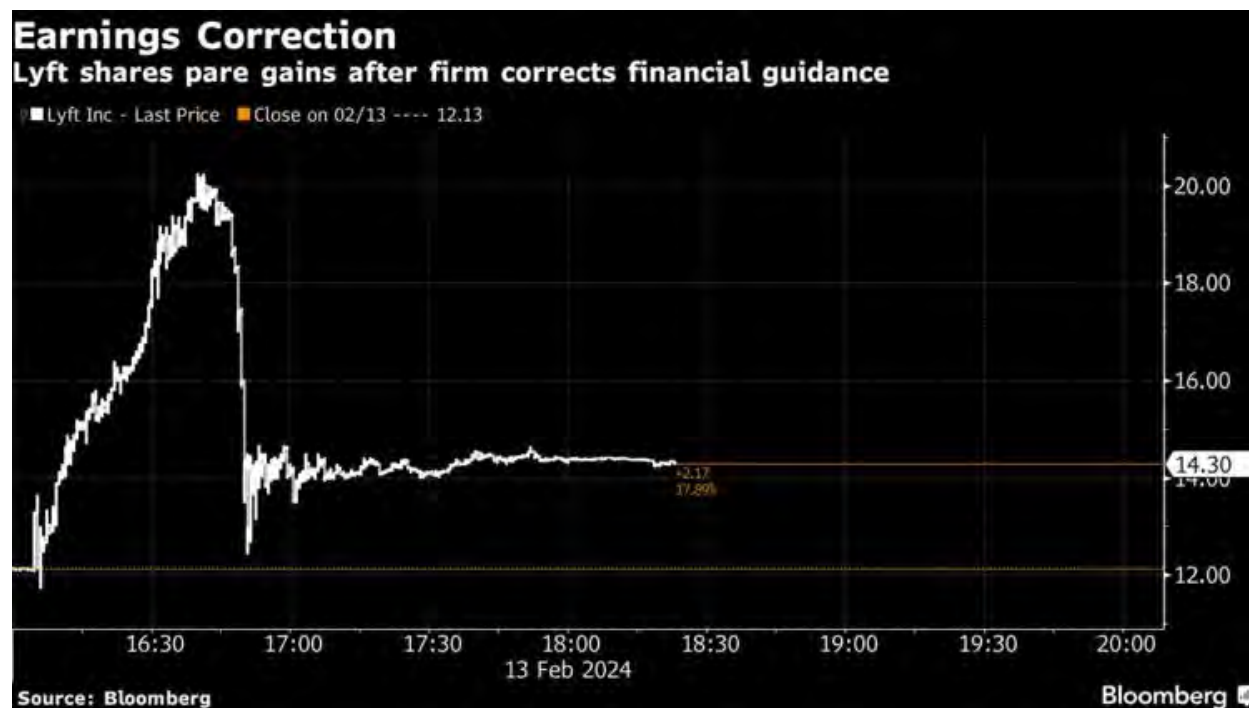


WATCH: Lyft CEO David Risher addresses the "clerical error" in the company's fourth-quarter earnings.

Source: Bloomberg

Shares almost immediately gave up some of those gains. But the stock was still up as much as 38% on Wednesday in New York, the biggest intraday gain ever and hitting its highest point in a year.

It's a "black-eye moment" for Lyft, said **Dan Ives**, an analyst at Wedbush Securities, "a debacle of epic proportions." He said by email that he'd "never seen an error like this in my almost 25 years on the Street."



The mistake overshadowed what was otherwise a solid beat on profit and bookings projections that signaled a years-long effort to boost ridership and challenge Uber Technologies Inc. may be paying off.

In fact, both Lyft and Uber delivered strong earnings reports this quarter, suggesting continued growth in overall rider demand since a nationwide plunge during the pandemic. The two have spent fiercely to recruit and retain enough drivers to meet the rise in orders. Lyft Chief Executive Officer **David Risher**, who took the helm less than a year ago, has focused the operations on customer satisfaction and has emphasized a return to the basics in an effort to close the gap with Uber. Lyft has spent millions of dollars to lure drivers but has had a hard time boosting its rider base.

"Lyft clearly did one thing right - it corrected the error quickly and decisively," said Brad Foster, a partner specializing in securities litigation at corporate law firm Haynes Boone. "The reality is that people make mistakes, and mistakes are not securities fraud."

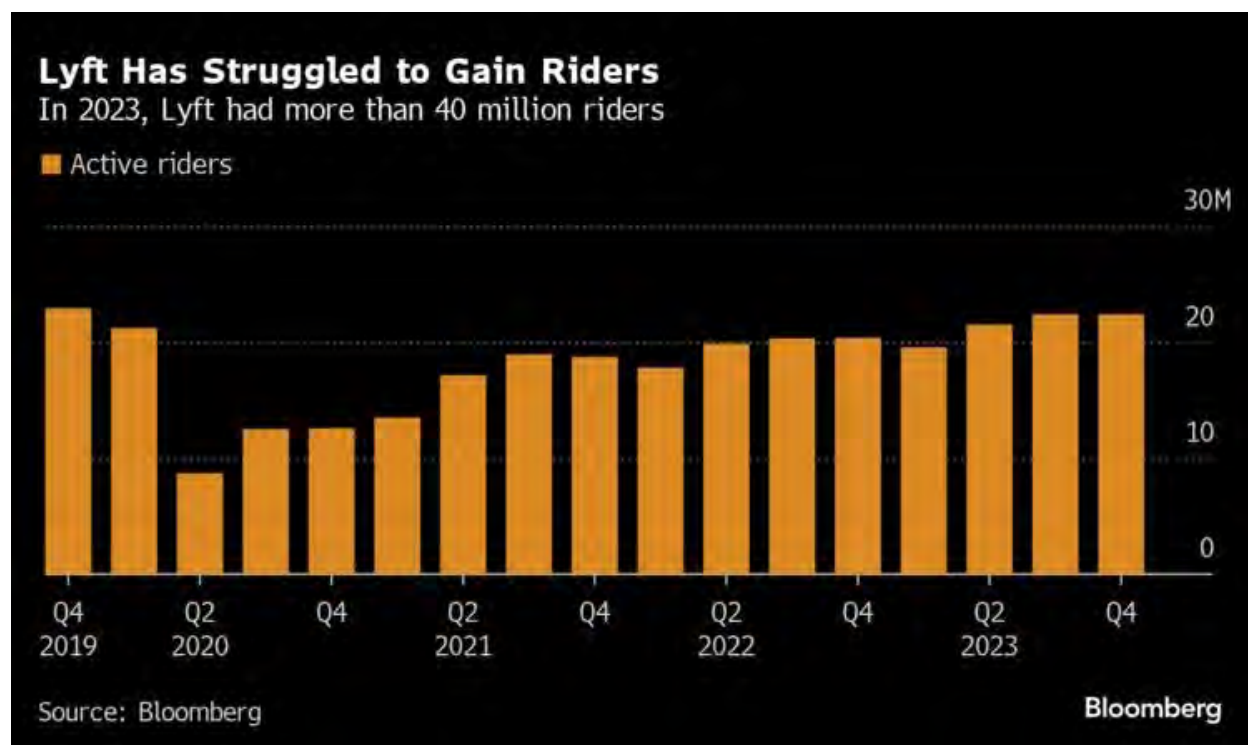
Gross Bookings

Under Risher, Lyft has cut hundreds of [jobs](#) since late 2022 as part of a restructuring, including positions in corporate communications, policy and employee operations.

In the fourth quarter, Lyft said gross bookings jumped 17% from a year earlier to \$3.72 billion, ahead of estimates for \$3.67 billion. Revenue was \$1.22 billion, up 4% from a year earlier and in line with projections. And it projected adjusted earnings of as much as \$55 million in the first three months of the year, topping analysts' estimates of \$49.5 million.

Lyft said the number of active riders on its platform increased 10% in the fourth quarter from a year earlier to 22.4 million. Last year, Lyft had more than 40 million riders, the highest annual ridership in its history.

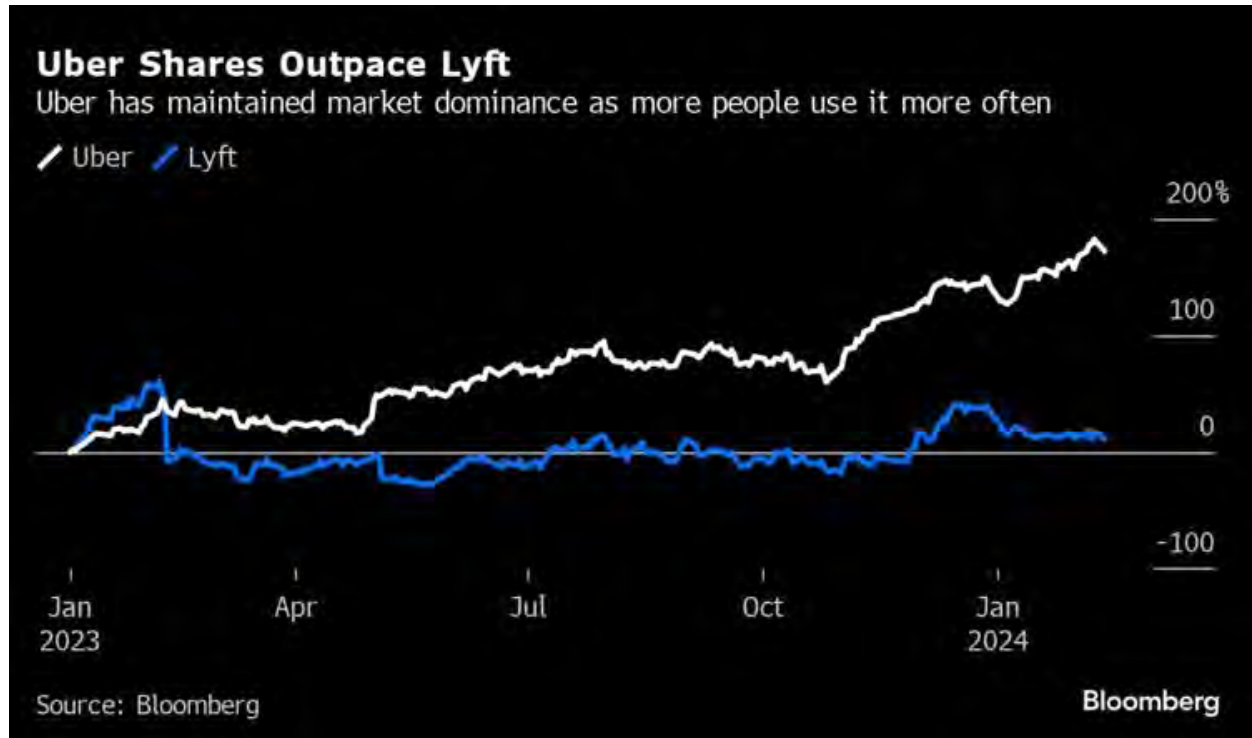
"We've entered 2024 with a lot of momentum and a clear focus on operational excellence," CFO **Brewer** said, positioning the company to "drive meaningful margin expansion and our first full-year of positive free cash flow."



But Lyft still lags behind Uber. According to market research firm YipitData, the company has held around 30% of the US rideshare market compared with 70% for Uber since the second quarter of 2022. Last week, [Uber reported](#) its full year of profit as a public company and said trips rose 24% in the quarter to 2.6 billion.

Stabilizing its market share is a critical first step for Lyft in building investors' confidence "in the long-term story," analysts at Jefferies Financial Group wrote before the company's results were released.

Lyft said adjusted earnings before interest, tax, depreciation and amortization were \$66.6 million in the fourth quarter, beating the \$56 million estimated by analysts. It reported a net loss of \$26.3 million.



Lyft has been making efforts to recruit more drivers and riders to its platform. One project that's gained traction is the Women+ Connect program, which matches women and non-binary drivers and riders. Since the initiative's launch in September, 67% of eligible drivers have opted in and kept the feature on 99% of the time, Lyft said.

The company launched in-app video ads in the fourth quarter, and its media revenue in that period exceeded the level achieved in all of 2022, it said, without giving an exact amount.

And, like many areas of the US economy, Lyft also saw a **Taylor Swift bump**. High-attendance stadium events such as concerts by Swift and **Beyonce**, the US Open and football games helped boost rides by 35%, Lyft said.

As part of efforts to retain drivers and promote pay transparency, Lyft earlier this month said drivers will earn at least 70% of the amount that riders pay each week, excluding external fees.

But workers say it doesn't go far enough. Drivers for Uber and Lyft are preparing to strike on Valentine's Day on Wednesday, to call attention to low pay and what they claim is poor treatment by the app companies, according to a coalition representing drivers.

Both Uber and Lyft drivers are considered independent contractors rather than employees, which has driven criticism from states such as New York, Massachusetts and California. Last November, both companies agreed to pay New York drivers a total of **\$328 million** to prevent further litigation over whether drivers should be classified as employees with traditional legal protections.

(Updates to add earlier job cuts and updates shares. A previous version of the story corrected the spelling of Jefferies Financial Group)

--With assistance from **Natalie Lung** and **Bailey Lipschultz**.

Lyft Inc

Lyft shares go on wild ride after earnings release error

Ride-hailing company's stock surges more than 60% before correction to margin growth outlook for 2024



Lyft has been struggling to catch its main ride-hailing rival Uber © Lucy Nicholson/Reuters

Tabby Kinder in San Francisco 5 HOURS AGO



Shares of Lyft soared more than 60 per cent on Tuesday before falling back sharply, after an error in the ride-hailing company's quarterly earnings release exaggerated the outlook for margin growth in 2024 by 10 times.

The company reported that it would improve adjusted earnings margins by 500 basis points, or 5 percentage points, in 2024 compared with the previous year. [Lyft](#) stock surged in the minutes after the announcement to just over \$20, the highest price since August 2022.

The shares then retreated to a gain of about 15 per cent after chief financial officer Erin Brewer said on a call with investors and analysts that the increase would in fact be 50bp, or 0.5 percentage points. "This is actually a correction from the press release," Brewer said. In early trading on Wednesday, Lyft shares were up about 35 per cent.

The mistake adds to years of woes for Lyft's shares, which have lost about 80 per cent of their value since its initial public offering in 2019. The erroneously strong prediction was taken as a sign by investors that the company's efforts to challenge much-larger rival Uber under chief executive David Risher, who took over less than a year ago, had started to pay off.

The company has invested millions of dollars to attract new drivers to its platform but has failed to significantly narrow the gap with [Uber](#) on the number of users. Lyft's gross bookings increased 17 per cent to \$3.7bn in the quarter compared with a year earlier, according to its latest earnings.

Lyft shares soar and plunge on earnings release error

Share price (\$), Tue 13 & Wed 14 Feb (EST)



Source: LSEG

© FT

It reported adjusted earnings of 18 cents a share in the quarter, more than the 8 cents a share analysts had forecast. Revenue of \$1.2bn aligned with analysts' expectations. Net losses narrowed to \$26.3mn.

For the first quarter of 2024, Lyft forecast gross bookings in the range of \$3.5bn to \$3.6bn and adjusted earnings before interest, taxes, depreciation and amortisation of between \$50mn and \$55mn.

Lyft said it expected to generate full-year positive free cash flow for the first time in 2024.

Risher said: “In 2023, the Lyft team set ambitious goals and the results speak for themselves. We reached the highest level of annual riders in our history, delivered over 700mn rides, and helped drivers take home over \$8bn . . . In 2024, we’ll prove that Lyft’s customer obsession will drive profitable growth.”

Uber last week cheered investors after [reporting its first-ever annual profit](#). It said gross bookings in the final quarter of 2023 had increased 22 per cent to \$37.6bn compared with the previous year.

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Ex-VW CEO Winterkorn to Testify Over Role in Diesel Scandal

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Securities Law

Feb. 13, 2024, 9:00 PM PST

Karin Matussek

Bloomberg News

- Former company leader will testify as part of investor lawsuit
- Winterkorn's own criminal trial could start later this year

For seven years, the German public hasn't seen much of former Volkswagen AG Chief Executive Officer **Martin Winterkorn**, aside from his occasional appearance at a home game for the Bayern München soccer team.

But on Wednesday, the ex-VW head will take the stand in Braunschweig to speak in public for the first time since 2017 about his role in one of the biggest corporate scandals in German history.

Winterkorn is testifying as part of a €9 billion (\$9.7 billion) investor suit over VW's diesel scandal, in which the company utilized deceptive software to undermine carbon emission testing. That incident triggered his hasty

from the company in September 2015.

Martin Winterkorn, center, in court with his lawyers, in Braunschweig, Germany, on Feb. 14.

Photographer: Ronny Hartmann/AFP/Getty Images

The lingering question is what Winterkorn knew at the time about VW's diesel-engine software. In his last public appearance at a parliamentary inquiry into the scam, he

any responsibility.

The former CEO is expected to make a statement along those lines this week, when he becomes the latest of the 86 witnesses testifying in the class action-style lawsuit. Ex-VW leaders Martin Diess and Michael Müller have already taken the stand. The suit was brought by investors claiming that VW took too long to inform them about misconduct in the diesel scandal, causing losses in the value of their securities.

While Diess and Müller were called on by VW to defend the company, both the carmaker and investors nominated Winterkorn as a witness for their respective cases. VW is trying to prove that company leadership had no early knowledge about the defeat device, and investors are trying to prove the opposite.

The 76-year-old's willingness to testify at all has come as a surprise as he still faces two indictments over the diesel scandal and could have therefore claimed a suspect's privilege to remain silent.

Along with four others, he was

for allegedly having VW vehicles equipped with the deceptive software. While Winterkorn's charges were separated from the group due to a health issue that made him unfit to stand trial, that case has been ongoing, and no end is in sight.

The other indictment alleged that Winterkorn, Diess and VW chairman Hans Dieter Pötsch informed markets too late about the diesel-emission rigging, mirroring the investor allegation of market manipulation in the current civil suit. Diess and Poetsch agreed to

the charges in 2020, and the criminal case against Winterkorn was dropped the following year on the grounds that prosecutors wanted to prioritize the fraud trial, which would potentially result in a much higher sentence.

That strategy must have changed recently, as the court, acting at the request of prosecutors, decided to revive the market-manipulation indictment a day after the Christmas holidays. A medical expert who examined Winterkorn concluded that the former CEO will be fit to stand trial by September. That's the soonest his criminal trial could begin, and the court could hear both charges at once.

Wednesday's investor suit is

v. Volkswagen AG and Porsche Automobil Holding SE (3 Kap 1/16).

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'Pig Butchered' Bank Drew \$21 Million From FHLB Before Collapse

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- Heartland failed after a flurry of borrowing, inspector finds
- Bank hadn't tapped FHLB financing in previous three years

A Kansas bank that failed last July after its chief executive officer allegedly siphoned off funds to buy cryptocurrency drew \$21 million from the Federal Home Loan Bank System shortly before collapsing, according to a regulatory review.

Heartland Tri-State Bank's sudden use of FHLB financing in its final weeks was an abrupt turnabout, the inspector general of the Federal Reserve and Consumer Financial Protection Bureau found in a Feb. 7 report. In the prior three years, the firm didn't borrow anything from the US-backed system, which helps support home lending.

Altogether, Heartland almost completely tapped out its sources of cash — also drawing \$24 million from lines of credit with a correspondent bank — to fund improper wire transfers, the report found. This month, the Justice Department charged Heartland's former leader, Shan Hanes, with embezzling \$47.1 million from the company as part of a so-called pig-butcher scheme, in which victims are lured into giving ever-more money, like pigs fattened for slaughter.

[Read More: Bank Failure That Rocked Tiny Kansas Town Began With Crypto Scam](#)

The mission of the \$1.3 trillion FHLB system has become a hot topic in Washington after it propped up lenders including Signature Bank, Silicon Valley Bank and First Republic Bank that imploded last year after catering to crypto firms, venture capitalists and the ultra-wealthy. Proponents of the system say that beyond supporting the mortgage market, FHLBs provide stability to banks at times of economic stress.

The abrupt collapse of Heartland shook the surrounding Elkhart community in southwest Kansas, added to a string of regional-bank failures and culminated in another hit to the Federal Deposit Insurance Corp.'s insurance fund. The agency estimated in July that Heartland could cost its fund \$54 million.

The inspector general's report doesn't specify which home-loan bank provided the burst of financing before Heartland's seizure, nor does it fault the system. A separate government listing shows Heartland was a member of the FHLB of Topeka, Kansas.

Read more: Why US Is Overhauling Federal Home Loan Banks: QuickTake

Representatives for that institution didn't immediately respond to messages seeking comment. Banks typically put up mortgages and other collateral to receive their "advances," ensuring FHLBs get repaid.

Heartland's former CEO hasn't responded to messages seeking comment on the criminal case. His initial court appearance is set for Feb. 28, the Justice Department said Monday.

In November, the Federal Housing Finance Agency, which regulates home-loan banks, proposed a slate of reforms to refocus the system on addressing the country's housing needs. The measures would likely require years of work by lawmakers and regulators to be enacted and are already facing fierce lobbying.

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Citigroup Is Having a Very Bad Week; Regulators Are Breathing Down Its Neck

 wallstreetonparade.com/2024/02/citigroup-is-having-a-very-bad-week-regulators-are-breathing-down-its-neck



By Pam Martens and Russ Martens: February 14, 2024 ~

At the exact moment that the stock market closed on Monday, Reuters dropped a bombshell in Warren Buffett's lap with news that federal banking regulators are breathing down Citigroup's neck. Buffett's Berkshire Hathaway owns 55,244,797 shares of Citigroup, according to its last 13F filing with the SEC. The bulk of the stake was acquired in the first quarter of 2022. (See our report: Warren Buffett Is Taking a Flyer on \$3 Billion of Citigroup's Stock — After It Loses 40 Percent in a Year.)

While a \$3 billion stock holding is chump change for Berkshire (as of its last 13F filing, it owned approximately \$33 billion in Bank of America stock), Buffett has a stock-picking reputation to defend and neither the history of Citigroup nor its troubles today are boosting that reputation.

On Monday, with the strike of the closing bell, Reuters reported the following:

"U.S. regulators have asked Citigroup for urgent changes to the way it measures default risk of its trading partners and the bank's own auditors have found a plan to improve internal oversight to be lacking, developments that could hinder CEO Jane Fraser's plans to revive



Sanford (Sandy) Weill, the Man Who Walked Away from Citigroup a Billionaire Before Its Collapse

the bank's fortunes.

"Late last year, the Federal Reserve sent Citi three notices directing the bank to address in the coming months how it measures risk of default by counterparties in derivative transactions, a source with direct knowledge of the matter said."

To fully grasp the hubris at Citigroup, a few key historic details are in order.

First, Citigroup's Citibank turned money laundering into an art form, or perhaps a concierge service, with its own "relationship managers."

Second, Citigroup received the largest bailout in global banking history before, during and after the financial crash of 2008 – a crash it played a pivotal role in causing with its subprime debt bombs and off-balance-sheet Structured Investment Vehicles (SIVs). Between December 2007 and July 2010, Citigroup received the following bailouts: The U.S. Treasury injected \$45 billion of capital into Citigroup; there was a government guarantee of over \$300 billion on certain of its assets; the FDIC provided a guarantee of \$5.75 billion on its senior unsecured debt and \$26 billion on its commercial paper and interbank deposits; and secret revolving loans from the Federal Reserve sluiced a cumulative \$2.5 *trillion* in below-market-rate loans to Citigroup according to an audit released by the Government Accountability Office in 2011.

Third, despite the unprecedented infusions of capital, guarantees and secret loans from the Fed, Citigroup's share price sank to 99 cents in the spring of 2009. In a clever maneuver to dress up its share price and remove the beaten-down appearance of a single digit stock, effective May 9, 2011, Citigroup did a 1-for-10 *reverse* stock split, meaning if you had 100 shares of Citigroup previously, you were left with just 10 shares; but those shares now had a double-digit price that looked far more respectable to the uninformed.

The shocking truth is that if you owned Citigroup's stock on January 1, 2008 – the year of the worst financial crash since the Great Depression – and you maintained your position in the stock all these years, you are still down 76 percent on the share price. (See chart above.)

Another key detail in Citigroup's history is that despite taking its shareholders on a very nasty journey for the last 16 years, its former Chairman and CEO, Sandy Weill, was able to walk away as a billionaire as a result of his so-called "Dracula" stock options.

Weill's riches grew out of what corporate compensation expert Graef "Bud" Crystal labeled the Count Dracula stock option plan – you simply could not kill it; not even with a silver bullet. Nor could you prosecute it because Citigroup's Board of Directors approved it.

Weill's stock option plan worked like this: every time he exercised one set of stock options, he got a reload of approximately the same amount of options, regardless of how many frauds the bank had been charged with during the year.

In an article at Bloomberg News, Crystal explained that between 1988 and 2002, Weill "received 96 different option grants" on an aggregate of \$3 billion of stock. Crystal says "It's a wonder that Weill had time to run the business, what with all his option grants and exercises. In the years 1996, 1997, 1998 and 2000, Weill exercised, and then received new option grants, a total of, respectively, 14, 20, 13 and 19 times."

When Weill stepped down as CEO in 2003, he had amassed over \$1 billion in compensation, the bulk of it coming from his reloading stock options. (Weill remained as Chairman of Citigroup until 2006.) With a bird's eye view of Citigroup's internal problems, Weill decided real estate looked like a better risk than Citigroup stock. Just one day after stepping down as CEO, Citigroup's Board of Directors allowed Weill to sell *back to the corporation* 5.6 million shares of his stock for \$264 million. This eliminated Weill's risk that his big share sale would drive down his own share prices as he was selling. The Board negotiated the price at \$47.14 for Weill's shares.

The \$264 million that Weill got for his Citigroup shares in 2003 were worth \$29.5 million at yesterday's closing price, adjusted for the reverse stock split: a very sweet deal for Weill and a very raw deal for long-term shareholders.

Now, back to the Reuters' story about Citigroup's current troubles with its regulators. Despite the bank's inability to resuscitate its share price, Citigroup held \$51 *trillion* in derivatives as of September 30, 2023, according to the Office of the Comptroller of the Currency. (For how Citigroup could have blown itself up with derivatives and off-balance-sheet vehicles in 2008 and still be allowed to live so recklessly today, see our report: Meet Your Newest Legislator: Citigroup.)

Regulators are now apparently questioning Citigroup's calculations on how much capital it should be holding based on the credit quality of the counterparties to that \$51 trillion in derivatives.

Federal banking regulators have good reason to question that. The giant insurer AIG had to be taken over by the U.S. government in 2008 and backstopped with more than \$180 billion when it turned out that one of its divisions had been a major derivatives counterparty to a multitude of Wall Street banks – but AIG had neglected to put aside reserves to pay up on those derivatives.

When the Financial Crisis Inquiry Commission wrote its final report for Congress, mapping out the major causes of the Wall Street financial collapse in 2008, it devoted an entire chapter to AIG. One exhibit stands out. It was an email sent on the evening of September 12,

2008 – three days before Lehman Brothers filed bankruptcy. It came from Hayley Boesky of the New York Fed and was directed to William Dudley, an Executive Vice President at the New York Fed at the time who oversaw its trading operations. Dudley would become President of the New York Fed on January 27, 2009 when its then President, Tim Geithner, was tapped by President Obama for Treasury Secretary. The email read:

“More panic from [hedge funds]. Now focus is on AIG. I am hearing worse than LEH [Lehman Brothers]. Every bank and dealer has exposure to them.”

On the same day that Lehman Brothers declared bankruptcy, Monday, September 15, 2008, the rating agencies brought down the hammer on AIG. The ratings downgrades were even worse than anticipated. AIG’s share price collapsed in one trading session by 61 percent to \$4.76. By Wednesday of the same week, AIG’s stock traded at an intraday low of \$1.99.

The Financial Crisis Inquiry Commission report notes that AIG’s “previous eight years’ profits of \$66 billion would be dwarfed by the \$99.3 billion loss for this one year, 2008.”

After much public uproar, a chart would eventually be released showing that more than \$90 billion of government bailout funds earmarked for AIG went to pay off its derivatives and stock lending agreements with the big trading houses on Wall Street. (See the chart here.)

The Financial Crisis Inquiry Commission summed up its analysis of what went wrong at AIG as follows:

“The Commission concludes AIG failed and was rescued by the government primarily because its enormous sales of credit default swaps [derivatives] were made without putting up initial collateral, setting aside capital reserves, or hedging its exposure — a profound failure in corporate governance, particularly its risk management practices. AIG’s failure was possible because of the sweeping deregulation of over-the-counter (OTC) derivatives, including credit default swaps, which effectively eliminated federal and state regulation of these products, including capital and margin requirements that would have lessened the likelihood of AIG’s failure. The OTC derivatives market’s lack of transparency and of effective price discovery exacerbated the collateral disputes of AIG and Goldman Sachs and similar disputes between other derivatives counterparties. AIG engaged in regulatory arbitrage by setting up a major business in this unregulated product, locating much of the business in London, and selecting a weak federal regulator, the Office of Thrift Supervision (OTS)...

“AIG was so interconnected with many large commercial banks, investment banks, and other financial institutions through counterparty credit relationships on credit default swaps and other activities such as securities lending that its potential failure created systemic risk. The government concluded AIG was too big to fail and committed more than \$180 billion to its rescue. Without the bailout, AIG’s default and collapse could have brought down its counterparties, causing cascading losses and collapses throughout the financial system.”

If you think it is nothing short of dereliction of duty that federal banking regulators have allowed Citigroup to hold \$51 *trillion* in derivatives given its history, please contact your U.S. Senators today via the U.S. Capitol switchboard by dialing (202) 224-3121. Tell your Senators to demand that regulators rein in this out-of-control derivatives market and its concentrated risk at a handful of mega banks on Wall Street.

Related Article:

Is Citigroup Under Orders from Its Regulators to Break Itself Up?

BofA Sued by Chicago Trading Firm Over Alleged Treasury Spoofing

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Banking Law News

Feb. 13, 2024, 1:27 PM PST

Steve Stroth

Bloomberg News

- Proposed class action seizes on allegations made by Finra
- Bank agreed to pay \$24 million fine but admitted no wrongdoing

Bank of America Corp. was sued by a Chicago trading firm that said it transacted in US Treasury futures and options at artificial prices due to years of market manipulation by the bank.

The proposed class action filed Tuesday by M & N Trading LLC seizes on the bank's \$24 million settlement in November of Financial Industry Regulatory Authority allegations that it failed to properly supervise two former employees who made fraudulent "spoofing" trades from 2014 to 2017.

Bank of America "engaged in at least hundreds of manipulative acts and successfully manipulated the prices of Treasury futures and Treasury securities, causing artificial prices and harm to other market participants," according to the complaint.

The second-largest US bank by assets, Bank of America did not admit or deny Finra's allegations as part of the settlement. It didn't have an immediate comment on the M & N suit Tuesday.

According to both Finra and the lawsuit, a former supervisor and a former junior trader at BofA Securities Inc. made the spoof trades of US Treasuries. Finra said the bank lacked systems to catch the fraudulent trades.

Regulators and prosecutors have increasingly focused on spoofing since it was specifically prohibited by lawmakers in 2010. The government has extracted more than \$1 billion in fines from banks including JPMorgan Chase & Co., Bank of America and Deutsche Bank AG, and several individual traders have been sentenced to jail time over the practice.

Read More: BofA to Pay \$24 Million Fine in Treasuries Spoofing Case

The case is M&N Trading v. BofA Securities, 24-cv-01229, US District Court, Northern District of Illinois (Chicago).

--With assistance from Katherine Doherty.

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Ky. Alleges Kroger Had 'Outsized' Role In State's Opioid Crisis

By **Dan McKay**

Law360 (February 13, 2024, 3:09 PM EST) -- Kentucky Attorney General Russell Coleman accused the Kroger Co. and two subsidiaries of ignoring red flags and suspicious orders as opioids devastated the state, alleging in a new suit the massive grocery and pharmacy chain violated nuisance and consumer protection laws.

In a 60-page **complaint** Monday, Coleman said Kroger and its affiliates played an "outsized role" in Kentucky's opioid epidemic as both a wholesale distributor and a dispenser of opioids through its pharmacies.

"For more than a decade," the attorney general said, "Kroger flooded Kentucky with an almost unthinkable number of opioid pills that directly led to addiction, pain and death."

The suit, filed in the state's Bullitt Circuit Court, seeks \$2,000 for each willful violation of Kentucky's Consumer Protection Act and an injunction barring Kroger from false, misleading and unfair trade practices.

The state also accuses Kroger defendants of "creating a public nuisance of historic proportions" and seeks an order forcing them to abate the nuisance.

Kentucky's lawsuit comes as a host of companies face litigation accusing them of contributing to the opioid epidemic.

Just this month, Publicis Health LLC **settled** a lawsuit with all 50 states, the District of Columbia and others for \$350 million over claims that it helped exacerbate the opioid crisis through its marketing work. Kentucky's portion of the settlement is \$7 million.

In January, the Fourth Circuit **heard oral arguments** centering on whether anti-nuisance laws can be used to target opioid distributors that supplied pharmacies.

Coleman contends his state was hit harder than any other. More than 2,100 Kentuckians, he said, died from drug overdoses and poisonings in a one-year period.

"Kroger, which families have trusted for so long, knowingly made these dangerous and highly addictive substances all too accessible," Coleman said in a news release. "Worst of all, Kroger never created a formal system, a training or even a set of guidelines to report suspicious activity or abuse."

The suit singles out Kroger for an especially critical role in Kentucky's crisis, given its position both as a wholesale distributor of opioids and dispenser through its retail pharmacies.

The lawsuit estimates the company and its more than 100 pharmacies were responsible for 11% of the opioids dispensed in the state between 2006 and 2019. It distributed almost 194 million hydrocodone pills to its pharmacies in that period, Coleman said.

"Occupying two links in the opioid supply chain," Coleman said in the lawsuit, "Kroger was in a unique and superior position of knowledge with regard to the gross amount of opioids pumped into their stores and poured out onto the streets of Kentucky."

Kroger continued to fill prescriptions despite "unresolved red flags" and failed to develop adequate policies to combat diversion of drugs into the illegal market, according to the suit.

Kroger didn't immediately respond Tuesday to a request for comment.

The commonwealth of Kentucky is represented by Russell Coleman, Justin Clark, J. Christian Lewis, Stephen B. Humphress and J. Christopher Bowlin of the Kentucky Attorney General's Office, Danielle Reesor Blandford, James D. Young and Juan Martinez of Morgan & Morgan, and Linda Singer, Mimi Liu, Elizabeth Smith, David I. Ackerman and Brendan Austin of Motley Rice LLC.

Counsel information for Kroger wasn't immediately available.

The case is the commonwealth of Kentucky v. the Kroger Co. et al., case number not yet assigned, in the Bullitt Circuit Court of the commonwealth of Kentucky.

--Additional reporting by Chart Riggall. Editing by John C. Davenport.

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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (February 13, 2024, 4:11 PM EST) -- A pizza chain, an energy company, a medical-device maker and a Manila casino were all hit with book-and-record demands last week in Delaware's Court of Chancery. A shoe company also walked away from a shareholder suit, two cryptocurrency companies tallied the costs of a broken merger, and three cigarette giants argued over Florida settlement payments.

For those who missed it, here's the roundup of all the latest news from Delaware's Chancery Court.

In the Courtroom

Reynolds Tobacco Co. and ITG Brands LLC urged Vice Chancellor Lori. W. Will **to reject a motion** from Philip Morris USA to intervene in their dispute over which owes millions in settlement payments in Florida for sales of the Kool, Maverick, Salem and Winston cigarette brands.

During arguments on cross-motions for summary judgment, Vice Chancellor J. Travis Laster **challenged** insurance brokerage BRP Group Inc. to justify bylaw amendments made to cure a shareholder's suit alleging the company's co-founders wielded too much control over the board.

And in a **second round of arguments** appealing the Chancery's dismissal of its case, California-based BitGo Holdings Inc. urged Delaware's Supreme Court to revive its suit against digital assets firm Galaxy Digital over their broken \$1.2 billion merger because the dispute involves complex questions of administrative, agency and securities laws.

Decisions

Delaware's Supreme Court **rejected a request** by Deutsche Bank to review a mid-case ruling by Vice Chancellor Sam Glasscock III in a long-running suit that accuses Norwegian billionaire Alexander Vik of shuffling more than \$50 million to a bank in Pennsylvania to avoid a \$235 million court judgment.

The state's highest court also **upheld, without elaboration**, a Chancery Court award of nearly \$7.8 million in damages, fees and prejudgment interest to the sole investor in a stone powder-based paper investment venture that was allegedly drained of cash by insiders.

It also **affirmed** a Chancery Court decision that ordered South Carolina medical claims management company Avande Inc. to pay the legal fees of its ex-CEO after he was found liable for breaching his fiduciary duties.

Meanwhile, Vice Chancellor Sam Glasscock III **denied** a \$5 million attorney fee request by Oracle stockholders who lost a lawsuit that alleged the software giant overpaid for its \$9.3 billion acquisition of Netsuite, rejecting the investors' contention that they deserved an award for prompting the company to appoint two new independent directors.

And Vice Chancellor Morgan T. Zurn **dismissed** a stockholder suit accusing Skechers USA founder and CEO Robert Greenberg and his son and company president Michael Greenberg of using corporate aircraft for personal trips.

New Cases

Shareholders of 3D model maker Matterport Inc. **accused** top company officials of self-dealing by paying themselves performance rewards following a 2021 merger, even though the company hadn't met benchmarks to allow them to cash out \$225 million in shares.

Investors in early-stage biotech venture Cartesian Therapeutics Inc. **sought a court order** to stop a shareholder vote on a pending stock conversion and reverse-split following its merger with Selecta Biosciences Inc., alleging material information about the deal had been withheld from stockholders.

A shareholder of urban air transport venture Blade Air Mobility Inc. **filed a lawsuit** against key figures of the special-purpose acquisition company that took it public, along with the deal's sponsor KSL Capital Partners.

A pension fund with shares of Pioneer Natural Resources **sued the oil and gas company** for its books and records to probe whether the company's officers and directors breached their fiduciary duties when negotiating a \$59.5 billion deal to be acquired by oil giant Exxon Mobil Corp.

New York hedge fund Zama Capital Master Fund LP **sued a special-purpose acquisition company** for corporate documents related to a failed \$2.6 billion deal to take the Okada Manila Resort and Casino in the Philippines public.

A minority investor in Ohio pizza and beer chain Pies & Pints **filed a second Chancery lawsuit** seeking corporate books and records, alleging the restaurant business had failed to respond to his first one.

And two shareholders of California medical device company Eargo Inc. **demanded company information** to investigate potential wrongdoing and breaches of fiduciary duties in connection with a pending buyout by controlling shareholder Patient Square Capital LP.

Still Under Seal

A stockholder of The Beauty Health Company, a Nasdaq-traded skincare business, filed a proposed class action for breach of fiduciary duty. The case is Margie Elstein v. Brenton Saunders et al., case number 2024-0114.

A Texas pharmacy and several Dallas-based investment firms filed a proposed class action against the top brass of Paratek Pharmaceuticals Inc., asserting breaches of fiduciary in connection with a recent acquisition. The case is DrugCrafters LP et al. v. Evan Loh et al., case number 2024-0111.

A Cayman Islands-registered sponsor for a special-purpose acquisition company deal that took Alternus Energy Group public in December sued the SPAC's parent, Clean Earth Acquisitions, to block and claw back share distributions. The case is SPAC Sponsor Capital Access v. Clean Earth Acquisitions Sponsor LLC, case number 2024-0120.

And a Hong Kong-based venture that had a \$1.4 billion project to develop a container port in Panama but saw it taken over in 2019 based on alleged delays sued to block the replacement developers from moving forward, alleging unjust enrichment, conversion and civil conspiracy, among other claims. The case is Landbridge Port Services (Hong Kong) Ltd. v. Notarc Port Investment LLC et al., case number 2024-0122.

Fees, Fees, Fees

Labaton Keller Sucharow LLP and Andersen Sleater Sianni LLC **squared off against** Rolnick Kramer Sadighi LLP and Heyman Enerio Gattuso & Hirzel LLP for a fee award linked to a proposed \$19 million settlement of a stockholder suit that challenged Apollo Global Management's \$3.1 billion sale of Momentive Performance Materials Inc. in 2019 to a consortium led by a South Korean building firm.

And proposed class attorneys at Grant & Eisenhofer PA who secured a \$6 million settlement from medical device company AMDI Inc. in a derivative suit challenging a purportedly conflicted stock sale to an interest of Oracle founder Larry Ellison **asked for \$750,000** in attorney fees for their work.

Quotable

"You broke five bones in my body, and you're coming back and fixing four, and you're saying, 'We're good now.' But you haven't restored me to the way I was." – Vice Chancellor Laster, pushing an attorney for BRP Group Inc. to explain bylaw challenges it made to "cure" a shareholder's suit.

--Additional reporting by Jeff Montgomery, Emily Lever, Emily Sawicki, Chuck Slothower, Nate Beck, Emilie Ruscoe and Rose Krebs. Editing by Philip Shea.

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Ambrx Shareholders Sue Over Proposed \$2B J&J Deal

By **Katryna Perera**

Law360 (February 13, 2024, 10:59 PM EST) -- Two new suits filed in Delaware federal court allege Ambrx Biopharma Inc. and its top executives omitted important information about a \$2 billion proposed Johnson & Johnson buyout in the deal's proxy statement.

Shareholders Bruce Miller and John Carroll filed **separate complaints** against Ambrx, its CEO Daniel O'Connor, board Chairman Stephen Glover and several other board members. Miller's suit was lodged Tuesday, while Carroll brought his claims against the defendants on Monday.

According to Carroll's complaint, Ambrx and Johnson & Johnson on Jan. 8 announced the all-cash, **take-private deal** that would have a total equity value of roughly \$2 billion. Shareholders are scheduled to vote on the transaction on March 6, but both Miller and Carroll allege that a proxy statement prepared by the Ambrx defendants and filed with the U.S. Securities and Exchange Commission in late January omits and misrepresents material information that is highly relevant to the deal.

Both complaints say missing information from the proxy statement includes details about Ambrx's financial forecasts, as well as financial analyses that support a fairness opinion provided by the company's financial adviser, Centerview Partners LLC.

"The proxy statement fails to disclose: the company's terminal values; the tax savings from usage of Ambrx's estimated federal net operating losses and Ambrx's future losses; Ambrx's estimated net cash balance as of Dec. 31, 2023; the impact of assumed equity raises in 2024, 2025, 2026 and 2027; and the company's fully diluted outstanding shares," Miller's complaint states.

If shareholders approve the transaction, Johnson & Johnson would acquire all the outstanding shares of the California-based Ambrx — a clinical-stage biopharmaceutical company that develops antibody-drug conjugates and other engineered therapies — for \$28 apiece in cash, according to Miller and Carroll. Should the deal close, Ambrx would then become a private company, with its shares being delisted from the Nasdaq Stock Market.

Miller and Carroll claim that the proxy statement also doesn't disclose potential conflicts of interest faced by Ambrx insiders, such as whether members of Ambrx's management would have positions within the combined company, or any other employment details or retention-related discussions and negotiations that have already occurred.

Both shareholders want to enjoin the defendants from taking any steps to close the proposed deal until the alleged omitted information is disclosed. If the buyout goes through, Miller and Carroll seek to recover damages, and also want attorney fees and a jury trial, according to the complaints.

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

Miller and Carroll are represented by Brian D. Long of Long Law LLC, and Carroll is also represented by Richard A. Acocelli of Acocelli Law PLLC.

Counsel information for the defendants was not immediately available Tuesday.

The cases are Miller v. Ambrx Biopharma Inc. et al., case number 1:24-cv-00192, and Carroll v. Ambrx Biopharma Inc. et al., case number 1:24-cv-00185, both in the U.S. District Court for the District of Delaware.



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Beauty Company Hit With Derivative Suit Over Skin Tech Woes

By **Leslie A. Pappas**

Law360 (February 13, 2024, 7:50 PM EST) -- Directors and officers at the Beauty Health Co. hid bad news about a defective skin care device for 18 months, leading to stock price drops, analyst downgrades and a securities class action when the truth was finally revealed, a shareholder alleges in a new Delaware Chancery Court complaint.

Shareholder Margie Elstein accuses the Long Beach, California, company of downplaying problems with its core product, the HydraFacial Syndeo delivery system, despite knowing for months there were hardware, software and noise issues with the machine.

"The individual defendants either knowingly permitted the dissemination of false information about the company's key product or decided to bury their heads in the sand and not make a decision to avert the knowable and grave risks raised by such false dissemination," according to a redacted version of the complaint made available Tuesday. It was initially **filed under seal** on Feb. 8.

The Beauty Health Co., which trades on the Nasdaq under SKIN, makes products that estheticians and consumers use for facials and skin and beauty treatments. Its brands include HydraFacial for hydradermabrasion, SkinStylus for microneedling and Keravive for scalp treatments, according to the company's website.

The shareholder derivative complaint raises one count of breach of fiduciary duty against Beauty Health's board chairman Brenton Saunders and the rest of its eight-member board. Beauty Health's former CEO Andrew Stanleick and former Chief Financial Officer Liyuan Woo are also named as defendants.

Elstein says the company publicly touted Syndeo, which it launched in March 2022, but internal company documents showed that from the outset, the machine was "plagued" with ongoing problems that had no apparent fix. Users of the machine began complaining on social media that it would stop working after a few weeks, the complaint says.

The company didn't reveal the problems until 18 months after the product launch. On Nov. 13, 2023, Beauty Health announced it would no longer sell the old versions of the Syndeo devices, resulting in an \$18.8 million write-down for the quarter ending Sept. 30, 2023, and an additional \$32.1 million of estimated costs to remediate, upgrade or exchange the faulty machines.

The surprise announcement triggered an immediate stock drop and several downgrades and price target cuts by leading securities analysts, the complaint says. In response to the turmoil, shareholders in California filed a securities class action in the Central District of California, the complaint says.

The company's stock now hovers at about \$3 per share, down from a 52-week high of \$13.90, according to the complaint.

None of the parties responded Tuesday to Law360's requests for comment.

Margie Elstein is represented by Emily Komlossy of Komlossy Law PA, Laurence D. Paskowitz of The Paskowitz Law Firm PC and Blake A. Bennett of Cooch and Taylor PA.

Counsel information for the defendants was not immediately available Tuesday.

The case is Margie Elstein v. Brenton Saunders et al., case number 2024-0114, in the Court of Chancery of the State of Delaware.

The federal securities class action is Abduladhim A. Alghazwi v. the Beauty Health Co. et al., case number 2:23-cv-09733, in U.S. District Court of the Central District of California.

--Editing by Philip Shea.

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Hotel Rental Co. Hid Litigation And Failed Deal, Suit Says

By **Sydney Price**

Law360 (February 13, 2024, 6:44 PM EST) -- Real estate company LuxUrban Hotels has been hit with a proposed class action alleging it lied about a 25-year deal with the Royalton Hotel in New York and multiple lawsuits over unpaid rent, which it says caused shares to decline after a short-seller report disclosed the issues.

According to the suit filed Monday by shareholder Janice Pack, Florida-based LuxUrban leases hotels across the U.S. on a long-term basis and rents individual rooms out to travelers. The suit claims LuxUrban lied to investors when it said it signed a lease with the Royalton Hotel in New York City.

A January report from short-seller Bleecker Street Research shed light on the nonexistent deal and several rent delinquency suits on its other properties, according to Pack's complaint.

Pack seeks to represent a class of investors who purchased or otherwise acquired LuxUrban securities between Nov. 8, 2023, and Feb. 2.

LuxUrban CEO Brian Ferdinand and Chief Financial Officer Shanoop Kothari are defendants in the suit.

The class period begins the day LuxUrban filed its third-quarter 2023 financial statement with the U.S. Securities and Exchange Commission, listing 168 units of the Royalton Hotel as "properties under lease, not operating," the complaint says.

A couple of weeks later, on Nov. 30, LuxUrban said in a press release that it had signed a 25-year lease agreement with the Royalton Hotel and that it expected to begin taking in guests next month.

On Jan. 17, Bleecker Street Research said Royalton Hotel's owner and operator confirmed LuxUrban had not signed a lease with the hotel. The report also said LuxUrban was involved in dozens of lawsuits alleging it had not paid rent and that key vendors, such as security, had gone unpaid, the complaint says.

"We believe that LuxUrban's myriad legal issues have never been disclosed properly to investors," the Bleecker Street Research report said, according to the complaint.

That day, LuxUrban's shares declined 58 cents, or about 12%, closing at \$4.32 per share, the suit says.

LuxUrban responded to the report in a statement after trading hours, saying litigation liabilities had been accrued in its previous financial statements and that LuxUrban customers would begin staying at the Royalton Hotel within a few weeks.

However, on Feb. 2, LuxUrban announced that it was "withdrawing its prior statements regarding the Royalton" and said it was terminating all discussions to add the hotel to its roster.

"There was a commitment by a qualified banking institution to fund the letter of credit required under the proposed lease in a form agreeable by the landlord; however, a complete set of definitive agreements relating to the lease were not, and will not be, entered into by the company," LuxUrban said.

LuxUrban's shares declined 99 cents, or about 22%, to \$3.50 per share on the following trading day, Feb. 5, according to the suit.

Pack seeks damages and accuses the defendants of violating the Exchange Act and acting with scienter, or actual knowledge of wrongdoing, or reckless disregard.

Counsel for Pack and a representative for LuxUrban did not immediately respond to requests for comment Tuesday.

Pack is represented by Gregory B. Linkh, Rebecca Dawson, Robert V. Prongay and Charles H. Linehan of Glancy Prongay & Murray LLP and Frank R. Cruz of The Law Offices of Frank R. Cruz.

Counsel information for LuxUrban was not immediately available Tuesday.

The case is Pack v. LuxUrban Hotels Inc. et al., case number 1:24-cv-01030, in the U.S. District Court for the Southern District of New York.

--Editing by Drashti Mehta.

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Cannabis Site Co. Moves To Ax 'Rambling' Securities Suit

By **Gina Kim**

Law360 (February 13, 2024, 6:53 PM EST) -- Decentral Life and its licensees asked a Colorado federal judge Monday to toss an investor's "rambling and incomprehensible" securities fraud suit accusing them of making false statements to trick him into investing more than \$1.7 million, arguing most of his allegations fail under the federal pleading requirements.

In a 38-page memorandum, attorneys for Decentral Life Inc. and several licensees, including cannabis website platform MjLink.com, HuntPost.com and LikeRe.com, moved to dismiss investor Alan Lamothe's complaint alleging claims for securities fraud, negligent misrepresentation, and unjust enrichment. Lamothe claimed Decentral Life, which licenses social media software, had boasted that its platforms had millions of monthly active users and that he relied on those statements when he bought shares of Decentral and MjLink.

At the outset, Monday's brief immediately attacks Lamothe's "disorganized and often incomprehensible" complaint, arguing his claims are unsupported by "disjointed and vague allegations," fail to state a cause of action, and fail to meet the Federal Rules of Civil Procedure's pleading standards.

"Rambling and incomprehensible pleadings cause 'disadvantages to the administration of justice' and make it so that 'district judges assigned the task of measuring legal pleadings against certain criteria embodied in the Rule 12(b), Rule 56 and the like, have their task made immeasurably more difficult,' the complaint said.

The most glaring deficiency in Lamothe's suit is his failure to allege with particularity when exactly he bought any of Decentral's securities. While he says he bought shares at some point in February 2021 and again between March 2021 and May 2022, those allegations do not meet pleading requirements, nor do they describe the causal nexus between the alleged misconduct and his injuries from purchasing shares, the memorandum said.

While Lamothe claims the defendants made misrepresentations and omissions during a five-year period from Jan. 25, 2018, to June 6, 2023, he's only limited to claiming reliance on statements that were made before he even bought any MjLink securities on March 9 and 11 of 2021, the defendants argued.

"Stated differently, it is impossible that plaintiff could have relied on statements defendants had not yet made," the memorandum said.

Furthermore, some of the suit's general misrepresentation allegations do not even specify an exact date or time period of when they were made, and only 12 allegations in his suit can be read as predating his most recent March 11, 2021, purchase of MjLink securities, the defendants argued.

Monday's memorandum comes **two months after Lamothe commenced his suit** against the defendants, claiming they made false statements that he relied on to buy shares in Decentral and MjLink. Lamothe claimed he later discovered that the sites' users numbered in the thousands at most, many of which were dummy accounts or duplicates from the site's administrators to bolster user counts.

Lamothe alleged that the defendants' officers, Ken Tapp and Gregory Todd Markey, repeatedly lied

about the prospect of third-party investors and other business plans, including plans to launch an initial public offering, or other means of going public that never came to fruition.

On Monday, the defendants told the judge that Lamothe's securities fraud claims also fail for being insufficiently pled and fail to plead facts showing falsity and scienter.

"First, the challenged statements — the only allegations that can even in theory serve as the basis for plaintiff's securities fraud claims — include allegations that are forward-looking and thus, subject to special statutory protection under the [Private Securities Litigation Reform Act]'s Safe Harbor."

The challenged statements include Decentral announcing on Jan. 25, 2018, in its registration statement that its cannabis and hemp platform would be seen by more than 150 million users across more than 80 websites and apps. Another statement was made on Feb. 13, 2020, wherein MjLink filed an offering circularity showing its intent to list its common stock on NASDAQ if it realized \$4.3 million in net proceeds.

Another challenged statement, according to the memorandum, is Decentral's February 2021 press release announcing it had more than two years of runway capital to proceed with its growth strategy of being a technology hub for niche industries and businesses.

Those statements were equipped with extensive cautionary language warning investors of potential risks, the defendants said. Lamothe does not allege particularized facts to show a strong inference that the companies knew their statements were false when made, the memorandum added.

Nor can he rely on a subsequent event that caused stock prices to dip "to say that the later, sobering revelations made on the earlier, cheerier statement a falsehood," the memorandum said, quoting [Grossman v. Novell Inc.](#)

Nor does Lamothe explain how each of the defendants reaped any benefits from the alleged conduct to allow his unjust enrichment claim to survive, the defendants argued.

Representatives for Lamothe and the defendants did not immediately return inquiries for comment Tuesday.

The defendants are represented by Eric J. Benzenberg and Mark R. Basile of The Basile Law Firm PC.

Lamothe is represented by Lauren E.M. Thompson of Foster Graham Milstein & Calisher LLP, and Christa P. McLeod and Shomik Ghosh of Spiro Harrison & Nelson.

The case is Lamothe v. Decentral Life Inc. et al., case number 1:23-cv-03251, in the U.S. District Court for the District of Colorado.

--Additional reporting by Mike Curley. Editing by Vaqas Asghar.

Voyager Investors Suing Mark Cuban Reach Deal With Gronk

By **Alex Wittenberg**

Law360 (February 13, 2024, 9:18 PM EST) -- Investors suing billionaire Mark Cuban over his role in promoting now-bankrupt Voyager Digital Ltd. said Tuesday they had reached a tentative agreement with former NFL star Rob Gronkowski to stay claims tied to his social media posts and appearances boosting the cryptocurrency firm.



Rob Gronkowski, a former tight end for the New England Patriots, is seen at a college football game on Dec. 16 in Inglewood, California. The ex-NFL star reached a tentative settlement Tuesday with investors suing him, Mark Cuban and others over their roles in promoting an ill-fated cryptocurrency venture. (AP Photo/Ryan Sun)

Counsel for the investors disclosed the settlement plans during a status conference in Florida federal court on the group's putative class action against Cuban, the Dallas Mavericks and others. The proposed deal is the result of "very productive" discussions with Gronkowski, said Adam M. Moskowitz, counsel for the investors.

NBA player and defendant Victor Oladipo is also in talks with the investors on an agreement to stay the claims against him, attorneys for the parties said Tuesday.

If those discussions succeed, Oladipo and Gronkowski will join NASCAR driver Landon Cassill in settling claims against themselves in the case. Cassill, who was named in the investors' second amended complaint and was once sponsored by Voyager, resolved the claims he faced last year, according to a

November court filing.

Cuban and the Mavericks haven't had such success negotiating with the plaintiffs, attorneys said at the hearing. Settlement talks between the two sides broke down months ago when the parties were still "quite far apart," said David Boies, counsel for the investors.

The parties are scheduled to participate in mediation on May 14 — ahead of a trial slated to start Oct. 28 — but U.S. District Judge Roy K. Altman asked Tuesday whether an earlier settlement conference would benefit the case. He instructed Boies and Stephen A. Best, attorney for Cuban and the Mavericks, to continue discussions this week.

Judge Altman also broached the "stickier" issue of a **new complaint** lodged last week by Voyager investors against the NBA and law firm McCarter & English LLP that lists Cuban and the Mavericks as co-conspirators.

Best argued that the plaintiffs had missed a Dec. 26 deadline for amended pleadings and were trying to find a "circuitous way" to bring new charges against new defendants. He added that neither the NBA nor McCarter & English had been served and that he hadn't learned about the new complaint before reading about it in a Law360 article published Feb. 7.

But after hearing arguments, Judge Altman decided he would keep the case against the NBA and McCarter & English "siloe" for now because its claims are different from those against Cuban. Representatives of the NBA and the law firm didn't appear at Tuesday's hearing.

The Voyager investors launched their **proposed securities class action** in August 2022, accusing Cuban and others of tricking them into buying unregistered securities and furthering the company's "false and misleading promises" of large profits.

Voyager **opened** its Chapter 11 case a month earlier following a run on the lender and the default of a \$650 million loan to defunct crypto hedge fund Three Arrows Capital. The company received purchase offers from FTX and Binance.US before their own massive problems scuttled hopes for a sale.

In May 2023, Cuban asked Judge Altman to **sanction attorneys** for the Voyager investors over alleged false claims made against him. The attorneys **hit back** later that month, saying he was initiating a "sideshow" in an attempt to oppose the investors' request to file a revised version of their suit.

The investors are represented by David Boies, Stephen N. Zack and Tyler Evan Ulrich of Boies Schiller Flexner LLP, Adam M. Moskowitz, Joseph M. Kaye, Barbara C. Lewis and John E. Rodstrom of The Moskowitz Law Firm PLLC, Kerry J. Miller, Molly L. Wells and C. Hogan Paschal of Fishman Haygood LLP, and Jose Ferrer and Desiree Fernandez of Mark Migdal & Hayden LLP.

Cuban and the Mavericks are represented by Christopher E. Knight, Esther E. Galicia and Alexandra L. Tifford of Fowler White Burnett PA, Paul C. Huck Jr. of The Huck Law Firm PA, and Stephen A. Best, Rachel O. Wolkinson, Sigmund S. Wissner-Gross and Jessica N. Meyers of Brown Rudnick LLP.

The case is Robertson et al. v. Cuban et al., case number 1:22-cv-22538, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Lauren Berg, Alex Lawson, Katryna Perera and Emilie Ruscoe. Editing by Adam LoBelia.



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Wells Fargo Can't Beat Inflated Stock Option Suit

By **Grace Elletson**

Law360 (February 13, 2024, 8:13 PM EST) -- A Minnesota federal judge on Tuesday rejected Wells Fargo & Co.'s request to toss a proposed class action claiming the banking giant used its \$40 billion employee retirement plan to buy company stock options at an inflated value to shoulder the company's 401(k) matching burden.

U.S. District Judge Eric C. Tostrud denied the company's motion to dismiss the Employee Retirement Income Security Act suit brought by a group of former workers against Wells Fargo and GreatBanc Trust Co., the trustee for the ESOP plan, according to a docket entry. The order has been temporarily sealed.

The ruling bats down Wells Fargo's arguments, made in the July motion to dismiss, that the plan participants' allegations are based upon "pure conjecture."

"Defendants committed none of the ERISA violations plaintiffs charged them with in the amended complaint, let alone ones that caused plaintiffs injury," the company said.

The workers claimed in their **September 2022 suit** that the retirement plan acquired Wells Fargo preferred stock options through its employee stock ownership plan above fair market value, and that the company used the excess income generated from the returns to fulfill its 401(k) matching obligations.

That money, the workers said, should have benefited Wells Fargo workers instead of the company. This also caused them to pay above fair market value for the preferred stock options because the returns weren't included in the plan, but instead diverted for 401(k) matching, they claimed.

In its July motion to dismiss, Wells Fargo argued that the workers lack standing to keep their claims in play. The company said the workers received all the matching contributions and profit-sharing contributions they were entitled to receive under the plan, including dividends earned on those contributions. Therefore, they haven't faced an injury to stand up their suit, the company said.

Even after conducting jurisdictional discovery, the company said they haven't shown they were harmed. All preferred stock dividends held in the ESOP were used to pay off the ESOP loans used to purchase the preferred stock options, the company said.

Wells Fargo said it also paid an additional \$1 billion into the ESOP to make the loan payments to release the requisite number of Wells Fargo Common Stock shares to fund its employer contribution obligation, stating that the workers had no other right to an additional allocation of Wells Fargo common stock.

In an August brief filed in opposition to Wells Fargo's motion to dismiss, the workers argued that the bid to toss the suit is a "non sequitur." They called the company's standing argument "bizarre."

"They repeatedly argue plaintiffs have no injury based on the premise that plaintiffs have received all the benefits that they are due under the plan," the workers said. "But plaintiffs aren't suing for benefits under the plan. Rather, plaintiffs sue for breaches of fiduciary duty and prohibited transactions."

A Wells Fargo spokesperson declined to comment. Counsel for the workers did not immediately respond to a request for comment.

The workers are represented by Paul J. Lukas, Steven Andrew Smith and Brock J. Specht of Nichols Kaster PLLP; Gregory Y. Porter, Mark G. Boyko and Laura Babiak of Bailey & Glasser LLP; and by Nina Wasow, Daniel Feinberg and Todd Jackson of Feinberg Jackson Worthman & Wasow LLP.

Wells Fargo is represented by Russell L. Hirschhorn, Myron D. Rumeld, Tulio D. Chirinos and Sydney L. Juliano of Proskauer Rose LLP, and by Richard A. Duncan and Kiera Murphy of Faegre Drinker Biddle & Reath LLP.

The case is Randall et al. v. Greatbanc Trust Company et al., case number 0:22-cv-02354, in U.S. District Court for the District of Minnesota.

--Editing by Amy Rowe.

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Qihoo 360, Investors Ink \$29.75M Deal Over \$9.3B Merger Suit

By **Sydney Price**

Law360 (February 13, 2024, 8:45 PM EST) -- Investors suing Chinese software company Qihoo 360 Technology Co. Ltd. asked a New York federal judge to approve a \$29.75 million settlement ending claims the firm worked to push down its share price in order to pay shareholders an unfairly low price when it went private by means of a \$9.3 billion merger.

The \$29.75 million settlement fund represents about 3.27% of the \$909.81 million total alleged damages. Three-quarters of the settlement fund will go to Qihoo shareholders who sold their shares during the class period, and the remaining 25% will go to shareholders who tendered their shares in the merger, according to Monday's settlement notice.

"The Settlement is demonstrably the product of well-informed and vigorous advocacy on behalf of the Settlement Class," the motion states.

Lead counsel for the plaintiffs intend to request up to approximately \$10 million in fees and up to \$1.1 million in litigation expenses.

The parties notified the court back in December of their intentions to settle. According to the settlement notice, the parties reached an agreement on Dec. 8, 2023, following extensive discovery and a full-day mediation session in September. Additional discovery would be particularly complex and uncertain due to the international nature of the suit, the motion states.

The proposed settlement came the same month U.S. District Judge Paul A. Engelmayer largely sided with the plaintiffs in a discovery dispute, ordering Qihoo to hand over certain documents. Qihoo had initially tried to resist turning over about 70,000 documents related to an appraisal suit brought in the Cayman Islands, but ultimately relented.

The investors moved for class certification in October, which has not been approved. In the settlement motion, the investors asked for the proposed class to be approved for settlement purposes.

Paris-based Altimeo Asset Management and Florida-based ODS Capital first brought the suit on behalf of anyone who owned or sold Qihoo 360 ADS — the company's American depositary shares — between December 2015 and July 2016, when Qihoo 360 announced it had been sold for \$9.3 billion to a group, led by its former founders and executives, that was taking the company private.

They alleged that the software company had deliberately misled shareholders about its value to drive down the merger price, only to relist the core part of the business through a "backdoor listing" in China shortly after.

Judge Engelmayer granted Qihoo 360's motion to dismiss in 2021, only to have that ruling vacated by the Second Circuit in 2022. In March 2023, Judge Engelmayer denied the bulk of Qihoo 360's motion to dismiss but trimmed the suit, dismissing certain claims from shareholders who tendered their shares at the time of the merger.

Counsel for the parties did not immediately respond to requests for comment on Tuesday.

Lead plaintiffs Altimeo Asset Management and ODS Capital LLC are represented by Jeremy A.

Lieberman and Michael Grunfeld of Pomerantz LLP and Carol C. Villegas, David J. Schwartz and Jake Bissell-Linsk of Labaton Sucharow LLP.

Qihoo 360 is represented by Eric F. Leon, Jason C. Hegt, Alexander Lazaro Mills and Hanyu "Iris" Xie of Latham & Watkins LLP.

The case is Altimeo Asset Management v. Qihoo 360 Technology Co. Ltd. et al., case number 1:19-cv-10067, in the U.S. District Court for the Southern District of New York.

--Editing by Vaqas Asghar.

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Shareholders Seek Approval For \$7.5M Faraday Future Deal

By **Tom Lotshaw**

Law360 (February 14, 2024, 11:54 AM EST) -- Faraday Future Intelligent Electric Inc. investors are asking a California federal judge to certify a settlement class and approve a \$7.5 million deal to resolve their claims that the company misled them about its electric vehicle reservations and financial prospects before a go-public special-purpose acquisition company merger.

Lead plaintiffs Byambadorj Nomin, Hao Guojun, Peihao Wang and Shentao Ye said that while they believe their suit against the Los Angeles-based company is strong, **the proposed settlement** is fair, reasonable and adequate, and in the best interests of the proposed class of investors.

U.S. District Judge Christina A. Snyder gave an initial nod to the settlement **in November**.

In a court **filing** Monday, the lead plaintiffs said the settlement would recover about 3.4% of the \$205 million in total maximum damages their expert estimated under a best-case scenario. That's above the 1.8% median recovery for securities class actions that settled in 2022, they said, and the 2.4% median recovery for such actions involving estimated damages between \$200 million and \$399 million.

"The settlement provides a substantial recovery to the settlement class despite several obstacles that plaintiffs faced, including the amount of potentially recoverable damages, defendants' potential defenses, defendants' ability to pay a larger amount and the risks of prosecuting this litigation through trial and appeals," the lead plaintiffs told the court.

The proposed settlement class includes all people and entities who purchased or acquired Faraday securities between Jan. 28, 2021, and April 14, 2022, as well as shareholders of the SPAC — Property Solutions Acquisition Corp. — who had been eligible to vote on the merger.

The deal would end allegations concerning Faraday's **\$3.4 billion go-public merger in 2021**, which saw the company combine with the SPAC after the latter had raised nearly \$230 million in a 2020 initial public offering.

The investors claimed the company deceived them by asserting it had received 14,000 reservations for one of its vehicles before the merger, when it had actually only received a few hundred reservations. They also pointed to the company's statement that it would bring the car to market within a year of the merger, claiming that when the company later had to concede that statement wasn't realistic, trading prices for its shares fell.

The lead plaintiffs also told the court that a proposed allocation plan for the settlement has "a reasonable, rational basis" and would distribute funds on a pro rata basis based on factors such as when people purchased and sold securities and at what price.

"Plaintiffs engaged a damages consultant to assist in developing a plan to allocate the settlement proceeds among claimants with the goal of reimbursing settlement class members in a fair and reasonable manner," the lead plaintiffs said. "Here, each authorized claimant will receive a pro rata share of the net settlement fund (comprised of cash, plus interest, less court-approved fees and expenses) based on the claimant's recognized loss as calculated in accordance with the plan."

According to Monday's court filing, the deal would steer \$5,000 to each of the four lead plaintiffs and

award lead counsel attorney fees of 25% of the settlement plus interest and about \$122,000 in expenses.

The lead plaintiffs said 45,721 potential class members were either mailed a settlement notice packet or emailed a direct link to it. While the deadline to object is Feb. 26, they said, no class members have formally objected to date and the claims administrator has received three exclusion requests.

"The lack of objections and the small number of requests for exclusion support final approval," the lead plaintiffs told the court.

Representatives for the parties could not immediately be reached for comment.

The plaintiffs are represented by Austin P. Van, Jeremy A. Lieberman and Jennifer Pafiti of Pomerantz LLP, Matthew M. Guiney, Patrick Donovan and Rourke C. Donahue of Wolf Haldenstein Adler Freeman & Herz LLP, Junbo Hao of Hao Law Firm, and Laurence M. Rosen of the Rosen Law Firm PA.

Faraday is represented by Pamela S. Palmer, Alan Kessel, Jay A. Dubow and Erica Hall Dressler of Troutman Pepper Hamilton Sanders LLP.

The case is Jian Zhou et al. v. Faraday Future Intelligent Electric Inc. et al., case number 2:21-cv-09914, in the U.S. District Court for the Central District of California.

--Editing by Daniel King.

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OpenText Wants Out Of Class Action Coverage Suit

By **Emily Enfinger**

Law360 (February 13, 2024, 4:17 PM EST) -- OpenText told a Michigan federal court it should be dismissed from an insurer's suit seeking to avoid coverage of a class action from former Covisint shareholders alleging an unfair merger, saying it's not involved in the underlying case and its only alleged connection is that it acquired outstanding Covisint stock.



OpenText argues that Wesco's coverage suit contains few allegations concerning it and that none of those allegations are sufficient to state a claim against it. (Rafael Henrique/SOPA Images/LightRocket via Getty Images)

In a **motion** Friday, OpenText Corp. told the court that Wesco Insurance Co. had no basis to loop the company into the coverage fight, saying it is not a party to the underlying litigation or the insurance policy at issue.

The Canadian corporation said that the insurer's complaint contains few allegations concerning it and that none of those allegations are sufficient to state a claim against it.

"Wesco does not, because it cannot, state a single fact that could result in any legally cognizable claim against OTC, much less any valid basis for making OTC a defendant in this action," the company said.

The shareholder action was first filed in 2017, shortly after Covisint announced that OpenText agreed to acquire it at \$2.45 per share. The suit, which **won class certification in October**, alleged that Covisint's cash-out merger was unfair to shareholders and was "significantly below the indications of interest the company received from other bidders between February 2016 and February 2017, which ranged as high

as \$3.75 per share."

The present coverage fight began in July 2023 when Wesco asked the court to agree that the policy it issued to Covisint does not provide coverage for the underlying lawsuit because the damages it sought are excluded from the policy's definition of "loss."

Last week, a group of former Covisint officers and directors argued that the insurer's suit **lacks subject-matter jurisdiction**, saying the underlying action is still months away from trial.

"At this point, this case is seeking nothing but an improper advisory opinion," the group of former executives said.

If the court decides not to toss the insurer's suit, the former executives said, it should consider halting the coverage fight until the shareholder suit is resolved.

On Friday, OpenText said that it was joining the motion lodged by the group of former Covisint executives, saying the insurer's complaint is "facially odd and deficient as a matter of law."

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

Wesco Insurance Co. is represented by Nicole E. Wilinski of Collins Einhorn Farrell PC and by April H. Gassler of Sperduto Thompson & Gassler PLC.

Defendants Samuel M. Inman III, John F. Smith, Bernard M. Goldsmith, William O. Grabe, Lawrence David Hansen and Enrico Digirolamo are represented by William H. Horton and John R. Fleming of Giarmarco Mullins & Horton PC.

Defendants Andreas Mai and Jonathan Yaron are represented by Thomas G. Costello of Lipson Neilson PC.

OpenText Corp. is represented by Edwin M. Baum of Perkins Coie LLP and by Jewel Haji Boelstler and Nick Gorga of Honigman LLP.

The case is Wesco Insurance Co. v. OpenText Corp. et al., case number 2:23-cv-11816, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Carolyn Muyskens. Editing by Khalid Adad.

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6th Circ. Backs Drugmakers' Early Win In Diabetes Drug MDL

By **Hailey Konnath**

Law360 (February 13, 2024, 10:57 PM EST) -- The Sixth Circuit on Tuesday affirmed an early victory for AstraZeneca Pharmaceuticals LP, Bristol Myers Squibb Co. and McKesson Corp. in multidistrict litigation alleging the diabetes drugs they manufacture, Onglyza and Kombiglyze, cause heart failure, holding that a lower court had multiple "good reasons" for finding the plaintiffs' expert's testimony unreliable.

The three-judge panel refused to vacate a summary judgment ruling in favor of the drugmakers, agreeing with a Kentucky federal court's finding that the patients behind the suit had no admissible expert testimony backing their claims that the drugs' active ingredient is likely capable of causing heart failure.

In particular, the panel said that the plaintiffs' only so-called causation expert, Dr. Parag Goyal, relied on just one study, "to the exclusion of all other studies involving human data" without offering an adequate reason for doing so, and he thus failed to base his opinion on "sufficient facts or data."

He also used animal data in forming his opinion despite the fact that he acknowledged he has no expertise in interpreting such studies, the Sixth Circuit said. And he acknowledged ignoring multiple peer-reviewed animal studies that dispelled any causal link between the active ingredient and heart failure.

The lower court thus didn't abuse its discretion in excluding Goyal's testimony, the Sixth Circuit said.

The panel also rejected the patients' argument that they didn't need his testimony to survive the drugmakers' summary judgment motion. In a case like this one, expert testimony is indeed required to show general causation, the Sixth Circuit said.

"While plaintiffs contest this requirement, they identify no state without a requirement of expert testimony to establish general causation in complex medical cases," the panel said. "Instead, plaintiffs resort to selectively quoting cases."

That means that without Goyal's testimony, their claims indeed fail, the Sixth Circuit said.

U.S. District Judge Karen K. Caldwell granted summary judgment for the drugmakers **in August 2022**, ruling that testimony from non-experts — or lay testimony — isn't enough to prove causation in such a case.

"Even if expert testimony on general causation were not required, defendants are entitled to summary judgment because plaintiffs have produced no evidence from which a jury could fairly infer that [the active ingredient] is capable of causing heart failure," Judge Caldwell said at the time.

She also refused to modify her scheduling order to allow the plaintiffs time to find a new expert, saying they were asking for "yet more time" more than two years after the initial deadline to serve expert reports.

On Tuesday, the Sixth Circuit said Judge Caldwell was also correct in refusing to give them more time to find an expert. The patients were asking to reopen expert testimony, yet they "cannot explain why they have failed to identify other, reliable general causation experts — despite years of expert

discovery," the decision said.

And granting their request would essentially restart expert discovery, requiring depositions, briefing, hearings and motions on their new expert, the panel said. That would delay resolution of the multidistrict litigation by years and would likely impose significant costs on the drugmakers.

"The court properly refused to reward plaintiffs for their failure to identify a reliable general causation expert by imposing significant costs on defendants," the panel said.

"To find otherwise would set a precedent that parties may drag out litigation by identifying 'only one expert witness on a crucial issue who is later excluded,'" it added, citing the lower court's summary judgment ruling.

Onglyza was introduced to the U.S. market in July 2009, and Kombiglyze entered the market the following year.

Onglyza is saxagliptin, and Kombiglyze is a combination of saxagliptin and metformin, which help control blood glucose. The drugs were marketed as treatments for type 2 diabetes, but patients said they come with significant increased risks of heart failure.

Specifically, the patients claimed that during the development of the drugs, the companies failed to perform adequate studies to determine if their drugs caused higher risks of adverse cardiovascular events. They also alleged that the drug companies failed to warn of the risks of heart failure and death.

In April 2015, the U.S. Food and Drug Administration determined saxagliptin **is safe** after conducting an investigation but recommended new safety information be added to the drug's label.

Bristol Myers Squibb, AstraZeneca, McKesson and counsel for the plaintiffs didn't immediately respond to requests for comment late Tuesday.

U.S. Circuit Judges Eugene E. Siler Jr., John B. Nalbandian and Stephanie Dawkins Davis sat on the panel for the Sixth Circuit.

The patients are represented by Jennifer A. Moore and Ashton Rose Smith of Moore Law Group PLLC.

The drugmakers are represented by Paul W. Schmidt and Emily S. Ullman of Covington & Burling LLP and Carol Dan Browning of Stites & Harbison PLLC.

The case is Leatha Taylor et al. v. Bristol-Myers Squibb Co. et al., case number 22-6078, in the U.S. Court of Appeals for the Sixth Circuit. The MDL is In re: Onglyza and Kombiglyze XR Products Liability Litigation, MDL number 2809, in the U.S. District Court for the Eastern District of Kentucky.

--Editing by Michael Watanabe.

Campbell Soup Sued For Claiming V8 Splash Is 'Healthy'

By **Gina Kim**

Law360 (February 13, 2024, 4:49 PM EST) -- Campbell Soup Co. is misleading customers into thinking its V8 Splash beverages are healthy and nutritious despite containing little to no actual fruit juice and consisting mostly of artificially-flavored "sugar water" and high-fructose corn syrup, according to a proposed class action filed in California federal court.



Campbell Soup Co. misleads shoppers into thinking its V8 Splash beverages are healthy and contain vitamins and minerals coming from natural fruits, when they mainly consist of artificial flavors, water and high-fructose corn syrup, according to a proposed class action filed in California federal court Monday. (Court Documents)

Two California residents, Monica Serrano and Debra Shaw, alleged Monday that they bought the V8 Splash beverages on multiple occasions from retailers including Smart and Final, Walmart, Food 4 Less, CVS and Ralphs over the last few years, relying on the labeling of the products: they believed the drinks to be healthy and contain vitamins and minerals from real fruit or fruit juices.

However, the products, at most, contain 1% to 2% or less juice from any of the fruits displayed on the bottles' front label, the plaintiffs alleged, arguing this amount isn't enough to make any of the beverages taste like any of the fruits or berries advertised by Campbell. Some V8 Splash drinks contain absolutely no fruit juice, but instead consist mainly of "sugar water" and flavorings, with a "token amount" of reconstituted sweet potato juice or dried carrot, the complaint said.

"The products are labeled as if they were solely naturally-flavored beverages, with the names of fruits and berries and photo-realistic images of fresh, ripe natural fruits and berries," the complaint said. "Instead, the products are predominantly water and sweeteners, artificially flavored to mimic the taste of fruit."

The V8 Splash "Berry Blend," for example, prominently features images of ripe berries, but the drink lacks any fruit or berry juice, the shoppers alleged. It instead includes a synthetic "Red 40" dye to make it appear like fruit juice, the suit said, and an undisclosed, artificial, tart-like flavoring to make the product taste like fruit.

The ingredient list on the back of the product shows the V8 drinks contain water, high-fructose corn syrup, sweet potato juice and carrot juice concentrates, sucralose, preservatives, licorice extract and vitamins B3, B6 and B12, according to the complaint.

The food manufacturing giant behind well-known brands like Pepperidge Farm, Snyder's of Hanover and Swanson takes advantage of its brand image and reputation, as well as consumer acceptance of its V8 products, and is able to gain an unfair commercial advantage over its competitors in the marketplace with its deceptive practices, the suit said.

Shaw and Serrano alleged they first discovered Campbell's allegedly deceptive marketing practices last fall. Both are reasonable consumers who aren't required to do their own laboratory analyses on the beverages, scrutinize the back of the label to figure out if the front label is misleading, or do any further digging to look into state and federal regulations governing product labeling, the complaint said.

The complaint said V8 Splash products also breach federal and state policies governing food fortification: meaning, companies cannot randomly add vitamins to food and beverage products. While the beverages are prominently advertised as a source of antioxidant vitamins, these types of random additions and labeling of nutrient additions are misleading to consumers, the complaint alleged.

Instead of including a substantial amount of naturally occurring vitamins and minerals coming from real fruit into the V8 Splash, only a small amount of synthetic vitamins are "sprinkled in" during the manufacturing process by Campbell, the complaint said.

The shoppers seek to represent several proposed classes, including a nationwide class of shoppers in the U.S. who bought the V8 Splash drinks at issue on or after Jan. 1, 2016, through the date of class certification.

They also seek to represent a proposed California subclass of all Golden State consumers who bought the drinks on or after Jan. 1, 2018, until class certification. Shaw and Serrano said they also plan to represent a multistate class alleging claims for warranty breaches on behalf of several states, including Delaware, Kansas, Virginia, California, Utah and Ohio.

The complaint asserts several causes of action against Campbell, including a violation of the California Consumer Legal Remedies Act, California's Unfair Competition Law and False Advertising Law, the New Jersey Consumer Fraud Act, breaches of express and implied warranties, intentional misrepresentation and fraud by omission.

A spokesperson for Campbell said Tuesday the company declines to comment on pending litigation.

Representatives for the plaintiffs did not immediately respond to requests for comment Tuesday.

The plaintiffs are represented by Marc L. Godino and Kevin F. Ruf of Glancy Prongay & Murray LLP.

Counsel information for Campbell was not immediately available.

The case is Serrano et al. v. Campbell Soup Co., case number 2:24-cv-01176, in the U.S. District Court for the Central District of California.

--Editing by Caitlin Wolper.

Update: This article has been updated to reflect a comment from a Campbell's spokesperson.



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Restaurants Trying To Derail Chicken Deals, 7th Circ. Told

By **Lauraann Wood**

Law360 (February 13, 2024, 7:18 PM EST) -- Direct broiler chicken purchasers who've inked nearly \$285 million in price-fixing settlements blasted Boston Market and other restaurants' attempts to stop an \$8 million deal from Simmons Foods, telling the Seventh Circuit the companies are trying to illegally unwind a strategic mistake.

The Seventh Circuit should outright affirm the district court's final approval for Simmons' \$8 million settlement because the objectors are unwilling class members who only take issue with the fact that they are bound by the deal, the direct purchasers argued Tuesday in their motion. Their appeal doesn't challenge the value of Simmons' settlement, and "their only purpose is to delay and perhaps derail a settlement to which all interested parties and the district court have assented," the class told the court.

"This court should thwart their illegitimate objective by summarily affirming," they argued.

Simmons' settlement is one of 13 the lower court has approved in the massive consolidated antitrust case claiming chicken producers including Tyson, Pilgrim's and Koch conspired to inflate prices through a supply reduction scheme, according to the direct purchasers' motion. U.S. District Judge Thomas Durkin, who has handled the litigation since its inception in 2016, gave the deal his final blessing in December alongside settlements with producers O.K. Foods and Mountaineer Farms.

Boston Market, Golden Corral and several other companies had filed their own lawsuits in the sprawling suit and received "ample" notice of their obligation to opt out before their April deadline, the direct purchasers told the appellate court. Rather than meet the deadline, the restaurants sought five months later and on the eve of trial to "confirm" their opt-out status given their complaint's inclusion of **bid-rigging claims**, which are being litigated on a separate track in the case, the purchasers said.

Judge Durkin said the chains should have followed required class opt-out procedures to avoid being included in and bound by the settlement, according to court records. It was only then that the restaurants decided to object to the Simmons settlement, the purchasers argued Tuesday.

"Their transparent attempt to undo their strategic mistake by appealing the Simmons settlement, which is universally supported by the bona fide DPP Class members, is improper and cannot support reversing final approval," they told the court.

The objectors cannot meet their high burden of showing that Judge Durkin abused his discretion in approving the Simmons settlement, the purchasers argued. After handling the litigation for seven years and presiding over a **jury trial** that ended with a defense win, the judge was "uniquely qualified" to assess the fairness and adequacy of Simmons' deal, they argued.

The appellate court should also reject the objectors' "quibble" regarding allegedly insufficient class notice regarding the Simmons deal, the purchasers argued. The restaurants argue the notice should have alerted them that entering the settlement would release their bid-rigging claims, but the notice included all the information required under the civil procedure rule governing class actions, they told the court.

"A claim that additional detail or analysis is required in a class notice is without merit," they argued.

Counsel for the direct purchasers and the objectors declined to comment Tuesday, and representatives for Simmons didn't immediately respond to a request for comment.

The case was launched in September 2016, when private plaintiffs sued the nation's largest broiler chicken producers over price-fixing allegations. Since then, the case has grown to include plaintiffs at nearly every point in the supply chain — from grocery stores to restaurants to end-user consumers.

The plaintiffs are largely separated into three classes: direct purchasers, commercial and institutional indirect purchasers, and end users. The case is also moving along two tracks, the second of which includes plaintiffs that intend to pursue late-addition bid-rigging claims alongside the price-fixing allegations.

The case's so-called track-one plaintiffs have agreed to forgo the bid-rigging claims, and the direct purchasers are the only class that has gone to trial so far. The indirect purchasers are the second track-one group going to trial, with jury selection scheduled for March.

Looming large over the civil case, however, are several criminal cases brought by the U.S. Department of Justice that fizzled out last year with a string of acquittals and mistrials following a guilty plea from Pilgrim's Pride and cooperation from Tyson Foods, antitrust attorneys have told Law360.

Five chicken industry executives were acquitted of criminal antitrust charges after two mistrials, and the DOJ ultimately dismissed charges against nine other people who were initially accused of participating in the scheme, along with charges against Claxton Poultry and Koch Foods.

In total, federal prosecutors charged 14 people with participating in the scheme without winning a single conviction and secured a guilty plea from only one of the companies it accused of being involved.

The direct purchaser class is led by Pearson Warshaw LLP and Lockridge Grindal & Nauen PLLP.

The objectors are represented by Bilzin Sumberg Baena Price & Axelrod LLP.

Simmons is represented by Shook Hardy & Bacon LLP and Conner & Winters.

The case is Boston Market Corporation, et al. v. Mountaineer Farms, Incorporated, et al., case number 24-1030, in the U.S. Circuit Court of Appeals for the Seventh Circuit.

--Editing by Kelly Duncan.



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Tesla Fights To Send False EV Mileage Fight To Arbitration

By **Dorothy Atkins**

Law360 (February 13, 2024, 10:17 PM EST) -- Tesla urged a California federal judge Tuesday to send to arbitration two proposed class actions alleging that the company falsely advertised inflated mileage ranges for its electric vehicles at the direction of CEO Elon Musk, arguing that the car owners agreed to arbitrate their disputes when they ordered the vehicles.

During a hearing in Oakland, California, Tesla's counsel, David L. Schrader of Morgan Lewis & Bockius LLP, told U.S. District Judge Yvonne Gonzalez Rogers that Tesla's order contract expressly incorporates the AAA Consumer Arbitration Rules, which provide that the arbitrator "shall have the power to rule on his or her own jurisdiction," and the named plaintiffs agreed to the provision.

The **suits were filed** in August by lead plaintiffs James Porter, Samuel Van Diest and other Tesla vehicle owners in the wake of Reuters news report that made similar allegations in July. The complaints generally allege Musk directed the company to inflate mileage ranges in advertisements and then used a secret "diversion team" to cancel service appointments over range issues and convince customers their batteries were operating normally.

The Tesla owners claim that, in some instances, the electric-car maker advertised its vehicles as having ranges that were up to 26% over the actual average range of the electric vehicle, according to the complaints.

But in November, Tesla filed motions asking the court to send the dispute to arbitration, arguing that each Tesla buyer repeatedly agreed to arbitration when they ordered their vehicles, accepted their delivery and signed sales agreements. Tesla also argued in its motions that the plaintiffs have refused to individually arbitrate their claims, even though plaintiffs' counsel sent Tesla a letter threatening mass individual arbitration.

On Tuesday, Judge Gonzalez Rogers began the hourslong hearing on Tesla's motions by focusing her questions on which Tesla contract controls and whether Tesla car buyers legally qualify as being "sophisticated" to validly accept arbitration, and whether their status matters under the Ninth Circuit's 2015 **Brennan v. Opus Bank**  **decision**.

The parties agreed that the arbitration provision in the order agreement is the primary contract at issue, but they disagreed over whether Tesla owners could be considered sophisticated, and each side cited various conflicting lower court rulings that favored their positions.

For her part, Judge Gonzalez Rogers appeared skeptical of arguments that the consumers were unsophisticated.

"All consumers buy cars, but not all consumers buy a Tesla," the judge said.

William A. Ladnier of Milberg Coleman Bryson Phillips Grossman PLLC argued on behalf of the Porter plaintiffs that there's no case law that says there's a "bright line rule" on what constitutes a sophisticated party, and he pointed to a ruling by U.S. District Judge Jon Tigar in finding that a Dickey's Barbecue franchisor was unsophisticated.

The judge also questioned whether the court must keep or sever any claim seeking public injunctive relief while the rest of the claims are decided by an arbitrator in light of the California Supreme

Court's 2017 **decision** in McGill v. Citibank, which held that, under California law, a clause prohibiting someone from seeking public injunctive relief was invalid and unenforceable.

Tesla's counsel suggested that the court could stay litigation on the other claims, which is what other courts have done in some cases, while the question of public injunctive relief is litigated in court.

But Judge Gonzalez Rogers appeared skeptical, adding, "I don't know how anybody can litigate a remedy without a claim."

The judge also questioned how she could decide injunctive relief without reviewing the facts of the case and weighing on the evidence through motions practice, and she noted the legal requirements for injunctive relief are distinct from damages claims.

"How is a court supposed to impose injunctive relief without making the findings that would be necessary to understand the equities involved in injunctive relief?" she asked Schrader. "You would have to retry the entire case, which is contrary to the whole point of arbitrating. How does that happen?"

Judge Gonzalez Rogers told Tesla's counsel that the court has to think about the litigation path in advance, and she doubted that there is a clear efficient litigation path forward if she has to decide injunctive relief.

The judge added that, at such an early stage of litigation, the court has to presume that the injunctive relief is going to prevail, because "preserving the [court's] ability to do something that one cannot do is pointless."

"I don't like to do pointless tasks," she added. "There has to be some forethought as to how one gives injunctive relief without the factual background."

Tesla's counsel responded that the Federal Arbitration Act and the U.S. Supreme Court's ruling on the statute favors enforcing arbitration agreements.

But the judge retorted, "There is certainly no case law that says, 'We want to support arbitration to make things duplicative,' that does not support the Supreme Court's view on arbitration."

Judge Gonzalez Rogers noted that the Supreme Court's ruling has clarified that agreeing to arbitration is a matter of contract and that arbitration is preferred for being "faster, more efficient" than litigation, but the judge said she takes issue with the justices' suggestion that arbitration is always more efficient.

"It's not clear to me that [arbitration] is faster or more efficient given how many cases I have stayed [pending the outcome of arbitration]," she said.

Judge Gonzalez Rogers added that "certainly" the Supreme Court's decision on arbitration doesn't support duplicative efforts with two proceedings occurring simultaneously in private arbitration and the courts.

At the end of the hearing, the judge didn't rule from the bench and took the arguments under submission.

"I'm going to go back and obviously look at contract language," Judge Gonzalez Rogers told the parties. "I do think there is a lot of disagreement in the courts about how these things should be interpreted when there are ambiguities [in the contracts], so I would like to go back and look at it."

The consumer litigation comes as Tesla is fighting dozens of race bias lawsuits filed by Tesla workers that are pending in California state court, including a case filed by the California Civil Rights Department.

During a case management conference in that **litigation** in January, plaintiffs' counsel accused Tesla of "obfuscation," "scorched earth litigation" and intentionally delaying litigation in their years-old litigation. One plaintiffs' attorney told the state judge the company has "vastly overplayed its

arbitration plan" to purportedly delay proceedings.

The Porter plaintiffs are represented by William A. Ladtner of Milberg Coleman Bryson Phillips Grossman PLLC.

The Van Diest plaintiffs are represented by Sophia Goren Gold of KaliefGold PLLC.

Tesla is represented by David L. Schrader and Mark A. Feller of Morgan Lewis & Bockius LLP.

The cases are James Porter et al. v. Tesla Inc., case number 4:23-cv-03878, and Samuel Van Diest et al. v. Tesla Inc. doing business as Tesla Motors, case number 4:23-cv-04098, both in the U.S. District Court for the Northern District of California.

--Additional reporting by Craig Clough. Editing by Dave Trumbore.

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