

Muddy Waters Research report saves shareholder case against China's biggest real estate brokerage

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Alison Frankel



A specialist trader works inside a post on the floor of the New York Stock Exchange (NYSE) in New York, U.S., April 17, 2017. REUTERS/Brendan McDermid Purchase Licensing Rights [↗](#), opens new tab

Feb 27 (Reuters) - How much credence should judges overseeing shareholder class actions give to reports by short sellers?

U.S. District Judge Gregory Woods of Manhattan confronted that question in a ruling [↗](#), opens new tab on Monday in a case accusing the gigantic Chinese real estate brokerage KE Holdings (2423.HK) [↗](#), opens new tab of drastically overstating key financial metrics, including how many agents and stores actively use its online platform.

Shareholder lawyers from Robbins Geller Rudman & Dowd based their allegations almost entirely on a 2021 report by the short-seller Muddy Waters Research, which tagged KE as a “massive fraud” after an extensive investigation.

In their motion to dismiss [↗](#), opens new tab the shareholder case, KE’s counsel urged Woods to disregard claims based on the Muddy Waters report because, among other things, Robbins Geller failed to conduct an independent investigation to corroborate the short seller’s accusations.

New York federal courts have generally been leery of short-seller reports because outfits like Muddy Waters and Hindenburg Research have an obvious financial motive to drive down the share price of companies they have targeted.

I told you last year, for instance, about a series of recent decisions by U.S. District Judge Paul Engelmayer of Manhattan in shareholder class actions premised on short-seller reports.

Engelmayer tossed all three cases — and though he didn't categorically slam the door on cases that rely on short-seller reports, he said plaintiffs' lawyers have to give judges a good reason to trust short-sellers' assertions.

In Monday's KE decision, Woods cited Engelmayer's decisions, agreeing that judges overseeing securities cases should be wary of short-seller reports, especially when the reports include allegations from confidential or anonymous sources.

But Woods pointed out that Engelmayer's cautionary rulings, including the 2023 dismissal [\[1\]](#), opens new tab of an investor class action based on a Hindenburg report criticizing DraftKings (DKNG.O) [\[2\]](#), opens new tab, "should not be misread as stating a rule that short seller reports are to be disregarded."

In effect, Woods said that courts have to look at the substance of the underlying short-seller accusations.

In this case, he said, the Muddy Waters report on KE wasn't based just on anonymous sources. The short-seller developed computer programs to crunch publicly available data from KE's platform, then sent out investigators to verify its data-based suspicions about how many stores and brokers were actually using the platform. Muddy Waters also used Chinese government data to raise doubts about the number of KE employees in key real estate markets.

This report, in other words, did not merely recite unsubstantiated allegations from anonymous whistleblowers, Woods said. Muddy Waters included data analysis, photographs, screenshots and transcripts to back its assertions. The short-seller's evidence, the judge said, amounted to "sufficiently reliable support" for shareholder's claims.

To be sure, Woods did end up dismissing most of the shareholder case. He tossed shareholders' Exchange Act allegations in their entirety because he concluded that their complaint failed to show KE's fraudulent intent. He also dismissed claims that KE was required to disclose how many of its purported platform users were inactive.

But Woods ruled that investors can proceed with Securities Act claims that KE's filings for its \$2.3 billion, post-IPO stock offering in 2020 contained false statements about the metrics at the heart of the Muddy Waters report.

A KE spokesperson did not respond to my email. The company, which is represented by Skadden, Arps, Slate, Meagher & Flom and O'Melveny & Myers, has said repeatedly that the Muddy Waters report was fatally flawed because (among other things) it was based only on publicly available data, not on KE's internal information. (Full disclosure: My daughter works at Skadden but is not in the securities group and was not involved in this case.)

KE told Woods that its audit committee conducted an independent investigation of the Muddy Waters allegations after the short-seller's report and found them to be unsubstantiated. The company also said that the market quickly shrugged off Muddy Waters' report, rebounding in a day of trading from an initial 5.75% drop.

Robbins Geller did not offer comment on Woods' decision. The judge gave shareholders three weeks to file an amended complaint to try to revive their Exchange Act claims.

I don't want to overstate the implications of Woods' analysis of the Muddy Waters report. Securities class action defendants, for the most part, have done an impressive job of persuading courts not to rely on allegations from traders whose goal is to drive down a company's share price.

Indeed, just last week, in a shareholder class action against Chinese entertainment streaming company iQIYI (IQ.O) [opens new tab](#), iQIYI's lawyers from Skadden told [opens new tab](#) U.S. District Judge Diane Gujarati of Brooklyn about six decisions in the last year that rejected shareholder claims based on short-seller reports. The judges in all six of those rulings, according to Skadden's letter brief, concluded that short-sellers were either unreliable — because of their own self-interest or because of flimsy investigations — or were merely repackaging already-public information.

But Woods' KE decision is a reminder that short-seller reports are not created equal. Shareholder lawyers might want to keep that in mind when they contemplate class actions that depend on short-seller allegations.

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DraftKings investors can't rely on short-seller report to prove fraud - N.Y. judge
Short-seller Muddy Waters takes aim at Chinese firm KE Holdings
Reporting By Alison Frankel

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Chinese Real Estate Platform Beike Faces Some Investor Claims

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KE Holdings Inc. investors may proceed with claims that the company, which operates the Beike online brokerage platform for real estate in China, misrepresented various business metrics in its secondary public offering, a federal court ruled.

But the investors didn't adequately support all the misrepresentations they claimed in the proposed class action, Judge Gregory H. Woods said Monday for the US District Court for the Southern District of New York.

And they failed to show the necessary level of intent for securities fraud claims under the Securities Exchange Act, he said.

Investors aren't required to plead intent when alleging misstatements in offering documents, he said.

The case concerns the impact of a short-seller report. Such reports by funds that benefit from a company's stock declining in value are sometimes accepted—and sometimes rejected—by courts assessing complaints by investors.

Here, the surviving claims are based on a short-seller report by Muddy Waters Capital LLC—a report that's sufficiently reliable at this early stage of the litigation, Woods said. The report asserted that KE, which also operates and franchises physical brokerage stores, inflated its gross transaction value, revenue, number of stores, and number of agents.

The lead plaintiff, the Saskatchewan Healthcare Employees' Pension Plan, seeks to represent a class of investors who purchased KE's American Depositary Shares in a November 2020 secondary public offering. The ADS price dropped 5.74% in December 2021 as the market absorbed the impact of the Muddy Waters report, the fund says. ADS shares allow US investors to purchase stock in companies that trade on foreign exchanges. KE is based in Beijing and incorporated in the Cayman Islands.

Woods said that KE's nondisclosure of the number of its active agents doesn't by itself support a misrepresentation claim. But the nondisclosure "enhances the plausibility" of the Muddy Waters-supported claims of an overcount of stores and agents, he said.

Robbins Geller Rudman & Dowd LLP represents the investors. **O'Melveny & Myers LLP** and **Skadden, Arps, Slate, Meagher & Flom LLP** represent KE.

The case is Saskatchewan Healthcare Emps. Pension Plan v. KE Holdings Inc. , 2024 BL 61374, S.D.N.Y., No. 1:21-cv-11196, 2/26/24 .

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Nation's Restaurateurs Urged to Apply for Credit Card Fee Claim As Part of Lawsuit Settlement



totalfood.com/restaurants-credit-card-fee-claim-lawsuit-settlement/

Total Food Service

February 27, 2024

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By

Total Food Service

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February 27, 2024



What would you do with part of a \$5.5 billion lawsuit settlement?

In 2005, a trio of national law firms helped set more than 16 million American merchants on the path to answering that question. Minneapolis, MN-based Robins Kaplan LLP, Philadelphia, PA-headquartered Berger Montague, and Robbins Geller Rudman & Dowd of San Diego, CA, teamed to sue payment

card conglomerates Visa and Mastercard, as well as card-issuing banks such as JPMorgan Chase and Bank of America, for charging grossly inflated and monopolistic transaction fees.

The settlement of that lawsuit marks a win for restaurateurs and retail merchants across the US that **can now apply** for their piece of the \$5 billion settlement fund. For restaurateurs nationwide, it marked the conclusion to nearly two decades of legal strife and the largest private antitrust class-action settlement in American history.

In addition to the potential reward of the settlement, the lawsuit helped spark many reforms. Restaurants and retail merchants can now incentivize customers to pay with methods other than payment card, often achieved by offering cash-paying customers a small discount or by restricting use of certain branded cards.

Additionally, the litigation led Visa and Mastercard to remove banks from their executive boards, eliminating anti-competitive influence over fee pricing. These banks, many of whom populated the executive boards of payment card companies, instituted price fixing agreements that preyed upon merchants' conception that they had to take credit and debit cards as payment forms to maintain business.

Most importantly, however, is the payout: to help alleviate the fee burden shouldered by merchants between 2004 and 2019, the Court of Appeals finally approved a \$5.54 billion settlement fund in March of 2023.

“There’s no better time than now,” advised Robins Kaplan partner Ryan Marth, “to take advantage of the suit and get some relief from the fees [restaurants] have been paying for more than a decade.”



Ryan Marth

The claim-filing process, noted Marth, was intentionally designed to be accessible to anyone – particularly smaller businesses. Starting in December 2023, the court overseeing the settlement authorized the sending of claim forms via mail to qualifying merchants. Blue and white in color, the form will bear a message identifying it as an official court-sanctioned form, which can be confirmed by a blue, gray, and white insignia. Enclosed within the communication are business-unique credentials that allow restaurateurs to access the online portal to begin filing a claim. Businesses not contacted via mail but likely to qualify can visit paymentcardsettlement.com and provide a unique taxpayer ID to be identified by the Court.

Restaurants need not worry about qualifying to receive a portion of the massive settlement fund, provided they file by May 31, 2024. So long as the establishment accepted payments on the credit cards denoted by the suit between 2004 and 2019, they are eligible to receive funds, regardless of transaction volume or business type. “The suit also includes everyone from restaurants to retailers and distributors,” Marth added. “My dentist even mentioned

she'd received a claim form in the mail and was planning on filling it out!" While the scope of the lawsuit may intimidate some, Marth urges all business owners that filing is important: "If I could really emphasize one point, it would be that the [claim portion] is real and worth your time, and you should spread the word to everyone."

Thankfully, determining the size of that portion is a relatively simple fraction: the numerator is the amount of interchange fees paid by a restaurant, and the denominator is the total amount of interchange fees paid by all claimholders. To calculate the value owed to those who file, administrators simply multiply that fraction by the \$5.5 billion up for grabs. While that math may appear daunting, Marth assured that "for most restaurants, this amounts to real money." Nevertheless, the lawyer added, "what constitutes real money varies from one establishment to the next," since claim size is determined by transaction volume. Moreover, since the filing process is simple and headache free, restaurants need not spend additional money on legal help. "Companies are going out and soliciting restaurants and other merchants to engage them to file their claims on their behalf," cautioned Marth, "but often charge a 25-40% cut of their claim; the process is designed to be easy to avoid this!"

There's no better time than today to file a claim and receive a portion of the settlement fund, urged Marth. The landmark suit, which helps businesses of all sizes find relief from overbearing credit card transaction fees, is shaking up the food service industry. With a remarkably easy filing process and potential to tap into the largest antitrust class-action litigation settlement fund in American legal history, the Payment Card Settlement helps restaurateurs nationwide reclaim ownership of their business, and importantly, their bottom lines.

For information about the settlement, qualification, or claim-filing, visit www.paymentcardsettlement.com.

Casino Queen Stock Plan Challenge Fails to Secure Class Status

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- Question of suit's timeliness requires individual inquiries
- \$170 million employee stock ownership plan deal at issue

A lawsuit involving the employee stock ownership plan of Illinois-based Casino Queen Inc. won't move forward as a class action after a federal judge said a key issue in the dispute turned on individual questions.

The Employee Retirement Income Security Act lawsuit would fail for being filed too late unless the defendants attempted to fraudulently conceal their misdeeds as alleged, the US District Court for the Southern District of Illinois said Monday. The question can't be answered on a class-wide basis, because the allegedly fraudulent acts were made by various defendants at various times and affected plaintiffs in "vastly different ways," the court said.

The lawsuit, filed in 2020 by former casino workers on behalf of a proposed class, challenges a 2012 transaction in which Casino Queen became 100% worker-owned through an employee stock ownership plan. Workers say the plan was forced to take on debt and pay about \$170 million for Casino Queen stock that was worth a fraction of that amount. They also challenge a subsequent transaction in which the stock plan sold the company's property to a third party.

The court's opinion, issued by Judge David W. Dugan, denied the workers' request to certify a class of about 529 stock plan participants. His opinion centered on ERISA Section 1113, which sets a six-year deadline for bringing claims of fiduciary breach but allows claims to be brought outside that window if a defendant engaged in fraudulent behavior to conceal its breaches.

The workers pointed to several alleged acts of concealment, including statements made in mandatory meetings and information included in government filings. But the degree to which employees heard or relied on these statements will vary significantly from person to person, Dugan said.

"Because Plaintiffs' claims depend on a variety of written and oral misrepresentations and documents made available to employees in different ways and at different times, and access to those communications and documents varied across the class, the decision of whether or not each Plaintiff's claims would be properly extended under §1113's 'fraud or concealment' provision will require some form of individualized inquiry, likely resulting in an array of possible answers, regardless of whether Defendants' actions were fraudulent," Dugan said.

The workers are represented by Cohen Milstein Sellers & Toll PLLC and Stris & Maher LLP. The defendants are variously represented by Clark Hill PLC; Heyl, Royster, Voelker & Allen PC; Bryan Cave Leighton Paisner LLP; Fisher & Phillips LLP; Lewis Rice LLC; and Groom Law Group.

The case is *Hensiek v. Bd. of Dirs. of Casino Queen Holding Co.*, 2024 BL 62408, S.D. Ill., No. 3:20-cv-00377, 2/26/24 .

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Las Vegas Sands Defeats Casino Money-Laundering Controls Suit

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Securities Law

A croupier spins the ball of a roulette table at a casino.

Photographer: Michele Spatari/AFP via Getty Images

- Judge closes case, investors didn't replead post-dismissal
- Shareholders didn't show fraud caused stock drops, judge ruled

Las Vegas Sands Corp. is off the hook for allegations that its Singapore casino didn't take proper money-laundering control measures, after shareholders opted not to replead claims that were previously rejected by a federal court in Nevada.

Investors had alleged that Las Vegas Sands failed to tell investors how control deficiencies put its Marina Bay Sands location in Singapore at increased risk of fraudulent transfers using patron funds. The casino chain also allegedly failed to disclose the legal risks and regulatory scrutiny to which it would be subject, and the Justice Department issued a grand jury subpoena in an anti-money laundering probe seeking records for potential violations in early 2020.

The case was closed after a stipulation from the parties agreeing to dismiss the allegations, according to the judgment entered Tuesday in US District Court for the District of Nevada.

Judge Cristina Silva granted a dismissal bid from Las Vegas Sands on Jan. 2, providing plaintiffs an opportunity to file a third amended complaint, but plaintiffs expressed in their joint stipulation on Monday that they had no intention to amend their claims. Both parties agreed to bear their own attorneys' fees and costs associated with the action.

The revelation of the internal control issues prompted three stock drops, the complaint alleged. Las Vegas Sands stock declined more than 4% on Sept. 16, 2020, then experienced another 3% drop on July 20, and fell again by more than 5% on May 12. Silva dismissed the second amended complaint, ruling that investors didn't adequately allege that those stock drops were the result of the fraud in question, rather than other unrelated causes.

Glancy Prongay & Murray LLP, Pomerantz LLP, and Levi & Korsinsky LLP represented plaintiffs and the proposed class.

Snell & Wilmer LLP and Sidley Austin LLP represented Las Vegas Sands and its top executives.

The case is The Daniels Fam. 2001 Revocable Trust v. Las Vegas Sands Corp. , D. Nev., No. 2:20-cv-01958, 2/27/24 .

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Live Nation, Executives Must Defend Shareholder Class Action

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- Plaintiffs say Live Nation concealed anticompetitive conduct
- Court also greenlights claims against Live Nation's CEO, CFO

Live Nation Entertainment Inc. lost a bid to dismiss a proposed shareholder class action alleging the entertainment and ticket company made false statements and omissions about its compliance with antitrust laws that caused its stock price to drop.

The plaintiffs say that Live Nation and two of its executives failed to tell investors that the company “engaged in anticompetitive conduct, including charging high fees and extended contracts with talent, and retaliated against venues.”

The complaint sufficiently alleged violations of the Securities Exchange Act of 1934, Judge Kenly Kiya Kato of the US District Court for the Central District of California said, denying Live Nation's motion to dismiss.

The plaintiffs asserted that Live Nation failed to disclose it “engaged in anticompetitive conduct and was not cooperating fully with the ongoing DOJ and Senate Subcommittee investigations,” making it “reasonably likely” the company would “incur regulatory scrutiny and face fines, penalties, and reputational harm.”

The complaint also alleged that it was false and misleading for the company and individual defendants to describe industry competition as “intense,” or to attribute revenue growth to “strong demand for live events” when the company “enjoyed monopolistic market power and abused that power to stifle competition.”

The allegations are sufficient to proceed with claims the company made material misrepresentations or omissions in connection with the purchase or sale of a security in violation of Section 10(b) of the Exchange Act, Kato said.

The claims of controlling person liability against Live Nation's Chief Executive Officer Michael Rapino and Chief Financial Officer Joe Berchtold also survive because the plaintiffs alleged they made misleading statements in a 2022 annual report filed with the Securities and Exchange Commission, Kato said.

The case isn't the first investor suit alleging market monopolization by Live Nation. The company misled shareholders about its intent and ability to abide by a consent decree, a 2018 suit alleged. That case was voluntarily dismissed after a few months.

Live Nation was also hit with a shareholder derivative suit on Nov. 13, 2023, alleging that the directors and Rapino misled investors ahead of the DOJ investigation, omitting or misrepresenting details about its anticompetitive conduct.

Glancy Prongay and Murray LLP, Rosen Law Firm PA, and Frank R. Cruz in Los Angeles represent the plaintiffs. Latham and Watkins LLP represents Live Nation.

The case is *Donley v. Live Nation Ent. Inc.*, 2024 BL 61946, C.D. Cal., No. 23-cv-06343, 2/23/24 .

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Snap Will Add Independent Director to Settle Investor Claims

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A settlement to end investor litigation alleging Snap Inc. pushed a scheme to give its co-founders perpetual control of the company finally received approval from a Delaware court.

Only Snap's class A stockholders are included in the class definition in an amended proposal approved Monday by the Delaware Court of Chancery.

The settlement was amended after Vice Chancellor Paul Fioravanti Jr. questioned at a previous hearing whether the class definition was too broad. He also had concerns that some stockholders hadn't received notice about the proposed settlement in time to file an objection before a September hearing.

"The form and manner of notice was fair and adequate" for the amended version, he said Monday in a hearing in Wilmington, Del.

Fioravanti approved a \$4.5 million attorneys fee award, plus over \$35,000 in expenses. The attorneys for the investors behind the litigation had sought a \$6.6 million attorneys fee award.

The case "presented interesting claims, but none were adjudicated," he said. "It was an early-stage settlement."

Pension funds sued Snap in 2022, alleging its board adopted charter amendments that would allow the mobile chat pioneer's co-founders, Evan Spiegel and Robert Murphy, to sell large amounts of stock without triggering a series of stock conversions intended to simplify the company's structure and hand control over to public investors. The moves were made without a shareholder vote.

The amended settlement requires Snap to make changes to those charter amendments, including adding a new, independent board director and adding an agreement that the co-founders won't approve another non-voting stock dividend without unanimous approval from the board's independent directors.

"In terms of the fairness of the settlement, we achieved in large part what we set out to do in this case," said the attorney representing the investors, Christopher Foulds of Friedlander & Gorris PA.

Spiegel and Murphy co-founded Snap in 2011. The company's existing capital structure stems from its initial public offering in 2017, in which only non-voting shares were issued to the public.

Since then, Snap has had three classes of stock—class A stock, which is publicly traded but has no voting rights; class B stock, which has one vote per share; and class C stock, which has 10 votes per share and is owned entirely by Spiegel and Murphy. The co-founders also own about 9% of the class A stock and 52% of the class B stock. Altogether they control over 99% of Snap's stockholder voting power.

At a hearing in September, Fioravanti had said while the complaint was brought on behalf of class A stockholders, the proposed settlement expanded the class to "class B stockholders other than the defendants."

"We very much appreciated Your Honor's guidance at the last hearing," Foulds told Fioravanti on Monday.

The lead pension fund is represented by Labaton Keller Sucharow LLP; Friedlander & Gorris, PA; Friedman Oster & Tejtell PLLC; and Kaskela Law LLC.

Snap and other defendants are represented by Wachtell, Lipton, Rosen & Katz; Morris, Nichols, Arsht & Tunnell LLP; Richards, Layton & Finger PA; Simpson Thacher & Bartlett LLP; Munger Tolles & Olson LLP; Potter Anderson & Corroon LLP; and Ross Aronstam & Moritz LLP.

The case is Greater PA Carpenter's Pension Fund v. Snap Inc. , Del. Ch., No. 2022-0679, settlement hearing 2/26/24 .

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Elite Delaware Court Stands Up to 'Big Money-Powered People'

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- Recent rulings scrutinize controller-driven company actions
- Novel opinion addressed fiduciary duties owed by controller

Delaware's elite corporate law court is shaping what it means to be a controlling shareholder.

The details vary in the recent decisions involving Tesla Inc., TripAdvisor Inc., and Sears Hometown and Outlet Stores Inc., but the overall message to controllers is clear: Acting in bad faith or not fully informing minority shareholders and keeping them from getting a fair shot will get you into trouble with the Court of Chancery.

The court is exploring shareholder control in different contexts where there isn't a lot of precedent, said Jill Fisch, a professor of business law at the University of Pennsylvania's law school.

Taken together, these opinions consider how broadly to define control, whether some transactions need heightened scrutiny, and what counts for someone to be a controlling shareholder, she said.

"You can read all three decisions as applying really heavy scrutiny to actions taken by companies with controlling shareholders that arguably favor the interests of those controlling shareholders," she said.

'Fearless'

The court's chief judge, Kathaleen St. Jude McCormick, and its longest-serving judge, J. Travis Laster, have been "fearless" in holding iconic corporate founders and executives accountable to their shareholders, said University of Iowa law professor Robert Miller, who has written about the development of Delaware corporate law.

"In a certain sense the Delaware franchise is on the line in cases like these, where, 'We prove that we stand up to big money-powered people and that everybody gets a fair deal in Delaware. And you don't get a better deal just because you're the richest guy in the world,'" he said.

In invalidating Musk's \$55 billion pay package at Tesla, McCormick found that Musk's influence at Tesla made him a controlling stockholder and therefore subject to Delaware's most stringent standard of judicial scrutiny.

In the unique Sears Hometown case, Laster set a new standard for controlling stockholders. He said they must show good faith and can't intentionally harm the company or minority shareholders when they push through changes the way corporate boards typically do. Blocking a board decision also draws an enhanced level of court review.

Laster also set standards for moving a company's incorporation out of Delaware in a separate case. He determined that Greg Maffei, who controls TripAdvisor through super-voting shares could move the company to Nevada, even if their investors believe that will make it harder to hold directors and officers accountable.

'It's the Control'

What Musk or other "superstars" seeking to emulate Maffei should take away from the court's recent rulings is that it's not necessarily the number of shares they hold.

"It's the control," said Carliss Chatman, who teaches corporate law at Southern Methodist University.

Say a billionaire activist investor has enough shares to do "what he thinks is righting the ship," but actually makes the company's performance worse, she said.

"Then he could be subject to this new standard" from Laster's Sears Hometown opinion, she said. "If his judgment is not correct, then he could be liable."

'Expect to Get Sued'

Corporate America may have been shocked by the decision rescinding Musk's pay package at Tesla, but it's more likely to be impacted by the ruling that found another billionaire, Eddie Lampert, short-changed shareholders.

Laster ordered Lampert to pay \$18.3 million to former shareholders of Sears Hometown. As a controlling stockholder, Lampert intervened in its board's liquidation plan in such a way that he could buy out the company for a price "below the range of fairness," according to the Jan. 24 opinion.

It's the first time the court addressed fiduciary duties owed when a controlling stockholder uses their voting power to change a company's status quo. When doing so, the controller owes a duty of good faith requiring them to refrain from intentionally harming the company or

minority shareholders, along with a duty of care demanding they avoid gross negligence, Laster said.

In most cases involving controlling shareholders, they clearly assume the power of a director. "In that situation, everybody agrees controlling shareholders have the same fiduciary duties as directors," Miller said.

Directors always must act in the company's best interest, even over shareholders' objections, to provide financial oversight and manage the business operations, Miller added.

In Lampert's case, "here we have a really pure case where the shareholder is acting obviously, clearly, entirely in his capacity as a shareholder," using his voting powers to change the company's bylaws and replace two directors, he said.

Laster's decision puts that type of behavior at risk for a person or an entity holding a majority of the stock. "The obvious set of cases where it would matter would be where the shareholder, acting as a shareholder, does something the board doesn't like—putting somebody onto the board, or voting someone off the board, or voting in a way that doesn't follow the votes of the public shareholders," Miller said.

Such a shareholder "could now expect to get sued," though the enhanced level of review mandated under Laster's opinion wouldn't be hard to clear in most cases, he said. "He'd probably win, but he could expect to get sued."

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Judge OKs \$385 Million Antitrust Settlement Over Suboxone Plot

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- Judge called settlement fair, reasonable, and adequate
- Plaintiffs sued Suboxone maker with antitrust claims

A federal judge approved a \$385 million settlement between a group of direct purchasers and Indivior Inc. over claims the drugmaker abused its monopoly over the Suboxone opioid addiction treatment.

Judge Mitchell S. Goldberg of the US District Court of the Eastern District of Pennsylvania on Tuesday called the \$385 million settlement “fair, reasonable, and adequate,” and said it provides plaintiffs who bought the drug with immediate recovery without subjecting them to the rigors of a difficult trial.

Goldberg also approved \$120.6 million in attorneys’ fees, or about 32% of the settlement fund amount. Indivior announced the settlement in October.

The ruling comes nearly a decade after plaintiffs sued Indivior over its decision to switch Suboxone from a tablet to a sublingual film in 2010. Purchasers and consumers claimed that switch was anticompetitive and solely designed to maintain Indivior’s monopoly over the drug, while the company said it was due to safety issues.

Demand for the drug has boomed after the pandemic worsened the opioid addiction crisis in the US, claiming the lives of thousands of Americans and putting pressure on health care systems.

Indivior last year reached settlements of about \$102.5 million with 42 states’ attorneys generals as part of multidistrict litigation, while a plaintiff class of end-payors, or entities that bought the drug on behalf of beneficiaries and employees, obtained a settlement of \$30 million.

“The settlement here involves an immediate payout of \$385 million, more than three times that of the states and more than ten times that of the EPPs,” Goldberg said. “Thus, there do not appear to be any disparities in the success of the settlements obtained by the various claimants.”

The direct purchaser plaintiffs are represented by firms including Faruqi & Faruqi LLP, Hagens Berman Sobol & Shapiro LLP, and Berger Montague PC.

The case is *In re Suboxone Antitrust Litig.*, E.D. Pa., No. 2:13-md-02445, 2/27/24 .

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<https://www.law.com/nationallawjournal/2024/02/27/phila-judge-rejects-indignant-self-promotional-challenge-to-175m-roundup-verdict/?kw=Phila.%20Judge%20Rejects%20%27Indignant,%20Self-Promotional%27%20Challenge%20to%20175M%20Roundup%20Verdict>



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[NEWS](#)

Phila. Judge Rejects 'Indignant, Self-Promotional' Challenge to \$175M Roundup Verdict

“Aggressively blaming the court and plaintiff’s counsel for the outcome as opposed to the ineffectiveness of defendant’s trial tactics, strategic choice of trial witnesses, cross examinations or proffered defense evidence outcome is hardly a compelling basis for the court to overturn this jury’s decision,” Crumlish ruled.

February 27, 2024 at 05:04 PM

Mass Torts



Aleeza Furman
Litigation Reporter



The original version of this story was published on [The Legal Intelligencer](#)

What You Need to Know

- Judge James Crumlish III rejected Monsanto's challenge to a \$175 million Roundup verdict.
- Crumlish was critical of the tactics Monsanto used during and after the trial.
- He also awarded \$2.3 million in delay damages to the plaintiff.

A Philadelphia judge has upheld a [\\$175 million](#) Roundup verdict against Monsanto.

Judge James Crumlish III of the Philadelphia Court of Common Pleas rejected Monsanto’s challenge to the verdict Tuesday, about a month after the judge [shut down](#) the company’s efforts to boot him from the case.

“Aggressively blaming the court and plaintiff’s counsel for the outcome as opposed to the ineffectiveness of defendant’s trial tactics, strategic choice of trial witnesses, cross examinations or proffered defense evidence outcome is hardly a compelling basis for the court to overturn this jury’s decision,” Crumlish ruled.

Monsanto had [asserted](#) that the \$175 million verdict in *Caranci v. Monsanto* was the result of a litany of errors from plaintiffs counsel and the court.

The company’s arguments included claims that the court issued one-sided evidentiary rulings and engaged in undisclosed communication with the jury during deliberation.

But Crumlish called Monsanto’s assertion that the jury should have agreed with the defendant an “indignant, self-promotional post-trial exculpatory diagnosis.”

In addition to denying the defendant’s motion for judgment entered in its favor, a new trial and/or remittitur, Crumlish also granted plaintiff Ernest Caranci’s motion for an additional \$2.3 million in delay damages.

Kline & Specter’s Thomas Kline, who represents the plaintiff, said in an email, “The opinion of Judge Crumlish is thoughtful and thorough, and constructed to withstand on appeal the unprecedented barrage of attacks upon him, the jury and the justice system itself, which is part and parcel of the larger strategy of Monsanto to defeat meritorious claims, like the one of Roundup victim Ernest Caranci for compensatory and punitive damages.”

A spokesperson for Bayer, Monsanto’s parent company, said in a statement that the defendant intends to appeal Crumlish’s ruling.

“The Caranci trial was marred by significant and reversible legal and evidentiary errors that unfairly prejudiced the company and distracted from the causation issues in this case, including the court’s undisclosed communication with the jury during deliberations,” the spokesperson said.

‘Unfairly Bushwhack Opposing Counsel’

Monsanto claimed that a post-trial conversation with a juror revealed the court had engaged in ex parte communication with the jury, which the defense argued warranted a new trial. The allegation was also the basis for Monsanto’s request that Crumlish recuse himself from the case.

In both his Tuesday opinion and his Jan. 5 rejection of the recusal request, Crumlish was skeptical of the means the plaintiffs used to obtain information from the juror, as well as that information’s validity.

He asserted that defense counsel facilitated a letter from the juror, which they then included in their post-trial motion without first notifying the court about the juror’s apparent concerns. Crumlish contended that Monsanto withheld the information and presented it later in its post-trial motion to gain a strategic advantage.

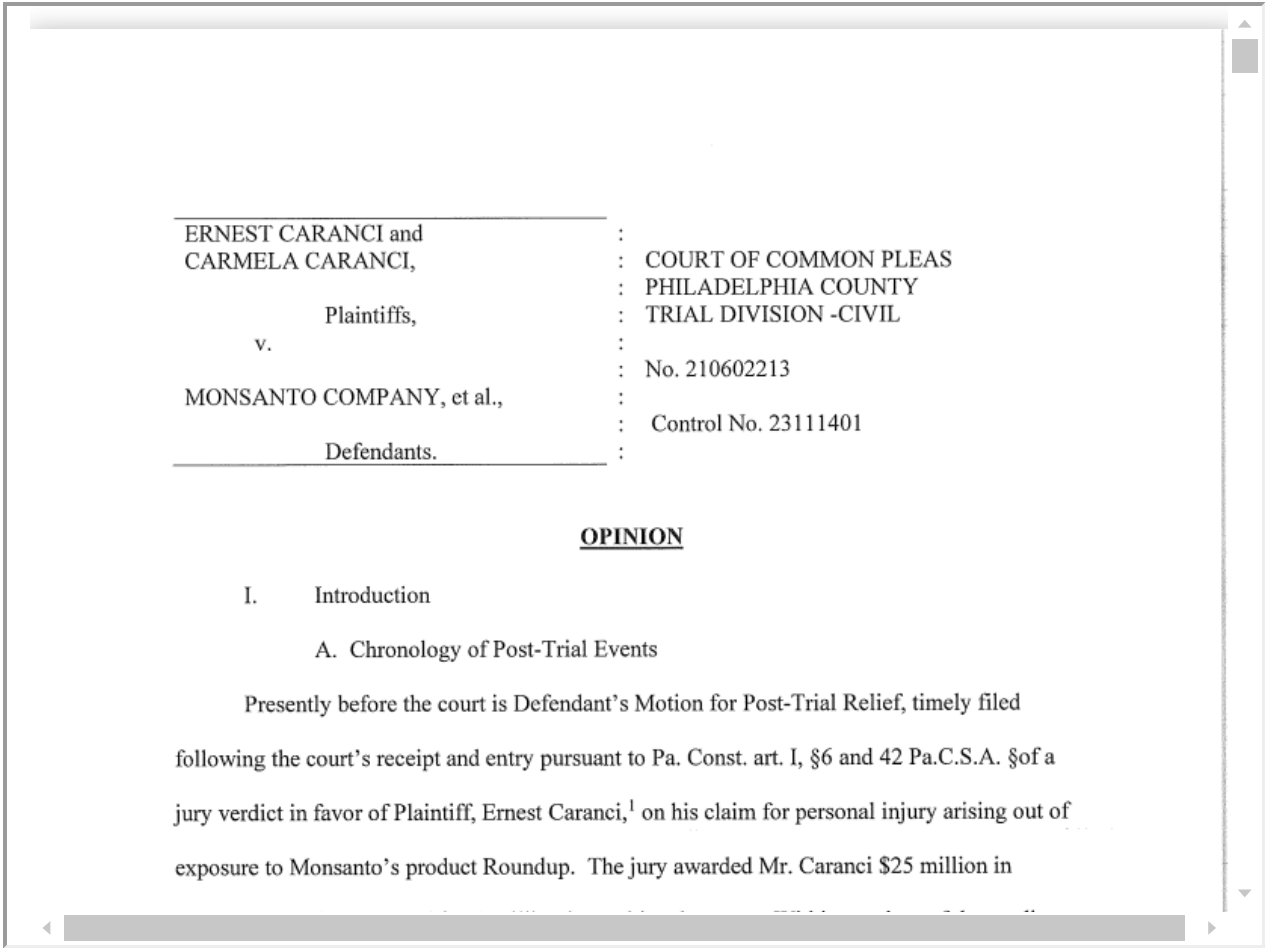
Crumlish further contended in his opinion that Monsanto made efforts during the post-trial proceedings to limit the plaintiff’s opportunity to respond to the defense’s filings.

“This gamesmanship and tactic of ‘last word-ism’ unfortunately plagued the trial and repeatedly led to the potential to unfairly bushwhack opposing counsel with undisclosed post-trial evidence or legal arguments,” he wrote.

Carnaci was the first of three Roundup verdicts so far to come out of Philadelphia. The other two—one for \$3.5 million and another for \$2.25 billion—are the subject of ongoing challenges from Monsanto.

A fourth Philadelphia Roundup trial is currently underway.

Read the opinion:



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California Judge Reduces \$332M Roundup Verdict to \$28M

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By Andrew Maloney



San Diego County Superior Court Judge Kevin Enright. Credit: John Gibbins/The San Diego Union-Tribune

NEWS

San Diego County Superior Court Judge Kevin Enright on Monday denied Monsanto's posttrial motions and upheld the Oct. 31 verdict, but found the punitive damages were unconstitutional.

February 28, 2024 at 01:46 PM

Litigation



Amanda Bronstad 
staff reporter

What You Need to Know

- Monsanto praised the 90% reduction in punitive damages but planned to appeal, citing 'significant and reversible legal and evidentiary errors.'
- The judge found punitive damages were warranted, however, because there was 'ample evidence of Monsanto engaging in highly reprehensible conduct.'
- On Tuesday, a Philadelphia judge upheld a \$175 million Roundup verdict, declining to reduce punitive damages.

A California judge upheld a Roundup verdict but reduced the \$332 million in damages to \$28 million after finding the award was unconstitutional.

San Diego County Superior Court Judge Kevin Enright on Monday denied Monsanto's posttrial motions and upheld the Oct. 31 verdict, one of several big jury awards over Roundup in the past six months.

"After weighing the evidence, the court is not persuaded that the jury clearly should have reached a different verdict," he ruled.

But the judge found that the \$325 million in punitive damages was unconstitutional and lacked a "reasonable relationship" to the \$7 million in compensatory damages. He reduced it to \$21 million.

"We are pleased with the court's decision to significantly reduce the unconstitutionally excessive damage award by more than 90%, consistent with reductions made to damages overall in the first three Roundup trials," a spokesperson for Bayer, which owns Monsanto, said.

"However, we disagree with the court's ruling that allows the liability verdict to stand, as it is at odds with the extensive weight of scientific evidence and the consistent assessments of expert regulators and scientists worldwide," the spokesperson added. "Monsanto will be filing an appeal as the *Dennis* trial was marred by significant and reversible legal and evidentiary errors that unfairly prejudiced the Company and distracted from the scientific causation issues that are central to this case."

Scott Love, a partner at Houston's Clark, Love & Hutson, who won the verdict for plaintiff Mike Dennis, said, "Unfortunately, California has strict caps on punitive damage. The judge correctly applied the law and wrote a thoughtful opinion completely eviscerating Monsanto's

grounds for appeal. We are very confident that the verdict will be sustained on appeal.”

Judges reduced damages in the first three Roundup verdicts, all in California. A San Francisco County Superior Court judge reduced a \$289 million award, in 2018, to \$20.6 million. In 2019, awards of \$80 million and \$2 billion were reduced by judges in the U.S. District Court for the Northern District of California and Alameda County Superior Court to \$25.27 million and \$86.7 million, respectively.

Monsanto has appealed many of the recent jury awards, which include a \$1.56 billion verdict in Missouri and two verdicts of \$3.5 million and \$2.25 billion in Pennsylvania.

On Tuesday, Philadelphia Court of Common Pleas Judge James Crumlish III upheld a \$175 million Roundup verdict. He declined to reduce the jury’s punitive damages for plaintiff Ernest Caranci, noting that he was “not shocked” by the amount.

“There was clear evidence that defendant was motivated by financial considerations and to protect its sales and profits over conducting unbiased research on the risks to consumers or the safety of its product,” he wrote. In fact, he said, the amount of profits Monsanto made during the time Caranci was exposed was “in the stratosphere.”

‘Monsanto Attempted to Deceive the Public’

In Monday’s opinion, Enright concluded that the jury could adequately find that Monsanto “willfully and consciously ignored the dangers inherent in Roundup and continued to sell and market the product and therefore acted with malice sufficient to warrant punitive damages.”

“Here, plaintiff presented ample evidence of Monsanto engaging in highly reprehensible conduct, including evidence of plaintiff’s physical harm and suffering,” Enright held. “Plaintiff further presented evidence contrasting his role as an ordinary consumer to that of Monsanto, a multibillion-dollar company which intentionally used its vast resources over several decades to protect its profits over the safety of ordinary consumers, showing a reckless disregard for the health and safety of the public.”

The plaintiff also had presented enough evidence, he wrote, that Monsanto “actively attempted to interfere with efforts by the EPA to classify glyphosate,” the key ingredient in Roundup, and “shape scientific opinion to conform to Monsanto’s perception of the safety of glyphosate and Roundup.

“Plaintiff presented further evidence that Monsanto attempted to deceive the public, including by shopping for experts that may be counted on to adopt their preferred conclusion that Roundup was safe,” he continued. “Plaintiff also presented evidence,



Scott Love, of Clark Love Hutson.

including internal emails, that Monsanto sought to influence and possibly manipulate outside scientific literature and opinions to support its desired conclusion.”

But he also considered that Monsanto had already paid \$100 million in punitive damage awards and stopped selling glyphosate-based lawn products in the United States, with the remaining inventory anticipated to be sold off by the second quarter of the year.

Crumlish, in contrast, found that argument “incongruous” in upholding the Oct. 27 verdict in Philadelphia.

“Monsanto is not saying this verdict in and of itself and in light of the record before the court violates due process, but that, it having injured scores of individuals resulting in juries imposing damages against its widely-determined intentional and reckless conduct should be a basis to relieve some of its

obligation here and apparently in perpetuity,” he ruled. “The court cannot agree that based upon the evidence presented in this case, due process requires reduction of the jury’s award of punitive damages.”

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- Latest
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Experts urge federal action to keep microplastics out of drinking water

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American drinking water has some of the highest concentrations of microscopic plastic waste of anywhere in the world, a group of environmental experts told the Senate.

Benjamin S. Weiss / February 27, 2024

This undated photo provided by the Hawaii Wildlife Fund shows microplastics at the beach at Kamilo Point in Naalehu, Hawaii. (Megan Lamson, Hawaii Wildlife Fund via AP)

WASHINGTON (CN) — Congress needs to step in to address the growing prevalence of microscopic plastic filaments and other plastic waste in U.S. water sources, a panel of environment and conservation experts told lawmakers Tuesday.

Scientists have for years been sounding the alarm about microplastics, small-scale plastic debris that can include fibers from synthetic clothing, plastic pellets used in manufacturing or broken-down fragments of larger plastic goods.

The minuscule plastic waste has found its way into ecosystems, drinking water and even the human body — recent studies have found plastic particles circulating in human bloodstreams and embedded in the placentae of pregnant women.

During a hearing Tuesday in the Senate Committee on Environment and Public Works, a panel of witnesses warned lawmakers that while experts are still learning about the potential adverse health effects such plastic waste could have on humans, the possibilities are concerning.

“We have accumulating evidence that as these microplastics degrade into smaller sizes, they can elicit inflammation, cellular toxicity and myocardial damage,” said Susanne Brander, an associate professor at Oregon State University’s College of Agricultural Sciences.

Studies conducted on rodents, which researchers use to model human health outcomes, show that exposure to microplastics in drinking water can affect reproductive health and the condition of the gut microbiome, Brander said.

Chemicals used in the production of plastic, when absorbed via contaminated water, can also be harmful to humans, said Sherri Mason, director of sustainability at Penn State’s Behrend College. They’ve been linked to fertility issues such as decreased sperm counts in men, as well as a host of other conditions including obesity, autism and developmental issues.

“Many of these are known to be carcinogens or endocrine disrupting chemicals,” Mason said, “which means that they mimic hormones, the chemical messengers of the body.”

Mason told lawmakers that experts know less about the harmful effects of the plastics themselves, what is known should be concerning — especially regarding how microplastics find their way into the human body.

“Water, the necessary elixir of life, is a primary means for the movement of micro- and nanoplastics into people,” she said.

Clothing and dishwashers are two significant sources of waterborne microplastics. The average load of laundry can generate nearly nine million plastic microfibers, and dryers produce even more, Brander said. Dishwashers, especially ones that use detergent pods in plastic casings, generate thousands of microplastics.

“A medium-sized town could emit over 300 million microplastics on a daily basis,” Brander said.

Because these tiny plastic filaments are drained away from homes, wastewater treatment and drinking water facilities have become the front lines for filtering out such waste.

While treatment facilities are often effective at pulling plastics out of wastewater, the plastic gets lumped in with biological waste in a sludge that is repurposed in fertilizers. That plastic is then reintroduced into the environment and washed back into waterways as agricultural runoff.

Drinking water is similarly afflicted by plastic waste, Brander said, pointing out that the U.S. has some of the highest concentration of microplastics in its potable water.

It’s not just filtered water that’s the problem, however, said Mason. “Should one think that bottled water is a solution to plastic within tap water — it’s not,” she said.

A study conducted at the Behrend College found that bottled water contains an average of more than 300 particles of plastic per liter, or 58 times as much waste found in tap water.

“We can’t filter ourselves out of the problem,” Mason said.

The experts urged lawmakers to step in. Brander pointed out that the 1972 Clean Water Act contains language regulating water pollutants but said that it has not yet been used to limit how microplastics are released into the environment.

Since many microplastics could be considered as originating from “point sources” of pollution, such as manufacturing or water treatment, water regulations provide the most direct route for regulating microplastics, she said.

The government could also take a smaller-scale approach, Brander suggested, requiring microfiber filters on washing machines or supporting efforts to install catchments and other devices designed to reduce plastic pollution from stormwater runoff.

Mason meanwhile expressed support for Oregon Senator Jeff Merkley's Break Free from Plastic Pollution Act. Introduced last year, the Democrat's measure would, among other things, implement a policy requiring that corporations take responsibility for the management of plastic waste and other potential pollution generated by their products.

The U.S. should also consider creating a national waste and recycling plan, Mason said.

In the long term, Berner told lawmakers, the U.S should look towards reducing the use of harmful plastics at the source. Such a task, though, comes with challenges.

"These are deeply embedded, as far as use goes, in our daily lives," she said.

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Latham, Jackson Walker avoid sanctions over bankruptcy forum shopping dispute

 [reuters.com/legal/litigation/latham-jackson-walker-avoid-sanctions-over-bankruptcy-forum-shopping-dispute-2024-02-27](https://www.reuters.com/legal/litigation/latham-jackson-walker-avoid-sanctions-over-bankruptcy-forum-shopping-dispute-2024-02-27)

Dietrich Knauth

A sign points the way towards U.S. Bankruptcy Court in New York June 1, 2009.

REUTERS/Chip East Purchase Licensing Rights , opens new tab

- Shareholder had sought \$540 millions in sanctions
- Sorrento Therapeutics also faces a motion to move its bankruptcy
- Sorrento used a new PO Box and bank account to justify Texas filing

Feb 27 (Reuters) - A U.S. judge has ruled that law firms Latham & Watkins and Jackson Walker did not commit bankruptcy fraud by opening up a new bank account and P.O. box to ensure that a California-headquartered biopharmaceutical company could file for bankruptcy in Texas.

U.S. Bankruptcy Judge Christopher Lopez in Houston denied the motion for sanctions at a court hearing late Monday, saying that the law firms representing Sorrento Therapeutics (SRNEQ.PK) , opens new tab had engaged in questionable "legal maneuvering" but had not committed bankruptcy fraud.

Timothy Culberson, an attorney and Sorrento shareholder, had argued that the law firms should be fined \$540 million for their forum shopping, saying that they committed fraud by saying that the new P.O. box in Houston was the "principal place of business" for a defunct Sorrento subsidiary, Scintilla Pharmaceuticals, that was never based in Texas.

Sorrento should have filed for bankruptcy in California, where it was headquartered, or Delaware, where it was incorporated, but it chose Texas to get in front of a favorable judge and "defraud" its shareholders and creditors, Culberson said in court filings.

Lopez said Culberson presented evidence that the P.O. box and bank account were created solely so that Sorrento could file for bankruptcy in Texas. But he said that there was no evidence that the attorneys engaged in bankruptcy fraud or intended to deceive the Texas court when they listed the P.O. box as a "principal place of business."

"I don't like it, but it's not sanctionable," Lopez said.

Latham & Watkins declined to comment beyond its court filings, which argued that Sorrento had established Texas as a proper venue for its bankruptcy filing by opening a P.O. box and bank account in Houston. Jackson Walker and Culberson did not immediately respond to requests for comment.

Sorrento was one of many companies whose bankruptcy case was reassigned after the judge presiding over the case, David Jones, resigned from the bench under an ethics investigation. Jones admitted to having a long-term romantic relationship with Jackson Walker attorney Elizabeth Freeman, and he oversaw many bankruptcy cases that her law firm filed in his Houston court.

Culberson alleged that Sorrento, Jackson Walker and Latham knew about the romantic relationship, and made efforts to ensure that Jones oversaw Sorrento's bankruptcy, believing that he would rule in their favor on key issues.

The law firms filed paperwork to open the P.O. box just 10 hours before Sorrento filed for bankruptcy, then used it to justify filing a Chapter 11 petition in Texas, Culberson said in his court filings.

Culberson had sought \$500 million in sanctions against Latham & Watkins and \$40 million against Jackson Walker, saying that a steep penalty, roughly equal to 10% of the law firms' annual revenue, would deter future misconduct.

Lopez said there was no evidence that the two law firms had tried to deceive the court or that they believed that their actions were illegal.

"It's not the first time it's happened in this district, or around the country," Lopez said. "I hope it's not rampant."

In future cases, forum shopping can be combated by early intervention from creditors, shareholders and the U.S. Department of Justice's bankruptcy watchdog, none of whom objected when Sorrento filed for bankruptcy in February 2023, Lopez said.

U.S. bankruptcy law says that debtors should file for bankruptcy in the district where they have their "principal place of business," or "principal assets," or in a district where an affiliate has filed for bankruptcy. Sorrento first placed its subsidiary Scintilla into bankruptcy in Texas, then it filed its own petition, saying that it had filed in Texas because its affiliate had filed for bankruptcy there.

Lopez did not rule on whether Sorrento's bankruptcy should be transferred out of Texas. He will hear arguments on that dispute in March. The DOJ's bankruptcy watchdog, the Office of the U.S. Trustee, has supported shareholders' motion to transfer the case.

The Texas court became a venue of choice for many large debtors, in part because it assigns all large cases to just two judges, and Jackson Walker frequently acted as local counsel to national law firms that filed their Chapter 11 cases in Texas. Outside creditor groups have lobbied the Texas bankruptcy court to change its rules to discourage forum shopping abuse, and creditors in other cases have pushed for Jackson Walker to return legal fees that it charged in cases before Jones.

Shareholders and other creditors have also sued Jackson Walker, Jones, Freeman and other bankruptcy law firms that represented debtors in Jones' court, alleging that Jones gave preferential treatment to Jackson Walker clients.

A new lawsuit was filed Monday by Morton Bouchard, former CEO of Bouchard Transportation, who alleged that his company's bankruptcy lawyers at Jackson Walker and Kirkland & Ellis charged excessive fees, knowing that Jones would approve them because his "live-in girlfriend" worked at Jackson Walker.

A Kirkland spokesperson said that Bouchard's lawsuit was "frivolous," and that the firm "abided by its ethical responsibilities" in representing Bouchard Transportation. Jones and Freeman did not immediately respond to a request for comment.

The case is Sorrento Therapeutics, U.S. Bankruptcy Court for the Southern District of Texas, No. 23-90085

For Sorrento: Caroline Reckler, Ebba Gebisa, Jeff Bjork, Kimberly Posin of Latham & Watkins

For Culberson: pro se

Read more:

Ethics probe into Texas bankruptcy judge ends following resignation
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Microsoft Responds to California Copyright Plaintiffs' Motion to Intervene in NY OpenAI Suits

The lawsuits in New York and California all concern alleged copyright violations related to the training of OpenAI's large language models. Microsoft is an investor in OpenAI.

February 27, 2024 at 06:03 PM

Artificial Intelligence



Jane Wester



The original version of this story was published on [New York Law Journal](#)

Attorneys for Microsoft on Monday wrote that they “conditionally oppose” an effort from writers pursuing lawsuits against ChatGPT developer OpenAI in California to intervene in a group of lawsuits against OpenAI and Microsoft in the Southern District of New York.

Microsoft’s legal team, which includes attorneys at Orrick, Herrington & Sutcliffe and Faegre Drinker Biddle & Reath, emphasized that Microsoft is named as a plaintiff in the New York cases but not in the California cases.

The lawsuits in New York and California all concern alleged copyright violations related to the training of OpenAI’s large language models. Microsoft is an investor in OpenAI.

Microsoft’s [attorneys wrote](#) that the software giant “would not object” if all the plaintiffs in the New York and California cases agreed to dismiss Microsoft from the litigation, allowing “the remaining common parties to facilitate complete consolidation of those matters.”

“On the assumption, however, that the Plaintiffs in the New York Actions are not amenable to dismissing Microsoft with prejudice, Microsoft opposes the relief sought by the California Plaintiffs for the simple reason that it is defending the cases brought against it in the jurisdiction where those cases were filed,” they wrote.

The California plaintiffs [moved to intervene](#) and to dismiss, or in the alternative to stay or transfer, the New York cases on Feb. 12, arguing that the first-to-file rule should apply.

The Microsoft attorneys argued that the motions from the California plaintiffs are an example of an attempt to “jockey... for position among putative class counsel in two separate jurisdictions.”

“Although there may come a time when one court or the other has to address that dispute (if counsel cannot work it out on their own), that turf war involves a procedural step—class certification—that the Second Circuit instructed should follow summary judgment rather than preceding it,” they wrote.

They argued that the proposed intervention would lead to delay.

“Microsoft seeks to defend the New York Actions—the only copyright infringement cases pending against it—as quickly as possible in order to vindicate its position that generative AI technologies do not constitute copyright infringement,” they wrote.

The Microsoft attorneys also argued that the first-to-file rule does not apply because the New York and California cases have material differences, notably the presence of Microsoft as a defendant.

Even if the California plaintiffs are allowed to intervene, the Microsoft attorneys urged U.S. District Judge Sidney Stein of the Southern District of New York to deny their motion because the “‘balance of convenience and interest of justice’ is an exception that favors maintaining these actions in this forum.”

There’s another potential item of interest in the proposed copyright class action involving OpenAI and the authors. It seems the California plaintiffs, who brought a similar suit earlier in 2023, are trying to intervene and potentially move the case to California. Microsoft is a defendant in the New York case but not the California case, so their lawyers at Orrick object, arguing that convenience outweighs the first-filed rule in this case.

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Google hit with \$2.3 bln lawsuit by Axel Springer, other media groups

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Foo Yun Chee

The Google logo is seen on the Google house at CES 2024, an annual consumer electronics trade show, in Las Vegas, Nevada, U.S. January 10, 2024. REUTERS/Steve Marcus/File Photo Purchase Licensing Rights , opens new tab

BRUSSELS, Feb 28 (Reuters) - Alphabet's (GOOGL.O) , opens new tab Google was hit with a 2.1-billion-euro (\$2.3 billion) lawsuit by 32 media groups including Axel Springer and Schibsted (SCHA.OL) , opens new tab on Wednesday, alleging that they had suffered losses due to the company's practices in digital advertising.

The move by the group which include publishers in Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, Hungary, Luxembourg, the Netherlands, Norway, Poland, Spain and Sweden comes as antitrust regulators also crack down on Google's ad tech business.

"The media companies involved have incurred losses due to a less competitive market, which is a direct result of Google's misconduct," a statement issued by their lawyers Geradin Partners and Stek said.

"Without Google's abuse of its dominant position, the media companies would have received significantly higher revenues from advertising and paid lower fees for ad tech services. Crucially, these funds could have been reinvested into strengthening the European media landscape," the lawyers said.

They cited the French competition authority's 220-million-euro fine against Google on its ad tech business in 2021 as well as the European Commission's charges last year to buttress their group claim.

Google last year said it disagreed with EU antitrust charges against its ad tech business where it is involved in both the buy-side as well as the sell-side of the supply chain.

Publishers around the world have in recent years lamented Big Tech's increasing dominance in advertising as their share of revenues fall. Google is the most dominant digital advertising platform in the world, according to analysts.

The group said they filed the lawsuit in a Dutch court because of the country's reputation as a key jurisdiction for antitrust damages claims in Europe, and to avoid multiple claims in different European countries.

Others in the group include Austria's Krone, Belgian groups DPG Media and Mediahuis, Denmark's TV2 Danmark A/S, Finland's Sanoma, Poland's Agora, Spain's Prensa Iberica and Switzerland's Ringier.

(\$1 = 0.9247 euros)

Reporting by Foo Yun Chee; editing by Jason Neely



Foo Yun Chee
Thomson Reuters

An agenda-setting and market-moving journalist, Foo Yun Chee is a 20-year veteran at Reuters. Her stories on high profile mergers have pushed up the European telecoms index, lifted companies' shares and helped investors decide on their move. Her knowledge and experience of European antitrust laws and developments helped her broke stories on Microsoft, Google, Amazon, numerous market-moving mergers and antitrust investigations. She has previously reported on Greek politics and companies, when Greece's entry into the eurozone meant it punched above its weight on the international stage, as well as Dutch corporate giants and the quirks of Dutch society and culture that never fail to charm readers.



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Feb. 28, 2024, 1:30 AM PST

AI Use in Law Practice Needs Common Sense, Not More Court Rules

By David Lat

Column

Columnist David Lat analyzes news, trends, and personalities shaping legal practice. He disagrees with courts' and judges' push to implement AI-specific rules, saying they hinder innovation and that existing rules suffice.

Bloomberg Law News 2024-02-28T09:46:55928468303-05:00

AI Use in Law Practice Needs Common Sense, Not More Court Rules

By David Lat2024-02-28T04:30:13000-05:00

In his 2023 year-end report on the federal judiciary, Chief Justice John Roberts highlighted the promise and perils of artificial intelligence for the legal system. "AI obviously has great potential to dramatically increase access to key information for lawyers and non-lawyers alike," he wrote. "But just as obviously it risks invading privacy interests and dehumanizing the law."

At this early stage, lawyers and judges have only a limited sense of how AI will affect the practice of law or the enterprise of judging. It would therefore be wise to pause and gather more data before taking action. But some judges are falling all over themselves to create AI-specific orders, rules, and disclosure requirements.

At least 21 federal trial judges have already issued standing orders regarding AI, according to Bloomberg Law. The Fifth Circuit is considering a proposal that would require attorneys to confirm that they checked the accuracy of AI-generated material. The Ninth Circuit has created an AI committee that could end up proposing AI-related rules, and so has the Third Circuit. State courts are convening AI committees as well.

I have a simple message for judges who are thinking about adopting AI-specific orders and rules.

Just. Say. No.

One can understand why judges have felt the need to take action. AI is dominating everything from newspaper headlines to cocktail-party chatter. There's a reason why Roberts made it a focus of his annual report.

And stories about “AI fails” by lawyers have gone viral, such as the tale of two Manhattan lawyers who filed a brief in federal court that cited nonexistent cases generated—or “hallucinated,” to use the technical term—by ChatGPT. But do a few highly unusual fiascos, involving a small number of attorneys, justify imposing additional rules and requirements on all lawyers?

“ChatGPT, and AI in general, can be misused,” acknowledged Ross Guberman, CEO of BriefCatch, which produces legal-editing software that includes AI features. “But I’m concerned that some courts are issuing sweeping anti-AI rules based on anecdotes.”

I see several problems with judges saddling lawyers with AI-specific rules and requirements. First and foremost, they’re simply not necessary.

“Any such rules are redundant given lawyers’ existing responsibilities to ensure the accuracy of their court filings,” said lawyer and legal journalist Bob Ambrogi, publisher of the legal-technology blog LawSites. “Rule 11 in the federal courts and similar state rules require lawyers to certify the factual and legal accuracy of their pleadings. Professional responsibility rules impose similar requirements. To create a new ‘accuracy’ rule specifically related to the use of AI is unnecessary.”

AI is just another tool in a lawyer’s toolkit. If lawyers build something defective with their tools, that’s the fault of the lawyers—which is why existing rules target lawyers, not the specific tools they use.

“A lawyer’s use of AI to assist in drafting is no different than the use of an associate or of legal editing software,” Ambrogi told me. “No matter how the draft was prepared, the lawyer is ultimately responsible for its contents. When a lawyer submits a filing with fictitious or erroneous citations, the fault is the lawyer’s, not the technology’s.”

Or as lawyer and legal commentator Carolyn Elefant put it, “GenAI is nothing more than the canary in the coal mine. The toxic uses are all completely human.” Like a canary in a coal mine, an AI disaster points to another problem: incompetent or unethical lawyers. There’s nothing wrong with the canary.

“In every case so far of filings containing hallucinated cases, the fault was either in a lawyer who did not bother to even check the cases or a self-represented litigant who did not know better,” Ambrogi added. “This is simply bad lawyering—and bad lawyering that existing rules are more than sufficient to address, as sanction awards have already demonstrated.”

Exhibit A: the lawyers from the ChatGPT debacle. Judge Kevin Castel sanctioned them using good old-fashioned Rule 11—no fancy new AI rule needed.

Second, AI-targeting rules and requirements carry significant costs. In addition to forcing lawyers to spend (or waste) time and money on compliance, they send a negative message about AI that could discourage attorneys from exploring the many positive uses for AI.

As Elefant wrote of one judge’s standing order on AI, it “isn’t just duplicative, but dangerous.” Such orders have the potential to “stymie innovation and scare lawyers from using a powerful tool.”

New AI rules “might seem harmless, but lawyers take court pronouncements seriously,” Guberman of BriefCatch said. “The risk is that the entire profession will miss out on AI’s vast potential for enhancing both lawyering and access to justice.”

Third, rules aimed at AI create tension between clients and their outside law firms, according to Alex Su of Ironclad, an AI-powered contracts software company.

How so? Corporate legal departments are under pressure from CEOs and other top executives to leverage AI—which is why in-house lawyers are embracing AI much more quickly than law firms.

But when they encourage their outside counsel to use AI solutions for efficiency and cost savings, they often get pushback—partly because lawyers at firms, who deal more directly with courts and judges than their clients, are getting negative messaging about AI from the judiciary.

“Law firms are already conservative about AI, and understandably so,” Su told me. “But when courts impose all these new rules and disclosures, they push things a bit too far.”

Finally, if we must have AI-specific rules, it would be nice to have uniformity.

“While I do not believe any new rules are needed, I am also concerned about the Babel-like approach we’re seeing so far, of individual courts adopting their own rules,” Ambrogi said. “If there is to be rulemaking around this, it should be done in a uniform and deliberative manner.”

Lawyers having to comply with a welter of competing, inconsistent rules counsels in favor of individual judges holding off on AI-specific requirements for now. Instead, jurists concerned about AI should advocate within the judiciary for a broader, coordinated response.

As Roberts’ report made clear, AI isn’t going anywhere. There will be plenty of time to develop new rules if necessary, after lawyers and judges have a better sense of the actual problems and pitfalls.

In Roberts’ words, using AI “requires caution and humility.” And judicial efforts to regulate the use of AI by lawyers require caution and humility as well.

David Lat, a lawyer turned writer, publishes Original Jurisdiction. He founded Above the Law and Underneath Their Robes, and is author of the novel “Supreme Ambitions.”

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Why Our Law Firm Bans Generative AI for Research and Writing

General counsel Peter Winders explains why Carlton Fields prohibits its lawyers from using generative AI to produce briefs, motion arguments, researched opinions, and other legal products.

Bloomberg Law News 2024-02-28T10:08:22730345886-05:00

Why Our Law Firm Bans Generative AI for Research and Writing

By Peter Winders2024-02-28T04:30:14000-05:00

Our law firm has a policy forbidding our lawyers to use generative artificial intelligence to produce legal products such as briefs, motion arguments, and researched opinions.

Here are some of the reasons we think this is the only right course.

Large language model generative AI digests a huge amount of literature and then predicts what a human most likely would say in response to questions and limited by how the question was presented. But generative AI sometimes “hallucinates,” a clever term describing what the tool has done when caught in an obvious lie. Media coverage about this phenomenon usually includes a quote along the lines of: “We don’t understand why it does that, and we are working on ways to control it.”

If the tool is working as described, predicting the most likely human response based on an enormous library of human works, then all it does is “hallucinate.” It predicts what a human would say, barely tethered by fact. At some point, such fabrications will be obvious, but at no point can the output of a product that works this way be trusted with a task unless the user knows immediately whether each statement in the product is true or false.

Apologists have suggested that generative AI could help summarize a lawyer’s own work, using a prompt that asks “digest the briefs and write an oral argument.” Generative AI certainly can do that, and it would be readily verifiable. But every appeals judge or justice since John Jay has told us oral arguments shouldn’t regurgitate the briefs, and oral argument is (or should be) a carefully crafted standalone art form.

Generative AI’s adherents in the legal profession and even the skeptics, including some courts, warn that all citations must be checked and certified to be accurate. That misses the point.

None of this “generative” output is based on thought, analysis, understanding, or upon a truly insightful examination of the case law, statutes, the facts of the case, and the policy reasons underlying either cases, statutes, or analogous sources of the law. Generative AI doesn’t think. “Remove the demonstrable lies” doesn’t cure the problems, including the problem of undetected lies.

Take the infamous New York case where two unfortunate lawyers submitted the ChatGPT brief containing citations to non-existent cases, quotations from other non-existent cases, and other ‘hallucinogenic’ problems. The reaction of the legal community in the main was that the lawyers should have double-checked those citations.

Think about it. Remove the fake cases and the misrepresented quotes. Would that result in a good brief? Would the court have had the benefit of a professional’s careful reasoning and analysis? Would the client have been well-served? Would any of the purposes of a brief (other than getting something timely filed) have been met?

It seems that “take out the provable fakes” should be an unacceptable solution to the problem of a generative AI-assisted brief. How does a lawyer responsibly check the rest of it? By starting over and doing the work, then comparing this work product to the fabricative AI product. The exercise saves no work at all if a thoughtful brief is the goal. Even then, the risk of being lulled or misled by the defective starting point of this analysis should be self-evident.

This isn’t like when a partner has to confirm that the cases a first-year associate cites are accurate. Associates are taught to think like lawyers, their drafts have thought and judgment behind them, and they’re presumably not compulsive liars.

What about a generative AI program trained only on a large library of only reliable material, such as the West system or the preserved research and output of a large law firm? This might cut down on the risk that the generative AI tool has scraped rubbish off the internet at large, but it will do nothing to stop its resort to the fabrication of cases.

We have no way to determine what the tool saw, what it missed, what it overlooked, what it misunderstood, the analogies it failed to make, what authorities were truly supportive or adverse based on a nuanced understanding of the facts of our own case and the facts of decided cases, what policies animated these cases, or what lines of analysis might have been left out of the query used for the search.

A generative AI tool can’t do any of these things because it can’t think. The narrative it generates is still a made-up answer created with algorithms, not with thought and judgment.

I hope no court we appear before is tempted to use generative AI to write its opinion. That might be even worse.

This invention may be useful for some purposes—those where the user immediately knows whether the output is accurate, or where the accuracy isn't important to the user, and where zero understanding or analysis of sophisticated concepts is required. But it simply can't be used to produce competent legal product intended to aid a client or assist a court in the important work of fairly deciding disputes and developing the law.

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American Airlines Seeks Win in 401(k) ESG Suit After Setback

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- Case questions legitimacy of socially conscious investing
- Federal judge greenlighted ERISA disloyalty, imprudence claims

American Airlines Inc. renewed its effort to kill litigation over its 401(k) plan's alleged ties to investments focused on environmental, social, and corporate governance goals, asking for a summary judgment victory five days after its motion to dismiss fell flat.

The record shows American's process for choosing and monitoring plan investment options was "at all times state of the art" and that it "secured contractual commitments from all investment managers to pursue investors' financial interests when voting the Plans' proxies," the airline said. There's no evidence plan fiduciaries held any improper motives, whether "ESG-related or not," and plaintiff Bryan Spence hasn't even attempted to calculate how the disputed investment decisions caused damages to the plan, the airline said.

American's motion for summary judgment, filed Monday in the US District Court for the Northern District of Texas, comes five days after Judge Reed O'Connor allowed Spence to move forward with claims of fiduciary disloyalty and imprudence under the Employee Retirement Income Security Act. O'Connor, a George W. Bush appointee who has repeatedly struck down provisions of the Affordable Care Act, said Spence's lawsuit tells a "plausible story" that the airline's "public commitment to ESG initiatives" caused it to invest 401(k) plan assets with ESG-focused managers while failing to properly investigate other managers that would focus exclusively on maximizing financial benefits for plan participants.

Spence's lawsuit, which seeks to represent a proposed class of more than 100,000 people, says American's \$26 billion 401(k) plan improperly favored ESG funds and invested billions with BlackRock Inc., which he describes as a proponent of the investment strategy. It's one of the first private-sector lawsuits to argue that a retirement plan fiduciary breached its duties by pursuing ESG investments—those aimed at promoting socially conscious goals—at the expense of workers' financial interests.

In addition to arguing that Spence lacks the evidence needed to make his case, the airline criticized him for attempting to introduce a new legal theory through an expert report. This theory—which argues American should have attempted to influence BlackRock's proxy vote in a 2021 election that installed new climate-friendly members on Exxon Mobil Corp.'s board of directors—is speculative, lacks proof, and wasn't properly pleaded in the operative complaint, American said.

BlackRock isn't a party to the suit.

O'Melveny & Myers LLP and Kelly Hart & Hallman LLP represent American. Hacker Stephens LLP and Sharp Law LLP represent Spence.

The case is Spence v. Am. Airlines, Inc. , N.D. Tex., No. 4:23-cv-00552, summary judgment motion 2/26/24 .

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ETF Hub **ESG investing**

ESG funds outperformed peers during Covid stress, finds Esma

European markets watchdog report says findings should contribute to retail investor debate



Esma report analysed the performance of 2,581 EU-domiciled Ucits funds from mid-February 2020 to the end of June 2020 © Bloomberg

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Environmental, social and governance funds outperformed non-ESG funds during the market turmoil caused by the Covid-19 crisis, according to new analysis by Europe's markets watchdog.

The European Securities and Markets Authority said the finding that active [ESG](#) funds performed better than non-ESG funds “adds to the active [versus] passive fund investing debate” for retail investors and could also help influence its work on sustainable finance.

The Esma report analyses the performance of 2,581 EU-domiciled Ucits funds from mid-February 2020 to the end of June 2020, when it said financial markets suffered from “an exogenous shock” that “affected the market as a whole”.

Esma found that active ESG Ucits funds outperformed non-ESG active funds during the first 10 weeks of the Covid-19 outbreak when much of the world rushed into lockdown.



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“Funds with a high ESG rating also reported higher returns over the whole period compared to funds with a low ESG rating,” said Esma.

The report also found that investors were interested in the sustainability characteristics of funds even during times of intense market volatility.

Many types of ESG funds also received higher net flows during the 2020 market volatility than non-ESG funds, according to Esma.

“ESG funds are associated with higher net flows during all periods except the recovery and funds with a high sustainability rating are associated with higher net flows during the stabilisation period.”

However, the watchdog found that there was “no statistically significant difference in net flows” between funds that employ exclusion strategies and those that do not.

The Esma report added that trying different methods to differentiate between ESG funds and non-ESG funds “sometimes led to different results” — a situation that it said was likely to improve once “the quality and quantity of data increases following the improvements in definitions and the regulatory efforts undertaken”.

The watchdog confirmed late last year that it would press on with its ESG fund name guidelines, despite strong industry opposition, after an amendment was tabled to Ucits and the Alternative Investment Fund Managers Directive.

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Feb. 27, 2024, 1:30 AM PST

A Clear Human Rights Policy Helps Steer Corporate ESG Priorities

As pressure grows over ESG policies, companies that establish cohesive human rights policies would clarify expectations for stakeholders and customers, Gartner's Chris Audet says.

Bloomberg Law News 2024-02-28T12:27:59396422552-05:00
A Clear Human Rights Policy Helps Steer Corporate ESG Priorities

By Chris Audet2024-02-27T04:30:27000-05:00

Legal and compliance leaders are rightly concerned about growing environmental, social, and governance imperatives from investors, internal stakeholders, global regulators and enforcers, and the public. These concerns are driving organizations to create statements that express their company's international commitment to human rights.

Companies often publish a brief statement to declare their support for human rights or include this kind of language in their codes of conduct. But this approach can be insufficient, as organizations face increasing pressure to implement a wider scope of actions to assess, avoid, and disclose risk in the human rights space.

A dedicated human rights policy can help establish explicit and comprehensive standards in response to evolving expectations.

New laws, such as the EU Corporate Sustainability Reporting Directive and relevant European Sustainability Reporting Standards, require certain companies to report social issues—including human rights—in their own workforce, value chain, affected communities, customers, and end users.

Existing laws, such as the US Uyghur Forced Labor Prevention Act and the UK Modern Slavery Act, already come with specific mandates that apply to businesses operating in those jurisdictions.

Beyond matters of regulatory compliance, shareholder proposals and media reports continue to scrutinize human rights issues within companies and their supply chains. Failing to meet public expectations in this area is likely to involve reputational damage that can impact hiring, retention, brand value, and ultimately the bottom line.

A standalone policy is among the positive factors several ESG rating firms use when scoring a company's ESG maturity.

Compliance leaders should play a critical role in evaluating how to codify a company's commitment to advancing internationally proclaimed human rights. To help organizations decide whether they need a human rights policy, compliance leadership should gather details from relevant stakeholders to answer these questions:

- Does a standalone human rights policy fit into our company's corporate strategy and ESG strategy?
- Does our company's industry, geography, and/or business model pose a high risk of human rights abuses in the value chain?
- Are our company's investors asking how we manage human rights issues?

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- Are they inquiring about the existence of any related policies?
- Are our company's customers and/or employees asking us to articulate our commitment in this space?
- Do our company's suppliers and/or other third-party partners have questions about our expectations of them?
- Has an ESG evaluator asked our company about the existence of a standalone policy?
- Is our company subject to any regulations that require a stand-alone human rights policy?



Emerging Practices

The best human rights policies are clear, transparent, and enforceable—and do the following:

Feature broader topics and supporting documents. Effective human rights policies specifically call out workplace civility topics such as anti-harassment, anti-discrimination, diversity and inclusion, safety, and anti-violence.

Also important is addressing labor standards, which can include prohibitions on human trafficking, forced labor, unsafe or unsanitary work conditions, guidance on work hours, prohibitions on child labor, fair wage and overtime practices, and benefits standards.

These rules should apply both inside and outside of an organization, including employees, contractors, suppliers, third-party partners, and customers. Leading organizations also make available public supporting documents such as ESG reports or dedicated human rights disclosures, and highlight company engagement and membership in relevant international groups and coalitions.

Spell out industry-specific challenges. Companies should consider incorporating industry-specific issues to demonstrate the policy that has been formulated around the context of the individual organization, as opposed to being a kind of off-the-shelf declaration.

For example, a technology company may cover data protection practices that specify how it balances privacy protection with government surveillance activities.

Organizations that work with Indigenous communities may want to create a dedicated policy about global community relations and rights of Indigenous peoples. For food and beverage companies, land rights and water resources may be another aspect of human rights to highlight since it's critical to bringing their products to market.

Explain how the policy is upheld and enforced. Leading companies are proactive in how they follow through on their human rights policies. These should detail the responsibilities of the board, CEO, ESG steering committee, and/or other internal ESG team members involved in governance of the policy.

It's also paramount to implement a program designed to engage, assess, and audit suppliers—another way to show enforcement is to share the methodology of supplier audits and the results.

A policy is just one opportunity for compliance leaders to demonstrate their organization's commitment to human rights. As every compliance leader knows, the real work lies in executing organizational commitments and ensuring policy declarations are operationalized.

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\$87 Million Buys This for Jamie Dimon: David Boies Can't Utter the Words "JPMorgan Chase" in a Jeffrey Epstein Sex Trafficking Case

 wallstreetonparade.com/2024/02/87-million-buys-this-for-jamie-dimon-david-boies-cant-utter-the-words-jpmorgan-chase-in-a-jeffrey-epstein-sex-trafficking-case

By Pam Martens and Russ Martens: February 27, 2024 ~



On Friday, February 16, ahead of a three-day weekend, JPMorgan Chase quietly filed its 10-K (annual report) with the Securities and Exchange Commission. The document carried the bombshell that the bank had paid an astonishing \$1.4 *billion* in legal expenses in 2023 – a 426 percent increase over the prior year's legal expenses.

While the bank didn't break down the names of the law firms that received the lion's share of those legal expenses, public records can fill in most of the blanks.

Throughout 2023, JPMorgan Chase was paying the expensive lawyers at WilmerHale to defend it against a federal lawsuit brought by the David Boies law firm, Boies, Schiller & Flexner LLP, on behalf of the raped, assaulted, and sex trafficked underage victims of Jeffrey Epstein. JPMorgan was also paying WilmerHale lawyers throughout 2023 to defend it against Epstein-related charges brought by the Attorney General of the U.S. Virgin Islands. In both cases, the plaintiffs credibly alleged that the bank was actively-engaged in facilitating Epstein's criminal sex-trafficking enterprise by providing the financial services and hard cash necessary to keep it going while willfully violating its duty to report the cash transactions to the Financial Crimes Enforcement Network (FinCEN).

Both cases were settled by JPMorgan last year, thus preventing the mountain of heavily redacted and sealed documents from seeing the light of day in a jury trial. The Epstein victims' case was settled for \$290 million while the U.S. Virgin Islands case was settled for \$75 million.

Throughout last year's scandalous headlines, the Chairman and CEO of JPMorgan Chase, Jamie Dimon, preposterously stuck to the story that he didn't know the notorious Epstein was a client at the bank, from at least 1998 to 2013, and likely much longer.

The Boies law firm and another law firm involved in the Epstein victims' case, Edwards Henderson Lehrman, received \$87 million in legal fees from the \$290 million settlement, plus more than \$1 million in legal expenses.

Now we're learning new details about what else WilmerHale and Dimon extracted from David Boies (in addition to a ton of documents remaining sealed or redacted) in exchange for that \$87 million payday.

Earlier this month, David Boies filed a federal lawsuit against Darren Indyke and Richard Kahn, Epstein's personal lawyer and accountant, respectively. There are two named plaintiffs who seek to become the class representatives in a class action against Indyke and Kahn: Danielle Bensky and Jane Doe 3.

Bensky's allegations originate during the time-period in which JPMorgan Chase was funneling \$40,000 to \$80,000 a month in hard cash to Epstein so he could pay hush money to his victims and incentive cash to his recruiters of underage girls. But instead of Boies including what would be the very critical information against JPMorgan Chase that was obtained in discovery in last year's cases, the bank's name is not mentioned *once* in the 85-page court filing.

The heart of the case against Indyke and Kahn is that they were "personally essential to the Epstein Enterprise's success—among other things, they helped structure Epstein's bank accounts and cash withdrawals to give Epstein and his associates access to large amounts of cash in furtherance of sex trafficking."

How a lawyer can prove this case without naming the bank that played a central role in the scheme from at least 1998 through 2013 is beyond our comprehension. Unless, of course, the strategy is to just grab another settlement.

Below is a sampling of the gut-wrenching charges that Boies made against JPMorgan Chase just last year in the victims' case against the bank:

"To access the large amount of cash needed to maintain his active sexual abuse of young women, it was essential that the financial institution where he banked be complicit in his operation, and more specifically that Epstein bank at a financial institution that would allow him to constantly withdraw cash from his accounts without following anti-money laundering and reporting laws. To put it plainly, Epstein needed a bank that knew he was engaging in illegal activity and did not care, which Epstein had in JP Morgan."

"Epstein's aptitude as a sex-trafficker and appetite as a sexual abuser did not suffer because of his Florida incarceration in 2008. Even while he was in jail in Florida, Epstein brazenly continued to sexually abuse young girls and women from his work-release office."

"At all relevant times, Epstein maintained numerous apartment units at 301 East 66th Street in New York City, where Epstein's co-conspirators often stayed and which operated as stash houses where numerous victims were kept over the years."

"JP Morgan knew of the 301 East 66th Street Epstein properties and knew that these units operated as victim stash houses."

"In 2006, Jeffrey Epstein was arrested in Florida after state and federal law enforcement discovered that he had sexually abused more than 30 children in his Palm Beach, Florida mansion...As a consequence of the Florida investigation, Epstein pled guilty to two felonies, was permanently labeled a 'Registered Sex Offender,' and was jailed in 2008. Epstein also entered into a non-prosecution agreement with the U.S. Attorney's Office for the Southern District of Florida barring his prosecution (and prosecution of his known and unknown co-conspirators) for violations of the TVPA [Trafficking Victim Protection Act] and other sex offenses in Florida. When the U.S. Attorney's Office entered into that non-prosecution agreement with Epstein, it had not received reports from JP Morgan about vast sums of cash that it was providing Epstein. Nor did JP Morgan provide any other assistance in the investigation."

"JP Morgan chose not to cooperate with law enforcement and other investigations into Epstein's sex trafficking, because it knew it would be exposed as assisting in Epstein's scheme."

"As Epstein's criminal sex trafficking venture expanded, he needed more protection and support from JP Morgan. Through [Jes] Staley and others, Epstein became more deeply involved with JP Morgan, providing JP Morgan with more financial benefits. And, as a quid pro quo, JP Morgan allowed Epstein to transfer massive amounts of hush money to his victims and recruiters. JP Morgan allowed Epstein to withdraw hundreds of thousands of dollars in cash so that all the payments were not traceable (the most obvious red flag for any criminal enterprise)."

"...JP Morgan failed to file with the federal government the required SARs that financial institutions must file with the Financial Crimes Enforcement Network ('FinCEN') whenever there is a suspected case of money laundering or fraud. Timely filing of these reports is required by the Bank Secrecy Act and related laws and regulations. These reports are tools that the federal government uses to detect and prosecute, among other illegal activities, sex trafficking in violation of the TVPA. While JP Morgan was providing Epstein vast sums of

cash each year, it was required to timely file SARs about Epstein's suspicious and unusual cash transactions. JP Morgan's failure to timely file SARs about Epstein's sex-trafficking venture, in spite of numerous red flags, was wrongful and purposeful."

This is what passes for "justice" in the United States of America, circa 2024.

Related Articles:

JPMorgan and Jeffrey Epstein Explained: Twisted Banking Taps into Sex Fiend's Network

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Trade secrets and RICO causes of action

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R. Mark Halligan

REUTERS/Oswaldo Rivas Purchase Licensing Rights , opens new tab

February 27, 2024 - A statutory amendment under the Defend Trade Secrets Act (DTSA) that is often overlooked expands liability for economic espionage and trade secret theft. This amendment creates civil liability under the Racketeer Influenced and Corrupt Organizations Act of 1970 (18 USC 1961). (RICO).

Since the enactment of the DTSA on May 11, 2016, Section 18 USC 1831 (economic espionage) and Section 1832 (theft of trade secrets) are now predicate offenses in "racketeering activity" under RICO. This means that plaintiffs can sue claiming a conspiracy "through a pattern of racketeering activity" when the theft of trade secrets or economic espionage is at least one of the underlying predicate acts of racketeering.

Adding Sections 1831 and 1832 to the list of RICO predicate acts also expands the applicability of extraterritorial jurisdiction in U.S. district courts to RICO conduct occurring outside the United States if (1) the offender is a citizen or permanent resident alien of the United States, or (2) an organization is organized under the laws of the United States or a State or political subdivision thereof, or (3) an act in furtherance of the offense was committed in the United States. (18 USC Section 1837)

Section 1831 of the Defend Trade Secrets Act prohibits the theft of trade secrets intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent. Section 1832 prohibits the theft of trade secrets intending or knowing that the offense will injure any owner of the trade secret.

The amendments fill a gap when the EEA was enacted as a criminal statute with no federal civil cause of action. Victims of trade secret theft or foreign economic espionage could report these crimes to the Justice Department, but the victims could not file a civil lawsuit for EEA violations.

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To state a civil RICO claim, a plaintiff must allege (1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that the defendant participated through a pattern of racketeering activity that included at least two RICO predicate offenses within 10 years of each other.

RICO utilizes Section 1961 to establish predicate criminal acts as the foundation for enterprise liability for RICO defendants. A defendant can face criminal or civil liability under RICO even if the defendant has not been convicted of the underlying RICO predicate acts.

A plaintiff seeking damages under RICO must allege four elements to state a claim: (1) conduct [causing injury to business or property] (2) of an enterprise (3) through a pattern (4) of racketeering activity.

The RICO "enterprise" is defined as any group of individuals who associate with each other for a common purpose. It need not be a formal business entity such as a corporation but may be merely an informal association of people. A RICO enterprise is distinct from the RICO defendant. RICO does not target the RICO enterprise. RICO targets the RICO defendants who corrupt legitimate enterprises through a pattern of racketeering activity.

One of the leading RICO civil actions involving trade secrets is *Brand Energy & Infrastructure Services, Inc. v. Irex Contracting Group* (USDC Eastern District of Pennsylvania 2017). The plaintiff (a construction services company) alleged that the defendants (former high-level employees) conspired to steal plaintiff's trade secrets by leaving the company in stages. While some of the individual defendants were moving to Ivex, other individual defendants stayed at Brand to steal and siphon off Brand's trade secrets and proprietary business information. According to the plaintiff, the defendants conspired to run Brand out of business.

The defendants moved to dismiss Brand's RICO claim because (1) Brand failed to allege facts establishing the existence of an "enterprise" and (2) Brand failed to sufficiently plead a "pattern of racketeering activity."

The court rejected both arguments. First, the facts alleged an association-in-fact enterprise in furtherance of a common scheme to steal trade secrets and put Brand out of business.

Second, the court rejected the argument that there was not sufficient evidence to establish a pattern of racketeering activity. The defendants orchestrated a scheme to defraud Brand by stealing its trade secrets, by stealing its equipment, and using its proprietary business information. Viewed together, the voluminous allegations of trade secret theft, mail and wire fraud, and interstate transportation of stolen property form a plausible pattern of racketeering activity.

RICO civil remedies are clear-cut and mandatory. Any person injured in their business or property by reason of a violation of RICO's prohibited activities, which now include economic espionage and theft of trade secrets, can recover treble damages plus its costs and attorney fees. These damage awards are mandatory, not discretionary.

There is a new horizon in trade secrets law. With the passage of the Defend Trade Secrets Act, the Racketeer Influenced and Corrupt Organizations Act (RICO) expands liability for economic espionage and trade secret theft (under Sections 1831-1832) including extraterritorial jurisdiction worldwide under Section 1837 of the Defend Trade Secrets Act.

R. Mark Halligan is a regular contributing columnist on trade secrets law for Reuters Legal News and Westlaw Today.

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The Ohio Nuclear Bribery Plot Widens

 [counterpunch.org/2024/02/28/the-ohio-nuclear-bribery-plot-widens](https://www.counterpunch.org/2024/02/28/the-ohio-nuclear-bribery-plot-widens)

February 28, 2024

Davis-Besse Nuclear Plant. Photo: NRC.

It was called “likely the largest bribery money-laundering scheme ever perpetrated against the people of the state of Ohio.” And the shoes are still dropping. Or should that be ankle monitors? Because these latter belong to the three latest criminals indicted for their roles in a scheme that saw FirstEnergy hand over \$61 million in bribes to Ohio politicians and their co-conspirators to secure favorable legislation.

That bill, known as HB6, guaranteed a \$1.3 billion bailout to FirstEnergy in order to keep open its two failing Ohio nuclear power plants, Davis-Besse and Perry, as well as struggling coal plants. The nuclear portion of the bill has since been rescinded, but Ohio consumers are still paying to prop up two aging coal plants, to the tune of half a million dollars a day, amounting to an extra \$1.50 a month on every ratepayer’s electric bill.

The \$61 million bribery plot was the mastermind of then speaker of the Ohio House, Larry Householder, who is now a household name in Ohio for all the wrong reasons. He was sentenced last June to 20 years in prison for his part in the conspiracy. GOP Chairman Matt Borges, was also found guilty of racketeering conspiracy and sentenced to five years in federal prison. Both men say they will appeal.



Dave Yost, Ohio Attorney General and a Republican, indicted Randazzo, Jones and Dowling in abstentia. The three were arraigned the next day. (Photo: Official photo of Dave Yost.)

Householder may have been the instigator, but in those earlier trials, FirstEnergy was described as a company that went “looking for someone to bribe them”. They found willing accomplices among politicians but also in the person of then Ohio Public Utilities Commission chairman, Samuel Randazzo.

So on February 12, yet more indictments were handed down, this time to Randazzo and the two FirstEnergy executives who corrupted him — former CEO Charles Jones, and former senior vice president of external affairs, Michael Dowling.

Their list of crimes, including a collective 27 felonies, was announced at a press conference by Ohio Attorney General Dave Yost. But although the presence of their company had been requested, the accused were not there.

With more than a hint of resignation in his voice, Yost said at the press conference that “the counsel representing these men assured us that they would turn themselves in this morning at eight thirty AM at the Summit County jail. They did not fulfill that promise and I suppose I

am unsurprised that they would not keep this promise either.”

However, Jones, Dowling and Randazzo evidently decided it would not be such a good idea to go on the lam and all three did appear the next day, rather sour-faced and slightly sinister-looking, to face arraignment in a courtroom scene that could have been cast in Hollywood (although perhaps with more flashy A-list attorneys). All three, of course, pled not guilty.

Perhaps in light of their Monday morning no-show, the court did not lift the pre-arraignment bonds of \$100,000 each, nor the order for Dowling and Randazzo to continue wearing GPS ankle monitors — Jones can carry his due to medical reasons. Randazzo was restricted to movement within three counties while Dowling was forbidden from leaving the state. Jones was viewed as the greatest flight risk and was forbidden, for now, from returning to his Florida home — lest he flee to, of all places, Cuba!

Householder, somewhat of a gangster lookalike himself, was described during his earlier trial as “the quintessential mob boss, directing the criminal enterprise from the shadows and using his casket carriers to execute the scheme.”

Larry Householder “stuck to his guns.” He also took the money. The only thing he blew up was his career. He was sentenced last year to 20 years in federal prison.

The mainstream national press has scarcely reported any of this. Maybe they view it as a local story. But this kind of nuclear corruption has also occurred in South Carolina and Illinois, culminating in multiple indictments and prison sentences. It’s possible we could yet see something similar go down in Georgia as electricity rates there soar to pay for the two late-arriving and over-budget Vogtle reactors, the second of which just started fissioning earlier this month.

Why does the nuclear industry find itself mired in these kinds of criminal conspiracies? Because it has no chance of standing on its own financial feet. Meanwhile, cheaper, faster, more job-friendly renewable energy industry options are leaving nuclear power behind in a cloud of radioactive dust.

This economic collapse has, in turn, put pressure on politicians to make things right for their corporate nuclear friends, something Senator Joe Manchin and others are currently working hard to do on Capitol Hill.

So there may yet be more shoes (and ankle monitors) to drop and it’s going to be very interesting to see who’s wearing them.

This article originally appeared on Beyond Nuclear International.

Ohio House Speaker supporting Larry Householder's attorney in legislative race

ocj ohiocapitaljournal.com/2024/02/27/ohio-house-speaker-supporting-larry-householders-attorney-in-legislative-race

By Morgan Trau

February 27, 2024



Ohio House candidate Scott Pullins (L) and Ohio House Speaker Jason Stephens (R). (Photo by: Stephens photo by Morgan Trau; Pullins photo by Scott Pullins. Graphic by WEWS.)

The leader of the Ohio House is speaking at a campaign fundraiser for the attorney of ex-speaker, and now felon, Larry Householder. Scott Pullins is running to become a state representative after his client and friend was sentenced to 20 years in federal prison for participating in the largest bribery scheme in state history.

Pullins confirmed to WEWS/OCJ that Ohio House Speaker Jason Stephens (R-Kitts Hill) would be attending as a “special guest” to his fundraiser on March 4 in Columbus. The flyer for the event includes Stephens’ name in large font in the middle of the page.

“I’m very appreciative of his support,” Pullins said.

WEWS/OCJ reached out to the campaign spokesperson for Stephens to ask about his support and is awaiting a response.

Pullins is running in a three-person Republican primary in hopes of earning the nomination for House District 98, which contains Coshocton and Holmes counties, as well as part of Knox. The other GOP opponents are business owner Mark Hiner and IT professional Brandon Lape. This seat is left open by a term-limited state Rep. Darrell Kick (R-Loudonville).

WEWS/OCJ asked Pullins if he would be supportive of Stephens were he to win his primary, considering there is a contentious speakership race expected in 2025.

"I'm focused on winning the primary," he said. "But I believe he's done an incredible job under the worst possible environment. Republicans need to stop the infighting."

The Republicans inside the House and between chambers cannot stop fighting with each other — this has led to a continuous effort to unseat Stephens, or rather, make his work as difficult as possible.

Senate President Matt Huffman (R-Lima) is expected to challenge Stephens for House speakership next January. He has a faction of supporters within the House currently, and candidates have told WEWS/OCJ that Huffman has helped support their bid to knock out the Stephens' team incumbents.

Scandal

This support comes as three additional men who allegedly masterminded the House Bill 6 scandal pleaded not guilty in court in mid-February. Householder took a \$61 million bribe in exchange for legislation to give utility company FirstEnergy a \$1 billion bailout, named H.B. 6, all at the expense of utility ratepayers.

Pullins was, and is still on the payroll as Householder's campaign finance attorney.

Back in March 2023, Pullins spoke exclusively to WEWS/OCJ about the guilty verdict — saying he didn't think he would be in the next group of individuals related to Householder would be indicted. He was not and has never been charged with a crime.

"I was involved with a lot of stuff that the events that occurred... during this," Pullins said in an interview before the verdict. "Larry has never asked me to lie."

Speaking about his relationship with Householder, the lawyer defended the former speaker for the entirety of the interview, blaming judicial bias and the FBI unfairly targeting his friend.

"If the federal government goes in and taps my phone... they're probably going to, if they listen long enough, hear some dumb stuff, some stupid stuff and probably some stuff we would feel embarrassed to hear in a courtroom," Pullins said about audio of Householder

threatening lawmakers' children.

He was upset he didn't get to testify in front of the jury, as he had asked the defense if he could and even interviewed with them, he said.

Householder's ties to Pullins

Along with being a client and a legal advisor, Pullins was paid by JPL and Associates, a consulting firm employer of Jeff Longstreth, a lobbyist who was indicted in the scandal, cooperated with authorities, and is awaiting sentencing.

The FBI found, and Longstreth admitted, that Householder's non-profit Generation Now, which was funded by FirstEnergy bribes, was the pot of money the team was dipping into. To break this down further, JPL used Generation Now funds to pay Pullins for complimentary coverage of the nuclear bailout.

"I was working for 3rd Rail Politics," the lawyer said, unprompted. "Part of my job with JPL was to research, write and get placed articles, columns, different sites."

3rd Rail Politics was a Householder-friendly blog that existed through 2018, but was pulled down around the time the now-convict became speaker of the Ohio House.

"I would have been paid either by 3rd Rail Politics or by JPL," Pullins added.

When asked if he was being paid to speak to WEWS Statehouse reporter Morgan Trau, Pullins said he could be, but "hadn't planned" on billing for it.

In his reports, which are now only available through screenshots and archive searches, he negatively covered Householder's speaker opponent Ryan Smith. This follows months of reporting on Smith's predecessor Cliff Rosenberger.

A few days after the interview took place, Pullins backtracked and said JPL asked him to look into Smith, but "can't recall" if he was explicitly paid to write about him.

"I'll have to look back... Did I reach out the folks there and... look for information... as sources and things like that? Yeah," Pullins said when asked a third time for a direct answer about whether he was paid using Generation Now funds to write about Smith. "But as far as being directed or asked... I can't recall anything like that."

As part of his employment at 3rd Rail, he had to sign a nondisclosure for his boss Cyndy Rees, he said, when asked about why he couldn't go into more details.

Stephens' relationship with individuals who worked with Householder

Any individual who still works at the Statehouse who was affiliated with Householder has not been charged with any crimes.

That being said, the following individuals worked with the former speaker and testified during the now-convicted felon's trial. At least one of the following was subpoenaed for testimony, however, it was likely they all were:

- State Rep. Bill Seitz, Majority Floor Leader (R-Cincinnati)
- State Rep. Brett Hillyer, Civil Justice Committee Chair (R-Cincinnati)
- Megan Fitzmartin, executive staffer for Stephens

When critiqued for his pick of Fitzmartin by rival Republicans, Stephens argued back that no one should be punished based on who they previously served.

Those were the only three to testify, however, plenty of other representatives, staffers and lobbyists still hold prominence within the Statehouse walls.

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Apple Inc

Apple parks its electric car project in sign of EV industry's struggles

Tech giant pulls plug on 'Project Titan' to fund a multibillion-dollar bet on generative artificial intelligence



Apple's chief Tim Cook. The company's move to exit carmaking comes as it has also lagged behind on releasing generative AI © FT montage/Getty Images

Michael Acton in San Francisco and **Peter Campbell** in London AN HOUR AGO



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About a decade ago, Tim Cook travelled to Munich to see BMW. The Apple chief executive spent several days touring its factories and design studios, according to two people with knowledge of the trip.

Cook stunned a senior BMW executive by saying that the iPhone-maker could, in fact, turn its hand to replicating the automaker's engineering and production capacity.

He was wrong.

On Tuesday, Apple announced to its staff it would [abandon a years-long effort](#) to develop an electric vehicle that could compete with the likes of Tesla, instead switching its research funding towards building artificial intelligence.

The move to kill off the car project — known internally under the code name “Project Titan” — has been seen as a vote against the state of the [EV industry](#) as a whole.

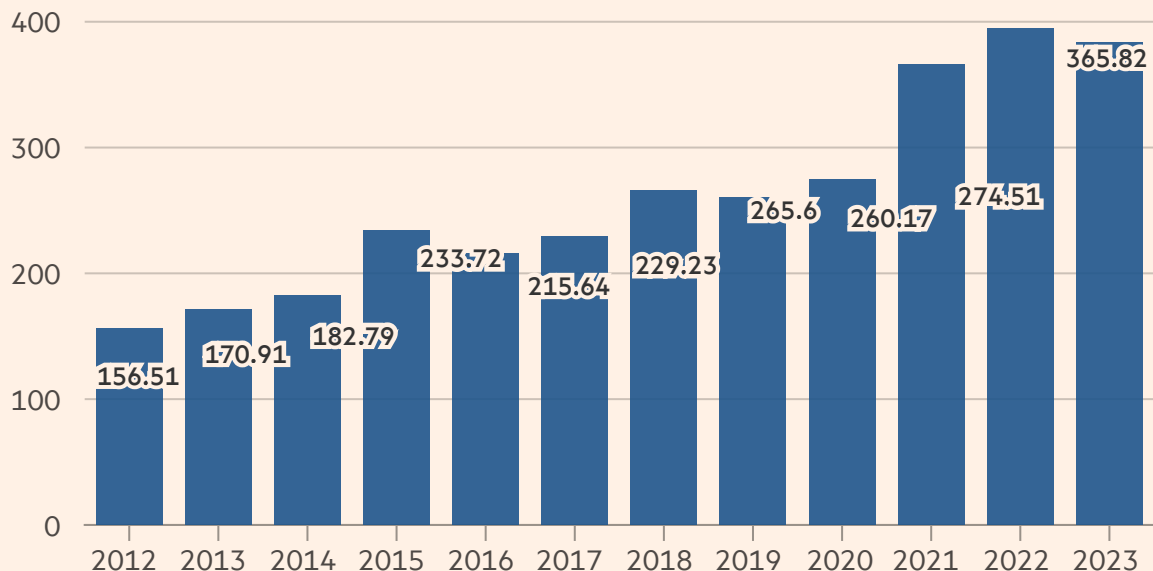
“The natural state of a car company is dead,” said Tesla’s chief Elon Musk on his social media platform X in response to the news.

EV sales growth — both from start-ups and from established players — is slowing worldwide as mass market consumers remain put off by their higher prices and perceived compromises with charging.

While sales are still rising worldwide, battery vehicles’ share of the market rose 2.8 percentage points to 15.8 per cent last year, compared with a 4.7 percentage point rise during 2022, according to data from EV-Volumes, while in some regions such as the UK market share declined.

Recent results point to **Apple's** revenue plateauing

Total net sales, \$bn



FINANCIAL TIMES

Source: Company reports

Even [Apple](#), which has cultivated itself as a luxury brand that also makes must-buy products for millions of people worldwide, may have struggled to break into this market. Apple's car would have cost a reported \$100,000, while falling short of the fat profit margins the company enjoys from sales of iPhones.

Tesla remains the only new company to have broken through selling EVs, as dozens of well intended start-ups fell by the wayside. Even China's BYD, which has overtaken Tesla in EV sales, had a legacy making engine cars. Then, last week, fellow start-ups Rivian and Lucid Motors also [announced lacklustre results](#), sending their shares tumbling.

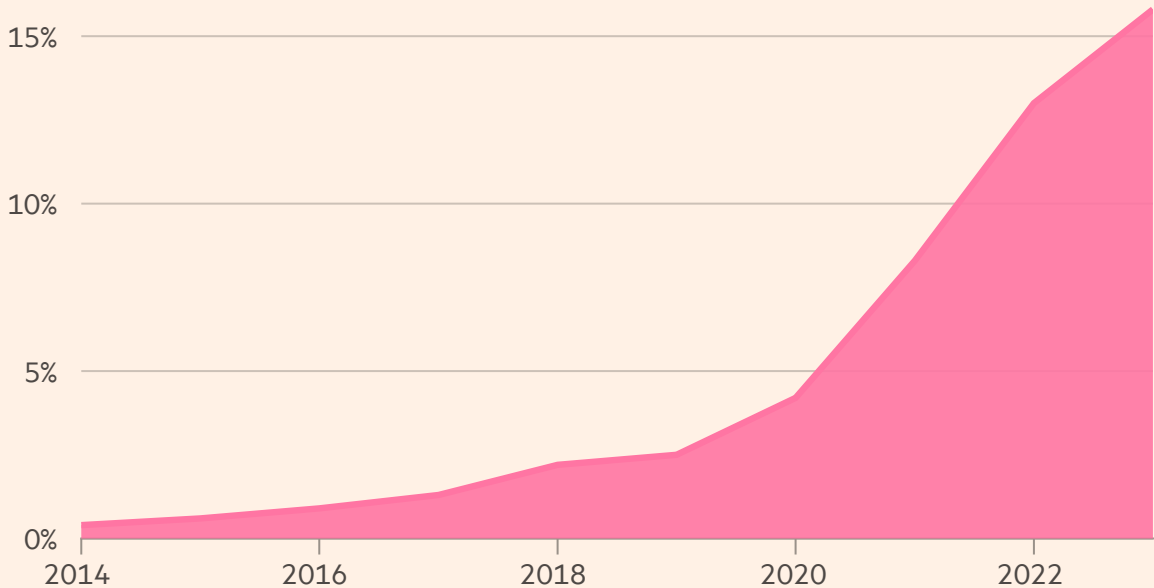
The industry nonetheless expects EVs to become dominant in time as governments push to decarbonise road transport. Apple had been betting on that future, with one of the few elements of the company's automotive project that it had publicly acknowledged being its attempts to master self-driving technology.

In 2021, Cook called autonomy "a core technology, in my view", adding: "If you sort of step back, the car, in a lot of ways, is a robot. An autonomous car is a robot. And so there are lots of things you can do with autonomy. And we'll see what Apple does."

Global **battery electric vehicles** and **plug-in hybrids** sales

Global battery vehicles' share of the market

EVs as % light vehicles



FINANCIAL TIMES

Source: [EV-Volumes](#)

Yet, much like EVs, autonomous vehicles have suffered a reality check following years of investment and hype.

[General Motors scaled back plans](#) for its self-driving Cruise unit last year following an accident while testing on public roads, while Ford pulled out of the technology altogether to focus on driver-assistance systems that will cost less but can be deployed earlier.

Few appear close to cracking the technological issues around self-driving cars. Waymo has deployed a live, customer-paying service, while many of the other new entrants have switched focus to niche applications such as commercial vehicles, or have been acquired.

Apple was “too far behind well-funded competitors to represent a viable path towards commercialisation and product differentiation”, said analysts at Morgan Stanley, who modelled the company’s car effort as adding “\$0” towards the tech group’s value.

There are “over 200 companies globally working on [electric and self-driving] technology, and over 20 carmakers already selling more than 10,000 EVs per year, while Apple was still in the testing phase”, they added.

The move to exit carmaking also comes as Apple has been a laggard on releasing generative AI — software that can produce text, images and code in seconds. Rivals such as OpenAI, Microsoft and Google are among those that made splashy announcements in recent weeks around the technology. Apple’s release this month of its Vision Pro, a “mixed-reality” headset, is another bet on future growth.

As competitors roll out smartphones with new AI capabilities, investors are impatient for Apple to reveal some of its own work in the space — something Cook has promised to do this year.

The Californian company has said its research and development efforts are focused heavily on AI, as it races to bring new products to its devices powered by its own large language models and silicon.

“There are new, shiny objects out there to tech titans trying to get a competitive edge that yields a higher valuation — and that’s AI,” said David Wagner, at Aptus Capital Advisors.

Apple began to build up Project Titan about a decade ago. In 2017, the company was granted a licence to test autonomous cars in California. Soon after, the company hired Doug Field, Tesla’s former vice-president of engineering.

But in January 2019, Apple cut a fifth of the 200 staff working on the project. In 2021, Field was poached by Ford. Around the same time, Apple approached both Nissan and Hyundai about [collaborating on the project](#), the Financial Times reported, potentially tapping into the carmakers’ manufacturing knowledge. The talks did not last long.

“While we think the car initiative likely offered the greatest long-term upside to [Apple’s] revenue trajectory, it was also likely to erode margins,” wrote Angelo Zino, at CFRA Research.

“Still, we viewed the car initiative as more of a ‘pie in the sky’ opportunity,” he added. “Investors are unlikely to see this as having major implications to the stock price as it wasn’t modelled into our (and most) long-term expectations.”

Apple shares barely moved in early New York trading on Wednesday, keeping steady at \$181.84.

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BUSINESS | AUTOS

Elon Musk Says Long-Delayed Tesla Roadster Coming Next Year

Details, including acceleration claims, follow Chinese rival BYD's \$233,000 sports-car debut

By [Ben Otto](#) [Follow](#)

Feb. 28, 2024 7:30 am ET



Tesla is preparing to launch a new Roadster. PHOTO: LIESA JOHANNSEN-KOPPITZ/BLOOMBERG NEWS

Tesla **TSLA 1.37% ▲** has finished designs for its long-delayed Roadster electric sports car and intends to begin shipments next year, Chief Executive Elon Musk said.

In a series of posts on his social-media platform X, Musk said Wednesday that the vehicle's design was a collaboration between Tesla and his rocket company SpaceX, and would be unveiled at the end of the year. The car will be capable of accelerating to 60 miles per hour in less than a second, which "is the least interesting part," he said.

"Tonight, we radically increased the design goals for the new Tesla Roadster," Musk wrote. "There will never be another car like this, if you could even call it a

car.”

The original Roadster was Tesla’s first production car, released in 2008.

In 2017, Musk promised a revamped version that he said would be the quickest production car ever made, with a top speed of 250 mph. At the time, Tesla said a base version would sell for \$200,000 and debut in 2020.

Tesla in 2021 delayed the launch, citing supply-chain shortages.

Musk’s focus on the Roadster comes days after Chinese electric-vehicle maker BYD debuted a \$233,000 sports car known as the U9, part of plans to expand from the company’s budget-car origins in hopes of higher returns under its premium brand Yangwang.

The Warren Buffett-backed company, which last year overtook Tesla as the world’s largest EV maker by sales, targets deliveries for the Lamborghini-esque, two-door coupe in mid-2024.

Write to Ben Otto at ben.otto@wsj.com

Opinion: The Tesla Growth Story Is Officially Dead

 [fool.com/investing/2024/02/26/opinion-the-tesla-growth-story-is-officially-dead](https://www.fool.com/investing/2024/02/26/opinion-the-tesla-growth-story-is-officially-dead)

Sean Williams

February 26, 2024

It's time to rethink one of Wall Street's most outsize and unsupported valuations.

Few trends have captivated the attention of investors over the past five years quite like the electric-vehicle (EV) revolution. That's because there are big dollar signs attached to the global growth of EVs. Based on a report released last year by Fortune Business Insights, worldwide EV sales are expected to grow by nearly 18% annually between 2022 and 2030, ultimately reaching close to \$1.6 trillion by 2030.

Though a lot of companies are vying for their piece of the ever-growing EV market share pie, it's **Tesla** (TSLA 1.77%) that's ridden its first-mover advantages to outsize returns.

Image source: Tesla.

Tesla has gained more than 12,000% since its IPO

As of the closing bell on February 22, Tesla was sporting a nearly \$629 billion market cap, which is more than the *combined* value of many of the world's legacy automakers. It achieved this mark by doing what no other automaker had done for more than a half-century: successfully build a car company from the ground up to mass production. Last year, Tesla produced almost 1.85 million EVs, which was ahead of its own early year guidance of 1.8 million EVs.

Further, Tesla is the only pure-play EV maker that's generating a recurring profit, based on generally accepted accounting principles (GAAP). Although legacy automakers like **General Motors** and **Ford Motor Company** are generating hearty profits from their internal-combustion engine vehicles, they, along with every other pure-play EV manufacturer, have EV segments that are bleeding red.

The more than 12,000% gain Tesla has delivered to shareholders since its 2010 initial public offering (IPO) is also a reflection of the company attempting to become more than just an EV maker. CEO Elon Musk has overseen the placement of nearly 55,000 supercharger connectors, and has talked up the potential of Level 5 autonomous driving software, as well as its Optimus humanoid robot, among other innovations.

In other words, Tesla's stock has been powered by the belief that it's a premier growth story.

But in my view, this story-book growth tale is officially dead.



NASDAQ: TSLA

Tesla

Today's Change

(1.77%) \$3.54

Current Price

\$203.27



✓ TSLA

Key Data Points

Market Cap

\$636B

Day's Range

\$198.44 - \$205.30

52wk Range	\$152.37 - \$299.29
Volume	75,095,780
Avg Vol	111,131,041
Gross Margin	18.25%
Dividend Yield	N/A

Statistically speaking, the Tesla growth story has stalled out

For a moment, let's put aside specific catalysts and headwinds and focus on a company's rawest measure of success: its earnings per share (EPS).

Between 2019 and 2022, Tesla's automotive revenue more than tripled to \$71.5 billion, and its adjusted (non-GAAP) EPS catapulted from \$0.01 to \$4.07. It was every bit the game-changer Wall Street expected it to be, with historically low interest rates and fiscal stimulus during the COVID-19 pandemic assisting its outperformance.

But based on Wall Street's consensus EPS estimates, the 2022 to 2025 stretch tells a completely different story. After reporting \$4.07 in EPS in 2022, the company's per-share profit declined by 23% in 2023 to \$3.12. For context, EPS estimates for 2023 entered the year above \$6 per share, which means they were halved over the course of 12 months.

It's the same story for Tesla's 2024 and 2025 consensus EPS, which currently sit at \$3.05 and \$4.06, respectively. Wall Street's 2024 forecast has come down from a peak of over \$7 per share, while the \$4.06 expected in 2025 has also been slashed by more than 50% over the past year and change. Although earnings estimates are subject to revision, Wall Street is expecting one of the leading growth stocks over the past decade to go absolutely nowhere (\$4.07 EPS in 2022 and \$4.06 EPS in 2025) through mid-decade.

To be fair, the entire EV industry has hit its first true speed bump. Higher interest rates have made borrowing money and financing new EVs costlier. Additionally, EV infrastructure still isn't widespread, which serves as an industrywide deterrent.

But as the world's most-valuable EV company by market cap, it's Tesla's glaring flaws that stand out the most.

Image source: Getty Images.

Tesla has officially lost its luster

Tesla's problems truly became recognizable last year when the company began aggressively reducing the selling price of its four production models (3, S, X, and Y). While shareholders had been hoping that these price cuts were the result of production efficiencies, Musk made clear during the company's annual shareholder meeting in May that his company's pricing strategy is dictated by demand. With Tesla continuing its price-reduction strategy into 2024, it's a crystal-clear indication that EV demand has waned and inventory levels have risen.

Another problem for Tesla is that its ambitions to become more than just a car company are falling flat. Sales growth from its Energy Generation and Storage segment have fallen off, while gross margin for the company's Services segment clocked in at less than 3% during the fourth quarter. While Tesla has enjoyed spurts of success (e.g., the acceptance of its Supercharger network among legacy automakers), it's also been prone to failures, such as with the acquisition of SolarCity.

The quality of Tesla's profits and cash flow also need to be called into question. During the third and fourth quarter of 2023, the company generated a respective 41% and 35% of its pre-tax income from a combination of regulatory tax credits that are sold to other automakers and interest income from its existing cash. This is an outsize percentage of its pre-tax income coming from sources that simply aren't sustainable and aren't representative of its EV sale/leasing operations.

With regard to free cash flow (FCF), Tesla generated roughly \$2.06 billion in 2023. If its \$1.81 billion in stock-based compensation were backed out of the equation, and its interest income and regulatory tax credits fully taxed, the company's FCF would effectively disappear.

CEO Elon Musk deserves blame, as well, for Tesla losing its luster. Despite being an innovator, Musk has found himself in the crosshairs of securities regulators on more than one occasion. Perhaps worst of all, the vast majority of Musk's innovations have failed to get

off the ground. He's promoted Level 5 full self-driving as being "one year away" for a decade and failed to deliver on a promised 1 million robotaxis. Backing out Musk's numerous unfulfilled promises would wipe away the bulk of Tesla's market cap.

Tesla's otherworldly valuation of 65 times forward-year EPS suggests it's one of the most-revolutionary companies of our time. In reality, it's a profitable but still cyclical car company that's trading at roughly 10 times the forward earnings multiple of GM and Ford.

It was fun while it lasted, but the Tesla growth story is officially dead.

Where to invest \$1,000 right now

When our analyst team has a stock tip, it can pay to listen. After all, the newsletter they have run for two decades, *Motley Fool Stock Advisor*, has tripled the market.*

They just revealed what they believe are the **ten best stocks** for investors to buy right now... and Tesla made the list -- but there are 9 other stocks you may be overlooking.

See the 10 stocks

**Stock Advisor returns as of February 26, 2024*

Sean Williams has no position in any of the stocks mentioned. The Motley Fool has positions in and recommends Tesla. The Motley Fool recommends General Motors and recommends the following options: long January 2025 \$25 calls on General Motors. The Motley Fool has a disclosure policy.

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Halfords Group PLC

Halfords shares plunge after profit warning

UK retailer forecasts earnings more than a quarter lower than previous estimate due to wet weather and rising cost of living



Halfords said consolidation in the cycling sector and more customers making purchases on credit had also led to weaker profit margins © Reuters

Franklin Nelson in London 3 HOURS AGO



Shares in Halfords plunged almost 30 per cent on Wednesday after the UK bicycle and car parts retailer issued its second profit warning in two years because of bad weather and the rising cost of living.

The London-listed group said profits would be more than a quarter lower than previous forecasts, sending shares 28 per cent lower to 144p by early afternoon.

[Halfords](#), which has 386 shops and 645 garages across the UK, said cycling and motoring had been hit by weak customer confidence and unusually mild and very wet weather reducing footfall in its stores.

This prompted a new forecast in an unscheduled trading update for underlying pre-tax profits of between £35mn and £40mn for the year to the end of March, down from £48mn to £53mn previously.

In the 12 months to March 2023, Halfords posted an underlying pre-tax profit of £51.5mn, compared with £89.8mn the previous year.

Consolidation in the cycling sector and more customers making purchases on credit had also led to weaker profit margins in the group's retail business, it said.

Halfords shares slump after profit warning

Share price, £



Source: LSEG

© FT

Data published this month by research group GfK showed [consumer confidence dipped](#) in February, driven in part by a drop in consumers' assessment of their personal financial situation.

With inflation staying steady at 4 per cent last month, households are continuing to watch discretionary spending in an effort to offset cost of living pressures.

The company, which boomed during the Covid-19 pandemic as demand for bikes and cycling products surged, said it remained "confident" in its strategy.

But it added: "Looking ahead to [2025], we remain cautious on market recovery in the short-term, and the current significant volatility in market conditions means that forecasting accurately is challenging."

In January last year, the company cut its forecast for pre-tax profit for the 12 months to March 2023, citing difficulties in hiring staff in its garages and a fall in demand for tyres.

Adam Tomlinson, analyst at broker Liberum, said the profit warning on Wednesday was “clearly another disappointing update” and a fresh indicator that Halfords’ target to double profits over the medium term was “very stretching”.

There were “no visible positive catalysts at this stage” on the outlook for the company, he added in a note.

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<https://www.wsj.com/business/new-york-attorney-general-sues-meatpacker-jbs-over-climate-claims-e900f75d>

EXCLUSIVE BUSINESS

New York Attorney General Sues Meatpacker JBS Over Climate Claims

Suit comes as Brazil-based JBS pursues an NYSE listing; meat giant has committed to net-zero carbon emissions by 2040

By [Patrick Thomas](#) [Follow](#)

Feb. 28, 2024 1:18 pm ET



JBS has said it takes environmental sustainability initiatives seriously and is working with third-party experts on a variety of investments and projects. PHOTO: NICK OXFORD FOR THE WALL STREET JOURNAL

New York's top lawyer is taking on JBS, alleging that the world's largest meatpacker lied about its impact on the environment to win over climate-conscious customers.

New York Attorney General Letitia James filed a lawsuit Wednesday against the Brazilian giant's U.S. division—saying that JBS misled consumers with its climate goals, including its plan to reach net-zero carbon emissions by 2040, to boost sales. If found liable, the company could be fined \$5,000 per violation and required to pay back any profits made from past sustainability claims found to be false.

“JBS USA’s environmental greenwashing exploits the pocketbooks of everyday Americans and the promise of a healthy planet for future generations,” said James in a statement.



New York Attorney General Letitia James
PHOTO: JEENAH MOON/BLOOMBERG NEWS

JBS had no immediate comment. The company has said in the past that it takes environmental sustainability initiatives seriously and is working toward its net-zero target.

The New York lawsuit spotlights the meat company’s climate goals and practices that have long been criticized by environmental groups. The lawsuit also comes as

environmentalists have joined to oppose the company’s planned listing on the New York Stock Exchange.

JBS is one of the top meat suppliers in the U.S. with the capacity to process more than 200,000 cattle, 500,000 hogs and 45 million chickens a week.

About half of the company’s nearly \$80 billion in annual revenue comes from its U.S. operations, which are based in Colorado. About a quarter of its revenue comes from Brazil, according to recent securities filings.

The company began as a family-owned slaughterhouse in the Brazilian countryside but has invested billions of dollars to acquire meat companies in the U.S. and elsewhere over the past two decades, including beef processor Swift Foods and a majority stake in the second-largest U.S. chicken producer, Pilgrim’s Pride.

Globally, JBS has more than 260,000 employees with operations stretching from Australia to South America. It is also a major processor of seafood and lamb.

For years, environmentalists have accused the company of having links to deforestation in the Amazon rainforest, and some have publicly lobbied for the U.S. Securities and Exchange Commission to deny JBS’s New York listing. A

bipartisan group of senators penned a letter last month asking the SEC to closely scrutinize the company's environmental record.

The lawsuit filed Wednesday alleged that JBS's net-zero commitment isn't attainable because of the amount of carbon emissions that come from beef production, including methane produced by the animals. The agriculture industry has come under increased environmental scrutiny in recent years for the greenhouse gas emissions that come from producing crops and livestock.

The suit says the company's alleged links to deforestation exacerbate the issue by reducing a source of nature that sucks the gas from the atmosphere.

The state's lawsuit cites claims made by JBS executives as far back as 2015, as well as the company's net zero commitment listed on its website this year. The New York attorney general alleged the company violated state laws that protect consumers from fraud.

Last year a U.S. advertising watchdog asked meatpacking company JBS to stop making claims such as "bacon, chicken wings and steak with net zero emissions. It's possible." The Better Business Bureau's National Advertising Division had said JBS doesn't have a plan to deliver on the claims.

JBS has said it disagrees with the body's decision and is working with third-party experts to reduce emissions through a variety of investments and projects.

JBS said last summer it planned to list shares in the U.S. by the end of 2023, but has since pushed back those plans to this year. The company, which is publicly traded in Brazil, has said its planned U.S. listing would give it greater access to capital and help highlight its footprint in the U.S.

JBS's past efforts for an NYSE listing were interrupted by market volatility following the Covid-19 pandemic, executives have said.

The company has also dealt with a corporate corruption scandal in Brazil. Brazil's J&F Investimentos, the controlling shareholder of JBS run by the Batista family, admitted in 2017 to paying about \$150 million in bribes to Brazilian politicians to secure cheap government funding.

The affair landed J&F's two major controllers, the billionaire brothers Joesley and Wesley Batista, in jail for several months. J&F in 2020 pleaded guilty to violating the U.S. Foreign Corrupt Practices Act and agreed to pay \$128 million. It said the agreement was important to improving its corporate governance efforts.

Last year JBS named Wesley Batista Filho, the son of former CEO Wesley Batista, as the leader of its U.S. division.

Write to Patrick Thomas at patrick.thomas@wsj.com

Reckitt Benckiser Group PLC**Reckitt shares tumble on sales drop and Middle East probe hit**

UK-based maker of Nurofen and Dettol disinfectant reveals compliance issue in Middle Eastern markets



Reckitt's health division suffered from an earlier cold and flu season, causing revenues to drop 2% in the quarter © Reuters

Laura Onita and **Madeleine Speed** 6 HOURS AGO



Reckitt's shares tumbled after the maker of Nurofen and Durex condoms announced a drop in its nutrition sales and a revenue hit related to an investigation into its Middle East business.

The consumer goods giant said on Wednesday that like-for-like sales fell 1.2 per cent in the final quarter, short of the 1.6 per cent growth expected by analysts. It was also blighted by a £55mn blow to annual revenues stemming from a compliance issue in two of its Middle Eastern markets discovered late in the period.

Shares were down 13 per cent to £50.80 in London, giving the company a market value of £41.6bn.

"We had feared that the results wouldn't be great, but we certainly hadn't anticipated the reporting anomaly that in our view means that Reckitt's results were really grim rather than just poor," said analysts at RBC Capital Markets.

Sales volumes at its nutrition business dropped 14.3 per cent in the three months to December, falling from highs touched in the same period in the previous year when [Reckitt](#) benefited from an infant formula shortage in the US.

Its health division suffered from an earlier cold and flu season, causing revenues to drop 2 per cent in the quarter. However like-for-like revenue in its hygiene division was up 5.2 per cent in the quarter.

Chief executive Kris Licht called the company's fourth-quarter performance "unsatisfactory."

Analysts at AllianceBernstein said: "Reckitt can't be blamed for the turbulence in its categories, but trying to filter out those impacts, we can't help but see steady volume declines in hygiene and nutrition."

Annual like-for-like revenues rose 3.5 per cent to £14bn, lower than the 4.1 per cent uplift expected by analysts.

The company said the problems in the Middle East were a case of a small group of employees under-recording liabilities, but chief financial officer Jeff Carr told reporters on Wednesday that "there was no indication of any issues in terms of financial irregularities".

He insisted it was "an isolated issue" and a small part of overall sales although the company also highlighted an annual adjusted operating profit impact of £35mn because of it. "We've dealt with the employees involved and it doesn't affect our outlook for 2024," he added. "It's been correctly recorded in Q4 and we move on."

"The restatement for unrecognition of trade spending . . . will not help confidence in controls at [the] group given historic similar issues as well," analysts at Jefferies said.

Licht, who unveiled a new strategy in October, was bullish about its prospects in the year ahead, with the company expecting like-for-like net revenue growth of between 2 per cent and 4 per cent.

**This article has been updated to reflect that some comments originally attributed to Kris Licht were made by CFO Jeff Carr*



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Under Armour Can't Slip Consumer-Demand Securities Suit

By **Alex Lawson**

Law360 (February 27, 2024, 5:36 PM EST) -- A Maryland federal judge denied Under Armour Inc.'s bid to shut down a massive class action alleging that the company misled investors about consumer demand Monday, finding that serious questions remain about the company's public statements.

The sports apparel behemoth has been **locked in a yearslong battle** with investors who claim that the company overstated the level of demand for its products and used "unnatural" business practices to conceal its customers' declining appetite.

Under Armour has disputed the allegations and called on U.S. District Judge Richard D. Bennett to grant it summary judgment, even as both sides prepare for a trial slated to begin March 4. But Bennett shut the bid down, ruling that the investors had shown a marked discrepancy between the company's attestations about its financial health and what key players in the company were saying behind closed doors.

"The record substantiates plaintiffs' claims that Under Armour's public statements throughout the class period did not align with the company's internal communications," the judge wrote. "Internal emails and presentations ... acknowledge that the company would not have hit its external guidance 'without overdriving liquidation and pulling [forward] forward revenue.'"

Much of the dispute surrounds Under Armour's use of "pull forward" sales in its investor reports, which refers to a sale that is executed earlier than planned. Under Armour has maintained that the practice was commonplace in the industry and not done in a deceptive manner.

But the investors have seized on internal communications which paint a different picture, specifically that the company's CEO, Kevin Plank, created a "culture of fear" that encouraged employees to use any means necessary to "f***ing hit the number" regarding sales output, even if it meant using artificial means.

Attorneys for the investors and Under Armour did not immediately respond to requests for comment Tuesday.

In its push for summary judgment, Under Armour said the case should not move forward because all of its reports and disclosures were based on historically accurate data, but the judge emphasized that merely being accurate is not enough, and that relevant caselaw prevents companies from "saying one thing and holding back another" to paint a rosy picture.

"Considering defendants' argument that the statements must be considered in the full context in which they were made, including risk disclosures and warnings ... this court finds there is a question of fact considering whether the disclosures and warnings accompanying defendants' statements were meaningful," the judge wrote.

The judge was similarly not convinced by the company's attempts to rebut allegations that it made its statements with an intent to deceive, a concept known as scienter.

"Simply stated, this is a matter for the jury to decide," he wrote. "This court finds that the defendants' alleged omission of the information, coupled with internal communications demonstrating Plank's knowledge of pull forwards and increased sales to liquidators, create a genuine issue of fact

on the question of scienter."

The investors are represented by Michael J. Dowd, Mark Solomon, X. Jay Alvarez, Robert R. Henssler Jr., Matthew I. Alpert, Christopher R. Kinnon, T. Alex B. Folkerth, Stephen R. Astley, Elizabeth A. Shonson and Andrew T. Rees of Robbins Geller Rudman & Dowd LLP, Joshua C. Littlejohn and Christopher F. Moriarty of Motley Rice LLC, Thomas Michaud of Vanoverbeke Michaud & Timmony PC and Andrew C. White, William N. Sinclair and Pierce C. Murphy of Silverman Thompson Slutkin & White LLC.

Under Armour and Plank are represented by G. Stewart Webb and William B. King of Venable LLP and James D. Wareham, Samuel P. Groner, Michael P. Sternheim and Anne S. Aufhauser of Fried Frank Harris Shriver & Jacobson LLP.

The case is In Re Under Armour Securities Litigation, case number 1:17-cv-00388, in the U.S. District Court for the District of Maryland.

--Editing by Kelly Duncan.

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Chinese Real Estate Giant KE Holdings Gets IPO Suit Trimmed

By **Katryna Perera**

Law360 (February 27, 2024, 8:05 PM EST) -- A New York federal judge tossed a swath of claims against Chinese real estate giant KE Holdings and its executives in an investor suit claiming they overstated the number of agents and stores on its platform, which a short seller later said was false, leading the stock price to drop.

U.S. District Judge Gregory H. Woods issued a 60-page **opinion** on Monday saying that because lead plaintiff Saskatchewan Healthcare Employees' Pension Plan has failed to adequately plead scienter, its claims under the Securities Exchange Act fail.

However, the judge kept intact negligence claims under the Securities Act related to KE Holdings Inc.'s secondary public offering documents, saying those documents contain misleading statements, and the claims can survive the dismissal motion since the plaintiffs are not required to plead scienter.

Judge Woods said Monday that many of the plaintiff's scienter claims are "conclusory in nature." According to the opinion, the pension plan alleged that the individual defendants — which include KE's CEO and chief financial officer — acted with scienter simply due to their high-level positions within the company, which made them "privity to confidential information concerning the company and its business, operations financial statements, and financial condition."

But Judge Woods said this is an insufficient allegation. The pension plan also alleged that the defendants' "lack of candor" in response to the short-seller report that caused the stock price to plummet supports a strong inference of scienter.

Judge Woods, however, said that was a "subjective characterization" of the response, and a lack of candor is insufficient to allege knowledge of wrongdoing.

"Finally, it is well established in this circuit that the lead plaintiff's allegations concerning defendants' alleged desire to maintain the 'artificial' high price of the stock and to be profitable is not sufficient to plead scienter," the judge added.

In addition to failing to plead scienter on its Securities Exchange Act claims, the pension plan also in several instances failed to identify actionable misleading statements, Judge Woods found. He also rejected the plaintiff's assertion that KE was required to disclose the number of its stores and agents that were "inactive" on the platform.

"The company was not obligated to provide additional disclosures regarding the activity level of the agents and stores on its platform," the opinion stated. "A reasonable investor viewing the company's disclosures would not understand that all of the reported agents and stores had the same level of activity."

Despite tossing all the suit's Securities Exchange Act claims, the judge said the pension plan plausibly alleged that the statements in KE's secondary offering documents were false and misleading. These claims specifically allege that the defendants acted negligently and are not subject to heightened pleading standards in which the plaintiff must plead scienter, according to the opinion. Therefore, the judge said, these claims can survive at this stage of the litigation.

He also said the suit adequately pled loss causation since the market "reacted adversely" to the

disclosures in the short-seller report.

The suit was initially filed in 2021, with investors claiming that KE had been overstating the number of agents and stores on its platforms, along with its revenue. KE operates a platform for housing transactions and services in China, and because much of its revenue is generated from commissions, its profitability is largely driven by the number of brokerage stores and agents on its platform, according to the order.

KE conducted two public offerings in 2020 that were highly successful, according to investors. A year after the second offering, in November 2021, the company disclosed the total number of stores and agents that used its platform and identified how many it considered "active."

"When it introduced its disclosures of this subset of active agents and stores, the company did not restate any prior financial or operating metrics, including the company's [gross transaction value], revenue, or the number of its agents and stores," the opinion stated.

The pension plan claimed that this new identification of "active" stores and agents meant KE Holdings' prior reports of the number of agents and stores were overstatements, and the company was able to maintain artificial inflation in its share price.

In December 2021, short-seller Muddy Waters Capital LLC published a report that, according to the pension plan, "lifted the veil on a massive fraud."

"Muddy Waters reported 'massive discrepancies between the ... store count and agent count reported to investors and the transaction data from our multi-month data collection program from [the company's] platform.' The report concluded that the company had substantially inflated its GTV and revenue for those periods," the opinion said. "The report concluded that the company had inflated its 2Q21 store count by at least 23% ... [and] the number of its agents by approximately 26%."

According to the opinion, KE's shares declined by roughly 5% in response to the Muddy Waters report.

In addition to KE executives, the suit names as defendants Goldman Sachs, Morgan Stanley & Co., J.P. Morgan Securities LLC and China Renaissance Securities Ltd., all of which acted as underwriters for the secondary offering.

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

The investors are represented by Samuel H. Rudman, David A. Rosenfeld, Erin W. Boardman and Brent E. Mitchell of Robbins Geller Rudman & Dowd LLP.

KE Holdings is represented by Scott D. Musoff, Robert A. Fumerton and Michael C. Griffin of Skadden Arps Slate Meagher & Flom LLP, and Jonathan Rosenberg, B. Andrew Bednark and William K. Pao of O'Melveny & Myers LLP.

The underwriter defendants are represented by Douglas H. Flaum and Gabrielle Lisa Gould of Goodwin Procter LLP.

The case is *Chin v. KE Holdings Inc. et al.*, case number 1:21-cv-11196, in the U.S. District Court for the Southern District of New York.

--Editing by Kristen Becker.



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Hot Spot Co., Investors Ask Court To Reconsider \$2.4M Deal

By **Sydney Price**

Law360 (February 27, 2024, 9:14 PM EST) -- Wireless equipment maker Franklin Wireless Corp. and its investors have again asked a California federal judge to approve their \$2.4 million deal to end a lawsuit accusing the company of concealing defects in lithium-ion batteries, saying their revised deal would pay investors \$350,000 more than the version the judge rejected last month.

The motion, filed on Monday, addresses concerns expressed by U.S. District Judge Anthony J. Battaglia in an **order** last month refusing to preliminarily approve the parties' settlement. Judge Battaglia took issue with several aspects of the settlement, noting the original proposed deal "appears to treat class members unequally," and estimated litigation and administration costs "appear excessive" compared to similar settlement deals.

The net settlement fund proposed in Monday's motion amounts to \$1.4 million, about \$350,000 more than the amount estimated in Judge Battaglia's order in January. Lead counsel for the investors still intends to request one-third of the fund, about \$800,000, in attorney fees. Litigation expenses are now estimated to be \$200,000, about \$100,000 lower than the January estimate.

According to the motion, administration costs are expected to cost \$100,000, down from the \$250,000 estimate in January. Additionally, taxes, which were not calculated in the original estimate, are expected to cost \$10,000, and interest paid is expected to total \$114,000.

The total \$2.4 million settlement provides a recovery of approximately 12.9% of estimated damages, according to the motion.

"The proposed settlement merits a presumption of fairness because it has no obvious deficiencies, and the settlement recovery falls within the range of possible approval," the motion states. "Indeed, it is both procedurally and substantively fair."

Judge Battaglia noted in his January order that under the proposed plan for allocating the settlement fund, prospective settlement claimants whose calculated settlement distribution sums were less than \$10, would not receive their distributions.

In Monday's settlement motion, the parties say the fairness of the settlement is "not disturbed" by excluding small claims.

"Such small checks are frequently discarded by recipients, serving only to add to the settlement's costs," the motion states.

Austin P. Van, an attorney at Pomerantz LLP and counsel for the investors, told Law360 in an email on Tuesday that he is pleased with the settlement.

"We believe that our renewed settlement motion addresses each of the court's concerns and that this settlement represents an excellent recovery for the class," Van said.

Lead plaintiff Gergely Csaba had moved for preliminary settlement approval in May, with Franklin Wireless and named defendants CEO O.C. Kim and acting Chief Financial Officer David Brown joining the request.

In the latest version of the suit, filed in November 2021, the investors say Franklin Wireless concealed issues with its hot spots in a filing with the U.S. Securities and Exchange Commission. In April 2021, Franklin Wireless recalled an estimated 2.5 million hot spots following 15 reports of the devices overheating, leading to share declines.

The suit alleges Franklin Wireless, Kim and Brown knew, or should have known, the company's "core product dangerously overheated, risking severe injury to their consumers, which included school-age children, yet failed to disclose this critical fact to the public to prevent a collapse in the company's value."

Csaba and the proposed class are represented by Jennifer Pafiti, Jeremy A. Lieberman and Austin P. Van of Pomerantz LLP and Lesley F. Portnoy of the Portnoy Law Firm.

Franklin Wireless, Kim and Brown are represented by Stephen M. Lobbin, Austin J. Richardson and Christopher M. Ferri of SML Avvocati PC.

The case is Ali et al. v. Franklin Wireless Corp. et al., case number 3:21-cv-00687, in the U.S. District Court for the Southern District of California.

--Additional reporting by Emilie Ruscoe. Editing by Drashti Mehta.

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Hospital Groups Allege Opioid Crisis Damaged Their Finances

By **Dan McKay**

Law360 (February 27, 2024, 7:38 PM EST) -- More than 20 hospitals and related companies have joined multidistrict litigation over the opioid epidemic, alleging in a massive new complaint that pharmacies, drug distributors and others contributed to a crisis that damaged hospitals' finances and strained their ability to help patients.

For-profit hospitals affiliated with Allegiance Health Management Inc., among other plaintiffs, filed the 278-page **complaint** Monday in Ohio federal court, alleging that more than a dozen defendants violated racketeering, nuisance, fraud and other laws by helping fuel the opioid epidemic.

"Hospitals — legally and morally — are compelled to act and treat patients with opioid-related conditions and, as a result, are directly and monetarily damaged by the opioid epidemic," the hospitals contend in the complaint. "Acute care hospitals have incurred and will continue to incur millions of dollars in losses for their treatment obligations in connection with opioid use disordered (OUD) patients."

The complaint is now part of a sprawling MDL centering on the opioid crisis. Defendants in the litigation have repeatedly denied wrongdoing and contend that they've taken steps to combat the misuse of opioids.

Some settlements **have been reached**, without admissions of liability.

Monday's complaint covers more than 20 plaintiffs, including a series of for-profit hospitals operating in Louisiana and Mississippi. Other plaintiffs include companies that used to operate hospitals.

Together, the plaintiffs accuse companies involved in the marketing, distribution and sale of opioids of taking advantage of hospitals' responsibility to treat communities ravaged by addiction.

"Defendants relied on the hospital plaintiffs to provide a safety net to prevent overdose deaths and treat health consequences arising from opioid addictions and depended on hospitals themselves to mitigate the health consequences of their illegal activities," the hospitals argue.

More than a dozen defendants are named in the suit, including AbbVie Inc., Walgreen Co. and others.

An affiliate of AbbVie has said its "promotion and marketing of opioid medications were responsible and appropriate."

Walgreens has said in public statements that it has taken a number of steps to address the opioid crisis, including educating customers on safe use, providing opioid reversal medication and other measures.

Representatives for the plaintiffs and defendants didn't immediately respond Tuesday to requests for comment.

The hospitals are represented by John W. "Don" Barrett of the Barrett Law Group PA, Warren Burns, Darren Nicholson, Korey Nelson and Natalie Earles of Burns Charest LLP, and Micah Marcus of McDonald Hopkins.

The case is Allegiance Specialty Hospital of Greenville et al. v. AbbVie Inc. et al., case number 1:24-op-45006, in the U.S. District Court for the Northern District of Ohio. The multidistrict litigation is In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Gianna Ferrarin and Jeff Overley. Editing by Rich Mills.

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Investors Can't Block \$1.6B Oil Co. Merger, Chancery Says

By **Leslie A. Pappas**

Law360 (February 27, 2024, 5:11 PM EST) -- Warrant holders of deep-water oil producer QuarterNorth Energy who say they're being dragged unwillingly into its \$1.6 billion merger with Talos Energy may not prevent the cashing out of their warrants because it could jeopardize the transaction and hurt QuarterNorth shareholders, Delaware's Court of Chancery has ruled.

In an opinion rendered late Monday, Vice Chancellor Lori W. Will declined to issue a preliminary injunction that QuarterNorth Energy Inc. warrant holders sought to stop a so-called "drag-along" sale in conjunction with the merger, concluding that the minority investors are unlikely to prove the process shouldn't apply to their warrants.

"The plaintiffs are not reasonably likely to succeed on these claims," she wrote. "Further, the balance of the equities disfavors the plaintiffs. To enjoin the drag-along sale could put the Talos merger at risk, harming all QuarterNorth investors."

The warrant holders — investment management firms Mudrick Capital Management LP, Bardin Hill Investment Partners LP, Ellington Management Group and more than a dozen funds they manage — sued QuarterNorth and its majority investors in the Chancery Court earlier this month, challenging the drag-along sale.

When the complaint was filed, QuarterNorth's stockholders were scheduled to vote on the merger on Feb. 20.

QuarterNorth is a private corporation headquartered in Houston, Texas, with oil and gas operations in the Gulf of Mexico.

The warrant holders were second-lien lenders to QuarterNorth's predecessor, Fieldwood Energy LLC, which filed for bankruptcy in August 2020. QuarterNorth was formed when a group of Fieldwood creditors bought some of the debtor's deep-water assets as part of a **Chapter 11 reorganization in 2021**.

In exchange for the assets, Fieldwood's first-lien lenders got QuarterNorth common stock, while Fieldwood's second-lien lenders got two tranches of stock warrants, the Chancery Court ruling noted.

Defendants in the case are the first-lien lenders: Avenue Energy Opportunity Fund II LP and several groups of funds that the complaint refers to as the Franklin stockholder defendants, the Nuveen stockholder defendants and the Invesco stockholder defendants.

The stocks and warrants are governed by several agreements, including a stockholders agreement with a drag-along mechanism, the opinion noted. That provision allows majority stockholders to force minority investors to join certain transactions, including a merger or sale of substantially all the company's assets.

Talos Energy, an offshore oil and gas exploration company, announced Jan. 15 that it would **acquire QuarterNorth for \$1.29 billion**, consisting of 24.8 million shares of Talos common stock and approximately \$965 million in cash.

The opinion that Vice Chancellor Will wrote Monday values the merger at \$1.6 billion, citing the

merger agreement that was attached as an exhibit to the complaint.

QuarterNorth informed stockholders on Jan. 19 that as part of the transaction, the majority owners decided to exercise their drag-along rights, meaning that all other investors would have to transfer their shares of common stock and warrants under the same conditions as the majority shareholders, according to the decision.

The warrant holders alleged the drag-along sale is not consistent with the stockholders agreement, and that a "transfer" of the warrants is not one of the actions the sellers can impose on other stockholders.

The Chancery Court found that various aspects of the plaintiffs' interpretation of the drag-along provisions were "illogical," "unreasonable," and "unsupported" by the plain language of the stockholders' agreement.

Since the warrant holders are unlikely to succeed on their claims and enjoining the sale would put the merger at risk, a preliminary injunction is not warranted, Vice Chancellor Will said.

"The plaintiffs will, now or later, receive the merger consideration," the ruling read. "They prefer for their warrants to roll through post-closing so that they can decide when to exercise them for cash and Talos shares. But money damages are an available (albeit tricky) remedy if I later find they were improperly subjected to the drag-along sale."

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

Mudrick Capital and the shareholders are represented by Bradley R. Aronstam, Roger S. Stronach and Benjamin M. Whitney of Ross Aronstam & Moritz LLP, and Jordan A. Goldstein, Lauren J. Zimmerman and Babak Ghafarzade of Selendy Gay PLLC.

QuarterNorth, Avenue Energy Opportunities Fund II, the Franklin defendants and the Nuveen defendants are represented by Blake Rohrbacher, Matthew W. Murphy, John M. O'Toole, Edmond S. Kim, Spencer V. Crawford and Margaret Rockey of Richards Layton & Finger PA.

QuarterNorth is additionally represented by Harry P. Susman of Susman Godfrey LLP.

The Invesco defendants are represented by Thomas W. Briggs Jr. and Kirk Andersen of Morris Nichols Arsht & Tunnell LLP and Andrew K. Glenn of Glenn Agre Bergman & Fuentes LLP.

The case is Mudrick Capital Management LP et al., v. QuarterNorth Energy Inc. et al., case number 2024-0106, in the Court of Chancery of the State of Delaware.

--Additional reporting by Renee Hickman and Rick Archer. Editing by Covey Son.



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Palo Alto Networks Investors Say Co. Lied On Growth Strategy

By **Sydney Price**

Law360 (February 27, 2024, 9:54 PM EST) -- Cybersecurity company Palo Alto Networks was hit with a proposed class action alleging it misled investors about the success of its platform consolidation strategy and damaged investors when its guidance cuts announcement led to a share price decline earlier this month.

According to the suit filed Monday in California federal court by shareholder Martin Schlaegel, Palo Alto Networks has significantly increased its product offerings over the past five years, which has led the company to consolidate customers across its multiple platforms. The suit alleges that Palo Alto Networks falsely told investors that the efforts were driving financial growth, but revealed earlier this month that the strategy shift is the main reason the company has lowered its financial outlook for the third quarter.

Schlaegel seeks to represent a class of those who purchased or otherwise acquired Palo Alto Networks securities between Aug. 18, 2023, and Feb. 20, 2024. In addition to Palo Alto Networks, CEO Nikesh Arora, Chief Financial Officer Dipak Golechha and Chief Product Officer Lee Klarich are named as defendants in the suit.

Throughout the class period, the defendants told investors that its consolidation efforts were driving growth and that demand for its products was high.

At the same time, Palo Alto Networks' competitors, including Microsoft and CrowdStrike, were also rapidly expanding their cybersecurity and artificial intelligence capabilities, leaving Palo Alto Networks "racing to compete," the suit claims.

"Despite representing to investors that there was 'strong demand in the market,' 'strong interest across our next-generation security portfolio,' and that 'platformization is continuing to drive large deal momentum,' Palo Alto Networks was struggling to compete in a competitive environment," the suit states.

Palo Alto Networks gave a gloomy financial update on Feb. 20, reducing billings guidance for the third quarter, according to the suit. The company also revealed the same day that U.S. federal government deals for several large projects did not close, resulting in "a significant shortfall in our U.S. federal government business" that was expected to continue through the rest of 2024.

The news resulted in Palo Alto Networks' shares declining \$104.12, or about 28%, to close at \$261.97 on Feb. 21, the complaint states.

The suit claims Palo Alto Networks and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act. The complaint alleges the defendants' statements aren't covered by the safe harbor provisions of securities laws. The plaintiff seeks damages with prejudgment and post-judgment interest.

Counsel for Schlaegel and a representative of Palo Alto Networks did not immediately respond to requests for comment Tuesday.

Schlaegel is represented by Jacob A. Walker, Jeffrey C. Block and Sarah E. Delaney of Block & Leviton LLP.

Counsel information for Palo Alto Networks and the individual defendants was not immediately available Tuesday.

The case is Schlaegel v. Palo Alto Networks Inc. et al., case number 5:24-cv-01156, in the U.S. District Court for the Northern District of California.

--Editing by Michael Watanabe.

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Payment Software Co.'s Bylaws Spark Class Action In Del.

By **Leslie A. Pappas**

Law360 (February 27, 2024, 6:43 PM EST) -- An investor sued a billing software maker and its board Tuesday in Delaware's Court of Chancery to invalidate what he called "coercive" company bylaw provisions that aim to thwart dissident stockholders from successfully waging a proxy contest.

Similar to other cases winding their way through Delaware's court of equity, William Matt's class action complaint highlighted so-called "acting in concert," "wolf-pack" and "daisy chain" provisions in Bill Holdings Inc.'s bylaws. The rules require shareholders seeking to nominate directors to disclose their connections with any other stockholders making nominations, even if the investors are unaware of each other, Matt said.

"These provisions serve as an unlawful deterrent to those seeking to meaningfully participate in the nomination process — a fundamental right of stockholders of a Delaware corporation," according to the lawsuit.

Headquartered in San Jose, California, Bill is a leading provider of cloud-based software that simplifies, digitizes and automates back-office financial processes for small and mid-sized businesses, its website says.

Matt's proposed class action seeks declaratory relief nixing the advance notice provision in Bill's bylaws. He brought a claim for breach of fiduciary duty against the company's 12-person board of directors and named all board members, including Aida Álvarez, a former administrator of the U.S. Small Business Administration, as defendants.

The advance notice bylaw effectively serves as a deterrent to stockholder nominations for two reasons, the investor argued.

First, the bylaw's definition of acting in concert assumes that shareholders who propose nominees are collaborating with each other, despite there being no express agreement, arrangement or understanding to do so, Matt asserted. He said the assumption creates uncertainty about what kind of information a stockholder has to disclose in connection with a director nomination.

Second, the acting in concert definition also includes both wolf-pack and daisy chain provisions, which can deem investors to be acting with one another even if they don't know about each other's existence, according to the complaint.

The wolf-pack provision considers stockholders to be acting in concert if they act "in substantial parallel" with each other, Matt said. Meanwhile, under the daisy chain provision, two shareholders are seen as working in concert if they happen to be working with the same third party, the investor added.

The complaint Matt filed Tuesday follows several other cases in the Chancery Court that similarly target advance notice provisions.

Stockholders of online commerce site Wish **sued** its parent company, ContextLogic Inc., in December, seeking a judgment against directors and officers for advancing an acting in concert provision in the retailer's advance notice requirement. The provision makes compliance "illusory and unobtainable and unlawfully serves as an effective deterrent to stockholders' exercising their right," the Wish

investors said in their filing.

Also in December, a Peloton Interactive Inc. shareholder **launched a proposed class action** against the New York City-based exercise equipment provider, also citing wolf-pack and daisy chain provisions.

And last week, aluminum product manufacturer Alcoa Corp. was **hit with a Chancery suit** from a proposed shareholder class making similar allegations.

Block & Leviton LLP and Abbott Cooper PLLC are representing shareholders in all four complaints. Kaskela Law LLC is also counsel for the investor in the Peloton suit.

Counsel for Matt declined to comment on the complaint filed Tuesday. A representative of Bill did not immediately respond to Law360's request for comment.

The investor is represented by Jason Leviton, Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax and Robert Erikson of Block & Leviton LLP and Abbott Cooper of Abbott Cooper PLLC.

Counsel information for the company was not immediately known.

The case is Matt v. Alvarez et al., case number 2024-0173, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Covey Son.

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Goldman's \$4.6M Exec Compensation Deal OK'd By Chancery

By **Kellie Mejdrich**

Law360 (February 27, 2024, 8:12 PM EST) -- A Delaware Chancery Court judge on Tuesday approved a settlement deal in a derivative suit against Goldman Sachs Group alleging excessive compensation was paid to nonemployee directors, which includes an agreement by the company to change its compensation practices and reduce executives' pay by an estimated \$4.6 million.

Vice Chancellor Sam Glasscock III signed off on the deal in a **21-page opinion** that said he "found the settlement in the interest of Goldman and its stockholders." According to the opinion, the third version of the settlement before the court removed a claim release from the deal that the Delaware Supreme Court **rejected as overbroad** in August 2022, but otherwise retained all the terms of a **previous deal** that the court had approved in August 2020.

Terms of the settlement include reducing compensation of the nonemployee directors by an estimated \$4.6 million and incorporating a review of director compensation into the company's business practices, Vice Chancellor Glasscock said in his opinion.

"To be clear, the get for the company and its stockholders is precisely the same; it is the company's give that has been reduced, by elimination of the release of theoretical future claims," Vice Chancellor Glasscock said.

According to lead plaintiff Shiva Stein's October 2022 motion outlining the amended settlement, the deal caps compensation for nonemployee directors of Goldman Sachs at \$475,000 for committee chairs and \$450,000 for other nonemployee directors through 2024.

The Delaware Supreme Court reversed and remanded Vice Chancellor Glasscock's previous approval after finding that a term in the deal releasing claims against Goldman from shareholders in the future was erroneously approved by the lower court because it was overbroad.

In his Tuesday opinion, Vice Chancellor Glasscock also overruled an objection to the settlement and denied a motion to intervene from a shareholder named Sean Griffith, who had argued that the **third version of the deal** benefited the company more than shareholders and had previously objected to the settlement.

"The fact that a portion of the release was successfully challenged does not alter my determination and the law of the case that the amended settlement is fair," Vice Chancellor Glasscock said.

The **first proposed settlement** in the case came in March 2018, **triggering an objection** from Griffith in June 2018. That led Vice Chancellor Glasscock to **reject the first proposed settlement** in October 2018. The parties proposed a **second settlement deal** in March 2020.

Goldman Sachs declined to comment. Counsel for Stein, the director defendants and objector Griffith didn't immediately respond to requests for comment on Tuesday.

Shiva Stein is represented by A. Arnold Gershon and Michael A. Toomey of Barrack Rodos & Bacine and by Brian E. Farnan, Michael J. Farnan and Rosemary J. Piergiovanni of Farnan LLP.

The Goldman Sachs Group Inc. is represented by Kevin M. Gallagher and Robert L. Burns of Richards Layton & Finger PA.

The director defendants are represented by Kevin G. Abrams, Peter Shindel Jr. and Matthew L. Miller of Abrams & Bayliss LLP and by Robert J. Giuffra Jr. and David M.J. Rein of Sullivan & Cromwell LLP.

Objector shareholder Sean Griffith is represented by Anthony A. Rickey of Margrave Law LLC.

The case is Shiva Stein v. Lloyd C. Blankfein et al., case number 2017-0354, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie A. Pappas. Editing by Amy Rowe.

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American Airlines Says ESG Doesn't Break Fiduciary Duty

By **Spencer Brewer**

Law360 (February 27, 2024, 6:40 PM EST) -- American Airlines Inc. has asked a Texas federal judge to ground a proposed class action involving environmental, social and governance policies in retirement plans, saying Monday that the plaintiff has no evidence that the airline breached fiduciary duty or that he suffered a loss.

American Airlines pilot Bryan Spence accused the airline of breaching fiduciary duty by pursuing ESG portfolio strategies when making investment decisions for the company's 401(k) plans at the expense of investment options that could have netted greater returns. ESG refers to environmental, social and governance standards for investment, such as climate impact.

American says that the plaintiff is no longer arguing that the company breached its fiduciary obligation by offering retirement plans with ESG strategies in the amended complaint, and that Spence failed to produce evidence that supports his theory that the company offered funds with traditional strategies that had managers that pursued "illicit ESG objectives through proxy voting."

"There is no evidence, in particular, that the plans' fiduciaries were motivated in their investment decision making by any improper considerations — including American Airlines' business goals (ESG related or not)," American said in the motion for summary judgment.

The case survived a previous motion to dismiss, but American says Spence hasn't produced the evidence needed to substantiate the allegations he's leveled. The company says that evidence shows its process for selecting investment options was "state of the art" at all times.

In an order from earlier this month, U.S. District Judge Reed O'Connor **said Spence adequately alleged** that American and its benefits committee failed to consider that ESG-focused funds tend to underperform in comparison to other available options and that investment managers engaged in proxy voting and shareholder activism.

Spence alleged that ESG-focused investment managers, such as BlackRock, cast proxy votes that caused ExxonMobil and Chevron stocks to fall, which reduced American's 401(k) plan participants' returns on those investments.

American says the plaintiff pivoted to an unpleaded theory because he couldn't prove his initial allegations. That theory, American says, is that the company should have maintained its investments in managers with misguided proxy votes, but influenced a single proxy vote in 2021 during the election of Exxon board members.

"Plaintiff speculatively contends that, facing pressure from defendants alone, BlackRock would have voted the shares it held for all BlackRock fund investors differently in that election," American says. "Like his pleaded theories, however, plaintiff's unpleaded theory fails for want of proof."

There is no evidence that American Airlines refrained from swaying BlackRock out of disloyalty to the retirement plans, and Spence can't establish a loss under this theory. Additionally, the airline contends that there is no evidence that it breached fiduciary duty. Because of this, American says it's entitled to summary judgment.

Representatives for American Airlines and Spence didn't immediately respond to a request for

comment.

Spence is represented by Andrew B. Stephens and Heather G. Hacker of Hacker Stephens LLP and Hammons P. Hepner, Isaac Diel, Nathan A. Kakazu and Rex A. Sharp of Sharp Law LLP.

American Airlines Inc. is represented by Dee J. Kelly, Jr. and Russell D. Cawyer of Kelly Hart & Hallman LLP and Mark W. Robertson, Jeffrey A.N. Kopczynski, William D. Pollak, Charles J. Mahoney, Brian D. Boyle and Shannon M. Barrett of O'Melveny & Myers LLP.

The case is Spence v. American Airlines Inc. et al., case number 4:23-cv-00552, in the U.S. District Court for the Northern District of Texas.

--Editing by Jay Jackson Jr.

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Securities Group Of The Year: Cohen Milstein

By **Sydney Price**

Law360 (February 27, 2024, 3:32 PM EST) -- Cohen Milstein Sellers & Toll PLLC's securities team made headlines last year by securing one of the largest securities class action recoveries of all time for Wells Fargo investors and by introducing major corporate governance reforms at several financial institutions after their alleged attempts to obstruct the stock loan market, earning the firm a spot among **Law360's 2023 Securities Groups of the Year**.



The \$1 billion settlement — the sixth-largest securities settlement of the last decade — between Wells Fargo and its investors was finalized in September, and Cohen Milstein served as co-lead counsel for the plaintiffs. The suit alleged the bank and its top executives made false and misleading statements about their compliance with consent orders put in place after the bank was found in 2016 to have engaged in widespread consumer abuses, including opening millions of unauthorized customer accounts.

The deal is the largest security settlement to not involve a financial restatement by the institution or enforcement actions by the U.S. Securities and Exchange Commission or the U.S. Department of Justice. Steven J. Toll, co-chair of Cohen Milstein's securities practice, said that makes the recovery especially significant, since accounting corrections and legal action from the government are typically the hallmark of securities cases.

"We didn't have those factors that make cases easier to win, so that heightens the value of what we were able to achieve here," Toll said. "It was all through our own work and research and analysis of all the issues that was able to get us such a large number."

Wells Fargo shareholders said they incurred significant losses in March 2020 when reports from the

U.S. House Committee on Financial Services and subsequent congressional hearings revealed that Wells Fargo had "clearly demonstrated an unwillingness and inability to stop harming its customers" and that its remediation plans fell "woefully short" of regulators' expectations.

Wells Fargo argued investors could not prove that statements about progress toward overhauling its risk management policies were false or made to intentionally mislead investors.

Toll said the timing of the alleged stock declines, which occurred around the time COVID-19 was declared a global pandemic, was another hurdle in the suit.

"It was a very unusual challenge to confront, and they kept arguing why the damages and thus the recovery and settlement should be much lower, but we were able to still get a very substantial settlement," he said.

Cohen Milstein helped investors secure another big payout last year in an anti-competitive class action against defendants Morgan Stanley, Goldman Sachs, UBS, JP Morgan and EquiLend. Including a previous \$81 million settlement with Credit Suisse, the court has preliminarily approved more than \$580 million in cash payments.

The case dates back to 2017 and was filed on behalf of a proposed class of investors in the stock loan market. According to the suit, large middlemen banks in that market worked to prevent the emergence of more competitive electronic exchanges that could have offered the investors better pricing.

Additionally, Cohen Milstein attorneys secured a settlement in 2022 requiring Boeing to revise its forum bylaw to enable stockholders to file derivative claims, where federal courts possess exclusive jurisdiction, as well as a \$6.25 million payment related to Exchange Act claims.

Many of Cohen Milstein's cases, including the Boeing suit, the Wells Fargo suit and the antitrust financial suit, are led by institutional investors. Julie Reiser, also Cohen Milstein's securities practice co-chair, said one of the most rewarding parts of her job is knowing people will have the financial security to retire when large settlements are paid out.

"Working with pension funds to collect money and to make sure they're made whole when there's fraud is really motivating for me and my colleagues, and that helps make our practice stronger," Reiser said.

--Editing by Janice Carter Brown.



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Product Liability Group Of The Year: Lief Cabraser

By **Y. Peter Kang**

Law360 (February 27, 2024, 2:00 PM EST) -- Lief Cabraser Heimann & Bernstein LLP has obtained a \$230 million settlement from Walgreens over the opioid crisis in San Francisco and secured a \$235 million vaping litigation settlement from tobacco giant Altria, earning it a spot among **Law360's 2023 Product Liability Groups of the Year**.



The success of the San Francisco-based firm's product liability practice is powered by its cadre of talented and experienced lawyers who focus exclusively on this area, according to partner Richard Heimann, a Law360 **2022 Product Liability MVP**.

"They've developed expertise over time and can identify cases that are appropriate for litigation," he said, explaining that one of the keys to success for a plaintiffs-side firm is to figure out during the intake process which cases are worthy of pursuing and then seeing them through to an impactful outcome.

"A lot of lawyers in the product liability field don't necessarily focus enough attention on that, and that's when you get the situation where lawyers bring lots of cases, and I think we've resisted that temptation," he said.

When a novel type of case pops up, Heimann said, "you'll see a dogpile of lawyers — everybody and their brother gets their clients on those cases," but they don't pay enough attention to the front end to see if the cases are worthwhile.

"That's not what we do, we are very careful and examine a potential case from the standpoint of whether it's meritorious and how large it is in terms of impact on people," he said.

Lieff Cabraser was founded in 1972 and has grown to 120 attorneys in four offices in San Francisco, New York, Nashville and Munich. It is among the largest plaintiffs' law firms in the United States and often takes a leadership position in MDLs, mass torts and other big cases.

"We are one of the oldest plaintiffs-side firms, and our strength comes in part from our legacy and leadership," partner Sarah London told Law360. "Elizabeth Cabraser and Richard Heimman continue to lead and provide encyclopedic knowledge of the law, and they are pioneers in the way we practice."

London said the firm's veteran leaders work collaboratively with top talent in the associate ranks, with the latter working collaboratively with the more experienced lawyers.

"It's not a formal, hierarchical and rigid practice," she said. "We encourage and provide meaningful opportunities for our young lawyers to grow and develop and learn from senior leadership, and it's incredible to have the resources we have, both in terms of the talent and the amount of great lawyers practicing for a long time together. We have such a rich fabric to draw from every time we approach a new case. We have institutional knowledge that isn't sitting in books, but in the everyday exchange of ideas and the practice of law."

That rich fabric was on full display in San Francisco federal court this past year when Lieff Cabraser and co-counsel faced off against major drugmakers, distributors and pharmacy chains in multidistrict litigation claiming the companies fueled the nation's devastating opioid crisis.

Lieff Cabraser represented the city of San Francisco in a successful bellwether, winning a liability verdict against Walgreens in August 2022, after all other defendants settled before or during trial. Months later, the pharmacy giant agreed to a \$230 million settlement.

The most challenging aspect of the deal, Heimann said, was arriving at a number that would allow San Francisco to address its public health concerns while not being so high that Walgreens wouldn't be able to pay up.

"The main question was, what could we reasonably expect from a company like Walgreens in a case like San Francisco's with an amount that can be both impactful but not beyond Walgreens' capability, keeping in mind this wasn't the only case against Walgreens," he said. "One or two billion in damages could have been supported by the experts' testimony, but it just wasn't feasible for Walgreens. So we had to come to a reasonable compromise so that Walgreens would be able to meet its obligations."

Another success for Lieff Cabraser stemmed from litigation accusing e-cigarette manufacturer Juul Labs Inc. and Altria Group Inc. of deceptively and dangerously marketing vaping products to minors.

While Juul settled in late 2022, right before a bellwether trial brought by San Francisco's public schools, Altria went forward with the litigation. But then, immediately after Lieff Cabraser and co-counsel closed their case at trial, the tobacco giant agreed to a deal worth \$235 million.

London, who served as co-lead counsel in the MDL, said the deal was unprecedented because it meaningfully resolved claims for four different types of plaintiffs just four years after the formation of the MDL, which London said is unheard of for such a sprawling tobacco case that normally takes dozens of years to resolve.

"Tobacco litigation has been historically protracted, taking decades in some cases to find a resolution," she said. "In this case, we were able to find resolution quickly, meaningfully and globally, and we did all that during the global pandemic and with a plaintiff's leadership group that had three women and one man of color. We had a historic leadership group producing historic results to get at the nicotine addiction crisis."

Looking ahead, London said Lieff Cabraser is on the right footing to continue its recent successes as new types of products and technologies emerge and evolve.

"We are well-positioned to continue to advance the law as to what kinds of injuries are recognizable and compensable, especially in a digital age. We are always at the cutting edge as a firm on the law,

and we are only stronger and more powerful with these recent cases under our belt," she said. "I believe our future is very bright."

--Editing by Goodwin Anim.

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Considerations For Disclosing AI Use In SEC Filings

By **Richard Hong** (February 27, 2024, 6:09 PM EST)

With the increasing development and use of artificial intelligence or machine learning in public companies, one of the key questions that is emerging in the corporate boardrooms is whether registrants disclose AI use in their securities filings, like 10-K, 10-Q, and proxy statements.

While the U.S. Securities and Exchange Commission in July 2023 proposed a rule requiring broker-dealers and investment advisers to address potential conflicts of interest associated with their use of predictive data analytics and similar technologies (read AI) to interact with investors, no rule has been proposed for what registrants should disclose regarding such technology in their SEC filings.



Richard Hong

Nonetheless, according to a recent article in Bloomberg Law, more than 40% of S&P 500 companies are already talking about AI in their most recent 10-Ks filed with the SEC.[1]

So, should your company join the ranks? And if so, what should your company disclose?

The latest guidance comes from none other than the chair of the SEC, Gary Gensler. In a Feb. 13 speech at Yale Law School, Gensler declared that "as AI disclosures by SEC registrants increase, the basics of good securities lawyering still apply."

He then provided the following four specific points to consider:

1. "Claims about prospects [based on AI] should have a reasonable basis, and investors should be told that basis."
2. "When disclosing material risks about AI — and a company may face multiple risks, including operational, legal, and competitive — investors benefit from disclosures particularized to the company, not from boilerplate language."
3. "Companies should ask themselves some basic questions, such as: 'If we are discussing AI in earnings calls or having extensive discussions with the board, is it potentially material?'; and
4. "These disclosure considerations may require companies to define for investors what they mean when referring to AI. For instance, how and where is it being used in the company? Is it being developed by the issuer or supplied by others?"[2]

Now, let's unpack Gensler's four points and glean some takeaways.

First, let's start with the last point. Registrants need to define what they mean by AI.

Contrary to some popular belief, AI did not just pop up for the first time last year with ChatGPT. AI has been around for a long time and is much more integrated in our daily lives than we think. Have you used your iPhone's Siri app recently?

Indeed, AI covers a wide swath of machine learning, and has been seriously discussed since 1950, when Alan Turing wrote his seminal article called "Computer Machinery and Intelligence." [3]

So, each registrant needs to define AI more specifically. A registrant should examine what it is doing

as to machine learning and how it is being integrated into its business. For example, to use Gensler's words: "How and where is it being used in the company? Is it being developed by the issuer or supplied by others?"

After undertaking such an examination, each registrant should define AI in its SEC filings.

Next, registrants need to assess whether their use of AI is potentially material to investors. Again, to borrow Gensler's words, "are [you] discussing AI in earnings calls or having extensive discussions with the board"?

Under the federal securities laws, to "fulfill the materiality requirement, 'there must be a substantial likelihood that the disclosure of the omitted [or misrepresented] fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"[4] Put more colloquially, the inquiry is whether the undisclosed or misrepresented fact at issue moves the needle very much for a reasonable investor's decision to invest or not in a security.

If AI is being discussed in any real length in earnings calls, including with analysts, or if there are extensive discussions with the board regarding AI, or, for that matter, with a disclosure committee, the SEC will likely find that the public company's use of AI is material. Disclosure is advised.

Third, registrants need to provide particularized disclosures for their material risks about AI. Gensler appears to emphasize such disclosures when "a company may face multiple risks, including operational, legal, and competitive."

But many registrants face multiple risks in using AI — indeed, that is more the norm than not. And many of those registrants, even some of the well-known tech companies, have historically provided less particularized AI risk disclosures — in part because of the uncertainty in the fast-developing technology.

As it is, risk disclosures of public companies in SEC filings are usually lengthy. Thus, crafting appropriately succinct particularized risk disclosures on AI will become even more important.

This is particularly true, as the U.S. Supreme Court in *Macquarie Infrastructure Corp. v. Moab Partners LP* will hand down a decision this term that may significantly alter how public companies will have to address Item 303 of Regulation S-K — for a Form 10-K's management discussion and analysis section, which provides material information relevant to an assessment of the financial condition and results of operations of a registrant.

Finally, registrants need to ensure that a company's prospects based on AI — that is, projections of future economic performance based on AI — should have a reasonable basis, supported by an appropriate disclosure of the basis.[5]

But how this may be accomplished by registrants remains uncertain, and Gensler does not explain in his speech. As registrants' projections based on AI may not have had a history or experience, it may be difficult to formulate them with a reasonable basis. The SEC guidelines on projections allow an outside review of management's projections, but the SEC essentially requires a registrant to make a more laborious quasi-expert disclosure about the reviewer and the process they undertook.[6]

In any event, even if such projections are protected by a safe harbor for forward-looking statements under the Private Securities Litigation Reform Act, disclosure committees of registrants should pay careful attention to evaluating and crafting such projections, particularly for the SEC's review.

In the past year, the SEC has repeatedly announced in speeches that it is focused on looking at whether registrants are making false or misleading claims about their use of AI — now commonly known as "AI washing."

To date, there has been only **one AI washing case** — a private class action filed on Feb. 21 in the U.S. District Court for the District of New Jersey against Innodata Inc., a New Jersey data engineering company claiming to "deliver[] the promise of AI to many of the world's most prestigious companies." [7]

Whether the SEC will bring an enforcement action focusing on how registrants are disclosing their prospects — projections or forecasts — based on AI is far from clear, but Gensler's remarks on registrants' disclosures as a whole should be heard as another clarion call to public companies for disclosure of AI use, and a sign that the issue is in the forefront of Gensler and the SEC's enforcement agenda.

Richard Hong is a partner at Morrison Cohen LLP. He previously served more than 17 years as a trial lawyer within the U.S. Securities and Exchange Commission's Division of Enforcement.

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[1] See Matthew Bultman, "AI Disclosures to SEC Jump as Agency Warns of Misleading Claims," Bloomberg Law (February 8, 2024), available at [AI Disclosures to SEC Jump as Agency Warns of Misleading Claims \(bloomberglaw.com\)](https://www.bloomberglaw.com).

[2] AI, Finance, Movies, and the Law, Prepared Remarks before the Yale Law School <https://www.sec.gov/news/speech/gensler-ai-021324>.

[3] <https://doi.org/10.1093/mind/LIX.236.433>.

[4] Basic, Inc. v. Levinson, 485 U.S. 224, 232-33 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)) (cleaned up).

[5] See 17 CFR 229.10 of Regulation S-K.

[6] See 17 CFR 229.10 (b)(1).

[7] D'Agostino v. Innodata Inc., No. 24-cv-971 (D.N.J. filed Feb. 21, 2024).

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Ex-Ohio Speaker Urges 6th Circ. To Ax His 20-Year Sentence

By **Ryan Harroff**

Law360 (February 27, 2024, 3:29 PM EST) -- Former Ohio House Speaker Larry Householder told the Sixth Circuit that it must vacate his 20-year prison sentence for allegedly taking \$60 million in bribes from FirstEnergy Corp., in part, because the presiding judge had a potential bias against him for opposing the judge's campaign to join the state's highest court.

U.S. District Judge Timothy S. Black should have recused himself, both because Householder had helped raise money for groups opposing his unsuccessful 2002 bid to become an Ohio justice, even though Judge Black said he harbored no animosity toward the former state speaker, according to the Monday brief.

Whether Judge Black was actually biased is "immaterial," Householder argued, both because the appearance of impropriety is bad enough and because there are purportedly several other good reasons to vacate the court's **20-year sentencing order** against him.

According to Householder's brief, Judge Black improperly allowed inadmissible evidence in the form of two "highly inflammatory recordings of Householder," and also let the jury hear that two of the former speaker's co-defendants had pled guilty, both of which prejudiced Householder.

Judge Black also dismissed a member of that jury without letting Householder's counsel take part in that decision-making process, which he said violated his Sixth Amendment right to be represented "at all critical stages of the trial."

For another alleged jury issue, Householder said the court failed to accurately instruct the jury that bribery laws require an agreement between the parties involved in the alleged scheme. The government also failed to establish a quid pro quo relationship between Householder and the FirstEnergy executives who funneled money into his political nonprofit Generation Now.

FirstEnergy **has admitted to** sending that money to the nonprofit as part of its effort to get a \$1.3 billion taxpayer-funded bailout of its nuclear program passed, and Householder pushed that bill while in office. Householder told the Sixth Circuit that there was nothing illegal about those donations to Generation Now, and that prosecutors were just trying to deter individuals and entities from exercising their constitutional right to contribute to political groups.

The brief cites **Citizens United v. FEC** — the well-known 2010 U.S. Supreme Court ruling that determined financial contributions to political organizations and campaigns are a form of free speech — and it argues that the contributions Householder's nonprofit received from FirstEnergy are allowed under that decision. That Judge Black allowed federal prosecutors to make a bribery case out of the contributions and allegedly do so without establishing a quid pro quo is a clear error, the brief states.

"This case is just the latest in a long line of cases in which federal prosecutors have overstepped the limits of their authority," Householder said. "The district court, however, never heeded the defendants' attempts to reign in these prosecutors."

Householder also argued that Judge Black improperly calculated his 20-year sentence based on a false belief that the value of the purported bribe was \$60 million, which the former speaker said is not accurate. Relying on the \$60 million figure, even though the government allegedly failed to establish a quid pro quo agreement related to that money, led Judge Black to misapply sentencing

guidelines and give Householder the maximum sentence following his conviction, the former speaker said in his brief.

Steven Bradley, counsel for Householder, said he and his co-counsel look forward to **pursuing the appeal** further.

"We feel confident about the issues that we have raised on appeal," Bradley told Law360 by email on Tuesday. "We look forward to the opportunity to further advance our issues at oral argument once the government has an opportunity to respond to our brief."

Counsel and representatives for the government did not immediately reply to requests for comment.

Householder is represented by Steven L. Bradley of Marein & Bradley and Nicholas R. Oleski of McCarthy Lebit Crystal & Liffman Co. LPA.

The government is represented by Alexis J. Zouhary of the U.S. Department of Justice.

The case is USA v. Householder, case number 23-3565, in the U.S. Court of Appeals for the Sixth Circuit.

--Additional reporting by Tracey Read and Clark Mindock. Editing by Nicole Bleier.

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