

'Smart' Device Platform Tuya Gets Fake-Review Stock Suit Trimmed

By Martina Barash

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- Court adds to district court split on knowledge requirement

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'Smart' Device Platform Tuya Gets Fake-Review Stock Suit Trimmed

By Martina Barash 2024-03-06T17:24:47000-05:00

- Amazon allegedly shut down product merchants after report
- Court adds to district court split on knowledge requirement

US investors in Tuya Inc., which provides cloud platform services to connected device makers, can proceed with some claims that its IPO papers omitted the risk of online merchant shutdowns over fake product reviews, a federal court ruled.

Tuya doesn't have to face claims over two Securities and Exchange Commission filings on trends and risk factors, however, or a satisfaction score tied to its own business customers, Judge John P. Cronan said Tuesday for the US District Court for the Southern District of New York.

Former General Electric Co. CEO Jeffrey Immelt, sued as a director of Tuya, is off the hook, Cronan ruled. But three underwriters that joined Tuya's request for dismissal remain in the suit. They are Morgan Stanley & Co. LLC, BofA Securities Inc., and China International Capital Corp. Hong Kong Securities Ltd.

The investors are suing on behalf of a proposed class in connection with Tuya's March 2021 initial public offering of American depositary shares, which allow US investors to buy stock traded on foreign exchanges.

In May 2021, a report by cybersecurity group Safety Detectives allegedly revealed a widespread fake review scheme by Chinese merchants on Amazon. Amazon suspended numerous merchant accounts, including Tuya customers, the investors said. Tuya's subsequent financial losses, announced in August of that year, allegedly caused a stock-price decline.



In its decision, the court weighed in on a split within the Second Circuit over the requirements for a claim of omissions in a registration statement under Section 11 of the Securities Act of 1933. Section 11 lacks “a requirement that the omitted fact be known, or should have been known, by issuers,” Cronan said.

And at this stage of the case, disclosures about the risk of negative customer reviews can’t “inoculate” Tuya and its co-defendants from liability for the fake positive reviews alleged by the investors, he said. “Plaintiffs’ allegations allow for the reasonable conclusion that Tuya investors were simply warned about the wrong—or at least an orthogonal—risk related to fake customer reviews,” he said.

Robbins Geller Rudman & Dowd LLP and Glancy Prongay & Murray LLP are lead counsel for the investors. Davis Polk & Wardwell LLP represents Tuya. Ropes & Gray LLP represents the underwriters.

The case is Lian v. Tuya Inc. , 2024 BL 72641, S.D.N.Y., No. 22 Civ. 6792, 3/5/24 .

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Securities Litigation Cases Continued to Decline Nationally in 2023, Report Finds

 [law.com/2024/03/07/securities-litigation-cases-continued-to-decline-nationally-in-2023-report-finds](https://www.law.com/2024/03/07/securities-litigation-cases-continued-to-decline-nationally-in-2023-report-finds)

The Daniel Patrick Moynihan U.S. Courthouse in the Southern District of New York. Photo: Ryland West/ALM

New York's Southern District continued to be the leading destination for cases, with Delaware second. The Brooklyn-based Eastern District was third and the Northern District of California fourth, the study said.

March 07, 2024 at 11:01 AM

Securities Litigation

Jane Wester 

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

What You Need to Know

- In the highly active deal environment of 2021, the volume of securities litigation peaked at 2,647 cases filed, according to the report.
- The most active defendants are all major financial institutions.
- The top law firms representing defendants in securities cases include Latham & Watkins, Skadden and Gibson Dunn.

The Southern District of New York remains by far the busiest district for federal securities litigation, but the number of cases filed fell nationwide between 2021 and 2023, according to a new report from Lex Machina.

In the highly active deal environment of 2021, the volume of securities litigation peaked at 2,647 cases filed, according to the report. The number of cases fell to 1,937 in 2022 and then 1,758 in 2023, the lowest number of new cases since 2017, according to the report.

Lex Machina's analysts noted that only time will tell whether the number of cases will continue to flatten or decline further in future years.

Nearly 36% of securities cases were filed in the SDNY over the three-year period, with the District of Delaware coming in second at approximately 10%. The Eastern District of New York and the Northern District of California placed third and fourth, respectively, according to the report.

The report nevertheless found that the three most active judges for securities cases are all in Delaware, with U.S. District Judge Maryellen Noreika of the District of Delaware coming in first. She presided over 179 securities cases over the three-year period, according to the report, coming in just ahead of U.S. District Judge Richard Andrews with 162 and Chief U.S. District Judge Colm Connolly with 159.

The rest of the top 10 most active judges are all in the SDNY, according to the report. U.S. District Judge Vernon Broderick of the Southern District of New York, who placed fourth behind the Delaware trio, presided over 107 cases over the three-year period.

The most active defendants are all major financial institutions, according to the report. The top three, J.P. Morgan Securities, Goldman Sachs & Co. and Morgan Stanley & Co., were named as defendants in 56, 55 and 54 cases, respectively, over the three-year period.

The top law firms representing defendants in securities cases are Latham & Watkins, with 142 cases over the three-year period; Skadden, Arps, Slate, Meagher & Flom, which represented clients in 117 cases; and Gibson, Dunn & Crutcher, which was involved in 83 cases.

The rest of the firms in the top 10 defense list are Wilson Sonsini Goodrich & Rosati; Cooley; Davis Polk & Wardwell; Wilmer Cutler Pickering Hale and Dorr; Goodwin Procter; Paul, Weiss, Rifkind, Wharton & Garrison; and Sullivan & Cromwell.

The individual attorney with the most defense-side cases was Skadden partner Scott Musoff, who represented clients in 43 cases over the three-year period. Freshfields Bruckhaus Deringer partner Boris Feldman and Latham partner Michele Johnson tied for second place with 38 cases each.

The report found that the most active plaintiff, by far, was the U.S. Securities and Exchange Commission, which filed 733 cases in 64 districts over the three-year period. Most of the other highly active plaintiffs were individuals, with the exception of the Commodity Futures Trading Commission, which placed fifth with 82 cases filed over the three-year period.

Aside from the SEC itself, the most active plaintiffs firms were Long Law, Rigradsky Law and WeissLaw, each of which represented clients in more than 400 cases filed over the three-year period.

Lex Machina also examined resolutions for cases terminated between 2021 and 2023. About 84% of cases resulted in a likely settlement or a resolution on procedural grounds, according to the report.

In terms of financial outcomes, Lex Machina found that \$11.2 billion was awarded as part of approved class action settlements in 289 cases between 2021 and 2023. Lex Machina also calculated that 440 cases resulted in a total of nearly \$4 billion in SEC and CFTC penalties and 471 cases led to nearly \$4.8 billion in disgorgement.

The full report is available through Lex Machina.

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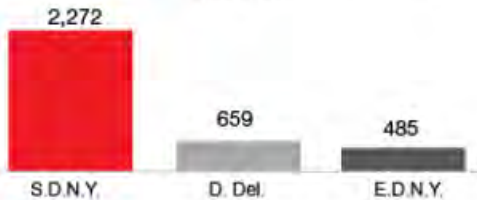
By Ellen Bardash

3 minute read

Lex Machina

SECURITIES LITIGATION REPORT 2024

Districts with the Most Cases Filed
2021-2023



Most Active Judges
2021-2023

Judge Noreika of the District of Delaware heard **179 cases** - the highest number of securities cases over the three year period.



Most Active Plaintiffs by Cases
2021-2023



Most Active Defendants by Cases
2021-2023



Most Active Law Firms by Cases
2021-2023

Representing Plaintiffs



Most Active Law Firms by Cases
2021-2023

Representing Defendants



Most Active Attorneys by Cases
2021-2023

Representing Plaintiffs

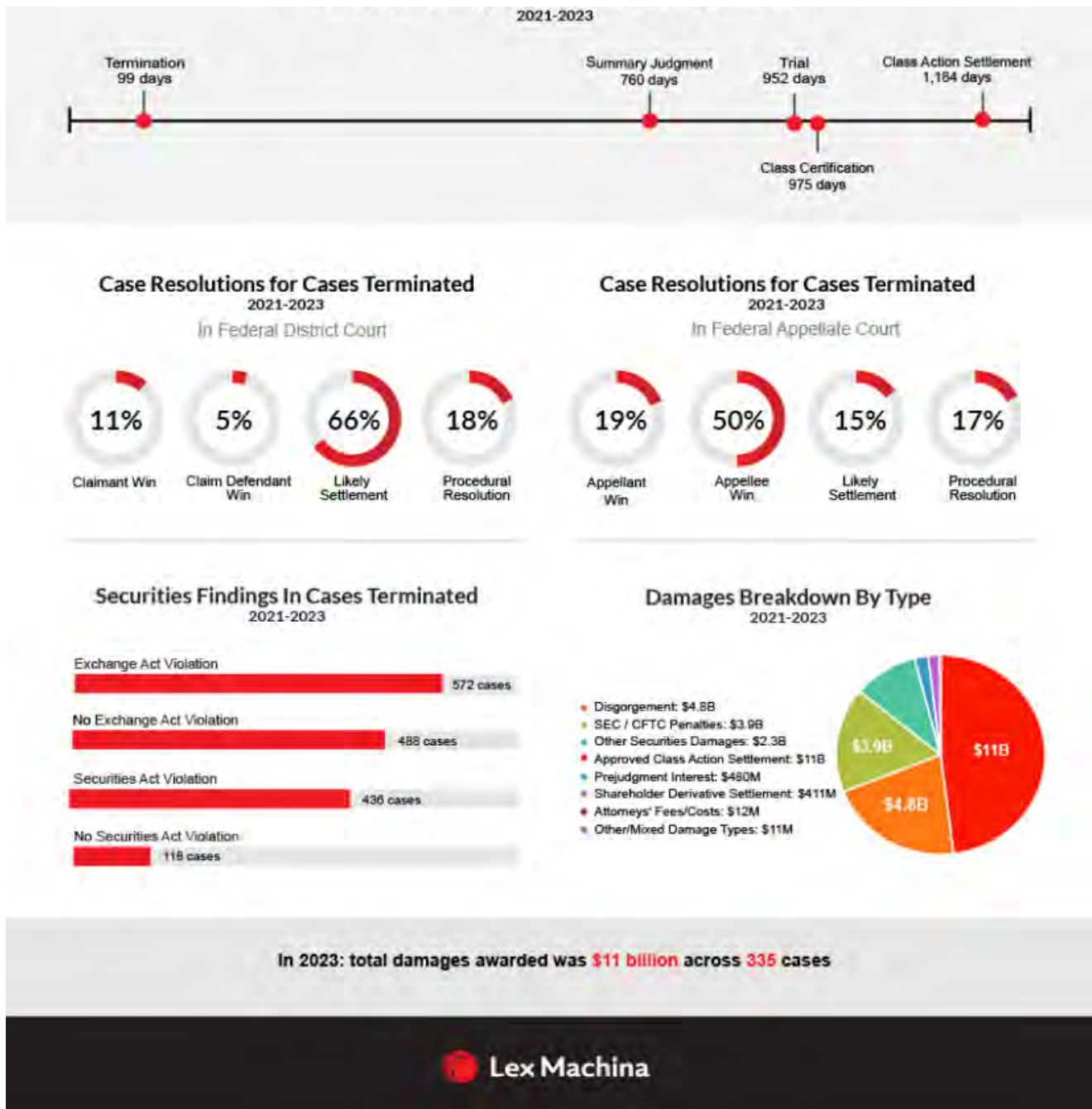


Most Active Attorneys by Cases
2021-2023

Representing Defendants



Median Time to Key Milestones for Cases Terminated



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'Barrage of Suspect Claims' Hampers Altria Class Settlement With Juul Users

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By Amanda Bronstad



U.S. District Judge William Orrick III of the Northern District of California. Photo by Jason Doiy/ALM

NEWS

At a Wednesday hearing, lawyers predicted that as many as 80% of the claims made in Altria's \$45.5 million class settlement over Juul could be invalid or fraudulent.

March 06, 2024 at 07:38 PM

Amanda Bronstad [➔](#)
staff reporter

What You Need to Know

- U.S. District Judge William Orrick III suggested that lawyers contact federal prosecutors about so-called click farms, which are making fraudulent Altria claims.
- Fraudulent claims are becoming increasingly frequent in class action settlements with the rise of AI and other technologies.
- Orrick said he would approve Altria's \$45.5 million class settlement, overruling a handful of objections.

Plaintiffs lawyers asking to approve a \$45.5 million class action settlement with Altria over Juul cigarettes told a federal judge Wednesday that they received 14.4 million claims, nearly five times what was expected—but about 80% of them were likely invalid or fraudulent.

“The innovation appears to be endless,” Dena Sharp, co-lead plaintiffs counsel in the Juul multidistrict litigation, told U.S. District Judge William Orrick III at a hearing. “It’s likely a combination of a relatively small number of bad actors using the force multipliers of AI and everything the internet has to offer.”

Some of the fraud is coming from so-called click farms, she said, which are rows of people who click the appropriate boxes when they come across the anti-bot program reCAPTCHA, which asks if a user, such as a claimant, is a robot by displaying images, such as a window or a set of stairs, for example.

That prompted Orrick, who is overseeing the Juul multidistrict litigation in the Northern District of California, to suggest that Sharp reach out to federal prosecutors to get involved—and possibly, consider criminal action against the fraudsters.

“That’s very concerning to me because it’s a fraud on the court, and I’m wondering whether this has been pushed on to law enforcement authorities,” he said. “This is a big problem.”

The influx of fraudulent claims in class action settlements has been rising, particularly with the advent of artificial intelligence and other technologies. Last year, the manufacturer of Chicco KidFit booster seats objected to its own class settlement, citing rampant fraud in the claims process.

At Wednesday’s hearing, Sharp, of San Francisco’s Girard Sharp, described batched claims with fictitious information, large numbers of claims coming from the same internet protocol address or claims for substantial amounts, such as \$100,000 in cigarette

purchases. She anticipated being able to reduce the number of claims to about 11.2 million simply through deduplication, but several of them remain in the middle, requiring extra work to identify the fraud.

It also requires more money.

As of Feb. 12, the Altria settlement administrator Epiq had spent \$1.5 million in costs, according to court papers. That is in addition to the \$3 million spent on the related \$255 million class action settlement with Juul Labs Inc., which Orrick approved in a final order on Sept. 19.

But Orrick authorized a total spend of \$6 million in administrative expenses for both settlements.

In court papers, lawyers estimated that between \$8.55 million and \$9.66 million was spent addressing fraudulent claims in both settlements.

“Epiq and class counsel have spent significant time and effort working to prevent claims by bots and other bad actors from being filed in the first place,” they wrote. “But given the advancing sophistication of fraudulent claimants and the use of AI technologies, both the JLI and Altria settlements faced a barrage of suspect claims that is unfortunately becoming the new normal in consumer class action settlements.”

In court, Orrick agreed to give lawyers more time to investigate the fraudulent claims, though Sharp said she hoped to get settlement payments to class members by this summer.

“We have every interest in getting money to class members’ hands before any more bots show up,” Sharp said.

A Claims Rate ‘Almost Unheard of in the Past’

Although Altria agreed to resolve thousands of lawsuits, including those alleging personal injuries and by government entities, Wednesday’s hearing concerned only a \$45.5 million class settlement with consumers seeking economic damages from purchasing Juul cigarettes.

At the time of the settlements, Altria, the parent company of Philip Morris, had a 35% stake in Juul. Altria has since backed out of its Juul investment.

At Wednesday’s hearing, Orrick said he would approve the Altria settlement, overruling a handful of objections. There were only three objections and 197 requests to opt out of the settlement.



Dena Sharp of Girard Sharp. Photo by Jason Doiy/ALM

Even after winnowing out the illegitimate and duplicative claims, Sharp still anticipated a claims rate of at least 15%, which she said was “almost unheard of in the past.” In court, Sharp estimated more than 2 million of the claims would be deemed valid, about 20% of the class.

“By any measure,” the lawyers wrote in court papers supporting the settlement’s approval, “the volume of claims submitted represent a positive reaction from the class, and thus supports final approval of the Altria settlement.”

In the Altria settlement, plaintiffs lawyers also asked for \$13.6 million in fees, plus \$1 million in expenses. In the Juul class settlement, they asked for \$76.5 million in fees, about 30% of the fund.

That means the total fees for both settlements would be \$90 million. Orrick said he had no issues with the fee amount.

“I think that the lawyering in this case was just excellent,” he said.

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- Latest
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Google Play Deal Rebuke Puts Settling Defendants on Notice

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- Terms of the deal to impact millions of class members
- Judge criticized provision barring claims over future conduct

A federal judge's rejection of a \$700 million settlement brokered by Alphabet Inc.'s Google and state attorneys general over the Google Play app gives warning to defendants hammering out similar class action deals.

Judge James Donato of the US District Court for the Northern District of California last week was severe in his rebuke of a deal with US states and consumers who claimed the tech company's Google Play app store abuses its market power, calling the deal "a bag of not great." He raised particular concerns about how little the settlement will pay out to 127 million consumers, many of whom may only get \$2, and its provision to essentially release the Google Play Store from any legal claims for the next seven years.

Donato's reaction highlights the need for companies to ensure class members are fairly and adequately compensated for their injuries, said Eduardo Robreno, who's been a partner with McCarter & English LLC since September. In an era of strict antitrust enforcement under the Biden administration, companies should be thinking even harder about the terms of their agreements, he said.

"It isn't just a matter of submitting a piece of paper and getting the judge to approve it," said Robreno, who as a federal judge in 2023 rejected Google's proposal for a \$5.5 million class settlement in a separate case related to the company's web browser privacy settings. That case has since been reassigned to another judge and stayed.

Companies need to "be able to defend it, and be sure we can say with a straight face that it's fair and adequate," he added.

Earlier: Google Play Judge Faults \$700 Million Deal as 'Bag of Not Great'

Donato's reaction shows judges do view defendants' conduct as inappropriate and will take that into account when assessing the fairness of deals, said Kathleen Bradish, vice president and director of legal advocacy at the American Antitrust Institute. The states accused Google of extracting large sums of money from consumers by steering them to Google Play's billing system to buy apps and in-app content, and prohibiting app developers from suggesting alternative ways to purchase content.

“You are seeing a lot of judges more willing to find that Big Tech is harming consumers,” she said.

Attorneys for Google didn’t immediately respond to a request for comment on the judge’s concerns and how they plan to resolve them. Donato last week gave both parties 30 days to convince him the settlement is fair, reasonable, and adequate. All 50 states, as well as the District of Columbia, Puerto Rico and the Virgin Islands joined the settlement.

Proposed Deal

Scrutiny over class actions isn’t a new phenomenon; the 2005 passage of the Class Action Fairness Act was designed to ensure more equitable outcomes for class members. Proponents of the bill thought it necessary to create uniform standards for certifying a class, as state and federal courts had been doing it differently for years, said Christine Bartholomew, a law professor at University at Buffalo School of Law who studies class actions.

Each case has its own unique circumstances, but judges typically look at various factors when approving settlements, including the odds of plaintiffs and defendants winning a suit, the total amount awarded to consumers, attorneys’ fees, and how funds would be distributed, she said.

The judge’s reaction in this particular case attracted more attention because it involves Google, a high-profile tech company that has faced multiple antitrust suits and enforcement scrutiny on both sides of the Atlantic. The US Justice Department also alleges Google illegally maintained a monopoly over search and advertising.

“I’m not surprised to see him looking at the scope of the release so that the class is not giving up more than it needs to,” Bartholomew said. “It’s not a mom-and-pop shop. You’re talking about a big-deal case.”

Under the proposed settlement terms, \$630 million would be distributed to eligible consumers while \$70 million would go to the states. The deal also aims to change Google’s business practices by requiring it to simplify the process for installing apps from outside Google Play and allowing developers to steer consumers away from the Google Play Store and toward alternative billing systems.

In the settlement, states attorneys general said that the deal provided “significant, immediate, and certain relief to consumers,” while opening up competition in the market for apps.

Settlement Tweaks

Richard Wolfram, an independent lawyer in New York who focuses on antitrust litigation and counseling, called the plaintiffs' approach to the Google deal "very, very aggressive" and said the settlement will likely have to be revisited by the states.

Donato's strong reaction to the provision to essentially release the Google Play Store from some future claims will likely be a lesson to other plaintiffs' counsel and attorneys representing defendants considering similar terms, he said.

"Do you frankly tick off the judge in going for something that you are almost surely not going to get?" Wolfram said.

Bartholomew said Donato was doing his job when pushing both parties to justify what they agreed to.

"I wouldn't want to go back in front of that judge without having at least tweaked that release a bit," she said.

Google and the states can now either try to convince Donato that his concerns are misplaced, or tweak the terms of the deal with various strategies, such as raising payouts higher than the \$2 minimum per eligible consumer, Bradish said.

"All the parties have information about where Judge Donato was leaning," Bradish said.

"They could always provide more money. The judge definitely seemed to be upset by how little the individuals would be getting out of this. Or they could be creative and come up with modification of some sort to their processes."

The states are represented by their attorneys general. Google is represented by firms including Morgan, Lewis & Bockius LLP, Munger, Tolles & Olson and Hogan Lovells.

The case is *Utah v. Google*, N.D. Cal., No. 3:21-cv-05227 .

—With assistance from Rachel Graf (Bloomberg News).

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Apple consumers urge appeals court to skip review in app store class action

 [reuters.com/legal/transactional/column-apple-consumers-urge-appeals-court-skip-review-app-store-class-action-2024-03-06](https://www.reuters.com/legal/transactional/column-apple-consumers-urge-appeals-court-skip-review-app-store-class-action-2024-03-06)

Alison Frankel

An Apple logo is pictured in an Apple store in Paris, France, March 6, 2024.

REUTERS/Gonzalo Fuentes Purchase Licensing Rights , opens new tab

March 6 (Reuters) - In the latest case to pose the question of precisely how rigorous trial courts must be in certifying gargantuan class actions, Apple consumers on Tuesday told , opens new tab a federal appeals court that there's no need to double-check the decision allowing tens of millions of iPhone and iPad users to bring classwide antitrust claims.

Apple (AAPL.O) , opens new tabasked , opens new tab the 9th U.S. Circuit Court of Appeals last month to grant rare mid-case, or interlocutory, review of the Feb. 2 class certification ruling , opens new tab by U.S. District Judge Yvonne Gonzalez Rogers of Oakland, California, in a long-running case alleging that Apple monopolized the market for iPhone apps by banning purchases outside its App Store.

As my Reuters colleague Jonathan Stempel reported, Rogers had previously refused in 2022 to certify the class because of concerns that plaintiffs' economic model swept in millions of consumers — nearly 20% of the originally proposed class — who did not actually overpay for apps. But the judge held in her decision last month that plaintiffs' lawyers adequately addressed the issue of uninjured class members by limiting the class to account holders who spent at least \$10 on apps or in-app purchases.

Apple told the 9th Circuit in its Feb. 16 petition for interlocutory review that even with the narrowed class definition, plaintiffs' own expert found that the class would still contain “at least 10 million uninjured Apple App Store accounts.”

The 9th Circuit, as you may recall, has refused to set a specific limit on the number or percentage of uninjured class members in a certified class. But when the en banc appeals court considered that question a couple of years ago in antitrust class actions against tuna fish suppliers, the 9th Circuit told trial judges , opens new tab that before they certify a class, they must carefully weigh whether individual questions about class membership will predominate over classwide issues.

Apple contended that Rogers wasn't sufficiently rigorous. Its specific criticisms — including skepticism about the “crude and ineffective” \$10 minimum for class membership — are particular to this case, but Apple lawyers at Gibson, Dunn & Crutcher told the 9th Circuit that the judge's ruling shows why the appeals court needs to offer more guidance on class certification standards.

“This court should make clear that certification cannot be premised on a model that flouts real-world evidence and foundational tenets of economics,” Apple said, “particularly where the model itself has not been proven capable of screening out uninjured members.”

In their new brief opposing Apple’s petition, plaintiffs’ lawyers from Wolf Haldenstein Adler Freeman & Herz and Kellogg, Hansen, Todd, Figel & Frederick argued that in evaluating their class certification motion, Rogers did just what the 9th Circuit demanded in the tuna decision, exhaustively analyzing Apple’s criticism of their classwide damages model before determining that the model could reliably show the impact of Apple’s allegedly monopolistic conduct across the class.

The 9th Circuit only recently clarified the rules for class certification in the tuna case, the Apple plaintiffs said. Rogers “faithfully applied” those rules, they argued, so there’s no reason for the appeals court to take the extraordinary step of delving into the specifics of Rogers’ analysis.

Plaintiffs’ lawyer Mark Rifkin of Wolf Haldenstein said in an email that the opposition brief “clearly lays out why [Apple’s] petition is without merit.” Neither an Apple spokesperson nor Apple counsel Ted Boutros of Gibson Dunn responded to my query.

Apple seems to be hoping that the 9th Circuit is still hankering to refine its class certification rules after losing a chance to revisit them in an antitrust case accusing Alphabet (GOOGL.O) [□](#), opens new tab subsidiary Google of monopolizing the Android app market via its Google Play Store. In February 2023, the appeals court granted Google’s petition to review a class certification ruling by U.S. District Judge James Donato of San Francisco.

Google, like Apple, argued [□](#), opens new tab that the trial judge failed to grapple with both the problem of uninjured class members and real-world data undercutting plaintiffs’ economic models. After the 9th Circuit agreed to hear Google’s case, the appellate docket was swamped with amicus briefs from business-friendly groups, including the U.S. Chamber of Commerce and the Business Roundtable, that viewed the appeal as an opportunity to tighten class certification standards.

The Google plaintiffs, like the plaintiffs in the Apple case, insisted [□](#), opens new tab that the trial judge applied requisite rigor when he evaluated their economic model and concluded that it was adequate to establish classwide injury, regardless of whether some class members suffered no actual harm.

The 9th Circuit was scheduled to hear oral arguments last September but the appeal was withdrawn when Donato decided in August to decertify the Google Play class.

Apple told the 9th Circuit in its Feb. 16 petition that its case “presents the same important issues this court was poised to address” in Google’s appeal.

The Apple plaintiffs countered in their new opposition brief that any perceived problems with class certification in the Google case are irrelevant because their economic model relies on different (and better) methodology.

Regardless of what happens at the 9th Circuit, there's a chance that the U.S. Supreme Court will revisit class certification requirements in an appeal brought by Visa (V.N) [↗](#), opens new tab and Mastercard (MA.N) [↗](#), opens new tab. As I told you in January, the credit card companies' have petitioned for Supreme Court review of decisions certifying three classes to proceed with \$9 billion in antitrust claims over ATM fees.

Visa and Mastercard, like Apple and Google, told the justices that too many lower courts are not rigorously policing classes to be sure that classwide issues predominate over individual questions about class members' injuries (or lack thereof). They're calling on the Supreme Court to clear up "rampant confusion" on class certification standards.

Plaintiffs' lawyers in those cases told me that the credit card defendants are really carping about the fact-specific outcome, not the process that resulted in class certification. Like the Apple and Google plaintiffs, they said there's no need to tinker with class action precedent.

Their Supreme Court brief opposing review is due next week.

Read more:

Judge certifies Apple app store class action

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

US judge set to decertify Google Play class action

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Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

Judge tosses 'lengthy, puzzling and burdensome' securities case

DJ [dailyjournal.com/articles/377515-judge-tosses-lengthy-puzzling-and-burdensome-securities-case](https://www.dailyjournal.com/articles/377515-judge-tosses-lengthy-puzzling-and-burdensome-securities-case)

Securities

Mar. 7, 2024

U.S. District Judge Mark C. Scarsi found the lead plaintiff, represented by The Rosen Law Firm and Pomerantz LLP, acted in bad faith by submitting “yet another unnecessarily lengthy, puzzling and burdensome complaint.

Jack Dorsey, a Twitter founder, in 2021. (The New York Times)
A federal judge in Los Angeles dismissed a securities fraud class action against Twitter Inc., now X Corp., and its former owner after the plaintiffs’ counsel filed a third amended complaint that the judge found did not raise any new facts in the dispute.

The judge said the filing was “a waste of judicial resources – and no doubt, the resources of the opposing parties.”

In his order Tuesday, U.S. District Judge Mark C. Scarsi found the lead plaintiff, represented by The Rosen Law Firm and Pomerantz LLP, acted in bad faith by submitting “yet another unnecessarily lengthy, puzzling and burdensome complaint. ... Despite its 100-plus page amended complaint, lead plaintiff provided no new facts that cured these previously identified deficiencies. Therefore, the court is left with no choice but to believe there are no facts available for lead plaintiff to sustain his claims,” Scarsi wrote.

X. Corp., now owned by Elon Musk, was represented by Latham & Watkins LLP. Co-defendant Jack Dorsey, Twitter’s founder, was represented by Munger Tolles & Olson LLP.

Neither of the lead attorneys responded to emails or phone calls by press deadline Wednesday.

The 114-page amended complaint was filed last October on behalf of four named plaintiffs and a putative class who claimed their acquired Twitter common stock was damaged following a 2020 cyberattack. They also claimed that Dorsey made false and misleading statements about the site’s security practices. *William Baker et al. v. Twitter Inc.*, 2:22-cv-06525 (C.D. Cal. filed Sept. 13, 2022).

The court previously dismissed parts of a prior iteration of the plaintiffs' complaint, which brought claims under the Securities Exchange Act, Sections 10(b) and 20(a), on grounds that most of the challenged statements were not false or misleading or supported by particular facts that showed scienter.

The amended complaint brought the same claims to the court that the defense argued should be tossed because they did not bring anything new to the case.

Jonathan D. Park of Pomerantz LLP for the plaintiffs, wrote in an opposition filing that the amended complaint alleged new false statements he claimed were made by several former Twitter data security officers at the time of the cyberattack. He said these did show scienter.

However, the judge agreed with the defense and found the plaintiffs' counsel did not heed his previous warning of refiling an overly complex complaint that did not raise new facts.

"Despite the court's previous warning against filing an unduly burdensome complaint ... lead plaintiff submitted yet another cumbersome complaint combining the previously parsed-out statements into eight sets and offering overarching allegations of falsity and scienter for each set," Scarsi wrote. "The court explicitly warned lead plaintiff against this conduct. Sifting through the third amended complaint only to find lead plaintiff had provided no new facts, just new theories, was a waste of judicial resources – and no doubt, the resources of the opposing parties."

#377515

Devon Belcher

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Lyft earnings report error prompts shareholder lawsuit

 [reuters.com/legal/lyft-earnings-report-error-prompts-shareholder-lawsuit-2024-03-06](https://www.reuters.com/legal/lyft-earnings-report-error-prompts-shareholder-lawsuit-2024-03-06)

Jonathan Stempel

A Lyft [CHEVRON_LEFT]LYFT.O[CHEVRON_RIGHT] logo is seen in the Driver Hub in Los Angeles, California, U.S., March 20, 2019. REUTERS/Lucy Nicholson/File Photo Purchase Licensing Rights , opens new tab

March 6 (Reuters) - Lyft (LYFT.O) , opens new tab has been sued by shareholders for securities fraud after a mistake in a recent earnings release about a key profit metric sent the ride-sharing company's stock price on a wild ride up, and then down.

In a proposed class action on Tuesday, shareholders said Lyft was careless in initially saying on Feb. 13 that one of its profit margins would expand in 2024 by 500 basis points, or 5 percentage points, when it actually expected 50 basis points.

The mistake disclosed at 4:05 p.m. EST (2105 GMT) triggered a buying frenzy that caused Lyft's share price to rise 67% in a half-hour.

"It was a bad error, and that's on me," Chief Executive David Risher told CNBC the next day.

Shareholders said the stock shed most of the gains after Chief Financial Officer Erin Brewer gave the correct margin forecast at 4:47 p.m. on an investor conference call. They said Lyft waited another seven minutes to formally admit error.

"The misrepresentation was so apparent that it went beyond mere negligence, and amounted to a reckless indifference to the truth," the complaint filed in San Francisco federal court said.

Lyft did not immediately respond on Wednesday to requests for comment.

The lawsuit seeks damages for investors who bought Lyft shares at "inflated prices" between 4:05 p.m. and 4:51 p.m. on Feb. 13.

During that period, Lyft's market value rose as much as \$3.2 billion, and then shed roughly \$2.9 billion of that increase.

Shareholders also said Risher and Brewer were "motivated" to delay fixing the mistake in order to boost their stock-based performance bonuses, as investors who had bet Lyft's share price would fall were forced to cover their short positions.

About 13% of Lyft's stock had been shorted as of Jan. 31, compared with 3% at larger rival Uber (UBER.N) , opens new tab.

The case is Chen v Lyft Inc et al, U.S. District Court, Northern District of California, No. 24-01330.

Reporting by Jonathan Stempel in New York Editing by Tomasz Janowski

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Another class complaint filed over Lyft's earnings report

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Securities

Mar. 7, 2024

Lyft CEO David Risher took responsibility for the blunder, calling it 'an unacceptable error.'

Lyft Inc. was hit with a putative shareholder class action in federal court a month after the rideshare company released an earnings report that mistakenly projected its 2024 margin expansion to increase by 5% rather than 0.5%.

The San Francisco company did not respond to a request for comment on the lawsuit filed Tuesday. In an interview with Bloomberg shortly after the report came out on Feb. 13, Lyft CEO David Risher took responsibility for the blunder, calling it "an unacceptable error."

Wolf Popper LLP partner Philip M. Black wrote in the complaint that the mistake caused Lyft stock, which closed on Feb. 13 at \$12.13, to trade as high as \$20.25 in the aftermarket. Lyft's share price rose almost 70% within 30 minutes of the report's release before plummeting back down. "To company insiders who were responsible for ensuring the accuracy of the press release and the supplemental data, the misrepresentation was so apparent that it went beyond mere negligence, and amounted to a reckless indifference to the truth," said Black. *Chen v. Lyft Inc. et al.*, 3:24-cv-01330-AGT (N.D. Cal., filed Mar. 5, 2024).

According to the complaint, Lyft released the report at 4:05 p.m., which went uncorrected until 4:47 p.m. when chief financial officer Erin Brewer said on an investor conference call that the rideshare company anticipated a 50-point margin expansion instead of a 500-point margin expansion. Over 30 analysts issued research reports on Lyft common shares on Feb. 13, "and it is not plausible that no analyst inquired of the defendants or Lyft's other senior officers as to the accuracy of the 500 basis point margin expansion within minutes of the issuance of the press release," wrote Black.

The attorney added that Lyft was motivated to misrepresent the facts because the company had a large short position and research analysts had given negative commentary on its common stock. "The defendants knew that many, if not most, of the shares that traded in the

aftermarket were shorts covering their positions and therefore were motivated not to move promptly to correct the press release,” said Black.

In 2022, Lyft agreed to pay \$25 million to settle claims that the company misled investors and failed to disclose relevant information related to passenger sexual assault before its initial public offering. The plaintiffs said Lyft sought to differentiate itself from Uber, its biggest competitor, by promoting a safe and progressive image. However, news articles and class action complaints revealed that Lyft had a pervasive problem with sexual assaults by its drivers before the company went public, said lead plaintiff’s counsel Jacob A. Walker of Block & Leviton LLP. Lyft was represented by Latham & Watkins LLP and denied any wrongdoing. In re: Lyft Inc. Securities Litigation, 4:19-cv-02690-HSG (N.D. Cal., filed May 17, 2019).

#377513

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Xponential Fitness Defrauded Shareholders, Class Action Suits Allege

FT [franchisetimes.com/franchise_news/xponential-fitness-defrauded-shareholders-class-action-suits-allege/article_2fab1286-db3e-11ee-8370-fff981831fcb.html](https://www.franchisetimes.com/franchise_news/xponential-fitness-defrauded-shareholders-class-action-suits-allege/article_2fab1286-db3e-11ee-8370-fff981831fcb.html)

Emilee Wentland

March 5, 2024



Pure Barre is one of Xponential Fitness' brands. Law firms have filed class action lawsuits against Xponential for allegedly defrauding its shareholders.

Xponential Fitness defrauded its investors by making “materially false and misleading statements and omissions regarding Xponential’s business, financial results and prospects,” according to a lawsuit filed last month.

The corporate team at the Irvine, California-based company allegedly didn’t tell its investors that its franchisees “were largely failing” and eight of the 10 brands weren’t drawing a profit on a monthly basis, notes the class action suit, filed on behalf of Xponential shareholders.

Xponential’s revenue is mainly derived from franchisees. “Despite this grim reality, Xponential snookered new franchisees to sign up with the company with false and misleading promises of robust financial returns, misleading claims regarding past studio performance and deceptive assurances of corporate support,” the lawsuit alleges.

The lawsuit was filed in the U.S. District Court in the Central District of California. Law firm Robbins Geller Rudman & Dowd filed the suit February 9 on behalf of the City of Taylor General Employees Retirement System, and several firms nationwide filed similar suits. The lawsuit alleges Xponential made the false representations between July 26, 2021, and December 7, 2023.



Anthony Geisler formed Xponential Fitness in 2017, growing it to 10 concepts.

CEO Anthony Geisler reportedly boasted in March 2022 that Xponential has never closed a store, which the lawsuit alleges is false and reports the company has permanently closed at least 30 studios.

Geisler formed Xponential in 2017 after he bought Club Pilates, which had just 25 units at the time. The franchisor has since grown to 10 brands—including Pure Barre, CycleBar and StretchLab—largely through purchasing founder-led, studio fitness concepts.

Xponential announced in February that it sold Stride, a running-centric workout concept, to Shaun Grove, president of another portfolio brand, Rumble Boxing. Xponential bought Stride in 2019 when it had just one unit; the brand lists 19 units in 2024.

The company went public in July 2021 and has since seen gross profits of \$269 million during the class period, the suit says.

Law firms involved in the class action suits didn't respond to requests for comment. Xponential didn't immediately provide comment; Franchise Times will update this story if comments are received.

Related: Xponential Fitness CEO Calls IPO 'Super Bowl of Business'

The suit details instances where Xponential reported financial results and Geisler and Chief Financial Officer John Meloun made statements about “purported profitability” and average unit volume growth that could reach \$600,000.

Those statements, the suit says, were “materially false and misleading” for several reasons, among them that “many Xponential franchisees were substantially in debt, suffering high attrition rates and running non-viable studios that had no realistic path to profitability.”



Club Pilates is one of 10 brands under the Xponential Fitness umbrella.

A Florida franchisee named in the suit, Brent Zartler, reportedly noted that his CycleBar studio lost more than a half-million dollars and he was planning to file for bankruptcy. Yet, the suit alleges, Zartler’s studio was highlighted as a success “to lure in new franchisees.”

“What they don’t tell these franchisees is it’s just been a slow, steady death with that studio,” Zartler reportedly said. “I’ve been working in gyms for 20 years, and I’ve never worked in a business where there’s been such a high attrition rate.”

Analyst firm Fuzzy Panda Research released a report June 26, 2023, after reportedly sifting through 64 franchise disclosure documents from among all of Xponential’s brands. The firm’s research found that, allegedly, over half of the company’s studios “never make a positive financial return.”

Following the Fuzzy Panda report, the company’s stock fell 37 percent, to \$15.72.

On December 11, 2023, Xponential announced the U.S. Securities & Exchange Commission contacted the franchisor December 5 to request “certain documents;” the company’s stock price fell by 14 percent the same day. Xponential didn’t elaborate, but said in its 8-K filing, “The company intends to cooperate fully with the SEC in this matter.”

After the company announced the SEC request, stock prices fell another 26 percent, to under \$9. The suit claims the stock price had “largely not recovered” as of February 9. As of March 5, the company’s stock, which trades on the New York Stock Exchange under the ticker “XPOF,” was priced at \$13.53 per share.

During the class period, “defendants engaged in a scheme to deceive the market and a course of conduct that artificially inflated the prices of Xponential common stock,” the suit reads. Plaintiffs are seeking compensatory damages, along with other relief, and have requested a jury trial.

Xponential ended 2023 with 3,062 units after opening 557 new studios. A company spokesperson wrote in an email that 87 studios closed in the fourth quarter, which makes up less than 3 percent of its portfolio. The suit alleges about 600 of its “sold licenses in North America had been terminated and over 30 had been terminated internationally” from inception through the end of 2022.

Related: Snapdragon Capital Invests \$30 Million in Largest Club Pilates Franchisee

X, Former Twitter Execs Beat Fraud Suit Over Security Concerns

By Ben Miller

- Judge tosses third amended complaint, denies chance to refile
- Suit alleged social platform, ex-exec's hid operational issues

Bloomberg Law News 2024-03-07T10:00:24100640605-05:00

X, Former Twitter Execs Beat Fraud Suit Over Security Concerns

By Ben Miller 2024-03-06T12:31:36000-05:00

- Judge tosses third amended complaint, denies chance to refile
- Suit alleged social platform, ex-exec's hid operational issues

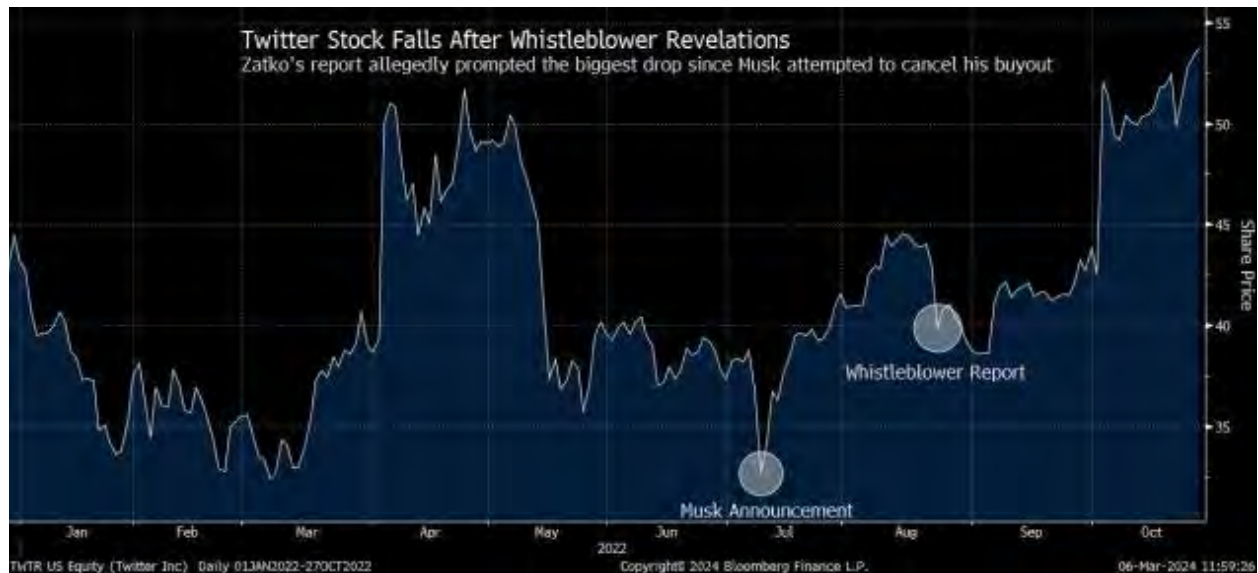
X Corp., formerly known as Twitter Inc., and its former executives won't have to face allegations that they concealed security issues, misstated the social media platform's monetizable user numbers, and failed to disclose instances of government influence, after a judge dismissed a proposed class action.

The ruling puts an end to the litigation sparked by whistleblower Peiter Zatko's accusations of security problems at the company after a year and a half. Judge Mark C. Scarsi didn't give shareholders a chance to refile their claims after three previous amended complaints, according to the order filed Tuesday in US District Court for the Central District of California.

Zatko, former head of computer security at Twitter, revealed publicly that Twitter had inadvertently used customer data intended for security purposes in its advertising campaigns in mid-2021. Before taking over the social media giant, Elon Musk cited the whistleblower's accusations among his reasons for attempting to cancel the \$44 billion buyout.

The proposed class action, filed in September 2022, sought to recover damages for shareholders who owned Twitter stock during a two-year period, starting in 2020.

The suit alleged that after years of misrepresentations, the whistleblower revelations prompted a stock drop that harmed investors after Zatko's report was published by The Washington Post on August 23, 2022. The same day, the company's stock fell 7.3%, closing at \$39.86 on Aug. 23, 2022. That was the stock's biggest drop since July 11, 2022, the day after Musk announced his intention to cancel the deal, according to data compiled by Bloomberg.



Scarsi ruled that the third amended complaint fails to plead loss causation or sufficiently allege a securities fraud claim against the company or its former executives, adding no new facts to previous iterations of the lawsuit. The suit also failed to allege that former CEO Parag Agrawal knew about an influence campaign by Indian army unit Chinara Corps and decided not to disclose it to investors, the judge said in the order.

"The court also finds lead plaintiff acted in bad faith by submitting yet another unnecessarily lengthy, puzzling and burdensome complaint," Scarsi said in the order.

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

The Rosen Law Firm PA and Pomerantz LLP represented the plaintiffs and the proposed class.

Latham & Watkins LLP represented X. Munger, Tolles & Olson LLP represented ex-CEO and co-founder Jack Dorsey. Sidley Austin LLP represented Agrawal and Ned Segal, former chief financial officer. Friedman Kaplan Seiler Adelman & Robbins LLP represented Damien Kieran, former chief privacy officer.

The case is *Baker v. Twitter Inc.*, C.D. Cal., No. 2:22-cv-06525, 3/5/24.

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March 6, 2024, 11:07AM PST
HPE's \$14 Billion Deal for Juniper Draws Shareholder Challenge
By [Mike Leonard](#)
Documents

-  [Complaint](#)
-  [Docket](#)
-  [Company: Juniper Networks Inc.](#)
-  [Company; Hewlett Packard Enterprise Co.](#)

- COURT:** Del. Ch.
- TRACK DOCKET:** [No. 2024-2014](#)

Bloomberg Law News 2024-03-07T10:40:24835027307-05:00
HPE's \$14 Billion Deal for Juniper Draws Shareholder Challenge

By [Mike Leonard](#) 2024-03-06T14:07:26000-05:00
COURT: Del. Ch.
TRACK DOCKET: [No. 2024-2014](#)

A Juniper Networks Inc. investor sued Wednesday to halt a shareholder vote on its \$14 billion sale to Hewlett Packard Enterprise Co. until more information about the deal is made public.

The proposed class action seeks an injunction blocking the April 2 vote pending supplemental disclosures about the process leading up to the transaction announced in January, especially about competing bids. The price of \$40 a share appears too low, although Juniper CEO Rami Rahim may have had other reasons for favoring the transaction, the lawsuit says.

As it stands, the software company's stockholders don't have enough information to compare the deal price to offers submitted by other corporate suitors, "assess whether these interested parties also dangled the potential for post-closing employment for Rahim," or "weigh the board's rationale for not engaging" with them, according to the complaint filed in Delaware's Chancery Court.

Juniper didn't immediately respond to a request for comment Wednesday. HPE had no comment. The suit targets both companies and members of Juniper's board, although it doesn't include any allegations of wrongdoing by HPE, which is named as a defendant "to the extent it is a necessary party for relief to be granted."

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According to the court filing, Juniper's investors can't cast an informed vote on the deal without more information about the timing and price terms of other bids, any pledge of post-deal employment for Rahim they may have included, and any standstill arrangements that would have blocked other offers in the first place.

Nor will shareholders be able to decide if they should participate willingly in the sale or ask a judge to appraise the fair value of their shares, the suit says.

Investors suing for more information about a deal often drop their lawsuits when supplemental disclosures are filed, claim credit for having forced the company's hand, and seek legal fees as a reward. Delaware's judges have begun cracking down on the practice, often derided as a "merger tax," but they still award fees if the additional disclosures are "plainly material."

The shareholder leading the case, Stephen Bushansky, is represented by Bielli & Klauder LLC and Weiss Law LLP.

The case is Bushansky v. Juniper Networks Inc. , Del. Ch., No. 2024-0214, complaint filed 3/6/24 .

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Jack Henry Says 401(k) Fee Lawsuit Is Based on Cherry-Picking

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- Claims that services are fungible aren't enough, company says
- Suit filed in 2023 on behalf of proposed class of 7,000 people

A proposed class action challenging Jack Henry & Associates Inc.'s retirement plan fees is based on faulty comparisons with dissimilar plans, the financial technology company said in a court filing asking that the case be dismissed.

The lawsuit, which seeks to represent a class of 7,000 people, rests on “bare cost comparisons” between Jack Henry’s plan and eight other plans that “seem to be cherry-picked simply to prove Plaintiff’s claim,” the company said in a motion filed Tuesday in the US District Court for the Western District of Missouri. These comparisons don’t account for differences in plan size, and they don’t adequately address the different administrative services received by the plans in question, the company said.

The lawsuit makes conclusory allegations that 401(k) recordkeeping services are “commoditized and fungible,” but that’s not enough to state a valid claim for excessive fees under the Employee Retirement Income Security Act, the company said, citing the Eighth Circuit’s recent decision rejecting similar claims against MidAmerican Energy Co.

The five-month-old lawsuit, filed by current Jack Henry employee Guy Lacrosse, says participants in the company’s 401(k) plan paid about \$78 per person in administrative fees each year, when a reasonable fee for these services would have been closer to \$39. The company failed to take appropriate action to lower these fees through negotiation, competitive bidding, or careful monitoring, Lacrosse said in the complaint.

Hundreds of employers have been sued in the past few years over the fees in their retirement plans, and federal appeals court decisions have been mixed.

The Ninth Circuit revived lawsuits against Trader Joe’s Co. and Salesforce.com Inc., while the Sixth, Eighth, and Tenth circuits issued employer-friendly decisions largely favoring MidAmerican, CommonSpirit Health Inc., TriHealth Inc., and Barrick Gold. The Seventh Circuit rejected a plan fee challenge against Oshkosh Corp. in 2022, but last year it allowed key claims to proceed against Northwestern University.

The Western District of Missouri is under the purview of the Eighth Circuit. The case is before Judge Stephen R. Bough.

Jackson Lewis PC represents Jack Henry. DiCello Levitt LLP, Wagner Reese LLP, and Johnson Becker PLLC represent LaCrosse.

The case is Lacrosse v. Jack Henry & Assocs., Inc. , W.D. Mo., No. 3:23-cv-05088, motion to dismiss 3/5/24 .

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Milliman Must Face 401(k) Fund Suit Despite Goldman Sachs Impact

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- Suit challenges ‘untested’ funds tailored to risk preference
- Intervening 2nd Cir. opinion doesn’t warrant reconsideration

A decision allowing Milliman Inc. employees to go to trial over their 401(k) plan’s target risk funds will stand after a federal judge declined to reconsider it in light of an intervening appeals court victory for Goldman Sachs Group Inc.

The Second Circuit’s February decision in *Falberg v. Goldman Sachs Group Inc.* “does not eliminate the genuine issues of material fact that preclude summary judgment in this case,” Judge Thomas S. Zilly said in a March 6 order denying Milliman’s motion for reconsideration. Zilly’s one-page order, entered in the US District Court for the Western District of Washington, didn’t include a lengthy analysis of the case.

The 4,300-person class action takes aim at a suite of “target risk” funds from Unified Trust Co., which are sub-advised by Milliman’s investment adviser affiliate, Milliman Financial Risk Management LLC. Plaintiff Joanna Mattson says the funds—which are tailored to investors with conservative, moderate, and aggressive risk preferences—had no track records when they were added to the plan in 2013, and they went on to perform worse than 70% to 90% of similar funds in the marketplace.

Zilly on Feb. 8 denied Milliman’s motion for summary judgment, which said the challenged funds were appropriately monitored and added to the plan at the request of workers concerned about market volatility and preserving capital. Zilly announced his decision in a docket entry after hearing arguments from the parties; his ruling wasn’t accompanied by a written explanation for the decision.

A week later, Goldman defeated an appeal over the proprietary investments in its employees’ 401(k) plan under a decision by the Second Circuit, which has authority over federal courts in Connecticut, New York, and Vermont but no direct authority over courts in Washington. The Second Circuit said Goldman appeared to have monitored its plan using a robust process that included fiduciary training sessions and reliance on an unbiased, outside investment adviser.

Milliman, a risk management and consulting firm, asked Zilly to look at the case again, saying it “went further” than Goldman and took additional steps to protect the plan from any potential conflict of interest.

The trial is scheduled for April.

Sanford Heisler Sharp LLP and Byrnes Keller Cromwell LLP represent Mattson. Groom Law Group and Gordon Rees Scully Mansukhani LLP represent Milliman.

The case is Mattson v. Milliman, Inc. , W.D. Wash., No. 2:22-cv-00037, 3/6/24 .

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New York Life's \$19 Million In-House 401(k) Fee Deal Gets Nod

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Benefits & Executive Compensation News

The New York Life parade float is being prepared during the 96th Macy's Thanksgiving Day Parade balloon inflation at Central Park on November 23, 2022 in New York City.

(Photo by Roy Rochlin/Getty Images)

- Company's mutual funds, stable value fund in 401(k) at issue
- Class settlement expected to cover more than 40,000 people

New York Life Insurance Co. and a class of employees challenging the in-house investment funds in their 401(k) plan received initial court approval for a \$19 million settlement.

The agreement is expected to cover more than 40,000 people who invested in any of five challenged funds through a pair of New York Life retirement plans since March 2015. It provides them with a "robust monetary recovery" that represents between 20% and 25% of their total estimated losses, according to the settlement motion.

Judge Jesse M. Furman of the US District Court for the Southern District of New York signed the preliminary approval order March 5; he also scheduled a July 18 fairness hearing in the case.

The lawsuit says New York defaulted certain retirement plan participants into an undiversified general account insurance fund that provided them with a guaranteed rate of return. This fund allowed the company to earn enormous profits while exposing workers' retirement savings to its credit risk, according to the lawsuit.

New York Life is also said to have offered its own affiliated investment products—the MainStay funds—in the plans without properly considering cheaper and better performing alternatives from competitors.

Furman allowed the lawsuit to advance in both 2022 and 2023.

Dozens of recent cases have targeted financial companies that put their own funds in their workers' 401(k) plans. These cases have garnered hundreds of millions of dollars in settlements, with settling employers including Reliance Trust Co. (\$39.8 million), McKinsey & Co. (\$39.5 million), Wells Fargo & Co. (\$32.5 million), and Deutsche Bank (\$21.9 million).

Goodwin Procter LLP represents New York Life. Cohen Milstein Sellers & Toll PLLC represents the employees.

The case is . Krohnengold v. N.Y. Life Ins. Co. , S.D.N.Y., No. 1:21-cv-01778, 3/5/24

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O-I Glass Workers' \$5 Million 401(k) Settlement Clears Hurdle

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Benefits & Executive Compensation News

Empty bottles sit in packing.

Photographer: Carla Gottgens/Bloomberg

O-I Glass Inc. received initial court approval for a \$5 million settlement with workers who said the glass bottle maker's retirement plans were filled with pricey and underperforming funds managed by a company it previously owned.

Judge Jack Zouhary of the US District Court for the Northern District of Ohio on Tuesday granted preliminary approval to the deal, which is slated to benefit about 10,300 people covered by O-I's plans since July 2016. He also scheduled an Aug. 15 fairness hearing.

- The lawsuit says O-I allowed nearly 80% of its retirement assets to be invested in funds from Harbor Capital Advisors, a company O-I sold to a third party in 2001.
- O-I allegedly continued offering these funds despite their high fees and poor performance because it allowed the company to receive more money in the 2001 transaction.
- Zouhary allowed the case to advance last year, saying allegations of "direct cash incentives" are sufficient to state a fiduciary disloyalty claim under the Employee Retirement Income Security Act.

Nichols Kaster PLLP and Barkan Meizlish DeRose Cox LLP represent the plan participants. Morgan, Lewis & Bockius LLP and Shumaker, Loop & Kendrick LLP represent the company. The case is *Schaf v. O-I Glass, Inc.*, N.D. Ohio, No. 3:22-cv-01240, 3/5/24.

To contact the reporter on this story: Jacklyn Wille in Washington at jwille@bloomberglaw.com

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March 7, 2024, 1:30 AM PST

Multidistrict Litigation Rule Should Drive Merits-Based Results

Hollingsworth's Robert Johnston and Gary Feldon say the proposed Federal Rule of Civil Procedure 16.1 for managing multidistrict litigation could go further to push courts toward a merits-driven approach.

Bloomberg Law News 2024-03-07T10:03:55711697539-05:00

Multidistrict Litigation Rule Should Drive Merits-Based Results

By Robert Johnston and Gary Feldon2024-03-07T04:30:34000-05:00

More than 70% of federal civil cases are part of a multidistrict litigation, according to 2023 US Courts data. Despite their crucial role in the US judicial system, there is presently no formal guidance to MDL courts on how to promote an outcome reflective of the cases' merits despite the unique challenges posed by this type of mass litigation. That may be about to change.

Anticipated to go into effect on Dec. 1, 2025, the proposed Federal Rule of Civil Procedure 16.1 would be the first rule to address MDLs specifically and would govern MDLs' critical initial case management phase.

As we expressed to the Advisory Committee on Civil Rules in our written comment, the draft Rule 16.1's endorsement of effective merits-driven case management principles is a major step forward, but the rule also needs to offer concrete guidance to MDL courts on implementing those principles.

MDLs centralize individual cases "involving one or more common questions of fact" in a single court that addresses common issues before remanding any remaining cases to their home courts for individual trials. The parties can't rely on the ordinary tools of civil litigation—full discovery, case-specific motions practice, and trial—to determine the value (if any) of each plaintiff's claims.

Instead, they rely on the MDL court to efficiently address the common issues and keep doing so until the cases are resolved on their merits (whether by dismissal or on remand) or the parties' valuations are close enough that a party-led settlement is possible. This is what we call the merits-driven approach.

Although this commonsense approach may seem obvious from the nature of MDLs, it has only recently gained ascendancy. One federal judge said it was once "almost a point of honor" among MDL judges to settle cases instead of remanding them for trial, leading judges to keep cases within the MDL to pressure settlements.

Even today, too many courts cling to the idea that the MDL court's role is to push global settlements instead of engaging with the merits from the outset. One study found that "nearly one-third of the MDL judges who presided over products-liability MDLs that ended in private settlement had not ruled on a single merit-related motion before the settlement occurred."

An early focus on global settlement becomes self-perpetuating because, without MDL courts affirmatively culling unsupportable claims and resolving dispositive issues to cleave off cases before remand, MDL dockets rapidly become unmanageable.

If Rule 16.1 takes effect without being stripped of its intended purpose, it will help cement a subtle revolution in how courts administer MDLs. Draft Rule 16.1 and its accompanying committee note encourage early engagement with the merits to promote efficient resolution of the cases within an MDL.

The draft committee note also specifically recognizes that "the question whether parties reach a settlement is just that—a decision to be made by the parties." Together, this may be enough to dissuade MDL courts from myopically pushing early settlement instead of engaging on the merits.

The draft rule endorses a merits-driven approach primarily through Rule 16.1(c)'s list of proposed topics for the parties' initial case management report and the topics' discussion in the draft committee note.

The topics include possible early discovery or motions practice to address the MDL's principal factual and legal issues (e.g., Lone Pine orders requiring prima facie evidence, targeted summary judgment rulings), planning parties' exchanges of information supporting their claims and defenses (e.g., plaintiff fact sheets), and efficiently addressing likely motions (e.g., motions for remand).

A comprehensive case management report addressing these topics will immediately focus the MDL court on planning to efficiently address the merits of plaintiffs' claims and how to bring the MDL to a conclusion, even if not all the cases are resolved at that time.

Despite its seminal endorsement of the merits-driven approach, draft Rule 16.1 doesn't provide enough direction to MDL courts in how to implement that approach. We therefore called on the committee to amend the draft rule to make it more prescriptive and to provide more concrete guidance within the rule itself.

A better final rule would require MDL courts to enter case management orders that:

- Create affirmative obligations that all plaintiffs provide evidence of a prima facie claim so that MDL courts can identify non-meritorious cases to be cleaved off through merits decisions and Lone Pine orders
- Establish procedures for enforcing plaintiffs' obligations to provide accurate, substantially complete plaintiff fact sheets and other "census" discovery
- Set a schedule for the full lifecycle of the MDL, including remand of any unresolved cases, to ensure the litigation moves toward a conclusion

MDL courts should also be encouraged to revisit the Rule 16.1(c) topics throughout the litigation, and discouraged from attempting to facilitate settlement before the litigation

has generated sufficient information for the parties to reasonably assess the value of plaintiffs' claims.

Rule 16.1 would be far more effective if the final rule and its committee note reflected the types of changes we propose. Regardless of the precise language ultimately adopted, however, a new Rule 16.1 will represent an invitation to litigants to push for efficient and fair MDL case management. Smart MDL practitioners will pay close attention to this rule and be prepared to wield it effectively when it comes into effect.

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

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Write for Us: Author Guidelines

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California Roundup Case Dismissed Midtrial, Monsanto Declares Victory

 [law.com/therecorder/2024/03/06/california-roundup-case-dismissed-midtrial-monsanto-declares-victory](https://www.law.com/therecorder/2024/03/06/california-roundup-case-dismissed-midtrial-monsanto-declares-victory)

By Riley Brennan

What You Need to Know

- Bayer, which owns Monsanto, praised the dismissal as one of 'three consecutive victories at trial.'
- Juries in Arkansas and Pennsylvania handed Monsanto defense verdicts on March 1 and March 5.
- A Delaware judge declared a mistrial after jurors in a Roundup trial were deadlocked.

Plaintiffs lawyers voluntarily dismissed a Roundup case in California on the third day of trial.

Tuesday's dismissal came on the same day that a jury handed Monsanto a defense verdict in the fourth Roundup trial in the Philadelphia Court of Common Pleas. The California trial, in Sonoma County Superior Court, was brought by Bobbie and Michael Meyer.

"Bayer has now won three consecutive victories at trial, validating the company's strategy of taking cases to trial based on strong scientific and regulatory evidence," Bayer, which owns Roundup pesticide manufacturer Monsanto, said in a statement. "The plaintiffs could not prove that Roundup was the cause of the injuries alleged in these cases, consistent with this science."

Lawyers for the Meyers—Behram Parekh of Rueb Stoller Daniel in Los Angeles; Brian Glasser of Bailey & Glasser in Charleston, West Virginia; and David Wool, of Denver's Wool Trial Law—did not respond to a request for comment.

The dismissal comes after a Roundup jury in Arkansas returned a defense verdict on March 1. On the same day, in a separate Roundup trial, a Delaware judge declared a mistrial after jurors were deadlocked.

In the California trial, Monsanto was represented by Manuel Cachán, a Los Angeles partner at Skadden, Arps, Slate, Meagher & Flom, and Sidley Austin's Jennifer Saulino in Washington, D.C.

NOT FOR REPRINT

Wisconsin appeals court upholds restrictions on regulating 'forever chemicals'

 [courthousenews.com/wisconsin-appeals-court-upholds-restrictions-on-regulating-forever-chemicals](https://www.courthousenews.com/wisconsin-appeals-court-upholds-restrictions-on-regulating-forever-chemicals)

Joe Kelly

Regulators, environmentalists, businesses and lawmakers continue to fight over what to do about the hazardous chemicals in Wisconsin, where multiple regions have dealt with pollution for years.

Foam from PFAS, or perfluoroalkyl and polyfluoroalkyl substances, gathers at the Van Etten Creek dam in Oscoda Township, Mich., in 2018. (Jake May/The Flint Journal via AP)

WAUKESHA, Wis. (CN) — A Wisconsin appeals court on Wednesday upheld a circuit court decision barring regulations for PFAS and other contaminants implemented by the state natural resources agency, including those requiring businesses to test for and clean up contamination.

The underlying lawsuit was filed in Waukesha County Circuit Court in 2021 by Wisconsin Manufacturers and Commerce, the state's largest business lobby, and Leather Rich Inc., a dry-cleaning business based in Oconomowoc. They claimed that, shortly after Leather Rich volunteered in 2019 for a program to help businesses remediate pollution on their property, the Department of Natural Resources moved the goalposts and tried to make businesses in the program start testing for "emerging contaminants" like PFAS or risk losing liability protections the program offers.

The department did so, the plaintiffs said, without giving affected parties proper notice; adequately defining emerging contaminants or hazardous substances and for what concentrations they should be tested; or going through legislative oversight in the form of statutory rulemaking procedures. Until the department goes through those procedures, PFAS and other emerging contaminants cannot be covered by state spills laws, the plaintiffs argued.

Waukesha County Circuit Court Judge Michael Bohren agreed that the department lacked the authority to regulate the pollutants and blocked its policies, though he ultimately stayed his ruling pending the agency's appeal.

On Wednesday, the Wisconsin Court of Appeals' Second District, also based in Waukesha, affirmed Bohren's decision against the department in a ruling penned by Judge Shelly Grogan.

In her decision, Grogan, a former law clerk of conservative Wisconsin Supreme Court Justice Rebecca Bradley who was elected to the appeals court in 2021 with the backing of prominent Republicans, cited state law related to challenging the validity of rules and a 1979 state supreme court decision outlining a five-factor test to determine if an agency action is a “rule” under the law.

Because the Wisconsin Legislature did not sign off on them, Grogan said, the three specific policies the lobby and Leather Rich challenged — including those allowing the department to regulate thousands of PFAS compounds as hazardous substances — all satisfied each of the five factors, and therefore are invalid and unenforceable rules.

The same statutory scheme and case law have been used to strike down Wisconsin government agencies' regulations before, including in a 2020 decision tossing an early Covid-19 lockdown order, in an order that was also written and championed by conservative-leaning jurists.

Also on the three-judge panel that heard the department's appeal was Judge Maria Lazar, who was elected to the appeals court in 2022 and, like Grogan, received support and endorsements from Republicans.

Liberal Judge Lisa Neubauer, who in 2019 lost a race for a vacant Wisconsin Supreme Court seat to conservative Justice Brian Hagedorn, rounded out the panel. In a dissenting opinion, Neubauer noted that, for the first time since the state spills law was enacted in 1978, “the court holds that the DNR must promulgate rules identifying certain substances as hazardous before the spills law applies to discharges of those substances,” disagreeing that the department was required to do so.

Neubauer was appointed to the appeals court in 2007 by former Democratic Governor Jim Doyle and was most recently reelected to a six-year term in 2020.

Asked for a reaction to Grogan's decision, how it might affect PFAS regulations and whether the Department of Natural Resources plans to appeal, a department representative said on Wednesday that the agency was reviewing the decision and could not comment at this time.

In a press statement applauding the appeals court's ruling, Scott Rosenow, an attorney with Wisconsin Manufacturers and Commerce, said the decision “protects the public's right to know what the law requires” and that the lobby “will continue our fight to protect the public from government overreach.”

PFAS — short for per- and polyfluoroalkyl substances, and also known as “forever chemicals” due to their resistance to dissolution — are a broad category of human-made chemical compounds that can come from a variety of commonplace sources, including non-

stick cookware, fast food wrappers, household cleaners, firefighting foams and, according to a Waukesha-based environmental engineering consultant, dry-cleaning products and wastes.

Regulating the chemicals, cleaning them up and holding polluters responsible has become the subject of political wrangling and litigation in Wisconsin and nationwide. In the Badger State, Democratic Governor Tony Evers has made addressing PFAS contamination a priority since the earliest days of his tenure, but he and the GOP-controlled Legislature have been consistently at loggerheads over the issue.

Last month Evers rejected legislation over PFAS because it put too many restrictions on regulators and provided too many benefits for polluters. He also urged Republican lawmakers to release \$125 million for fighting PFAS earmarked in the biennial budget last July — but that call met resistance from Republicans like Senator Eric Wimberger of Green Bay, who co-sponsored the rejected bill and said in a post on X that Evers' plan for the money would turn it into a "slush fund for bureaucrats."

Multiple municipalities in Wisconsin are struggling with PFAS contamination in their water tables, including the town of Campbell on French Island, where residents say they've been using bottled water for years since PFAS were detected in municipal wells.

Regions such as La Crosse, Green Bay, French Island and their residents have sued PFAS manufacturers like Minnesota-based 3M in recent years for damages, as has the Wisconsin Department of Justice.

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Cancer-causing chemical found in Proactiv, PanOxyl, Target acne creams

 [10news.com/cancer-causing-chemical-found-in-proactiv-panoxyl-target-acne-creams](https://www.10news.com/cancer-causing-chemical-found-in-proactiv-panoxyl-target-acne-creams)

Alex Arger

March 7, 2024

Acne products from brands like Proactiv, Clinique, Clearasil and Target's Up & Up contain high levels of a chemical that's been linked to cancer, according to a Connecticut laboratory's testing.

In a petition to the U.S. Food and Drug Administration Tuesday, the New Haven-based lab, Valisure, said its testing of dozens of benzoyl peroxide acne products uncovered many had high levels of the known human carcinogen, benzene. It's calling on the federal agency to recall any benzoyl peroxide products while regulators investigate.

Benzene is a colorless chemical that is a natural component of gasoline and cigarette smoke. Once a person is exposed to high or extended amounts of it, the chemical can cause their blood cells to not work properly, potentially leading to anemia, tissue damage, leukemia and other serious health issues.

Though the major sources of the chemical include second-hand smoke and industrial fume inhalation, Valisure researchers said their testing of 66 different benzoyl peroxide products — including over-the-counter and prescription-type washes, gels, creams and lotions — found high levels of benzene in decomposing benzoyl peroxide products, too.

They note this decomposition stems from the "inherent instability" of the acne product's molecule that breaks down into benzene, not from a specific ingredient contamination. This particularly occurs when the benzoyl peroxide products kept in higher temperatures, like a hot car or steamy bathroom.

SEE MORE: The risks of benzene in personal care products

In some products, this temperature instability led to a more than 800 times the federal regulatory limit for benzene — 2 parts per million — in under three weeks. Proactiv's 2.5% benzoyl peroxide cream, for example, contained as much as 1,761 parts per million of benzene, while another from Target showed 1,598 parts per million. Other products the lab identified as containing high levels of benzene included benzoyl peroxide creams from PanOxyl, Walgreens, La Roche-Posay, Equate and Differin.

The lab also believes product packaging could allow the benzene to leak into the air surrounding unopened benzoyl peroxide products, adding to concern over inhalation exposure.

In a statement to CBS News, an FDA spokesperson said Valisure's data must be verified as "accurate and reproducible before it can be utilized to make regulatory decisions such as recommending product sale suspensions and recalls."

Meanwhile, Clearasil manufacturer Reckitt told the publication it was "confident that all Clearasil products, when used and stored as directed on their labels, are safe." Other companies involved in the petition did not respond for comment.

This is the latest report to potentially show unhealthy levels of benzene in many Americans' everyday products. As of late, its presence in sunscreens, hand sanitizers, antiperspirants and dry shampoos have led to product recalls from major companies, including Johnson & Johnson and Procter & Gamble.

FloSports' \$2.6 Million Pixel Video-Data Settlement Approved

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X5TGK8L8000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X5TGK8L8000000)

March 6, 2024, 9:25 AM PST

Tonya Riley

FloSports Inc. will pay \$2.6 million to settle class action claims that the sports video streaming service shared subscribers' personal viewing information with Facebook without their consent, following a federal judge's approval of the agreement.

- Judge Angel Kelley approved the settlement in an order filed Tuesday in the US District Court for the District of Massachusetts.
- FloSports transmitted information about videos viewers obtained to Met Platforms Inc.'s Facebook via Meta Pixel tracking code installed on its website, according to the complaint lead plaintiff Christopher Fiorentino filed in September 2022.
- The complaint alleged that FloSports violated the Video Privacy Protection Act, a federal law that protects privacy related to the viewing and delivery of recorded materials.
- Initial data indicated that approximately 639,000 users accessed prerecorded videos on FloSports' website during the two-year period covered by the complaint.
- In addition to monetary relief, FloSports must cease use of Meta's Pixel tracking software or obtain user consent to share their information.

Cera LLP, Burns Charest LLP, Carney Bates & Pulliam , PLLC, and Lieff Cabraser Heimann & Bernstein LLP. represent Fiorentino and the proposed class. FloSports is represented by Holland & Knight LLP and Blank Rome LLP.

The case is Fiorentino v. FloSports Inc. , D. Mass., No. 1:22-cv-11502, order filed 3/5/24 .

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March 7, 2024, 2:30 AM PST

Law Firms Aren't Behind the Generative AI Adoption Curve—Yet

By Roy Strom

Column

Bloomberg Law News 2024-03-07T09:59:35278845061-05:00

Law Firms Aren't Behind the Generative AI Adoption Curve—Yet

By Roy Strom 2024-03-07T05:30:56000-05:00

Welcome back to the Big Law Business column . I'm Roy Strom, and today we look at how law firms stack up to other companies deploying generative AI tools. Sign up to receive this column in your Inbox on Thursday mornings.

A lot has happened since the world met ChatGPT in late 2022. It's dominated headlines, minted billions (or trillions) in the stock market, and, in the surest sign yet that it's captured the zeitgeist, even generated more work for Elon Musk's lawyers.

It might feel like the AI revolution is well underway. But for all the excitement, generative AI has not yet transformed many businesses. In fact, very few companies use it to make products or sell services and only a relative handful of companies expect they will do so in the near future.

This puts lawyers—notoriously maligned as something near Luddites—in a rare spot: They might be ahead of the curve on adopting a new technology. At the very least, it's hard to argue law firms are lagging the broader economy when it comes to putting AI tools to good use.

In February, a mere 5.4% of American companies said that within the past two weeks they had used AI to produce goods or services, according to data from the US Census Bureau, which began asking about companies' AI-fueled products in September. (Some 28,000 companies responded to the Census questionnaire in February.)

Professional services companies, which includes law firms, were more likely to have put AI to good use: 13.1% of such businesses told the Census Bureau they'd used AI to produce goods or services in February.

While those numbers are not lawyer-specific, they are roughly in-line with a Bloomberg Law survey last year that found 7% of lawyers had used AI to perform a work task.

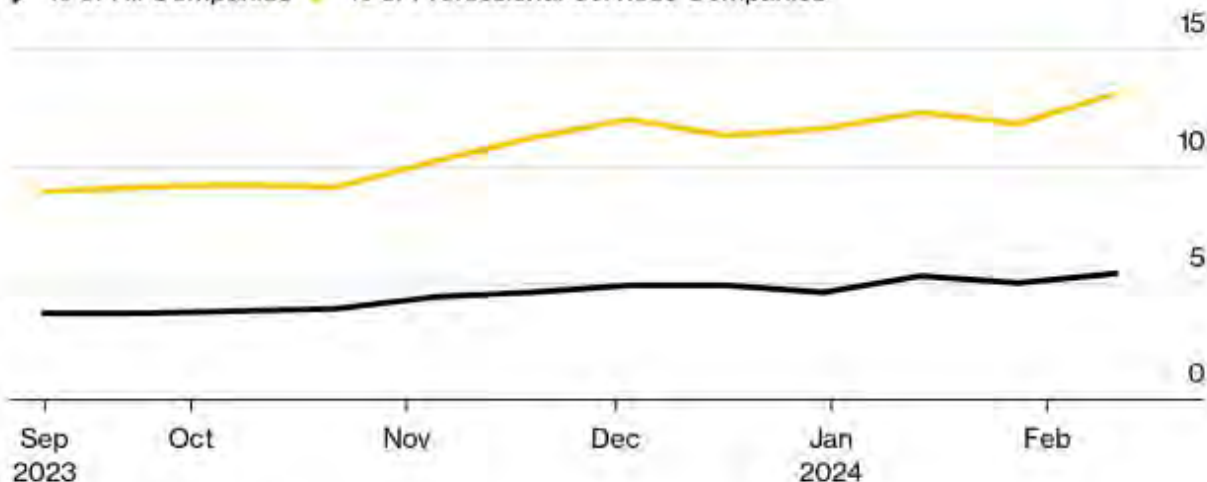
The Census Bureau also asks companies whether they will be using AI to produce products in the next six months. Only slightly more companies answered affirmatively: 6.6% of all companies and 16.1% of professional services firms.

But across the economy, fewer companies are answering “no,” suggesting they’re at least tinkering with AI.

Does Your Company Use AI to Produce Goods or Services?

Professional services firms are more likely to report having used AI in the past two weeks to produce goods or services.

✎ % of All Companies ✎ % of Professional Services Companies



Source: US Census Bureau

Bloomberg Law

Law firms are still finding their footing. But examples abound of firms who say they are using AI to help clients.

Allen & Overy said around 3,500 of its lawyers had asked an AI program around 40,000 queries for their day-to-day client work—and that was over a year ago. DLA Piper has paired data scientists with lawyers to use AI to test large language models for bias or legal problems. Dechert has rolled out a suite of internally built generative AI offerings branded DechertMind.

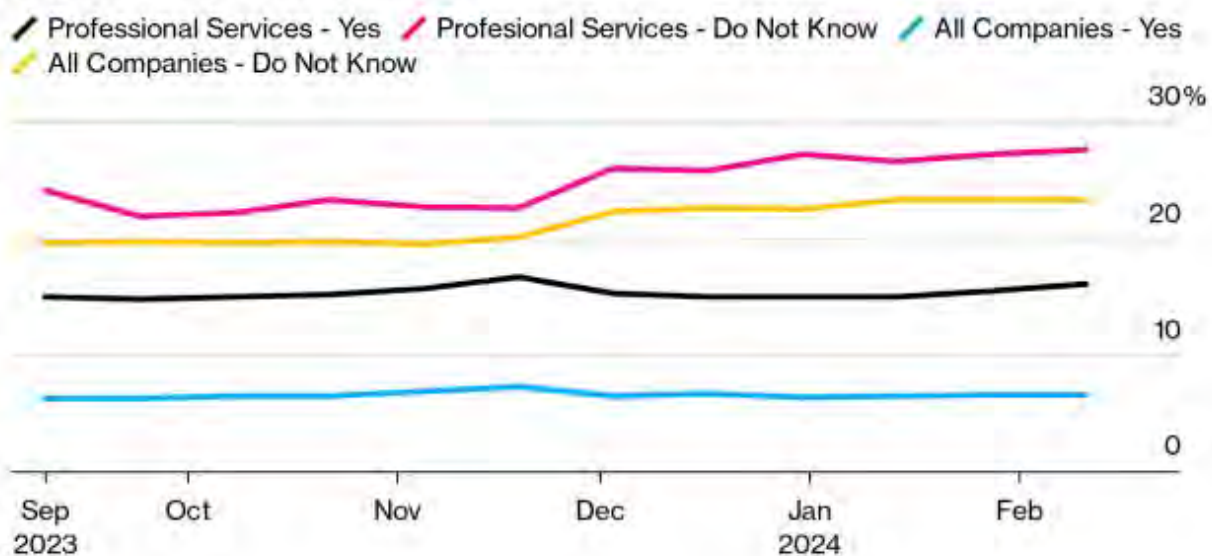
Blake Rooney, chief information officer at Husch Blackwell, said his job has changed significantly in the past 18 months. Used to an internal role, he’s now getting face time with clients to talk about how his law firm and its data science team can use AI to provide better services. He was in client meetings in Minneapolis last week and in Nashville the week prior.

Rooney's firm has had plenty of projects for AI pop up in recent months. In one example, a client facing a deadline to file a temporary restraining order asked the firm to pore over hundreds of voicemails. The firm used an AI program to transcribe and index the messages, turning the project around the same day, Rooney said.

"We're starting to see a good number of projects like that where if it was a human effort it would be enormous, but using technology we can get good answers in good short order," Rooney said.

Will Your Company Use AI In the Next Six Months?

Many companies still don't know whether they will use AI to produce goods or services in the next six months.



Source: US Census Bureau

Bloomberg Law

Companies that are curious about AI tools are often turning to their legal departments as a place to try new products, said Richard Punt, global leader of Deloitte Legal.

"There's quite an interesting subset of companies who are saying, 'Can we find something that's more back-office we can practice on?'" Punt said. "And it's surprising how often legal is the area that they want to practice. You're seeing legal [departments] come to the front of the queue inside companies."

Lawyers are constrained in their use of AI by ethics rules and privacy concerns. Buying AI tools can also be expensive, which could prevent smaller firms from making early investments.

That would also be like the broader economy. Companies with 250 or more employees are more likely than smaller businesses to have used AI to sell products or services, the Census data show.

Warren Hodges, who leads an AI task force at 200-lawyer Hanson Bridgett, said his firm has stayed up-to-date on generative AI tools. It's studied the ethics of using AI for client work, and Hodges said the firm's lawyers are convinced it can provide "incredibly powerful" solutions.

The firm is "not under the illusion" that it won't eventually invest in something, Hodges said, but for now it's taken a wait-and-see approach.

"The products will get better and cheaper over time, and it's not easy to roll out anything new companywide," Hodges said. "Every company faces that and law firms are no different."

Staying Ahead

There's no guarantee law firms will succeed in adopting AI tools. And it will no doubt present challenges to law firms' hourly billing model. But they're at least off to a decent start relative to the rest of the business world.

One way to ensure they stay ahead of the curve is to educate more employees on generative AI tools.

Law firms would be wise to invest more in training programs like those offered through Coursera, an online education platform, said Tracey George, a Vanderbilt Law School professor who oversees an interdisciplinary generative AI team for the university.

She said many of the most sophisticated technology companies provide Coursera classes for employees, many of which are free. She has particular insight into popular GenAI classes offered by Vanderbilt, and she said few if any law firms have used them.

Using a similar model for pro bono work, George suggests law firms provide a billable hour credit for lawyers spending time learning about AI. Law firms that pledge their lawyers would spend 40 or 50 hours learning about the technology would send a strong signal to clients that they're serious about performing work more efficiently, she said.

"The equivalent of one work week would make a difference," she said.

Worth Your Time

On Legal Fees: Objectors to a \$185 million fee won by Quinn Emanuel are seeking to drastically slash the award to roughly \$12 million to \$23 million. The most recent court filing in the long-running dispute also shed light on a judgment preservation insurance policy Quinn Emanuel purchased to protect the award.

On SPACs: Nicola White details the travails of Lottery.com Inc., which she reports came to represent "all the hubris and excesses of the special purpose acquisition company era." The company had phantom revenues, multiple CEOs hired and fired, accusations of forged documents, an alleged check-kiting scheme, and more.

On DEI: Business is booming for DEI lawyers as companies try to figure out what's legal in wake of the Supreme Court's ruling, Bloomberg's Simone Foxman reports.

That's it for this week! Thanks for reading and please send me your thoughts, critiques, and tips.

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<https://www.wsj.com/finance/banking/nycb-slashes-quarterly-dividend-to-1c-amid-broader-overhaul-16a3c45b>

FINANCE | BANKING

NYCB Slashes Dividend Amid Broader Overhaul

Troubled regional lender is taking steps to steady itself

By [Denny Jacob](#) [Follow](#)

March 7, 2024 9:38 am ET



NYCB has raised \$1 billion from a group of investors. PHOTO: BING GUAN/BLOOMBERG NEWS

New York Community Bancorp **NYCB 6.04%** ▲ slashed its quarterly dividend to 1 cent a share, part of an overhaul aimed at shoring up confidence in the troubled regional lender.

NYCB 6.04% ▲ disclosed the reduced dividend in an investor presentation on Thursday. The prior dividend was 5 cents a share.

Other changes included in the presentation were the \$1 billion raised from a group of investors and an overhaul of its management announced Wednesday. Details of the fundraising efforts were first reported by The Wall Street Journal.

The infusion is meant to steady the bank as it has been buffeted over the past several weeks by fears over potential real-estate loan losses, weaknesses in internal controls and a sharp drop in its stock price.

Banks Stuck With X Debt Held Refinancing Talks With Elon Musk

 finance.yahoo.com/news/banks-stuck-x-debt-held-194538099.html

Mon, March 4, 2024 at 11:45 AM PST · 2 min read

(Bloomberg) -- A bank group spearheaded by Morgan Stanley held discussions with Elon Musk and his team about refinancing a roughly \$12.5 billion debt package that supported the tech billionaire's take-private of the social media platform X, according to people with knowledge of the matter.

In talks that faltered earlier this year, certain banks and Musk's team explored options to strengthen the debt package, said the people, who asked not to be identified discussing confidential talks. The parties discussed options that could reduce the cost of the debt and make it less risky for banks to hold, one of the people said.

A group of seven banks, led by the New York-based lender, has been stuck holding the debt since 2022. They've repeatedly renewed an agreement not to individually offload their holdings, with the goal of coordinating a sale when X — formerly known as Twitter — is on firmer financial footing with stable advertising revenues, subscription growth and further traction from a planned peer-to-peer payments platform, one of the people said.

Representatives for X and Morgan Stanley declined to comment.

Morgan Stanley was the largest lender on the deal, providing just over a quarter of the debt package. That contributed to \$876 million of mark-to-market losses the bank took in 2022 on corporate loans it was looking to sell. The firm said in its annual regulatory filing last month that such losses were smaller in 2023, without providing a figure.

Fidelity, which received a stake in X after helping Musk complete his \$44 billion purchase, has marked down the value of its position by 72% since the takeover.

Musk, who counts X as one of several business ventures, has recently been focusing on reincorporating companies including SpaceX and Neuralink Corp. to Texas and Nevada, respectively, after a Delaware judge in January voided his almost \$56 billion pay package at Tesla Inc.

Steve Mnuchin, Trump's Treasury Secretary/Foreclosure Kingpin, Joins with Hedge Fund Guys to Grab a Teetering, Federally-Insured Bank for \$2 a Share

 wallstreetonparade.com/2024/03/steve-mnuchin-trumps-treasury-secretary-foreclosure-kingpin-joins-with-hedge-fund-guys-to-grab-a-teetering-federally-insured-bank-for-2-a-share

By Pam Martens and Russ Martens: March 7, 2024 ~

Former Trump Treasury Secretary, Steve Mnuchin, has teamed up with his pals from his days as a foreclosure kingpin at OneWest and assorted hedge funds/private equity guys, to pull a coup d'état at the teetering New York Community Bancorp (NYCB), parent of Flagstar Bank.

A press release from NYCB yesterday confirmed that Mnuchin and his pals would be injecting \$1 billion in equity at a purchase price of \$2 a share for NYCB, massively diluting existing shareholders whose share price on the last trading day of last year was \$10.23. (For why shares of NYCB have been in free fall this year, see our report on Tuesday: New York Community Bancorp Was JPMorgan's Top Regional Bank Pick for 2024; It's Lost 73 Percent Y-T-D and Had Its Deposit Rating Downgraded to Junk.)

Buttressing Mnuchin's audacity, he will put himself and three of the other investing pals on the Board of NYCB, giving his team four votes on a Board he plans to shrink from 12 members to 9, according to the press release.

In addition, Mnuchin's foreclosure pal from his days at OneWest, Joseph Otting (whom Trump had made the head of the Office of the Comptroller of the Currency, the regulator of national banks) will become the CEO of NYCB, replacing the existing CEO who just took his seat at the helm of NYCB last Friday. (The bank is now changing its CEO as often as some people change their socks.) Otting is to also have a seat on the NYCB Board of Directors.

Trading in the shares of NYCB was so chaotic yesterday that the New York Stock Exchange halted trading 13 times for reasons of limit-up or limit-down, and once for news pending. The share price gyrated yesterday from an all-time low of \$1.70 to close at \$3.46.



Actress Louise Linton and Husband, Former U.S. Treasury Secretary Steve Mnuchin, Showing Off His Signature on U.S. Currency During Trump Administration

To grasp what is really going on here, we need to look back at what happened at Mnuchin's Senate confirmation hearing when President Donald Trump picked him to become U.S. Treasury Secretary – a post which would simultaneously make Mnuchin the head of the Financial Stability Oversight Council (F-SOC), allowing him to approve or disapprove vast Wall Street bailouts by the Federal Reserve. (See our previous report: The Language Toomey Inserted into the Stimulus Bill Enshrines a \$681 Billion Trading Slush Fund for Mnuchin with the NY Fed.)

At Mnuchin's confirmation hearing, Senator Ron Wyden of Oregon had this to say about the practices of OneWest under Mnuchin:

"In early 2009, Mr. Mnuchin led a group of investors that purchased a bank called IndyMac [which had also collapsed in share price], renaming it OneWest. OneWest was truly unique. While Mr. Mnuchin was CEO, the bank proved it could put more vulnerable people on the street faster than just about anybody else around.

"While he was CEO, a OneWest vice president admitted in a court proceeding to 'robo-signing' upward of 750 foreclosure documents a week. She spent less than 30 seconds on each, and in fact, she had shortened her signature to speed the process along. Investigations found that the bank frequently mishandled documents and skipped over reviewing them. All it took to plunge families into the nightmare of potentially losing their homes was 30 seconds of sloppy paperwork and a few haphazard signatures.

"These kinds of tactics were in use between 2009 and 2014, a period during which the bank foreclosed on more than 35,000 homes. 'Widow foreclosures' on reverse mortgages – OneWest did more of those than anybody else. The bank defends its record on loan modifications, but it was found guilty of an illegal practice known as 'dual tracking.' One bank department tells homeowners to stop making payments so they can pursue modification, while another department presses on and hurtles them into foreclosure anyway."

At the close of the confirmation hearing, Senator Wyden strongly suggested that Mnuchin had lied on his personal financial disclosure form, stating the following:

"Mr. Mnuchin, a month ago you signed documents and an affidavit that omitted the Cayman Island fund, almost \$100 million of real estate, six shell companies and a hedge fund in Anguilla. This was not self-corrected. The only reason it came to light was my staff found it and told you it had to be corrected."

The man the Mnuchin team has named as the new CEO at NYCB, Joseph Otting, set hair on fire in banking circles while serving as the head of the Office of the Comptroller of the Currency (OCC) in the Trump administration.

In July of 2018, the OCC announced that financial technology companies, known as fintech, which provide various types of banking activities *other than* accepting insured deposits, will now be allowed to apply for a special purpose national bank charter and operate across state lines. The OCC announcement promptly followed a report from the U.S. Treasury which recommended that the OCC make the charter available.

The immediate impact of gaining such a charter was that online lenders, who then had to abide by state-by-state limits on the amount of interest they could charge on a loan to consumers, would be unleashed to fully channel their predatory lending instincts.

The Superintendent of the New York State Department of Financial Services (DFS), Maria Vullo, issued a statement that was highly critical of both the OCC and Treasury actions. Vullo stated:

“The New York State Department of Financial Services fiercely opposes the Department of Treasury’s endorsement of regulatory ‘sandboxes’ for financial technology companies. The idea that innovation will flourish only by allowing companies to evade laws that protect consumers, and which also safeguard markets and mitigate risk for the financial services industry, is preposterous. Toddlers play in sandboxes. Adults play by the rules...

“DFS also strongly opposes today’s decision by the Office of the Comptroller of the Currency to begin accepting applications for national bank charters from nondepository financial technology (fintech) companies. DFS believes that this endeavor, which is also wrongly supported by the Treasury Department, is clearly not authorized under the National Bank Act.”

Laws and rules were just pesky details during the Trump administration – with the evidentiary support of the 91 felony counts the former President is facing today.

Another OneWest Mnuchin pal moving to the Board of NYCB is Allen Puwalski, the Chief Investment Officer and Managing Partner at Cybiont Capital. Puwalski served as a Director on the Board of OneWest from 2009 to 2015. Puwalski was also a former partner at John Paulson’s hedge fund, Paulson & Company, from 2007 to 2018. It was during that period that the notorious Goldman Sachs’ Abacus deal went down, where the hedge fund hand-selected subprime mortgage debt it thought would fail for the Abacus offering, then shorted it, making \$1 billion for itself while costing unknowing Abacus investors \$1 billion. (See our report: Putting John Paulson on AIG’s Board Is an Insult to Every Law-Abiding Citizen.)

Another Mnuchin investment team member who will join the NYCB Board is slated to be Milton Berlinski, co-founder of Reverence Capital, which is chipping in \$200 million of the \$1 billion equity infusion. Mnuchin’s private equity firm, Liberty Strategic Capital, is providing \$450 million to the deal. Like Mnuchin, Berlinski was a long-tenured veteran of Goldman Sachs, working there for 26 years. Mnuchin’s tenure at Goldman Sachs was 17 years.

In addition to buying up common stock in NYCB at close to a record low share price, Mnuchin's team is getting lots of other goodies. Yesterday's press release includes the following terms:

"In connection with the equity capital raise transactions, NYCB will sell and issue, in the aggregate, to the Investors approximately (i) 59,750,000 shares of common stock, par value \$0.01 per share, of the Company at a price per share of \$2.00, (ii) 192,062 shares of a new series of preferred stock, par value \$0.01 per share, of the Company designated as Series B Noncumulative Convertible Preferred Stock at a price per share of \$2,000 and with a conversion price of \$2.00, and (iii) 273,188 shares of a new series of preferred stock, par value \$0.01 per share, of the Company designated as Series C Noncumulative Convertible Preferred Stock at a price per share of \$2,000 and with a conversion price of \$2.00, for an aggregate investment amount of \$1.05 billion. In addition, investors will receive 7-year warrants to purchase non-voting, common-equivalent stock of the Company representing \$315 million of underlying shares of common stock of the Company with an exercise price of \$2.50 per share, a 25% premium to the price paid on common stock. Upon completion of the transactions, the aggregate shares issued to the Investors are expected to represent approximately 41.4% of the outstanding shares of Company on an as converted fully diluted basis.

"Holders of the preferred stock will not have voting rights and will be entitled to quarterly non-cumulative cash dividends, as and if declared by the Board. Each share of preferred stock is convertible into common stock on a 1 preferred share – 1,000 common shares basis. Series B preferred stock will automatically convert upon certain transfers permitted by federal banking regulations, while Series C preferred stock will automatically convert upon the achievement of certain trigger events related to receipt of antitrust clearance under the Hart Scott Rodino Act and shareholder approval. The Company will provide customary shelf and piggyback registration rights to each of the Investors. Additionally, Liberty and Reverence will also have the ability to request an underwritten shelf take-down and block trade rights."

The key passage in the above verbiage is this: "Upon completion of the transactions, the aggregate shares issued to the Investors are expected to represent approximately 41.4% of the outstanding shares of Company on an as converted fully diluted basis." To put that another way, for \$1 billion, Mnuchin's team is getting 41 percent of a federally-insured, regional bank that had a market value of \$9.8 billion less than one year ago.

X Corp. 'Forum-Shopping' May Unleash Copycat Cases, Adeia Argues

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Adeia Inc. accused Elon Musk's X Corp. of trying to be "first in line for an event that may never occur" with its federal lawsuit seeking a declaration that the social media platform doesn't infringe four streaming-media patents Adeia hasn't charged it with violating.

X's 2023 declaratory judgment suit against a former technology partner is "gamesmanship" designed to "stake a claim on the Northern District of California as its preferred forum for hypothetical patent litigation that has never been threatened and may never be filed," Adeia said in a March 5 reply supporting its motion to dismiss filed in California federal court.

"If allowed, it would result in a swarm of copycat litigation that would impose enormous burdens on the judiciary," Adeia's filing said.

Adeia sued X for contract breach in California state court in November 2023, alleging the microblogging platform stopped paying royalties on a group of patents Twitter licensed from TiVo Inc. and Adeia's predecessor Rovi Corp., according to court records.

But that state court dispute doesn't involve any infringement claims, Adeia said in its filing in the US District Court for the District of Northern California. Any federal court determination of invalidity or non-infringement "would not resolve the parties' true dispute, which is whether X owes unpaid royalties" under the ruptured licensing deal, it said.

"X's numerous attempts to conflate the enforcement of a contract with the enforcement of a patent," Adeia said in the filing, "are misplaced."

X, however, claimed Adeia's state-court contract litigation is proof it intends to sue the platform for infringement in a different venue that will drive up the company's litigation costs, according to X's original complaint.

Adeia called X's contention "speculation," and said it typically achieves its goals without litigation.

"Our goal is always to find negotiated deals. We've been incredibly successful in doing so," an unnamed Adeia executive said during a recent earnings call cited in the filing. "In the last 3 years, we've signed 95-plus agreements, almost entirely without any litigation at all," according to the filing.

X shouldn't have to license any Adeia patents, it said last month, because the company's technologies "do not cover any of X's products and services." X also said Adeia broke their agreement by divulging confidential deal terms in its state-court filings.

At dispute in that state-court case is whether Adeia or X breached their licensing agreement first. Adeia claims the deal obligates X to pay the entire lump-sum royalty for the licensed technology, "regardless of whether the technology is commercially successful or even used," according to the March 5 filing.

X proved its declaratory judgment suit was a procedural gambit when the company offered to drop it if Adeia would agree to bring any future patent infringement litigation in San Francisco federal court, Adeia said in support of its request for Judge Trina L. Thompson to dismiss X's suit.

If X's "forum-shopping" move works, Adeia's reply said, "every company in Silicon Valley could proceed to haul any and every patent owner in the United States into court" to head off patent-infringement litigation the same way.

Infringers could then choose what patents they want to insulate themselves from, it added, "bogging down the already-overloaded federal judiciary and diverting limited resources away from actual, imminent, and legitimate disputes that patent owners actually intend to assert."

"This court should not countenance such gamesmanship," Adeia said.

Adeia is represented by Irell & Malella LLP. X is preresented by Keker Van Nest and Peters LLP, and lawyers with that firm didn't immediately respond to a request for comment.

The case is X Corp. v. Adeia Inc. , N.D. Cal., No. 3:23-cv-06151, reply filed 3/5/24 .

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SpaceX Faces New Sex Harassment Claim Amid Broader Investigation

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Litigation

SpaceX headquarters on Aug. 3, 2020 in Los Angeles, California.

Photographer: AaronP/Bauer-Griffin/GC Images

- SpaceX allegedly backed manager who forced sexual relationship
- California separately investigating company's culture of harassment

New allegations of sexual harassment at Elon Musk's SpaceX were filed in California state court Tuesday as the state's human rights agency continues to investigate separate allegations of widespread discrimination against women employees at the company.

According to the complaint filed in Los Angeles County Superior Court, the worker's manager allegedly forced her into a "quid pro quo" sexual relationship with the expectation that her career advancement was contingent upon her compliance. SpaceX leadership knew about the manager's behavior but sided with the manager even after he left the company, the worker's complaint said.

The worker's suit follows complaints to the California Civil Rights Department from seven former employees, alleging SpaceX executives joked about sexual harassment and fired workers who reported it.

SpaceX didn't immediately respond to request for comment on the new complaint Wednesday.

The worker alleged that the manager began sexually harassing her in 2019. As a result, she became pregnant about a year later. When she told SpaceX leadership, the manager wasn't disciplined, according to the complaint.

SpaceX leadership helped him fraudulently avoid paying child support and gave him confidential information about her after he left the company, the worker alleged.

The company is now trying to force her to quit, according to the complaint.

Prior to that pattern of sexual harassment, the worker said that her previous manager denied her promotions because she was a woman, and that he did nothing to stop rumors that she and other female employees were hired because of their looks.

She and her coworkers in 2018 reported the behavior to SpaceX executive Gwynne Shotwell, who allegedly didn't act on the complaints.

The seven workers who filed complaints with the state had been fired after distributing a letter critical of Musk. They also complained to the US National Labor Relations Board in 2022. NLRB accused SpaceX of illegal retaliation in January.

SpaceX responded by suing the federal agency, saying the allegations hurt the company's reputation.

Valles Law PC represents the worker.

The case is Dopak v. Space Expl. Tech. Corp. , Cal. Super. Ct., No. 24STCV05506, complaint 3/5/24 .

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Judge Tosses Suit Alleging IoT Co. Hid Issue Of Fake Reviews

By **Sydney Price**

Law360 (March 6, 2024, 7:39 PM EST) -- Chinese "Internet of Things" platform developer Tuya Inc. and one of its directors, former General Electric CEO Jeff Immelt, have — for now — beaten some claims in a suit from shareholders alleging Tuya hid that its merchant customers were facing scrutiny for using fake reviews to boost their own products.

In his order and opinion issued Tuesday, U.S. District Judge John P. Cronan said the plaintiffs were successful at pleading, among other things, a claim under the Securities Act that the registration statement Tuya filed in connection with its initial public offering failed to disclose the specific risks related to the scam. The judge also ruled that the plaintiffs do not need to plead that Tuya knew, or could have known, of the scam at the time of the IPO.

However, the shareholders failed to show that Immelt, who had little voting power over Tuya shares and did not oversee any specific business operations, had "control" over the company, Judge Cronan found.

In his order, Judge Cronan said the investors have 30 days to launch a second amended complaint.

The most recent version of the suit was filed in March 2023. According to the complaint, Tuya's products and services are deployed on a wide variety of smart products manufactured by other companies, including home appliances, security cameras and health products. Tuya's customers include equipment manufacturers and system integrators that sell their products on Amazon and other e-commerce sites.

The complaint alleges Tuya and several of its executives, directors and underwriters of its March 2021 IPO participated in a scheme to conceal that a large percentage of Tuya's e-commerce customers violated policies of e-commerce sites like Amazon by posting fake reviews of their products. The practice eventually slowed sales at Tuya as Amazon and others cracked down on the scheme's participants, plaintiffs said.

Tuya's stock price fell 18% following Tuya's announcement June 14, 2022, that it experienced "a slowdown in the U.S. and Europe" — which the plaintiffs say was connected to an emergence of news about a fake review scheme.

Judge Cronan said Tuesday that the existence of news articles and academic studies documenting the occurrence of a fake review scheme was not enough to allege the Tuya defendants should have known Amazon's decision to ban customers participating in fake review schemes would hurt Tuya's business.

"Public reports about broader trends in the e-commerce industry fail to raise the inference of actual knowledge of Tuya's 'customers' systematic violations of Amazon's policies' — a much more specific allegation — beyond a speculative level," the order states.

The suit accuses several of Tuya's directors, including Immelt, of having the "power, influence and knowledge" to allow Tuya to make the alleged misrepresentations. Immelt previously served as CEO of General Electric for 16 years. He became a director of Tuya when the registration statement the company filed in February 2021, which he did not sign, took effect.

The mere fact that Immelt was a director does not establish control, Judge Cronan said.

"By contrast, the other individual defendants are alleged to have controlled a substantial portion of 'total voting power of Tuya's voting shares,' or were 'responsible for Tuya's sales, business development and product operations' by virtue of their positions in the company," the judge wrote.

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

The plaintiffs are represented by Casey E. Sadler and Natalie S. Pang of Glancy Prongay & Murray LLP, and Samuel H. Rudman, Alan I. Ellman and Natalie C. Bono of Robbins Geller Rudman & Dowd LLP.

Tuya and the individual defendants are represented by Edmund Polubinski III, Mari Grace Byrne, Marie Killmond and Jonathan K. Chang of Davis Polk & Wardell LLP

The underwriter defendants are represented by Gregg L. Weiner and Andrew S. Todres of Ropes & Gray LLP.

The case is Lian v. Tuya Inc. et al., case number 1:22-cv-06792, in the U.S. District Court for the Southern District of New York.

--Editing by Amy French.

Update: This story has been updated with clarifying details from the order.

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Juul MDL Judge Asks Feds To Probe AI Fraud In \$45.5M Deal

By **Dorothy Atkins**

Law360 (March 6, 2024, 9:58 PM EST) -- A California federal judge Wednesday approved e-cigarette Juul investor Altria's \$45.5 million settlement and counsel's \$13.65 million fee request to resolve consumer claims in Altria's broader \$235 million multidistrict settlement agreement, but said fraudulent claims submitted by AI and "click farms" are a "real problem" prosecutors should investigate.

U.S. District Judge William H. Orrick's comments came during a hearing in San Francisco on class counsel's request to grant final approval to Altria Group Inc.'s **\$45.5 million deal** ending consumers' class claims they overpaid for unsafe e-cigarettes made by Juul Labs Inc., and class counsel's request for 30%, or \$13.65 million, in attorney fees plus \$1 million in expenses.

Judge Orrick approved the deal and overruled three written objections to it, concluding that the settlement — like the others he's previously signed off on in the MDL — is fair, reasonable and adequate and in the best interest of the class.

"The class was well served, and this was a good result," he said.

Before signing off on the deal, however, Judge Orrick asked class counsel, Dena C. Sharp of Girard Sharp LLP, to update him on the claims process. Sharp explained that to date, the claims administrator has received roughly 14 million claims, which is five times the amount of claims they had expected to receive.

Sharp said after deducting duplicates, the claims administrator expects there will be 11 million claims, but she added that there are still "many claims that are quite evidently fraudulent," and class counsel only expect roughly 2 million to be legitimate with valid documentation.

"But there's quite a bit of work that needs to be made to make those determinations," Sharp said.

Judge Orrick appeared surprised by the large number of purportedly fraudulent claims and asked for more specifics about them and how the administrator determines whether they're fraudulent.

Sharp explained that the claims administrator knows some claims are clearly fraudulent and likely submitted by artificial intelligence bots because they use fictitious names and streets with sequential street numbers.

Sharp said the issue was such a significant problem that class counsel suggested that the claims administrator use the reCAPTCHA software test on the claims website, which asks claimants to verify a series of images to ensure the user is a human and not a robot, Sharp said.

As a result, she said, the number of claims submitted weekly plunged from approximately 140,000 claims per week to roughly 10,000 per week, but a few weeks later, the number of claims jumped back up again due to possible "click farms," in which groups of people are hired to fraudulently click dozens or hundreds of reCAPTCHA checkboxes to defraud the system.

The new trend concerned the judge.

"Click fraud is very concerning to me," Judge Orrick told Sharp. "It's a fraud on the court. I wonder

whether this has been pushed on to law enforcement authorities."

Sharp agreed that the issue has become a problem for claims administrators, who once struggled with getting claims rates above 3%, and now face 20% claims rates but with significant fraudulent submissions.

"The innovation appears to be endless in this regard," Sharp said of the click fraud technology. "We've dealt with a lot of cutting-edge issues in this case and unfortunately this seems to be one of them."

Judge Orrick suggested that class counsel and the claims administrator document the alleged fraudulent submissions and provide it to the U.S. Attorney's Office for the Northern District of California.

"I would encourage you to see whether you can develop a persuasive enough package ... about who these fraudsters are to perhaps interest the U.S. Attorney's office, because I think this is a real problem," Judge Orrick said.

The judge also asked the attorneys to submit documentation to the court that lays out the administrator's fraud analysis and how class counsel plans to deal with the rejection notices, which Sharp said class counsel will provide.

"We have every interest in getting money into class members' hands before more bots show up," she added.

The U.S. Attorney's Office didn't immediately respond to a request for comment Wednesday.

The class members are purchasers of Juul products who allege they paid more than they would have otherwise "if accurate information concerning the products' addictiveness and safety had been provided, and [if it were clear] that Juul products were unlawfully marketed to minors," according to information filed with the court.

Similar to Juul's \$255 million deal, the Altria settlement class consists of all individuals who purchased a Juul product from a brick-and-mortar or online retailer in the United States before Dec. 6, 2022.

Altria announced it had struck the **\$235 million deal last May**, one day after San Francisco's public schools **rested their case** in a multidistrict litigation bellwether trial over claims Altria helped fuel a youth vaping crisis created by Juul.

According to class counsel, the \$45.5 million class settlement is part of Altria's global settlement program for the government entity, school districts, cities and counties and personal injury cases, and there are separate settlement funds and programs encompassed within the \$235 million agreement with the tobacco company.

San Francisco-based Juul announced its own separate **\$255 million** deal with the plaintiffs, which include adolescents, school districts, municipalities and Native American tribes, in **December 2022**, just as the sprawling litigation headed to bellwether trials led by California schools. That left Altria — which had previously acquired a 35% stake in Juul — as the sole defendant.

After **specifically barring claims submitted using artificial intelligence "en masse,"** Judge Orrick approved Juul's settlement last **December**, saying the plaintiffs' lawyers did a "superb job" while also expressing concern about the lack of Black and Latino attorneys involved.

The Juul and Altria deals allow class members to submit claims for up to \$1,600 per year of Juul product purchases with proof of purchase, with an overall cap of 150% of the value of their total purchases, or 300% of total purchases if their first purchase was made under the age of 18. Class members without proof of purchase will have their claims capped at a lower amount.

The consumers are represented by Sarah Robin London of Lieff Cabraser Heimann & Bernstein LLP, Dena C. Sharp of Girard Sharp LLP, Ellen Relkin of Weitz & Luxenberg PC and Dean Kawamoto of

Keller Rohrbach LLP.

Altria is represented by John C. Massaro, Jason A. Ross, David E. Kouba, Paul W. Rodney and Lauren S. Wulfe of Arnold & Porter Kaye Scholer LLP, and Beth A. Wilkinson, Brian L. Stekloff, James M. Rosenthal, Matthew R. Skanchy and Moira K. Penza of Wilkinson Stekloff LLP.

The case is In re: Juul Labs Inc., Marketing, Sales Practices and Products Liability Litigation, case number 3:19-md-02913, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger and Mike Curley. Editing by Kristen Becker.

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Epic Tesla Fee Bid May Blaze Extraordinary Chancery Path

By **Jeff Montgomery**

Law360 (March 6, 2024, 4:52 PM EST) -- An unprecedented \$5 billion-plus stock-based fee award sought by class attorneys who recently short-circuited Tesla CEO Elon Musk's 12-step, \$51 billion compensation package has set up an equally unprecedented test for Delaware Court of Chancery fee guidelines and a potential award one law expert described as "dynastic wealth."

Class attorneys who have battled Tesla's compensation scheme for Musk since mid-2018 last week sought more than 11% of the 266,947,208 Tesla shares freed up Jan. 30, when Chancellor Kathaleen St. J. McCormick ordered rescission of the options that Tesla's board awarded to Musk in an all-stock compensation plan. The value had been estimated initially at \$5.6 billion, but would fluctuate with the value of Tesla's stock.

While the process of seeking a stock fee award instead of cash is not unprecedented, it is an unusual posture for Delaware Chancery litigation, and its scale is likely to reopen what were once considered settled questions over counsel risks, rewards, and just how much attorneys can command for corporate benefit fees, experts told Law360.

"Given the order of magnitude here, I suspect that the case will not set any records in terms of percentage of the recovery awarded to the plaintiffs attorneys, but in absolute terms it'll still amount to dynastic wealth," said University of Connecticut School of Law professor Minor Myers. He described the fee as "destined to be epic, if only because it involves the invalidation of a pay package that was itself comically large."

Chancellor McCormick put the fee in play with an order rescinding Musk's 12-tranche, all-stock compensation plan Jan. 30, after a weeklong trial in November 2022. The ruling cited disclosure failures, murky terms, conflicted director architects and Musk's own conflicted influence in Tesla's creation of an Everest-sized mount of fast-triggering stock options.

"Plaintiff won complete rescission of the largest pay package ever issued," the fee motion, filed last week, said. "Our research demonstrates that the court's decree of rescission, conservatively valued, was the largest compensatory award in the history of American jurisprudence by multiples," driven by "the gargantuan size of the tort underlying this action."

But class attorneys are seeking an equally gargantuan fee, even after departing from calculation customs that Vice Chancellor J. Travis Laster stressed last year in declining to apply a size reduction to a nearly 27%, \$267 million award to stockholders who challenged a Dell Technologies stock swap in 2018. In his fee ruling, the vice chancellor said the calls to reduce the Dell fee conflicted with court efforts to reward attorneys for going deeper into litigation and taking greater risks in pursuit of legitimate claims.

"Of course, everyone involved will try to fit this into an existing framework, but the reality is that a \$5.6 billion fee award is staggeringly high, whatever factors are considered," said Lyman P.Q. Johnson, Robert O. Bentley professor of law, emeritus, at Washington and Lee School of Law. "I think Chancellor McCormick will find a way to go a fair bit lower, while still providing the attorneys with a very high award of some amount."

Johnson added: "The shock of Musk's compensation, undone by the chancellor, is unlikely to be followed by what many would regard as a shockingly high \$5.6 billion fee award."

Vice Chancellor Laster's most recent big fee ruling established, pending appeal, a \$266.7 million fee last year for attorneys who secured a \$1 billion settlement for minority stockholders who sued over a \$23.9 million Dell Technologies stock swap in 2018.

In Dell, the vice chancellor rejected investor arguments that large "mega-fund" settlements justified throttling back on fee payouts because customary fee percentages can produce massive, windfall payouts. Instead, Vice Chancellor Laster defended the use of customary, variable percentages, including 15% to 25% shares of awards for settlements after "meaningful litigation and motion practice" and up to 33% post-trial. He also acknowledged the tension between successful plaintiffs' counsel seeking appropriate compensation and large investors working to minimize carve-outs from court awards.

In Tesla, class attorneys, wary of blowback over big recoveries borne of typical fee ratios, acknowledged the Dell ruling's guidance, but also pointed to an earlier ruling that produced the current largest court-approved fee, a \$304 million award approved in 2011 by then-Chancellor Leo E. Strine and upheld by Delaware's Supreme Court a year later.

That decision required Grupo Mexico to return to Southern Peru Copper Corp. nearly \$1.3 billion worth of Southern Peru stock — rather than cash — after finding that Southern Copper had been coerced by a conflicted, controlling stockholder into overpaying for a Grupo Mexico mine in 2005. With pre- and post-judgment interest, the award reached more than \$2 billion, with class attorneys awarded 15%, or \$304 million, for fees and expenses.

Tesla class attorneys referenced the 15% fee carveout approved in Southern Peru, but adjusted even that percentage downward — to just over 11% — to reflect value added by the absence of a holding period for any award of Tesla shares before they could be sold.

Case costs included more than \$13.6 million in attorney fees and more than \$1.1 million in expenses during the multiyear Chancery action. Requested fees would equal a \$288,888 hourly rate that the fee motion said was justified by the case's complexity, results and attorney skill levels, among other factors.

Jill E. Fisch, Saul A. Fox distinguished professor of business law at the University of Pennsylvania Carey Law School, said use of stock for attorney fees was once "kind of frowned upon," but is not unprecedented.

"They are repeat players" in Delaware's courts, Fisch said of the attorney teams that prevailed in the Tesla case. "They want credibility before the court. The numbers, I think, reflect the benefit and risk of this kind of litigation, and traditionally, Chancery Court has acknowledged those risks."

The suit, led by stockholder Richard Tornetta, branded Musk's compensation package as unprecedented and unfair, noting that Musk had already qualified for some \$20 billion in awards by the time the suit was filed, "making him one of the richest men on Earth" at the time. It alleged in part that he relied on two in-house Tesla attorneys for work on the plan before the board's conflicted compensation committee took up the issue.

Ann M. Lipton, the Michael M. Fleishman associate professor in business law and entrepreneurship at Tulane University Law School and associate dean, pointed to another Tesla- and Musk-related case to illustrate the risks stockholder attorneys take.

Last year, after about seven years of litigation, Delaware's Supreme Court upheld a post-trial dismissal of a suit filed by stockholders of rooftop solar venture SolarCity, seeking damages tied to Tesla's \$2.6 billion purchase of the company, for which Musk was CEO and also held a big share of company stock.

At one point during the case, the SolarCity stockholders suggested a damage award amounting to a \$13 billion giveback of Tesla stock Musk received for his SolarCity shares. Dismissal of the case and rejection of class claims, however, wiped out class attorneys' hopes for a share of a big award.

In the more-recent scuttling of Musk's Tesla stock awards, Lipton said, shareholders benefited from

the stock award cancellations by being dramatically less diluted in their holdings. "That the attorneys are asking for a little bit of dilution" through their fee, "but far less than the shareholders would otherwise have suffered, seems like a real benefit that was provided, from a financial point of view."

Lipton said she was not familiar enough with the current Tesla fee motion to comment on the percentage sought, but cited the enormous risk and stockholder counsel loss in SolarCity and said that "attorneys deserve to be compensated" when they prevail.

University of Michigan Law School professor Gabriel Rauterberg said the fee bid in Tesla appears excessive, despite the importance of fee as a motivator.

"It seems to me extremely implausible that an award this large is necessary to provide the right incentives, given that plaintiffs attorneys' fixed costs for investigating lawsuits, conducting research, and prosecuting cases can be significant but not on this scale," Rauterberg said. "It seems like a windfall to me. You can give the attorneys a large award, while still falling short of billions."

Counsel for the Tesla stockholders have pointed out that Delaware's Supreme Court has in the past declined to replace the current fee approach with declining percentages.

"Under Delaware law, the unprecedented size of the benefit conferred does not alter plaintiff's counsel's entitlement to 33% of that benefit," attorneys for the Tesla stockholders wrote. They also pointed to voluntary concessions reducing the total ask to around 11%, with features that reduce the cost to the company.

Some of the sting felt by Tesla, the brief indicated, could be taken away by federal tax law terms that will make 21% of the fee award cash tax-deductible, reducing the post-tax fee award cost from \$5.63 billion to \$4.45 billion. State corporate income tax and payroll tax deductions and allowances also could offset the share payout.

UConn's Myers said the Tesla stockholder attorneys won a landmark victory and "deserve to be compensated handsomely" for taking a risky case through trial, while also predicting that the court will "take a hard look at the magnitude of the benefit actually achieved here — that may be a figure in some dispute."

The case nevertheless also stands as an example of "how the Delaware system effectively harnesses the efforts of folks like the plaintiffs attorneys to generate powerful incentives for good governance at public companies," Myers said.

The shareholders are represented by Jeroen van Kwawegen, Margaret Sanborn-Lowing, Gregory V. Varallo and Glenn R. McGillivray of Bernstein Litowitz Berger & Grossmann LLP, Jeremy S. Friedman, Spencer M. Oster and David F.E. Tejtrel of Friedman Oster & Tejtrel PLLC and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC.

Musk and the other defendants are represented by Evan Chesler, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP and David E. Ross and Garrett B. Moritz of Ross Aronstam & Moritz LLP.

The case is Richard J. Tornetta et al. v. Musk et al., case number 2018-0408, in the Court of Chancery of the State of Delaware.

—Additional reporting by Leslie Pappas, Vince Sullivan, Lauren Berg and Rose Krebs. Editing by Kelly Duncan.



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X Gets Investors' 'Puzzling' Cybersecurity Suit Axed For Good

By **Lauren Berg**

Law360 (March 6, 2024, 9:18 PM EST) -- The social media site X, formerly known as Twitter, does not have to face shareholders' claims that they were misled and kept in the dark about the platform's cybersecurity concerns, a California federal judge ruled while scolding the shareholders for filing an "unnecessarily lengthy, puzzling and burdensome complaint."

U.S. District Judge Mark C. Scarsi, in a 25-page **order** issued Tuesday, dismissed with prejudice the lawsuit accusing the social media company and its former top brass of hiding security concerns on the platform, saying lead plaintiff William Baker and the other shareholders haven't adequately alleged that most of the challenged statements are false or misleading.

The few statements that are plausibly pleaded to be false or misleading, don't adequately allege the defendants' scienter, or knowledge, that those statements were false, according to the order. As for the one statement that did plausibly allege scienter, the shareholders haven't alleged a causal connection between that statement and their losses, the order said.

The investors in **September 2022 sued** Twitter, its former CEOs Jack Dorsey and Parag Agrawal, former Chief Financial Officer Ned Segal and other former executives, alleging that they worked to hide security concerns on the platform, repeatedly making misleading statements and omissions in U.S. Securities and Exchange Commission filings. And contrary to what it said in those filings, Twitter was actively refusing to address the issues, the suit said.

The truth came to light when former Twitter security chief Peiter Zatk0 blew the whistle in late August 2022, claiming he was fired after trying to raise the alleged security lapses with Twitter's board of directors, the suit said. Zatk0 had also tried to help Twitter fix its purported noncompliance with a decade-old Federal Trade Commission privacy agreement, the investors alleged.

"On this news, Twitter shares traded at unusually high volumes and Twitter share prices fell \$3.15, or over 7%, to close at \$39.86 on Aug. 23, 2022, damaging investors," the suit said.

Judge Scarsi this past **August dismissed** a previous iteration of the suit, excoriating Baker and his counsel at the Rosen Law Firm PA for saddling him with a rambling, confusing complaint that took "months" to decipher. But the judge allowed the shareholders to try again, warning them to use "common sense" and follow a "simple formula" when drafting their amended complaint.

The shareholders filed the instant complaint in October, but in his order Tuesday, Judge Scarsi said the new suit does not fix the issues of the previous iteration.

This time, the judge denied the shareholders' request to amend the complaint again, saying they haven't provided new facts to cure the previous deficiencies and that they "acted in bad faith by submitting yet another unnecessarily lengthy, puzzling and burdensome complaint."

"Sifting through the [third amended complaint] only to find lead plaintiff had provided no new facts, just new theories, was a waste of judicial resources — and, no doubt, the resources of the opposing parties," the judge said.

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

The shareholders are represented by Laurence M. Rosen, Jonathan Horne and Brian B. Alexander of The Rosen Law Firm PA, Jennifer Pafiti, Jeremy A. Lieberman and Jonathan D. Park of Pomerantz, and Peretz Bronstein of Bronstein Gewirtz & Grossman LLC.

Twitter is represented by Susan Engel, Michele Johnson, Andrew Clubok, Whitney Weber, Cindy Guan, Sheridan Caldwell and Peter Trombly of Latham & Watkins LLP.

The case is William Baker et al. v. Twitter Inc. et al., case number 2:22-cv-06525, in the U.S. District Court for the Central District of California.

--Additional reporting by Hailey Konnath and Ryan Boysen. Editing by Alex Hubbard.

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Feb. 2025 Trial Set In \$1B Ronaldo Binance Promo Suit

By **Elaine Briseño**

Law360 (March 6, 2024, 8:35 PM EST) -- A Florida federal judge has set a February 2025 trial date and other pre-trial details for the proposed class action against soccer star Cristiano Ronaldo related to his role in promoting embattled crypto platform Binance.com, following the failure of the parties to file their joint scheduling reports.

On Nov. 28, the court ordered both sides to submit their scheduling reports and warned it would set the case management schedule if that was not done.

On Tuesday, U.S. District Judge Beth Bloom followed through, issuing an order setting a pre-trial schedule, including a Feb. 24, 2025, trial date. She also ordered the parties into mediation and to file a mediation report by Nov. 12. Meanwhile, preparation for a possible trial will proceed. The parties must provide initial discovery materials by March 19 and disclose all experts, exchange expert witness summaries and reports and all discovery material by October.

Three men filed the **\$1 billion proposed class action** against Ronaldo on Nov. 27, accusing the star forward of helping lure customers to use Binance.com with deceptive statements. Powerful influencers, including Ronaldo, promoted and hyped the company on social media and through traditional advertising, playing a big role in its growing popularity and success, the complaint said.

Binance, which provides an exchange for digital currencies, including its own token, has been sued by state and federal regulators, the U.S. Securities and Exchange Commission among them.

Plaintiffs initially **had trouble** pinning down Ronaldo to serve him notice of the lawsuit because of his jet-setting lifestyle. They asked the court for permission Jan. 16 to give him notice via the X platform, formerly known as Twitter. That request was withdrawn Feb. 1 after they were able to locate his counsel.

Ronaldo was a paid spokesperson for Binance, signing a multiyear partnership with the platform that included the launch of his first-ever non-fungible tokens, according to the lawsuit. The former Manchester United star is considered one of the best soccer players of all time, making him especially influential.

The lawsuit went on to assert that promoting such products may be flouting federal securities laws.

Suing the promoters may be the only method plaintiffs have to recoup their losses, according to the lawsuit. The plaintiffs are Michael Sizemore of California, Mikey Vongdara of Florida and Gordon Lewis of Colorado.

The SEC has accused Binance, which has U.S. headquarters in Florida, of being a sham entity established to circumvent regulations and defraud U.S. regulators through its sale of unregistered securities, according to the lawsuit. It also warned that virtual tokens may be securities and cautioned that any celebrity or individual who promotes them must disclose the nature, scope and amount of money they received for the endorsement, according to the suit.

On Nov. 21, the company accepted a plea deal from the U.S. Department of Justice after a yearslong investigation over allegations of money laundering, bank fraud and sanctions violations. The cryptocurrency exchange agreed to pay \$4.3 billion in penalties. Its founder and CEO, Changpeng Zhao, pled guilty to failing to maintain an effective anti-money laundering program and agreed to pay a \$50 million fine and resign his post. Zhao faces 18 months in prison.

An attorney for Ronaldo said they are not commenting at this time. Representatives for the plaintiffs did not immediately respond to a request for comment.

The proposed class is represented by Adam Moskowitz, Joseph Kaye and Barbara Lewis of The Moskowitz Law Firm PLLC, Jose Ferrer and Desiree Fernandez of Mark Migdal & Hayden, Stephen Neal Zack and Tyler Ulrich of Boies Schiller Flexner LLP, and Kerry Miller, Molly Wells and C. Hogan Paschal of Fishman Haygood LLP.

Ronaldo is represented by Daniel González of Hogan Lovells LLP.

The case is Sizemore et al. v. Ronaldo, case number 1:23-cv-24481, in the U.S. District Court for the Southern District of Florida.

--Editing by Kelly Duncan.

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L3Harris Deal For DE Shaw Board Seats Prompts Suit In Del.

By **Jeff Montgomery**

Law360 (March 6, 2024, 3:04 PM EST) -- An L3Harris Technologies Inc. stockholder has sued the aerospace and defense company in Delaware's Court of Chancery, challenging an agreement obliging it to recommend the election of two activist investor-backed board candidates.

Stockholder Bruce Taylor's single-count complaint, filed late Monday, asks the court to invalidate the requirement to recommend directors backed by D.E. Shaw Oculus Portfolios LLC and affiliates, and to bar its enforcement.

L3Harris agreed in December to add two D.E. Shaw-backed board members without providing a "fiduciary out," which would assure the company can refuse and issue a different recommendation if deemed appropriate based on changing circumstances.

The recommendation rule "illegally contracts away the board's duty to provide an honest and current recommendation regarding which individuals are best suited to serve as a director," the suit said.

Florida-headquartered L3Harris has 50,000 employees and describes itself as providing "end-to-end technology solutions connecting the space, air, land, sea and cyber domains in the interest of national security."

Along with the additional board members, L3Harris said it would form a business review committee "focused on operational performance, costs and the composition of its portfolio. L3Harris will adjust its long-term incentive compensation plan as well."

The suit said L3Harris took its present form in 2019 with the merger of L3 Technologies Inc. and Harris Corporation, at the time one of the largest aerospace and defense industry combinations.

Soon afterward, however, the merged business proved both weak and volatile, with its long-term debt increasing from \$6.2 billion at the end of 2022 to \$11.1 billion a year later and its stock falling to a three-year low.

D.E. Shaw, which has focused on underperforming companies in the past, invested some \$60 million in L3Harris and began "privately pressuring" the company, moves the complaint said "the incumbent directors would have recognized as a threat to their board seats."

By Dec. 10, the company and D.E. Shaw announced a cooperation agreement that included planned "refreshment" of the company's board and the addition of former Raytheon Company CEO Bill Swanson and Kirk Hachigian, former CEO of window- and door-maker JELD-WEN Holding Inc.

The company and D.E. Shaw are also to agree on an additional independent director.

The suit named L3Harris, D.E. Shaw and its affiliates as well as 14 Shaw directors.

The Chancery Court has already invalidated a similar provision this year in the case of West Palm Beach Firefighters' Pension Fund v. Moelis & Co.

In an opinion issued on Feb. 23, Vice Chancellor J. Travis Laster declared "facially invalid" all but three provisions of a stockholder agreement that gives Moelis & Co. founder Kenneth Moelis board-

trumping power over the global investment bank's business.

At the time, the vice chancellor observed that the decision might have implications for similar stockholder agreements at other companies.

"Internal corporate governance arrangements that do not appear in the charter and deprive boards of a significant portion of their authority contravene" state corporation laws, the vice chancellor said in a 133-page opinion.

Stockholder Bruce Taylor is represented by Aaron M. Nelson of Heyman Enerio Gattuso & Hirzel LLP, Amanda Crawford and Joel Fleming of Equity Litigation Group LLP, and Richard A. Maniskas of RM Law PC.

Counsel information for L3Harris Technologies Inc. was not immediately available.

The case is Bruce Taylor v. L3Harris Technologies Inc. et al., case number 2024-0205, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas. Editing by Philip Shea.

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Weber Stockholders Vie For Chancery Suit Over \$3.7B Deal

By **Leslie A. Pappas**

Law360, Wilmington, Del. (March 6, 2024, 8:39 PM EST) -- The competition among former Weber Inc. stockholders who are suing over the grill maker's \$3.7 billion squeeze-out by BDT Capital Partners LLC heated up Wednesday in Delaware's Court of Chancery as more than a dozen firms on teams led by Scott + Scott Attorneys at Law LLP, Friedlander & Gorris PA and Prickett Jones & Elliot PA are battling to lead a consolidated class suit.

The stockholders' three competing lawsuits, which were consolidated in December, all alleged that BDT — the private equity firm that took Weber public in 2021 and then private again a year and a half later — exploited its influence on the Weber board to grab the company at an unfairly low price of \$8.05 per share.

But all three complaints had important differences that made them stand out above the rest, attorneys argued Wednesday to Chancellor Kathaleen St. J. McCormick at a hearing over which team would lead the consolidated class action, with each group of firms insisting that their client had made the best case.

Palatine, Illinois-based Weber announced in December 2022 that it would be acquired by various investment funds managed by BDT in a deal worth \$3.7 billion. Weber said in February 2023 that it had closed the deal and that its stock would be delisted from the New York Stock Exchange. The acquisition's \$8.05 share price was a "substantial discount" from the \$14 per share that stockholders paid to grab their piece of the grill manufacturer when it made its **initial public offering in August 2021**.

Shareholders Micah Marshall II and Richard J. Bishop were the first to file their proposed class action in Chancery Court in October. And the following month, **another proposed class** was filed by Michael D. Levine, who had **sued** Weber in September for books and records.

Plaintiffs Randall Costner, George Assad and Jonathan Abbott followed up in December with their class action against BDT.

Marshall "undeniably holds the most shares of any other plaintiff," Corinne Elise Amato of Prickett Jones, arguing on behalf of the Marshall-Bishop team, told the court Wednesday.

Marshall had 18,206 Class A shares, worth roughly \$147,000, when the merger closed — an investment that represented about 25% of his portfolio, Amato said.

"That is a larger stake than all of the other plaintiffs combined," the attorney noted.

The Marshall-Bishop team also filed its case first, Amato said, adding that "we smoked out our competitors and we got the litigation moving."

Marshall and Bishop asked to be appointed as co-lead plaintiffs and that the trio of Prickett Jones, Kessler Topaz Meltzer & Check LLP and Grant & Eisenhofer PA serve together as lead counsel.

Joel Friedlander of Friedlander & Gorris, representing the Costner group of plaintiffs, argued that his team had done more than the rest.

The firm hired a well-known valuation expert and paid \$18,000 for an analysis, which allowed the Costner group to plead clearly that the merger price was unfair, Friedlander noted.

"We think there are some differences in tactical approach," the attorney said.

That group asked for Costner, who held 10,830 Weber shares when the merger closed, to be appointed as lead plaintiff. If the group is successful, Friedlander & Gorris and Friedman Oster & Tejtrel PLLC would represent the class as co-lead counsel, with Labaton Keller Sucharow LLP, Block & Leviton LLP, Wohl & Fruchter LLP and Kaskela Law LLC serving as additional counsel, according to the group's motion.

Levine filed his motion to be lead plaintiff in January, asking for Scott+Scott to serve as lead counsel, Christensen & Dougherty LLP to be appointed as Delaware counsel and the Kehoe Law Firm PC to be named additional counsel.

Levine owned 4,116 shares of Weber Class A common stock, valued at \$33,133.80, court papers said.

In arguments Wednesday, Justin O. Reliford of Scott+Scott argued that the Levine complaint is superior because it brings claims against Weber's current CEO Alan D. Matula and its former Chief Financial Officer William Horton.

He pushed back on Friedlander's assertion that Scott+Scott didn't have as strong of a performance history in Chancery Court as the Costner group's chosen firms.

"I am not going to get into a food fight with Mr. Friedlander about who has a better track record," Reliford said. "Despite our shorter track record, we have filed a complaint that better serves the interest of the class."

The chancellor asked no questions. She took the matter under advisement and did not say when she would issue a decision.

Levine is represented by Maxwell R. Huffman, Justin O. Reliford and Elizabeth Dragovich of Scott+Scott Attorneys At Law LLP, and Joseph L. Christensen of Christensen & Dougherty LLP.

Bishop is represented by Eric L. Zagar, J. Daniel Albert and Cameron N. Campbell of Kessler Topaz Meltzer & Check LLP, and Corinne Elise Amato, Kevin H. Davenport, Eric J. Juray and Stacey A. Greenspan of Prickett Jones & Elliott PA.

Marshall is represented by David Wissbroecker, Christine M. Mackintosh and Rebecca A. Musarra of Grant & Eisenhofer PA, Douglas E. Julie and W. Scott Holleman of Julie & Holleman LLP, and Leslie F. Portnoy of Portnoy Law Firm.

Costner, Assad and Abbott are represented by Joel Friedlander and Jeffrey M. Gorris of Friedlander & Gorris PA, Jeremy S. Friedman and David F.E. Tejtrel of Friedman Oster & Tejtrel PLLC, John Vielandi, Nina Varindani and Ned Weinberger of Labaton Keller Sucharow LLP, Jason Leviton, Kimberly A. Evans, Lindsay K. Faccenda and Robert Erikson of Block & Leviton LLP, Joshua Fruchter of Wohl & Fruchter LLP, and D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC.

The case is In re: Weber Inc. Stockholder Litigation, case number 2023-0993, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.



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Startup Investors' Attys Want \$1.5M In Fees On Disclosure Suit

By **David Hansen**

Law360 (March 6, 2024, 5:38 PM EST) -- Lawyers for a class of investors have asked a New York federal court to approve their attorney fees of \$1.5 million for a \$4.5 million settlement with a Chinese analytics startup over claims the company misrepresented its tax liability before its initial public offering.

The court also should reimburse \$309,000 of litigation costs and \$30,000 in payments to the two lead plaintiffs for their representation of the settlement class, the attorneys said in a memorandum of law filed Monday.

One lead plaintiff, Peifa Xu, had argued in the case that Gridsum Holding Inc. should have revealed it had 28.4 million yuan (\$3.9 million) in income tax expenses for 2016 in its prospectus from the same year. Gridsum had its initial public offering in 2016, raising \$87.1 million.

Had the prospectus included that amount, it would have increased the company's net losses by 47.8%, "making the company far less appealing to investors," the complaint said. The expenses were revealed only in an investor document filed later.

The parties **reached an agreement** to settle Oct. 17 following months of discovery and a full-day mediation session in September. Additional discovery would be particularly difficult and expensive because Chinese law would block most of the investors' witnesses from testifying, and it also would make collecting from the Chinese defendants difficult, according to the settlement motion.

The fee request is 33 1/3% of the settlement fund, the investors' attorneys told the court in their motion. The settlement amount is less than requested, but the defendants had strong arguments that they were not liable, and proving causation and damages at trial would be difficult, perhaps resulting in little to no recovery, the attorneys said.

The settlement required hard work, according to the plaintiffs' attorneys. It required drafting three complaints, addressing multiple options to dismiss, briefing a class certification motion, conducting discovery, defending and taking class representative and expert depositions and consulting with experts, they said.

The request is in line with fee awards from the Second Circuit and with the outcome of other securities class actions, according to the attorneys. The plaintiffs support the request, and no class members have filed objections to it, they added.

Representatives of the plaintiffs and of Gridsum did not respond to requests for comment.

The plaintiffs are represented by Lawrence P. Eagel, Marion C. Passmore and Melissa A. Fortunato of Bragar Eagel & Squire PC and Gregory M. Egleston and Thomas J. McKenna of Gainey McKenna & Egleston.

Gridsum and the individual defendants are represented by Daniel Roy III, Michael C. Tu and Sarah M. Topol of Cooley LLP.

The case is Xu v. Gridsum Holding Inc. et al., case number 1:18-cv-03655, in the U.S. District Court for the Southern District of New York.



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Juniper Networks Sued In Del. For Details On \$14B HP Sale

By **Leslie A. Pappas**

Law360 (March 6, 2024, 4:27 PM EST) -- Leaders of artificial intelligence networking platform Juniper Networks Inc. are breaching their duties to stockholders by withholding material information about the company's recently announced \$14 billion acquisition by Hewlett Packard Enterprise Co., a Juniper shareholder alleged Wednesday in a Delaware Court of Chancery complaint.

The proposed class action filed Wednesday morning asserts that a proxy about the merger has "materially misleading information" regarding Juniper's interactions with other would-be buyers, how much they offered, when they made bids, whether the other proposals would have kept Juniper's CEO, and how and whether any competing bidders were restricted from making a topping offer.

Shareholder Stephen Bushansky's 29-page complaint targets Hewlett Packard, Juniper Networks Inc., Juniper's CEO Rami Rahim, its board Chairman Scott Kriens and the rest of the AI networking platform's 10-member board. Jasmine Acquisition Sub Inc., a wholly-owned subsidiary of Hewlett Packard that is part of the merger transaction, is also named as a defendant in the case.

Sunnyvale, California-based Juniper designs, develops and sells products and services for high-performance networks in more than 150 countries in North America, Europe, the Middle East, Africa and Asia, the complaint says. Its offerings include Wi-Fi, network security, AI and software-defined networking technologies.

The two companies **jointly announced on Jan. 9** that Hewlett would acquire Juniper for \$14 billion, pending regulatory approvals, in an all-cash transaction that would give existing Juniper shareholders \$40 per share — an estimated 32% premium compared to Juniper's Jan. 8 closing stock price of \$30.22. The companies aim to close the deal in late 2024 or early 2025.

Hewlett Packard expects the acquisition to double its networking business and shift its product mix toward higher growth services, particularly generative AI and cloud computing. With operations in California and Texas, the nearly 85-year-old company makes a range of personal computers and computing and storage devices.

Bushansky alleges in his complaint that the merger price is "inadequate" and values the company at least \$6 lower than what the company's financial adviser, Goldman Sachs & Co. LLC, has estimated.

Because the proxy omits information about bids that Juniper received from other interested parties, stockholders have no way to evaluate whether the 32% premium above the Jan. 8 closing price is higher than the per-share amount they would collect through any of the previous offers, the complaint says.

Juniper stockholders will vote on the merger at a special meeting scheduled for April 2.

Juniper Networks did not immediately respond Wednesday to Law360's request for comment.

Stephen Bushansky is represented by Michael A. Rogovin of WeissLaw LLP and Ryan M. Ernst of Bielli & Klauder LLC.

The case is Stephen Bushansky v. Juniper Networks Inc. et al., case number 2024-0214, in the Court of Chancery of the State of Delaware.



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Gemini Scores Arbitration Bid In 'Earn' Crypto Investment Suit

By **Katryna Perera**

Law360 (March 6, 2024, 4:33 PM EST) -- Gemini Trust Co. LLC investors must arbitrate their claims that the cryptocurrency exchange misled them about the firm's interest-bearing accounts and were hurt after the program for the accounts was halted, with a New York federal judge finding that Gemini and its founders have shown that a valid arbitration agreement exists.

U.S. District Judge Naomi Reice Buchwald issued an **order** on Tuesday stating that Gemini and its founders, Tyler and Cameron Winklevoss, have not only shown that an enforceable arbitration agreement exists between them and the investors, but that the investors also consented to the relevant agreements.

"Every previous agreement between plaintiffs and Gemini required the parties to submit their disputes to arbitration and there is no question that plaintiffs agreed to arbitrate their dispute with Gemini," the order states. "Moreover, to the extent that plaintiffs argue these modifications were made to gain an advantage in the present litigation, these modifications were made nearly two weeks before plaintiffs filed this lawsuit."

Gemini and the Winklevosses filed a motion to compel arbitration **last April**, arguing that platform customers agreed to arbitrate all future claims against the company and its founders when they accepted the Gemini User Agreement as part of the process of becoming a Gemini account user.

According to the motion, the user agreement states that "any controversy, claim, or dispute arising out of or relating to this user agreement or your relationship with Gemini — past, present, or future — shall be settled solely and exclusively by binding arbitration."

Judge Buchwald said Tuesday that the earliest versions of the user agreement submitted to the court contained an arbitration provision. Other governing agreements contained language stating that their terms do not supersede those of the user agreement, according to the order.

The user agreement was modified in December 2022 and continued to require arbitration. It also included language delegating issues of arbitrability to an arbitrator, extending the provision to third parties and waiving class actions, and reiterating that the agreement supersedes any other a user might have entered into with Gemini.

The investors argued that they would not have agreed to the modified agreement had they been given fair notice and that Gemini cannot show that they accepted the modifications. But Judge Buchwald said the investors received reasonable notice of the changes to the user agreement "at least twice," and their argument that they did not agree to the terms is "unsupported by the record and is unavailing in the face of specific evidence provided by defendants."

According to the order, the investors also argued that the Winklevosses cannot compel arbitration on the claims against them because they "are not individually parties to any of the [a]greements."

However, the judge agreed with the defendants that the language of the user agreement says otherwise.

"Plaintiffs' argument is in direct conflict with the provisions of both versions of the user agreement, which provide that the arbitration clause 'applies not just to disputes between you and Gemini but

also to ... disputes with Gemini and any other party named or added as a co-defendant," the order states.

"When plaintiffs brought this action against Gemini, they named the individual defendants as co-defendants in this case and continue to do so under the amended complaint," the judge added. "Given the express language in the user agreement, the individual defendants can compel arbitration ... and the plaintiffs do not provide any evidence to the contrary."

Judge Buchwald on Tuesday also ruled that the parties have agreed to delegate the issue of arbitrability to an arbitrator and that the class action waiver in the user agreement is valid.

In a statement to Law360 on Wednesday, James R. Serritella of Kim & Serritella LLP, counsel for the investors, said the court's decision is disappointing, but he noted that Judge Buchwald did not rule on the case's merits.

"Defendants should be held accountable for their actions regardless of the forum or trier of fact. Although we are currently assessing next steps, Kim & Serritella remains committed to ensuring that our clients and other Gemini Earn investors are made whole," he said.

Counsel for Gemini and the Winklevosses did not immediately respond to requests for comment.

The action, filed in December 2022, is on behalf of a proposed class of those who invested in the Gemini Earn program or otherwise had a Gemini interest account between Feb. 2, 2021, when the Gemini Earn program launched, and when the suit was filed.

The investors claim that Gemini Earn interest accounts are unregistered securities and that the company misrepresented the risks associated with the program and with cryptocurrency lender Genesis Global Capital LLC, Gemini's "partner and borrower" for the program.

The investors allege that a series of collapses in the cryptocurrency market led Genesis to experience its own financial distress.

The investors said, "Gemini halted the Gemini Earn program and refused to honor any further investor redemptions, effectively wiping out all investors who still had holdings in the program."

Days after Gemini answered the suit and inquired about an arbitration bid, the U.S. Securities and Exchange Commission **filed similar claims** against Gemini and Genesis in New York federal court, with SEC Chairman Gary Gensler saying the suit alleges the defendants sold unregistered securities, "bypassing disclosure requirements designed to protect investors."

The SEC's suit is ongoing. Gemini and the Winklevoss twins are also facing a class action in New York federal court by a non-fungible token buyer claiming Gemini and its subsidiary Nifty Gateway reaped hundreds of millions of dollars from thousands of investors who bought their NFTs, which the companies refer to as Nifties.

Gemini has requested that the suit be sent to arbitration as well, but plaintiff John Hastings **opposed that request** last March, saying the defendants have failed to show an agreement to arbitrate even exists between the parties.

The proposed class is represented by James R. Serritella, Justin Stone and Hee-Jean Kim of Kim & Serritella LLP.

Gemini and the Winklevosses are represented by John F. Baughman and Maryia Y. Jones of JFB Legal PLLC.

The case is Picha et al. v. Gemini Trust Company LLC et al., case number 1:22-cv-10922, in the U.S. District Court for the Southern District of New York.

--Editing by Patrick Reagan.



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Nvidia Wants High Court Review Of \$1B Crypto Sales Suit

By **Hailey Konnath**

Law360 (March 6, 2024, 11:30 PM EST) -- Nvidia has asked the U.S. Supreme Court to weigh in on a Ninth Circuit decision partially resurrecting a suit accusing the technology company of understating more than \$1 billion in sales to cryptocurrency miners, arguing that the justices are needed to clarify the Private Securities Litigation Reform Act's pleading requirements.

Nvidia said in its petition for writ of certiorari that the investors who filed suit don't meet those pleading requirements because they don't actually have information on the internal documents that they say contradicted the public statements made by Nvidia and its executives. Without that information, the investors simply hired an expert witness to "manufacture data" and then assumed that the internal reports would have matched that data, Nvidia said in the filing, dated March 4 and docketed Wednesday.

The main question for the justices: can plaintiffs looking to plead scienter do so without pointing to the actual contents of internal documents? Nvidia said this question "affects nearly every securities fraud case across the country."

According to Nvidia, the PSLRA was enacted to "prevent securities fraud complaints from proceeding past the pleading stage — and imposing burdensome discovery and litigation costs — in service of 'suits whose nuisance value outweighs their merits,'" Nvidia said. In service of that, the law established heightened pleading standards on securities fraud complaints, it said.

The application of those standards has led to a "longstanding circuit split," and the Ninth Circuit's August decision only deepened that split, Nvidia said. The appellate court's ruling also led to a second circuit split, according to the petition.

In the **split decision**, the Ninth Circuit majority held that investors adequately laid out their claims that Nvidia CEO Jensen Huang knowingly or recklessly made false or misleading statements during discussions with investors and analysts. In those 2017 and 2018 discussions, he repeatedly downplayed the significance of the volatile market of cryptocurrency miners on Nvidia's graphics processing unit sales, the investors alleged.

However, in a dissent, U.S. Circuit Judge Gabriel P. Sanchez said the majority's take improperly relies on a third party's "post hoc analysis," and the allegations don't actually meet the "exacting," "formidable pleading requirements" to state a viable securities fraud claim as required under the Private Securities Litigation Reform Act.

The majority opinion was written by U.S. Circuit Court Judge William A. Fletcher and joined by J. Clifford Wallace.

In its petition, Nvidia said that five circuit courts — the Second Circuit, Third Circuit, Fifth Circuit, Seventh Circuit and Tenth Circuit — have ruled as a matter of law that plaintiffs must plead with particularity the actual contents of internal company documents. The First Circuit was the only circuit to allow plaintiffs to make it past a motion to dismiss without pointing to those details, Nvidia said.

The Ninth Circuit has now joined the First Circuit, "concluding that plaintiffs here could proceed to discovery, not based on allegations about what Nvidia's internal reports actually showed, but based on the complaint's speculation about what such reports might have said," per the petition.

On top of that, the Ninth Circuit's decision has created another circuit split regarding whether an expert opinion could substitute for particularized factual allegations of falsity, Nvidia said. The Second Circuit and Fifth Circuit have both held that such a substitution is not permissible, but now the Ninth Circuit has found otherwise, Nvidia said.

"In doing so, the Ninth Circuit opened the door to securities fraud suits based on the opinions of retained experts — rather than particularized facts — circumventing the PSLRA's rigorous pleading standards," it said.

Nvidia urged the justices to grant certiorari to address both splits, saying their intervention is "particularly warranted given the divergence between the Second and Ninth Circuits on both questions."

"Those circuits account for a significant majority of securities litigation nationwide, and the disagreement between them threatens to turn the nation's largest circuit into a haven for abusive securities litigation," Nvidia said.

The suit was initially filed in 2018 against Silicon Valley-based Nvidia and its CEO, as well as its Senior Vice President Jeff Fisher and its Chief Financial Officer Colette Kress after the multinational corporation's stock price plummeted by nearly 30% following its announcement that revenues would decline by 7%. Nvidia makes graphics processing units, or GPUs, used in creating computer graphics.

The investors **lodged an amended complaint** in May 2020, claiming that the company tricked them into believing that its gaming sales growth came from strong demand from video gamers, when in fact, a significant portion of its surging sales came from cryptocurrency miners, who use the GPUs to mine cryptocurrency.

Mining is the use of computing power to solve complex equations to verify transactions in a cryptocurrency.

Specifically, the investors said Nvidia and its executives made statements **understating** between \$1.3 billion and \$1.35 billion of crypto-related sales.

U.S. District Judge Haywood S. Gilliam Jr. **threw out the litigation** in 2021, holding that the investors hadn't sufficiently alleged that the executives were deliberately reckless as required to state viable claims under the Securities Exchange Act and federal regulations.

The investors then appealed, and the Ninth Circuit majority agreed with the investors that they sufficiently alleged that in August and November 2017, both Kress and Huang made false or misleading statements about Nvidia's crypto-related GPU sales.

The majority reversed the dismissal of claims against Nvidia and Huang, and remanded those claims for further litigation. The panel affirmed the dismissal of claims against other executives.

Counsel for the investors declined to comment, and Nvidia didn't immediately respond to a request for comment late Wednesday.

Nvidia and its executives are represented by Neal Kumar Katyal, Katherine B. Wellington, William E. Havemann, Reedy C. Swanson and Keenan Roarty of Hogan Lovells US LLP and John C. Dwyer, Patrick E. Gibbs and Samantha A. Kirby of Cooley LLP.

The investors are represented by Gregory P.N. Joseph of Joseph Hage Aaronson LLC.

The case is Nvidia Corp. et al. v. E. Ohman J:Or Fonder AB et al., case number 23-970, in the U.S. Supreme Court.

--Additional reporting by Dorothy Atkins, Rachel O'Brien and Elise Hansen. Editing by Emily Kokoll.



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Latham Passes Skadden As Busiest Securities Defense Firm

By **Katryna Perera**

Law360 (March 6, 2024, 11:02 PM EST) -- Despite a downward trend in securities case filings over the past three years, Latham & Watkins LLP has remained one of the most active law firms on the defense side, taking over the top spot from Skadden Arps Slate Meagher & Flom LLP, according to reports released by Lex Machina.

Lex Machina's **Securities Litigation Report** for 2024, which analyzes the trends of federal securities litigation from 2021 to 2023, found that Latham consistently took on more securities cases than other defense firms, a change from **previous** Lex Machina **reports**, in which Skadden came out on top.

Latham has also kept its caseload high as other defense-oriented firms saw notable declines in the number of new federal securities suits they appeared in over the last three years. From 2021 to 2023, Latham represented clients in 142 cases across 26 federal court districts, compared to Skadden, with 117 cases, and Gibson Dunn & Crutcher LLP, at 83 cases.

Latham Bumps Skadden in Securities Defense

Latham & Watkins LLP remained consistently active in the securities litigation space from 2021 to 2023, over securities cases they handled over the last three years.

Most Active Law Firms Representing Defendants by Cases Filed from 2021 to 2023

Firm	2021	2022
Latham		50
Skadden		49
Gibson Dunn		36
Wilson Sonsini	24	
Cooley	24	
Davis Polk	28	
WilmerHale	28	
Goodwin	29	
Paul Weiss	17	
Sullivan & Cromwell	22	

Source: Lex Machina • Created with [Datawrapper](#)

In a statement to Law360 on Wednesday, Andrew Clubok, global chair of Latham's securities litigation and professional liability practice, attributed the firm's high level of activity to the "breadth and depth" of its practice.

"Our group isn't just one or two stars — we've had dozens of lawyers from all over the country individually recognized for their success in securities and [mergers and acquisitions] cases. But nobody works alone," Clubok said. "Latham fosters a firmwide culture of collaboration which means that those who turn to us to handle the most complex matters are going to get 'the best of' the firm, no matter which individual lawyers happen to work on the matter."

In 2023 alone, the firm appeared on behalf of clients defending against 44 suits. The rest of the firms listed in the report, including Skadden and Gibson Dunn, all worked on fewer than 30 cases.

Latham has also remained consistent despite a decline in federal securities case filings. According to the Lex Machina report, 1,758 federal securities suits were filed in 2023 — a 34% drop from when the number peaked at 2,647 cases in 2021.

However, while securities cases have declined overall, the report says some subsets of securities litigation, including shareholder derivative suits and cryptocurrency cases, have increased. The report states that the spike in case filings in 2021 may be related to the surge in mergers and acquisitions, businesses formed through special purpose acquisition companies and an expansion in capital markets that occurred that year.

"Therefore, the drop in case filings in 2022 could have been a return to the normal trend rather than a marked decrease," the report states. "Whether 2023 was a return to normalcy or the continuation of a downtrend can only be determined with more time."

The report notes that the 2021 spike can also partly be attributed to the Delaware Chancery Court's 2016 ruling in **Trulia Inc. Stockholder Litigation** , in which the court said it would reject disclosure-only settlements unless the resulting disclosures are "plainly material" and not just potentially significant.

The report's law firm data reflects the decline in new securities case filings. For instance, Skadden saw a 34% drop in the number of cases it was involved with from 2022, while Wilson Sonsini Goodrich & Rosati PC saw its caseload decline by nearly half.

In a phone call with Law360 on Wednesday, Scott Musoff, co-deputy head of Skadden's securities litigation group, said the general decline in securities case filings is due to a combination of factors.

"It's a combination of coming out of the pandemic, a robust stock market and, I think, a decline generally in the number of public offerings," he said. "But I think we've been very pleased that [Skadden's] activity has remained very high."

"We're always in that mix of a handful of firms that can say that they represent more of these types of cases than many other firms, and I think we like to attribute that to the fact that we have a very broad array of clients and geographic breadth in our securities litigation practice not only throughout the United States but internationally, as well," he added.

Greg Watts, partner and securities litigation practice group leader at Wilson Sonsini, also noted in an email to Law360 that the firm has seen an uptick in shareholder securities lawsuits filed in state courts nationwide.

"So comparing only federal case totals between 2022 and 2023 doesn't fully reflect how busy we've been in 2023," he said.

On the plaintiffs side, the U.S. Securities and Exchange Commission remained the most active counsel, with 694 securities cases filed in 62 districts since 2021. Long Law, led by former Rigrodsky Law PA partner Brian D. Long, came in second, with 421 cases filed, while Rigrodsky ranked third, with 414 cases.

However, Rigrodsky and Weiss Law LLP, which came in fourth in the rankings, have seen steep drops in the number of cases filed, according to the report. In 2021, Rigrodsky filed 230 cases, compared to 54 this past year. Weiss Law saw a similar decline, from 285 cases in 2021 to 49 cases in 2023.

Richard Adam Acocelli Jr. of Acocelli Law was the most active individual attorney of the last three years, representing plaintiffs in 470 securities cases. However, the report notes that Acocelli Law does not appear on the list of most active firms because Acocelli's standing as the most active individual attorney includes cases he was involved with while a practicing attorney at Weiss Law.

Wall Street giants were among the most common defendants in securities cases over the past three years. J.P. Morgan Securities LLC was the most frequently sued, having been named in 56 cases, followed by Goldman Sachs & Co. LLC, at 55 cases, and Morgan Stanley & Co. LLC, at 54.

"One reason big banks were the leading defendants was likely due to their role as underwriters to the [initial public offerings] that were the subject of the securities class actions," the report states.

Regarding the types of cases filed, those mentioning cryptocurrency continued to rise, with 171 suits filed in 2023. The report states that the volatile price of bitcoin over the last decade may be a contributing factor, along with the growing popularity of crypto — and increased regulatory scrutiny.

The report notes that "the trend's upward continuation will largely depend on the court's answer to the threshold question: Does the non-fungible token or cryptocurrency constitute a security?"

Musoff said that he and his colleagues at Skadden have also noticed a shift toward more crypto-

related securities cases.

"There has certainly been an uptick as the [crypto] industry has grown ... but one of the things I like to say is that there is a certainty that there will be an uncertain type of case that comes up each year," he said.

Finally, the report shows that Delaware and the Southern District of New York continued to dominate as the country's most active federal districts for securities cases. SDNY saw nearly 36% of all securities cases during the past three years, while Delaware saw roughly 10%.

However, the data for the districts nevertheless reflects the downward trend in new securities case filings. While SDNY remained the most active district, it saw 165 fewer cases in 2023 compared to the previous year. The Eastern District of New York ranked as the third-most active district, but it also saw a steep 70% decline in the number of cases.

At the appellate level, the Second and Ninth Circuits continued to see the most activity over the last three years, with 152 and 124 cases, respectively.

--Editing by Alanna Weissman and Kelly Duncan.

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Quinn Emanuel's 2nd \$185M Fee Bid Blasted As 'Indefensible'

By Jack Karp

Law360 (March 6, 2024, 4:30 PM EST) -- Quinn Emanuel Urquhart & Sullivan LLP's second attempt to win \$185 million in attorney fees in \$3.7 billion litigation over the Affordable Care Act still fails to justify the "indefensible" amount and barely pays "lip service" to a reevaluation ordered by the Federal Circuit, health insurers told the federal claims court.



Health insurers are asking the federal claims court to reject Quinn Emanuel's second bid for \$185 million in attorney fees in litigation over the Affordable Care Act. (iStock.com/Gustavofrazao)

The Federal Circuit already wiped out the \$185 million attorney fee that the U.S. Court of Federal Claims awarded to Quinn Emanuel and directed the claims court to reexamine objecting class members' insistence that the firm hadn't justified its fee request, Kaiser Foundation Health Plan Inc. and UnitedHealthcare Insurance Co. said Tuesday.

"Despite this clear direction, class counsel's second petition again fails to justify its lodestar and again seeks to avoid a lodestar cross-check. It instead asks the court to rubberstamp the same \$185 million award," the health insurers said in their opposition to the firm's latest motion for approval of its fee request.

That motion for approval fails to support the 10,000 hours Quinn Emanuel says it spent on the case, suggests that the firm double-counted hours by including time spent on a separate multibillion-dollar

class, and tries to skew its rates higher by seeking 2023 rates, even though its first fee petition was filed in 2020, according to the insurers.

"Trying to reverse-engineer defenses for its indefensible fee demand, class counsel uses inflated and unproven hours, multiplies those alleged hours by unprecedented rates, and then proposes a multiplier that is miles outside accepted norms. That is akin to applying no cross-check at all," the insurers said.

Quinn Emanuel and a group of healthcare plan insurers the firm represents **have insisted** the firm used a novel claim and achieved a 100% recovery for the class in litigation over so-called risk corridor payments under the ACA.

But objectors Kaiser Foundation, UnitedHealthcare and others have argued that class counsel was **entitled to just \$8.8 million** after a lodestar cross-check.

A Court of Federal Claims judge granted Quinn Emanuel's **request for \$185 million**, or 5% of the total \$3.7 billion settlement, in 2021 finding that a lodestar cross-check was unnecessary. But that conclusion "was legal error," according to the Federal Circuit, which **vacated the award** in 2023.

That \$185 million amount was inconsistent with promises made in class opt-in notices, and the "extraordinarily high award" wasn't justified, the three-judge panel ruled, ordering the fees to be recalculated.

But Quinn Emanuel's renewed request for \$185 million "does little more than pay lip service" to the Federal Circuit's order, according to the insurers.

While the insurers still think their original \$8.8 million fee request is reasonable, they are willing to agree to a fee award between \$11.77 million and \$23.14 million in "the interest of finality," they told the claims court Tuesday.

"[T]he objectors sincerely want class counsel to be handsomely rewarded. \$11.77 [million] to \$23.14 million represents an incredibly large fee award that also fulfills class counsel's promise of a lodestar cross-check," the insurers said.

A spokesperson for Quinn Emanuel pushed back against the insurers' objections Wednesday.

"We strongly disagree with the objectors' insinuations. We are proud of our work in this case and the unprecedented \$3.7 billion award we obtained for the class, and we will refute these latest assertions in our upcoming reply brief," the spokesperson said in a statement.

An attorney representing the objecting class members did not respond to a request for comment Wednesday.

Kaiser and UnitedHealthcare are represented by Moe Keshavarzi of Sheppard Mullin Richter & Hampton LLP.

Quinn Emanuel is represented in-house by Adam B. Wolfson and Andrew Schapiro.

The cases are Health Republic Insurance Co. et al. v. U.S., case number 1:16-cv-259C-KCD, and Common Ground Healthcare Cooperative et al. v. U.S., case number 1:17-cv-00877-KCD, in the U.S. Court of Federal Claims.

--Editing by Nicole Bleier.



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NYCB Gets \$1B Infusion, Names Ex-OCC Chief As CEO

By **Katryna Perera**

Law360 (March 6, 2024, 6:25 PM EST) -- New York Community Bancorp Inc. has lined up a \$1 billion investment from several institutional investors, including former U.S. Secretary of the Treasury Steve Mnuchin's firm, in a deal guided by Skadden Arps Slate Meagher & Flom LLP and Sullivan & Cromwell LLP.

In an announcement on Wednesday, NYCB said Liberty Strategic Capital, Hudson Bay Capital, Reverence Capital Partners, Citadel Global Equities, other institutional investors and certain members of NYCB's management have agreed to make a combined investment of over \$1 billion in the bank.

According to the announcement, Hudson Bay will invest \$250 million and Reverence will invest \$200 million. The largest reported investment of \$450 million will come from Liberty, Mnuchin's investment firm.

Mnuchin will also join NYCB's board of directors along with former U.S. Comptroller of the Currency Joseph Otting and two others from Hudson Bay and Reverence. Otting will also step in as CEO, the announcement states, and

In a statement, Mnuchin said Liberty decided to make the investment because it believes the bank's leadership has taken appropriate steps to stabilize the bank and position it to become the "best-in-class \$100+ billion national bank with a diversified and de-risked business model that supports long term profitability."

"In evaluating this investment, we were mindful of the bank's credit risk profile. With the over \$1 billion of capital invested in the bank, we believe we now have sufficient capital should reserves need to be increased in the future to be consistent with or above the coverage ratio of NYCB's large bank peers," Mnuchin added.

Under the terms of the transaction, NYCB will sell and issue shares of common stock of the bank to investors for \$2 per share, along with a series of convertible preferred stock with a conversion priced at \$2.

Investors will also receive 60% warrant coverage to purchase non-voting, common-equivalent stock with an exercise price of \$2.50 per share, a 25% premium to the price paid on common stock, according to the announcement.

The transaction is subject to certain closing conditions and regulatory approvals related to the new roles of Otting and others, but it is expected to close on March 11.

NYCB's Non-Executive Chairman, Sandro DiNello, said in a statement that the bank welcomes the incorporation of the institutional investors' insight going forward.

"The strategic investment involving [Mnuchin and Otting], along with the other institutional investors is a positive endorsement of the turnaround that is underway and allows us to execute on our strategy from a position of strength," DiNello said.

"We enter this next chapter with a strong balance sheet and liquidity position supported by a diversified and retail focused deposit base," he added. "Our new leadership team, with the support of

the reconstituted board, will continue to take the actions that are necessary to improve earnings, profitability and drive enhanced value for shareholders."

NYCB and its executives have faced a **growing pile of litigation** related to the fallout from its acquisition of Signature Bank's assets last year. NYCB acquired \$38.4 billion in assets from Signature Bank in March 2023, which had been placed into Federal Deposit Insurance Corp. receivership after **failing**.

Jefferies LLC is serving as financial adviser and Skadden Arps Slate Meagher & Flom LLP is serving as legal counsel to NYCB.

Sullivan & Cromwell LLP is serving as legal counsel to Liberty Strategic Capital.

Counsel information for the other parties was not immediately available.

--Editing by Vaqas Asghar.

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