

GE Workers Approved for \$61 Million 401(k) Deal, Attorneys' Fees

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

Attorneys representing General Electric Co. workers will receive a one-third cut of the \$61 million class settlement they negotiated in a lawsuit challenging the affiliated investment funds in the company's 401(k) plan, a federal court said Friday.

Judge Indira Talwani granted final approval to the deal, which GE workers described as the largest class settlement ever reached in an Employee Retirement Income Security Act lawsuit targeting a retirement plan that offers affiliated investments. The approval order, issued in the US District Court for the District of Massachusetts, was accompanied by an order awarding the workers' lawyers one-third of the settlement value as attorneys' fees, along with interest and more than \$1.3 million in expenses.

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

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

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

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

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

The case is In re GE ERISA Litig. , D. Mass., No. 1:17-cv-12123, 3/8/24 .

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Class Action

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Advisers Make Millions in Bankruptcy as Opioid Victims Get Zero

By Amelia Pollard and Fiona Rutherford

Bloomberg Law News 2024-03-08T13:30:56118231131-05:00

Advisers Make Millions in Bankruptcy as Opioid Victims Get Zero

By Amelia Pollard and Fiona Rutherford2024-03-08T06:00:28724-05:00

Nancy Zailo is at the back of the line.

She's behind Jeffrey Stein , the Rite Aid Corp. chief executive collecting \$300,000 paychecks every month. She's behind consultants at Alvarez & Marsal , who have billed the pharmacy chain \$75 million and counting. She's behind bondholders and behind \$2,000-an-hour lawyers from Kirkland & Ellis . And she's behind lenders like Bank of America Corp. and Wells Fargo & Co. that are collecting millions of dollars in interest from a credit line carrying the company through bankruptcy.

Only after they've all been paid – along with many, many others – could some of what's left go to thousands like Zailo who allege the drug-store chain ignored red flags as it fed their opioid addictions for years. "I lost everything," she said.

Here's what she's expected to get: Nothing.

The plight of people like Zailo, it turns out, does little to bend the rigid structures of the US Bankruptcy Code. In fact, insolvency rules make it pretty easy for Rite Aid to nearly ignore its opioid claimants altogether. Rite Aid, which has denied wrongdoing, faced more than 1,600 opioid lawsuits when it filed for bankruptcy in October.

While rivals Walmart Inc. , CVS Health Corp. and Walgreens Boots Alliance Inc. [agreed to pay](#) more than \$13 billion combined to settle opioid lawsuits, Rite Aid never reached a similar accord before its bankruptcy filing put litigation on hold. The company told opioid plaintiff lawyers it didn't have the funds, according to people with knowledge of the negotiations, who asked not to be named because the talks were private. And unlike [drugmakers](#) that have gone bankrupt, the retailer doesn't expect it will wind up with any money to pay opioid victims.

"Bankruptcy is perceived as a strategic tool that provides enormous leverage in negotiations with injured people," said Melissa Jacoby, a law professor at University of North Carolina Chapel Hill. "It's a real problem that bankruptcy is being used this way, even when a company has other financial problems."

Rite Aid's restructuring talks have focused on how much it can afford to repay its secured creditors before either selling itself or reorganizing into a new company, immune from future opioid lawsuits. People like Zailo are simply lumped in with every other general unsecured creditor, meaning they're among the last to get any compensation.



Photographer: Mario Tama/Getty Images North America

Bankruptcy is notoriously expensive, and large companies' advisory fees often climb into the hundreds of millions. Just five months into its court proceedings, Rite Aid is facing at least \$200 million in fees from lawyers, consultants and bankers, according to court records. In January it [hired additional consultants](#) to liquidate its assets. So high are the fees that some of the company's creditors, themselves no strangers to expensive lawyers, have grown concerned about how rapidly they've been piling up, according to people with knowledge of the matter, who asked not to be named because the discussions were private.

Rite Aid and Wells Fargo declined to comment. Kirkland & Ellis, Alvarez & Marsal and Bank of America didn't respond to requests for comment.

Prescriptions were a major part of Rite Aid's business. Dispensing medication regularly accounted for around 70% of the company's total drugstore sales over the years, regulatory filings show. Drugs were a buoy for the retailer as it fell into disrepair amid stiff competition and shifting shopping habits.

Pharmacists are required to conduct due diligence when filling prescriptions to make sure they are for a legitimate medical purpose. A whistleblower lawsuit filed by three Rite Aid pharmacists in 2019 alleged the company illegally filled "hundreds of thousands" of invalid prescriptions and billed the US government for ones that were covered by Medicare and Medicaid. The US Justice Department intervened in the case in March 2023 to file its own complaint in support of the allegations, saying Rite Aid's practices "opened the floodgates" for millions of illegal opioid pills.

The company deleted pharmacists' internal notes that raised concerns about certain prescribers, including ones as blunt as "cash only pill mill???" and "writing excessive dose[s] for oxycodone," according to the DOJ. The company also had systems in place to ensure pharmacists were working as fast as possible, regardless of how suspicious a prescription might be, according to the whistleblower suit.

Rite Aid filed a motion to dismiss the case soon after the DOJ intervened, arguing that the government's allegations "rest on nothing more than its disagreement, with the benefit of hindsight, with doctors' prescribing decisions." The company also added that its pharmacists used professional judgment in filling prescriptions, and that the firm helped to support them.

Rite Aid was Zailo's go-to pharmacy after she shattered her wrist when she was thrown through the windshield of her car in 1994. The pharmacy was across from her doctor's office in Denville, New Jersey, and it soon became a frequent stop for her. She said her prescriptions always came quick, even as her daily dose of OxyContin rose to 800 milligrams – enough to last a typical patient two weeks. She says she also got other drugs like Percocet, Vicodin and Xanax there.

The pharmacists would even fill Zailo's prescriptions early if she was willing to pay in cash, she said. She says she saw multiple pharmacists over the years there, and none of them questioned her outsize dosage or early fills.

A graphic designer at the time of her accident, she eventually ended up homeless for a time before recovering from her addiction around eight years ago. She now relies on social security disability assistance because of a stroke she suffered during an episode of withdrawal and supplements her income by selling hand-crocheted garments.

After Rite Aid's bankruptcy, Zailo volunteered to serve on the proceeding's official tort committee, a group that represents people who say they were hurt by the company. Although she wasn't among those who sued Rite Aid before its financial collapse over its alleged role in the opioid crisis, she has joined those who are now asserting a claim against the company for damages. It's the last chance she has to try to get compensation.

"Fortunately, the opioids are gone," she said over Zoom in late February. "Unfortunately, the pain's still here."

The company earlier agreed to pay at least \$42 million to settle separate cases brought by New York's Suffolk County, three other local governments and the state of West Virginia. But it never reached a global settlement.

That's in part because Rite Aid has been struggling for years. A much bigger rival, Walgreens, tried to buy the company for about \$17 billion in 2015, but the deal got hung up on antitrust concerns and Walgreens settled for buying close to half of Rite Aid's stores instead. What was left of the chain started racking up annual losses in 2019, and three years later, then-CEO Heyward Donigan acknowledged that the traditional retail part of its business was "in a deteriorating state."

Last year, Rite Aid filed for Chapter 11 bankruptcy, listing debts of \$8.6 billion, close to \$1 billion more than the value of its assets at the time. The company got a new \$200 million loan in Chapter 11 and continued access to an existing credit line from a group of its secured lenders after it agreed to bump up more than \$3 billion of their old debt in the repayment line.

Rite Aid is still trying to sell its retail business. But its back-up plan involves shedding a lot of debt, shutting down more than 600 stores and giving the remaining pharmacy business a fresh start. Mediated talks with the committee of mass tort claimants are ongoing, so their outcome could change if a deal is struck. But Rite Aid said in court papers as recently as Feb. 20 it doesn't expect for there to be any money left for opioid plaintiffs after paying higher-ranking debts.

Companies often dole out millions to advisers in the months leading up to a bankruptcy filing, and Rite Aid was no exception. The company paid around \$90 million to advisers, investment bankers and lawyers in the months before the bankruptcy, according to court papers. Consultants at Alvarez & Marsal and lawyers at Kirkland & Ellis charged the company \$34 million and \$16 million, respectively, during the bankruptcy case through the end of December. Their fees from January and February have not yet been disclosed.

Then there are the executive bonuses. Rite Aid paid more than \$18 million in bonuses to executives before filing for bankruptcy. Stein, who was appointed as the company's chief executive officer the day it went bankrupt, is due to get a payout of as much as \$20 million when the company emerges from the court process, according to a regulatory filing. That's not far from what Walmart's chief executive officer received in salary last year.

Meanwhile, Zailo is waiting alongside thousands of other opioid victims to definitively find out if the company will compensate her at all. The bankruptcy is the last real chance for them to argue that Rite Aid should have to pay opioid victims. Once a federal judge signs off on the company's restructuring plan, it will be largely cleansed of previous wrongdoing and shielded from future lawsuits.

The company had a responsibility to "monitor what doctors were prescribing and patients were taking and how often," Zailo said. "There should have been a better system in place. I knew what was going on wasn't right."

--With assistance from Reshmi Basu , Jonathan Randles and Elizabeth Campbell .

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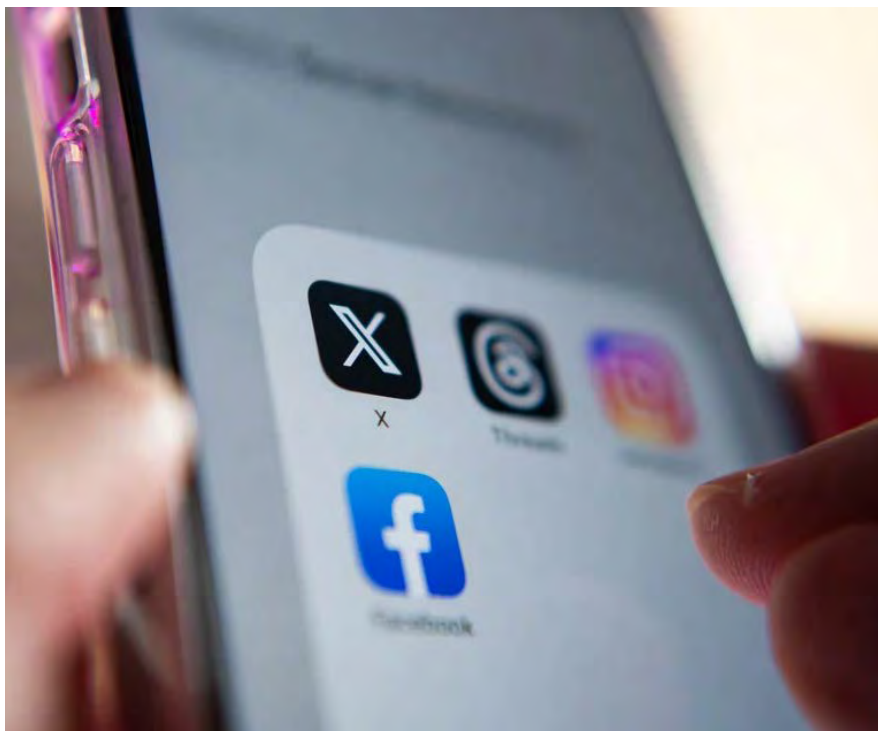
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Facebook, NVIDIA Take Stock-Drop Appeals to Supreme Court

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By Maydeen Merino



Facebook has turned to the U.S. Supreme Court in its effort to defeat an investor lawsuit filed after the Cambridge Analytica scandal in 2018 wiped out \$100 billion in the tech giant's market capitalization.

Facebook founder Mark Zuckerberg and company filed a petition this week urging the justices to review a recent U.S. Court of Appeals for the Ninth Circuit decision that partially revived the suit.

The appeal was filed the same day as a similar high court petition from NVIDIA Corp., the maker of "graphics processing units" that is also facing an investor stock-drop suit in the Ninth Circuit.

Facebook Sued Over 'False' Risk Report

With the help of Joshua Lipshutz and other lawyers at Gibson, Dunn & Crutcher, Facebook says the appeals court's ruling creates "burdensome and unworkable" new requirements for corporate risk disclosures and will turn the Ninth Circuit into the "the preferred forum for plaintiffs alleging fraud-by-hindsight after a stock drop."

The lawsuit centers around two Facebook stock drops in 2018 that totalled more than \$200 billion.

The first occurred after news reports surfaced detailing the exploitation of Facebook user data by political consulting firm Cambridge Analytica to boost former President Donald Trump's campaign. The second drop occurred a few months later after additional reporting about Facebook's practice of "whitelisting" Apple, Microsoft and other third parties by giving them access to user friend data.

Facebook says the second drop had to do with a disappointing earnings report and not the "whitelisting" story.

Lead plaintiff Amalgamated Bank claims Facebook submitted a false Form 10-K to the U.S. Securities and Exchange Commission in 2016 when it cast misuse of user data as a hypothetical risk that could harm the company's bottom line. In reality, the lawsuit alleges, that misuse was already occurring when harvested user data was sold to Cambridge Analytica to influence American elections.

A panel of the Ninth Circuit held that the plaintiffs' allegations about the Form 10-K were sufficient to meet the heightened pleading standards of the Private Securities Litigation Reform Act, which was enacted in 1995 to deter frivolous securities lawsuits.

Facebook cast the decision as creating an "extreme rule" not required by any other circuit that would force companies to "chronicle past instances a risk came to fruition, even if the company has no reason to suspect those events pose any risk of business harm."

"That outlier approach will spur lawsuits alleging fraud-by-hindsight, make compliance with 10-K disclosure requirements burdensome and unworkable, and ultimately reduce the usefulness of risk-factor disclosures by drowning investors in irrelevant information," Facebook wrote. "This Court should grant certiorari and reverse."

Facebook's petition was docketed at the Supreme Court on Wednesday. Amalgamated Bank has until April 5 to submit its response. The case is docteted at the Supreme Court as *Facebook Inc. v. Amalgamated Bank*, No. 23-980.

NVIDIA Also Seeks Justices' Review

In a similar Supreme Court petition made available Wednesday, NVIDIA asked the justices to review and reject a stock-drop suit filed by investors claiming the artificial intelligence company made false and misleading statements about the impact of cryptocurrency sales on its business.

Like Facebook, NVIDIA argued that the Ninth Circuit departed from other circuit courts in relaxing the heightened pleading requirements of the PSLRA..

“This Court should grant certiorari to resolve these important disagreements among the circuit courts and ensure that the PSLRA continues to serve as a bulwark against abusive and speculative litigation,” wrote NVIDIA’s legal team, led by Hogan Lovells’ Neal Katyal and including other attorneys at that firm and Cooley.

That case is docketed as *NVIDIA Corp. v. E. Ohman J:Or Fonder AB*, No. 23-970.

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Binance Investor Suit Gets Second Life From US Appeals Court
By Bob Van Voris

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Binance Investor Suit Gets Second Life From US Appeals Court

By Bob Van Voris2024-03-08T10:58:35497-05:00

A fraud suit targeting Binance Holdings Ltd. and founder **Changpeng Zhao** was given new life as the federal appeals court in New York overturned a lower-court ruling that threw it out.

Buyers of cryptocurrencies on Binance.com sued in 2020, claiming the exchange sold billions of dollars in tokens that weren't registered as securities in violation of US law. A judge in Manhattan dismissed the case two years later, ruling that the crypto investors had waited too long to sue and weren't entitled to bring suit in US court for non-US transactions.

A three-judge panel of the appeals court reversed that ruling on Friday, reviving the case and sending it back to the lower court for pretrial evidence gathering. The court said the transactions may be domestic, because the investors claimed their orders were matched with offers from counterparties on servers in the US. It also ruled the suit was filed within the required one-year time frame.

The investors are seeking class action status to represent other purchasers of tokens on the Binance exchange.

A lawyer for Binance didn't immediately respond to a call seeking comment on the reversal.

The case is Lee v. Binance, 22-972, 2nd US Circuit Court of Appeals (Manhattan).

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Binance must face revived investor lawsuit in US over crypto losses

 [reuters.com/technology/binance-must-face-revived-investor-lawsuit-us-over-crypto-losses-2024-03-08](https://www.reuters.com/technology/binance-must-face-revived-investor-lawsuit-us-over-crypto-losses-2024-03-08)

Jonathan Stempel

Smartphone with displayed Binance logo and representation of cryptocurrencies are placed on a keyboard in this illustration taken, June 8, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, March 8 (Reuters) - A federal appeals court on Friday revived a lawsuit where investors accused Binance, the world's largest cryptocurrency exchange, of violating U.S. securities laws by selling unregistered tokens that lost much of their value.

In a 3-0 decision, the 2nd U.S. Circuit Court of Appeals in Manhattan said investors in the proposed class action plausibly alleged that domestic securities laws applied because their purchases of tokens had become irrevocable in the United States once they paid for them.

Circuit Judge Alison Nathan said Binance's use of domestic Amazon computer servers to host its platform supported this outcome, given how Binance "notoriously denies the applicability of any other country's securities regulation regime."

The appeals court also said investors could pursue claims arising from purchases made within the year before they sued.

Friday's decision reversed a March 2022 ruling by U.S. District Judge Andrew Carter in Manhattan, and returned the case to him.

The appeal covered investors who had bought seven tokens - ELF, EOS, FUN, ICX, OMG, QSP and TRX - through Binance starting in 2017, and which soon lost much of their value.

They claimed that Binance failed to warn them about the tokens' "significant risks" and sought to recoup what they paid.

Binance argued that U.S. securities laws did not apply because its exchange was located outside the country.

It cited 2010 U.S. Supreme Court decision, *Morrison v National Australia Bank*, that limited the extraterritorial reach of domestic securities laws.

Binance and its lawyers did not immediately respond to requests for comment.

Jordan Goldstein, a lawyer for the plaintiffs, said his clients were pleased that the court "unanimously acknowledged the strength of our claims."

The case is separate from Binance's recent guilty plea and more than \$4.3 billion penalty for violating federal anti-money laundering and sanctions laws.

Binance founder Changpeng Zhao pleaded guilty to related money laundering violations and stepped down as chief executive. His sentencing is scheduled for April 30.

The case is Lee et al v Binance et al, 2nd U.S. Circuit Court of Appeals, No. U.S. District Court, Southern District of New York, No. 22-972.

Reporting by Jonathan Stempel in New York, Editing by Franklin Paul

Harpoon Hit With Investor Lawsuit for \$680 Million Sale to Merck

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- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0220

An investor sued Harpoon Therapeutics Inc. on Thursday over fears that its planned \$680 million sale to Merck & Co. may be aimed at handing a windfall to insiders who were given cheap equity before the transaction.

The lawsuit seeks internal files to investigate concerns that a board with ties to New Leaf Venture Partners pushed for an underpriced sale so the investment firm could turn a quick 350% profit on securities it got at a huge discount. The complaint in Delaware's Chancery Court was filed a day before Harpoon's stockholders are set to vote on the deal Friday.

The price of \$23 a share falls below many Wall Street estimates for Harpoon, which in October announced positive data for an experimental drug to treat small cell lung cancer, the suit says. But it's a great deal for New Leaf, which bought millions of dollars worth of stock and warrants for \$5.83 each after Harpoon's board was already aware of the promising results, according to the court filing.

The sale "is riddled with indicia of unfairness," the complaint says. "The transaction was announced on the heels of multiple capital raises that will lock in tens, if not hundreds, of millions of dollars of profits for company insiders."

Harpoon and New Leaf didn't immediately respond to requests for comment Thursday. The venture capital firm—which allegedly held about a 16% stake in Harpoon as of January, making it the company's largest investor—isn't named as a defendant.

According to the lawsuit, New Leaf—whose managing director sits on Harpoon's board—acquired discounted securities in two tranches within the year before the Merck transaction was announced. In addition to participating in the October private placement, New Leaf allegedly bought preferred shares for \$1,000 each in March 2023 that it will get the chance to cash in for nearly \$3,600 in connection with the sale.

"Moreover, the transaction process was rushed and there was no formal auction," the complaint says.

The lawsuit seeks documents under a state law giving shareholders broad access to corporate records if they credibly suspect wrongdoing. The “lackluster premium and suspect process, and the misaligned interests of New Leaf,” satisfy that legal standard, the suit says. Records cases often reflect an attempt to drum up fiduciary breach claims for future litigation.

The investor leading the case, Kamyar Haimof, is represented by Bernstein Litowitz Berger & Grossmann LLP and Wohl & Fruchter LLP.

The case is Haimof v. Harpoon Therapeutics Inc. , Del. Ch., No. 2024-0220, complaint filed 3/7/24 .

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Terran Orbital Sued Over Poison Pill Added After Lockheed Offer

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- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0218

An investor is suing Terran Orbital Corp. over the poison pill its board adopted after Lockheed Martin Corp. offered to take the satellite maker private for more than \$500 million.

The lawsuit, filed Wednesday, seeks an order invalidating Terran's shareholder rights plan, which works by triggering a major stock dilution event if any investor or consortium acquires a 15% stake. The plan's daisy-chain clause, taking an aggressive view of when stockholders count as a group, makes it "just like the pill" struck down in a landmark 2021 ruling by a Delaware Chancery Court judge, the suit says.

The maneuver reflects a "brazen attempt by the members of the Terran board to entrench themselves—and potentially favor a management-led buyout over competing bids," according to the proposed class action. "This unreasonably overbroad provision serves as a tripwire that will chill corporate democracy."

Terran didn't immediately respond to a request for comment Thursday. Lockheed isn't named as a defendant.

According to the complaint, the Lockheed offer followed pressure from activist investors drawn to Terran by its poor performance after the blank-check merger that took it public. The activist group, led by Sophis Investments LLC, allegedly spent months pushing for a sale—potentially to Lockheed—and agitating for reforms to the company's governance structure, including a new CEO.

Read More: Poison Pills Targeting Activists Push Judges to Draw New Lines

Although CEO Marc Bell called the shareholder activism "a joke," the lawsuit says, the two sides reached a settlement in early February, when Sophis agreed to back off in exchange for potential changes to the board's roster. Bell—also the company's founder and chairman—has said he "would lead a management buyout before allowing the company to be sold to a third party," according to the court filing.

Lockheed submitted its bid March 1, offering to acquire Terran for \$1 a share and assume more than \$300 million in debt. But “instead of allowing stockholders to freely assert their will through a normal process of corporate democracy,” the board adopted the poison pill three days later, the suit says.

The investor leading the case, Andrew Jones, is represented by Labaton Keller Sucharow LLP, Equity Litigation Group LLP, Friedman Oster & Tejtell PLLC, and Richard A. Maniskas of Berwyn, PA. Terran and its board haven’t yet made a court appearance.

The case is Jones v. Bell , Del. Ch., No. 2024-0218, complaint filed 3/6/24 .

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March 7, 2024, 11:15 AM PST

Matt Levine's Money Stuff: Exxon Barges in on Hess Deal

By Matt Levine

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Matt Levine's Money Stuff: Exxon Barges in on Hess Deal

By Matt Levine 2024-03-07T14:15:22801-05:00

Stabroek

I worry that perhaps nobody knows how mergers work. Not in like a “let me tell you” sense, but in an “everything is fundamentally unknowable” sense. Lots of contracts between companies have provisions that say that the companies can’t transfer them to someone else. If you hire McKinsey & Co. to do some consulting for you, you don’t want Joe’s Consulting to show up for the engagement and say “oh yeah we bought this contract from McKinsey, that’s fine right?” So the contract will say that neither side can assign its rights and obligations under the contract to anyone else.

So an *incredibly basic* question in mergers and acquisitions is: If we acquire Company X, do we keep all of its contracts? Or do those contracts have “anti-assignment” provisions that would be triggered by an acquisition?

From first principles, you’d think that most of the contracts should continue without interruption. If you rent some office space to Company X and it gets acquired by another company, not much has changed *for you*: The same people come to the same office to do the same work, and they pay you the same rent with checks drawn on the same account. If you license some software from Company X and it gets acquired, it’s still the same software.

If the contracts continue uninterrupted when the company is acquired, that generally makes life simpler for the company’s customers and suppliers and landlords. Also, though, it makes mergers and acquisitions *possible*. If every company lost all of its office leases and customers and supply deals and employment contracts when it was acquired, who would want to acquire it? A company mostly *is* a big pile of contracts; if an acquisition terminated all of those contracts then there would be no acquisitions.

Most of the time this is the right answer and works out fine. Most big public mergers and acquisitions, for instance, are structured in ways that preserve the target company intact, with the buyer owning its stock. (For instance, in a “reverse triangular merger” in which a subsidiary of the buyer merges with the target, which survives the merger as a subsidiary of the buyer.) A contract that says “Company X can’t transfer this contract to anyone else” should not be affected by this sort of deal: Company X *hasn’t* transferred the contract to anyone else; Company X is still doing the contract; it’s just that Company X has a new owner.

But probably there are some contracts where that doesn’t make sense, where an acquisition of the company should give the counterparty a right to get out of the contract. If you have a huge deal to sell a sensitive product to some trusted customer, and then that customer gets acquired by your biggest rival, or in a leveraged buyout that makes it less creditworthy, or by a sanctioned foreign company, you will be unhappy and think that the deal is no longer what you signed up for. And so some contracts will say something like “you can’t transfer this contract, and just to be clear, if you get acquired in a merger we can also get out of the contract.”

You could imagine contracts just saying this clearly. Like, every contract could say either:

- 1. “Neither company can transfer or assign this contract, but obviously if the company is acquired in a merger that’s fine, that’s not a transfer.” Or,
- 2. “Neither company can transfer or assign this contract, and if the company is acquired in a merger that also counts as a transfer and is not allowed.”

I don’t know, you’d have to work on the language. There are lots of more complicated ways to acquire a company, different ways to structure mergers or buy control or gain influence on the board or whatever; specifying exactly what you mean could take some work.

But in actual fact the world seems to be considerably messier than that. There are all sorts of contracts with all sorts of language, and a lot of them do not make it *obvious* whether the company can do a merger and keep the contract. Here is a sort of horrifying law-firm blog post about a 2020 court decision in Delaware finding that a contract that says it can’t be assigned “by operation of law or otherwise” does not survive a *forward* triangular merger, which is different from *other* Delaware decisions finding that “anti-assignment clauses containing both a prohibition on assignment ‘by operation of law’ and a reference to ‘successors’ were ambiguous” about mergers. You get the sense that there are a lot of contracts out there where one side thinks “this contract terminates on a merger” and the other side doesn’t.

Hess Corp. is an oil company. Last October, it signed a merger agreement to be acquired by Chevron Corp. in a reverse triangular merger. Like a lot of oil companies, Hess owns partial stakes in several oil fields, which it shares with other oil companies under joint venture agreements. Some joint venture agreements have provisions saying that Hess can't transfer its interests in those fields without giving its partners a right of first refusal to buy out Hess's interests. You could imagine those provisions applying to mergers (oil projects are pretty fraught, Hess's partners don't want to suddenly end up partners with some other, more geopolitically undesirable company), or you could imagine them *not* applying to mergers (if an oil company lost all of its oil projects when it was acquired, who would want to acquire it?). Either way, you could imagine these provisions being *very carefully negotiated and drafted*, so that everyone was very clear on whether or not Hess could keep the joint ventures if it was acquired.

Or totally not! Bloomberg's Kevin Crowley reports:

Exxon Mobil Corp. filed for arbitration to retain pre-emption rights in a giant Guyanese oil field, threatening Chevron Corp.'s attempt to acquire a stake via its pending \$53 billion takeover of Hess Corp.

Exxon filed for arbitration in the International Chamber of Commerce in Paris on Wednesday, Senior Vice President Neil Chapman said during a Morgan Stanley conference. Exxon, as 45% owner and operator of the Guyana project, believes it has a right of first refusal over any change of hands in Hess' 30% stake and would consider matching Chevron's valuation, he said. ...

Chevron's deal to buy Hess amounts to a circumvention of Exxon's pre-emption rights, Chapman said. While the joint-operating agreement with Hess and other partners in Guyana is confidential, Exxon is "very, very confident" in its position, he said.

"We understand the intent of this language of the whole contract because we wrote it," Chapman said. "The Chevron-Hess transaction, what it really did, is it attempted to circumvent the commercial purpose" of the agreement.

Maybe! Bloomberg's Yiqin Shen, Dinesh Nair and Swetha Gopinath also report:

Hedge fund managers that wagered billions on Chevron Corp.'s October deal to buy Hess Corp. are sticking to their bets despite another roadblock that could potentially torpedo the acquisition. ...

"Chevron has made it clear that it doesn't think the right of first refusal issue is applicable, and most investors seemed to have gotten around to that view," said Frederic Boucher, a risk-arbitrage analyst at Susquehanna Financial Group, which is a market maker in Hess's securities. Chevron said last week that it's "fully committed" to the Hess deal and doesn't believe the contract or discussions with Exxon will prevent its completion.

Exxon thinks that the joint operating agreement for the Stabroek block off Guyana gives it a right of first refusal (ROFR) over any transfer of Hess's stake in the block, including by a merger in which Hess is acquired. Hess and Chevron think it doesn't apply to mergers; they say in their merger proxy that "Chevron and Hess believe that the Stabroek ROFR does not apply to the merger due to the structure of the merger and the language of the Stabroek ROFR provisions." "There is no possible scenario in which Exxon or CNOOC could acquire Hess' interest in Guyana as a result of the Chevron-Hess transaction," Hess told its employees yesterday.

All of these are big serious companies with good lawyers who have written these contracts before. Chevron's proposed acquisition of Hess is as straightforward as can be, a completely standard all-stock reverse triangular merger; there is no weird structuring here to either get around or trigger the right of first refusal. It's a simple question: Does the right of first refusal apply to a normal merger of Hess? Exxon seems confident that it does; Chevron and Hess seem confident that it does not.

Weird stuff. I *obviously* cannot tell you who is right. The language of the Stabroek joint operating agreement is not public, and neither is the arbitration filing, so I don't know what the contract says, and even if I did I probably wouldn't be sure what it *means*. The people who *wrote* it aren't sure!

Still, I see the arbitrageurs' point. "We owe it to our investors and partners to consider our preemption rights," says Exxon, and: "The pre-emption rights are to give us the opportunity to look at the value, which we can then match should we choose to do so." It is *considering options*, not *actually offering to buy the stake*. Buying the stake would be expensive, arguably more expensive for Exxon than for Chevron because it would have to gross Hess up for taxes. On the other hand, for Exxon, filing for arbitration to delay the Chevron/Hess deal (and cast some doubt on its ability to close) is just good business! At worst, you make life annoying for two competitors. At best, they write you a large check to go away and let them close their deal. Also:

The possibility that Exxon might eventually make a bid for Hess outright might have contributed to the [merger arbitrage] spread narrowing, Boucher added.

If Exxon just acquired Hess itself, I guess this joint venture wouldn't be a problem.

Avid oopsie

Elsewhere in "nobody knows how ____ work": *Really* nobody knows how convertible bonds work. I mean, a lot of people have the general idea (they're bonds that can convert into stock). But they are somewhat weird instruments with odd nooks and crannies, and, while they are not *rare*, neither are they all that common. Lots of companies will never do a convertible in their lives. Generally financially literate people — chief financial officers and corporate treasurers, industry investment bankers — will probably have a decent working knowledge of bond deals and bank loans and stock offerings and mergers, because they come up a lot; they might be less familiar with convertibles.

I, on the other hand, used to be a convertible bond investment banker, so I have somewhat more than the usual familiarity with them. I could tell you, for instance, that it is common in the US for a convertible to be done as a Rule 144A offering, meaning that the bonds are sold to large “qualified institutional buyers” (QIBs) in a private placement and then can’t be resold to retail investors. Doing a 144A deal is generally faster and cheaper than doing a public deal that is registered with the US Securities and Exchange Commission, and retail investors don’t really buy convertibles anyway.

But eventually the institutional buyers of a 144A deal will want to be able to convert their bonds into regular, publicly traded stock, so there needs to be some mechanism for turning “144A” convertibles into “registered” ones. I am old enough that, when I started as a converts banker, the way to do this was to file a registration statement with the SEC, but the modern approach is pretty much that you wait six months or a year and the convertible becomes freely tradeable as a legal matter.

As a *practical* matter, though, the way this works is that the bonds, when they are originally issued, have a “restrictive legend” on them saying that they can be sold only to institutional buyers, and after a year the company sends a notice to its transfer agent saying “you can take that legend off the bonds now.” And when the bonds have the legend, they can’t be freely traded; once the legend is off, they can be. Here I am pretending, as one does, that “the bonds” are pieces of paper with a legend stamped on them, but of course they are actually entries in an electronic database; what *really* happens is that the original bonds have a “restricted CUSIP” (the identification number that every security has), telling transfer agents and depositaries and brokers and everyone else that they can only be sold to QIBs, and then after a year the company gets them a new “unrestricted CUSIP” and they trade freely. This is not hard — it’s a phone call or an email, maybe a legal opinion — but the company has to do it.

It is good, for the bondholders, to get unrestricted bonds, though it doesn’t matter *that* much, since they’re really only trading with other institutional buyers anyway. And so in the documents for the convertible bond, there will be a provision saying that, after a year, the company has to make the convertible unrestricted (by removing the restrictive legend and getting an unrestricted CUSIP). If it doesn’t do that, it has to pay some extra interest to compensate the bondholders and to incentivize the company to get its act together.

So for instance here is the indenture for Avid Bioservices Inc.’s 1.25% exchangeable senior notes due 2026, a convertible bond it issued in 2021. Section 4.06(e) of the indenture, the 94-page contract governing the bonds, says:

If, and for so long as, the restrictive legend on the Notes specified in Section 2.05(c) has not been removed, the Notes are assigned a restricted CUSIP or the Notes are not otherwise freely tradable ... as of the 370th day after the last date of original issuance of the Notes, the Company shall pay Additional Interest on the Notes at a rate equal to 0.50% per annum of the principal amount of Notes outstanding until the restrictive legend on the Notes has been removed. ...

I’m sorry, this is boring. Now you know more about the administrative workings of convertible bonds than you ever wanted to. Also though you know more about the administrative workings of convertible bonds than Avid’s CFO did last week, whoops:

On February 29, 2024, Avid Bioservices, Inc. (the “Company”) received an acceleration notice (the “Acceleration Notice”) from a holder of its 1.250% Exchangeable Senior Notes due 2026 (the “2026 Notes”). The Acceleration Notice stipulates, among other things, that (i) the Company did not remove the restrictive legend on the 2026 Notes by March 17, 2022 as required under the indenture governing the 2026 Notes (the “2026 Notes Indenture”), (ii) due to such failure, additional interest has accrued thereafter at a rate of 0.50% per annum (the “Additional Interest”), (iii) such Additional Interest has not been paid by the Company as of the date of the Acceleration Notice, which constitutes an event of default under the 2026 Notes Indenture (the “Event of Default”), and (iv) such holder is the beneficial owner of at least 25% in aggregate principal amount of the outstanding 2026 Notes and therefore has the right to accelerate all of the 2026 Notes.

As a result of such interest payment default and pursuant to the terms of the 2026 Notes Indenture, such holder declared 100% of the principal of, and accrued and unpaid interest on, the 2026 Notes to be due and payable immediately (the “Acceleration Event”). The accelerated amount, inclusive of principal and interest due and payable, as of February 29, 2024, the date of acceleration, was approximately \$146.0 million and accrues interest at 2.75% per annum until paid in full.

The Company did not receive any notices and was not otherwise made aware of the Event of Default prior to receipt of the Acceleration Notice, and did not have an opportunity to cure the Event of Default at the time of receipt of the Acceleration Notice.

That’s from a Form 8-K that Avid filed yesterday. Avid forgot, for two years, to take the restrictive legend off of its convertible. This was *very understandable*: Its obligation to remove the restricted legend was boring and technical and buried in Section 4.06(e) of a bond indenture that surely *nobody* read. It could only remove the legend a year after it issued the bonds, after everyone had stopped paying attention. And, as Avid points out, it “did not receive any notices and was not otherwise made aware” of this provision in, sure, a contract that it signed, but a very long and boring contract. (And, to be fair, the holders forgot too!) And because it completely forgot about its obligation to remove the legend, Avid *also* forgot to pay the 0.5% penalty interest rate for two years. And because it forgot to pay the extra interest, it created a non-curable default on the bonds: The holders can demand all of their money back, with interest, immediately, with no chance for Avid to fix the problem by removing the legend and paying the overdue interest.

So Avid issued a *new* \$160 million convertible bond, yesterday, on a fairly emergency basis, to raise money to pay back the old one. The new one will be considerably more dilutive and will pay 7% interest instead of 1.25%. Not ideal! To do this, Avid also had to pre-announce its earnings for the last quarter. And because of the forgotten interest, it “is currently evaluating” whether its previous financial statements “should no longer be relied upon.” Also there’s a cross-default in its revolving credit agreement. Just a mess.

This is a bad oopsie by Avid, which probably should have put a reminder in its calendar to unrestrict the CUSIP. But it's a clever *trade* by whoever this holder was: The old bonds are far out-of-the-money (that is, they're not going to convert into stock), and Bloomberg tells me that they were trading in the high 70s as recently as a month ago (the high 80s more recently). If you had noticed Avid's *extremely technical oopsie*, you could have bought the bonds at, say, 80 cents on the dollar, sent them a letter saying "we gotcha hahahaha," and made a quick 20 points, plus interest. The holder owns "at least 25%" of the bonds (the amount required to accelerate), and there are \$143.75 million of bonds outstanding; 20 points on 25% of \$143.75 million is \$7.2 million. Plus interest.

That's the thing about efficient markets, man. *You* might quite reasonably find section 4.06(e) of this 2021 convertible bond indenture, the section covering restricted transfer legends, boring, and not want to think about it. *Avid* quite reasonably found it boring, and did not think about it. But for someone who *did* find it interesting enough to pay attention, there was \$7 million of prize money just lying around for the taking.

NYCB

The thing about troubled banks is:

- 1. There is no better news story, for a troubled bank, than "Troubled Bank Raises Equity Capital." The trouble, at a troubled bank, always is that the market has lost faith that its assets have enough value to pay back all of its creditors (depositors, etc.) with an ample cushion of shareholder money left over. Raising money from shareholders just *fixes the trouble*. Oh there's other stuff — probably earnings are going to be rough for a while even after the balance-sheet hole is filled, and you've got to fix whatever management problems led to the trouble — but at some level a troubled bank is just a binary question — will it fix its balance-sheet hole or not? — and if it does, then the stock should rally.
- 2. There is no worse news story, for a troubled bank, than "Troubled Bank Tries to Raise Equity Capital." The market practice, these days, is that troubled banks try to raise capital *quietly*, and then go out and announced that they have *done it*. If they announce that they're *trying*, that suggests to the market that their discreet calls to potential investors didn't work, and it causes panic. There are many reasons that Silicon Valley Bank failed last year, but a big one is that, when it ran into trouble, it *launched a public stock offering* to fix the trouble. The offering itself caused a panic that sank the bank.

These two facts suggest an investment opportunity: If you see a news story like "Troubled Bank Tries to Raise Equity Capital," you call it immediately and offer to put in enough money to fill its capital hole, fix the problem, and cause a huge rally in the stock. And you offer to do it at an absolute bargain-basement price, because otherwise that stock is going to zero.

I suppose they suggest another investment opportunity: If a troubled bank calls you quietly looking to raise equity capital, and maybe somehow, through no fault of your own of course, it *leaks out* that the bank is looking to raise money, you'll probably get a good price on the shares.

Anyway, a little after noon yesterday, Bloomberg's Bre Bradham and Matthew Monks reported:

New York Community Bancorp dropped as much as 47% as the beleaguered commercial real estate lender tries to raise equity capital to restore investor confidence.

Bankers are gauging investors' interest in buying stock, a person familiar with the matter said Wednesday. The company is working with advisers including Jefferies Financial Group Inc., according to people with knowledge of the matter.

And then at 2:10 p.m. they reported:

Commercial real estate lender New York Community Bancorp received an equity investment of more than \$1 billion, gaining a vote of confidence in the struggling lender from investors including former US Treasury Secretary Steven Mnuchin.

The capital injection was led by Mnuchin's Liberty Strategic Capital, Hudson Bay Capital and Reverence Capital Partners, NYCB said in a statement Wednesday, confirming an earlier Bloomberg News report. The shares erased an earlier plunge after the announcement.

"In evaluating this investment, we were mindful of the bank's credit risk profile," Mnuchin said in the statement. "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."

And by yesterday evening, Bradham and Hannah Levitt reported:

The intervention sent the troubled lender's stock soaring, giving their coalition an instant paper profit and a shot at earning billions more. ...

As news emerged Wednesday that NYCB was seeking fresh equity, the stock dipped to \$1.70 — from more than \$13 last year.

Catching the proverbial knife set up Mnuchin's firm and the other investors for huge potential windfalls. The group will buy common shares at \$2 apiece and get some convertible preferred stock with a conversion price also at \$2, to raise \$1.05 billion in total. It will also get warrants with an exercise price of \$2.50 per share. Their shares are expected to represent about 41.4% of the total outstanding on a fully diluted basis.

Yes, the very most valuable service that you can provide to a troubled bank is *quickly* giving it enough money to strengthen their balance sheet. You can charge a lot for that.

Lyft

Oh come on:

Lyft Inc. may want to move on from last month's earnings gaffe, but a shareholder is making a federal case out of it.

An investor filed a proposed class-action securities suit over the typo in a Feb. 13 company press release that caused the stock to briefly surge 67% in after-hours trading.

The complaint filed late Tuesday in San Francisco federal court alleges the ride-share company defrauded investors when it mistakenly said it expected adjusted earnings margins, calculated as a percentage of bookings, to expand by 500 basis points — when it was actually 50 basis points.

The gaffe was corrected within an hour and attributed to a “clerical error,” but shareholder Yuan Chen claims he bought 20,000 shares during the 46 minutes that the stock traded at “artificially inflated” prices.

“To company insiders who were responsible for ensuring the accuracy of the press release and supplemental data, the misrepresentation was so apparent that it went beyond mere negligence, and amounted to a reckless indifference to the truth,” Chen’s lawyers wrote in the complaint.

To quote Lyft’s chief executive officer: “It was one zero in a press release.” On the second page. The theory in this lawsuit — here is the complaint — appears to be that Lyft’s executives *knew* the press release was wrong, but they *wanted* to mislead the market — for 46 minutes of after-hours trading — because ... ? Because they were “entitled to substantial performance based executive compensation based on Lyft common stock achieving certain price-based benchmarks,” and “the presence of a large short position in Lyft common stock is an impediment to [their] ability to achieve those performance based benchmarks”? And so they tried to conduct some sort of brief after-hours short squeeze to push up the stock and get paid on their options? I don’t even know what to tell you. The complaint is wild:

To company insiders who were familiar with Lyft’s historical and anticipated operating results, the misstatement in the press release and Supplemental Data would have stuck out “like a sore thumb.”

One zero!

Bloomberg lists 35 separate stock analysts who provide active coverage of Lyft common stock.

It is highly likely, if not certain, that one or more of those analysts — or other investors — contacted the Defendants or other Lyft personnel in the minutes immediately after the issue of the press release to obtain clarification on the 500 basis point margin expansion.

Thus, Defendants knew or were almost certain to know of the misstatement on or shortly after 4:05 p.m. on February 13, 2024.

I feel like *this* theory of efficient markets goes too far? “If there’s a typo in the adjusted EBITDA margin forecast in the second page of an earnings release from a widely followed company, eagle-eyed analysts will spot it within minutes and call the company to correct it.” I know that I often say around here that “everything is securities fraud,” but I have already said that this wasn’t, and I think I’ll stick to that.

Fake bankruptcy!

The classic move is: You buy stock in a company, you put out a fake press release saying that you — or Amalgamated Amalgamators Inc., or Warren Buffett — have proposed to acquire the company at a 50% premium to its current price, automated news-writing algorithms pick up your press release, automated trading algorithms buy stock, the stock goes up, you sell your stock at a profit, and everyone pretty quickly realizes it's a hoax and the stock goes down again. There are two problems with this:

- 1. It is illegal and you'll probably get caught.
- 2. While it technically *works*, in the sense that you can pretty reliably generate a brief small stock-price pop with a fake merger announcement, people who *actually do it* have an absolutely bizarre track record of messing it up and not making any money on it. It is baffling to me, but they put all this work into filing fake press releases and then forget to sell their stock while it's up. I wrote in 2015 about an accused serial fake-merger hoaxer who, according to the US Securities and Exchange Commission complaint against him, manipulated three different stocks with fake mergers and lost money on each one of them. And we talked a few months ago about a guy who allegedly did a hoax merger manipulation on WeWork Inc. just before it filed for bankruptcy, but who put out the fake press release after market hours and so couldn't sell his stock at a profit — in fact, couldn't sell it at all before the bankruptcy filing.

If *I were* doing a merger hoax, I would put out the fake press release at like 10:29 a.m. and then *sit at my computer for five minutes*, with my brokerage account website open, ready to hit the “sell” button as soon as the price went up. (Not legal, or illegal, advice.) But for some reason nobody ever executes this trade correctly.

The inverse trade is: You *short* stock in a company (or buy puts, etc.), you make a *fake bankruptcy filing* on behalf of the company, automated news-writing algorithms pick up the filing and report that the company is bankrupt, automated trading algorithms sell the stock, the stock goes down, you cover your short at a profit, and everyone pretty quickly realizes it's a hoax and the stock goes up again. This however suffers from the same two problems, namely:

- 1. You will get in trouble.
- 2. You will mess it up.

Bloomberg's Jonathan Randles and Steven Church report:

A Buffalo man identified in court papers as Robert W. Johnson — who sometimes goes by Willie — has filed bankruptcy petitions on behalf of two different publicly traded companies in recent months despite having no authority or basis to do so. Public policy in the US makes them tough to stamp out completely, leaving a confusing trail of public denials and quick dismissals in their wake.

He first took aim at Carrols Restaurant Group, the largest Burger King franchisee in the US, in early February. Shoddy assembly of the snail-mailed petitions didn't stop them from appearing in official court dockets, however briefly. Then, in recent days he targeted NerdWallet, a personal finance firm with a market value of more than \$1 billion. NerdWallet called the filing "fraudulent and unauthorized" and a judge tossed the petition shortly after.

Even the brief existence of such fake filings can trigger computer-driven court filing scrapers, leaving incorrect impressions on court watchers including Bloomberg News. Both of Johnson's filings showed up outside of stock market hours, but NerdWallet's shares still fell for a time when trading opened on Monday.

"Snail-mailed"! How are you going to trade on that?

Things happen

Fed's Powell Says Significant Changes to Bank Capital Plan Likely. JPMorgan pursued Discover deal before Capital One's \$35bn offer. 'Sued on both sides': SEC braces for lawsuits from supporters and critics of climate rule. China Scrutinizes Bond Buying at Smaller Banks as Market Soars. The Lehman liquidators taking on China's Evergrande. Bitcoin Bulls Cite a Simple Reason for Its Rally: Not Enough Coins. Step Aside Pickleball, America's New Local Battle Is Over Cricket.

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- 1. Loosely, the first sort of provision — "you can't sell this contract to someone else" — is an "anti-assignment" provision, while the second — "if you get acquired we can get out of the contract" — is a "change of control" provision.
- 2. Page 80 of the Chevron/Hess merger proxy says: "The Stabroek JOA contains a right of first refusal (the Stabroek ROFR) provision that, if applicable to a change of control transaction and properly exercised, provides the Stabroek Parties with a right to acquire the participating interest in the Stabroek Block held by the Stabroek Party subject to such transaction (at a value that is based on the portion of the value of the change of control transaction that reasonably should be allocated to such participating interest and is increased to reflect a tax gross-up)." So basically: 1. You figure out how much Chevron is paying for Hess (a \$60 billion headline enterprise value, though it's an all-stock deal so that moves around with Chevron's stock price). 2. You figure out how much of the purchase price is meant to pay for the Stabroek block (obviously debatable, though you can probably get a reasonable estimate). 3. Hess effectively gets that payment from Chevron tax-free: It's an all-stock merger that doesn't trigger any tax on the Stabroek interest. But if Exxon were to buy just the Stabroek interest from Hess, for cash, that *would* be a taxable transaction, and the contract requires Exxon to

gross Hess up for the taxes. So Exxon would have to pay Hess more for the project than (an arbitrator calculates that) Chevron is paying.

- 3. I was going to write a footnote explaining this, but you don't honestly care do you? Here's Rule 144A, governing sales to qualified institutional buyers. Here's Rule 144, which is what allows 144A convertible buyers to eventually publicly resell their bonds (or the underlying stock); Rule 144(d)(1)(i) is where the "six months" comes from, while Rule 144(d)(1)(ii) says it can sometimes be a year.
- 4. Technically a "convertible" is a bond issued by a company that is convertible into its stock, while an "exchangeable" is a bond issued by a company that is convertible into a different company's stock — commonly, as here, a bond issued by a financing subsidiary convertible into its parent's stock.
- 5. See section 6.01 of the indenture, governing events of default, and section 6.02, governing acceleration. In particular, most covenant defaults require 60 days' notice and can be cured (section 6.01(g)), but failure to pay interest can't be (section 6.01(a)).
- 6. Also arguably its lawyers should have sent it a reminder? Its bankers? I mean, no, I was a convertibles banker and it would never in a million years have occurred to me to ping my clients a year after issuing their bonds to say "hey remember to unrestrict the CUSIP"; that was someone else's problem. Whose? Nobody's?
- 7. Or, if you owned these bonds for years, you could have held off on notifying Avid because getting the unrestricted CUSIP wasn't that great, and getting the 0.5% extra interest wasn't that great, but accelerating the bonds and getting 100 cents on the dollar immediately *is* pretty great.
- 8. This Craig Coben piece at FT Alphaville lays out the case against SVB's public offering: "Investors must assess the equity offering on the basis of a repaired balance sheet. They must know you don't actually need them." And: "The (much) bigger issue is that the offering was not underwritten or already subscribed-for. Ideally, Goldman Sachs would have spoken with a small group of investors before the equity offering by 'wall-crossing' them. ... And ideally, SVB's press release would have said that the entire offering was subscribed for or guaranteed by a series of reputable investors."

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[Litigation](#)

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Hess Shareholder Sues Over Chevron Buyout Conflicts, Valuation

By Ben Miller

- COURT: S.D.N.Y.
- TRACK DOCKET: [1:24-cv-01723](#)

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Hess Shareholder Sues Over Chevron Buyout Conflicts, Valuation

By Ben Miller 2024-03-07T11:23:59000-05:00

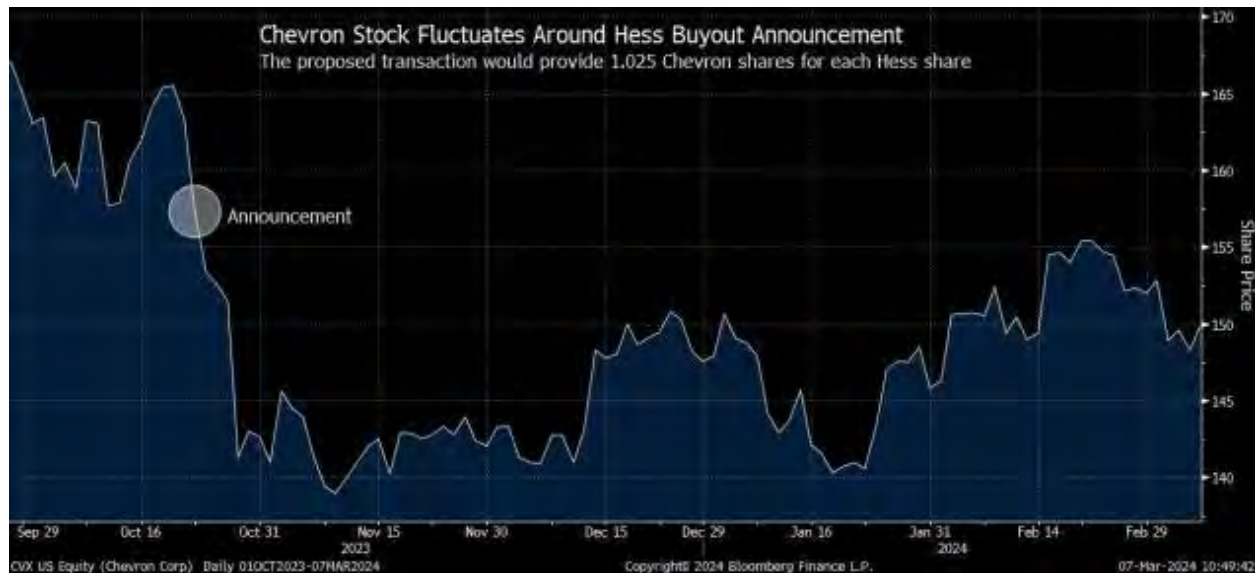
- COURT: S.D.N.Y.
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Hess Corp. and its directors deprived investors of necessary information to vote on a proposed buyout by Chevron Corp., filing a deficient registration statement for the all-stock deal valued at approximately \$53 billion last month, a shareholder complaint says.

The energy giant's acquisition would pay out \$171 per share based on the Oct. 20 Hess closing price, providing its shareholders with 1.025 shares of Chevron for each of their shares, but that proposal lacks a collar mechanism to keep the merger consideration value within a reasonable range, according to the complaint filed Wednesday in US District Court for the Southern District of New York.

Chevron stock has whipsawed around the Oct. 23 merger announcement, closing as high as \$165.53 on Oct. 19 and dipping as low as \$138.95 on Nov. 9, according to data compiled by Bloomberg. The complaint alleges the per-share merger consideration is an unfair aspect of the proposed transaction, as Chevron hasn't traded above \$156 per share since the announcement, devaluing the consideration being paid for the Hess stock.

The registration statement that Hess and its directors filed for the proposed deal also lacks key information regarding potential conflicts of interest for Hess management, as well as financial projections and data given to support financial adviser Goldman Sachs & Co. LLC's fairness opinion on the deal's valuation, according to the complaint.



Directors and executive officers at Hess are conflicted because they will secure unique benefits for themselves from the deal, which aren't available to public stockholders, including large merger considerations in exchange for their equity, options, and restricted stock units.

Executives including CEO John Hess—who is named as a defendant—and Gregory Hill, the company's president and chief operating officer, also stand to benefit from "golden parachute" severance packages if they are terminated, providing them millions of dollars in compensation. The registration statement doesn't disclose if any communications regarding post-transaction employment took place during negotiations, the complaint says.

The target oil company also failed to disclose adequate information on its decision to retain J.P. Morgan Securities LLC as an additional financial analyst for the proposed deal, including the fees paid and the services rendered to Hess and Chevron in the two years leading up to the merger announcement.

Shareholder William Globokar seeks to prevent the transaction from being completed, and an updated registration statement remedies the deficiencies highlighted in the complaint. In the event that the transaction is completed, he seeks to rescind the deal and collect rescissory damages, alleging that the company and its board violated the Securities Exchange Act. He also seeks legal fees, the complaint says.

Hess Corp. didn't immediately respond to a request for comment.

Brodsky & Smith LLC represents the plaintiff.

The case is Globokar v. Hess Corp. , S.D.N.Y., No. 1:24-cv-01723, complaint filed 3/6/24 .

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Chevron's CEO faces challenges of a lifetime with Hess bid

 [reuters.com/business/energy/chevrons-ceo-faces-challenges-lifetime-with-hess-bid-2024-03-08](https://www.reuters.com/business/energy/chevrons-ceo-faces-challenges-lifetime-with-hess-bid-2024-03-08)

Sabrina Valle

Mike Wirth, the CEO of Chevron Corporation, listens as John Podesta, the White House senior advisor for clean energy, delivers a speech during the CERAWeek energy conference in Houston, Texas, U.S., March 6, 2023. REUTERS/Callaghan O'Hare/File Photo Purchase Licensing Rights , opens new tab

HOUSTON, March 8 (Reuters) - Chevron (CVX.N) , opens new tab CEO Michael Wirth is facing a head-to-head match with Exxon Mobil (XOM.N) , opens new tab with his \$53 billion bid for Hess (HES.N) , opens new tab and its stake in oil hotspot Guyana, and could wind up trapped in a dispute between two of South America's biggest energy rivals.

On Wednesday, Exxon filed an arbitration claim that could block Hess' proposed merger with Chevron. The sale includes Hess' 30% stake in a consortium that has discovered more than 11 billion barrels of oil in Guyana's Stabroek offshore block, which analysts say has potential recoverable oil at upwards of 20 billion barrels.

Exxon, which holds a 45% share of the consortium, with Hess and CNOOC (0883.HK) , opens new tab owning minority stakes, claims the operating agreement governing the group gives it a right of first refusal to any sale of Hess's Guyana oil assets.

The contest for a share of the largest oil discovery in almost two decades could soon test Wirth's famously calm demeanor. But a deal would be a legacy-maker for Wirth, who is known at the second-largest U.S. oil firm as an affable but firm boss.

Wirth won accolades on Wall Street for his refusal to get involved in a bidding war for Anadarko Petroleum in 2019, and then moved to boost Chevron's reserves through a series of small deals.

His ability to play a long-game served him well in Venezuela, where he held onto the company's properties there amid years of hyperinflation and punishing U.S. sanctions. The 63-year-old executive declined to be interviewed.

The video player is currently playing an ad.

A spokesperson, however, stressed the company remains "fully committed to the transaction, and is confident in our position. We look forward to closing the transaction."

TWO BROKEN DEALS?

If Exxon's challenge blocks Chevron's purchase, it would be the second time a deal slipped through Wirth's fingers. His \$33 billion offer for Anadarko, just a year after he took over as

Chevron CEO, was snatched away with a higher bid by Occidental Petroleum (OXY.N) , opens new tab.

"The truth is that Wirth has been slow to come to the party and a step behind on almost everything," said Bill Smead, founder and chairman of Smead Capital Management, who said Wirth also missed an opportunity in 2022 to buy Occidental with Anadarko's assets for \$32 billion, less than the 2019 offer.

"Because of making decisions like that, he is in a food fight over assets in Guyana," said Smead.

Wirth won a \$1 billion breakup fee in the Anadarko loss, but Exxon said this week it would consider exercising its preemption right if Chevron pursues its bid. If Chevron drops the deal, Hess could be potentially off the hook for a \$1.7 billion break up fee.

Exxon left open the prospect of a negotiated settlement.

Its arbitration claim before an international tribunal could take about six months or more to resolved, said Exxon Senior Vice President Neil Chapman, pushing back Chevron's goal of closing the deal by mid-year.

Hess on Thursday said it was reviewing the timeline for closing the deal.

Analysts said the dispute could go either way.

"It is still very possible" that Exxon sees the need to bid for Hess before a Chevron-Hess shareholder vote, which could happen in the next couple of months, said Mark Kelly, CEO of financial advisory firm MKP Advisors.

"Exxon has seemingly implied it really wants to own Hess' stake in Guyana, so it potentially needs to put something competing on the table prior to a Chevron-Hess vote," he said.

Paul Sankey, an analyst with Sankey Research, said the other possibility is that Chevron is forced to pay Exxon to allow the deal to proceed.

"There's the possibility that (Chevron) cuts them a check and just says, "can you go away please? And there's the possibility that they (Exxon) goes to arbitration and delays the deal," he said.

BORDER TENSIONS

Wirth's misfortunes have piled up around the globe. Last autumn, he delayed for a second time a major expansion project in a Kazakhstan oilfield where it is the operator and Exxon is a partner.

Later, Venezuelan President Nicolas Maduro reactivated a century-old border dispute with Guyana and threatened to take over Guyana's oilfields by force.

"He (Wirth) has to stay super neutral and lay low," while the two countries settle the dispute, said Francisco Monaldi, an expert on Latin American energy at Rice University's Baker Institute for Public Policy.

"It would make sense for Chevron to treat Guyana an investment in which they are not making any decisions," he said. "It would make it easier for the Venezuelan government not to have to acknowledge that Chevron would be on both sides" of the dispute border.

As the only U.S. oil major that remained in Venezuela despite U.S. sanctions on the OPEC nation since 2019, Wirth faces a new challenge to its Venezuela operations.

Chevron last month produced about 180,000 barrels per day from its joint ventures in Venezuela - output that could again be barred from delivery to its U.S. customers if the sanctions are allowed to snap back.

"Everyone says he (Wirth) is a nice guy, he is in the right business, he will figure it out," Smead said. "If not this deal, he will get the next one."

Reporting by Sabrina Valle Editing by Marguerita Choy

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AppHarvest's \$4.85 Million Settlement Deal Gets Preliminary Nod

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Litigation

U.S. one-hundred dollar, ten-dollar, five-dollar and one-dollar banknotes are arranged for a photograph in Hong Kong, China, on Thursday, April 23, 2020.

Photographer: Paul Yeung/Bloomberg

Investors of AppHarvest Inc. will likely get their proposed \$4,850,000 securities class action settlement approved as fair, reasonable, and adequate, a federal judge said in preliminarily approving the deal.

The investors alleged that in 2021, AppHarvest's then President, CEO, and CFO made misleading statements that concealed the extent of labor and productivity issues the food production company had at its Morehead, Ky., farm. Lead plaintiff Alan Narzissenfeld alleged that those statements turned out to be false, and as a result, the stock price dropped when the truth was revealed, hurting him and other investors. However, only a few of the alleged misstatements survived a motion to dismiss, and the stipulation requesting approval recognized that further litigation would've been risky after the ruling.

- Judge Lewis J. Liman "has reviewed the Stipulation and preliminarily" found Wednesday that he will likely be able to approve the proposed settlement
- The court said that a class action is the superior method of fair adjudication where, in part, the claims of many of the individual members of the class—certified for settlement—would be too small to justify individual actions
- Liman scheduled a settlement hearing for May 15, 2024. Settlement class members who wish to exclude themselves or object will have until 21 days before the hearing to do so

Levi & Korsinsky LLP is lead counsel for the investors. Cooley LLP represents AppHarvest. The case is *In re AppHarvest Sec. Litig.*, S.D.N.Y., No. 1:21-cv-07985, 3/6/24 .

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Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/03/activision-and-delaware.html

Friday, March 8, 2024

Activision and Delaware

By Ann Lipton

Last week, Chancellor McCormick decided *Sjunde AP-Fonden v. Activision Blizzard*, which held that former shareholders of Activision had stated a claim that Activision's board failed to comply with DGCL 251(b) when it approved the merger agreement with Microsoft. The draft agreement that the board reviewed was missing key details, such as consideration, the disclosure letter, and a plan to handle dividend payments between signing and closing. Those details were obviously filled in later, but the full board never formally approved the revised merger agreement – dividends, for example, were handled by committee. McCormick held that while a board need not review a formal, final version of the agreement, Section 251(b) requires that they at least review a version that includes essential terms, and plaintiffs had for pleading purposes alleged that the Activision board failed to do so. Due to the statutory violations, McCormick ultimately concluded, the plaintiffs had stated a claim for unlawful conversion of their shares.

So, here's the thing. Of *course* boards should formally review the essential terms of a merger agreement before declaring the deal's advisability for statutory purposes. How could it be otherwise? But at the same time, it seems, you know, likely, that the individual Activision board members eventually came to learn the full essential terms and approved them, at least in practice if not through formal action. Or, to put it another way, I think it's *unlikely* there will be evidence that if the board had called a formal meeting to formally approve the final final merger, signed with a quill pen on a vellum scroll, the deal terms would have been any different.

So the shareholders would have gotten the same deal regardless. Meanwhile, the deal's done; no way McCormick is going to *unwind* it. (One case even held there can be no conversion claims post-merger because of the impossibility of unwinding, see *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 1995 WL 376919 (Del. Ch. June 19, 1995), though I am not sure that makes sense; conversion claims can be maintained when property is destroyed or transformed.).

But, absent unwinding, the only remedy available to shareholders will be the fair value of their pre-merger shares. And there are some precedents about determining fair value of a tradeable asset – giving the victim the benefit of the higher price when there are fluctuations in value after conversion – but here, the asset itself disappeared from the market after

conversion. Even if you looked to the pre-conversion price, Activision traded consistently below the deal price. And if nothing else, I imagine that McCormick might conclude the fair value in this context should be calculated the same way it would be in an appraisal action, which *probably* means deal price. Any way you slice it, I'm not sure what damages the shareholders can obtain, beyond nominal plus attorneys' fees. So it *seems* like an awful running around for something that doesn't really provide much benefit.

And that, I think, was kind of the spirit of the grumblings about Delaware law I heard at the Delaware Developments panel at the Tulane Corporate Law Institute on Thursday. (I missed the *Activision* discussion that I gather occurred in the prior panel; anyone know if they talked about remedies?) Anyway, at Delaware Developments, mostly, corporate attorneys were complaining about new cases like *Activision* or *Moelis* that upset settled expectations and subjected corporations to unpredictable liabilities, but I think the spirit of the objection, and there's some truth to this, is that it feels like formalities being enforced without a corresponding shareholder benefit. There may be a *systemic* benefit from adhering to the technicalities - governance restrictions in the charter, not a shareholder agreement, and of *course* boards should have the details of a merger agreement when approving it - but it's hard to see the benefit to shareholders by enforcing them ex post in individual cases.

But that's the weakness of relying entirely on a system of private litigation. *Activision*, for example, very much smacks of the kind of thing that should be handled with a regulatory fine and a stern warning to others. But that's not on the table.

Hy-Vee Defeats 55,000-Person Class Suit Over 401(k) Plan Fees

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Hy-Vee Inc. appropriately monitored and controlled the recordkeeping fees tied to its \$2.2 billion 401(k) plan, according to a federal court opinion throwing out a 55,000-person class action.

The Iowa-based grocery chain repeatedly assessed its 401(k) fee levels at internal meetings, reviewed outside assessments showing its fees were competitive, and decided to remain with its existing 401(k) recordkeeper after reaching out to multiple competitors that were unwilling to provide the same services for less money, Judge Stephen H. Locher said in a Thursday opinion awarding summary judgment to Hy-Vee.

It's also undisputed that the plan's annual fees fell from \$93 per person in 2007 to \$37 per person in 2021, Locher said.

The opinion, issued in the US District Court for the Southern District of Iowa, focused on the process Hy-Vee used to monitor its retirement plan. Locher said he found it important that Hy-Vee initiated an "extensive" information request process to determine if there was a better alternative to the plan's existing recordkeeper, ultimately concluding that there wasn't.

The lawsuit challenges the annual recordkeeping fees in Hy-Vee's 401(k) plan. Locher allowed the case to advance in 2022, saying the plaintiffs identified seven comparable plans with annual fees ranging between \$21 and \$34 per person, along with a recent stipulation from a major recordkeeper that these services cost even less.

In his latest opinion, Locher explained that the comparisons necessary to survive a motion to dismiss under Eighth Circuit case law won't necessarily be enough at the summary judgment stage.

"Otherwise, the fiduciaries of only a small handful of 401(k) plans in each category—e.g., the cheapest four or five large plans in the entire country—would be entitled to summary judgment on breach of fiduciary duty claims," he said. "This cannot possibly be the appropriate standard."

More than 250 proposed class actions challenging retirement plan fees have been filed in federal court over the past few years, 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 CommonSpirit Health Inc., TriHealth Inc., MidAmerican Energy Co., 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.

Capozzi Adler PC and Bowman, DePree & Murphy LLC represent the plaintiffs. Morgan, Lewis & Bockius LLP and Dorsey & Whitney LLP represent Hy-Vee.

The case is Rodriguez v. Hy-Vee, Inc. , S.D. Iowa, No. 4:22-cv-00072, 3/7/24 .

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Google must face video ad company's antitrust lawsuit, judge rules

 [reuters.com/legal/transactional/google-must-face-video-ad-companys-antitrust-lawsuit-judge-rules-2024-03-08](https://www.reuters.com/legal/transactional/google-must-face-video-ad-companys-antitrust-lawsuit-judge-rules-2024-03-08)

Mike Scarcella

The logo for Google LLC is seen at the Google Store Chelsea in Manhattan, New York City, U.S., November 17, 2021. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

March 8 (Reuters) - Alphabet's Google (GOOGL.O) , opens new tab has lost a bid to dismiss a lawsuit in Manhattan federal court accusing it of driving digital media advertising company Inform out of business.

U.S. District Judge P. Kevin Castel ruled on Thursday that Inform can move ahead with part of its case, finding it plausibly alleged Google was unlawfully monopolizing the market for online video advertising.

The decision also said Inform could pursue millions of dollars in alleged damages but not seek an injunction that could force Google to change some business practices.

Castel's 26-page order , opens new tab, which applies only to Inform's lawsuit, came in a larger coordinated antitrust case he is overseeing that includes advertisers, publishers and small businesses suing Google over its digital advertising practices. Google has denied any wrongdoing.

Inform's 2019 lawsuit said Google violated antitrust law with a change to its Chrome web browser that blocked video ads from Inform and other competitors but not from Google's YouTube platform. Google's conduct had the effect of "advantaging YouTube," Castel wrote.

Google in a statement said Castel "significantly narrowed the case, aligning with previous decisions to dismiss similar claims in other cases." The company said it will further challenge what it called "meritless allegations."

A lawyer for Inform did not immediately respond to a request for comment.

Castel ruled in March that advertisers could move ahead in a proposed class action claiming Google illegally dominates the ad exchange market, though he also narrowed that case.

Google in a court filing last year said Inform's lawsuit did not show any anticompetitive behavior or how it had driven the company out of business.

"Adopting new technology is wholly consistent with a vibrant and competitive market that antitrust law does not condemn," Google said.

Google faces other claims alleging it has abused its power in the digital ads market.

In one case, the U.S. Justice Department last year sued Google in Alexandria, Virginia federal court. Texas is leading another related case in the state's Eastern District federal court.

Google is scheduled to face a jury trial in the Virginia case in September, and it will head to trial in March 2025 in the Texas case.

The case is Inform Inc v. Google LLC et al, U.S. District Court, Southern District of New York, No. 1:23-cv-01530-PKC.

For Google: Justina Sessions of Freshfields Bruckhaus Deringer

For Inform: Serina Vash of Herman Jones

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US judge says Google must face some advertisers' antitrust claims, dismisses others

Google must face 'smart' keyboard app's antitrust lawsuit, US judge rules

Google to face US antitrust trial over digital ads in September

Reporting by Mike Scarcella

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Column: Pfizer diversity case splits appeals court over 'naming names' to establish a right to sue

 [reuters.com/legal/government/column-pfizer-diversity-case-splits-appeals-court-over-naming-names-establish-2024-03-07](https://www.reuters.com/legal/government/column-pfizer-diversity-case-splits-appeals-court-over-naming-names-establish-2024-03-07)

Alison Frankel

A 3D printed Pfizer logo is placed near medicines from the same manufacturer in this illustration taken September 29, 2021. REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights , opens new tab

March 7 (Reuters) - An appellate decision , opens new tab on Wednesday that rejected a conservative group's challenge to a Pfizer diversity fellowship raised a tough question: When an organization brings a lawsuit claiming harm to its members, must those members be identified by name?

That question divided the 2nd U.S. Circuit Court of Appeals panel that heard the Pfizer case.

Judges Beth Robinson and Dennis Jacobs ruled that under the 2nd Circuit's heightened requirements for constitutional standing at the summary judgment stage of litigation, organizations must supply the court with the name of at least one allegedly injured member.

Judge Richard Wesley agreed that the nonprofit in the Pfizer case, a group called Do No Harm, did not have standing to enjoin Pfizer's program – but strongly disagreed with the majority's holding that organizations must identify an injured member by name to meet standing requirements.

Wesley said in a concurring opinion that this “new constitutional rule” is both unnecessary and ungrounded in precedent. (As I'll explain, the majority disputed that assertion.) Wesley also said the new rule could have “troubling” implications for groups seeking to vindicate the civil rights of their members.

Do No Harm, which says its mission is “to protect healthcare from radical, divisive and discriminatory ideologies,” sought on behalf of a white member and an Asian member to enjoin a Pfizer fellowship for Black, Latino and Native American applicants. But the 2nd Circuit's new “naming names” rule, Wesley predicted, will “constrict access to the courts” for all kinds of groups, regardless of their ideology.

“That is an unfortunate ruling for organizations everywhere,” the judge said in his concurrence.

Diversity proponents were quick to seize on the 2nd Circuit's new holding. The 11th Circuit heard oral arguments in January in an anti-affirmative action group's bid to enjoin a venture capital fund's grant program for businesses run by Black women. On Wednesday, lawyers

for the venture capital firm, the Fearless Fund, notified [link](#), opens new tab the 11th Circuit of the 2nd Circuit ruling in the Pfizer case.

The letter noted that the group that sued the Fearless Fund, the American Alliance for Equal Rights, similarly failed to identify allegedly injured members by name. The American Alliance for Equal Rights retorted in its own letter [link](#), opens new tab to the 11th Circuit that the 2nd Circuit's Pfizer decision is an "outlier" that is at odds with rulings from several other federal circuits.

Among the contrary decisions, the American Alliance said, is a Feb. 9 opinion [link](#), opens new tab from the 10th Circuit in a case brought by Speech First, a group dedicated to the free speech rights of conservative college students. The 10th Circuit ruled that Speech First had constitutional standing to challenge policies at the University of Oklahoma even though its allegedly injured members used pseudonyms instead of their real names.

As it happens, the conservative groups in the Pfizer, Fearless Fund and Oklahoma cases were all represented by the same law firm, Consovoy McCarthy. Consovoy partner Cameron Norris, who argued for the groups at the 2nd and 10th Circuits, did not respond to my query on the implications of the 2nd Circuit's "naming names" requirement.

But Do No Harm said in an email statement that it intends to seek additional review of the 2nd Circuit ruling, which, according to the group, "departs from established precedent and makes it unduly hard for organizations to vindicate civil rights."

That is not the view of the 2nd Circuit majority, which concluded that the naming requirement is not only justified by U.S. Supreme Court precedent [link](#), opens new tab in 2009's *Summers v. Earth Island Institute* -- which rejected an environmental group's attempt to establish standing by claiming a statistical likelihood that one of its members was harmed by the federal government's approval of a timber sale on federal land -- but also necessary to assure that organizations are asserting claims on behalf of members who are genuinely harmed by alleged discrimination.

A name, according to the 2nd Circuit majority, "does not merely check a box; it is a demonstration of the sincerity of the member's interest." (The majority said the name need not be public but must be disclosed to the court.)

Robinson and Jacobs acknowledged 2nd Circuit case law holding that organizations can establish standing in the preliminary stages of litigation without revealing the names of specific injured members. But because Do No Harm sought a preliminary injunction, the 2nd Circuit said, it was held to a higher standard.

The 2nd Circuit majority also conceded that the Supreme Court's decision in the *Summers* case does not explicitly require organizations to identify members by name to establish standing. The court held only that *Earth Island* could not meet standing requirements by asserting that one of its members was likely harmed but was required to allege injury to a specific person.

The ruling also contained a sentence whose meaning has now become a matter of hot dispute. In a reference to a 1990 case in which the court rejected constitutional standing arguments based on an affidavit asserting harm to unnamed people, the Supreme Court said in *Summers* that “this requirement of naming the affected members has never been dispensed with.”

The 2nd Circuit majority, like the 1st Circuit in a 2016 ruling [\[1\]](#), opens new tab in *Draper v. Healey*, interpreted that sentence from the *Summers* decision to “recognize the necessity of naming members actually harmed by a challenged program.”

“We assume the Supreme Court said what it meant and meant what it said,” Robinson wrote for the majority.

As I mentioned, other appellate courts have read the Supreme Court’s ruling in *Summers* differently. The 10th Circuit, in that Feb. 9 ruling in the *Speech First* case, for instance, refused to draw inferences from the Supreme Court’s use of the word “naming,” holding that it was “clearly not the intent of the court” to impose a new requirement for standing in an opinion that “provided no hint, much less an emphatic statement, that it was abrogating decades of precedent.”

Given Do No Harm’s pledge to seek review of the 2nd Circuit holding – and the percolation of the naming issue in other appellate courts – it’s a good bet that you haven’t heard the last of this.

Read more:

Group suing over Pfizer diversity fellowship program loses US appeal
Venture capital fund defends grants for Black women in US appeals court
Reporting By Alison Frankel

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Alison Frankel
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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,

Tesla drivers lose US class action bid in battery range cases

 [reuters.com/legal/tesla-drivers-lose-us-class-action-bid-battery-range-cases-2024-03-07](https://www.reuters.com/legal/tesla-drivers-lose-us-class-action-bid-battery-range-cases-2024-03-07)

Mike Scarcella

A Tesla vehicle is charged at a Tesla supercharging station in Kettleman City, California, U.S., January 25, 2023. REUTERS/Mike Blake/File Photo Purchase Licensing Rights , opens new tab

March 7 (Reuters) - Tesla (TSLA.O) , opens new tab owners who accused it of falsely advertising estimated driving ranges for its electric vehicles must pursue their claims in individual arbitrations rather than banding together in proposed class action lawsuits, a federal judge ruled.

U.S. District Judge Yvonne Gonzalez Rogers in Oakland, California said , opens new tab on Thursday the drivers had agreed to an arbitration provision for resolving disputes with the automaker when they bought their vehicles.

The plaintiffs accused Tesla of fraudulently inducing consumers to buy its cars by overstating how far they can travel on a single charge. The pair of lawsuits also alleged that Tesla, led by billionaire CEO Elon Musk, misrepresented the driving range on vehicle dashboards.

A Reuters special report in July revealed that Tesla had created a secret team to suppress drivers' complaints about driving range. Both lawsuits cited the special report.

Tesla and lawyers for the company did not immediately respond to requests for comment.

Tesla has called the claims in the lawsuits "unmeritorious."

Attorneys for the plaintiffs in the two cases either declined to comment or did not immediately respond to a request for one.

Rogers' order did not address the merits of the drivers' claims. She did not dismiss the lawsuits and said she could eventually issue an injunction against Tesla if the drivers successfully arbitrated their claims under California's unfair competition law and other provisions.

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The drivers' attorneys had called Tesla's effort to compel individual arbitration an "effort to avoid classwide liability for its deceptive conduct."

Tesla lowered driving-range estimates across its EVs in January, as a new U.S. government vehicle-testing regulation was implemented to ensure automakers accurately reflect real-world performance.

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Class Action
March 8, 2024, 6:42AM PST; Updated: March 8, 2024, 8:15AM PST
Tesla Gets to Arbitrate Proposed Vehicle Range Class Claims (1)
By Peter Hayes
Documents

- N.D. Cal. Opinion
- N.D. Cal. Docket

- Batteries allegedly have much lower miles per charge
- Court issues ruling in two consolidated class action cases

Bloomberg Law News 2024-03-08T13:32:1246381353-05:00
Tesla Gets to Arbitrate Proposed Vehicle Range Class Claims (1)

By Peter Hayes 2024-03-08T09:42:51000-05:00
Batteries allegedly have much lower miles per charge
Court issues ruling in two consolidated class action cases

Tesla Inc. won a bid to compel arbitration of proposed class action claims that it exaggerates the driving range of its electric cars.

The arbitration agreement the plaintiffs signed when they purchased their electric vehicles is binding, Judge Yvonne Gonzalez Rogers of the US District Court for the Northern District of California said.

And the arbitration provision is enforceable because it doesn't bar the plaintiffs' claims for public injunctive relief, Rogers said. The California Supreme Court has held in *McGill v. Citibank* that an arbitration provision barring the plaintiff from seeking public injunctive relief in any forum is unenforceable.

"The plain language of the Arbitration Provision allows for the arbitration of all claims in one's 'individual capacity,'" Rogers said. "Such a class waiver does not implicate public injunctive relief because, under *McGill*, public injunctive relief is brought on behalf of an individual for the benefit of the public, not as a class or representative claim," she said.

The plaintiffs in the two consolidated class actions brought claims for violations of the California Consumer Legal Remedies Act, California Unfair Competition Law, California False Advertising Law, and various other California law claims, as well as claims under the consumer protection laws of Florida, Illinois, Massachusetts, New York and Washington.

The plaintiffs conceded that all claims must be arbitrated except the claims under the UCL, FAL, and CLRA, and the other states' equivalent of those claims.

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The plaintiffs who don't live in California also must pursue arbitration because *McGill* doesn't extend to their state statutes, Rogers said.

The plaintiffs seek injunctive relief, damages, attorneys' fees and costs.

Milberg Coleman Bryson Phillips Grossman PLLC represents the plaintiffs in the Porter case. Watts Guerra LLP and KalieGold PLLC represent the plaintiffs in the Van Diest case. Morgan Lewis Bockius LLP represents Tesla.

The cases are Porter v. Tesla Inc. , N.D. Cal., No. 23-cv-03878, 3/7/24 ; Van Diest v. Tesla Inc. , N.D. Cal., No. 23-cv-04098, 3/7/24 .

(Story updated to add additional reporting)

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Perdue, Sanderson reach settlements in chicken price-fixing cases

 [reuters.com/legal/litigation/perdue-sanderson-reach-settlements-chicken-price-fixing-cases-2024-03-07](https://www.reuters.com/legal/litigation/perdue-sanderson-reach-settlements-chicken-price-fixing-cases-2024-03-07)

Mike Scarcella

REUTERS/Nick Oxford Purchase Licensing Rights 

March 7 (Reuters) - Food distributors that sued Perdue, Sanderson and other major chicken producers for alleged price-fixing have agreed to drop their claims after seven years of litigation.

The settlement, disclosed in a Wednesday court filing , opens new tab in Chicago federal court, does not include any payments. Perdue, Sanderson and other defendants, which had won recent victories in the cases, agreed that they would not seek to recoup defense costs from the plaintiffs if they abandoned their remaining claims.

The claims that suppliers fixed prices for wholesale direct purchasers were part of broader — and still-ongoing — antitrust litigation involving price-fixing claims from consumers and commercial plaintiffs, including grocery stores.

The distributors had earlier secured nearly \$285 million in settlements in recent years from chicken producers including Tyson and Pilgrim's Pride.

Representatives for Sanderson and Perdue did not immediately respond to requests for comment. The plaintiffs' lawyers declined to comment.

The distributors had alleged a years-long conspiracy by major suppliers to keep wholesale prices artificially high by curbing production and sharing nonpublic data about supply and demand.

None of the settling companies admitted liability as part of the proposed resolution, which they said served “to avoid the costs, expenses and uncertainties” of continuing the litigation.

The distributor plaintiffs include Maplevale Farms in New York, Pennsylvania-based John Gross & Company and New Jersey's Ferraro Foods.

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Last October, Sanderson defeated the distributors' allegations at trial, and Perdue and a group of other companies won a court order in June knocking them out of the case. The plaintiffs were in the process of challenging those results.

The food distributors said in court filings that overturning their losses would be a "significant" challenge and that the potential costs the defendants could seek against the plaintiffs were "substantial."

U.S. District Judge Thomas Durkin set a March 14 hearing to weigh preliminary approval of the settlements.

The case is In re: Broiler Chicken Antitrust Litigation, U.S. District Court for the Northern District of Illinois, No. 1:16-cv-08637.

Read more:

Jury sides with chicken producer Sanderson in US price-fixing trial

US chicken producers ordered to face price-fixing claims

Chicken price-fixing plaintiffs can proceed as classes

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DOJ to Pay Whistleblowers for Corporate Crime Tips (2)

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- Department to launch program awarding individuals via forfeitures
- Pilot to start later this year

The Justice Department will start paying non-culpable whistleblowers who deliver tips on financial misconduct, overseas bribery, and other corporate fraud.

The new program formalizes an approach that's been used occasionally in the past to reward people for providing information resulting in criminal or civil forfeitures, and will launch later this year, Deputy Attorney General Lisa Monaco said at a legal conference Thursday.

Similar financial incentives for whistleblowers offered by the Securities and Exchange Commission and other agencies have proven effective at coaxing tipsters and disgorging ill-gotten gains from white-collar criminals, Monaco said in remarks prepared for delivery. But the existing programs "are limited in scope," and "don't address the full range of corporate and financial misconduct that the department prosecutes."

"The premise is simple: If an individual helps DOJ discover significant corporate or financial misconduct—otherwise unknown to us—then the individual could qualify to receive a portion of the resulting forfeiture," Monaco said at the American Bar Association's white collar crime conference in San Francisco.

The initiative marks the latest Biden administration white-collar enforcement policy shift designed to entice more self-reporting of corporate wrongdoing. To date, the administration has focused on encouraging corporations to hand over evidence they uncover of internal misconduct while the new effort targets individual employees who learn about their company's fraud.

DOJ will be building a pilot program over the next 90 days with plans for it to take effect later this year, Monaco added.

The whistleblower programs at the SEC and Commodity Futures Trading Commission have been critical in attracting thousands of tips since they launched under the Dodd-Frank Act, Monaco said.

However, the number of SEC tipsters who were rewarded money plummeted in fiscal 2023 and a 2022 Bloomberg Law investigation reported that the SEC program often ignores its own rules, shields much of its work from the public, and has been a financial boon for law firms that hired former agency officials.

Many of the specifics on how DOJ's version will function remain unclear, and require additional development. Monaco said it will be reserved for individuals who didn't play a role in the crime, submitted accurate information not already known to government, and when there aren't other federal financial incentives for whistleblowers, such as DOJ's false claims qui tam system. DOJ will only provide payments after victims have been compensated.

The department may also need to address concerns from within its own ranks.

"One unintended consequence of a DOJ authorized whistleblower program paying witnesses is that it creates a whole new area for defendants to demand discovery of exculpatory information, and to cross-examine witnesses at trial on their financial bias," said Henry Van Dyck, a former DOJ criminal fraud supervisor who now co-chairs the white collar practice at Faegre Drinker. "The program may well lead to an increase in corporate criminal investigations, but I would be surprised if line prosecutors are universally thrilled by the prospect of this new discovery headache."

The new model appears to tap into an authority established in 1984 for the attorney general to award those providing information leading to criminal and civil forfeitures of criminals' assets. That led to about \$10.6 million in overall payments in each of the past few years, according to a department budget document.

But DOJ has never before used this authority "as part of a targeted program," Monaco said.

DOJ is particularly interested in luring tipsters who can provide information about misconduct targeting the US financial system, international bribery schemes under the Foreign Corrupt Practice Act, a recently-enacted statute criminalizing when foreign officials take bribes, and other corruption.

"Maybe you've got a client at a private equity firm, and she discovers the CFO is forging underlying loan documents," Monaco said. "If your client reports it, a portion of the recovery could be hers."

The deputy AG also reserved a portion of her speech to reinforcing the department's recent efforts around combating threats from AI. Monaco re-upped her recent directive for prosecutors to consider recommending harsher sentences for criminals who've abused AI to accelerate their offenses and said Thursday that prosecutors will also consider how companies mitigate AI risks when evaluating their compliance programs.

(Updates with attorney reaction.)

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US Justice Dept to offer more rewards to corporate whistleblowers

 [reuters.com/world/us/us-justice-dept-offer-more-rewards-corporate-whistleblowers-2024-03-07](https://www.reuters.com/world/us/us-justice-dept-offer-more-rewards-corporate-whistleblowers-2024-03-07)

Karen Freifeld, Chris Prentice

Deputy Attorney General Lisa O. Monaco delivers remarks about the prosecution of war crimes in Ukraine committed by Russian forces during a press conference at the Department of Justice in Washington, D.C. on April 17, 2023. REUTERS/Amanda Andrade-Rhoades./File Photo Purchase Licensing Rights , opens new tab

SAN FRANCISCO, March 7 (Reuters) - The U.S. Justice Department is expanding its whistleblower program to coax more tipsters to disclose corporate misconduct by offering monetary rewards, Deputy Attorney General Lisa Monaco said on Thursday.

The Justice Department is already authorized to dole out awards for information that leads to forfeitures of assets, but the agency has used it sparingly. The plan now is to launch a Justice Department-run whistleblower rewards program later this year, Monaco said at a conference of lawyers on Thursday.

"The premise is simple: if an individual helps the Justice Department discover significant corporate or financial misconduct - otherwise unknown to us - then the individual could qualify to receive a portion of the resulting forfeiture," Monaco said at the American Bar Association's annual conference on white collar crime.

The department is particularly interested in information on criminal abuse of the U.S. financial system, as well as foreign and domestic corruption cases, especially involving illegal corporate payments to government officials.

Other agencies have whistleblower programs. The Securities and Exchange Commission and Commodity Futures Trading Commission, both civil regulators, launched initiatives in the wake of the 2008 financial crisis that they have touted as remarkably successful.

But those programs are limited in scope by the agencies' jurisdictions, and the Justice Department is seeking to fill in the gaps, Monaco said.

The Justice Department has launched a series of policy changes under President Joe Biden, aimed at charging more executives involved in misconduct and holding repeat corporate offenders accountable.

Monaco said the department would continue to pour resources into the most serious cases, work to hold individuals accountable, and pursue tough penalties for repeat offenders, part of what she called a "carrots and sticks" approach to enforcement.

In addition to an upcoming monetary rewards program, she said U.S. Attorney's offices in Manhattan and San Francisco are testing programs to offer non-prosecution agreements to wrongdoers who self-disclose to authorities and cooperate against more culpable targets.

Monaco noted that the department was focused on applying its tools against artificial intelligence that can "supercharge" illegal activity.

"Whether we're deploying old school methods like flipping cooperators or responding to game-changing technology," Monaco said, "the Justice Department will be unrelenting in our work to enforce our laws."

Reporting by Chris Prentice and Karen Freifeld in San Francisco; Additional reporting by Luc Cohen in San Francisco; Editing by Bill Berkrot

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Chris Prentice

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

Exclusive: FBI agents deliver grand jury subpoenas as ADM criminal probe escalates, sources say

 [reuters.com/legal/government/fbi-agents-deliver-grand-jury-subpoenas-adm-criminal-probe-escalates-sources-say-2024-03-07](https://www.reuters.com/legal/government/fbi-agents-deliver-grand-jury-subpoenas-adm-criminal-probe-escalates-sources-say-2024-03-07)

Chris Prentice

The Archer Daniels Midland Co. (ADM) logo is displayed on a screen on the floor of the New York Stock Exchange (NYSE) in New York, U.S., May 3, 2018. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights [↗](#), opens new tab

SAN FRANCISCO, March 7 (Reuters) - FBI agents delivered grand jury subpoenas to current and former employees of grain trader Archer-Daniels-Midland (ADM.N) [↗](#), opens new tab this week, three sources with knowledge of the matter told Reuters.

The subpoenas were signed by officials at the U.S. attorney's Manhattan office and delivered to recipients' homes in the Decatur, Illinois, area where ADM has major operations.

They show that a criminal probe into ADM's accounting issues first reported by Reuters last month is escalating fast and directly relates to accounting issues that the company said in January were the subject of an internal probe.

Grand jury subpoenas order the recipient to produce documents or testify before a grand jury.

The subpoenas seek information, communications, as well as devices containing those communications, relating to certain ADM accounting information, including details on goods and cash transferred between company segments, according to the three sources.

Authorities were also seeking information on below-cost sales from the Carbohydrate Solutions and Agricultural Services & Oilseeds units to the nutrition division, one said.

They also require the recipients to report to a New York courthouse in coming weeks, the three people said. Reuters could not immediately determine the number of subpoenas issued.

Government investigations are not evidence of wrongdoing and do not necessarily result in charges. A spokesperson for ADM, a \$28 billion commodities giant which makes animal feed, sweeteners and other products, declined to comment.

Shares of ADM briefly turned lower after the Reuters story was published but ended the regular session 0.2% higher at \$54.25. The shares were down 0.5% after-hours.

Spokespeople for the U.S. attorney's office and the Federal Bureau of Investigation, which is part of the Justice Department, declined to comment.

A probe by the Justice Department, which has the power to bring criminal charges and impose steep fines, increases pressure on ADM and will likely weigh on its share price.

The company's shares are down 20% since it disclosed in late January that it had suspended its chief financial officer and was delaying financial results amid an internal probe into accounting practices related to its Nutrition division.

ADM said at the time that a Securities and Exchange Commission (SEC) inquiry prompted the company's probe.

ADM said on Thursday it would report financial results on March 12. Last week, ADM said in an SEC filing that it would correct certain sales between units within ADM because they were not recorded at approximate market value. The corrections are not expected to impact consolidated balance sheets, statements of earnings, income or cash flows, ADM said.

For years, ADM has said in regulatory filings that sales between business segments were recorded at amounts "approximating market" value, according to a Reuters review of SEC filings.

At an event in San Francisco on Wednesday, an official with the U.S. attorney's office for the Southern District of New York said his office intends to bring more accounting cases against publicly traded companies.

"These are important cases for us," said Scott Hartman, co-chief of the office's securities and commodities fraud unit.

Reporting by Chris Prentice in San Francisco Additional reporting by PJ Huffstutter in Chicago and Luc Cohen in San Francisco Editing by Caroline Stauffer, Michelle Price and Matthew Lewis

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

FirstEnergy Fools Legal Bill for Axed Executive in Bribery Case

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FirstEnergy Corp. is paying for the high-powered attorneys representing at least one fired executive in an Ohio racketeering case that includes allegations of bribing the state's top utilities regulator, prosecutors said.

Covering the legal fees for Michael Dowling, the Akron-based utility's former senior vice president of external affairs, may appear peculiar in the tangled web of cases that portray the company both as a criminal perpetrator and a victim. However, outside observers say the situation is a common one to attract and protect board members.

The office of Ohio Attorney General Dave Yost (R) said in a Thursday filing that Dowling "has the benefit of legal counsel *paid for entirely* by FirstEnergy Corp. (and its electric ratepayers)." The statement came in a brief opposing Dowling's request to travel to South Carolina for a nearly two-week vacation.

The team representing Dowling, 59, in the criminal and related civil cases consists of attorneys from Tucker Ellis LLP and Winston & Strawn LLP. Tucker Ellis partner John F. McCaffrey and Winston & Strawn co-executive chairman Dan K. Webb, both of whom are on the team, didn't return requests for comment.

Dowling, along with former FirstEnergy CEO Charles Jones and ex-Public Utilities Commission of Ohio Chairman Samuel Randazzo, face an indictment that leads with Ohio's racketeering law. The charges against them came from a probe by an attorney general-convened task force related to corruption surrounding FirstEnergy and follows a similar investigation by federal authorities.

All three have pleaded not guilty. FirstEnergy, which fired Jones and Dowling in 2020, agreed the following year to pay \$230 million and cooperate with federal authorities.

‘Pretty Standard’

Such agreements between directors, officers, and corporations are common, and the FirstEnergy situation seems “pretty standard,” said Paul Rose, an associate dean and chair in contract law at Ohio State University’s Moritz College of Law.

Anat Alon-Beck, an associate professor at Case Western Reserve University’s law school, agreed. “You want people to sit on your board,” Alon-Beck said. “It’s a risk and you want to protect them.”

A finding that a covered person committed certain crimes may give FirstEnergy the right to recoup what it paid, the professor noted. However, she doubted the utility would go after anyone for the paid legal fees it paid in the current scandal.

“From the company’s perspective, what they want is this issue to go away and have more quiet about it, not to open it up more,” Alon-Beck said.

Jones’ Fees

It wasn’t immediately clear if Jones—whose is represented by lawyers from BakerHostetler, including former Northern District of Ohio US Attorney Carole S. Rendon, and Ohio Defense Firm—receives the same benefit as Dowling.

Rendon didn’t respond to a request for comment.

FirstEnergy spokeswoman Jennifer Young didn’t respond to questions about whether the utility is covering Jones’ and Dowling’s legal fees. Instead, she said in an email that the utility’s obligations were outlined in a Securities and Exchange Commission filing from 2018.

That filing details an agreement officers and directors entered with the utility regarding such fees, and said they “generally have the right to advancement by the Company of expenses as they are actually paid or incurred or are reasonably likely to be paid or incurred in connection with defending a claim covered by the Indemnification Agreement prior to the final disposition of such claim.”

A draft agreement attached to the filing also says the officer or director would have to repay money the utility fronted if it’s proved in court that their actions were done to harm the utility or “undertaken with reckless disregard for the best interests of the Company.”

A separate SEC filing from 2021 also said an indemnification agreement between FirstEnergy and Jones covers representation for his actions while he was an officer and director.

As for whether Jones and Dowling are convicted, Young wrote, "I'm unable to speculate on any future actions that may be considered to recoup fees."

The case is Ohio v. Randazzo , Ohio Ct. Com. Pl., No. CR-2024-02-0473, brief filed 3/7/24 .

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B

But Bloom said the offering met the *Howey* test in denying the men's dismissal motion in April 2023.

Goldberg and Hogg then sought reconsideration or an interlocutory appeal, citing the Southern District of New York's ruling in the Ripple Labs case, which held that offerings of Ripple's XRP token were not securities offerings when sold to the general public. And a conflict existed between the Ripple and Terraform decisions, both from July 2023, they said.

The court in *Terraform* later partially granted summary judgment for the SEC in a December 2023 opinion.

The DIG defendants didn't show clear error or manifest injustice, which would be needed for reconsideration, Bloom said.

Her own order and those in the Ripple and Terraform cases "each reasonably applied *Howey* to the particular facts—or allegations—of each case," Bloom said.

"The Court concludes the resulting distinctions among those decisions reflect the differing procedural postures and factual circumstances at issue rather than a principled disagreement on the proper interpretation of the *Howey* test," she said in declining to authorize an appeal.

Forman Law Group and Schlam Stone & Dolan LLP represent Hogg. Lehr Levi & Mendez PA represents Goldberg. Carlton Fields PA represents Stephen Braverman.

The case is SEC v. Arbitrade Ltd. , 2024 BL 74814, S.D. Fla., No. 22-cv-23171, 3/6/24 .

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New York Community Bank**How Steven Mnuchin pulled off a \$1bn deal to steady a teetering US bank**

Trump's former Treasury secretary has seized a chance to replicate his lucrative IndyMac deal



It was clear from the start that Steven Mnuchin's firm, Liberty Strategic Capital would anchor the deal by putting in \$450mn © Bing Guan/Christopher Pike/Bloomberg

Joshua Franklin, Stephen Gandel, Brooke Masters and James Fontanella-Khan in
New York 8 HOURS AGO



When New York Community Bank reignited concerns about US regional banks by revealing big losses from commercial real estate loans at the end of January, Steven Mnuchin spotted his chance to get back into the game.

Donald Trump's former US Treasury secretary had made a fortune rehabilitating a failed US mortgage lender after the 2008 financial crisis. This time, as [NYCB's](#) shares plummeted 38 per cent in a day, [Mnuchin](#) put in a call into Jefferies, the mid-sized lender's go-to advisers, to let them know that his private equity firm would be interested in throwing the bank a lifeline.

Just over a month later, NYCB turned to Mnuchin, 61, to anchor the [\\$1bn equity injection](#) that it announced on Wednesday.

NYCB is hoping the equity raise will stabilise the bank after it cycled through three chief executives in six weeks as its stock price plunged on worries about its commercial real estate exposure.

For Mnuchin, it is his highest-profile deal since leaving the Trump administration and one which investors hope will replicate his highly lucrative but controversial turnaround of failed US bank IndyMac 15 years ago. His consortium may have already struck gold — the paper gains on the transaction at Thursday's closing price are about \$1.2bn, according to Financial Times calculations.

“Steve’s a very careful investor, and I’m assuming that he did his homework,” Wilbur Ross, a private equity investor who worked with Mnuchin in Trump’s cabinet, told the FT. “This is a bank that he bought for an eighth or tenth of its top valuation. They can fix it and make it very healthy.”

NYCB and Mnuchin declined to comment. This account of how the deal came together is based on conversations with eight people familiar with the matter.

NYCB, more than a century old and based in Hicksville on New York’s Long Island, had become the 33rd biggest US bank by assets after almost doubling in size on the back of two quick-fire deals for Flagstar Bank and the rump of Signature Bank, which failed last March.

NYCB share price plummets after Q4 losses

Stock price in \$

— NYCB



Source: S&P Capital IQ

© FT

The Signature purchase was initially viewed as a sweetheart acquisition, helping NYCB’s stock almost double in a matter of months.

But NYCB would soon face concerns about a worsening credit environment for commercial real estate, where it had a large exposure, and fixed-rate loans that were yielding less than benchmark interest rates. The lender was also facing more stringent regulatory oversight because of its bulkier size following the Flagstar and Signature deals.

Things came to a head on January 31 when NYCB reported an unexpected [loss from loans](#) tied to office buildings and slashed its dividend. Almost a year on from the collapse of Silicon Valley Bank, investors feared another regional US lender was in trouble.

Mnuchin is no stranger to a banking crisis. After 17 years at Goldman Sachs, he made his real fortune fronting a group in 2009 to acquire IndyMac, which now ranks as the fifth-biggest failed bank in US history. The acquisition was as lucrative as it was controversial.

OneWest, as IndyMac was renamed, made headlines for its hard-knuckled approach to evictions and debt collecting, foreclosing on tens of thousands of homes. But when it was eventually sold in 2015 to CIT, Mnuchin's consortium of investors had more than [tripled](#) its money, including dividends paid along the way.

"They took a fairly cold-blooded approach when it came to foreclosures," said Jesse Van Tol, head of the National Community Reinvestment Coalition, which advocates for low and moderate income borrowers.

While Mnuchin's first outreach to NYCB was unsuccessful, his chance came back around quickly. A week after January 31, former Flagstar CEO Alessandro DiNello took over as NYCB's executive chair, in effect superseding chief executive Thomas Cangemi. DiNello had one message for the board: start planning for the worst.

Within days, DiNello and Mnuchin were on the phone, and the deal started moving forward, slowly at first. Mnuchin got access to NYCB's loan files for due diligence, but DiNello was not ready to commit to a deal.

Then NYCB identified a weakness in its loan controls, telling the market on Friday March 1. Deposits, which had been stable for weeks, started leaving. Later in the day, Moody's downgraded its credit rating for the bank's deposits to junk.

DiNello, who by that time had formally replaced Cangemi as CEO, instructed Jefferies on Saturday morning to start canvassing potential investors with the initial goal of raising about \$600mn to \$700mn. In the end, it pulled in more.

It was clear from the start that Mnuchin's firm, Liberty Strategic Capital, whose backers include SoftBank and Saudi Arabia's sovereign wealth fund, would anchor the deal by putting in \$450mn. Reverence Capital, an investment firm co-founded by fellow Goldman alumnus Milton Berlinski, would eventually put in \$200mn.

Other investors included Hudson Bay Capital Management, which put in \$250mn, and Citadel, the hedge fund led by billionaire Ken Griffin. By Tuesday Jefferies had commitments of about \$1bn, with the deal to be priced based on the prevailing market price on the day it closes.

NYCB had hoped to announce the deal before the market opened on Wednesday but did not make it in time. At midday, the Wall Street Journal reported the bank was gauging investor interest in buying new stock.

This sent NYCB's shares, which had been hovering above \$3 a share, crashing below \$2. Trading was halted as the bank rushed to get an official announcement out, misidentifying Citadel in its haste as Citadel Securities, the market making business. In the end, the investor consortium bought in at \$2 a share, a slight premium to where the stock had been halted at.

But within hours the new investors were sitting on hundreds of millions of dollars of paper profits and NYCB appeared to have halted its freefall. By Thursday evening, Moody's said it was reviewing whether to upgrade its credit rating.

Along with the equity raise, NYCB said Joseph Otting, a former US banking regulator who ran OneWest for Mnuchin, would take over as NYCB CEO. On Thursday morning, Mnuchin went on CNBC to promote the deal.

"Joseph and I have done this before with a bank that needs to be rebuilt," he said. "We've got plenty of time over the next couple of years to really rebuild this franchise."

Additional reporting by Sujeet Indap

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March 7, 2024, 7:48 AM PST

Trump Media SPAC Avoids Legal Roadblock on Way to Merger Vote

By Bailey Lipschultz

Bloomberg Law News 2024-03-08T14:02:55001537045-05:00

Trump Media SPAC Avoids Legal Roadblock on Way to Merger Vote

By Bailey Lipschultz2024-03-07T10:48:11163-05:00

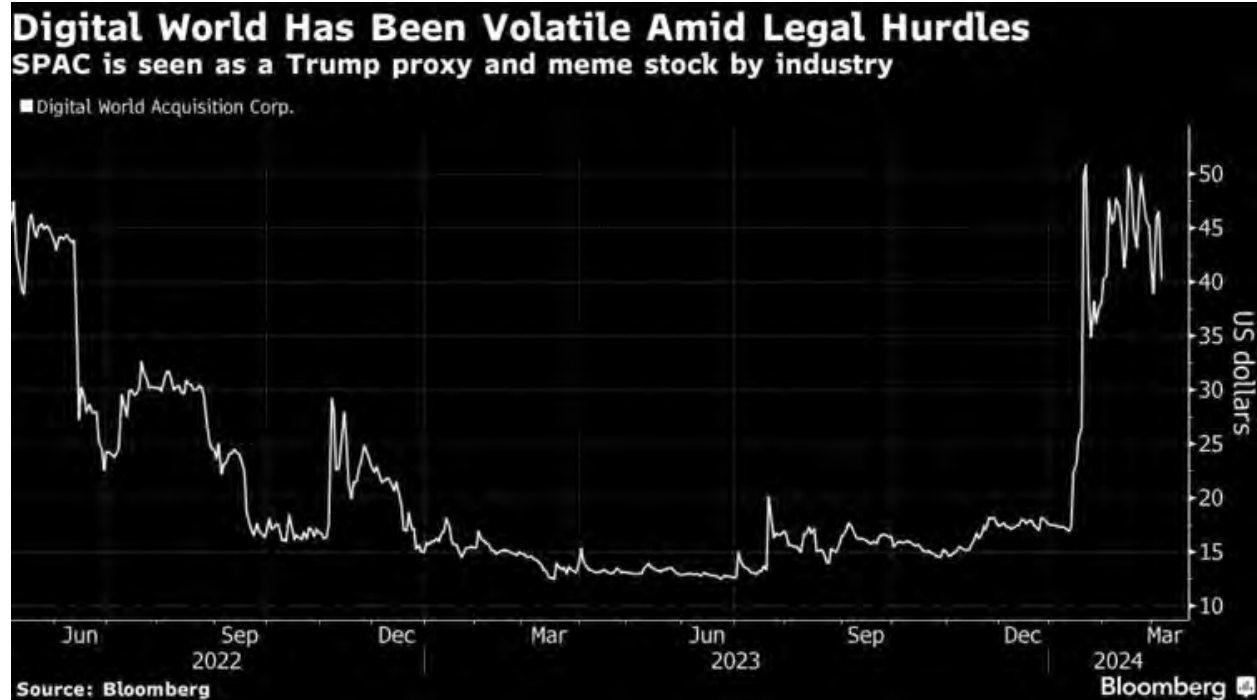
The blank-check firm working to take Trump Media & Technology Group public scored a win after a court declined to expedite a lawsuit, opening the door to investor approval of the transaction.

Digital World Acquisition Corp., which is scheduled to host an investor vote to approve the Trump Media merger on March 22, said a Delaware judge denied a request from Patrick Orlando’s ARC Global Investments II that threatened to delay the deal’s completion.

Shares rose about 3% on Thursday after sliding 14% the previous day even after former President Donald Trump swept the Super Tuesday primaries.

In its lawsuit, ARC challenged the conversion rate proposed for its founder’s stake, with the firm arguing that it should have an increased position in the new company. Orlando is the former CEO of Digital World, which proposed to place disputed shares into an escrow account upon the deal’s completion. The judge adopted that proposal in saying it wasn’t necessary to speed up the case.

“It’s a win for Digital World – their move to escrow the shares was elegant,” said Usha Rodrigues, a professor of corporate law at the University of Georgia School of Law. “It took the wind out of the sails of ARC’s argument that they had to enjoin the business combination or risk irreparable harm.”



Read more: [Trump Eyes \\$4 Billion Stock Windfall as His Legal Bills Pile Up](#)

In the March 5 ruling, the court gave Digital World until Friday to propose a schedule for the case to be resolved within five months of the merger.

Investors will now focus on the March 22 shareholder vote, which will enable the long-delayed deal to be completed. The SPAC merger was announced in October 2021, and has faced a bevy of delays, from regulatory investigations to the costly need of courting retail investors for [more time](#).

Read more: [Trump's \\$4 Billion SPAC Deal Hit by Wave of Lawsuits Over Shares](#)

Another lawsuit remains outstanding. Trump Media co-founders Andy Litinsky and Wes Moss, both former contestants on *The Apprentice*, claim Trump is trying to dilute their stakes in the company. They also say that the more than \$500 million Trump owes in legal judgments makes the merger a possibly "existential" liquidity event for him and might be motivating a "last-minute stock grab" at their expense.

With Digital World trading around \$41.50, the former president's stake is worth roughly \$3.3 billion [on paper](#) with more than \$1.1 billion in potential earnouts depending on how shares perform. The cash infusion could come at a critical time given the massive penalties he's facing from two legal cases.

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Norfolk Southern Loses Bid to Split Ohio Derailment Cleanup Cost

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Railway company Norfolk Southern's claim that several other companies should share cleanup costs for a chemical spill after train cars derailed in Ohio last year was dismissed by a federal court.

The US District Court for the Northern District of Ohio on Wednesday found that Norfolk Southern Railway Co. failed to state a claim against the seven companies it alleged should be liable for the vinyl chloride that spilled and ignited when 38 train cars went off the tracks in East Palestine, Ohio, in February 2023. The derailment occurred when an overheated car bearing failed, according to the complaint.

The companies named in Norfolk Southern's third-party complaint, filed in June 2023, are primarily rail car owners, including Dow Chemical, Union Tank Car Co., Trinity Industries, SMBC Rail Services, Oxy Vinyls, Gatx Corp., and General American Marks Co.

Norfolk Southern's complaint—which came three months after Ohio and the federal government sued the company for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—was an attempt “to share and/or shift the cost of the environmental cleanup,” according to a decision authored by Judge John R. Adams.

Norfolk Southern alleged that the seven companies were potentially responsible parties, or PRPs, under federal law. But the court disagreed, saying Norfolk met the definition of “owner or operator” under CERCLA and couldn't establish that any of the third-party defendants also met that definition.

“Norfolk Southern is the owner or operator responsible for any release that occurred from circumstances and conditions beyond the control of the Railcar Owners,” the decision says.

The railway company also didn't allege that any of the seven companies had control over the conditions leading to the derailment and subsequent chemical spill, Adams wrote.

In fact, Norfolk Southern says the derailed cars were damaged as a result of the derailment, rather than contributing to the derailment itself, the decision states.

The court stressed that the dismissal of Norfolk's claims will not impact the ultimate amount of cleanup that will occur or the timeline of the cleanup efforts.

Wilmer Cutler Pickering Hale & Dorr LLP and McMahon DeGulis LLP represent Norfolk Southern.

The case is Ohio v. Norfolk Southern Ry. Co. , N.D. Ohio, No. 4:23-CV-00517, decision issued 3/6/24 .

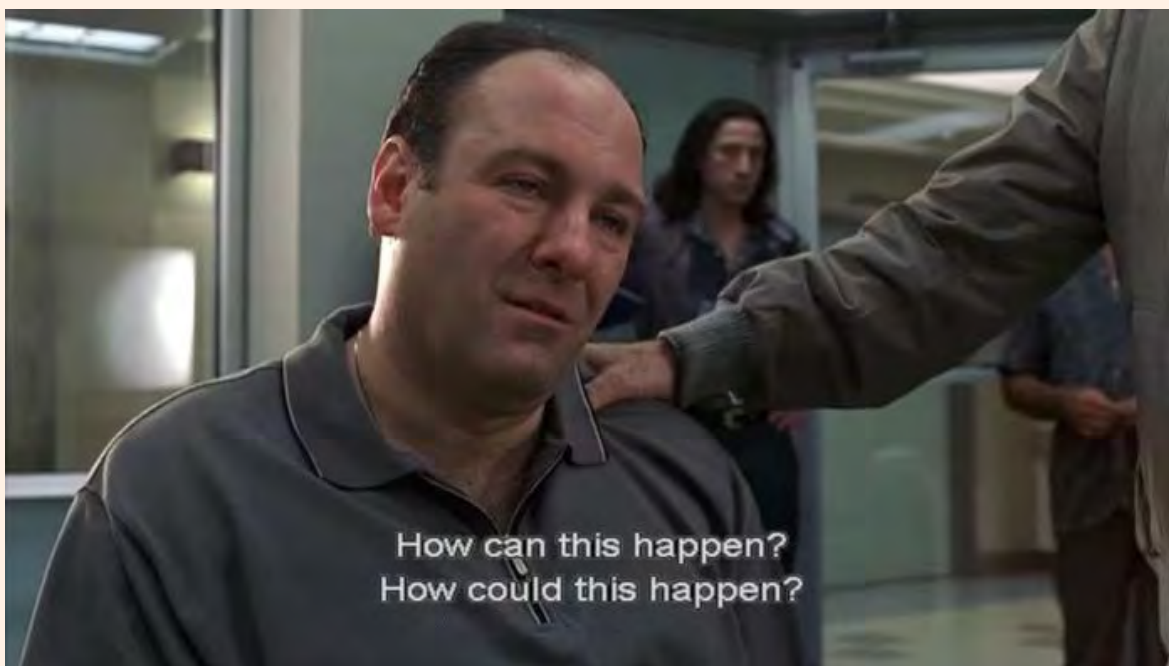
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FT Alphaville Skechers USA Inc

Skechers' family troubles

Nepotism: harder than you think



Louis Ashworth 9 HOURS AGO



In last night [from the SEC](#):

“

The Securities and Exchange Commission today [Thursday] announced that Skechers U.S.A. Inc., a footwear company based in California, agreed to settle charges for failing to disclose payments for the benefit of its executives and their immediate family members. Skechers agreed to pay a \$1.25 million civil penalty to settle the SEC's charges.

The order says the Californian shoe company:

“

... did not comply with related person transaction disclosure requirements when it failed to disclose its employment of two relatives of its executives and did not disclose a consulting relationship involving a person who shared a household with one of its executives

That such a thing could occur will come as no surprise to Alphaville readers.

Exchange Act regulations state that 10-K “proxy” filings — the juicy disclosure documents that listed US companies drop before their AGMs — must disclose certain transactions involving related persons. It’s a broad category, including (but not limited to) siblings, siblings-in-law and fellow household members.

[As we wrote last year](#), the incestuous nature of Skechers’ corporate structure led to couple of notable mistakes in its recent disclosures to investors. Which is to say they understated compensation for four children of founder Robert Greenberg who were on the Skechers payroll, over a period four years from 2018 to 2021. These errors were corrected in its filing last year.

Most notably, the company managed to neglect to mention that it paid Robert’s sister Marlene Greenberg roughly half a million dollars in both 2021 and 2022 for ... something, possibly consultation.

A Skechers spokesperson told us at that time that it had “undertaken and will be undertaking process improvement measures to guard against similar situations arising in the future”.

So, uh, what else had gone wrong? The SEC says Skechers:

- Failed, in its 2019 10-K, “to disclose that a person sharing the same household as a director and executive officer of Skechers, in 2018, had received \$210,000 in compensation as an independent contractor of the company”.
- Failed, in its 2020 10-K, “to disclose that a person sharing the same household as a director and executive officer of Skechers, in 2019, had received \$210,000 in compensation as an independent contractor of the company”.
- Failed, in its 2021 10-K, “to disclose that a sibling-in-law of an executive officer and director of Skechers, in 2020, had received \$213,645 in compensation while serving as a non-executive employee of the company”
- Failed, in its 2022 10-K, “to disclose that, in 2021, a sibling-in-law of an executive officer and director of Skechers had received \$155,419 in compensation and a sibling of a different executive officer and director of Skechers had received \$486,790 in compensation, while both served as non-executive employees of the company”

On top of all those forgotten payments, there are also the forgotten debts:

“

... each of the proxy statements described above failed to disclose that one or more executive officers and directors of Skechers owed in excess of \$120,000 to Skechers with respect to personal expenses that had been paid for by Skechers but not yet reimbursed by the related person.

In particular, one executive officer and director of Skechers owed in excess of \$120,000 to Skechers as of the years ended December 31, 2018, December 31, 2019, December 31, 2020, and December 31, 2021. Another executive officer and director of Skechers owed in excess of \$120,000 to Skechers as of the years ended December 31, 2019 and December 31, 2021.

We’ve contacted Skechers for comment.

Keeping it in the family has never seemed like such a regulatory burden.



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\$61M Deal Gets Final OK In GE In-House 401(k) Fund Suit

By **Kellie Mejdrich**

Law360 (March 7, 2024, 6:29 PM EST) -- A Massachusetts federal judge granted final approval Thursday to a \$61 million settlement ending a lawsuit from current and former workers accusing General Electric of mismanaging their retirement savings, signing off on a deal that comes after six years of litigation and includes \$21.5 million in attorney fees and expenses.

U.S. District Judge Indira Talwani granted final approval to the class action settlement in the Employee Retirement Income Security Act suit at an in-person fairness hearing in Boston, according to court records and Charles Field, an attorney for the class at Sanford Heisler Sharp LLP. Field confirmed the outcome to Law360. Attorneys from Sanford Heisler as well as Block & Leviton LLP and Robbins Geller Rudman & Dowd LLP, among others, **moved for final approval** of the deal in February.

Parties to the consolidated class action against GE, GE Asset Management Inc. and other company defendants first told the court they were **close to a final deal** in August 2022 as the case was approaching arguments on cross-motions for summary judgment. Judge Talwani granted preliminary approval to the settlement **in October**. The settlement partly reimburses about 200,000 employees who have participated in GE's 401(k) plan since September 2011. The class alleged that the plan lost value because of GE Asset Management's poorer performance compared to other funds.

Plaintiffs Robyn Berger, Kristi Haskins, Donald J. Janak, Maria LaTorre, Frank Magliocca, Laura Scully, Melinda Stubblefield and Brian Sullivan alleged that GE violated its fiduciary duties under ERISA by choosing its asset management subsidiary's higher-cost and underperforming funds over less-costly and better-performing ones. The plaintiffs first sued in October 2017 and were later consolidated.

The plaintiffs alleged that GE sought to make its asset management subsidiary more attractive to buyers before it was sold by investing retirement plan funds in proprietary offerings. State Street Corp. purchased GE Asset Management in 2016. GE took the position that it was allowed to invest retirement funds in an affiliated entity.

When asked for comment on the settlement on behalf of the class, Field, at Sanford Heisler, said that "we're very happy" the case had reached a conclusion.

"We think that the \$61 million, given the risks involved, was fair and very reasonable, and represents a great outcome for plan participants," Field said, adding that he believed the sum represented "the largest settlement of its kind in a plan that had proprietary funds."

Counsel for GE did not immediately respond to a request for comment Thursday. A GE spokesperson did not immediately respond to a request for comment.

The plaintiffs are represented by Charles H. Field and David McNamee of Sanford Heisler Sharp LLP; by Jason M. Leviton, Jacob A. Walker and Jeffrey C. Block of Block & Leviton LLP; by Orin Kurtz, Meagan A. Farmer, James S. Notis and Mark C. Gardy of Gardy & Notis LLP; by Samuel H. Rudman, Evan J. Kaufman, Magdalene Economou and Jonah H. Goldstein of Robbins Geller Rudman & Dowd LLP; by Lee Squitieri of Squitieri & Fearon LLP; by Theodore M. Hess-Mahan of Hutchings Barsamian Mandelcorn LLP; and by Theodore J. Pintar of Milberg Weiss Bershad Hynes & Lerach.

GE is represented by Alison V. Douglass, Benjamin S. Reilly, David Rosenberg, DeMario M. Carswell,

Jaime A. Santos, James O. Fleckner and Katherine G. McKenney of Goodwin Procter LLP.

The case is In re: GE ERISA Litigation, case number 1:17-cv-12123, in the U.S. District Court for the District of Massachusetts.

--Editing by Nick Petruncio.

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Equity Concerns Follow Mass Torts' March Into Bankruptcy

By **Brandon Lowrey**

Law360 (March 7, 2024, 3:58 PM EST) -- After decades of suffering and waiting, a group of more than 82,000 childhood sexual abuse survivors recently reached a \$2.5 billion bankruptcy settlement with the Boy Scouts of America and related groups. Yet the survivors may once again be in suspense.



Experts say the Supreme Court's recent reversal of its own order halting payments to victims in the Boy Scouts of America's Chapter 11 case highlights concerns surrounding nonconsensual releases of third-party liabilities in bankruptcies of companies and organizations facing mass-tort claims. (iStock.com/AmyKerk)

Last month, the U.S. Supreme Court briefly ordered the trust in the Boy Scouts case to stop making payments to victims, only to reverse course days later. The problem: The court has yet to decide whether one of the deal's key provisions — the mandatory release of claims against numerous nondebtor third parties — is legal.

The high court's pause highlighted the rocky transition for bankruptcy courts as they handle more mass-tort claims, which typically have been litigated in civil courts. And the Boy Scouts case has become something of a legal Rorschach test, used as evidence that the treatment of the claims in bankruptcy court unfairly favors one side or the other.

The debate over the process' fairness rages as companies have recently been finding new ways to pull mass-tort claims out of civil courts, into bankruptcy courts and settle them there, strategies that first

began to take shape decades ago during asbestos litigation.

Bankruptcy is a dramatically different legal landscape than civil court. There, the goal is not to assign blame and mete out justice before a jury, but to coldly distribute money and discharge debt. And while these courts excel at divvying up large sums of money, attorneys and academics question whether bankruptcy judges have been overstepping their statutory authority by approving deals that grant powerful protections to companies that are not actually bankrupt.

The Boy Scouts bankruptcy plan was approved by the vast majority of survivors, but the protections for the nondebtors are nonconsensual, meaning those who disagree with the deal cannot opt out and sue the nonbankrupt parties in civil court. Attorneys for the survivors contend this limits the pot of money available to them by shielding local Scout councils, churches and other affiliated groups, many of which have their own insurance policies.

The U.S. Supreme Court is currently reviewing the legality of these nonconsensual third-party releases in the Purdue Pharma case, which uses similar releases in its proposed opioid settlement. In that case, members of the Sackler family that own Purdue seek to contribute \$6 billion to be released from claims related to their involvement in the national opioid crisis.

A former head of the U.S. Trustee's Office, meanwhile, contends the survivors' attorneys are the ones exploiting the system, using unverified mass tort claims to effectively hijack the bankruptcy process.

Still, several experts say the bankruptcy system is not inherently advantageous to either side.

Lindsey Simon, a law professor at Emory University who studies bankruptcy, said the differences are too complex to be boiled down to giving advantages to one side or the other — it comes down to who knows the system best.

"Just like any system, those who are savvy, well-informed and well-resourced are going to take advantage in a better way than others," she said.

Born From Asbestos

While bankruptcy courts have seen a dramatic increase in mass tort claims over the past few years, the seeds for this trend were planted decades ago, when asbestos injury litigation reached critical mass.

Asbestos lawsuits began in the 1960s and ramped up throughout the 1970s. By 1982, construction material manufacturer Johns Manville had spent years up to its neck in litigation.

Johns Manville was not out of cash at the time, but the flood of lawsuits had no end in sight — as asbestos exposure can take years or even decades to cause cancer and other ailments. So the company filed for Chapter 11 bankruptcy protection and dragged its insurers into the proceedings.

Six years later, the company emerged with a bankruptcy plan that, at the time, was unique and creative.

The company and its insurers established a \$2.5 billion trust to settle all current and future asbestos-related claims. In return, the court entered an injunction shielding Johns Manville and its non-debtor insurers from civil lawsuits, instead channeling them into the trust's claims settlement process.

Other companies used the same maneuver to deal with similar asbestos claims. In 1994, federal lawmakers amended the Bankruptcy Code to allow such non-debtor releases only in certain asbestos cases.

But this new tool would not remain confined to the realm of asbestos litigation. Just the next year, Dow Corning Corp. filed for bankruptcy to use the same maneuver in breast-implant defect litigation. The Sixth Circuit allowed it, finding the Bankruptcy Code did not prohibit nonconsensual third-party releases for insurers.

Corporate defendants have recently begun piggybacking as third parties on the bankruptcies of their potential mass-tort codefendants, using the process to press would-be plaintiffs into global settlements. In some cases, a defendant can spin off its liabilities into a new company, which then declares bankruptcy in a move known as the "Texas Two-Step."

These recent innovations — or abuses, depending on who you ask — stem from a strategy first seen in asbestos litigation in the 1980s. They enable companies to reap the benefits of the bankruptcy process while avoiding the risks and burdens the court imposes on actual debtors.

Bankruptcy halts civil lawsuits against the companies, sparing them from jury trials and punitive damages. The bankruptcy court can then consolidate the claims and force those harmed by sex abuse, automotive defects and opioids into mandatory, global settlements.

Critics contend that the Bankruptcy Code does not specifically give bankruptcy judges the power to authorize such settlements, making them essentially judicial inventions.

Would-be mass-tort defendants that have used these methods contend they provide an efficient way to aggregate and resolve mass tort claims.

In recent briefs to the U.S. Supreme Court in the Purdue Pharma case, they argue the Bankruptcy Code gives bankruptcy judges a great deal of flexibility in approving deals that are found to be fair and necessary to a Chapter 11 reorganization.

Indeed, a group of tens of thousands of Purdue Pharma victims urged the court to keep the deal intact, saying it was much better than they could have hoped for in civil litigation with the Sacklers.

"What happened below, and what the releases made possible, is a triumph of the bankruptcy process which allows for an efficient, creative, flexible economic solution to an otherwise intractable, value-destructive litigation firestorm," they wrote.

Equitability

Simon, the Emory University professor, authored a paper titled "Bankruptcy Grifters" in 2022 that criticized the emerging trend of solvent nondebtors attaching themselves to bankruptcies in the face of mass-litigation exposure.

She called them "parasites, receiving many of the substantive and procedural benefits of a host bankruptcy, but incurring only a fraction of the associated burdens," she wrote. Even so, she is among many top bankruptcy experts who reject the notion that mass-tort plaintiffs are at an inherent disadvantage in bankruptcy court. In fact, they said, it could be more equitable.

In multidistrict litigation — federal civil courts' process for handling many of the biggest mass torts — few plaintiffs typically go to trial. Some of those who do may receive jury-awarded jackpots, but the vast majority often end up settling their cases in secretive settlements for far less.

Bankruptcy courts, meanwhile, have the plaintiffs vote collectively on proposed settlements, but in some deals, those plaintiffs cannot opt out and sue the debtor or other covered companies if a settlement is ultimately approved over their objections.

Federal appellate courts are split on whether bankruptcy courts can approve these kinds of settlements with nonconsensual, third-party releases. The latest flashpoint in this debate is Purdue Pharma's massive opioid settlement in the Second Circuit, which is under review by the U.S. Supreme Court.

"Such releases deprive tort victims of their day in court without consent," the U.S. Trustee's Office wrote to the high court in that case.

It can, however, be done without disadvantaging victims, according to Simon.

In her paper, Simon found a success story in the bankruptcy of Japanese auto parts maker Takata Corp., which faced massive liability when more than 42 million vehicles were recalled over defective air bags. Manufacturers of some affected vehicles, such as Honda Corp., participated in Takata's bankruptcy plan, agreeing to make ongoing contributions — rather than more common fixed sums — to a settlement trust.

The Takata bankruptcy plan used detailed metrics to determine what different types of claims would be worth outside of bankruptcy, using that as a framework for trust payments, Simon wrote.

She credited a unique mix of a judge who demanded transparency, a deal that required full payment of claims and a litigation-like claims process designed to be fair to claimants.

"Trust in this approach is possible because claimants and decision-makers have been granted access to information about the debtor and nondebtor beneficiaries, including their litigation values and legal positions," she wrote.

Ralph Brubaker, a professor at the University of Illinois College of Law, responded to Simon's paper with one of his own, arguing nonconsensual releases for third parties should simply be done away with entirely.

He wrote in 2022 that bankruptcy has promise as a way of efficiently and fairly aggregating and resolving mass tort claims without such releases, and called on the Supreme Court to clarify the scope of bankruptcy judges' powers.

And in September, he and other law professors submitted an amicus brief to the high court in the Purdue Pharma case arguing these nonconsensual releases for nondebtors are an abusive practice, "manufactured out of whole cloth" and "with no redeeming theoretical merit."

"The process by which nonconsensual nondebtor releases are negotiated, proposed and approved also violates nonconsenting claimants' constitutional due process rights, denying them both an adequate, unconflicted litigation representative and any opportunity to exclude themselves from a mandatory no-opt-outs settlement process involuntarily imposed upon them," the professors wrote.

In an email to Law360, Brubaker said bankruptcy is effective at resolving mass torts in cases where the debtor actually needs bankruptcy relief and without the use of nonconsensual nondebtor releases and Texas Two-Steps. These devices only serve to allow would-be defendants to "cherry-pick only those aspects of bankruptcy that are advantageous, in ways that undermine important structural and substantive protections for tort claimants," he said.

The Second, Third, Fourth, Sixth and Eleventh circuits have allowed nonconsensual third-party releases. Meanwhile, the Fifth, Ninth and Tenth circuits have barred them, creating a split that may soon be resolved by the U.S. Supreme Court's upcoming decision in Purdue Pharma.

Whatever the high court's decision, it is unlikely to push mass torts out of bankruptcy courts or diminish the venue's attractiveness to defendants. Even if the Supreme Court bans nonconsensual third-party releases, experts said companies could just seek releases from claimants — and some have already begun doing so.

In the Boy Scouts of America case, more than 85% of the voting abuse survivors favored the plan. It was a high enough percentage to easily persuade U.S. Bankruptcy Judge Laurie Selber Silverstein to approve the deal, though the U.S. Supreme Court's decision in Purdue could complicate or even overturn it.

'Shakedown'

While the methods used in the Boy Scouts case to lead claimants to a successful settlement remain in controversy, a former head of the U.S. trustee program argued the case exemplified a different kind of abuse.

Lawrence Friedman, a past director of the Executive Office for U.S. Trustees, argued in recent papers that the would-be mass tort plaintiffs were actually the ones exploiting the system in this case. He calls it a textbook example of a bankruptcy "shakedown" scheme increasingly used by their lawyers.

The shakedown, as he calls it, involves trial lawyers flooding a bankruptcy case with thousands of unverified claims, then using those claims as leverage to steer the case to benefit themselves. The bankruptcy process does not require trustees to investigate unsecured claims until later on in the process, giving decision-making power to potentially invalid claimants and their attorneys.

"Unlike the typical corporate case where unsecured creditors are generally known and listed in the company's books, in the mass-tort case, they are usually unknown at the outset of the bankruptcy proceedings," he wrote in the Harvard Journal of Law & Public Policy journal last year. "The more of these claims a party controls, the more that party can influence the direction and outcome of the case. You don't need a law degree to understand the free-for-all this creates."

In a recent interview, Friedman said the number of claims filed by alleged victims in the Boy Scouts case rapidly grew from about 200 to over 80,000, thanks to online marketing techniques that plaintiffs' lawyers

use to generate claims.

"It's not even a lawyer representing you," he said. "It's just getting shoved into a big group of claims, and it's crazy. And by the way, it raises ethical issues. If you're generating all those claims, and each time you're diluting [claims of] some of your other clients, what does that say?"

He has proposed using a claims examiner to assess the validity of mass-tort claims earlier in the process to reduce the likelihood of fraud.

Experts said Friedman's "shakedown" theory may hold water as a possible method of abuse and generally agreed with his proposed solution.

However, they said the Boy Scouts case was not necessarily a prime example of bankruptcy exploitation. Attorneys involved in the case rejected the idea that any significant portion of the more than 80,000 claimants were invalid, fake or otherwise undeserving.

Gilion Dumas, who has handled sex-abuse cases involving the Boy Scouts for years, was among those who disagreed with Friedman's claim that the case represents a bankruptcy shakedown.

The large number of claimants in the case is, if anything, an undercount, she said.

She added that she and others have estimated the actual number of Boy Scouts abuse survivors to be over 100,000, based on the number of the organization's ineligible volunteer files and the fact most people who sexually abuse children have far more than one victim by the time they are caught.

Forcing sex-abuse survivors to litigate claims in an administrative process overseen by bankruptcy courts is "absurd," Dumas said in a recent interview.

"The bankruptcy system is putting its arms around way too many claims that should not ever be in bankruptcy court because there are claims against entities that are not themselves bankrupt," she said. "That completely distorts our tort system [and] our rule of law, and abuse claimants' right to be heard in their venue of choice by a jury of their peers."

'Day in Court'

For hundreds of the child sexual abuse survivors in the Boy Scouts case, the bankruptcy process delivered confusion and disappointment.

They claimed they had each accidentally given up their potentially multimillion-dollar legal claims against the scouting organization in exchange for \$3,500. Their error: a mistaken checkmark on their dense and lengthy bankruptcy court ballots.

For this, they will never be able to sue the scouting organization or certain affiliated entities for the abuse or lodge a claim with a \$2.5 billion trust created for abuse survivors, a federal bankruptcy judge ruled recently. The judge acknowledged her ruling would have a "harsh result" for the survivors but placed blame on their attorneys.

"The circumstances are also unfortunate, as each [survivor] had counsel to advise him in completing his ballot, ensuring and/or confirming correction of any mistaken elections and timely bringing the matter to the attention of the court prior to confirmation of the plan," U.S. Bankruptcy Judge Laurie Selber Silverstein wrote. "But the harsh outcome does not permit me to ignore the plan or the law regarding amending a plan."

The court had earlier given attorneys the choice of casting a complex "master ballot" for all their clients or allowing each claimant to do their own individual ballot.

The individual ballots seemed simpler, said plaintiff's attorney Tyler Fox.

"I thought that the master ballot would be too complicated for myself and my clients, and therefore ironically left it to my client to do," Fox said. His client checked the box for \$3,500.

Fox and other plaintiffs' attorneys have sharply criticized bankruptcy courts as unsuitable for these types of claims, adding expense, complexity and delays to the already painful process for victims.

Even if the claimant receives more money in bankruptcy court than they would have following a civil trial, the victory still may feel hollow, said Richard Epling, a veteran bankruptcy attorney who now works as a mediator.

Bankruptcy courts lack some key things that civil courts can sometimes provide to plaintiffs: control over their own cases, and the catharsis that comes from being heard and having one's injuries formally acknowledged.

"These people need emotional support, and that's really not what the bankruptcy system is designed to do," he said. "It's all about how do we distribute scarce assets? And who do we distribute them to? ... Emotion doesn't get into it the way it would in a personal injury trial."

Bankruptcy instead tends to favor pragmatism, as many would-be mass tort defendants have argued.

The Boy Scouts of America submitted a brief in the Purdue case urging the high court not to outlaw nonconsensual third-party releases.

It said such a decision could imperil its own settlement and perhaps even its existence. Those covered by the releases in the Boy Scouts plan were all interrelated and shared liability, and a nonconsensual, third-party release was the only way a fair settlement could have been reached, the nonprofit argued.

If those releases were illegal, the organization wrote, "then most survivors of Scouting-related abuse would get nothing, and Scouting as an organization would likely be finished. Fortunately, that is not the law."

--Additional reporting by Hilary Russ and Vince Sullivan. Editing by Philip Shea.

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Harpoon Shareholder Sues For Records On \$680M Merck Buy

By **Leslie A. Pappas**

Law360 (March 7, 2024, 6:58 PM EST) -- A shareholder of Harpoon Therapeutics Inc. sued in Delaware's Court of Chancery Thursday for corporate documents related to the company's proposed \$680 million cash buyout by Merck, saying the proposed deal appears to unfairly "lock in a windfall for select Harpoon investors."

Merck's proposed \$23-per-share deal would yield a profit of nearly \$25.8 million for New Leaf Venture Partners, a New York healthcare-focused private equity firm and Harpoon's largest stockholder, Harpoon shareholder Kamyar Haimof says in a 16-page complaint.

Yet the price does not reflect the full value of the San Francisco-based immunotherapy company, which has developed at least one promising candidate in a class of drugs called T cell engagers, which help the body naturally fight cancer and other diseases.

"This rushed process does not appear reasonable and does not appear to maximize value for the company's public stockholders," the complaint says. "Plaintiff has a strong basis to investigate whether members of the Board and Harpoon management breached their fiduciary duties in connection with negotiating, approving, and recommending the Transaction."

Haimof says the company hasn't responded to his formal demand for documents under Section 220 of Delaware's General Corporation Law, which allows stockholders to inspect a company's corporate books if they can show a proper purpose, such as a probe of suspected corporate wrongdoing.

Rahway, New Jersey-based Merck & Co. Inc. — which is known outside of the U.S. and Canada as MSD, short for Merck Sharp & Dohme LLC — announced **on Jan. 8** that it would acquire Harpoon through a subsidiary, in a deal valued at approximately \$680 million.

The merger announcement touted Harpoon's leading drug candidate, HPN328, a T cell engager that shows promise for treatment of small cell lung cancer. The transaction, which is expected to close in the first half of 2024, still requires regulatory approval and the support of Harpoon stockholders, who are scheduled to vote on the merger on Friday, March 8.

The deal appears to have been rushed and is "riddled with indicia of unfairness," the complaint says.

The merger price is lower than many other Wall Street estimates, such as a \$30-per-share valuation from financial services firm Canaccord Genuity Group Inc. and a \$27-per-share from Oppenheimer & Co. Inc., the complaint says.

Yet the board awarded a \$1 million transaction bonus to Harpoon's president and CEO Julie Eastland and a \$400,000 bonus to chief medical officer Luke Walker on the same day it voted to approve the merger in January, the complaint says.

The merger was also announced "on the heels of multiple capital raises that will lock in tens, if not hundreds, of millions of dollars of profits for company insiders," the complaint asserts.

The company did not engage with other bidders before agreeing to the deal with Merck, and moved forward on capital raises at a low company valuation despite encouraging results of its HPN328 drug candidate.

New Leaf, which holds 16.26% of Harpoon's shares, invested \$9 million in warrants and common stock that Harpoon offered in a \$150 million private placement in October 2023, according to the complaint.

Merck's \$23-per-share deal price is 294% above the price of the October Private Placement, the complaint says.

None of the parties immediately responded Thursday to Law360's request for comment.

Kamyar Haimof is represented by Jeroen van Kwawegen, Edward Timlin, Shiva Mohan, and Daniel E. Meyer of Bernstein Litowitz Berger & Grossman LLP and Joshua Fruchter of Wohl & Fruchter LLP.

Counsel information for Harpoon was not immediately available.

The case is Kamyar Haimof v. Harpoon Therapeutics Inc., case number 2024-0220, in the Court of Chancery of the State of Delaware.

--Editing by Alex Hubbard.

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Chancery Clears Way For March 22 Trump Media SPAC Vote

By **Jeff Montgomery**

Law360 (March 7, 2024, 7:53 PM EST) -- Efforts to take former president Donald Trump's Truth Social media platform public have continued moving ahead after Delaware's Court of Chancery rejected a full preliminary injunction sought by a former executive of the blank-check company involved before a key vote on the take-public merger.

Vice Chancellor Lori W. Will on Tuesday denied a motion to hold a merits or injunction hearing before the vote but said she would schedule a hearing before the end of a 150-day lockup barring post-closing share sales.

The rulings stymied for now a move by Patrick Orlando, a former executive of special-purpose acquisition company Digital World Acquisition Corp., to stop the deal pending resolution of a dispute over the shares that Orlando-controlled SPAC investor ARC Global Investments II will receive with the deal closing.

Orlando sought an expedited proceeding to stop the vote pending resolution of the share dispute, but Vice Chancellor J. Travis Laster denied the injunction and ordered a filing of a schedule and hearing date by week's end. The court also ordered filing of a letter disclosing how the Delaware action will proceed while a suit Trump filed in Florida, accusing Orlando of using litigation in Delaware to obtain a windfall from the deal, proceeds.

DWAC said in a U.S. Securities and Exchange Commission filing that its proposal to place disputed shares into an escrow account upon the closing of the business combination "was sufficient to preclude a possibility of irreparable harm related to the conversion of ARC's shares."

In a statement, DWAC CEO Eric Swider said, "The court's denial of an injunction prior to the merger vote was critically important as we proceed towards our vote on March 22."

Orlando and ARC argued that it should receive 1.78 class A shares for each class B share owned, while DWAC has said the ratio was 1.34, a difference allegedly amounting to more than 2.5 billion shares.

Still pending is a motion to expedite a Court of Chancery suit filed on Feb. 27 by United Atlantic Ventures LLC, which holds an 8.6% equity stake in the company that owns Truth Social, Trump-controlled Trump Media & Technology Group Corp.

UAV alleged that its shares of TMTG are being diluted ahead of the merger through a recent authorized stock increase of common stock from 120 million to 1 billion common shares. Vice Chancellor Sam Glasscock III has scheduled a rare Saturday argument on the motion to expedite.

United Atlantic Ventures was identified in court papers as having been co-founded by Andy Litinsky and Wes Moss, two former "Apprentice" contestants who say they helped Trump launch Truth Social in 2021 in exchange for equity in Trump Media & Technology Group.

Trump founded TMTG in 2021. Digital World went public in September 2021 after completing a \$250 million initial public offering and announced in October 2021 that it would take the social media platform public, in a deal that was then valued at \$1.7 billion.

The SPAC raised \$1 billion for the effort in May 2022 in a PIPE deal — a private investment in public equity — but the financing package to support the deal has dwindled as investors pulled their financial commitments. In December, Digital World disclosed that cancelations from the PIPE totaled \$484.5 million.

ARC Global Investments II LLC is represented by Matthew D. Perri, Daniel E. Kaprow, Elizabeth J. Freud and Rae Ra of Richards Layton & Finger PA.

Digital World Acquisition Corp. is represented by Kevin M. Coen and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP and Bradley J. Biondi and Nicholas J. Griepsma of Paul Hastings LLP.

The case is ARC Global Investment II LLC v. Digital World Acquisition Corp., case number 2024-0186, in the Court of Chancery of the State of Delaware.

United Atlantic Ventures LLC is represented by Richard I. G. Jones Jr., David B. Anthony, and Harry W. Shenton IV of Berger McDermott LLP and Christopher Clark and Benjamin Dozier of Clark Smith Villazor LLP.

Trump Media & Technology Group is represented by Theodore A. Kittila and William E. Green Jr. of Halloran Farkas & Kittila LLP.

The case is United Atlantic Ventures LLC v. Trump Media & Technology Group Corp., case number 2024-0184, in the Court of Chancery of the State of Delaware.

--Additional reporting by Elaine Briseño, David Minsky, Tom Zanki and Al Barbarino. Editing by Dave Trumbore.



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Del.'s Corp. Law Dominance A Hot Topic At Tulane Conference

By **Rose Krebs**

Law360 (March 7, 2024, 8:18 PM EST) -- Whether Delaware will continue to be where many companies choose to incorporate and its courts will remain the go-to venue for deciding high-stakes business disputes was a hot topic of conversation as Tulane Law School commenced its annual Corporate Law Institute on Thursday.

Litigators, former or current Delaware judges and others who sat on panels as the two-day conference kicked off made it clear they know that the First State's corporate law preeminence is under scrutiny given dissatisfaction with and confusion caused by recent rulings and competition from other venues.

In some cases, scrutiny is coming from those unhappy with rulings that didn't go their way, such as Elon Musk's displeasure over the Chancery Court's January decision that **struck down** his proposed \$55 billion Tesla pay package.

But in other cases, increasing concerns about "unpredictability" created by recent Chancery Court rulings are coming from litigators themselves, said Scott B. Luftglass, vice chair of Fried Frank Harris Shriver & Jacobson LLP, during a panel discussing notable Delaware developments.

Others on the panel agreed, including Catherine G. Dearlove, a director at Delaware firm Richards Layton & Finger PA.

Some decisions coming out of the court "are making them question the predictability of Delaware law," Dearlove said, and there are instances that lawyers are even having to tell clients they're not sure how to advise them about certain matters.

One decision highlighted as **having caused confusion** over settled practice was Chancery Court's ruling last month deeming all but three provisions of a stockholder agreement that gave Moelis & Co. founder Kenneth Moelis board-trumping power over the global investment bank's business as being "facially invalid" under Delaware law.

In his ruling, Vice Chancellor J. Travis Laster said the provisions violate Delaware law because they take away powers from the board that can only be altered by a company's charter or bylaws. The compact is part of "a new wave of stockholder agreements" corporate planners now regularly use that include "extensive veto rights and other restrictions on corporate action," the vice chancellor said.

Although he called the vice chancellor's decision "thoughtful," Luftglass said it was also "polarizing" because it upended existing practice and caused confusion about how such agreements should be prepared moving forward.

There have already been numerous challenges to stockholder agreements at other companies, Luftglass said.

In a panel earlier in the day about hot topics in mergers and acquisitions, Delaware's former Chief Justice Leo E. Strine Jr., now of counsel at Wachtell Lipton Rosen & Katz, acknowledged that the First State judiciary is facing a moment of increased scrutiny.

"It's an interesting moment," Strine said, adding that he has "the utmost confidence in my state and its judiciary."

But there are questions that need clarity, such as what constitutes control and who is a controller under Delaware's entire fairness doctrine, he said. Some key appeals pending at Delaware's Supreme Court should help clear those issues up, Strine said.

Scott A. Barshay, partner and chair of Paul Weiss Rifkind Wharton & Garrison LLP's corporate department, suggested that as questions persist more companies are going to pause before incorporating in Delaware and may look elsewhere to states like Nevada.

"This is real folks," William Anderson, senior managing director of investment banking firm Evercore, chimed in. "Companies are looking at Nevada" because of uncertainty caused by recent Delaware decisions, he said.

In pondering whether Delaware will remain "corporate America's favorite home," consistency and predictability are what corporations crave, said William M. Lafferty, chair of Delaware firm Morris Nichols Arsht and Tunnell LLP. Lafferty moderated the Delaware happenings panel.

Delaware has more than a century of case law to draw from, its legislature is quick to address corporate law issues as they arise, and it has smart lawyers and judges, Lafferty said.

It's not all "doom and gloom," Lafferty said, as concerns that have roiled the market will be addressed by Delaware's bench and bar.

"We hear you," Lafferty said. "We're not sitting back idle doing nothing."

Joel Friedlander, an experienced corporate lawyer who has his own litigation boutique, Friedlander & Gorris PA, offered a bit of historical perspective.

Although Musk's well-publicized calls on social media, after his Chancery Court loss, for companies not to incorporate in Delaware have created a "bandwagon effect," it isn't the first time the First State has faced such a situation.

Other corporate officials have been unhappy over rulings in the past and also mounted media campaigns criticizing Delaware's courts, he said.

But through it all, Delaware has maintained its standing and continues to attract companies to incorporate in the state, Delaware Chief Justice Collins J. Seitz Jr. said.

And the chief justice made it clear that Delaware's judges will not be put in a position of responding to public pressure or opinion when making decisions.

They will continue to "strive to be fair and impartial" and aren't "trying to win popularity contests," the chief justice said.

The chief justice wouldn't offer commentary on specific cases, noting there are numerous pending appeals in the Supreme Court that will consider issues discussed by the panels.

"Let's all take a breath," the chief justice suggested. Yes, the state's courts "are in the spotlight" given recent high profile rulings, but "Delaware has always persevered," he said.

Tulane Law launched its annual corporate law institute in 1988 to gather the "best and brightest M&A and securities practitioners," members of Delaware's judiciary, "leading corporate counsel and Wall Street investment bankers," its website says.

--Additional reporting by Leslie A. Pappas and Jeff Montgomery. Editing by Alex Hubbard.



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Towers Watson Insurers Off Hook For \$90M Merger Coverage

By **Abraham Gross**

Law360 (March 7, 2024, 5:17 PM EST) -- Towers Watson's insurers do not need to cover settlements totaling \$90 million in two shareholder suits stemming from the company's merger with Willis, a Virginia federal judge ruled, saying the transaction was barred by a so-called bump-up exclusion.



A Virginia federal judge found that insurers for Towers Watson are off the hook in covering \$90 million in settlements of shareholder suits related to the company's Willis merger. (AP Photo/M. Spencer Green, File)

Judge Anthony J. Trenga found Wednesday that the payments settling the suits were excluded from the company's directors and officers policy because they effectively increased the consideration for the merger. The suits alleged the company put forward an unfair sales price when it merged with Willis Group Holdings PLC in 2016.

The amounts paid through the settlements clearly related to the consideration shareholders received in connection with the merger, Judge Trenga said, adding: "The question, however, is whether the Settlements in effect represent such consideration for the merger. The Court concludes that the Settlements did just that."

The dispute centers on the "bump-up" exclusion contained in the policy of primary insurer AIG unit National Union Fire Insurance Co. of Pittsburgh, Pa., and other excess insurers. The provision bars coverage for a settlement that represents an effective increase in the price or consideration for an

acquisition.

Towers Watson argued the settlements were instead paid for the underlying claims that the company's misrepresentations and breach of fiduciary duties led to shareholder losses, noting that supporting documents — like notices to class members and settlement terms — either omitted or expressly disclaimed that the settlement increased consideration.

Judge Trenga said the exclusion focused on if "at the end of the day, the former Towers Watson shareholders were paid additional monies because the amount they received in the merger was inadequate."

"That is the case here, where the Actions' allegations of harm were solely predicated on the theory that shareholders got less in the merger than Towers Watson was worth," he concluded.

Even Towers Watson's alternative argument to allow coverage for \$17 million in attorney fees and other costs was unavailing, as Judge Trenga determined these expenses also represented an increase in consideration and nothing in the exclusion limited it to the net benefit to shareholders.

The ruling marks the latest twist in Towers Watson's winding coverage fight.

In October 2021, Judge Trenga ruled that the exclusion didn't apply to the settlements because it wasn't clear that the "reverse triangular merger" was considered an "acquisition," noting that the policy did not define the term.

A Fourth Circuit panel disagreed, writing **in May of last year** that Towers Watson's transition to a wholly owned subsidiary of the new parent company, Willis Towers Watson, met the plain meaning of the term "acquisition."

The panel remanded the case to Judge Trenga to decide if the settlements were an "effective increase" barred by the exclusion.

Following the complex merger between Towers Watson and Willis, shareholders filed suits alleging Towers Watson's former CEO had not disclosed a conflict of interest from a \$165 million compensation package he would receive once the deal closed, according to court filings, which they allege caused a below-market valuation.

Counsel for Federal, Travelers, Liberty, Ironshore and National Union declined to comment.

A spokesperson for Towers Watson declined to comment.

Towers Watson is represented by Robin Cohen, Adam Ziffer and Orrie Levy of Cohen Ziffer Frenchman & McKenna LLP and by Andrew Terrell and Marla Diaz of Whiteford Taylor & Preston LLP.

Federal is represented by D. Sean Trainor and Allen Burton of O'Melveny & Myers LLP.

National Union is represented by Ian Hoffman, Scott Schreiber and Arthur Luk of Arnold & Porter.

Travelers is represented by Charles Chotvac, Thomas Judge and Jeffrey Ward of Dykema Gossett PLLC.

Liberty and Ironshore are represented by William Mitchell of Eccleston & Wolf PC and by Scott Schechter and Joshua DiLena of Kaufman Borgeest & Ryan LLP.

Allied World is represented by Patrick McDonald and Edward Cameron of Cameron McEvoy PLLC and by Kristin Gallagher and William Brennan of Kennedys CMK.

The case is Towers Watson & Co. v. National Union Fire Insurance Co. of Pittsburgh, Pa. et al., case number 1:20-cv-00810, in the U.S. District Court for the Eastern District of Virginia.

--Editing by Nick Petruncio.



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Chemours Internal Review Reveals Violations By Top Execs

By **Henrik Nilsson**

Law360 (March 7, 2024, 11:27 PM EST) -- Chemical giant Chemours announced on Wednesday that an internal investigation revealed that three executives engaged in unethical financial practices to boost their incentive compensation.

The investigation conducted by the company's audit committee of the board of directors found that Chief Executive Officer Mark Newman, Chief Financial Officer Jonathan Lock and Controller and Principal Accounting Officer Camela Wisel violated the company's code of ethics. The executives were placed on leave last week, according to a news release.

Chemours received help from outside counsel but didn't disclose the law firms that worked on the investigation.

The investigation revealed that the executives delayed payments to vendors that were due in the fourth quarter of 2023 until the first quarter of 2024, and also accelerated the collection of receivables into the fourth quarter of 2023 that were not due to be received until the first quarter of 2024.

"The audit committee found that these individuals engaged in these efforts in part to meet free cash flow targets that the company had communicated publicly, and which also would be part of a key metric for determining incentive compensation applicable to executive officers," the company said.

Additionally, the committee found similar actions taken in the fourth quarter of 2022, "resulting in a significant increase in these cash flow measures for the quarter ended December 31, 2022, and a decrease in these measures in the first quarter of 2023."

The investigation was spurred by an anonymous tip to the company's ethics hotline. However, the report didn't reach Chemours' general counsel or audit committee until it was revealed in the company's year-end 2023 external audit process. The committee said the issue wasn't elevated because of inadequate internal procedures "and poor judgment by certain employees who handle the intake of such reports," according to a statement.

The company said the internal review doesn't affect the preliminary results of its fourth quarter. However, it said the executives' actions "had the effect of significantly increasing" cash flow measures for the fourth quarter of 2023 "with a corresponding anticipated decrease in these measures in the first quarter of 2024."

Chemours announced last month it would delay the release of its financial results for 2023. The company provided an update Thursday, saying it's "working diligently to complete its year-end reporting process."

A representative for Chemours did not immediately return a request for comment.

--Editing by Michael Watanabe.



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Axos Bank Sued Over Money Market Account Reclassification

By **Katryna Perera**

Law360 (March 7, 2024, 8:44 PM EST) -- Axos Bank has been hit with a proposed class action in California federal court, alleging that it reclassified customers' high-yield money market accounts into lower-yield investment accounts without informing them.

Joseph Pliszka **filed a complaint** Wednesday against Axos Bank, which operates accounts under UFB Direct. The suit is on behalf of a proposed class of customers who have held money market accounts with UFB since March 2022.

Pliszka alleges that Axos, doing business as UFB, "surreptitiously" reclassified customers' high-yield money market accounts into lower-yield "legacy" accounts while simultaneously creating a series of new, identical accounts with competitive rates without notice to customers.

According to the complaint, UFB is a division of Axos Bank that offers online banking services, including high-yield FDIC-insured deposit accounts. The complaint says UFB has continuously advertised that its money market accounts pay high-yield interest rates on account balances.

However, Pliszka alleges that when market interest rates began to rise in 2022, UFB started "taking advantage of customers by furtively creating new, similarly named money market accounts with higher rates, while leaving existing customers in so-called 'legacy' accounts with lower rates."

According to the complaint, UFB executed a "shell game tactic" and created several functionally identical accounts with minimally different names, each with a stepped-up interest rate from the previous version.

"Each time UFB introduced a new, similarly named money market account offering, it synchronized the new advertised annual percentage yield with the escalating federal funds rate," the complaint says.

Pliszka says that as the federal fund's target rate rose to a range of 5.25% to 5.5% over 2022 and 2023, the annual percentage yield, or APY, linked to UFB's money market accounts also surged. However, Pliszka says, UFB did not continue to raise the APY for preceding "legacy" accounts in response to market conditions; instead, it lowered the APY for those legacy accounts.

Additionally, as new versions of the money market accounts were launched, the previous versions were classified as legacy accounts without notice to customers, the complaint says.

"UFB neglected to inform its account holders about the availability of a new money market account, nor did UFB inform account holders that its advertised money market account was not simply another name for their existing money market account, but instead was a distinct account offering a higher rate of interest," the complaint says. "Consequently, existing money market customers were left in lower yield accounts."

According to the complaint, Pliszka opened a UFB money market account with his wife in April 2023 when the advertised APY was 5.02%. He invested funds into the account under UFB's representations that the interest rate was variable and he expected his account would yield interest based on the federal funds rate.

However, throughout 2023, Pliszka says, UFB capped the APY on his account at 5.02% and then decreased it to 4.67% in September 2023 while at the same time actively advertising other money market accounts with an APY of 5.25%.

Pliszka says "no rational person" would choose to remain in a legacy account with a lower interest rate and that UFB breached the covenant of good faith and fair dealing by failing to raise interest rates for its money market account holders, to whom it had promised a variable high-yield rate.

The complaint also alleges that UFB was able to report higher profits by underpaying money market account holders.

The suit seeks damages, disgorgement, restitution, attorney fees and a jury trial.

Counsel for Pliszka declined to comment Thursday and representatives for Axos did not immediately respond to requests for comment.

Pliszka is represented by Philip M. Black and Chet B. Waldman of Wolf Popper LLP.

Counsel information for Axos Bank was not immediately available Thursday.

The case is Pliszka v. Axos Bank, case number 3:24-cv-00445, in the U.S. District Court for the Southern District of California.

--Editing by Stephen Berg.

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Judge Doubts 'Dead-End' Google BIPA Fight Over IBM Dataset

By **Dorothy Atkins**

Law360 (March 7, 2024, 6:11 PM EST) -- A California federal judge said Thursday she'll likely allow limited discovery in a proposed class action alleging Google violated Illinois residents' biometric privacy rights with facial data collected by IBM Corp., but she doubted the case "has legs" given that another federal judge has thrown out similar "dead-end" litigation.

U.S. District Judge Beth Freeman's comments came during a hearing via Zoom on Google's motion to dismiss a lawsuit filed by Chicago residents Steven Vance and Tim Janecyk in July 2020.

The pair claim that the Silicon Valley-based Google violated the Illinois Biometric Information Privacy Act when it bought a "diversity in faces" dataset that purportedly contained geometric scans of their faces from IBM Corp.

IBM created the dataset by allegedly scanning 100 million images on Flickr, the public image-sharing site where both Janecyk and Vance held accounts. IBM then made the dataset available to researchers in 2019, so that Google and other technology companies could help train computer programs to better recognize faces.

However, Janecyk sued IBM in Illinois state court in **early 2020** claiming IBM collected the facial data without their consent in violation of BIPA, and a few months later, the plaintiffs **fired off four nearly identical**, but separate lawsuits against Google and face-matching software company Facefirst Inc. in California, and against Amazon.com Inc. and Microsoft Corp. in Washington.

In February 2021, Judge Freeman **agreed to pause** the case against Google to await the outcome of the other pending lawsuits, and the parties agreed to resume litigation in October, when Google filed a motion to toss the lawsuit.

Google's motion noted that Janecyk voluntarily dropped his state lawsuit against IBM in May, and after **surviving the pleading stage**, U.S. District Judge James L. Robart in Washington handed Amazon and Microsoft **separate summary judgment wins** in 2022, finding that the litigation improperly sought to apply BIPA outside the boundaries of Illinois.

Meanwhile, the parties agreed to voluntarily drop the California lawsuit against Facefirst in October, according to the case's court docket.

At the start of the hearing on Google's motion Thursday, Google's counsel, Anna M. Thompson of Perkins Coie LLP, argued that the lawsuit should be dismissed outright for insufficient pleadings, noting that the consumers are alleging Google purportedly used their data internally to improve its products, but not that Google gave any sensitive data to other consumers or third parties.

Under the high court's **Iqbal**  pleading standard, she argued, plaintiffs must make allegations "beyond the mere possibility of misconduct," but "there is no misconduct here."

Judge Freeman indicated she would likely grant Google's motion to dismiss with respect to some claims, but not others, and she would give the plaintiffs a chance to amend their allegations and take limited discovery on the issue of extraterritoriality. Following the limited discovery, she said, she would likely allow the parties to file early summary judgment motions.

Even so, Judge Freeman repeatedly expressed doubts that the litigation is viable, given that the Washington federal court threw out similar litigation filed by the plaintiffs' firms.

"Frankly, it's unlikely this case has legs based on the history of all these other cases," the judge said.

Judge Freeman told plaintiffs' counsel, Jamisen A. Etzel of Lynch Carpenter LLP, that his firm has "hit a brick wall in every court you've been in, and I don't know why you think I would rule different."

But Etzel argued that his clients haven't been allowed to take discovery in the current litigation, so he doesn't know if Google collected and stored the information on servers in Illinois.

"It's not far-fetched that Google might have actually used this data in Illinois," he argued

But the judge replied that it "would be kind of random" for Google to have stored and collected the data in Illinois, particularly since Google is based in California and obtained the data from the New York-based IBM.

"I don't think Google is known for having a major presence in Illinois," she said, adding, "I could be wrong but ... I can look out my window [in San Jose, California] and I can see most of [Google's] people."

Judge Freeman also noted that the complaint doesn't allege that Google had any relationship with Flickr, which is also based in San Francisco. Ultimately, plaintiffs aren't allowed to sue simply to open discovery, the judge cautioned, but she also acknowledged that "there's only so much a plaintiff can know without taking discovery."

"I have to say," she added. "It's very frustrating to be the fourth in line on a series of dead-end cases. Or maybe it should be more frustrating for the plaintiffs. I don't know."

Regarding the specific claims, Judge Freeman said she'll likely deny the motion to dismiss allegations that Google profited off the consumers' BIPA data, but she would toss their unjust enrichment claim and allow the plaintiffs to amend it to specify which state law the claim is invoking.

"I'm not going to consider an unjust enrichment claim until I know which law," she said. "Pick a state. I don't care which, and then we'll decide if that's the right one."

Vance and Janecyk are represented by Jamisen A. Etzel of Lynch Carpenter LLP and Scott R. Drury of Drury Legal LLC.

Google is represented by Bobbie J. Wilson and Anna M. Thompson of Perkins Coie LLP.

The current case is Vance et al. v. Google LLC, case number 5:20-cv-04696, in the U.S. District Court for the Northern District of California.

The dismissed Facefirst case is Steven Vance et al. v. Facefirst Inc., case number 2:20-cv-06244, in the U.S. District Court for the Central District of California.

The Washington cases are Steven Vance et al. v. Microsoft Corp., case number 2:20-cv-01082, and Vance et al. v. Amazon.com Inc., case number 2:20-cv-01084, in the U.S. District Court for the Western District of Washington.

The state case is Tim Janecyk et al. v. International Business Machines Corp., case number 2020CH00833, in the Circuit Court of Cook County.

--Editing by Michael Watanabe.



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Skechers Fined \$1.25M Over Execs' Family Member Payments

By **Gina Kim**

Law360 (March 7, 2024, 10:15 PM EST) -- Skechers will pay the U.S. Securities and Exchange Commission \$1.25 million to resolve claims it failed to disclose hundreds of thousands of dollars in payments made to its directors and their immediate family members who were hired by the sneaker giant as contractors or nonexecutive employees.

The SEC alleges in its cease-and-desist order Thursday that, from 2019 to 2022, the California-based footwear company didn't disclose in its proxy statements that it had hired two relatives of its executives and directors, as well as a consulting relationship involving an individual who lived with one of Skechers USA Inc.'s executives.

"In addition, each of the proxy statements ... failed to disclose that one or more executive officers and directors of Skechers owed in excess of \$120,000 to Skechers with respect to personal expenses that had been paid for by Skechers but not yet reimbursed by the related person," Thursday's order states. "In particular, one executive officer and director of Skechers owed in excess of \$120,000 to Skechers as of the years ended December 31, 2018, December 31, 2019, December 31, 2020 and December 31, 2021."

Another Skechers executive owed the company more than \$120,000 as of the years ending on Dec. 31, 2019 and Dec. 31, 2021, according to the SEC.

Skechers' conduct and omissions violated multiple provisions of the Exchange Act, the SEC contends, adding that the company has entered into a settlement agreement without admitting or denying any of the commission's findings.

According to Thursday's order, Skechers files a 10-K form regularly with the SEC that contains a so-called Item 404, which requires a description of transactions that occurred since the start of its last fiscal year that are in excess of \$120,000 in which the company was a participant, and any "related person had or will have a direct or indirect material interest."

A "related person" refers to a director or executive of the company, as well as immediate family members — including siblings or siblings-in-law of executives or directors, or any individual who lives in the same household as the director or executive, the SEC states.

On April 12, 2019, according to the order, Skechers submitted a definitive proxy statement that included the election of its directors and didn't reveal that a person sharing the same household as a Skechers executive was paid \$210,000 in 2018 when they were hired as an independent contractor.

Skechers submitted another definitive proxy statement in April 2020 that didn't include that a person sharing the same household as one of its executives received \$210,000 in 2019 while working as an independent contractor for the company, the SEC asserts.

On April 14, 2021, the regulator says, Skechers again failed to disclose in its definitive proxy statement that a sibling-in-law of an executive officer was paid \$213,645 in 2020 while serving in a non-executive employee role for the company.

Skechers also omitted from its April 14, 2022, proxy statement that one sibling-in-law of an executive was paid \$155,419, and a sibling of another executive was paid \$486,790 while both were

employed with Skechers in non-executive positions, the SEC says.

Skechers has agreed to cease and desist from its alleged conduct and pay \$1.25 million to settle the case, according to the order.

"Disclosure of related person transactions provides important information for investors to evaluate the overall relationship between a company and its officers and directors," said Scott A. Thompson, associate director of enforcement at the SEC's Philadelphia Regional Office. "Today's action is a reminder that companies should take appropriate measures to ensure proper disclosure of such transactions."

In an emailed statement to Law360, a spokesperson for Skechers said the company is pleased that the commission recognized its cooperation and remedial efforts, and that they were able to come to an amicable resolution.

"This outcome is consistent with the results of our previously announced internal review and the corrective disclosures made over the course of last year," Skechers' representative said.

The SEC is represented in-house by Scott A. Thompson, Brendan P. McGlynn, Nicholas P. Grippo, Oreste P. McClung and Brian R. Higgins.

Skechers is represented by Thomas Hanusik of Crowell & Moring LLP.

The case is In the Matter of Skechers USA Inc., case number 3-21893, in the U.S. Securities and Exchange Commission.

--Editing by Kristen Becker.

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Tesla Can Force Individual Arbitration In EV Mileage Fight

By **Henrik Nilsson**

Law360 (March 7, 2024, 11:11 PM EST) -- A California federal judge on Thursday ruled that Tesla can force individual arbitration in two proposed class actions alleging the carmaker falsely advertised inflated mileage ranges for its electric vehicles, but stayed the suit in case an arbitrator determines that certain relief is barred under Tesla's arbitration agreement.

U.S. District Judge Yvonne Gonzalez Rogers granted Tesla's motion to compel the named plaintiffs into individual arbitration. However, the judge noted that although the arbitration agreement doesn't explicitly reference public injunctive relief, an arbitrator could interpret its language to preclude granting public injunctive relief.

The California Supreme Court's 2017 decision in **McGill v. Citibank**  held that, under California law, an arbitration clause prohibiting someone from seeking relief that benefits both the plaintiff and the general public was invalid and unenforceable.

The judge pointed to language in the Tesla agreement that could cause an arbitrator to find the agreement unenforceable as to plaintiffs' claims for public injunctive relief.

For example, the agreement "expressly states that the 'arbitrator cannot hear ... requests for relief on behalf of others purchasing or leasing Tesla vehicles,'" the judge noted.

"Because, when in doubt, the court must interpret the arbitration provision to permit arbitration, and Tesla stated in both its briefing and at the hearing that it did not draft the arbitration provision to prohibit public injunctive relief, the court ultimately concludes that the arbitration provision permits plaintiffs to seek public injunctive relief in arbitration," Judge Gonzalez Rogers wrote.

"To the extent an arbitrator finds otherwise, the court stays the action as such relief is severable and can be separately adjudicated by this court," the order noted.

The suits **were filed in August** by lead plaintiffs James Porter and Samuel Van Diest and other Tesla vehicle owners, and they generally allege that Tesla founder Elon Musk directed the company to inflate mileage ranges in advertisements. They also allege Tesla used a secret "diversion team" to cancel service appointments over range issues and convince customers their batteries were operating normally.

The drivers brought claims under California's Consumer Legal Remedies Act, Unfair Competition Law, False Advertising Law and various other California law claims as well as claims under consumer protection laws in Florida, Illinois, Massachusetts, New York and Washington, according to the order.

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

But in November, Tesla filed motions asking the court to send the dispute to arbitration, arguing that each Tesla buyer repeatedly agreed to arbitration when they ordered their vehicles, accepted their delivery and signed sales agreements.

Tesla also argued in its motions that the plaintiffs have refused to individually arbitrate their claims,

even though plaintiffs' counsel sent Tesla a letter threatening mass individual arbitration.

During **oral arguments last month**, Judge Gonzalez Rogers questioned whether the court must keep or sever any claim seeking public injunctive relief while an arbitrator decides the rest of the claims in light of McGill.

"Upon further reflection, the court concludes that it will be able to craft appropriate public injunctive relief if plaintiffs successfully arbitrate their [Unfair Competition Law, False Advertising Law and Consumer Legal Remedies Act] claims and such relief is deemed unavailable," Judge Gonzalez Rogers wrote on Thursday.

Counsel for the parties did not immediately return a request for comment.

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

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

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

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

--Additional reporting by Craig Clough and Dorothy Atkins. Editing by Jay Jackson Jr.

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Tesla's \$6M Solar Roof Deal OK'd After Objector Backs Down

By **Dorothy Atkins**

Law360 (March 7, 2024, 10:20 PM EST) -- A California federal judge on Thursday approved Tesla's \$6.08 million class action settlement and class counsel's \$1.5 million fee request resolving allegations Tesla deceptively raised prices of its solar roof tile system after a class member dropped her sole objection mid-hearing upon learning she'll receive \$17,000 under the settlement.

During a hearing held via Zoom, U.S. District Judge Vince Chhabria said he would approve the settlement under which roughly 8,622 class members would receive payments to resolve claims over Tesla's decision to delay installation and dramatically increase the cost to purchase and install the Tesla Solar Roof to power their homes in April 2021.

Judge Chhabria also said he'll sign off on class counsel's request for \$1.5 million, or about 24.7% of the settlement, in fees, plus \$9,692 in costs.

The settlement resolves litigation that lead plaintiffs Matthew Amans and Babak Malek filed in May 2021, alleging that Tesla carried out "bait and switch" schemes by having customers sign contracts to buy the company's solar roof tiles but then faced price hikes in April 2021.

Tesla denied the allegations in its motion to dismiss, arguing that the contracts provided an estimated price, which purportedly specified that if the final cost or scope of work for installation is greater than anticipated due to "unforeseen" circumstances, the company would issue an amended agreement.

Tesla also said it gave customers the choice to cancel contracts with a refund on their deposits, and that by fall 2021 the company had walked back the April 2021 price change and offered customers the choice to proceed with their original pricing and terms.

According to Amans and Malek, however, Tesla's actions were deceptive, saying the company held customers hostage with unjustified and illegal price hikes and delays in installation.

After a **July 2022 hearing**, Judge Chhabria **trimmed some claims**, but refused to toss the litigation outright, and the dispute entered discovery, but in May, the parties **informed the court** they had struck a **deal**.

Although Judge Chhabria had **previously expressed reservations** about certain details of the settlement, the judge began the hearing Thursday saying he didn't have any significant questions or concerns about the fairness of the agreement or motion for attorney fees.

Under the proposed deal, Tesla pledged to honor the original contract pricing for anyone who had a roof installation date scheduled by April 24, 2023, and class members would be able to claim three types of relief to recover out-of-pocket expenses incurred when preparing for solar roof installations that Tesla never performed, money to defray increased installation costs and money to more generally compensate for Tesla's alleged breach of contract.

The judge noted that there was only one objector, Michelle Prevost, who submitted a written objection to the court. She attended the hearing, so the judge invited her to speak.

Prevost complained that the settlement agreement doesn't specifically prohibit Tesla from shifting costs to other line items not covered by the deal. She argued that after receiving a quote from Tesla

and signing a contract, she and her wife had been charged \$6,000 in additional decking construction fees, and she expressed concerns that as it's currently written, the settlement may allow Tesla to shift similar costs to other line items.

But class counsel Eve-Lynn J. Rapp of Edelson PC responded that she had looked into Prevost's contract with Tesla, and the decking construction charges incurred prior to Tesla's April 2021 price hikes at issue in the lawsuit. Rapp explained that Tesla also considered the construction "unforeseen" charges due to a deck overlay on Prevost's property.

But Judge Chhabria questioned Rapp on the issue, noting that Tesla had argued during the litigation that its "unforeseen conditions" provision in the contract was so broad that it could include anything. The judge asked Rapp if she is taking the position that even under a narrow reading of the provision, the additional decking construction charges were due to unforeseen issues.

Rapp agreed that the charges were due to an unforeseen issue, but she noted that even so, the objector is going to receive a \$17,000 check under the settlement agreement if it's approved.

Prevost disagreed that the decking charges were unforeseen, and she noted that she was "flabbergasted" when Tesla added decking to current decking on the roof. However, she also appeared to be surprised by the amount Rapp said she would receive under the deal and said she would withdraw her objection if she is getting a \$17,000 check.

"I don't understand the logic, but I'm certainly happy with that," Prevost said.

The exchange between Rapp and Prevost prompted the judge to observe that "that's the funny thing about class actions," because they seek rough justice and they're not always logical.

"But I'm happy to hear that you're happy that you will receive \$17,000," Judge Chhabria said.

Before the hearing ended, Judge Chhabria also questioned the size of the requested \$10,000 incentive payments to lead class members, and he noted that the plaintiffs didn't face the same career risks that employees face in pursuing class action litigation against employers.

But Rapp argued the fee awards are justified due to the work the two lead plaintiffs put into the case and the risk they faced to their reputation if Tesla CEO Elon Musk went after them in court or in public.

Tesla's counsel replied that there's no evidence that Musk has taken action against class action plaintiffs and that should not be the basis for the awards. The judge appeared to agree.

"I think I would be inclined to award incentive awards in this case even if Elon Musk were not the CEO of the company," he said.

Objector Michelle Prevost represented herself.

The customers are represented by Eve-Lynn J. Rapp of Edelson PC, Saravenaz "Nazy" J. Fahimi of Cotchett Pitre & McCarthy LLP and Peter A. Muhic of the Miller Law Firm PC.

Tesla is represented by Alan E. Schoenfeld and David C. Marcus of WilmerHale.

The case is *Amans v. Tesla Inc.*, case number 3:21-cv-03577, in the U.S. District Court for the Northern District of California.

--Additional reporting by Henrik Nilsson, Madeline Lyskawa and Gina Kim. Editing by Michael Watanabe.