

Bloomberg Law

Research Trail

My Work

000888

Help

Account

Bloomberg L...

robbins geller

?

Select Sources

Go

Home

Practice Centers

Litigation

Transactional

Business

Practitioner Tools

News & Analysis

Laws & Regulations

Secondary Sources

Manage Subscription

Bloomberg Law

April 4, 2024, 11:35 AM PDT

Anadarko Investors' Class Status Hinges on Same-Day Major Events

By Martina Barash

Documents

5th Cir. Docket

- Oil company, investors posit different causes for stock drop
 - Anadarko challenges district court's handling of evidence
- Bloomberg Law News 2024-04-08T10:45:18416655497-04:00

Anadarko Investors' Class Status Hinges on Same-Day Major Events

By Martina Barash 2024-04-04T14:35:03000-04:00

Oil company, investors posit different causes for stock drop

Anadarko challenges district court's handling of evidence

Anadarko Petroleum Corp. and investors who say the company misled them about a new oil field both faced sharp questions Thursday at the Fifth Circuit in an appeal seeking to reverse class status for shareholders.

Anadarko contends the lower court judge improperly refused to consider its evidence that a different piece of adverse news caused the 2017 stock drop at the center of the case, the company's attorney told a concerned three-judge panel of the US Court of Appeals for the Fifth Circuit.

Judge James C. Ho, the main questioner, expressed concern about "fair notice" to Anadarko on that key issue, even though he wondered whether the outcome would have changed had the company been able to file an additional brief on the cause of the price decline.

"The point is, you're supposed to have a clash of ideas," he said. "The question is whether the adversarial process was completed at this stage."

"We believe it was," said Joseph Daley of Robbins Geller Rudman & Dowd LLP, who argued for the investors.

Anadarko had a chance to offer its own analysis during its turn for briefing on class certification but focused on other arguments instead, Daley said.

Class Members' Reliance

Class certification hinges on the issue because the investors would need to show they relied on the alleged misrepresentation on a classwide, rather than an individual, basis. Judge Charles Eskridge of the US District Court for the Southern District of Texas held the investors made that showing. Evidence that the market reacted to the news of Anadarko's roughly \$900 million writeoff for the oil field allows the investors' reliance to be presumed, classwide, under *Basic Inc. v. Levinson*, the lower court said.

The case also tests the reach of the US Supreme Court's 2021 decision in a securities case against Goldman Sachs Group, which concerned a different aspect of the *Basic* price impact analysis for class certification but also addressed how courts should look at price impact evidence.

The investors alleged that Anadarko, which was acquired by Occidental Petroleum Corp. in August 2019, intentionally failed to disclose key information related to exploratory wells drilled in the roughly 13,000 acre "Shenandoah" oil field in the Gulf of Mexico, also called "Shen."

Anadarko and some of its executives allegedly doubted the oil field's commercial viability by the end of 2014 but failed to disclose that information in corporate filings.

Anadarko's common stock price fell approximately 8% on May 3, 2017, after the company disclosed after trading on May 2 that it was suspending its appraisals of the field, "resulting in \$435 million in expensed suspended exploratory well costs and a \$467 million impairment," Eskridge said in his September 2022 order.

Within an hour of that announcement on May 2, Colorado officials said in a press conference that the company was responsible for a fatal home explosion in Firestone, Colo., the previous month, according to the lower court.

Detailed Timeline

Ho probed the timeline in some detail after Kevin Orsini, an attorney for Anadarko, pointed to a 4:02 p.m. tweet saying that a sheriff's office in Colorado was about to begin a press conference about the explosion.

Ho asked whether there was evidence that people were watching the press conference before news of the Shenandoah write-down broke. "Was there anyone in the room who could affect the market?"

Orsini, who's with Cravath, Swaine & Moore LLP, said he didn't have evidence of that, but that an analysis based on after-market trading was flawed. Later, he said the early tweet was from ABC and urged people to "watch live."

Ho asked Daley whether the after-market reference and study were in the record prior to the investors' reply brief.

They weren't, Daley said. But the timing shows the stock was dropping in response to the oil field news, he said. Anadarko's premise was that "Shen didn't affect it one iota," the investors' attorney said.

Echoing Ho, Anadarko's attorney Orsini emphasized the importance of the "clash of ideas" in the securities context, where he said courts have moved away from rubber-stamping class certification requests.

Reply, Sur-Reply

In the lower court, the investors' economic evidence for separating out the stock-price effect of the oil field information and the Colorado incident came with their reply brief—the last of the litigants' three scheduled briefs on class certification.

In written arguments to the Fifth Circuit, the parties disagreed about whether Eskridge followed guidelines in denying Anadarko a chance to file an additional brief, or sur-reply.

Anadarko also argued that Eskridge should have subjected the economist's study to scrutiny under the so-called *Daubert* standards for allowing expert evidence into a case.

"Critically, the District Court explicitly relied on Plaintiffs' new expert evidence in reaching its certification decision while refusing to substantively consider the 'probative evidence' that Defendants had offered in response and refusing to conduct the rigorous *Daubert* analysis this Court requires," the company said in its brief. "That was an abuse of discretion."

Further, the Supreme Court held in *Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.* "that courts must consider *all* probative evidence in ruling on class certification," it said.

But the investors said in a December 2023 appellate brief that under Goldman, "the burden of *disproving* price impact (and rebutting *Basic's* presumption) lay squarely on" Anadarko. Eskridge also cited the high court's reference to "common sense," they said.

The news of the Firestone fire was at most a contributing factor to the stock drop, they said. Anadarko would have had to prove the fire was the sole cause in order to adequately show the absence of a price impact from the Shenandoah oil field disclosure, they said.

The other members of the panel were Judges Carolyn Dineen King and Kurt D. Engelhardt.

The case is Georgia Firefighters' Pension Fund v. Anadarko Petroleum Corp., 5th Cir., No. 23-20424, oral argument 4/4/24 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law

Contact Us

Wirecard AG

Wirecard shareholders sue EY over alleged asset stripping in Germany

Lawyers for former investors in collapsed German payments group claim Big Four firm's reorganisation made it harder to enforce claims



EY is facing an avalanche of lawsuits from former Wirecard investors, as well as its administrator, demanding billions of euros in damages © Gary Hershorn/Getty Images

Olaf Storbeck in Frankfurt YESTERDAY



Former Wirecard shareholders are suing EY Germany over alleged asset stripping as they fear a complex organisational revamp at the Big Four firm will make it harder if not impossible to enforce damage claims over its allegedly flawed audits of the defunct payments group.

EY is facing an avalanche of lawsuits from former [Wirecard](#) investors, as well as its administrator, demanding billions of euros in damages.

The Big Four firm had issued unqualified audits for almost a decade for the once-celebrated German tech company, which collapsed in June 2020 in one of Europe's largest accounting scandals.

The firm last month accepted a €500,000 fine from Germany's audit watchdog over alleged violations of its professional duties as well as a two-year ban on taking on new, large, listed audit clients. EY said it did not agree with all of the watchdog's findings.

EY is adamant that damage claims from Wirecard investors are unmerited, but earlier this year it executed a complex internal reorganisation ringfencing its lucrative non-audit operations, according to people familiar with the transaction.

In a multi-stage process that first involved a change of the existing group's legal structure, the firm then carved out its highly profitable consulting, tax and M&A advisory operations through an asset swap between the legacy body and three of EY's four business lines.

The profitable units, which account for three-quarters of its annual €2.6bn revenue, are now sitting in separate legal entities from its auditing business. Of the firm's 11,000 employees, 8,000 as well as the units' client relationships were also transferred.

"The legal entity that is subject to the Wirecard lawsuits is stripped of significant assets, which otherwise could have been used to cover damage claims," said Joachim Lehnhardt, a partner at Quinn Emanuel Urquhart & Sullivan, which represents a number of large institutional shareholders who are suing EY. He said this made it "much harder to enforce claims" over the Wirecard audits.

In a worst-case scenario for claimants, the legal entity that is subject to the lawsuits, and currently generates €714mn in annual revenue, could even "be turned into an empty shell with no operative business and no assets", Lehnhardt warned.

Berlin-based litigation lawyer Marc Liebscher, who is part of the legal team that is pursuing a class-action lawsuit against EY, said the changes were a "brazen move to protect the bulk of EY's assets in Germany from the Wirecard litigation".

Liebscher and his colleagues last week already filed a motion to Bavaria's highest district court, which is hearing the class action lawsuit, that the split was happening in bad faith hence constituting an "abuse of law". In the motion, which was seen by the Financial Times, the lawyers demanded the court establish that all of EY's German business units remain liable for potential damages.

Wirecard's administrator Michael Jaffé, who late last year filed a lawsuit of €1.5bn in damages against EY, is also highly concerned about the move and is evaluating legal steps against the reshuffle, according to people familiar with his thoughts. Jaffé declined to comment.

EY said in a statement that its reorganisation aligned its legal structure in Germany with other European countries, adding that it was also reflecting diverging regulatory requirements for its different business lines. "The legal entity changes don't have any consequences for the liability risk of current or former mandates or ongoing lawsuits," the firm said.

However, people familiar with EY's internal discussions acknowledge that the non-audit business lines will not be exposed to Wirecard litigation risks after five years, after a legally stipulated transition period will have expired. Litigation lawyers warn that the slow moving court procedures in Germany will almost certainly mean that the lawsuits will still be ongoing, pointing out that a similarly complex class action lawsuit over alleged misconduct by Deutsche Telekom dragged on for 19 years before it was finally settled.

They added that another key motivation was the increased liability of its auditors in Germany in the wake of the Wirecard scandal and the need to protect the other units from future potential liability claims caused by the audit work.

But Quinn Emanuel's Lehnhardt pointed to the fact that EY in early 2024 also created an additional legal entity in Germany that meets the required legal and regulatory requirements to perform audit work. Should the professional service firm be sentenced to pay damages to Wirecard shareholders, it could shift its existing audit business into the new entity and declare the old one insolvent, he warned.

[EY](#) declined to comment on the legal motion that was filed to the Munich court last week.

A person familiar with EY's thinking argued that the firm would never have been able to meet billions in damages claims as it does not possess meaningful physical assets and pays out all of its profits to its partners each year.

Bavaria's highest district court said it was unable to respond to a request for comment because of "procedural reasons". It said in February that it was planning to hold the first hearing of the class action lawsuits this autumn.

Bloomberg Law

Research Trail

My Work

000888

Help

Account

Securities Law

Search Securities Law

?

Select Sources

Go

Home

Practice Centers

Litigation

Transactional

Business

Practitioner Tools

News & Analysis

Laws & Regulations

Secondary Sources

 [Manage Subscription](#)

[Securities Law](#)
April 5, 2024, 2:00AM PDT
Match.com Ruling Stresses Investor Protections in Insider Deals
By [Jennifer Kay](#) and [Mike Leonard](#)
Documents
 [Opinion](#)

- Diller will have to formally argue for dismissal from case
- Court rejects claims it hadn't understood precedents

Bloomberg Law News 2024-04-08T14:57:19427619819-04:00
Match.com Ruling Stresses Investor Protections in Insider Deals

By Jennifer Kay and Mike Leonard 2024-04-05T05:00:34000-04:00
Diller will have to formally argue for dismissal from case
Court rejects claims it hadn't understood precedents

The Delaware Supreme Court has reiterated its intent to protect minority investors who are effectively powerless to sway transactions between companies and their controlling stockholders.

The court on Thursday turned aside arguments that such protections only applied to deals where minority investors get cashed out at a price set unilaterally by a controller.

The 50-page ruling revives litigation over a restructuring that split online dating company Match Group Inc. from billionaire Barry Diller's tech and media holding company IAC/Interactive Corp.

Here are some takeaways from the five-judge decision, signed by Chief Justice Collins J. Seitz Jr.

MFW Scope

The court took the unusual step of asking for additional briefing and arguments to consider whether the level of judicial scrutiny for many corporate transactions changes if a defendant shows either approval by an independent special committee or approval by fully informed, unaffiliated shareholders.

The framework Delaware courts had applied since 2016 required both of those steps to be taken in order for a transaction to be reviewed under the less onerous "business judgment" standard. Without both, corporate leaders must defend a transaction as "entirely fair." The test requires them to prove in court that both the process and the price were adequate, questions that can have different meanings in different contexts.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/X707G1K8000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6...> 1/4

Both steps must be taken whenever “a controlling stockholder stood on both sides of a transaction with a controlled corporation and received a non-ratable benefit,” Seitz wrote.

“But the use of just one of these procedural devices does not change the standard of review. If the controlling stockholder wants to secure the benefits of business judgment review, it must follow all” parts of what’s known as the “MFW” doctrine, after 2014’s *Kahn v. M&F Worldwide Corp.*, Seitz said.

The court rejected the defendants’ arguments that previous Delaware Supreme Court rulings didn’t require application of those procedural devices outside of “freeze out” or “squeeze out” transactions.

“We read our Supreme Court precedent differently,” Seitz said. “Our analysis starts with the common thread running through our decisions: a heightened concern for self-dealing” when there’s a controlling stockholder on both sides of a transaction.

And in the MFW ruling, “we noted that a controlling stockholder generally has inherently coercive authority over the board and the minority stockholders,” he said.

The Supreme Court’s opinion signals frustration among Delaware’s judiciary with transactional planners and “corporate law nerds” trying to push the limits of business judgment review, said Richard Renck, a partner at Duane Morris LLP.

Match shows the state’s high court isn’t swayed by arguments attempting to narrow the scope of previous orders concerning controller-led deals, he said.

“If you’re a Delaware corporate lawyer advising boards and directors, if you’ve got any kind of transaction with your conflicted stockholder, the paradigm is what the Supreme Court has said it is, and that’s even including *MFW*,” Renck said.

Committee Independence

A trial court judge had found that just a majority of the special committee considering a transaction involving a controlling stockholder needed to be independent. But the Supreme Court disagreed, finding that a board must set up an entirely independent committee.

“We stated in *MFW* that the special committee must be independent, not that only a majority of the committee must be independent,” Seitz said.

In other contexts where a deal doesn’t include a controlling stockholder, even majority independence isn’t always required, he said.

But transactions where there’s a conflict between a company and its controlling stockholders are special cases. “A controlling stockholder’s influence is not ‘disabled’ when the special committee is staffed with members loyal to the controlling stockholder,” Seitz said.

“Longstanding business affiliations, particularly those based on mutual respect, are of the sort that can undermine a director’s independence. Directors who owe their success to another will conceivably feel as though they owe a ‘debt of gratitude’ to the individual,” he said.

The opinion “ratcheted up” what will be accepted as an independent committee by the courts going forward, said Jill Fisch, a University of Pennsylvania law professor.

“And that, in a way, is almost as important as the fact that you need the sort of two-step process, because true independence and disinterestedness in a company with a real controlling stockholder—it’s going to be pretty hard,” she said.

Musk Up Next?

Diller and former Match board members initially dodged the legal challenge to the online dating company’s spinoff from IAC.

He had argued before Vice Chancellor Morgan T. Zurn that he wasn't a Match fiduciary because he controlled it only indirectly, through IAC. But the lower court judge never had to address that issue before she dismissed the lawsuit on *MFW*-related grounds in September 2022.

He'll have to make that argument now that the case is going back to Delaware's Court of Chancery.

"Now that the case will be remanded, the Court of Chancery should have the opportunity to decide his dismissal motion in the first instance," Seitz said.

The Delaware Supreme Court has positioned itself to take on another billionaire—Elon Musk, who's expected to appeal the Chancery Court's rescission of his \$55 billion pay package at Tesla Inc., said Eric Talley, who teaches at Columbia Law School.

The trial court applied the *MFW* standard in Musk's case too, finding that the Tesla directors' decision to give Musk the excessive compensation plan was rife with conflicts of interest.

Now the justices on the high court are going to be able to clear up any concerns about controller liability without having to invent "a made-up jurisprudence that draws artificial distinctions between freeze-outs and cosmetically different transactions," Talley said.

To contact the reporters on this story: Jennifer Kay in Philadelphia at jkay@bloomberglaw.com; Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editors responsible for this story: Alex Clearfield at aclearfield@bloombergindustry.com; Andrew Harris at aharris@bloomberglaw.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law

Contact Us

Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/04/match-is-out.html

Thursday, April 4, 2024

Match is out!

By Ann Lipton

It's the moment we've all been waiting for and - the Delaware Supreme Court holds that all conflicted controller transactions require *MFW* protections to win business judgment review.

It also appears that the special committee must be composed completely of independent directors - none of this, oh, well, one turned out to be conflicted but it didn't matter much business, which to me actually *tightens* the standard that I kind of assumed was being employed, and was employed in the Chancery decision in *Match* itself.

Also, I have previously remarked on the disjunction between requiring *MFW* for conflicted transactions, but only board independence for considering litigation demands against controlling shareholders. In my paper, *After Corwin: Down the Controlling Shareholder Rabbit Hole*, I said:

litigation demands are, in a real sense, different from ordinary conflict transactions. If directors are too conflicted to consider the merits of a transaction, the court evaluates its fairness. By contrast, if directors are too conflicted to consider the merits of bringing litigation, shareholders themselves are permitted to assume control of corporate machinery to bring the action in their stead. For that reason, demand excusal may legitimately be viewed as its own category of problem.

Reading quickly, it appears the Delaware Supreme Court adopted similar reasoning:

Admittedly, there is a tension in our law in these contexts. But *Aronson* and our demand review precedent stand apart from the substantive standard of review in controlling stockholder transactions. The distinction is grounded in the board's statutory authority to control the business and affairs of the corporation, which encompasses the decision whether to pursue litigation.

(They didn't cite me but that's okay, they cited me for something else, I can live with it.)

I may or may not have more to say as I read again; it's a very short opinion and doesn't seem to address what I believe have become the real issues: who is a controlling shareholder, and what counts as a conflicted transaction? That's really what's created much of the difficulty, but resolution must await another day.

I guess I'll conclude with: the Council of the Corporation Law Section of the Delaware State Bar Association may be cowed by threats of migration out of Delaware, but the Delaware Supreme Court is holding firm.

Match.com Spin Case Revived in Major Ruling on Insider Deals (2)

By Mike Leonard and Jennifer Kay

Documents

 [Ruling](#)

 [Docket](#)

-
- Litigation addressed framework covering controller-led deals
 - Court upholds standard, handing loss to billionaire Diller

Bloomberg Law News 2024-04-08T09:57:01479839216-04:00

Match.com Spin Case Revived in Major Ruling on Insider Deals (2)

By Mike Leonard and Jennifer Kay 2024-04-04T09:52:54000-04:00

- Litigation addressed framework covering controller-led deals
- Court upholds standard, handing loss to billionaire Diller

Delaware's top court Thursday rejected billionaire Barry Diller's invitation to streamline M&A dealmaking between companies and their controlling stockholders, upholding a legal framework that requires heightened scrutiny of certain insider transactions.

The state's justices partly reversed a lower court judge's decision to uphold the transaction that separated Match Group Inc. from Diller's IAC/Interactive Corp. Their ruling for Delaware's Supreme Court explicitly preserved a host of protections covering minority investors in a range of deals between a company and its controller.

Read More: [Match.com Appeal Hearing Tees Up Major Ruling on Insider Deals](#)

Diller and IAC had argued that the legal framework in question should be confined to the context of “squeeze-out” or “freeze-out” transactions that cash out minority investors at a price unilaterally set by a controlling stockholder. Justice Collins J. Seitz Jr. rejected that limitation in his ruling for the unanimous five-member court.

Legal precedents suggest the need for “heightened concern for self-dealing when a controlling stockholder stands on both sides of a transaction,” Seitz said. “A controlling stockholder generally has inherently coercive authority over the board and the minority stockholders.”

Retired University of Delaware law professor Charles Elson praised the ruling Thursday. “They did the right thing,” said Elson, who contributed a friend-of-the-court brief in the case. “Delaware protects investors,” he said.

Jill Fisch, a University of Pennsylvania law professor, was less optimistic. “I can’t help feeling that the court is going in the wrong direction on this,” she said. “I thought they would be a little more cautious.”

‘Intestinal Fortitude’

The litigation, led by a group of pension funds, concerned the framework used since 2014 to review transactions involving a potential conflict of interest between a company and its corporate controller.

Judges in recent years have applied the standard outside the squeeze-out context to a range of side deals between companies and their controlling stockholders, including the decision in January that struck down Elon Musk’s \$55 billion Tesla Inc. pay package.

Musk has assailed the ruling and the court system that delivered it, threatening to move Tesla out of Delaware—where a majority of Fortune 500 companies are incorporated—to a state like Texas or Nevada that’s trying to woo businesses with looser accountability rules. The public pressure campaign has amplified doubts about Delaware’s place as America’s corporate capital, along with a backlash against the backlash.

Read More: Novel Corporate Rulings Fuel Charged Debate on Delaware’s Role

Eric Talley, a Columbia University law professor, said the fevered reception to the Musk ruling—the idea that “Delaware is turning its back on controlled companies”—was overblown.

“But to the extent that was a reaction people were putting out there, it led some folks to predict the Delaware Supreme Court was going to feel the politics of the moment and try to issue a compensatory decision as sort of an olive branch to controlled companies,” Talley said. “That’s not what they did. They got it right, but it took a little bit of intestinal fortitude.”

MFW Creep

The legal standard at issue in the Match case—known as the “MFW” doctrine, after 2014’s *Kahn v. M&F Worldwide Corp.*—requires corporate leaders to defend a transaction as “entirely fair” unless the board both set up an independent special committee and sought “majority of the minority approval” from unaffiliated investors, onerous steps that can derail a deal.

That double “belt and suspenders” approach significantly eases the legal requirements for a company and its board by applying the “business judgment” rule, which broadly gives company executives the benefit of the doubt. Few stockholder cases can get past business judgment review.

The central dispute on appeal in the Match case was over *MFW*’s scope. The original landmark decision came in a case involving a squeeze-out, but judges starting in 2016 began applying the framework more broadly to controller-led deals, many of which bear little resemblance on the surface to squeeze-outs.

After an influential article by a prominent academic and two former judges argued that the doctrine had outrun its purpose—a concept they called “*MFW* creep”—Delaware’s high court surprised experts by agreeing late in the Match litigation to determine if the rule should be confined to the squeeze-out context.

Read More: Match.com Case Holds Potential to Upend Insider Deal Scrutiny

The court’s belated decision to hold a second round of oral argument devoted to *MFW* led many observers to conclude the justices were preparing to rein the doctrine in—why else take the issue up? That turns out to have been premature, according to Richard Renck, a partner at Duane Morris LLP.

“It didn’t strike me as being outlandish that the Supreme Court might come back and say, ‘No, we’ve meant what we’ve always said when we’ve said it,’” Renck said. “There seems to be some frustration amongst the bench, and that means both Chancery and now the Supreme Court, with transactional planners out there kind of trying to get ahead of the law.”

But Fisch pushed back on the idea that the contours of *MFW* were already well settled. “I don’t think it was super clear before this decision that *MFW* was the only way to avoid entire fairness in so many situations,” she said. “I didn’t think they would go for that.”

‘Transactional Alchemy’

In the Match case, Vice Chancellor Morgan T. Zurn, who presided over the dispute in Delaware’s Chancery Court, issued a ruling in September 2022 that evaluated the complex IAC spinoff and restructuring under the *MFW* framework. But she found that the deal protections in place satisfied the standard, despite one special committee member with strong ties to Diller.

The state supreme court partly agreed, rejecting the idea that the original *MFW* decision was limited to squeeze-outs. “We cannot find any statement in *MFW* that distances our law in any transactional setting from the inherent coercion” concerns involving controlling stockholders, Seitz said in Thursday’s 52-page ruling.

That part of the decision was an important affirmation of legal substance over “artificial transactional boundaries,” according to Columbia’s Talley.

“For Delaware lawyers, a more complicated holding giving them an invitation to engage in various types of transactional alchemy would probably have been a more lucrative outcome,” Talley said. “But the court said, ‘You can’t just dress up the transaction to make it not look like a freeze-out.’”

Fisch said the decision will force judges to evaluate “entire fairness” across virtually all deals involving controller conflicts—without providing any clear guidance about what entire fairness means—while Delaware’s courts are simultaneously applying the “controlling stockholder” label in ever-widening contexts.

“What we have in the real world is a lot of people who exercise control through a variety of different mechanisms—dual-class stock, or being a superstar CEO,” she said. “I think the court just kind of kicked the can down the road.”

Delaware vs. Nevada vs. Texas

Although the justices upheld the *MFW* framework, they overturned the section of Zurn’s ruling that applied it. A special transaction committee can’t be considered independent if one member is beholden to the company’s controller, Seitz wrote.

In many contexts it’s appropriate to “count heads” when it comes to board-level conflicts of interest, but transactions between a company and its controlling stockholder are a special case, according to the court ruling.

“We stated in *MFW* that the special committee must be independent, not that only a majority of the committee must be independent,” Seitz said.

Talley emphasized that section of the opinion, calling it fairly novel and “super important.” It hadn’t been entirely clear, which is why Zurn got it wrong, he said.

Elson, the retired University of Delaware professor, struck a similar note. “Committees like to move unanimously, and they’ll often compromise in ways that undermine their effectiveness when they have a non-independent member,” he said.

Justices Karen L. Valihura, Gary F. Traynor, Abigail M. LeGrow, and N. Christopher Griffiths joined the ruling. Their decision sends the case back to Zurn’s courtroom for renewed trial-level proceedings.

Renck, the Duane Morris partner, said it will be interesting to see where the decision fits into wider discussions about Delaware “versus Nevada versus Texas.” Whatever Delaware’s courts end up doing, it won’t be because they were intimidated by all the chatter, according to Renck.

The judges seem to be saying, “If you do not like the system, then I guess you can go to Nevada, and hopefully you can convince stockholders to invest in you because they have no protections whatsoever,” Renck said. “But, you know, we provide a place for that, and this is the lane we’re in.”

Prickett, Jones & Elliott PA and Kessler Topaz Meltzer & Check LLP are counsel for the pension funds. Diller and IAC are represented by Wachtell, Lipton, Rosen & Katz and Morris, Nichols, Arsht & Tunnell LLP.

The case is In re Match Grp. Inc. Deriv. Litig. , Del., No. 368, 2022, 4/4/24 .

(Updates throughout with additional reporting and reactions to ruling.)

To contact the reporters on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com; Jennifer Kay in Philadelphia at jkay@bloomberglaw.com

To contact the editors responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com; Rob Tricchinelli at rtricchinelli@bloombergindustry.com; Andrew Harris at aharris@bloomberglaw.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Accounting-Related Securities Class Action Filings Rose in 2023

 [cornerstone.com/insights/press-releases/securities-class-action-filings-rose-in-2023](https://www.cornerstone.com/insights/press-releases/securities-class-action-filings-rose-in-2023)

- Press Release
- 3 April 2024

Number of Accounting-Related Securities Class Action Filings Rose in 2023 Despite Increase in Filing Lag to 10-Year High

Total value of settled accounting cases also increased in 2023

A new report released today by Cornerstone Research shows an increase of nearly 10% in the number of securities class action filings involving accounting allegations in 2023 compared to 2022. This growth occurred even though cases took longer to be filed, with the median filing lag reaching 43 days, the longest in a decade. The report, *Accounting Class Action Filings and Settlements—2023 Review and Analysis*, also found that the total value of settlements increased 11% year-over-year despite a decrease in the number of settlements.

Accounting Case Filings

The number of accounting-related securities class action filings grew to 56 in 2023. Despite three years of consecutive increases, the number of cases filed remained below the historical average of 62.

For defendant companies named in accounting case filings, the DDL Index, the dollar-value change in the defendant firm's market capitalization, more than doubled in 2023 to \$76.9 billion. This was the second largest for accounting cases in the last 10 years and came amidst a 44% decline in total DDL for all federal securities class action filings in 2023. The increase was largely due to filings with a DDL of at least \$5 billion, accounting for approximately half of the total accounting DDL.

"While the DDL substantially increased in 2023 compared to 2022, the trend of plaintiffs filing accounting cases against smaller issuer defendants continued," said Frank Mascari, a report coauthor and a principal at Cornerstone Research. "At \$719 million, the issuer defendant's median market capitalization in 2023 accounting case filings was 46% less than the 2014–2022 average and was the lowest in the last 10 years."

Additional Filing Trends:

- Revenue recognition continued to be the most common GAAP violation alleged in 2023.

- The first-year dismissal rate of 2023 accounting case filings was 36% lower than the average first-year dismissal rate over the last 10 years.
- Accounting case filings in the Financial sector doubled in 2023, returning to historical levels.
- Accounting case filings involving financial statement restatements continued to rebound after a 10-year low in 2021, and they were the second highest in the last 10 years.

The total value of accounting-related securities class action settlements increased slightly from \$1.4 billion in 2022 to \$1.6 billion in 2023. The increase was led, in part, by the presence of four mega settlements (equal to or greater than \$100 million), which represented 65% of the total value of all accounting case settlements and resulted in the average settlement amount increasing from \$33.3 million in 2022 to \$45.7 million in 2023. In contrast, the median settlement amount declined from \$16.1 million in 2022 to \$15.0 million in 2023.

Almost 90% of the total value of all accounting cases settled was attributable to settlements involving institutional lead plaintiffs.

Despite the increase in value, there were just 35 accounting case settlements in 2023, an almost 19% decrease from 2022 and the third fewest observed over the last 20 years.

“As discussed in our recent *Securities Class Action Settlements—2023 Review and Analysis*, securities class actions as a whole have recently settled at more advanced stages of litigation, contributing to a drop in the number of settlements,” said Laura Simmons, a report coauthor and a Cornerstone Research senior advisor. “This is especially true for accounting class actions, which have progressed even further before settling than non-accounting cases. In particular, only 37% of accounting cases were settled before the motion for class certification was filed, compared to 54% of non-accounting cases.”

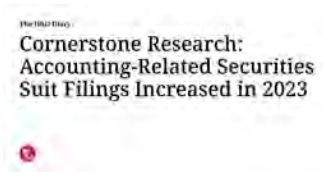
Additional Settlement Trends:

- In 2023, accounting case settlements with alleged GAAP violations but no internal control weaknesses hit a five-year peak.
- The size of issuer defendants in accounting cases settled in 2023, as measured by total median assets, decreased by 70%.
- In 2023, the number of settled accounting cases involving restatements fell to the lowest level since 1998. The number of accounting case settlements alleging internal control weaknesses declined to the lowest level in 10 years.
- Median “simplified tiered damages” in 2023 were lower for settlements involving accounting allegations than non-accounting cases.

Cornerstone Research: Accounting-Related Securities Suit Filings Increased in 2023

K [dandodiary.com/2024/04/articles/securities-litigation/cornerstone-research-accounting-related-securities-suit-filings-increased-in-2023](https://www.dandodiary.com/2024/04/articles/securities-litigation/cornerstone-research-accounting-related-securities-suit-filings-increased-in-2023)

April 4, 2024



By Kevin LaCroix on April 4, 2024
Posted in Securities Litigation

CORNERSTONE RESEARCH

The number of securities class action lawsuit filings involving accounting allegations increased in 2023 compared to 2022, but the

2023 accounting-related filings remained below the long-term annual average number of such filings, according to the latest annual report from Cornerstone Research. The number of accounting-related settlements decreased during 2023, as did the median settlement value, though the aggregate and average value of accounting related settlements increased. The Cornerstone Research Report, which is entitled "Accounting Class Action Filings and Settlements: 2023 Review and Analysis," can be found [here](#). Cornerstone Research's April 3, 2024, press release about the report can be found [here](#).

According to the report, there were 56 securities class action lawsuit filings in 2023 that containing allegations related to GAAP violations or violations of other reporting standards, auditing violations, or weaknesses in internal controls over financial reporting, compared to 51 accounting-related filings in 2022, representing an increase of nearly ten percent. The accounting-related securities suit filings represented 27% of the 207 total securities class action lawsuit filings in 2023. While the 56 accounting-related filings represented an increase in the number of such filings compared to 2022, the 2023 accounting-related filings remained below the 2014-2022 average annual number of accounting case filings of 62.

Accounting-related securities suits tend to be filed more quickly than non-accounting cases, a pattern that held again in 2023. However, the median number of days between the end of the class period and the lawsuit filings date ("the lag time") in connection with accounting-related securities suit filings increased substantially for the second year in a row; the lag time for the filing of accounting cases during 2023 was 43 days, the longest period in the last ten

years, and only slightly below the lag time for non-accounting cases (46). The lag time for accounting cases in 2023 of 43 days was well above the 2014-2022 annual average median number of lag time of 14 days.

The median pre-disclosure market capitalization of issuer defendants in accounting-related securities suit filings in 2023 was \$719.3 million, well below the 2022 market capitalization of \$1.04 billion, and well below the 2014-2022 annual average accounting case-disclosure market capitalization of \$1.34 billion. The 2023 median pre-disclosure market capitalization in accounting cases was the smallest in the last ten years.

While the market capitalization of the issuer defendants in accounting-related securities suits filed in 2023 declined, the disclosure dollar loss (DDL) for accounting-related case filings increased. DDL is the dollar value change in the defendant firm's market capitalization between the trading day immediately preceding the end of the class period and the trading day immediately following the end of the class period. While total DDL for all securities filings declined by 44% in 2023, the DDL for accounting cases more than doubled, from \$30.6 billion in 2022 to \$76.9 billion in 2023. The 2023 accounting-related suit filing DDL was the second highest in ten years. There were three accounting cases filed in 2023 with DDL of \$5 billion or greater; these three cases accounted for about half of the total accounting suit-related DDL in 2023.

The number of accounting-related securities suit filings involving restatements increased in 2023, with 21 accounting case filings involving restatements in 2023 compared to 17 in 2022 (and just five in 2021). The number of securities suit filings involving restatements in 2023 (21) was well above the 2014-2022 annual average number of restatement cases (16). The restatement cases as a percentage of all accounting-related cases were also elevated in 2023 compared to recent prior years; the restatement cases represented 38% of all accounting related cases in 2023, compared to 33% in 2022 (and just 11% in 2021). The number of accounting case filings involving restatements in 2023 reached its second highest level in the last ten years both with respect to the number of accounting cases and as a percentage of accounting cases.

Interestingly, accounting-related securities cases appear less likely to be dismissed and more likely to settle. Accounting cases filed from 2014 through 2022 were about 12% less likely to be dismissed as compared to non-accounting cases, and accounting cases filed from 2014 through 2022 were 31% more likely to settle than non-accounting cases.

There were 35 accounting-related securities suit settlements in 2023, compared with 43 in 2022, representing a decrease of almost 19%. The total of 35 accounting-related securities suit settlements in 2023 was below the 2014-2022 annual average number of accounting suit settlements of 42. The report notes that over the last 20 years fewer accounting suit settlements were observed only twice. Interestingly, accounting cases settled in 2023 at

more advanced stages than non-accounting cases. 54% of non-accounting cases were settled before the motion for class certification was filed, compared to only 37% of accounting cases.

The total value of accounting-related settlements increased to \$1.6 billion in 2023, compared to \$1.4 billion in 2022, representing an increase of about 11.4%. But while the total settlement amount increased in 2023 compared to 2022, the 2023 total settlement amount remained below the 2014-2022 accounting case annual average total settlement amount of \$2.8 billion.

The average accounting case securities suit settlement amount also increased, from \$33.3 million in 2022 to \$45.7 million in 2023. The average accounting-related securities suit settlement amount in 2023 was driven by four settlements of over \$100 million; the four large settlements alone represented about 65% of the 2023 total value of all accounting-related securities suit settlements. While the average settlement amount increased in 2023, the median settlement amount declined, from \$16.1 million in 2022 to \$15.0 million in 2023, representing a decrease of about 7.1%.

This Week in Chancery Court: Trump, Liberty Media, Nikola, Loews

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThlLTliMDAtZGNhZC1hOWVmlLWRmOTgzMzI2MDAwMiIsImN0eHQiOiJTTE5XIiwidXVpZCI6IjI0eHJlZDZlbnRpbWUiOiIxNzEyNTc0ODY0MTgwIiwic2lnIjojUHhvZEVpYU5Bb3BsRkVhZjBCRlo2UmZ4UkhVPSIsInYiOiXln0=

Former President Donald Trump's overlapping legal troubles amid his campaign for the White House includes a deposition this week in a civil lawsuit before the Delaware Court of Chancery.

Here's a look at more from the court's calendar:

Monday: Fishel v. Liberty Media Corp., Del. Ch., No. 2021-0820, settlement hearing 4/8/24.

At issue: Chancellor Kathaleen St. Jude McCormick will hear additional arguments regarding a proposed \$36 million settlement by Liberty Media Corp. and Sirius XM Holdings Inc. to resolve litigation alleging that a stock repurchase scheme indirectly increased Liberty's stake in the entertainment company without adding protections for minority shareholders. In January, McCormick preliminarily approved a settlement class consisting of all holders of Sirius XM common stock as of the close of trading on Jan. 5. The lead plaintiff's attorneys seek a fee award of \$9.6 million, according to a brief.

Court action: A settlement hearing will be held in Wilmington, Del.

Liberty, Sirius Class, Derivative Settlement Gets Green Light

Tuesday: In re Nikola Corp. Derivative Lit., Del. Ch., No. 2022-0023, bench ruling 4/9/24.

At issue: McCormick will deliver a bench ruling on motions to dismiss an investor's lawsuit against electric vehicle maker Nikola Corp.'s leaders, backers, and founder, alleging they ran "an old-fashioned 'pump and dump' scheme" while a board member sold stock at prices inflated by lies about the startup's electric vehicle prototypes. Attorneys for founder Trevor Milton and other defendants argued for the case's dismissal at a hearing in December. The plaintiffs filed an omnibus answering brief opposing all their motions to dismiss. Meanwhile, Milton is being sued by Nikola while he's also appealing a conviction and four-year prison sentence for misrepresenting key details about the development of Nikola's products and technology while he was CEO.

Court action: McCormick will deliver a bench ruling by phone.

Nikola Board, Backers Hit With Insider Trading Suit in Delaware

Friday: United Atlantic Ventures LLC v. Trump Media & Tech. Grp. Corp., Del. Ch., No. 2024-0184, deposition 4/12/24.

At issue: Trump's deposition in the Chancery Court lawsuit was originally scheduled for the same day as one of his four criminal cases is set to begin jury selection in Manhattan. It was later rebooked for Friday morning, according to the Chancery Court docket. The former president will be questioned in a civil lawsuit filed by his social media startup co-founders, who claim he tried to dilute their shares in the company before it began publicly trading through a merger with a so-called blank check firm. Shares of Trump Media initially soared after the startup began trading publicly last month following its merger with Digital World Acquisition Corp., but shares fell following a filing saying Trump Media lost \$58 million last year while making only \$4.1 million in revenue.

Court action: Trump's deposition will be held in New York.

Trump SPAC Deposition Set for Same Day Criminal Trial Begins (1)

Friday: Bandera Master Fund LP v. Boardwalk Pipeline Partners LP, Del. Ch., No. 2018-0372, oral arguments 4/12/24.

At issue: The Delaware Supreme Court reversed a Chancery Court ruling that ordered Loews Corp. to pay \$690 million in damages to affiliates of New York hedge fund Bandera Partners LLC, who claimed they were squeezed out of an oil-pipeline partnership. Now that the case is back before Vice Chancellor J. Travis Laster, the Bandera affiliates argue the Chancery Court's "original, credibility-based factual determinations regarding bad faith, breach of contract and damages" constitute "ample grounds" for entering judgment in their favor, according to a brief. Loews, in a reply brief, said the Bandera affiliates "would have this Court ignore most of what the Supreme Court said."

Court action: A hearing on a motion to conform and remand issues will be held in Wilmington, Del.

Bandera's \$690 Million Court Win Over Loews Tossed on Appeal (2)

To contact the reporter on this story: Jennifer Kay in Philadelphia at jkay@bloomberglaw.com

To contact the editors responsible for this story: Stephanie Gleason at sgleason@bloombergindustry.com; Patrick L. Gregory at pgregory@bloombergindustry.com

Page Printed From:

<https://www.law.com/nationallawjournal/2024/04/05/massachusetts-court-real-time-clinical-trial-data-not-needed-to-avoid-securities-claims/>



NOT FOR REPRINT

Massachusetts Court: 'Real Time' Clinical Trial Data Not Needed to Avoid Securities Claims

U.S. District Judge Angel Kelley wrote that Latham & Watkins-repped Homology Medicines Inc. "had no duty to disclose data in real time."

April 05, 2024 at 03:16 PM

Securities Litigation



Ellen Bardash



A Massachusetts federal court has dismissed claims against a biopharmaceutical company, finding statements it released about a gene therapy drug didn't violate securities laws.

In an [opinion](#) signed March 31 and made public on April 3, U.S. District Judge Angel Kelley wrote that Latham & Watkins-repped Homology Medicines Inc. "had no duty to disclose data in real time" and that the case stands in contrast to others in which courts found in plaintiffs' favor because the information Homology didn't disclose doesn't contradict the information it did.

"We appreciate Judge Kelley's careful consideration of the issues," Latham & Watkins partner Colleen Smith said. "This decision is important for early-stage life sciences companies, as it confirms that opinion statements reflecting a reasonable interpretation of clinical trial data are not a basis for securities fraud."

Plaintiffs represented by Pomerantz, Portnoy Law Firm and Levi & Korsinsky initially filed the action in the Central District of California, but it was ultimately transferred to the federal court in Massachusetts, where Homology is based.

Investors claimed that they were misled about the safety of Homology's gene therapy drug HMI-102, a treatment for the rare genetic disorder phenylketonuria, based on what the company disclosed about the clinical trial process. They claimed Homology hadn't properly disclosed information about efficacy and risk mitigation that would affect the likelihood of the drug making it through the clinical trial process and be commercialized.

Homology's stock price decreased by nearly a third in February 2022 when the company issued a news release announcing that the FDA had put HMI-102 trials on a clinical hold in response to tests showing elevated liver functions in trial participants.

Homology and the individuals named as defendants moved to dismiss, claiming the plaintiffs hadn't shown that the false statements were made and hadn't adequately proved scienter or loss causation.

"While plaintiffs take issue with Homology's decision not to release all patient data available at the time, it was transparent about what data it was withholding from investors," Kelley wrote.

Counsel for the Homology shareholder plaintiffs did not immediately respond for comment.

THE

NATIONAL LAW JOURNAL

Breaking news and trends for law firm and legal departments about the evolving federal regulations in a volatile political climate.



FEDERAL LEGAL NEWS

- [Courts & Litigation](#)
- [Expert Columns](#)
- [Latest Stories](#)
- [Events](#)

SPECIAL COVERAGE

- [Special Reports](#)
- [Special Supplements](#)

SURVEYS & RANKINGS

- [The NLJ 500](#)

NATIONAL LAW JOURNAL

- [Current Issue](#)
- [Contact](#)
- [Sitemap](#)

NOT FOR REPRINT

Copyright © 2024 ALM Global, LLC. All Rights Reserved.

Genius Brands Securities Fraud Claims Revived in Part on Appeal

By Ben Miller

- 9th Cir. reverses district ruling on grounds of loss causation
- Panel affirms dismissal of claim related to Schwarzenegger role

Bloomberg Law News 2024-04-08T10:31:05118984207-04:00

Genius Brands Securities Fraud Claims Revived in Part on Appeal

By Ben Miller 2024-04-05T15:40:53000-04:00

- 9th Cir. reverses district ruling on grounds of loss causation
- Panel affirms dismissal of claim related to Schwarzenegger role

Genius Brands International Inc. will need to defend securities fraud allegations again in federal court, after a panel of judges in the US Court of Appeals for the Ninth Circuit partially revived a proposed class action on Friday.

The revived claims include allegations that the children's entertainment company concealed its relationship with stock promoter PennyStocks.com, misrepresented acquisition interest from Disney or Netflix, and overstated its rights to the collected works of comic book author Stan Lee, the Ninth Circuit said.

Shareholders adequately pleaded that Genius misled its investors by stating it hadn't paid any outside party to solicit the purchase of its stock, given that the company allegedly failed to disclose an arrangement with PennyStocks wherein more than 90,000 shares of stock were exchanged for favorable articles, the appeal panel ruled.

The suit sufficiently alleged that Genius exaggerated how frequently Nickelodeon Jr. aired its show Rainbow Rangers, with the appeal panel remanding that loss causation claim alongside three other sets of claims.

The panel didn't revive the allegation that the company misrepresented its relationship with Arnold Schwarzenegger, which the district court dismissed in 2022. Shareholders had alleged that the company made a statement about the actor and former California governor becoming a "significant investor" in the company, when he was instead involved in developing a new television show for Genius.

"Investing in Genius and developing programming with Genius are not mutually exclusive; Schwarzenegger could have done both," the appeal panel said. "Indeed, he is a man known for his ability to do many things, like act and run a state government."

The Ninth Circuit revived allegations that Genius stoked investors' speculation that Netflix or Disney would buy the company in 2020, using a strategic social media repost and teasing the upcoming announcement of a "key business development," which ultimately had no connection to the anticipated buyout.

Instead, Genius announced in July 2020 that it would jointly own the Stan Lee Universe, which shareholders plausibly alleged was received by the broader market as bad news because it failed to mention a buyout by Disney or Netflix, the panel said.

Shareholders also alleged that the Stan Lee intellectual property joint ownership announcement was itself misleading because Genius had received notice from a law firm indicating that POW! Entertainment had already licensed the rights to the Stan Lee Universe. Genius didn't publicly disclose that information to investors until eight months later, when the company disclaimed its intellectual property rights in a press release, which the appeal panel found sufficient to show loss causation and revive the claim.

Judge Salvador Mendoza wrote the opinion, joined by Judge William A. Fletcher and Judge Karen E. Schreier of the US District Court for the District of South Dakota, sitting by designation.

Glancy Prongay & Murray LLP represent the appellants. Vinson & Elkins LLP represent Genius and its executives.

The case is *In re: Alavi v. Genius Brands Int'l Inc.*, 9th Cir., No. 22-55760, 4/5/24.

To contact the reporter on this story: Ben Miller in New York City at bmiller2@bloombergindustry.com

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Gridsum Investor Deal Approved as SEC Progresses in Insider Suit

B

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThlLWFmMzUtZDUwZC1hM2NmLWJmMzcwMGE2MDAwMCI6ImN0eHQiOiJTTE5XliwidXVpZCI6IjBrb293cUhh4cnBkUWN3SnErQW9tV2c9PU04R0NrWFNJMGdIQkx3cGlkdU5yK0E9PSIsInRpbWUiOiIxNzEyNTc0ODY0MTgxliwic2lnIjojInNc4NzBDMkdLY0RtQnpoeGdHNW9YZXhWak04PSIsInYiOiIxIn0=

- Court grants \$1.5 million attorneys' fee request in class case
- SEC asks for second default in insider-enrichment lawsuit

Gridsum Holding Inc.'s \$4.5 million settlement with investors over accounting and tax issues has received final court approval, closing one chapter as the data analytics company continues to face an SEC enforcement action.

Judge Gregory H. Woods approved the class action settlement, and \$1.5 million in attorneys' fees, in orders docketed Thursday in the US District Court for the Southern District of New York.

The resolution comes as the Securities and Exchange Commission is getting closer to a possible default judgment against the software company, its founder, and his wife in an insider-enrichment case before a different judge in the same district. The SEC filed a proposed certificate of default against the founder and CEO, Guosheng Qi, on Thursday and updated Judge Lewis A. Kaplan on the status of the case.

The agency obtained a certificate of default against Gridsum in February. It is still attempting to serve Huijie He, Qi's wife, and intends to wait until it has effected service on all the defendants before asking for a default judgment, according to its letter to Kaplan. The SEC didn't accuse He of wrongdoing but named her as a "relief defendant" in order to obtain allegedly ill-gotten funds.

The SEC alleges that Gridsum's public filings disclaimed paying initial public offering funds to insiders, even though the company sent money to He, also an executive, starting the day after it received the first installment of IPO proceeds. It also made payments to a consulting company controlled by He's mother, the agency says.

In the class action, investors alleged that Gridsum's American Depositary Share price dropped after it announced in April 2018 that its financial statements for 2016 shouldn't be relied upon.

Woods said in his final approval order that no class members objected to the settlement.

Bragar Eagel & Squire PC represents the investors as lead counsel. Cooley LLP represents Gridsum in the class action.

The SEC represents itself. Gridsum, Qi, and He haven't made appearances in the enforcement action.

The cases are Xu v. Gridsum Holding Inc. , S.D.N.Y., No. 1:18-cv-03655, entered 4/4/24 and SEC v. Qi , S.D.N.Y., No. 1:23-cv-07924, 4/4/24 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

To contact the editor responsible for this story: Drew Singer at dsinger@bloombergindustry.com

Cassava Leaders Pushed Flawed Alzheimer's Drug Data, Suit Says

By Ben Miller

- **COURT:** N.D. Ill.
- **TRACK DOCKET:** [1:24-cv-02725](#)

Bloomberg Law News 2024-04-08T10:39:50439246392-04:00

Cassava Leaders Pushed Flawed Alzheimer's Drug Data, Suit Says

By Ben Miller 2024-04-05T10:49:48000-04:00

- **COURT:** N.D. Ill.
- **TRACK DOCKET:** [1:24-cv-02725](#)

Cassava Sciences Inc.'s top executives and directors touted the efficacy of Alzheimer's drug candidate Simufilam, despite alleged scientific misconduct that impacted clinical trial data, a shareholder derivative suit says.

The drugmaker's principal scientific advisor Hoau-Yan Wang was the subject of a citizen petition filed with the US Food and Drug Administration, which called for phase three trials of Simufilam to be paused due to data manipulation. Cassava's leadership continued to defend Wang and the data from the trials he oversaw, as well as the drug's efficacy, opening the company up to financial and reputational harm, according to the complaint filed Thursday in US District Court for the Northern District of Illinois.

Cassava views Simufilam as a "game changer" for the company, which currently has no source of revenue, and its overall financial success depends on regulatory approval, the complaint says. The drugmaker touted the drug's potential to slow cognitive decline in a trial of Alzheimer's patients in multiple press releases last year.

During clinical trials, however, Wang had engaged in "deliberate scientific misconduct" and could not provide any raw data upon request from an investigative panel, the City University of New York Medical School said in a March 2023 article in the academic journal Science.

The next day, Cassava's stock price fell more than 15% to close at \$14.86 on Oct. 13, 2023, the stock's biggest drop in more than eight months, according to data compiled by Bloomberg.



Cassava's board, CEO Remi Barbier, and CFO Eric Schoen allegedly failed to maintain adequate data management controls for its drug research programs, leaving its published data on Simufilam's efficacy susceptible to manipulation. They also overstated the drug's clinical and commercial prospects, the complaint says.

Shareholder Jose Garza seeks to recover damages on behalf of the company for the directors and executives' alleged violations of the Securities Exchange Act between Aug. 18, 2022 and Oct. 12, 2023. He also seeks reforms and improvements to the company's governance and internal procedures, as well as legal fees, the complaint says.

The company, Barbier, and Schoen are also named as defendants in a separate proposed class action, which is currently pending in the same district court and will cost the company "many millions of dollars," according to the shareholder derivative complaint.

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

The Brown Law Firm PC and Bronstein, Gewirtz & Grossman LLC represent the plaintiff.

The case is Garza v. Barbier, N.D. Ill., No. 1:24-cv-02725, complaint filed 4/4/24.

To contact the reporter on this story: Ben Miller in New York City at bmiller2@bloombergindustry.com

To contact the editors responsible for this story: Drew Singer at dsinger@bloombergindustry.com; Brian Flood at bflood@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Documents

- Recommendation
- Docket

The bank underwrote \$6.5 billion of 1MDB debt in bond offerings for which it was paid \$600 million in fees, the judge said. After an investigation, Goldman pleaded guilty to conspiracy to violate the Foreign Corrupt Practices Act and entered into an agreement with the US Department of Justice, the court said. Goldman paid \$2.9 billion in fines to settle with the DOJ, while Goldman's Malaysian branch agreed to pay \$3.9 billion in connection with a deal with Malaysian prosecutors, the court said.

Parker recommended on April 5 that the request for class certification met the requirements of the Federal Rules of Civil Procedure.

Bernstein Litowitz Berger & Grossmann LLP and Kessler Topaz Meltzer & Check LLP represented the plaintiffs. Paul Weiss Rifkind Wharton & Garrison LLP represented Goldman Sachs.

The case is Ajunde Ap-Fonden v. Goldman Sachs Grp. Inc. , S.D.N.Y., No. 1:18-cv-12084, recommendation filed 4/5/24 .

To contact the reporter on this story: Bernie Pazanowski in Washington at bpazanowski@bloombergindustry.com

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law

Contact Us

View Full Desktop Site

Shareholder sues Chemours over stock drop

 legalnewsline.com/stories/657491627-shareholder-sues-chemours-over-stock-drop

April 5, 2024

Laurence Rosen | rosenlegal.com

WILMINGTON, Del. (Legal Newsline) - A shareholder who lost money on a stock drop is suing Chemours.

In a March 25 lawsuit filed in the United States District Court for the District of Delaware, Todd Masel, on behalf of himself and others similarly situated, has brought a class action against The Chemours Company, Mark E. Newman, Sameer Ralhan, and Jonathan Lock.

The case is centered around alleged violations of federal securities laws.

The complaint alleges that individuals or entities who purchased or otherwise acquired publicly traded Chemours securities between April 28, 2023, and February 28, 2024, suffered compensable damages due to Defendants' violations of the Securities Exchange Act of 1934.

The complaint accuses all individual defendants of direct participation in company management at the highest levels and alleges they were involved in drafting, producing, reviewing and/or disseminating false and misleading statements about the company.

Specifically, the complaint targets Feb. 13's 8-K form and press release in which it said it was postponing the release of its financial results for the fourth quarter of 2023.

That led to a 12.6% stock drop, or \$3.85 per share. A notice to the SEC later that month said it was evaluating the "tone at the top" set by senior management. The company suspended top executives and opened an accounting probe.

That caused the stock to fall even further, down 31.5% to \$19.67 per share on Feb. 29.

Phillip Kim and Laurence Rosen of The Rosen Law Firm are pursuing the case, along with lawyers at Farnan LLP.

Coinbase Consumer Suit on Securities Claim Revived on Appeal (1)

B

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThlLWFmMDItZDMYy1hNWZmLWJmMzlwMTBhMDAwMSIsImN0eHQiOiJTTE5XliwidXVpZCI6IjNo0ek1BZzJrb3FIQVBKckszaUcyTkE9PjNLWFAXcGNWWkN3UnY3ZjdMa0dQK3c9PSIsInRpbWUiOiIxNzEyNTc0ODY0MTc3liwic2InIjoieGQ3TWplMUUIMUk5N0NpQU5zT0hhdXFIbHJNPSIsInYiOiIxIn0=

- Court reverses 2023 dismissal over terms of user agreement
- Crypto exchange was accused of selling unregistered securities

A US appeals court revived a 2021 consumer lawsuit against Coinbase Inc. accusing the cryptocurrency exchange of facilitating the sale of unregistered securities.

The 2nd US Circuit Court of Appeals said Friday the federal judge in New York who dismissed the suit last year shouldn't have relied on a December 2021 user agreement because Coinbase had updated the language from earlier versions. The three-judge appeals panel sent the case back to the district court to determine which user agreement should be used in determining whether to dismiss the class-action suit.

US District Judge Paul A. Engelmayer in February last year said the 2021 user agreement contradicted allegations in the complaint, which claimed the company holds title to the digital assets that are bought and sold on the exchange.

While the appeals court reversed that ruling, it affirmed Engelmayer's dismissal of claims raised under the US Securities and Exchange Act in which the plaintiffs sought to rescind some transactions. The consumers who sued had failed to identify specific contracts that meet the requirements for cancellation under the law, the panel ruled.

A representative for Coinbase didn't respond to a request for comment.

The proposed class-action lawsuit seeks damages arising from the sale or soliciting of 79 digital assets that the consumers say amounted to illegal contracts because the platform is not registered with the SEC.

Jordan Goldstein, a lawyer for the plaintiffs, said Friday they "look forward to pursuing these claims" in district court.

The suit alleges Coinbase promoted the sale of the tokens by providing users with descriptions and their purported value, as well as by participating in promotions, giving news updates about cryptocurrency price movements and links to web stories.

The case is *Louis Oberlander v. Coinbase Global Inc.*, 23-cv-184, US Court of Appeals (2nd Circuit).

(Updates with comment from the group behind the lawsuit.)

--With assistance from Chris Dolmetsch.

To contact the reporter on this story:

Madlin Mekelburg in Austin at mmekelburg@bloomberg.net

To contact the editors responsible for this story:

Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net

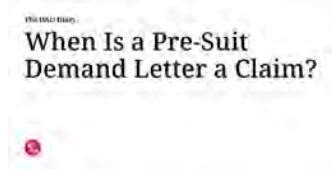
Steve Stroth, Peter Blumberg

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

When Is a Pre-Suit Demand Letter a Claim?

K [dandodiary.com/2024/04/articles/d-o-insurance/when-is-a-pre-suit-demand-letter-a-claim](https://www.dandodiary.com/2024/04/articles/d-o-insurance/when-is-a-pre-suit-demand-letter-a-claim/)

April 7, 2024



By Kevin LaCroix on April 7, 2024

Posted in D & O Insurance



It is frequently the case that lawsuits are preceded by a letter in which a prospective litigant identifies a grievance and makes various kinds of threats or demands. A perennial question is whether this type of pre-suit demand letter constitutes a “claim” within the meaning of a claims-made liability insurance policy. The Second

Circuit, applying New York law, recently affirmed a district court ruling holding that a pre-suit demand letter, received before the applicable policy’s coverage inception date, was a claim within the meaning of the policy. Because the claim was first made prior to the inception of coverage, the court held that there was no coverage for the subsequently filed lawsuit. The Court’s ruling provides an interesting take on this frequently recurring issue.

A copy of the Second Circuit’s March 26, 2024, Summary Order can be found [here](#). An April 1, 2024, post on the Wiley law firm’s *Executive Summary* blog about the decision can be found [here](#).

Background

Pine Management is a real estate management company. In a July 17, 2018, letter written by a law firm on behalf of the owner of certain properties the company managed, the firm advised Pine of possible claims against it. In July 2019, the owner filed a complaint against Pine in New York state court alleging that Pine had mismanaged certain of the owner’s apartment buildings. Attached to the complaint was a copy of the July 17, 2018, letter.

Pine maintained a program of professional liability insurance. The policy was effective from August 1, 2018, to December 1, 2019. Pine submitted the lawsuit to its insurer as a claim. The insurer refused to defend or indemnify Pine in the lawsuit on the ground that the July 17, 2018, pre-suit demand letter was a Claim within the meaning of policy that had been made prior to the policy’s inception date. Pine filed a coverage lawsuit against the insurer seeking

damages and a judicial declaration that the insurer had a duty to defend Pine in the lawsuit. The insurer moved for judgment on the pleadings. The district court granted the insurer's motion. Pine appealed.

The policy defines the term "Claim" to include "a written demand received by [the Insured] for monetary, nonmonetary or injunctive relief" and arising from a "Wrongful Act."

The March 26, 2024, Summary Order

In a March 26, 2024, a three-judge panel of the Second Circuit affirmed the district court's ruling granting the insurer's motion for judgment on the pleadings.

In ruling on the dispute, the appellate court considered Pine's argument that the pre-suit letter does not constitute a Claim because it "does not contain a sufficiently clear demand for relief and because it is framed in precatory language that failed to put Pine on proper notice of the demand." The appellate court rejected this argument and agreed with the district court that the pre-suit letter was a Claim within the policy's meaning.

First, the court said, the letter "contains several allegations of wrongdoing, including specific theories" that the letter expressly styled as "claims." The letter specifically stated that Pine had "breached its fiduciary duty" and "failed to disclose material facts."

Second, the court said, the letter "makes it clear that it is demanding certain forms of relief." Among other things, it explicitly demanded the production of specified documents. The letter also alleges that Pine made unauthorized payments to itself, "indicating that the letter was demanding repayment of such funds." The letter "therefore put Pine on notice that [the owner] sought relief to remedy Pine's alleged wrongdoing."

Third, the court noted, the letter suggested a meeting to resolve the dispute. Pine had argued that this language indicates the owner was not making a claim but simply a communication that the aggrieved party wanted to discuss the concerns. The appellate court disagreed, noting that the letter's final line explicitly referred to future litigation, underscoring the legal consequences that would likely result from non-compliance with the demands and reinforcing the letter's prior assertion that there are serious issues arising from Pine's management and "such claims would survive a motion to dismiss and a motion for summary judgment."

In short, the appellate court said, the pre-suit letter "sets out specific legal claims, including facts, legal theories of liability, and sufficiently clear demands for relief." The letter, the court said, therefore constituted a Claim within the policy's meaning. Because the Claim was made before the policy's inception, the insurer had no obligation to defend or indemnify Pine in the underlying lawsuit.

Discussion

It is worth noting that while the result of the court's analysis in this case is that the insurer prevailed and the finding of no coverage was affirmed, it is not always going to be the case that a finding that a pre-suit demand letter is a Claim is going to be to the insurer's advantage and to the policyholder's detriment. It is sometimes the case that it is the *policyholder* that is arguing that a pre-suit demand letter constitutes a claim. In other situations, the recognition that a pre-suit demand letter is a claim will simply determine in which policy period a claim was first made.

Determinations of this kind often are going to be a factor of the contents of the letter – what the letter does or doesn't say – and the specific wording of the applicable policy's definition of "claim" and the requirements of applicable law.

However, the fact that a pre-suit demand letter can constitute a claim is an important insurance management principle for policyholders to keep in mind. As Bonnie Thompson of the Lavin Ridner and Duffield law firm wrote in an April 2, 2024, *Law360* article about the Second Circuit's order (here), "it is important for insureds to be aware" that a pre-suit demand letter can constitute a Claim "when considering their notice obligations," particularly because the issue of whether or not a letter is a claim "can be dispositive of coverage." Indeed, the question of whether a pre-suit demand letter constitutes a claim comes up most frequently in the context of a dispute over whether the policyholder gave the insurer notice of claim within the requirements of the policy.

The court's analysis of the issues is interesting, particularly its consideration of what constituted a demand for relief. Among other things, the court noted that the request for production of documents was a form of a demand for relief. Also, the court said that the letter's assertion that Pine had made unauthorized payments to itself indicated that "the letter was demanding repayment of the such funds." I find these aspects of the appellate court's ruling as these kinds of assertions are common features of pre-suit demand letters. I find it particularly interesting that the court was willing to conclude that the letter's reference to unpaid funds represented a kind of demand for relief even though the letter did not itself expressly demand the return of funds.

The court's consideration of the letter's suggestion of a meeting to resolve the concerns in the letter is also interesting. The court's analysis of this aspect of the letter is noteworthy because this kind of suggestion is a regular feature of these kinds of pre-suit demand letters – indeed, that is almost always the point of the letter, to see if the parties can resolve the matter without litigation. A factor in the court's analysis was that the letter expressly referenced the possibility of litigation if the matter were not resolved. It is interesting to consider how the analysis might have gone if there were a request for a meeting but no express threat of future litigation – would the various other elements (demand for production

of documents, reference to unauthorized expenditure of funds) have been sufficient for the court to conclude that the letter presented a demand for relief sufficient for the court to conclude that the letter represented a Claim within the policy's meaning?

In any event, I don't suppose this appellate opinion will clear up forever when a pre-suit demand letter represents a Claim. However, it does provide some important guideposts for prospective coverage litigants to consider when addressing the question.

Page Printed From:

<https://www.law.com/thelegalintelligencer/2024/04/08/ozempic-leadership-fight-escalates-proposed-co-leads-are-losing-control/>



NOT FOR REPRINT
NEWS

Ozempic Leadership Fight Escalates: Proposed Co-Leads Are 'Losing Control'

Sarah Foster, of Schlesinger Law Offices in Fort Lauderdale, continued to insist she and others were excluded from the Ozempic leadership process, noting the last-minute addition of two lawyers to the proposed team.

April 08, 2024 at 03:00 PM

Litigators



Amanda Bronstad
staff reporter



What You Need to Know

- Florida attorney Sarah Foster continued to push for U.S. District Judge Gene Pratter, who is overseeing the Ozempic multidistrict litigation, to get involved in the application process.
- Foster objected to the amended 32-attorney team after proposed co-leads added two lawyers, one of whom, Marcus Susen, they originally rejected.
- The leadership fight comes after the judge urged the lawyers to remain civil to one another.

A Florida attorney who objected to the way in which plaintiffs lawyers organized leadership of the Ozempic multidistrict litigation doubled down after two more members were added to the proposed team.

Sarah Foster, of Schlesinger Law Offices in Fort Lauderdale, insisted she and others were excluded from the leadership process, which wasn't transparent and open. In an April 5 filing, she pointed to [the last-minute addition of two lawyers](#), one of whom, Marcus Susen, of Susen Law Group in Fort Lauderdale, was initially rejected by the proposed co-lead attorneys of the team.

“Proposed leadership was called out for their lack of transparency in their initial application, so they were forced to supplement it,” Foster wrote in the April 5 objection to the amended leadership team, which now has 32 lawyers after adding Susen and George Williamson, of Farr Law Firm in Punta Gorda, Florida.

Foster added, “The record reflects that proposed leadership, simply put, is losing control of the very litigation they attempted to seize control of. The reason for that is their control was assumed and not earned through a fair and objective process.”

She continued to push for [U.S. District Judge Gene Pratter](#), who is overseeing the Ozempic multidistrict litigation in the Eastern District of Pennsylvania, to get involved in the application process.

“This all reinforces the position the undersigned has taken from the start: that it is for the court to decide who is or is not qualified to serve on the plaintiffs’ leadership after a transparent process that includes submissions of relevant information to the court from each applicant,” she wrote.

Proposed co-lead counsel of the leadership team are Parvin Aminolroaya, of Seeger Weiss in Ridgefield Park, New Jersey; Paul Pennock of Morgan & Morgan in New York; Jonathan Orent, of Motley Rice in Providence, Rhode Island; and Sarah Ruane, of Wagstaff & Cartmell in Kansas City, Missouri. Aminolroaya did not respond to a request for comment.

‘The Fragility of the Alliance They Have Created’

The lawsuits allege Novo Nordisk and Eli Lilly failed to warn that their medications, which include Ozempic, Wegovy and Mounjaro, could cause gastroparesis, or stomach paralysis, leading to nausea, vomiting and hospitalizations. Lawyers are predicting at least 10,000 lawsuits.

The Ozempic leadership spat comes after Pratter cautioned lawyers at last month’s initial conference [to remain civil to one another](#).

The fight also exemplifies a growing debate in multidistrict litigation over how to appoint lawyers to lead all the lawsuits. Historically, lawyers organized themselves, often putting familiar names in the top spots, but that process often cut off opportunities for younger, [nonwhite](#) or new attorneys to get appointments. As a result, several judges have taken a more active role in the appointment process, with some conducting individual interviews.

Plaintiffs lawyers initially organized a team of 30 attorneys. In a March 21 motion, they insisted they had the support of lawyers in 68 of the 76 complaints on file. Six days later, Foster [filed an objection](#), which the proposed leadership team called an “unfounded attack on a well-accepted, fair, and transparent process.”

Foster has characterized the proposed leadership team as consisting of “repeat players” in multidistrict litigation. In the April 5 filing, she noted that the four proposed co-lead attorneys come from firms specifically referred to as “repeat players” in the [2019 book “Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation”](#) by Elizabeth Burch, a professor at the University of Georgia School of Law.

“The reality is that the proposed leadership consists of the same repeat players that have been involved in MDL leadership for the past five years,” she wrote.

Susen’s addition to the team, she wrote, exemplifies proposed leadership’s “complete turn-about.”

One day before adding him to the team, the co-leads said that Susen “made no effort to work collaboratively with counsel,” they wrote in opposing Foster’s objection, “and has not attended or offered to assist with any of the longstanding plaintiff working groups.” But in their amended leadership team, they proposed adding Susen based on his “assurances that he is committed to working collaboratively with counsel on this litigation, assisting with any needed discovery tasks, and in light of his legal experience.”

“One cannot help but wonder what caused the drastic change in position in such a short amount of time,” Foster wrote in the April 5 filing. “The nimbleness with which proposed leadership can navigate between drastically opposing positions demonstrates the fragility of the alliance they have created.”

Co-leads of the proposed team said they offered Foster a spot on the leadership development committee, which is designed to introduce younger lawyers to multidistrict litigation, but she did not respond to that offer and “has not participated in any way in the litigation.”

A 2019 graduate of Nova Southern University’s Shepard Broad College of Law, Foster had “limited legal experience” and wasn’t qualified to serve on a steering committee or executive committee, they wrote.

Foster, on last week’s filing, said she asked to participate but was ignored. Plus, she added, at least one other individual on the proposed executive committee has only two more years of experience than her, and six on the team have never been on an executive or steering committee before.

“In short,” she wrote, “the very arguments the proposed co-leads used against the undersigned are at odds with their own slate.”

RELATED STORIES

Meet the Pennsylvania Judge Overseeing the Ozempic MDL

NOT FOR REPRINT

Copyright © 2024 ALM Global, LLC. All Rights Reserved.

Column: Ozempic litigation's leadership spat spotlights lawyers' self-selection

 [reuters.com/legal/legalindustry/column-ozempic-litigations-leadership-spat-spotlights-lawyers-self-selection-2024-04-04](https://www.reuters.com/legal/legalindustry/column-ozempic-litigations-leadership-spat-spotlights-lawyers-self-selection-2024-04-04)

Alison Frankel

Pens for the diabetes drug Ozempic sit on a production line to be packaged at Danish drugmaker Novo Nordisk's site in Hillerod, Denmark, September 26, 2023. REUTERS/Tom Little/File Photo Purchase Licensing Rights [↗](#), opens new tab

April 4 (Reuters) - A squabble playing out in consolidated litigation against Ozempic, Wegovy and Mounjaro drugmakers highlights important questions about how courts should decide who will lead these sweeping cases.

Should judges allow plaintiffs' lawyers to pick their own leadership structure? Or must courts throw open the process to all candidates and independently decide who is best?

U.S. District Judge Gene Pratter of Philadelphia was appointed in February to oversee all of the federal-court lawsuits accusing drugmakers Novo Nordisk (NOVOB.CO) [↗](#), opens new tab and Mounjaro maker Eli Lilly (LLY.N) [↗](#), opens new tab of failing to warn patients about some of the harsh side effects of the blockbuster drugs.

Novo Nordisk said in an email statement that the claims are meritless and it will “vigorously defend” against them. Eli Lilly did not respond to a query. Both companies insist that their medications are safe and that the drugs’ side effects are fully disclosed in the drugs’ labeling materials.

Plaintiffs' lawyers nevertheless predict the consolidated litigation may eventually include as many as 20,000 cases. And they've been talking among themselves for months about a leadership structure that will allow the litigation to move forward efficiently.

Two camps – one led by Motley Rice and Wagstaff & Cartmell, the other by Seeger Weiss and Morgan & Morgan – initially had different ideas about where the cases should be consolidated. But after the Judicial Panel on Multidistrict Litigation transferred all of the lawsuits to Pratter’s courtroom, the four firms joined forces and rallied other plaintiffs to let them take the lead.

At the first hearing [↗](#), opens new tab before Pratter last month, lawyers from all four of those firms said the early organization has already allowed plaintiffs to make progress on key preliminary issues, such as how to educate the court about the science underlying the drugs and how to draft protective orders to assure discovery will remain confidential.

The video player is currently playing an ad.

Most of the other plaintiffs' firms in the case, Seeger Weiss partner Parvin Aminolroaya told Pratter at the hearing, had already authorized the four firms to speak on their behalf. Another lawyer who is working with the group told the judge that a majority of plaintiffs' firms had agreed on a leadership structure with the four firms as co-leads and many others serving on executive and steering committees.

That self-selection, the lawyer said, "will allow plaintiffs' firms to devote their time, energy and effort to litigating these claims instead of fighting amongst themselves."

Pratter said it was "a delight to hear" that plaintiffs' firms were organizing themselves, later adding that she doesn't like to see lawyers "squabbling with each other."

But the judge also said she wanted to be sure that no plaintiffs' lawyers felt they'd been "left out in the cold" or "muzzled" by the majority group. She invited anyone who sought a leadership appointment to file a motion for consideration.

After the hearing, the group led by Seeger Weiss, Motley Rice, Morgan & Morgan, and Wagstaff filed a formal motion [opens new tab](#) to be appointed lead counsel, with more than a dozen other firms slated to be represented on leadership committees. The four firms told Pratter that after extensive collaboration and negotiation with other firms in the case, plaintiffs' lawyers had averted competition and come together "to form a strong and cohesive group that will work cooperatively and efficiently to best represent the interests of the injured plaintiffs."

But last week, Sara Foster and Jeffrey Haberman of the Schlesinger Law Offices asked [opens new tab](#) Pratter to reject the consensus slate and throw open the leadership contest. It should not be up to self-appointed lead counsel to decide who is qualified to head the case, they argued. Openness and transparency, they said, requires that all candidates make leadership pitches on the public docket.

Foster, who separately asked [opens new tab](#) Pratter to name her to a leadership committee, said she tried to work out an appointment with the proposed lead counsel but did not get the post she believes she is qualified for.

Putting aside the specifics of Foster's dispute with the proposed leads, the Schlesinger filing asserts the provocative argument that a fair process requires the judge to review written applications from leadership candidates instead of simply relying on proposed lead counsel to make leadership determinations. That's the only way, the brief said, to assure all plaintiffs' firms – and their clients – that the best lawyers were selected.

Seeger Weiss, Motley Rice, Wagstaff, and Morgan & Morgan filed their response [opens new tab](#) on Wednesday, arguing that under the guidelines of both the Manual for Complex Litigation in federal court and the 3rd U.S. Circuit Court of Appeals' 2002 report on the selection of class counsel, it's entirely appropriate for judges to rely on plaintiffs' firms to

coordinate on a proposed leadership structure. Courts routinely approve these slates, they said, citing an array of recent MDLs.

That's no wonder, the proposed leads said: By allowing plaintiffs' firms to reach a consensus on who's in charge, judges in these complex cases can avoid time-wasting fights that squander resources that would be better used to benefit allegedly injured plaintiffs.

In this case, proposed lead counsel said, every leadership candidate had a chance to make a pitch. One firm that spoke up after Pratter's hearing last month won a spot on the proposed steering committee, they said.

Foster of the Schlesinger firm was offered a post on a development committee for young lawyers, according to the response brief, but wasn't satisfied with that appointment. In light of that interaction, proposed lead counsel said, Foster and her firm should be excluded from the consensus slate.

Foster did not respond to my email seeking comment on the latest brief and the larger debate over best practices for MDL leadership appointments.

Proposed lead counsel sent me a joint statement: "We followed a process put in place by Judge Pratter at the initial case management conference, which has delivered outstanding and successful MDL leadership committees recently and over the years," they said. "The consensus leadership group included essentially everyone that has been working on the case over the last several months."

Read more:

Ozempic side effects lawsuits centralized in Pennsylvania court

As Ozempic cases mount, consumer lawyers push to consolidate lawsuits

Jumpstart your morning with the latest legal news delivered straight to your inbox from The Daily Docket newsletter. [Sign up here.](#)

Reporting By Alison Frankel

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Opinions expressed are those of the author. They do not reflect the views of Reuters News, which, under the Trust Principles, is committed to integrity, independence, and freedom from bias.

Purchase Licensing Rights

Alison Frankel

Thomson Reuters

Page Printed From:
https://www.law.com/nationallawjournal/2024/04/03/despite-call-for-civility-squabbles-among-counsel-emerge-over-ozempic-leadership/?
kw=Despite%20Call%20for%20Civility%2C%20%27Squabbles%20Among%20Counsel%27%20Emerge%20Over%20Ozempic%20Leadership&utm_position=2&utm_source=email&utm_medium=enl&ut



NOT FOR REPRINT
NEWS

Despite Call for Civility, 'Squabbles Among Counsel' Emerge Over Ozempic Leadership

Plaintiffs lawyers in the Ozempic multidistrict litigation organized a leadership team of 30 attorneys, but one Florida attorney objected to the proposed slate, which she says appears to be composed of 'repeat players.'

April 03, 2024 at 06:09 PM

Litigators



Amanda Bronstad
staff reporter



The original version of this story was published on [Law.com](#)

What You Need to Know

- The leadership dispute comes after U.S. District Judge Gene Pratter told lawyers at an initial March 14 hearing that she expected civility with one another.
- Sarah Foster, of Schlesinger Law Offices, has asked the judge to reject the proposed slate, which was created through a process that was 'closed off.'
- The four proposed co-lead counsel are: Parvin Aminolroaya, of Seeger Weiss; Jonathan Orent, of Motley Rice; Paul Pennock of Morgan & Morgan; and Sarah Ruane, of Wagstaff & Cartmell.

Despite a federal judge’s warning against “squabbling with each other,” a fight over leadership has emerged in the multidistrict litigation over Ozempic and related drugs.

Plaintiffs lawyers organized a leadership team of 30 attorneys, including four co-lead counsel: Parvin Aminolroaya, of Seeger Weiss in Ridgefield Park, New Jersey; Jonathan Orent, of Motley Rice in Providence, Rhode Island; Paul Pennock of Morgan & Morgan in New York; and Sarah Ruane, of Wagstaff & Cartmell in Kansas City, Missouri.

In a March 21 motion, they insisted they have the support of lawyers in 68 of the 76 complaints on file. But one of them wasn’t Sarah Foster, of the Schlesinger Law Offices in Fort Lauderdale, Florida. She objected to the proposed slate, which she says appears to be composed of “repeat players.”

“The court should deny the motion because the application process leading to the proposed leadership ‘slate’ was closed off when, instead, it should have been open and transparent,” she wrote in a March 27 objection. “The court should respectfully call for a written application for any attorney seeking a leadership position. An open application process would ensure fairness and would be consistent with best practices.”

Neither Foster nor the four proposed co-lead counsel responded to requests for comment.

The dispute reflects a debate in multidistrict litigation on how best to appoint a plaintiffs’ leadership team. Historically, lawyers organized themselves, often putting familiar names in the top spots, but that process often cut off opportunities for younger, [nonwhite](#) or new attorneys to get an appointment, and sometimes resulted in bloated teams whose fees and costs concerned some judges.

In recent years, some judges have taken a more active role in the appointment process: U.S. District Judge Yvonne Gonzalez Rogers of the Northern District of California [initially rejected a slate of 20 lawyers](#) in the addiction lawsuits against social media sites like Facebook and YouTube; and U.S. District Senior Judge Joy Flowers Conti of the Western District of Pennsylvania interviewed lawyers one by one for leadership appointments in the multidistrict litigation over recalled Philips CPAP breaching machines.

“Much has been written about ensuring openness and transparency in selecting plaintiffs’ leadership in MDLs and class actions,” Foster wrote in her objection. “The purpose was not to cast aspersions on counsel or inform the court of the squabbles among counsel that seem inherent in all MDLs. But rather, to show the court just how closed-off this process was. The proposed slate contains several firms that continuously obtain leadership positions in MDLs.”

‘Share With Another Generation of Lawyers’

The lawsuits, brought against Novo Nordisk and Eli Lilly, allege that the makers of Ozempic and four similar medications, including Wegovy and Mounjaro, failed to warn about the risk of gastroparesis, or stomach paralysis, leading to nausea, vomiting and hospitalizations. Lawyers, citing [rampant social media advertising](#) for the prescription medications, are predicting at least 10,000 lawsuits.

The leadership dispute comes after U.S. District Judge Gene Pratter, who is overseeing the multidistrict litigation in the Eastern District of Pennsylvania, told lawyers [at an initial March 14 hearing](#) that she expected civility with one another. “Life is way too short to be cranky with each other,” she told them. She noted “how unattractive it is for lawyers to be squabbling with each other.”

A day after the hearing, Orent sent an email out to more than 100 plaintiffs’ lawyers for information about their relevant experience or work they’d already done on the Ozempic cases for a seat on the leadership team, according to Foster’s objection.

In a March 18 email to Morgan & Morgan’s Jonathan Sedgh, in New York, Foster asked if she could receive a copy of the proposed slate, noting that she planned to file an application in court for a leadership post.

Orent replied in a March 19 email: “We have tried hard to include all known to have interest in the litigation and would be happy to give you fair consideration.”

In a March 20 email, Foster told Orent: “Thanks again for the phone call earlier today confirming my spot on the leadership committee—looking forward to working with everyone!”

But, in a March 21 email, Orent referred to Foster as being on the “Idc.” In a footnote to their motion, proposed co-lead attorneys said they would select a “small group of junior attorneys” for an informal leadership development committee. That’s in response to Pratter, at last month’s conference, telling lawyers: “I want you to share with another generation of lawyers in maybe spreading out the needs, but without it being the premier exclusive goal.”

Both Conti and U.S. District Judge Robin Rosenberg, who oversaw the Zantac multidistrict litigation in the Southern District of Florida, created leadership development committees in their appointment orders.

Foster, a 2019 graduate of Nova Southern University’s Shepard Broad College of Law, said in her objection that she hadn’t applied to be on the leadership development committee.

Her March 21 application, however, acknowledged Pratter’s focus on “opportunities for attorneys at different levels in their respective careers.” Although not having been appointed to a committee in multidistrict litigation before, she noted her involvement in numerous mass torts involving medical devices and pharmaceutical drugs.

“As a 30-year-old woman—like many of the plaintiffs in this litigation—my selection here would be consistent with the goals of fostering diversity and inclusion,” she wrote.

On Tuesday, another Florida lawyer, George Williamson, of Farr Law Firm in Punta Gorda, filed an application for a spot on the plaintiffs’ executive committee. He said he represents 100 plaintiffs.

“The leadership appointed by the court will be the guiding light for those plaintiffs, and for thousands more,” he wrote.

THE

NATIONAL LAW JOURNAL

Breaking news and trends for law firm and legal departments about the evolving federal regulations in a volatile political climate.

FEDERAL LEGAL NEWS

- [Courts & Litigation](#)
- [Expert Columns](#)
- [Latest Stories](#)
- [Events](#)

SPECIAL COVERAGE

- [Special Reports](#)
- [Special Supplements](#)

SURVEYS & RANKINGS

- [The NLJ 500](#)

NATIONAL LAW JOURNAL

- [Current Issue](#)
- [Contact](#)
- [Sitemap](#)

NOT FOR REPRINT

Page Printed From:

<https://www.law.com/2024/04/05/mdl-judges-orders-should-spur-new-rule-calling-for-the-early-vetting-of-claims/>



NOT FOR REPRINT
COMMENTARY

MDL Judge's Orders Should Spur New Rule Calling for the Early Vetting of Claims

Some lawyers have found that they can gain an advantage in an MDL by stockpiling claims, regardless of their individual merits. In recent years, this gamesmanship has become a huge problem.

April 05, 2024 at 02:00 PM

Class Actions

By Phil Goldberg | April 05, 2024 at 02:00 PM



The Federal Rules Advisory Committee is considering a new rule of civil procedure to govern multidistrict litigation (MDLs), and recent rulings in an herbicide MDL are spotlighting a key issue before the committee: the urgent need to address the widespread filing of unsupported claims. These are claims where people responded to lawsuit advertisements, but never provided evidence to anyone that they used the product or sustained the injury at issue in the litigation. Their mass presence is undermining many MDLs.

As a general premise, MDLs can serve an important purpose. Congress enacted the MDL statute in the 1960s so that federal courts can consolidate for pretrial proceedings multiple claims involving common issues. This early coordination can create efficiencies and facilitate uniformity and justice across the federal courts. However, some lawyers have found that they can gain an advantage in an MDL by stockpiling claims, regardless of their individual merits. In recent years, this gamesmanship has become a huge problem.

Just ask U.S. District Chief Judge Nancy Rosenstengel of the Southern District of Illinois, who is overseeing the MDL where 5,000 claims have been filed alleging the herbicide Paraquat caused these individuals' Parkinson's disease. Last May, she expressed "concerns about the integrity of the docket." Rosenstengel had selected six cases for trial, and after significant judicial resources were spent, two had to be dismissed because the claimants neither showed they used Paraquat nor had Parkinson's disease.

The same thing happened again. Nine of 25 plaintiffs she chose to be worked up for trial earlier this year were dismissed for lacking this basic evidentiary support. Rosenstengel said this experience "reinforced the court's concern about the proliferation of non-meritorious claims on the docket." She observed that "many plaintiffs in the MDL have not produced any documentary evidence in support of their exposure allegations, despite" being asked to do so. She has now ordered all plaintiffs to provide this material or their claims will be dismissed.

Rosenstengel's experience has become all too common in MDLs today. Several years ago, the Federal Rules Advisory Committee issued a report estimating about 20% to 30% of claims in MDLs are unsupportable. Lawsuits are filed and consolidated into MDLs even though nobody has provided any facts showing the claims belong there. In some MDLs, the committee's report continued, unsupported claims could be "as high as 40% or 50%."

Indeed, the Advisory Committee just concluded an open comment period on the proposed MDL rule and heard from numerous lawyers and judges that their personal experiences echoed these findings. So why is this happening? Why are so many unvetted claims being filed in MDLs?

One thing appears to be certain: most plaintiffs lawyers would not file these cases as individual matters. They take cases on contingency fee bases and want to be sure each case is worth their time and resources. So, they ask clients to provide exposure and medical records as part of the intake process. They also know they will be asked for this information shortly after filing, and Federal Rule 11 requires them to certify that “the factual contentions have evidentiary support.”

With MDLs, the dynamics are different. Most filings result from a mass tort generation machine, where litigation financing pays for marketing campaigns with TV, radio and internet ads. Lead generators collect the names of people who respond to the ads and sell their names to lawyers. The lawyers often file these claims without speaking to the claimants or seeing records that the claimants are injured or used the product. Reports have shown that some people do not even know that lawsuits were filed in their names, and most cannot identify their lawyers.

Currently, the federal rules are not up to the task of weeding out these claims. Once a claim is transferred into an MDL, it may never have to be substantiated—unless it is picked for trial, as Rosenstengel and many MDL judges have found. Yet, the quantity of claims is leveraged to create a misimpression that there is merit to the litigation and the liability exposure is high. The plaintiffs lawyers then pressure the courts and defendants toward settlement, hoping to reach a payday without having to validate the individual cases.

The first jurist to expose these dynamics was U.S. District Judge Clay Land in 2016. He observed that MDLs create “incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit” because the lawyers “seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized.” “Many cases are filed ... with so little pre-filing preparation that counsel apparently has no idea whether or how she will prove” the case.

Rosenstengel found the same thing. She stated the “presence of cases on its docket that present implausible or far-fetched theories of liability ... would not have been filed but for the availability of this multidistrict litigation.” Some scholars have referred to this predicament as the “Field of Dreams” problem: if you build an MDL, the claims will come.

In a comment to the committee, judges in California offered a sensible solution: ensure action is taken “early in the life of the MDL” to identify meritless claims. This can be done by including in the new MDL rule a requirement that lawyers vet each claim transferred into an MDL.

This prerequisite should not be controversial. In an op-ed on the proposed MDL rule, plaintiff-lawyers Chris Seeger and Jen Scullion accepted that “the responsibility for vetting cases rests primarily with the plaintiffs bar.” They both have reputations for seeking this information, including in mass tort cases. Most people can get their own exposure and medical records.

There may be some cases where this information is difficult to obtain, and these circumstances can be addressed by offering good faith extensions. But, there is no good reason for delaying proper vetting. First, they interfere with bellwether trials. Second, most MDLs are resolved through global or inventory settlements, and it is unjust for any unsupported claims to be paid. And, their presence delays justice for others. When defendants can be confident the claims in an MDL have support, they can better assess the litigation and reach resolution.

As the old saying goes, “fool me once, shame on you; fool me twice, shame on me.” Some 20 years ago, Judge Janis Jack exposed a previous scheme for using claim aggregation as a vehicle for hiding unmeritorious claims. She found medical diagnoses driving thousands of silica and asbestos claims were fraudulent: “These diagnoses were drive by neither health nor justice: they were manufactured for money.” Her ruling led to the end of these mass filings.

Rosenstengel’s orders should spur a similar turning point for MDLs. The Federal Rules Advisory Committee should heed these lessons. It should ensure that claim vetting and validation are fundamental to filing a lawsuit—whether heard individually or aggregated into an MDL.

Phil Goldberg *is the office managing partner of Shook, Hardy & Bacon in Washington, D.C., where he co-chairs the firm’s public policy group.*

NOT FOR REPRINT

Copyright © 2024 ALM Global, LLC. All Rights Reserved.

Mortgage lender United Wholesale sued by consumers alleging billions in excess fees

 [reuters.com/legal/transactional/mortgage-lender-united-wholesale-sued-by-consumers-alleging-billions-excess-fees-2024-04-03](https://www.reuters.com/legal/transactional/mortgage-lender-united-wholesale-sued-by-consumers-alleging-billions-excess-fees-2024-04-03)

Mike Scarcella

REUTERS/Larry Downing Purchase Licensing Rights , opens new tab

April 3 (Reuters) - United Wholesale Mortgage was hit with a proposed consumer class action on Tuesday in U.S. court accusing it of scheming with brokers to push home-buyers into expensive mortgages, costing them billions of dollars in excess fees.

Four residents of North Carolina, Florida and Tennessee filed the lawsuit , opens new tab in federal court in Detroit against UWM Holdings (UWMC.N) , opens new tab and related entities, including United Wholesale.

The lawsuit alleged that UWM engaged in a mortgage loan “steering enterprise” with “captive” brokers in violation of federal racketeering laws and other provisions. The complaint said hundreds of thousands of mortgage loans are at issue nationwide.

Pontiac, Michigan-based United Wholesale, which bills itself as the country’s largest home mortgage lender, on Wednesday in a statement called the lawsuit a “sham” and said it will “defend these allegations to the fullest extent permitted by law.”

Details of the alleged mortgage-lending fraud scheme were first published on Tuesday by startup Hunterbrook Media, which is affiliated with the hedge fund Hunterbrook Capital. The media outlet said Hunterbrook Foundation shared data analysis and research with Boies Schiller Flexner, the firm that filed the lawsuit.

Wholesale lenders don’t interact directly with prospective borrowers but instead use a network of mortgage brokers, who in turn engage with home buyers. The mortgage industry’s other channel is retail-focused, where a buyer works with a loan officer at a financial institution. No brokers were named as defendants.

Mortgage brokers in the wholesale arena are supposed to be independent and shop around to offer would-be borrowers a range of options, the consumers’ lawsuit said.

United Wholesale, according to the complaint, “corrupted a large swath of ‘independent’ brokers” — using them essentially as employees who could steer borrowers to United Wholesale mortgages that were not in the best interest of the consumer.

United Wholesale, according to the lawsuit, “misrepresented and concealed the relationship between itself and brokers.”

The lawsuit said that as early as 2020 "an already high proportion of mortgage brokers in UWM's network were steering most of their loans to UWM."

United Wholesale issued \$39 billion in mortgages over the last three years through thousands of brokers who referred "99% of their business to UWM," the lawsuit said.

United Wholesale imposes an "onerous and restrictive" agreement on brokers with whom the company works, according to the consumers' lawsuit. The agreements, the lawsuit alleged, prevented brokers from presenting clients with the best mortgage deal, the lawsuit said.

The case is Therisa Escue et al v. United Wholesale Mortgage LLC et al, U.S. District Court, Eastern District of Michigan, 2:24-cv-10853-PDB-DRG.

For plaintiffs: John Zach, Tyler Ulrich and Mark Mao of Boies Schiller Flexner, and Brandon Hubbard of Dickinson Wright

For defendants: No appearances yet

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. [Sign up here.](#)

Reporting by Mike Scarcella

Bloomberg Law

Research Trail

My Work

000888

Help

Account

Class Action

Search Class Action

?

Select Sources

Go

Home

Practice Centers

Litigation

Transactional

Business

Practitioner Tools

News & Analysis

Laws & Regulations

Secondary Sources

 [Manage Subscription](#)

[Class Action](#)
April 4, 2024, 8:58 AM PDT
Oracle Trims Claims in Web-Privacy Suit Over 'Digital Dossiers'
By [Christopher Brown](#)
Documents

-  [Order](#)
-  [Docket](#)

- Plaintiffs didn't show web tracking intruded into private place
- Oracle was entitled to party exception under wiretap law

Bloomberg Law News 2024-04-08T14:44:17071360159-04:00
Oracle Trims Claims in Web-Privacy Suit Over 'Digital Dossiers'

By Christopher Brown 2024-04-04T11:58:53000-04:00
Plaintiffs didn't show web tracking intruded into private place
Oracle was entitled to party exception under wiretap law

Oracle America Inc. defeated consumers' attempt to revive two claims in a proposed class action alleging it tracks their online activities and creates digital dossiers about them for marketing purposes in violation of state and federal privacy laws.

Plaintiffs Michael Katz-Lacabe and Jennifer Golbeck failed to show that Oracle invaded a private space where they had a reasonable expectation of privacy when it tracked their Internet browsing, or that the company was acting with tortious intent in collecting their data, Judge Richard Seeborg of the US District Court for the Northern District of California said Wednesday.

Seeborg dismissed the claims of intrusion upon seclusion under Florida common law and of violations of the Electronic Communications Privacy Act from their second amended complaint.

The judge previously denied Oracle's motion to dismiss the plaintiffs' claims of unjust enrichment under California law and of violations of the California Invasion of Privacy Act and the Florida Security of Communications Act.

Katz-Lacabe, a privacy activist, and Golbeck, a professor at the University of Maryland, alleged that Oracle used cookies, pixels, cross-device tracking, and other technologies to track and collect data about Internet users, and combined that data with information from brick-and-mortar stores to create comprehensive profiles of them. The suit also takes aim at Oracle's data marketplace, where it allegedly sells the data it collects and where other companies and third-party data brokers buy and sell data.

https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XAP7FPCO000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6L... 1/3

The plaintiffs argued that Oracle invaded their privacy by intruding into two private places: their homes, where they were located when browsing, and their password-protected devices.

Seeborg disagreed, holding that the collection of information about a person didn't transform what previously wasn't an intrusion into a physical place into an intrusion, and that communication with websites constituted open conduct on the web rather than activity in a private place.

On the ECPA claim, Seeborg rejected their argument that statements from Oracle officials and employees, and its alleged misrepresentations about its data-collection practices, showed it acted with tortious intent—a requirement for showing the company wasn't entitled to an statutory exception for parties to a communication.

The plaintiffs didn't allege that Oracle's intent was "anything other than to generate revenue" nor that it thought its practices were tortious, Seeborg said.

Their argument that the company wasn't entitled to the exception because the websites that installed its data-collection tool didn't consent to Oracle's practices also failed, he said.

Third party websites agreed to deploy Oracle's data collection tool, and the plaintiffs offered no plausible reason to conclude their consent was conditioned on Oracle limiting the types of data it collected or how it used the data, he said.

Lieff Cabraser Heimann & Bernstein LLP represent the plaintiffs. Morrison & Foerster LLP represents Oracle.

The case is *Katz-Lacabe v. Oracle America Inc.*, N.D. Cal., No. 3:22-cv-04792, 4/3/24 .

To contact the reporter on this story: Christopher Brown in St. Louis at ChrisBrown@bloombergindustry.com

To contact the editor responsible for this story: Nicholas Datlowe at ndatlowe@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Google Wins Order Trimming Classes in Privacy On/Off Switch Suit

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XE0NRDES000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XE0NRDES000000)

Google LLC convinced a federal court to trim the class definitions in a lawsuit alleging it collected information from 100 million mobile-app users despite telling them they could turn off the data-mining function.

Users of accounts created by companies for employees and by parents for their children will no longer be included in class definitions approved by Judge Richard Seeborg of the US District Court for the Northern District of California concerning the plaintiffs' claims of invasion of privacy.

Their inclusion was inappropriate because resolving their claims would raise individualized questions about whether they consented to Google's data collection or had a reasonable expectation of privacy in their web activities, Seeborg said in an April 5 order.

Lead plaintiff Anibal Rodriguez and others alleged Google effectively "placed itself in the middle of conversations to which it was not an authorized party," despite telling them they could opt out of the company's tracking of users' regular and "supplemental" web and app activity as early as July 1, 2016.

Seeborg granted the plaintiffs' motion to certify two classes in the lawsuit in a Jan. 3 order: a class of people who had both regular and supplemental tracking switched off and whose activity was still tracked by the company on a non-Google-branded mobile app or on a phone using its Android operating system; and those who had their tracking switched off while their activity was still relayed to the company via Firebase or Google Mobile Ads software developer kits.

Google argued in a motion for clarification that the class definition didn't include users who hadn't set the user privacy settings at issue in the lawsuit when their accounts were established. These included employees whose accounts were established by their employers, and children whose accounts were established for them by their parents.

Seeborg ruled that the class definitions as approved by the court did in fact include the users now challenged by Google, but that their exclusion was required in order for the class to meet the predominance requirements of Federal Rule of Civil Procedure 23(b)(3).

The court's original predominance inquiry rested in part on the notion that the class members had engaged in a uniform pattern of conduct in switching off the regular and supplemental tracking functions on their apps and phones, he said.

Unlike most class members, users whose accounts had been set up by employers or parents didn't necessarily turn off the settings themselves or even know whether the settings had been turned off, Seeborg said.

The configuration of the accounts raised individualized factual questions concerning who engaged in the pertinent conduct for the purposes of class certification, as well as whether the users consented to Google's data collection, he said.

Seeborg also said that the employee users and child users could remain in the classes as originally defined for the purposes of the plaintiffs' claims of violations of the Comprehensive Computer Data Access and Fraud Act, which turned on the privacy settings communicated to Google rather than "consent" by the user.

Employee users and child users also could remain in classes certified under Rule 23(b)(2) for injunctive and declaratory relief, Seeborg said.

Boies Schiller Flexner LLP, Sussman Godfrey LLP, and Morgan & Morgan represent the plaintiffs and the classes. Willkie Farr & Gallagher LLP represents Google.

The case is *Rodriguez v. Google LLC*, N.D. Cal., No. 3:20-cv-04688, 4/5/24 .

To contact the reporter on this story: Christopher Brown in St. Louis at ChrisBrown@bloombergindustry.com

To contact the editor responsible for this story: Nicholas Datlowe at ndatlowe@bloombergindustry.com

Bloomberg Law

Research Trail

My Work

000888

Help

Account

Home

Practice Centers

Litigation

Transactional

Business

Practitioner Tools

News & Analysis

Laws & Regulations

Secondary Sources

 [Manage Subscription](#)

[Class Action](#)
April 5, 2024, 11:52 AM PDT
Hain Celestial Says Lead Baby Food Suit Should Get Thrown Out
By [Shweta Watwe](#)
Documents

-  [Motion to Dismiss](#)
-  [Docket](#)

- Plaintiffs haven’t shown the products they bought had metals
- Parents say they were misled by packaging safety statements

Bloomberg Law News 2024-04-08T14:23:04361903998-04:00
Hain Celestial Says Lead Baby Food Suit Should Get Thrown Out

By Shweta Watwe 2024-04-05T14:52:57000-04:00
Plaintiffs haven’t shown the products they bought had metals
Parents say they were misled by packaging safety statements

Hain Celestial Group Inc. says a suit accusing it of mislabeling organic baby food products as safe and healthy when they allegedly contained heavy metals should be dismissed because the plaintiffs lack standing.

The parents accusing Hain of misrepresenting its products’ safety haven’t shown that the products they actually purchased contained elevated levels of heavy metals or that they didn’t receive what they expected, the baby food maker argues in its motion to dismiss filed Thursday in the US District Court for the Eastern District of New York.

The consolidated class action accuses Hain of marketing its Earth’s Best Organic line of products as “time-trusted and safe” though they are tainted with heavy metals like lead. Suits from parents started rolling in after a Congressional report found multiple brands of baby food were contaminated with elevated levels of arsenic, lead, cadmium, and mercury. The Food and Drug Administration has stalled on finalizing acceptable levels of heavy metals in baby foods, and it removed its Closer to Zero action plan from the agency’s website in January 2023.

Hain says the parents lack standing because they haven’t shown it products have uniformly elevated levels of heavy metals and they didn’t show they tested the products they bought for contamination.

“Absent any plausible allegation that all of Hain Celestial’s products contain elevated levels of heavy metals,” the parents can’t show their purchases had dangerous amounts of the metals, Hain argues.

But the parents say they have standing because they relied on the foods’ packaging that promised “pure quality products” and wouldn’t have bought the products or paid as much as they did if they had known about the alleged heavy metal presence, according to their opposition, filed the same day.

The company says other courts have dismissed similar suits alleging deceptive labeling practices because “the mere presence of heavy metals, absent some resulting harm, does not mean that a consumer received something different than what she purchased –and that the consumer was thus not deprived of the benefit of her bargain.”

The parents also can’t allege they overpaid for the product, and therefore experienced an economic injury, because they haven’t alleged comparable cheaper or safer products, Hain argues.

The parents say that not only did they cite alternative products without the heavy metals, they also “did not get the ‘pure’ or safe product” they bargained for.

The parents’ fraud-by-omission claim should also be dismissed because they not only failed to specify what a normal level of heavy metal presence would be, but also they failed to show any harm to their children, Hain says.

“Given the ubiquity of heavy metals in the air, water, and soil,” the parents can’t say the risk of exposure to heavy metals in Hain’s products matters to reasonable consumers, the company says.

The parents say their suit should proceed because when looking at the products’ packaging as a whole, reasonable consumers could be misled. Statements like “pure, quality products,” “made with superior ingredients,” and “Grown without Potentially Harmful Pesticides or Herbicides” mislead customers into thinking the Earth’s Best line didn’t have heavy metals. Additionally, “consumers may reasonably perceive labels touting ‘natural goodness’ and ‘gentle’ qualities to mean safe, not dangerous” or free of toxic metals, the parents argue.

Hain is represented by Jenner & Block LLP.

The parents are represented by Labaton Keller Sucharow LLP.

The case is *In re Hain Celestial Heavy Metals Baby Food Litig.*, E.D.N.Y., No. 2:21-cv-00678, 4/4/24 .

To contact the reporter on this story: Shweta Watwe in Washington at swatwe@bloombergindustry.com

To contact the editor responsible for this story: Nicholas Datlowe at ndatlowe@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Judge slashes Bayer \$1.56 billion Roundup verdict to \$611 million

 [reuters.com/legal/judge-slashes-bayer-156-billion-roundup-verdict-611-million-2024-04-05](https://www.reuters.com/legal/judge-slashes-bayer-156-billion-roundup-verdict-611-million-2024-04-05)

Nate Raymond, Jonathan Stempel

Bottles of Roundup, a brand owned by Bayer, are seen for sale in a store in Manhattan, New York City, U.S., June 30, 2022. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights , opens new tab

April 5 (Reuters) - A Missouri judge slashed a \$1.56 billion verdict against Bayer (BAYGn.DE) , opens new tab to \$611 million for three people who claimed its Roundup weed killer caused their cancer, by reducing punitive damages. Bayer said on Friday it is appealing.

The German company's Monsanto unit had been found liable in November by a Cole County, Missouri, jury to Valorie Gunther of New York, Jimmy Draeger of Missouri and Daniel Anderson of California, who blamed their non-Hodgkin's lymphoma on their exposure to Roundup.

Jurors found Monsanto liable for negligence, design defects and failing to warn about Roundup's risks. They awarded \$61.1 million of compensatory damages and \$1.5 billion of punitive damages, with the latter divided equally among the plaintiffs.

In orders on March 15, Judge Daniel Green let the \$61.1 million component stand, but reduced punitive damages to nine times that amount, or \$549.9 million.

The U.S. Supreme Court has said that punitive damages should generally not be more than nine times compensatory damages.

Bayer had sought to throw out the verdict, as well as reduce damages, and filed a notice of appeal on March 22.

It has said decades of studies have shown that Roundup and its active ingredient glyphosate are safe.

"While the court reduced the unconstitutionally excessive damage award, the company believes that the court did not apply the law correctly on damages," Bayer said on Friday. "We also disagree with the ruling on the liability verdict as it is at odds with the extensive weight of scientific evidence."

Bart Rankin, a lawyer for the plaintiffs, said in a statement the reduced awards are "unassailably constitutional," and "align with the evidence of Monsanto's willful, malicious, and reckless disregard for the safety of consumers and the injuries suffered by these

plaintiffs."

Roundup is among the most widely used weedkillers in the United States, though Bayer phased out sales for home use last year.

Bayer has faced extensive litigation over whether Roundup causes cancer since it bought Monsanto for \$63 billion in 2018.

It agreed to settle much of that litigation for \$10.9 billion in 2020, but failed to resolve future cases. About 113,000 [cases](#), opens new tab of the 167,000 claims that Bayer has faced have been settled or deemed ineligible.

Though Bayer has won the majority of its more recent Roundup trials, plaintiffs have won more than \$4 billion of verdicts, including \$2.25 billion in a single case in January. Bayer is appealing those verdicts.

Reporting by Jonathan Stempel in New York and Nate Raymond in Boston, Editing by Alexia Garamfalvi and Richard Chang

Sanofi to settle 4,000 Zantac cancer lawsuits in US state courts

 [reuters.com/legal/sanofi-settle-4000-zantac-cancer-lawsuits-us-state-courts-2024-04-03](https://www.reuters.com/legal/sanofi-settle-4000-zantac-cancer-lawsuits-us-state-courts-2024-04-03)

Reuters

Zantac heartburn pills are seen in this picture illustration taken October 1, 2019.

REUTERS/Brendan McDermid/Illustration/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, April 3 (Reuters) - Sanofi (SASY.PA) , opens new tab has reached an agreement in principle to settle 4,000 lawsuits linking the discontinued heartburn drug Zantac to cancer, the company said on Wednesday.

Sanofi did not disclose financial terms of the deal. The agreement, which still needs to be finalized, will resolve most of the lawsuits pending in the U.S. state courts, with the exception of cases pending in Delaware.

Sanofi did not admit any liability in the settlement, and said it is settling to avoid the expense and ongoing distraction of the litigation.

"Sanofi has vigorously defended the Zantac litigation since the outset and will continue to do so," the company said in a statement.

Jumpstart your morning with the latest legal news delivered straight to your inbox from The Daily Docket newsletter. Sign up here.

Reporting by Dietrich Knauth Editing by Chris Reese

Read Next / Editor's Picks

Change Healthcare wants data-breach lawsuits heard in Nashville federal court

 [reuters.com/legal/litigation/change-healthcare-wants-data-breach-lawsuits-heard-nashville-federal-court-2024-04-04](https://www.reuters.com/legal/litigation/change-healthcare-wants-data-breach-lawsuits-heard-nashville-federal-court-2024-04-04)

Mike Scarcella

The corporate logo of the UnitedHealth Group appears on the side of one of their office buildings in Santa Ana, California, U.S., April 13, 2020. REUTERS/Mike Blake/File Photo
Purchase Licensing Rights [↗](#), opens new tab

April 4 (Reuters) - UnitedHealth Group's (UNH.N) [↗](#), opens new tab Change Healthcare on Wednesday asked a U.S. court panel to designate Nashville, Tennessee, as the place to consolidate at least 24 class actions accusing the payment processor of failing to protect personal data from February's cyber hack.

Change is based in Nashville and the company said in its filing [↗](#), opens new tab that the federal court there was well prepared to oversee a large, consolidated legal proceeding. Evidence and key witnesses will be based in Tennessee, Change told the Judicial Panel on Multidistrict Litigation, which weighs forum questions about lawsuits focused on the same set of facts.

In its filing, Change said the panel should put the lawsuits before U.S. District Judge Eli Richardson, who is already assigned to some of the cases filed in that court in recent weeks. Richardson, who previously [↗](#), opens new tab worked at law firm Bass, Berry & Sims, was appointed to the trial bench in 2018.

"Centralization of these actions in a single district is imperative to prevent duplicative discovery and inconsistent pretrial rulings, and to conserve the resources of the parties and the courts," Change's attorneys at law firm Hogan Lovells told the judicial panel.

UnitedHealth did not immediately respond to a request for comment. The Minnesota-based company has said it was focused on restoring Changes' operations.

The video player is currently playing an ad. You can skip the ad in 5 sec with a mouse or keyboard

The attack was carried out by the ransomware hacker group BlackCat. UnitedHealth disclosed the intrusion on Feb. 21 but did not indicate then how many people were affected.

The proposal for consolidation in Nashville, part of the U.S. District Court for the Middle District of Tennessee, mirrored a request from a group of plaintiffs' lawyers involved in the litigation. Last month, they asked the multidistrict panel to select that court.

Thirteen of the lawsuits filed so far were lodged by consumers claiming a heightened risk for identity-theft from the cyberattack. Eleven other cases were filed by healthcare providers

alleging there was a delay in insurance claim payments. Change is named as a defendant in all of them.

Change's filing on Wednesday said the lawsuits are "based on the incorrect and unfounded theory that, because a cyberattack occurred, Change's security must have been deficient and plaintiffs must have been harmed."

Read more:

Class action lawsuits pile up over UnitedHealth data breach

UnitedHealth could take months to fully recover from hack

Healthcare providers hit by frozen payments in ransomware outage

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Read Next / Editor's Picks



Page Printed From:
https://www.law.com/nationallawjournal/2024/04/03/judge-allows-suit-to-proceed-against-bmw-vehicles-alleged-to-spontaneously-combust-and-catch-fire-398-128892/?kw=Federal%20Judge%20Allows%20Suit%20to%20Proceed%20Against%20BMW%20Vehicles%20Alleged%20to%20%27Spontaneously%20Combust%27&utm_position=4&utm_source=email&utm_r



NOT FOR REPRINT

Federal Judge Allows Suit to Proceed Against BMW Vehicles Alleged to 'Spontaneously Combust'

The judge declined to dismiss the plaintiffs' claims of consumer fraud, unfair competition and false advertising, as well as a Magnuson-Moss Warranty Act claim.

April 03, 2024 at 04:15 PM

Consumer Protection

By Marianna Wharry | April 03, 2024 at 04:15 PM

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

A putative class action against BMW of North America alleging the company knew of electrical defects in its vehicles but failed to warn regulators or the public will continue in federal court, a U.S. District Court judge held last week.

Multiple plaintiffs, including a consolidated class action complaint brought by Gabriel Patlan, Wendy Vasquez and Vikkie Wilkinson, filed lawsuits against BMW in U.S. District Court for the District of New Jersey. The plaintiffs alleged their vehicles had defective blower-motor wiring systems and valve heaters which caused their vehicles to “spontaneously combust and catch fire,” even when the vehicles are not in operation, according to the opinion filed March 28.

The plaintiffs relied on the assertion that BMW affirmatively misled and improperly concealed the defects in purchased vehicles. They claim BMW failed to accurately represent the safety of the vehicles and assert that BMW violated its 48-month/50,000-mile warranty with the sale of the defective vehicles.

While the court sided with BMW on one count of breach of express warranty, the judge declined to dismiss the plaintiffs’ other claims, including allegations of consumer fraud, unfair competition, false advertising violations out of California, New Jersey and Nevada, along with a Magnuson-Moss Warranty Act claim. The plaintiffs’ class action suit is seeking damages, restitution and equitable relief due to BMW’s allegedly fraudulent business practices.

BMW argued that the plaintiffs claims are prudentially moot since its recall programs provided complete relief to the vehicle owners, and called some of the plaintiffs' damages “totally speculative.” The automotive company also said the plaintiffs did not sufficiently allege that BMW had knowledge of a common defect as early as 2011 and 2012.

U.S. District Judge Claire E. Cecchi sided with the plaintiffs, rejecting BMW’s claims that the Patlan plaintiffs’ allegations were insufficient, as the three plaintiffs plausibly alleged that their vehicles sustained a decrease in value as a result of the defects existing at the time of purchase, issues with a positive crankcase ventilation component and alleged out-of-pocket expenses, including failure to provide a rental vehicle.

The Patlan plaintiffs, which include Gabriel Patlan, Ryan Cornell and La Della Levy, all purchased BMW 328i vehicles with differing production years, but each plaintiff claimed to have purchased the cars based on BMW’s messaging regarding manufacturing quality and safety commitments. Patlan and Cornell say they were informed about the defects but were later told BMW could not repair the vehicles.

Levy alleged that her vehicle was destroyed by a fire while the car was not in operation, but BMW claims the plaintiff’s claims are “too speculative,” the opinion said.

Cecchi disagreed, holding that Levy’s allegations fell within the parameters of a recall in which the National Highway Traffic Safety Administration safety recall report showed that BMW had received reports of vehicles catching on fire.

In 2017, BMW recalled about 1.4 million vehicles after ABC News ran an investigation into vehicles spontaneously combusting. A safety recall report from the NHTSA showed the agency first received reports of fires in 2007 and 2008, with the reports of additional fires originating in the cars’ heating and cooling systems through 2011. In May 2011, BMW changed the design of the blow-regulator, but it did not notify customers of the defect, correct it in already-purchased vehicles or notify the agency, the opinion said.

Natalie Finkelman Bennett and James C. Shah, of Miller Shah in Hoboken; Catherine E. Anderson, of Giskan Solotaroff & Anderson in New York; and Roosevelt N. Nesmith, of Bloomfield, are representing the plaintiffs.

Christopher J. Dalton, Jacqueline M. Weyend, Argia J. DiMarco and Melissa Bayly, of Buchanan Ingersoll & Rooney in Newark, are representing BMW.

Counsel for both parties did not return a request for comment.

THE NATIONAL LAW JOURNAL

Breaking news and trends for law firm and legal departments about the evolving federal regulations in a volatile political climate.



FEDERAL LEGAL NEWS

- [Courts & Litigation](#)
- [Expert Columns](#)
- [Latest Stories](#)
- [Events](#)

SPECIAL COVERAGE

- [Special Reports](#)
- [Special Supplements](#)

SURVEYS & RANKINGS

- [The NLJ 500](#)

NATIONAL LAW JOURNAL

- [Current Issue](#)
- [Contact](#)

Page Printed From:
https://www.law.com/2024/04/01/boies-schiller-flexner-bounces-back-with-revenue-head-count-gains-in-2023/?kw=Boies%20Schiller%20Flexner%20Bounces%20Back%20With%20Revenue%2C%20Head%20Count%20Gains%20in%202023&utm_position=8&utm_source=email&utm_medium=enl&utm_campaign=



NOT FOR REPRINT
NEWS

Boies Schiller Flexner Bounces Back With Revenue, Head Count Gains in 2023

After years of declining head count and revenue, the litigation shop is back in growth mode.

April 01, 2024 at 02:56 PM

Law Firm Profitability



Dan Roe
Reporter



The original version of this story was published on [The American Lawyer](#)

What You Need to Know

- Boies Schiller Flexner boosted gross revenue by 11.8% in 2023 while headcount rose by 2%.
- The gains represent a reversal of the firm’s declining headcount and revenue in recent years.
- Chairman-elect Matthew Schwartz attributed the success to lateral partner hiring and contingency fee revenue.

For the first time since 2018, both revenue and head count are up at Boies Schiller Flexner, as the litigation shop reported \$246 million in gross revenue for 2023.

The figure represents an 11.8% gain over 2022, while the firm’s full-time equivalent head count eked upward by three lawyers, to 153. Revenue per lawyer landed at \$1.6 million, a 9.6% increase, while profits per equity partner rose 1.3% to \$2.5 million.

Boies Schiller peaked at 320 lawyers and \$420 million in gross revenue in 2018 before a tumultuous succession plan and controversial representations of Theranos and Harvey Weinstein cut head count and revenue roughly in half over the following three years.

Notably, the firm hired more lateral partners than it lost last year, and Chairman-elect Matthew Schwartz said the newcomers helped propel the firm toward its double-digit revenue increase.

“2023 was a very successful year for the firm,” Schwartz said in an interview. “We were busier, we were bigger, and we were doing the kinds of matters that Boies Schiller is best at, which are big, complicated disputes that end up before fact finders.”

Schwartz said contingency fee payouts also contributed to a positive financial year. In March, Mexican broadcaster Grupo Televisa settled an investor lawsuit for \$95 million over a bribery scandal that damaged the company’s stock price. Boies Schiller and Miami boutique Sugarman, Susskind, Braswell & Herrera were awarded 30% of the settlement.

The firm also saw rising demand in bankruptcy litigation amid an uptick in creditor disputes; Boies Schiller is representing Yankee Entertainment and Sports Network as a creditor in the bankruptcy of regional sports broadcaster Diamond Sports Group.

Boies Schiller also continued its litigation involving Jeffrey Epstein in 2023, with a federal judge granting a \$290 million settlement against JPMorgan Chase & Co. and a \$75 million settlement against Deutsche Bank over the banks’ roles in Epstein’s sex trafficking ring. Boies Schiller was awarded 30% in attorneys fees to split with co-counsel for each settlement.

The firm continues to await its biggest contingency payout, however. Alongside other plaintiffs firms, Boies Schiller is set to receive 25% of a \$2.7 billion settlement for its work in an antitrust lawsuit against Blue Cross Blue Shield. Although the 11th U.S. Circuit Court of Appeals upheld the district court’s decision in October, class member Home Depot is petitioning the U.S. Supreme Court to overturn the settlement agreement, putting the fee payout on hold.

The firm continues to dedicate 30% to 40% of its lawyers’ time to contingency fee matters, Schwartz said.

In addition to reversing a downward revenue trend, Boies Schiller finished the year with 15 more partners. Among the biggest hires, Southern District of New York judge [Shira Scheindlin](#) joined the firm in September as she faced rising conflicts at Stroock & Stroock & Lavan, which was seeking a merger partner prior to the firm’s eventual dissolution.

The firm also added former Arizona attorney general Mark Brnovich and IP litigator Katie Kavanaugh as partners to its Los Angeles office, hired former Twitter litigation counsel Joshua Stein in San Francisco, and added former U.S. Department of Justice Office of Legal Counsel attorney David Lehn from Wilmer Cutler Pickering Hale and Dorr in Washington, D.C.

In December, the firm opened a [Rome](#) office by hiring three partners and two associates from a local firm, an expansion of its Italian presence after launching a Milan office in 2021. “We will be expanding that practice, which focuses on European disputes and European clients,” Schwartz said. “In addition to pure disputes work, it will include some advisory and transactional work, particularly for high net worth individuals.”

Boies Schiller also continued to rebuild its London office after former co-managing partner Natasha Harrison [departed](#) the firm in late 2021, taking more than a dozen attorneys with her. With an eye toward international arbitration for the future of the office, the firm hired King & Wood Mallesons arbitration partner [Andrei Yakovlev](#) in March. Yakovlev has represented corporations and sovereign states such as Ukraine, the People’s Republic of China and Kazakhstan in multi-billion dollar matters, according to Boies Schiller’s website.

Most arrivals came in as non-equity partners, as the firm’s equity tier only grew by two attorneys in 2023.

Notable partner exits included Joanna Wright, a former executive committee member who joined a number of former Boies Schiller colleagues at Jenner & Block in May. Several other partners went to boutiques, including Matthew Tripolitsiotis to [Burns Charest](#) in Dallas and Adam Turbowitz to Aronson Mayefsky & Sloan in New York.

The firm moved into a smaller space in Los Angeles, ending its tenancy at the former offices of Caldwell Leslie, a 27-lawyer litigation boutique that merged with Boies Schiller in 2017 but saw 12 partners decamp for King & Spalding in 2020. Left with 19,000 square feet until the lease ran out, Boies Schiller was finally able to leave the downtown Los Angeles space behind in September when it moved to a new 4,000 square foot space in Century City, which Schwartz said is closer to clients and the JAMS International Arbitration Center.

Schwartz said the firm’s 2024 performance will depend on a number of cases that settled in 2023, including a handful of class actions. “We always have a portfolio of valuable plaintiff-side cases in various stages,” Schwartz said. “I can’t predict what’s going to happen with them. In any given year, we can usually confidently rely on several resolving in ways that are important.”

Among the firm’s largest active cases are litigations against FTX, Voyager and Binance, as well as a recent \$5 billion settlement against Google over the company’s tracking of users who believed they were browsing privately on “incognito mode.”

Schwartz was [elected](#) to be the first firm chairman not named David Boies in December, with his term beginning in December 2024. The election marked the culmination of a [succession plan](#) that saw numerous heirs apparent depart the firm as insiders said Boies was reluctant to give up the reins. Presently, Schwartz co-manages the firm alongside managing partners Sigrid McCawley and Stuart Singer.

“This transition year is really just about a continuation of the process of understanding the kinds of decisions that have to be made, working closely with David and understanding his thought process so when his term expires at the end of the year and when I take over, things are as smooth and as seamless as they have been over the last several years when he delegated day-to-day management to new people,” Schwartz said.

RELATED STORIES

[Boies Schiller Flexner Names Matthew Schwartz as Chair-Elect](#)

[David Boies’ Succession Plan Will Make or Break Boies Schiller](#)

[Boies Schiller Flexner Opens in Rome](#)

NOT FOR REPRINT

State AGs say Hawaii case is 'unique opportunity' for SCOTUS to halt climate lawsuits

 legalnewsline.com/stories/657617702-state-ag-say-hawaii-case-is-unique-opportunity-for-scotus-to-halt-climate-lawsuits

April 8, 2024

Climate Change

Alabama Attorney General Steve Marshall | Attorney General Steve Marshall Official website

WASHINGTON (Legal Newsline) - A group of 20 state attorneys general has joined the oil industry in calling for the U.S. Supreme Court to hear a Hawaii lawsuit over climate change, saying the case offers a “unique opportunity” to decide whether state courts have the power to effectively drive national energy policy.

The lawsuit by the City and County of Honolulu accuses oil companies of accelerating climate change by misleading consumers into consuming fossil fuels. Honolulu’s claims are framed as violations of state consumer-protection laws, but the AGs of Alabama, Indiana, Kansas, Texas and 16 other states say the real aim of the lawsuit is to cripple the oil and gas industry.

Any sale of fossil fuels anywhere on earth allegedly contributes to Honolulu’s damages, the AGs say in a writ of certiorari seeking Supreme Court review, meaning the Hawaii case really involves questions of interstate and international law that can only be decided by Congress or in federal courts.

“An action seeking abatement and damages for an alleged ‘global climate crisis’ must be governed by federal law, so Honolulu’s state-law claims fail,” the state AGs say. Companies like ExxonMobil, Chevron and Sunoco have also asked the Supreme Court to intervene, saying the Hawaii case is the only one in position now to allow the court to decide once and for all whether state courts can hear climate lawsuits.

The Supreme Court has thus far refused to wade into climate-change litigation, last year rejecting a plea by ExxonMobil and Chevron to overturn decisions by federal courts around the country to transfer cases back to state courts where they were filed. Those cases were over where case can be heard, however, while the Hawaii case is headed for trial and presents the central question of whether state law even applies.

“This case may be a unique opportunity,” the AGs say. The Supreme Court “should act before state courts issue preliminary relief that could trigger a national emergency or fashion a patchwork of new taxes on the nation’s energy system that would make life harder for

every American.”

Oil companies scored some successes early on in climate litigation when federal appeals courts in New York and California ruled the federal Clean Air Act barred lawsuits over interstate emissions of greenhouse gases. In a 2018 decision, for example, U.S. District Judge William Alsup dismissed lawsuits by San Francisco and Oakland, saying the scope of the legal theory developed by plaintiff lawyers was “breathtaking,” and would “reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales.”

Private lawyers led by Sher Edling retooled their legal theories in the face of those defeats, recasting the claims of their government clients as involving violations of state, not federal law. So far federal courts have mostly agreed with the approach, rejecting attempts by defendants to remove cases to federal court.

The AGs, many of them from oil-producing states, argue any lawsuit accusing the oil industry of aggravating climate change necessarily involves matters governed by federal law, however. Otherwise each state could dictate energy policy for the others by imposing crippling costs on oil and gas companies unless they cease selling their products everywhere.

The claims of consumer deception are ludicrous, legal scholars Richard Epstein and John Yoo argue in an amicus brief to the Supreme Court. Under Honolulu’s theory, the oil companies have damaged the city by conducting a “disinformation campaign” that caused consumers worldwide to burn more fossil fuels than they would have, had they known the true risks of global warming.

Honolulu claims the oil companies “are in possession of information on global warming of which the plaintiffs are ignorant,” Epstein and Yoo wrote. “But nothing could be further from the truth. Information about climate change is a matter of public knowledge and can be obtained from many different sources, each with its own distinctive perspective.”

Hawaii has “an active Office of Consumer Protection,” they note, yet neither that office nor the Federal Trade Commission has ever pursued the defendant companies over supposed misinformation about greenhouse gases.

The defendants argue federal common law – judge-made law covering interstate disputes – is the only applicable law in these cases.

The SEC Is Reportedly Sweeping Various Tech Companies

 fcpprofessor.com/sec-reportedly-sweeping-various-tech-companies

April 5, 2024

An industry sweep is a concept that entered the FCPA vocabulary over a decade ago.

As explained in this prior post by an FCPA practitioner:

“Industry sweeps are often led by the Securities and Exchange Commission (“SEC”), which has broad subpoena power as a regulatory agency, arguably broader oversight authority than prosecutors. They are different from internal investigations or traditional government investigations, and present different challenges to companies. Because the catalyst may be wrongdoing in a single company, agencies may have no evidence or suspicion of specific violations in the companies subject to an industry sweep. A sweep may thus begin with *possible cause*, not probable cause. In sweeps, agencies broadly solicit information from companies about their past FCPA issues or present practices. And they may explicitly encourage companies to volunteer incriminating information about competitors. This practice not only fuels the “salesman’s defense” (that “everybody does it”), but can also generate anecdotal or speculative information that simply leads to additional rounds of inquiries.

Inevitably, industry sweeps become organic and evolve, with government investigators using information from one company as the basis for additional requests to others. Pooling information about unreliable third parties, suspect government instrumentalities, and information about employees who have worked for multiple companies can prolong an investigation or cause its scope to expand or turn in new directions.”

According to this Bloomberg report, the SEC is currently sweeping various tech companies asking about relationships with distributors or other business partners outside of the U.S.

Bloomberg reports:

“The US Securities and Exchange Commission is asking publicly traded tech companies about their relationships with distributors and other business partners outside the US in a push to root out possible corruption, according to people familiar with the matter.

The SEC started sending letters to the firms earlier this year under its mandate to enforce the Foreign Corrupt Practices Act ...

[...]

The agency’s FCPA unit is asking whether the companies did business with a list of dozens of intermediaries — some of which have been implicated in other investigations — across various regions, including Asia, Latin America and Africa, said one of the people. All of the people familiar asked not to be named discussing a confidential matter.

The companies that have received the inquiries about their contractors couldn’t immediately be identified. They haven’t been accused of wrongdoing and the inquiry, which is in its early stages, could result in no action.

[...]

The inquiries came from staff at the SEC’s Fort Worth office ...

[...]

The letters are part of an enforcement sweep, which typically involves sending questions to multiple companies in a particular industry. The SEC, which shares a mandate with the Justice Department to enforce the FCPA, is focusing across the tech supply chain on companies that sell equipment and/or services to governments, said one of the people.”

As stated in the prior guest post on industry sweeps:

“What threshold of evidence is appropriate to target a particular company in an industry sweep? What prevents sweeps from becoming fishing expeditions that are costly to the companies and unconstrained in the agencies? What are the disclosure considerations for a company in a sweep investigation focused on Asia if issues arise in Latin America? Can a company decline to participate or cooperate, and, if so, what are the risks or trade-offs for doing so? Answers to questions such as these — which often raise policy issues, not legal ones — could affect corporate attitudes about disclosure generally, and possibly result in challenges to the agencies.”

f

in

tw

pr

em

cc

NOT FOR REPRINT

'Failure Is Not Fraud': SEC, Dentons Partner Make Closing Arguments in Terraform Civil Fraud Trial

Jurors have begun deliberating on whether the cryptocurrency company and its founder defrauded investors by lying about the company's success.

April 05, 2024 at 02:58 PM

Securities Litigation

By Jane WesterT April 05, 2024 at 02:58 PM

f in tw pr em cc

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

Jurors in the U.S. District Court for the Southern District of New York began deliberating Friday on whether cryptocurrency firm Terraform Labs and its founder Do Kwon defrauded investors by lying about the company's success.

In her closing argument in the civil trial, U.S. Securities and Exchange Commission attorney Laura Meehan reiterated the SEC's point, from opening statements, that Terraform "was a house of cards."

Meehan said Kwon lied to hide the company's problems because he "knew that no one would want to invest in a business whose fundamentals did not work."

Dentons partner Louis Pellegrino, who delivered closing arguments on behalf of his client, Terraform, and on behalf of Kwon and Kwon's lawyers at Kaplan Hecker & Fink, emphasized that Terraform was "a real company with real products."

Pellegrino said the trial evidence demonstrated that building new products with new technology is difficult, but he said Kwon and Terraform were honest about the challenges they faced.

"Terraform and Do Kwon never tried to hide their failures from you," he said.

Pellegrino reiterated the defense's statement, at the outset of the trial, that "failure is not fraud."

"We told you in our opening that failure is not fraud—and it's not," he said. "Now, the SEC is trying to punish Terra for that failure."

Meehan urged the jurors to discount Terraform's argument that the SEC wrongly portrayed the company's failure as fraud.

"If you swing big, and you miss, and you don't tell people, that is fraud," she said.

Meehan outlined the two fraud schemes alleged in the case, starting with Terraform and Kwon's claims that its blockchain was being used to settle transactions on the South Korean payment app Chai.

Meehan said the jurors should understand from the evidence that the blockchain was not being used in that way, and that the alleged false statements were significant because the "holy grail of crypto" is real-world application.

Pellegrino urged jurors to credit the testimony of Terraform's Paul Kim about Chai's use of the blockchain.

"For Chai, what mattered to a reasonable purchaser is that Chai used the Terra blockchain ... the technical details about settlement and processing did not matter to a reasonable purchaser," Pellegrino said.

In the second alleged fraud scheme, Meehan said the defendants hid Jump Crypto's role in stabilizing Terraform's UST stablecoin after a 2021 incident in which it "de-pegged" from the value of the U.S. dollar.

"Defendants told investors repeatedly that the Terra algorithm for UST worked and helped to restore UST's price to one dollar," Meehan said. "This was a lie, and the defendants knew it."

Meehan said Do Kwon had entered into a "secret deal" with Jump that gave Jump a windfall in exchange for its assistance in restabilizing UST.

"You heard from investors ... that they absolutely would have wanted to know about Jump's intervention," Meehan said.

Pellegrino argued that Jump had a written agreement with Terraform to serve as a market maker, a relationship described as "entirely legal."

"The only reason they call it secret is to try to explain why they don't have any evidence to show you of it," Pellegrino said.

Meehan continued to deliver her closing argument and did not appear to react as a 4.8-magnitude earthquake in New Jersey shook the 27-story courthouse Friday morning.

After she finished speaking, U.S. District Judge Jed Rakoff of the Southern District of New York suggested that the cause of the shaking was either the earthquake or "according to the SEC, the force of their arguments."

The jurors left the courtroom to begin deliberations at approximately 1 p.m.

THE NATIONAL LAW JOURNAL

Breaking news and trends for law firm and legal departments about the evolving federal regulations in a volatile political climate.

https://www.law.com/nationallawjournal/2024/04/05/failure-is-not-fraud-dentons-partner-sec-make-closing-arguments-in-terraform-civil-fraud-trial-398-129166/?kw=%27Failure Is Not Fraud%27: SEC%2C Dentons Pa... 1/2

Opinion **Retail & Consumer industry**

Corporate bosses are forced to get creative to talk up price increases

'Price pack architecture' is latest jargon to describe price increases without unleashing public opprobrium

LOUIS ASHWORTH



Some companies are using the phrase 'price pack architecture' to describe products that cost the same but whose size get smaller © Angus Mordant/Bloomberg

Louis Ashworth YESTERDAY



Consider this statement: “We continue to see a dynamic external environment with consumers increasingly being cost conscious. With this in mind, we continue to leverage our recommended price pack architecture to address different consumer needs across the spectrum of affordability and premiumization.”

Uttered during an earnings call last year by Manik Jhangiani, chief financial officer for Coca-Cola Europacific Partners — which bottles Coca-Cola’s products across much of the areas in its name — it roughly boils down to “things cost more, so we’re making our products smaller”.

“Price pack architecture”, in other words, has lately become a synonym for shrinkflation — when products get smaller, but their price stays the same. Use of the phrase globally is at an all-time high, according to data from transcript analysis firm AlphaSense.

CCP are not the only PPA enthusiasts in the London market. Haleon, the consumer healthcare business spun out of GSK, in February hailed “optimised price pack architecture across the portfolio” in its latest annual report, while in 2022, drinks maker Britvic boasted that investment had made it “better equipped to deliver . . . price pack architecture”.

What is behind these word crimes? It is natural, of course, that bosses want to avoid saying shrinkflation, since acknowledging it would be public relations equivalent to sticking a “kick me” sign on their business. Tellingly, no listed British company has dropped the S-word in a filing or investor call over the past three years.

But bosses do not work for the public — they work for shareholders. And, for shareholders, a successful shrinkflationing (or its conventional cousin, successfully inflating prices) — one that protects unit margins without eroding volumes — is a good thing.

This creates an odd dynamic for bosses, particularly when they are doing calls with investors or the media. When a journalist asks why your prices have gone up, it can carry a certain note of populist hostility, but when an equity analyst does the same it is a lay-up to brag about your business’s strong market position and pricing leverage.

Pricing is an especially sensitive area, and that is why it attracts euphemisms. Even at a time when mostly everyone has heard of “greedflation” — and decided if they believe in it — it is a little too hot to handle. So in come the neologisms.

Perhaps the most risible of these is “choiceful”. The term was initially deployed by chief executives to describe customers who are cutting down on their spending while still splashing out for certain products — but seems to have morphed into a pretentious way of saying “not spending stupidly”.

Usage of choiceful on calls hit a record-high last year. The rise was chiefly driven by American bosses but, like a Hershey's chocolate bar, the horror has crossed the Atlantic. British business leaders have succumbed: Informa says it is a "very choiceful buyer" when it comes to M&A; Diageo warns customers are "still cautious and choiceful"; while Shell last spring disclosed it is being "very choiceful" about its operating expenditure. CCP — where clearly there is something in the water — titled a recent presentation slide featuring details on Indonesian SKU reductions and bulk water exits in three countries with "being more choiceful on where we want to play". Yuck.

Choiceful may be shaking off its inflationary-era semantic trappings and becoming ubiquitously awful, but the most controversial phrase at present — "dynamic pricing" — is well understood. For the uninitiated, the phrase refers to the demand-affected "surge" pricing traditionally associated with airlines but now synonymous with Uber.

Wendy's, the American fast-food chain, found itself on the receiving end of widespread opprobrium recently after announcing it planned to experiment with dynamic pricing in its shops. Despite the uproar, the chief executive of Merlin Entertainments, owner of Legoland, last week told the Financial Times [it would be doing the same](#), and it is likely many more companies will follow.

Consumers have wised up to this — clocking that this so-called dynamism often works out as higher prices for a worse service during busy times, and standard prices when it is quiet. But, done right, there is surely money to be made.

The public may not like it, but investors will. For company bosses, the dirty trick is being honest with the latter without tipping the former off. And if you cannot find the right words, just make some up.

[Copyright](#) The Financial Times Limited 2024. All rights reserved.

Few merger deals immune from regulatory scrutiny, M&A attorney says

DJ [dailyjournal.com/articles/377908-few-merger-deals-immune-from-regulatory-scrutiny-m-a-attorney-says](https://www.dailyjournal.com/articles/377908-few-merger-deals-immune-from-regulatory-scrutiny-m-a-attorney-says)

Corporate

Apr. 4, 2024

“Dealmakers anticipating heightened antitrust scrutiny are paying particularly close attention to reverse break-up fees, covenants to litigate against the government and “drop-dead” dates (and related extension provisions), for example,” according to Richard Climan, global head of Hogan Lovells’ Tech M&A practice.

Richard Climan, global head of Hogan Lovells’ Tech M&A practice
Increased regulatory scrutiny of proposed mergers and acquisitions has led to a renewed focus on incorporating terms like “drop dead” dates into deal documentation and deterred some parties from pursuing deals altogether, a leading M&A attorney says.

This was despite the lack of success the Department of Justice and Federal Trade Commission have been experiencing in the courtroom.

“I think it’s fair to say that the current regulatory environment – and, in particular, the U.S. antitrust environment – has been less conducive to getting deals done than during prior administrations,” Richard Climan, global head of Hogan Lovells’ Tech M&A practice, wrote.

Climan was responding to questions from the Daily Journal ahead of the firm’s M&A forum, to be held in Silicon Valley April 24. He wrote that the FTC’s advancement of novel theories and new merger guidelines initiated in December had contributed to this chilling effect.

“Today, it seems that very few M&A transactions of significant size are immune from antitrust scrutiny. Deals that would have sailed through the Hart-Scott-Rodino process without a hitch half a dozen years ago are now being routinely challenged, or at least routinely examined and delayed, by the FTC or the Department of Justice,” he wrote.

This “tendency” to challenge merger proposals had, “at least at the margins, deterred some parties from initiating M&A transactions they might have otherwise pursued, and has led some parties to abandon announced transactions before they get to the courthouse.”

In response to the shifting regulatory environment, “deal documentation has been evolving,” Climan explained, with provisions designed to limit the damage caused by regulatory intervention in focus.

“Dealmakers anticipating heightened antitrust scrutiny are paying particularly close attention to reverse break-up fees, covenants to litigate against the government and “drop-dead” dates (and related extension provisions), for example,” he wrote.

These changes were occurring even though regulators had yet to see legal success.

“Despite all this, both the FTC and the DOJ have been losing in the courtroom,” Climan wrote. “Our firm has beaten the FTC in court recently on the Meta/Within transaction, and was involved the successful defense against the DOJ’s challenge of the UHC/Change Healthcare transaction.” *Federal Trade Commission v. Meta Platforms*. 3:22-CV-04325 (N.D. Cal. filed October 7, 2022);

While overall M&A activity was down in 2023, partly in response to changed financial conditions, there were some bright spots. Climan’s practice in Northern California had been “unusually busy,” with deals conducted including Walmart’s pending multi-billion-dollar acquisition of tech-focused smart television maker VIZIO, announced in February.

“2023 was by all accounts a down year for M&A activity. I expect the Q1 2024 stats will show meaningful improvement in overall M&A activity, particularly in the number of M&A deals valued at over \$1 billion given that there have been a number of large deals announced in Q1,” he reported.

He added that “overall M&A deal volume has not returned to the levels we saw in 2021 and is not likely to reach those levels this year. I also expect the Q1 data will not show any meaningful improvement in the dollar volume of buy-side M&A activity on the part of private equity sponsors.”

In particular, the reduced presence of private equity players in the tech sector had opened growth opportunities for other buyers, Climan explained.

“What I’m seeing generally in the tech M&A marketplace is that large strategic buyers with strong balance sheets, including many of the clients my group represents, are in an excellent position to grow and innovate through M&A. Valuations in the tech sector have declined

meaningfully, so these strategic buyers are able to negotiate attractive purchase prices in their deals. They are not facing the same level of competition from private equity buyers – financial sponsors – as they were several years ago,” he wrote.

“Even though PE sponsors are sitting on vast quantities of so-called “dry powder”, they are encountering significant challenges in the current M&A marketplace. It’s partially because of the change from a low interest rate environment to a higher one, which makes it more difficult for PE sponsors to get inexpensive debt financing for their deals, especially from syndicated lenders. Without meaningful leverage on their deals, these sponsors can’t generate the kinds of financial returns their investors expect,” he added.

The forum includes an investment banker’s presentation, a mock negotiation of deal terms, a panel on “M&A and the media,” and an update on recent M&A-related cases and legislative developments.

AI, and the potential for related dealmaking, will take prominence, Climan wrote.

“This upcoming Forum is built around three major themes. The first is artificial intelligence (AI) – and the M&A aspects of this increasingly important area. This is very timely as we are in the midst of what could be characterized as an AI revolution,” Climan wrote. Zaheed Kajani, senior managing director at investment bank Evercore, will lead the AI session.

“The second theme is pre-announcement deal leaks – we will explore how these leaks come about and their legal ramifications,” Climan wrote. That panel will feature Sheila Ennis of public relations firm H/Advisors-Abernathy, former Bloomberg deals reporter Serena Saitto and Hogan Lovells partner Keith Flaum.

The third theme involves the negotiation of 10b-5 representation in the deal documentation for private company acquisitions.

“That theme is somewhat technical, but M&A practitioners and their clients need to understand it because failing to properly negotiate a “10b-5” representation can give rise to substantial liability,” Climan wrote.

The forum isn’t only for attorneys, Climan said, with company executives and law students also welcome.

Hogan Lovells’ Silicon Valley M&A forum will be held April 24 at the Four Seasons Hotel in Silicon Valley and livestreamed.

#377908

By Matt Levine
Opinion

the company *does* go public, *then* you give me the shares."

- You say "sure," she gives you the \$50, and you write a little contract saying "IOU: startup shares."
- Two years later (or whenever), the company goes public, the transfer restrictions lift, you get your shares, and you deliver them to her. If the stock is at \$400, you feel a twinge of regret: You're giving her stock worth \$400 today, and all you got was \$50 two years ago.

This is called a "forward contract." There are some risks:

- 1. If your company has transfer restrictions, they *probably cover forward contracts*. They won't say "you can't sell your stock"; they will say something more complicated like "you can't sell, pledge, assign, agree to sell, enter a derivative contract to sell, etc., etc." your stock. The point of a forward contract is not that it is *allowed* by your company; the point is that you can sign the contract now, and deliver the stock later, without your company *knowing about it*.
- 2. But say that the company goes public at \$400 per share, two years after you did the forward contract. You have all this stock worth \$400 per share. The buyer comes to you and says "hey, remember me? We had a contract? I paid you \$50 per share for your stock? I'd like the stock now." You feel a twinge of regret, but might you also feel a twinge of ... amnesia? Litigiousness? "I don't remember any contract," you might tell the buyer. "I'm pretty sure it's invalid anyway," you might add, "because the company's transfer restrictions cover forward contracts. See you in court!"
- 3. Say that the company goes public at \$400 per share. The *company* now has all this extra cash, and this valuable stock. The *company* gets wind of your forward contract. It calls you and/or the buyer and says "hey, it seems like you agreed to trade this stock at \$50 two years ago. Well, we had a right of first refusal, and we are now exercising it, so you have to sell *us* the stock. Today, for \$50." Your buyer – who paid \$50 two years ago as a bet that the company would be far more valuable when it went public, and was right – now has to give the stock back and get back only her \$50.

One more point about forward contracts. A forward contract is, in essence, a placeholder for stock, an empty box that will one day hold a share of stock of the underlying startup. The buyer paid money for it, because it is desirable. She can *sell* it, too. If she no longer likes the company, or if the company's valuation has gone up and she wants to take profits, there's probably some *other* investor who wants exposure to a hot startup and who will pay her \$60 or whatever for that forward. Maybe that investor will turn around and sell it, too. In two years, when your company goes public, you might get a call from a total stranger saying "hey, you don't know me, but I bought a forward from someone who bought it from someone who bought it from someone who bought it from someone who bought it from you, so please send me the stock." Your twinge of amnesia might be strong.

At the New York Times last Friday, Erin Griffith had a fun article about Destiny Tech100, a publicly traded closed-end fund that invests in private tech startups:

It is offering a publicly traded fund that contains shares of 23 private tech companies including Stripe, SpaceX, OpenAI, Discord and Epic Games. The fund, which began trading on the New York Stock Exchange last week, plans to expand its holdings to include stock in 100 start-ups.

Sohail Prasad, the chief executive of Destiny XYZ, the parent company of the fund, said his goal was to let anyone own part of the tech industry's top private companies. ...

Mr. Prasad and a team of five deal makers have used their relationships to get access to the start-up shares that Destiny has bought so far. Private companies can be picky about whom they let own their shares. But as they stay private for longer, their employees and early investors can become antsy to cash out. The most valuable companies have held regular "tender offers" that allow employees to sell their shares, which is one way Destiny Tech100 buys stock.

It is a fascinating model: It trades publicly on the New York Stock Exchange (under the ticker DXYZ), but its investments are private and illiquid. It computes its net asset value quarterly, and its most recent computation lists its net asset value per share at \$4.84. It went public last month with a reference price of \$4.84, but started trading at \$8.25 and went up from there; it closed on Friday at \$59.20, and it was trading around \$80 at noon today. It has a net asset value – its computation of the fair value of its underlying startup stakes – of about \$54 million, and a market capitalization – the value that the market places on its shares – of about \$875 million.

Somebody is wrong! One way to model this is that there is \$875 million of demand from regular public investors to own shares in hot private startups, and so far only about \$54 million of supply. But if each of this fund's holdings goes up 1,000% by the time they go public, people who bought into the fund today will *lose money*. Weird!

The other weird thing is, as Griffith reports:

The fund has also bought shares in Stripe and Plaid, a financial technology provider, through “forward contracts.” In these agreements, start-up employees can get cash by agreeing to transfer their company shares to an investor when the company goes public or sells.

The contracts are controversial. Stripe has said that it forbids its current and former employees to strike such deals and that any forward contract is void. Mr. Prasad said his fund was confident the deals were legal.

Here is Stripe's threat:

To be clear, transactions in which a Stripe [employee] receives payment now and promises to transfer shares directly or indirectly in the future are subject to ROFRs and transfer restrictions. This means, among other things, that at the time the transaction is “closed out” Stripe is entitled to step in and repurchase the shares that are subject to the contract at the original price paid by the buyer. We intend to vigorously enforce our ROFR rights with respect to all such contracts.

To be fair, Destiny Tech100 lists its investment in Stripe forward contracts as having a cost of about \$3.5 million and a fair value (as of last June) of about \$1 million: It bought into Stripe forwards at the peak, Stripe's valuation [has fallen](#), and at this point it would be *great* for the fund if Stripe tried to buy back its shares at the original price it paid. Still the fund's forward-related risk factors are a fun read:

Should counterparties breach their agreement inadvertently, by operation of law, intentionally, or fraudulently, it could affect our performance. ...

In cases where we purchase a forward contract through a secondary marketplace, we may have no direct relationship with, or right to contact, enforce rights against, or obtain personal information or contact information concerning the counterparty(ies). ...

Should the portfolio company object to the existence of the forward contract, it may take any number of steps to discourage or obstruct the transactions, including claiming that the counterparty transactions violate the portfolio company's agreements, claiming causes of action against counterparties or us, defensive measures intended to discourage counterparties from selling the portfolio company's securities to us, refusing to accept or process securities transfers, or claiming rights to rescind our transactions or trigger rights of refusal to purchase the portfolio company's securities involved in our transactions.

It seems to me that the safest way for a forward contract to work is for the company *not to know about it*: Once it goes public, the seller just delivers the unrestricted stock and never tells the company. But once you put it in a prospectus, the company knows!

SEC v. crypto

A pretty standard story in crypto is:

- 1. Crypto in general, and Crypto Project X in particular, are *building something*. Each crypto project is working to achieve some vision of the future of finance or communications or media or wireless networking or whatever, and crypto collectively – the aggregate of those projects – is moving toward some loosely shared vision of a future of decentralized ownership, censorship resistance, etc.
- 2. By buying tokens of Crypto Project X, you are betting on the success of whatever they are building: If the thing succeeds, the tokens will be worth more than you paid for them.
- 3. *Probably* the people building Crypto Project X are *selling* its tokens to raise money to build the thing, or doing something that rhymes with that.

This is not the only story in crypto; there is another common story that [goes like](#) “someone created some tokens as a joke and now they are worth billions of dollars.” But the one I laid out above is important. For one thing, it describes a lot of big crypto projects. Also, though, it would be hard to *care* about crypto if it *wasn't* trying to build something. “Dogecoin is a joke and if you buy it it might go up” is, I think, a very interesting fact about modern finance, but you’d feel silly devoting your life to it. *Read Write Own: Building the Next Era of the Internet* is the name of venture capitalist Chris Dixon’s book about crypto, and if you are a venture capitalist “the next era of the internet” is a better thing to back than “a joke about a dog.”

The problem with this story, though, is that Crypto Project X’s tokens sure sound like they are *securities* under US law. A [security is](#) “an investment of money in a common enterprise with profits to come solely from the efforts of others,” and what I laid out above – Crypto Project X is a group of people building a thing, they raise money by selling tokens, and you buy tokens hoping to make money if their thing succeeds – is that.

US securities law exists mostly to prevent swindling in the sale of securities. This creates several problems for crypto:

- 1. Some crypto projects are in fact swindles, and securities law is bad for them.
- 2. The main way that the law prevents swindles is by requiring disclosure by securities issuers, and the disclosure rules are not well adapted to crypto, meaning that even a non-swindle crypto project will have a hard time registering its tokens and complying with US law.
- 3. The law empowers the US Securities and Exchange Commission to regulate securities, and [the SEC hates crypto](#) and does not do anything to make registration easy or even possible.
- 4. Most critically, perhaps, the law also regulates securities *exchanges*, and it is hard for a crypto exchange to register with the SEC as a securities exchange. So the SEC can [go after crypto exchanges](#) for illegally listing crypto tokens that are securities.

And the SEC has done that, [suing Coinbase Global Inc.](#) and other crypto exchanges for operating illegal securities exchanges.

This really is an existential problem for crypto in the US, and the industry’s response has been to argue that these crypto tokens are not securities. The leading form of this argument goes something like this:

- A security is an “investment contract,” and there is no *contract* between you and Crypto Project X. Sure they say they will build the project, and you expect them to, and that’s why you invested. But you never signed a contract; if they just run off with your money you can’t sue. Therefore, not a security.
- Even if there is some sort of contractual arrangement between you and Crypto Project X, the *token* is not a security. The security is something like “the token plus the other arrangements and expectations you have with Crypto Project X.” But the token is not the contract; [the token is](#) “little more than [an] alphanumeric cryptographic sequence.” Maybe Crypto Project X issued a

security, but *secondary market* trading in the token – people buying and selling it on an exchange – is not a securities transaction, so crypto exchanges are not securities exchanges.

I have never found these arguments especially persuasive; to me, [these tokens are analogous to stock in companies](#), and secondary trading in Meta Platforms Inc. stock is obviously a securities transaction even though none of the money goes to Meta. (A share of stock is also, trivially, “little more than an alphanumeric cryptographic sequence,” an entry in a computer database: It’s what the database entry *represents* that makes it a security.)

But last July a federal judge in New York was persuaded, [issuing a puzzling ruling](#) in the SEC’s case against Ripple Labs Inc. finding that Ripple’s XRP token is mostly not a security. I thought that perhaps I had it all wrong, and crypto tokens really are a get-out-of-securities-law-free card: You can raise money for your business by selling quasi-stock and calling it a token, you can do as much fraud as you want, and the SEC can’t do anything about it.

Since then, though, the SEC has been on a winning streak against crypto. Shortly after the Ripple decision, another New York federal judge [issued a decision](#) in the SEC’s case against Terraform Labs and its founder Do Kwon, finding, no, of course Terra’s tokens are securities. And last month, a different New York federal judge [ruled that the SEC’s case against Coinbase](#) can go forward: “The ‘crypto’ nomenclature may be of recent vintage,” she wrote, “but the challenged transactions fall comfortably within the framework that courts have used to identify securities for nearly eighty years.”

Here is her opinion, which strikes me as thorough and straightforward, and which surveys several other cases reaching similar results, more or less ignoring the Ripple decision. Coinbase [had argued](#) that crypto tokens were like Beanie Babies: speculative investments, but not speculative investments *in a business*. The judge rejected that argument, writing that “unlike in the transaction of commodities or collectibles (including the Beanie Babies discussed during the oral argument), which may be independently consumed or used, a crypto-asset is necessarily intermingled with its digital network – a network without which no token can exist.”

And then last week the SEC won its jury trial against Terra. The Wall Street Journal reports:

After a two-week civil trial, a New York jury agreed with the SEC’s claims that Kwon and his firm, Terraform Labs, defrauded investors by misleading them about the stability of TerraUSD, a so-called stablecoin designed to maintain a value of \$1. Kwon had claimed that TerraUSD would “self-heal” if its value ever dropped below the peg.

The decision was the latest in a series of federal court wins bolstering regulators’ efforts to force the freewheeling industry to comply with the same laws that govern the stock and bond markets.

In some sense, the Terra result was obvious once the judge allowed the case to go forward: If you think that Terra’s tokens were *securities*, then *of course* you are going to find that Terra did *securities fraud*. This is in part because there is a lot of evidence that Kwon and Terraform were lying to investors about important facts of the Terra ecosystem, but there is also the more straightforward fact that [Terra crashed](#) and incinerated a lot of investor money. If (1) you call a thing a “stablecoin,” (2) its value drops to \$0.026 and (3) it is a security, then (4) you’re going to get sued for securities fraud and (5) you are going to lose.

Or as SEC Enforcement Director Gurbir Grewal put it in a statement after the verdict:

Through these deceptions, the defendants caused devastating losses for investors and wiped out tens of billions of market value nearly overnight. For all of crypto’s promises, the lack of registration and compliance have very real consequences for real people.

Last year, as the SEC accelerated its crypto crackdown, I [wrote about its timing](#). It seemed to me that cracking down on crypto in the wake of a crypto collapse was arguably bad regulation (better to prevent the collapse!) but good realpolitik:

In 2021, if the SEC thought your token was a security and you thought it wasn't, you could go to court to argue about it, and try to convince a judge that the SEC was wrong on the law. You might win, who knows. ... But in 2023, the SEC can go to court and say to a judge "we need to protect investors from unregistered crypto securities offerings, because *look at how many of them are frauds that went bankrupt*," and while that *legal* argument is no better than it was in 2021, it is much more *persuasive* now. At some emotional level the debate is "we need to stop fraudsters" versus "we need to allow for innovation," and the fraud/innovation balance has shifted a lot in recent months.

Well, now crypto is booming again, but the memory of all those frauds is still pretty fresh, and the SEC has notched some important wins.

Shadow trading

Elsewhere in SEC wins, Bloomberg's Rachel Graf [reported Friday](#) :

The US Securities and Exchange Commission won a jury verdict in its ground-breaking insider-trading case that seeks to bar employees from using non-public information about their own company to place bets on rival stocks.

The closely watched two-week San Francisco civil trial was the regulator's first enforcement action targeting so-called shadow trading, a widespread phenomenon that researchers say has gone largely unchecked.

Grewal put out a statement about that one too:

"As we've said all along, there was nothing novel about this matter, and the jury agreed: this was insider trading, pure and simple. Defendant [Matthew Panuwat] used highly confidential information about an impending announcement of the acquisition of biopharmaceutical company Medivation, Inc., the company where he worked, by Pfizer Inc. to trade ahead of the news for his own enrichment. Rather than buying the securities of Medivation, however, Panuwat used his employer's confidential information to acquire a large stake in call options of another comparable public company, Incyte Corporation, whose share price increased materially on the important news."

We have [talked about](#) the [Panuwat case before](#) , because there was *obviously* something novel about it: It's the first shadow trading enforcement case. Every other insider trading case has had the form "person gets inside information about Company X and trades Company X stock (or options)"; this one is "person gets inside information about Company X and trades *Company Y* stock (actually options)." Where Company X and Company Y are closely correlated competitors, it *makes sense* that the SEC thought this was illegal insider trading, and they won. But it was a novel argument.

Incidentally, it's hard to know how important the Panuwat result is. One possible interpretation is "shadow trading is illegal now," but that might go too far. (Not legal advice!) The way US insider trading law works, broadly speaking, is that it is illegal to trade stock using material nonpublic information in breach of some duty to someone. We have [talked before](#) about how important it was to this case that Medivation had a broad anti-insider-trading policy that specifically mentioned trading in "the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors of the Company." Under that policy, Panuwat had a contractual duty to Medivation not to use his inside information about Medivation to trade the stocks of its competitors. But not every company has a policy like that; some have policies saying, for instance, "don't use inside information to trade our stock," without mentioning competitors. For [all I know](#) some companies might *encourage* their executives to trade competitors' stocks. The meaning of Panuwat might be something like "shadow trading is illegal if your company tells you it is."

Trader pay

My [model](#) of investment banks is that they are [socialist collectives](#) run for the benefit of their employees, but I confess that that is an outdated model. Once upon a time it was more or less literally true – the big investment banks were once private partnerships – and even as public companies investment banks have sometimes had a tendency to run themselves for the enrichment of their employees rather than of shareholders. But the industry is [not what it used to be](#) , banks [care more about their shareholders](#) now, and these days some of the big investment banks seem positively skeptical of socialism.

For instance, the Financial Times reports:

Wall Street banks have warned that their next wave of hiring in France may be stunted without restrictions on dismissal costs for highly paid traders, a flagship measure that has been left out of a reform package intended to bolster Paris as a financial centre. ...

Redundancy payouts to traders earning more than €1mn a year in Paris can end up being more than five times that of London, although there is less of a difference between France and the rest of Europe. ...

The idea under review would be to put more specific limits on payouts to traders so they don't exceed a threshold of about half a million euros. ...

Alexandre Holroyd, a lawmaker who is leading the reform package, said France's labour rules were meant to be protective, but had never been designed to overcompensate traders.

"A trading floor is somewhere where there is a lot of volatility and variations in headcount," Holroyd said. "It's the flipside of being paid sums of money that are completely disproportionate to more than 99 per cent of people."

If you hire a trader and pay her more than a million euros a year, and she doesn't work out, you'd like to be able to get rid of her without paying her millions more. On the other hand, if you *are* a trader getting paid more than a million euros a year, and your bank decides to get rid of you, *you'd* like to get paid millions more, no? Seems nicer.

Also there are risk-management considerations; Byrne Hobart notes:

High legally-mandated payouts for firing amount to a put option on their compensation. If they get a free put option, their incentive is to take more risk. Part of what banks are worried about is what it costs to fire an underperforming trader, but another thing it's prudent for them to worry about is how much it pays for a trader to underperform.

This is true as a matter of options math, but I wonder how true it is sociologically. Are French traders notably riskier than British or American ones? (There are tantalizing [examples](#) .) There is some baseline level of risk that you have to take as a trader to *avoid* getting fired, and perhaps if getting fired is cushy enough your reaction will be laziness rather than risk-taking.

Elsewhere, [here is a claim that](#) "the hedge fund industry's biggest stars are looking beyond money when they plot their career moves, according to IDW Group founder and Chief Executive Officer Ilana Weinstein":

After a year or two of guaranteed compensation in a new role, "you're out and you're on your own, so to speak, and you need to put up the goods," Weinstein said Friday in a Bloomberg Television interview. "The question becomes: Are you really set up for success, how do you develop, and what are the resources the firm has to get you there?" ...

"Will I be better by virtue of making this move, developmentally – will I be the best version of myself?" she said. "The second question is, 'Is there more opportunity at this place that I'm going to, relative to where I'm at?'"

I feel like I'd probably be a better version with myself with more money.

Things happen

Bank Valuations at Stake as EU Splits With Wall Street Over [ESG](#) . Steelworkers Push Back Against \$14 Billion Deal for U.S. Steel as Vote Looms. Vitol posts \$13bn profits in second consecutive year of bumper results. How [Aston Martin](#) Outran a Billion-Dollar Debt Time Bomb. [TSMC](#) Gets \$11.6 Billion in US Grants, Loans for Three Chip Fabs. Jersey Mike's Considers Sale. Wall Street Is Searching for [AI Winners](#) Across Emerging Markets. Chinese State Bank Asks Court to Liquidate Developer [Shimao](#) . ZIG Debuts in Zimbabwe's Sixth Effort at a [Revamped Currency](#) . Brazil's Top Justice Opens Criminal Inquiry Against [Elon Musk](#) . The Best Summer Camps for Future Tech Moguls. Retiree loses \$1 million in new timeshare fraud by Mexican drug cartel known for cannibalism. I'm [verified on Twitter](#) again.

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

To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

- 1. There are some situations where public companies might have transfer restrictions or ROFRs on some of their shares, but generally not permanent restrictions for every employee. Employees might find themselves locked up for a few months after the initial public offering, and any new grant of shares might be restricted for some period, but eventually they'll have freely tradable stock.
- 2. Realistically she'd probably pay you less than \$50, to account for the risk and delay and complexity.
- 3. Or the company is acquired, you get \$20 per share in cash, and the forward contract requires you to pay her the \$20. Or the company fails, the stock is worth \$0, and the forward contract doesn't matter.
- 4. Generically, a "forward contract" often means a contract in which (1) I agree to pay you \$50 in a year and (2) you agree to deliver me the stock in a year. The thing in the text is a "prepaid forward contract," in which I pay you now and you deliver the stock later. But in tech-startup employee liquidity usage, a "forward contract" is normally prepaid, because you want the money now.
- 5. E.g., they are building the thing on the cheap without raising money, but they *have* a lot of the tokens, and if the thing succeeds those tokens will make them rich.

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law

Contact Us

Bloomberg Law Research Trail My Work 000888 Help Account

Bloomberg T... Advanced Search

Home Practice Centers Litigation Transactional Business Practitioner Tools News & Analysis Laws & Regulations Secondary Sources

News from Bloomberg Terminal

April 4, 2024, 11:30 AM PDT

Peltz's Disney Loss Worked Out Fine

By Matt Levine

(Bloomberg Opinion) --

Activism

If you are an activist hedge fund, I guess you have two motivations:

1. You are, essentially, a value investor: You buy companies that are cheap because they are mismanaged, and then you try to fix the mismanagement (by yelling at management, running proxy fights, etc.) so the stock goes up.
2. You probably *do* like conflict, right? You probably think that you could do a better job of running the company than management does. You want to win proxy fights, get board seats, so that you can impose your will on the company – and so that, in your *next* activist engagement, the company will be scared of you and more likely to do what you want.

You want to make money, and you want to win proxy fights. But you can make money while losing proxy fights, and you can lose money while winning them. Which is more important? Would you rather have a good track record as a value investor or as a winner of proxy fights? If you ask an activist hedge fund manager about her successes, is she more likely to mention:

the time she waged a proxy fight against a public company, and the company's management took the fight seriously and improved its operations in order to win the fight, with the result that (1) she lost the proxy fight and (2) the stock went up, or the time she waged a proxy fight against a public company, and won, and got some board seats, but the company continued to languish with her in charge, and the stock went down?

I don't know, I am just asking the question. Anyway:

On Wednesday at the annual meeting of Walt Disney Co., shareholders elected all of management's choices to the board, turning aside the nomination of [activist investor Nelson] Peltz, while also rejecting his ally, former Disney finance chief Jay Rasulo, and a slate from another dissident group. Iger was reelected with 94% support, according to people familiar with the matter, who asked not to be identified discussing results that haven't been announced publicly, while Peltz garnered 31% of the votes. In other words, a rout.

But also:

Nelson Peltz may have suffered a bruising defeat in his proxy battle with Disney Wednesday, but the sting could be eased by a gain the activist has scored on the investment.

Peltz's Triun Partners has made around \$300 million in profit on its 16-month investment, most of it on paper, according to people familiar with the matter.

The firm invested around \$800 million in Disney in 2022, buying much of its stake when shares were around \$88 apiece. ...

After subtracting the \$25 million Trian expected to spend waging the campaign, the firm's profit to date comes out to about \$300 million.

That is a roughly 40% return on the investment over the period Trian has owned the shares, which is about equal to the S&P 500's return over the same period.

I suppose the way to spin this is that Peltz forced Disney to improve its operations and get serious about succession planning, which made the stock more valuable, so he lost the proxy fight.

Trump Media

On the one hand, as we have discussed, the stock price of Trump Media & Technology Group Corp. has nothing to do with the company's fundamentals. Last year Trump Media lost \$58 million on \$4 million of revenue, but the stock has a market capitalization of more than \$6 billion. It is hard to work out a model of "this expected cash flows to shareholders from this company's business have a present value of \$6 billion."

On the other hand, there *are* cash flows to shareholders. Just not from the *business*. The cash flows are from stock lending. Here's the New York Times:

The demand to short Trump Media, the parent company of the social media platform Truth Social, is so great that stock lenders can charge enormous fees, making it hard for short-sellers to turn a profit unless the shares fall significantly. Still, there is a lot of interest in taking the bet. ...

There are roughly 137 million shares in the company, and only around five million of those are available to short-sellers. ...

According to S3, 4.9 million of the roughly five million available shares are already on loan. As with any loan, when share owners lend their stock to a short-seller, they charge a fee, usually expressed as an annual interest rate on the stock's current value. Typically, the fee for borrowing stock is a fraction of a percentage point. For Trump Media, it has risen to 550 percent, Mr. Dusaniwsky said.

Trump Media's stock currently trades at around \$50. That means that shorting it for a month would cost more than \$20 per share.

Which means that *buying* the stock today and *lending* it for three months would cost \$50 and bring in \$60, assuming that the borrow cost stays high. (Obviously a risky assumption! 1) Even if the stock goes to zero at the end of the three months, you come out ahead. Many people are probably buying Trump Media stock as a meme-stock bet on Donald Trump, but some people are probably buying it as a directional bet on *stock lending markets*.

That is: Trump Media's stock might really be trading at a price that reflects the present value of its expected future cash flows. It's just that those cash flows don't come from the company's business, but from people betting against that business. There is something somehow appropriate about that! You make the money from the haters.

Well, you're not *really* making the money from haters, or not exclusively. Many of the people *shorting* Trump Media are *not* making a bet against Trump, or the company's fundamentals; they are doing an arbitrage:

One large broker said much of the short trading was not an outright bet against Trump Media. ... Instead, the current trade driving demand is designed to capture the difference between DJT's stock price and outstanding "warrants," which will give the owners the right to new stock at a fixed price as long as regulators approve the new shares.

When it went public, the special purpose acquisition company that merged with Trump Media issued about 14 million warrants, each entitling the holder to buy stock at \$11.50 per share. This is fairly standard in SPAC deals, and the terms of the warrants provide that they become exercisable 30 days after the merger (that is, roughly April 25), as long as Trump Media has filed a registration statement for the underlying shares. (It hasn't done so yet, but "TMTG has agreed to use its best efforts to meet these conditions and to file and maintain a current and effective prospectus," and I assume eventually it will.)

Those warrants closed yesterday at \$18.51, against a stock price of \$48.81. If they were exercisable now, you could buy a warrant for \$18.51 and pay \$11.50 to exercise it, for a total cost of \$30.01. Then you'd get a share of stock that you could sell for \$48.81, an \$18.80 instant profit. But they're not exercisable now. Now, you could buy a warrant for \$18.51, borrow the stock for roughly \$20 a month or call it \$15 for three weeks, and sell it for \$48.81. If all goes well, in three weeks the warrants will be exercisable, you'll pay \$11.50 to exercise, and you'll deliver the stock to close out the borrow. Your cost is \$18.51 (warrant) plus \$15 (stock borrow) plus \$11.50 (exercise price), or about \$45.01; you sold the stock for \$48.81, so you make a few bucks. There's a little juice in the trade, on these rough hypothetical numbers, but not much. The market for Trump Media warrants is pretty efficient: The warrants are cheaper than the common stock, because the common stock is so expensive to borrow. 2

One more point here. Let us assume that Trump Media has the following properties:

Its stock has a market value of \$6 billion or so.

Its business generates, in round numbers, nothing.

What is the best way for *Donald Trump*, who owns about 58% of the company, to turn his ownership into money? The obvious answers are:

1. Sell some stock.
2. Post the stock as collateral to borrow money from banks. 3

These methods have problems. A big one is that he can't do either of them *now*, because he has signed a lock-up agreement that prohibits him from selling or pledging stock for six months after the merger. Also, though, if Trump sells stock, that might deflate Trump Media's price: If he's getting out, why should retail investors get in? And probably a bank will not lend all that much money, without recourse, against a meme stock.

One less obvious answer, suggested to me by a reader, is: Trump Media *itself* could sell stock, to raise money, and then lend that money to Trump. This would be ... highly, highly unorthodox? But I think it is technically allowed: Unlike in a traditional initial public offering, Trump Media is not subject to the lock-up agreement, so it could sell more stock. Would that crash the stock? Eh, probably, but if your view of Trump Media is that it is a meme bet on Trump himself, "we are raising money to give to Trump for whatever purposes he wants" might actually be a good pitch. 4

Another less obvious answer, suggested to me by a different reader, is: Could Trump *lend out his stock to short sellers*? Right now *some* Trump Media shareholders are making money by lending their stock to haters; can Trump himself get in on that action? Probably not, is the answer. For one thing, the lock-up agreement says that he can't "lend, offer, pledge, hypothecate, encumber," etc. his stock. Even after the lock-up expires, though, as a 58% shareholder an officer, there would probably be legal restrictions on his shares: He can't sell them freely, so he'd probably be restricted from lending them too. But making money from people betting against him would be a pretty fitting way for this to work.

Paramount

I wrote yesterday that, if you want to do a merger with a public company, it helps to already own most of the company, but it can also make things more complicated. The Wall Street Journal reports:

Members of Paramount Global's board agreed to enter exclusive merger discussions with Skydance, favoring it over a recent \$26 billion all-cash offer from private-equity firm Apollo Global Management.

The move means the entertainment conglomerate is putting on pause any conversations with other bidders for 30 days while it tries to work out a deal with Skydance, a production company led by David Ellison, people familiar with the matter said.

The decision could give Skydance an edge over Apollo, which earlier had offered \$11 billion for Paramount's movie studio, but on Sunday offered to buy the entire company for \$26 billion, including debt. ...

Shari Redstone, Paramount Global's controlling shareholder, has been in talks with Ellison to sell National Amusements, her family's media empire that owns about 77% of the voting shares of Paramount, since late last year.

The two have already agreed to terms, but Skydance has made it clear that to close that deal, it needs to make sure that it is allowed to merge their studios, something it can't do just by buying National Amusements. ...

Merging Paramount Global and Skydance requires a second deal that has to be approved by an independent committee of directors at Paramount. That committee must approve that the deal is good for all shareholders, not just National Amusements. That is, roughly:

Apollo went to Paramount's board and offered to buy all of the stock for cash at a \$26 billion enterprise value.
 Skydance went to Paramount's controlling shareholder, Shari Redstone, and offered to buy *just her* stock – but only if Paramount's board also allowed it to merge its studio with Paramount.
 The board agreed to negotiate exclusively with Skydance.

We are missing some details here. How much did Skydance offer Redstone for her stock, for instance? What sort of merger terms did it propose to Paramount? (Shareholders "might have indigestion at a Skydance deal that essentially leaves Paramount public, versus taking a cash premium from Apollo," noted Rosenblatt Securities, and Bloomberg Intelligence notes that "Skydance's desire to acquire control through parent company National Amusements suggests the deal will be complicated and may entail a two-step process.") And how feasible was Apollo's offer? ("Paramount's directors opted to move forward with Skydance as it wasn't clear how Apollo would finance its bid," reports the Journal. I feel like "ehh Apollo, those jokers, they can't raise that kind of money" is not a common response to an Apollo takeover proposal these days. 5)

Still, you can see the rough shape of the problem. Paramount has two classes of stock outstanding, Class A and Class B. Class A has one vote per share; Class B has no votes. There are about 40.7 million shares of Class A outstanding, and about 612 million shares of Class B. National Amusements owns about 9.7% of the total stock, but 77.4% of the Class A: It has complete voting control while owning less than 10% of the economics.

So if you want to *acquire* Paramount, the obvious two-step process is:

1. Pay up for Shari Redstone's 10% of the company, which is a controlling stake, and
2. Once you control the company, pay a lot less for the other 90%.

As I said yesterday, there are safeguards against that. The main one is that Paramount's board has appointed a special committee of independent directors to negotiate and approve any deal; the special committee has to work on behalf of all shareholders, and will presumably reject a deal that is really good for Redstone and bad for the rest of the shareholders.

But as I also said yesterday, these deals tend to be controversial and lead to lawsuits. If Redstone has a deal to sell to Skydance, then in some sense the board *can't* negotiate a deal with Apollo: Paramount can't do any sort of merger without the approval of the 77.4% Redstone stake, so if Redstone doesn't want to sell to Apollo there is no deal to be done. All the board can do is negotiate the best possible deal for shareholders *that Redstone will agree to*. And so it can end up negotiating exclusively with Skydance even while there are other bidders out there, because Skydance has a deal with the controlling shareholder.

Comp is down

It used to be that the big investment banking was the generic way to become rich. If you were a young person with fancy credentials, a strong desire for money, and no strong preferences or interests, it was kind of natural to go to a bank. "Oddly enough," Michael Lewis wrote of his first day as a Salomon Brothers bond salesman with a Princeton art history degree, "I didn't really imagine I was going to work, more as if I were going to collect lottery winnings."

That was in 1985, and the next two decades or so were good, dynamic, lucrative times for the big investment banks. They dominated finance, and they innovated, building new products that increased their dominance and brought in lots of money.

But now it is 2024 and things have changed. Corporate dealmaking is dominated by private equity firms, buyout financing is increasingly done by private credit, trading is increasingly done by hedge funds and proprietary trading firms. Those are the places to make a lot of money in finance these days. More broadly, the generic way to get rich these days is in computer technology; the aimlessly well-educated now go to Meta or Alphabet, not Goldman Sachs.

Still, "Wall Street" (meaning big investment banks) has retained its image as a generic wealth creator, which can lead to disappointment. At the New York Post, Lydia Moynihan reports that "hundreds of thousands of junior bankers are cutting back after their bonuses were a bust this year," with anecdotes like this:

One vice president at a large firm who has a one bedroom in the West Village, albeit a walkup, said after receiving even less this year than he did last year, he has tried to scale back the number of times he eats out to two nights a week instead of three or four.

At his favorite spots – Carbone where branzino costs \$95, Dante's where veal Milanese is \$60 and Saint Theo's where lamb chops are \$68 – a dinner tab can quickly balloon to \$300 or more and a drinks tab can easily hit \$100 for a date. ...

"First year employees are only making a \$100,000 salary in New York City. They rely on a decent bonus to pay their rent," a source in his 60s, who has been working as a banker for four decades, said.

The source, who noted the median Manhattan rent is \$4,257 according to a StreetEasy study from February said he "felt for the kids."

What is the world coming to when the investment banking kids can't even afford the branzino at Carbone.

Meanwhile at Meta

Here is a Bloomberg Businessweek story about a guy at Meta Platforms Inc. who used its internal chat system to solicit his co-workers to invest in his real estate venture. A bunch of them invested and then the venture failed, "leaving about 160 people who'd found real estate investments via the platform, including the dozens of Meta employees, with an estimated \$50 million in losses." Meta has the deepest pockets nearby, so of course the employees are half-heartedly blaming the company:

Meta had no direct connection to the episode, but that doesn't necessarily matter when people feel burned. Employees complained to the company that it should take responsibility for what happens on its internal chatrooms. "Maybe [Meta] should have had a policy against any sort of promotions like that," says Jeff Smith, a former Facebook product designer who says he lost more than \$50,000. "I think something like this could happen at any workplace."

Any workplace? How many workplaces do you think there are where dozens of people casually invest five-figure sums in their co-worker's speculative real estate platform after reading about it on the company Slack? This does not seem like a big problem for, say, Goldman Sachs vice presidents. Really this episode is a good bit of recruiting for Meta: "Come to Meta and you can afford to be as casual with your money as we were."

Things happen

How Hertz's Bet on Teslas Went Horribly Sideways. Chase Bank to Let Advertisers Target Customers Based on Spending Data. Anatomy of a credit card rewards program. Private equity stakes unloaded at a discount as investors seek exits. The British Are Coming for Your White-Collar Job. Commodity trading profits hit record \$104bn last year. Apple Explores Home Robotics as Potential 'Next Big Thing' After Car Fizzles. Activist Fund Sachem Head to Build Stake in Delivery Hero. CFA Level 1 Pass Rate Rises to 44%, Above Historic Average. In one of L.A.'s largest cash heists, burglars steal as much as \$30 million in elaborate operation. "One 700-word article was turned into a 34-slide slideshow, exposing the person who read it on a computer to about 150 ads."

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

To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

1. In particular, if the stock falls then you might expect the dollar cost of stock borrow to fall.
2. Incidentally the value of these warrants is basically their intrinsic value less borrow cost: There is not a ton of Black-Scholes time value in them, both because they are very in-the-money and because Trump Media can redeem them (i.e. force exercise) pretty much as soon as they become exercisable.
3. Probably you want the borrowing to be non-recourse: That is, you post \$1 billion of stock to borrow \$500 million, and if the stock goes down to \$100 million, or zero, the banks can't ask you for any more money; they can look only to the collateral to get their money back. Obviously the banks will not like that so much, though there are ways to make them feel better. (Funded collars, etc.) But borrowing recourse against a meme stock is not **really** a good way to monetize it: If the stock goes to zero, you have to pay back the money!
4. I have argued that just waiving the lock-up for him, so he could borrow against his shares, would work fine too.
5. Also: "People close to the Apollo bid said the private-equity firm wouldn't need additional debt financing to buy Paramount because its existing capital structure could be rolled into a new deal."

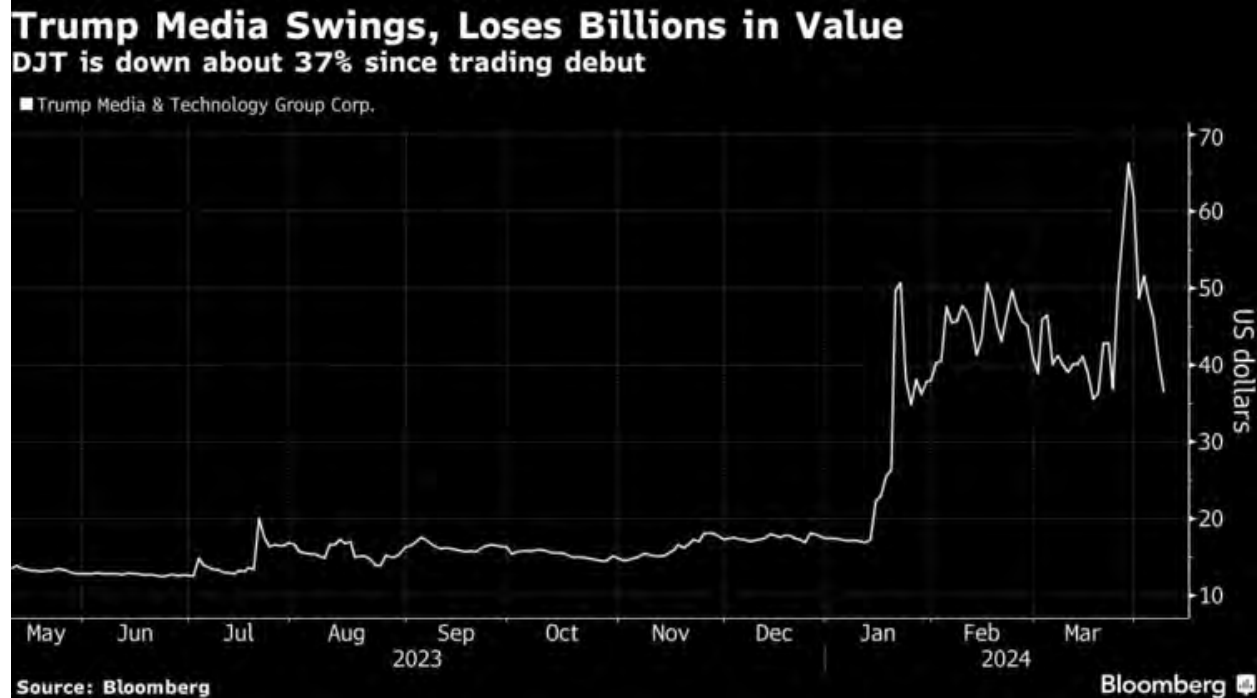
© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law

Contact Us

View Full Desktop Site

By Bailey Lipschultz



As the stock slides, the paper [windfall](#) for Trump himself has dropped some \$1.6 billion to roughly \$2.9 billion. For Trump to benefit from the paper wealth, he'll have to wait six months before he can sell shares under a lock-up agreement.

Read more: [Why Trump's Social Media Firm Is Awash in Legal Cases: QuickTake](#)

Trump Media has a market capitalization of nearly \$5 billion even after the latest drop despite generating just \$4.1 million in revenue last year. That heightened valuation has made it costly and risky to [bet](#) against the company, with short sellers facing annual financing costs of more than 450% to borrow the shares, according to brokerages.

Read more: [Trump Media Is Now the Most Expensive US Stock to Bet Against](#)

The fallout has shades of past meme stocks like GameStop Corp. and other so-called de-SPACs, companies that went public through blank-check deals, which saw initial swings in their stock performance before falling.

More than one-fifth of the nearly 500 SPAC deals that have closed since 2019 are trading below \$1 each, representing a greater than 90% plunge. And dozens of them at times saw share prices surge in retail trader-fueled frenzies, meaning losses for some are far greater.

To contact the reporter on this story:

Bailey Lipschultz in New York at blipschultz@bloomberg.net

To contact the editors responsible for this story:

Elena Popina at epopina@bloomberg.net

Amanda Fung, Katrina Compoli

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law
🕒 Research Trail ▾
📁 My Work ▾
📄 000888 ▾
🔍 Help ▾
👤 Account ▾

Securities Law ▾

🔍
Select Sources
Go

Home ▾
Practice Centers ▾
Litigation ▾
Transactional ▾
Business ▾
Practitioner Tools ▾
News & Analysis ▾
Laws & Regulations ▾
Secondary Sources ▾

[✉ Manage Subscription](#)

Securities Law

April 6, 2024, 5:00 AM PDT

Trump Media's Stock Price Has Become Unhitched: Weekend Edition

By Brooke Sample

Bloomberg Law News 2024-04-08T14:56:09879464149-04:00

Trump Media's Stock Price Has Become Unhitched: Weekend Edition

By Brooke Sample 2024-04-06T08:00:07389-04:00

This is the Weekend Edition of Bloomberg Opinion Today,

a roundup of the most popular stories Bloomberg Opinion publishes each week based on web readership. New subscribers can sign up here .

Trump Media's Business Doesn't Matter – Matt Levine

With time, I have become more comfortable with the answer to “what are we all doing here?” The answer is “not fundamental analysis.” Maybe it is “having fun online.” Maybe it is “playing a complex game of mass psychology.” Maybe it is “using our investments as a form of self-expression, buying stocks and cryptocurrencies we identify with and feeling better about ourselves if they go up.” The third era is new, and we do not understand the mechanisms here as well as we understand discounted cash flow analysis, but maybe there are mechanisms to discover; maybe in 10 years there will be textbooks on Meme Stock Analysis.

And maybe there will be a first-year MBA course in Meme Stock Analysis. And maybe it will have a final exam question – really a first-week pop quiz question – like: “Donald Trump has a publicly traded company with the ticker symbol DJT (his initials), he owns more than half of the stock, its business model is to ‘fight back against the big tech companies ... that it believes collude to curtail debate in America and censor voices that contradict their woke ideology,’ and last year it had a net loss of \$58.2 million on \$4.1 million of revenue. How much is that company worth?” And if you write “well Meta Platforms Inc. trades at like 9.3 times revenues so maybe \$40 million?” you will fail.

I don't know what you should write! The textbook is not yet written. But it does seem – as an empirical matter, but also just intuitively – like a lot of people would want to buy shares of an electronic token called “DJT” that represents their fondness for Donald Trump, that marks them out as members of a Donald Trump-supporting club, and that actually makes Trump himself richer and supports him in his endeavors. And so they might pay money for that token. And the cash flows just don't enter into it at all.

Read the [whole thing](#) .

Financial Markets Just Delivered a Powerful Reminder – Mohamed A. El-Erian

Amazon's AI Stores Seemed Too Magical. And They Were. – Parmy Olson

What's Happening in Tennessee Isn't Funny – Mary Ellen Klas

Trump SPAC Deposition Set for Same Day Criminal Trial Begins (1)

B

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThlWFYjQzZDMYyI1hNWZmLWJmYjRjOWQyMDAwMyIsImN0eHQiOiJTTE5XliwidXVpZCI6IjRmJiZjVmM0ZBTfJ3eUFHdW42YWc9PWl0UStuK3JuY3IU S3ExUll3T2xwdEE9PSIsInRpbWUiOiIxNzEyNTc0ODY0MTc3liwic2lnIjoiUHB6SDQzVnFmSHRNVnZPL2dJaHppdFBjcytZP SIsInYiOiIxIn0=

- Former president faces April 15 criminal trial in NY
- Deposition intended for Trump to answer questions under oath

Donald Trump is scheduled to be questioned in a civil lawsuit linked to his social media startup on April 15, the same day the former president's first criminal trial is set to start.

The deposition involves a February lawsuit by Andy Litinsky and Wes Moss, co-founders of Trump Media & Technology Group Corp., who sued Trump for allegedly trying to dilute their shares in the company before it began trading publicly through a merger with a so-called blank check firm. Notice of the deposition was filed April 3 in Delaware state court, where the suit is pending.

The planned deposition would conflict with the opening of Trump's first criminal trial, over "hush money" payments to a porn star, which starts with jury selection on April 15 in Manhattan. The overlap is the latest indication that the array of legal troubles facing Trump is leading to scheduling conflicts as the former president campaigns to return to the White House.

It's unclear how Trump will juggle the calendar dispute. Trump is required to attend the criminal trial, though New York Supreme Court Judge **Juan Merchan** could allow him to miss part of the proceedings to attend a deposition. If the judge balks, Trump could be forced to sit for the deposition another day.

A court official representing Merchan declined to comment.

Trump's criminal defense lawyers **Todd Blanche** and Susan Necheles didn't return emails seeking comment nor did Bragg's office, nor did Trump's lawyers in the Delaware lawsuit, **Theodore Kittila** and William Green.

The deposition is intended to get Trump to answer questions under oath that can be used in a potential trial. The questioning will take place at the midtown Manhattan offices of Clark, Smith, Villazor LLP. Christopher Clark, a lawyer with the firm, didn't immediately respond to a message seeking comment.

The civil suit, filed in February in Delaware, alleges Trump tried to dilute Litinsky's and Moss's 8.6% stake in the business through its now-completed merger.

The men — former contestants on Trump's TV show *The Apprentice* and joined forces with him to form Trump Media — allege the former president wanted to increase the amount of shares before the merger to water down their stake and potentially generate billions to pay off legal judgments.

Trump Media Shares

Shares of Trump Media initially soared after the startup began trading publicly last month following its merger with Digital World Acquisition Corp., adding billions of dollars in paper wealth for Trump, who owns nearly 60% of the company. Shares have fallen since then, following a filing saying Trump media lost \$58 million last year while making only \$4.1 million in revenue.

Trump Media fell for a third straight day Friday, trading at \$42.24. That's about a third down from its highest close of \$66.22 on March 27.

The April 15 trial involves a case by Manhattan District Attorney **Alvin Bragg** accusing Trump of falsifying business records to conceal a hush money payment to a porn star before the 2016 election. It's one of four criminal cases Trump is facing as he campaigns to return to the White House in the November election.

(Updates with court official declining to comment on the deposition schedule.)

--With assistance from **Patricia Hurtado**.

To contact the reporter on this story:
Erik Larson in New York at elarson4@bloomberg.net

To contact the editors responsible for this story:
Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net

Elizabeth Wasserman, Anthony Aarons

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

Bloomberg Law

Research Trail

My Work

000888

Help

Account

Securities Law

Search Securities Law

?

Select Sources

Go

Home

Practice Centers

Litigation

Transactional

Business

Practitioner Tools

News & Analysis

Laws & Regulations

Secondary Sources

Manage Subscription

Securities Law

April 8, 2024, 4:00AM PDT

Why Trump's Social Media Firm Is Awash in Legal Cases: QuickTake

By Greg Farrell

Bloomberg Law News 2024-04-08T14:54:17749678891-04:00

Why Trump's Social Media Firm Is Awash in Legal Cases: QuickTake

By Greg Farrell2024-04-08T07:00:01000-04:00

Donald Trump’s newly public social media company is entangled in many legal cases, the bulk of them involving suspected misdeeds by the executives who helped set up the company and merge it with a public entity – and by the former president himself.

It all started with Truth Social, the right-wing social platform launched by Trump in 2021 after he was banned by Twitter and other sites for encouraging violence during the Jan. 6, 2021, attack on the US Capitol. Trump formed a company, Trump Media & Technology Group, with a mission to counter the “liberal media” and Big Tech firms that “silence opposing voices.”

In September 2021, Trump Media agreed to merge with Digital World Acquisition Corp., a newly formed “special purpose acquisition company” that went public without an underlying business. A merger would eventually enable shares of Trump’s media company to be traded publicly.

That transaction finally took place in March, despite a Securities and Exchange Commission investigation of DWAC and the filing of criminal charges against a former DWAC board member accusing him of insider trading. In addition to the federal investigations, lawsuits have been filed by early investors and stakeholders in DWAC and Trump Media.

The newly public company, which trades under the ticker DJT, has generated minuscule revenue and no profit, but it had a market value of \$5.6 billion at the end of its first week of trading. Trump owns almost 58% of the company.

Here’s a look at the legal cases:

Misstatements by Ex-CEO

Several of the lawsuits involve **Patrick Orlando**, whose fund, ARC Global Investments II LLC, sponsored DWAC’s debut as a blank check company in 2021. Orlando became DWAC’s first chairman and chief executive officer.

Orlando was ousted as CEO, but not as a director, in March 2023. At the time, the SEC was investigating DWAC over comments Orlando had made prior to DWAC’s public offering about his intent to merge with Trump’s company.

https://www.bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/XETUA9LG000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM...

1/3

In a settlement last July, the SEC hit DWAC with an \$18 million penalty after it determined that Orlando had actually engaged in discussions about a deal with Trump's company in the months before DWAC's public offering. As a result, DWAC's public statements that it had never "had any discussions with any potential target companies prior to the IPO" were false, according to the commission.

Founders' Shares

After several delays, a vote by DWAC's shareholders on the merger with Trump Media – including Orlando's fund and other parties that invested in DWAC's initial public offering – was scheduled for March 22, just before the expiration of the deadline facing DWAC to deploy its capital or return the money it raised in its IPO.

As that date approached, the lawsuits [began to fly](#) .

On Feb. 27, DWAC sued its sponsor, ARC Global, and Orlando, asking a Florida court to declare that the founders' shares held by ARC should be converted to common shares at a ratio of 1.34 to 1. According to its complaint, DWAC was seeking to pre-empt an effort by Orlando to change the conversion ratio to a higher rate. The suit also claimed that Orlando deliberately delayed the process of preparing for DWAC's merger with Trump's company in an effort to secure better financial terms for him and ARC Global.

ARC Global responded by filing a suit against DWAC in Delaware Chancery Court, complaining that the original 1.34 to 1 ratio was too low and should be boosted to 1.78 to 1, which would boost the value of ARC Global's stake in the new company by almost 33%. ARC Global claimed that DWAC had misinterpreted the formula related to the conversion ratio and asked that the merger be blocked until the ratio and other "misstatements" were fixed. A judge declined to act before the merger vote, ruling that the issue could be addressed before the 150-day post-merger lockup period expired.

Separately, Orlando received a notice from the SEC, according to the Florida lawsuit, indicating that the commission planned to charge him personally with violations of federal securities laws, including securities fraud. Orlando responded to what's known as a Wells notice with his own submission with reasons why the SEC should not charge him. "The matter remains pending," according to the suit.

Trump Versus 'Apprentice' Alums

Trump Media co-founders Andy Litinsky and Wes Moss, both former contestants on *The Apprentice*, Trump's onetime reality show, filed a suit in Delaware on Feb. 28 claiming that the former president was planning to dilute their 8.6% stake in the firm, currently valued at about \$606 million. A judge refused to delay the vote on the merger, given that Trump had agreed to set aside extra shares in the new company in an escrow account. Trump has [counter-sued](#) in Florida, alleging that Litinsky and Moss (as well as Orlando) violated an agreement about the setup of the company and don't deserve their stake at all. Those cases are ongoing.

Insider Trading

Last June, federal prosecutors in Manhattan charged **Bruce Garelick** and two Miami investors, Michael and Gerald Shvartsman, with insider trading. According to prosecutors, Garelick, in his capacity as a DWAC board member, learned that the SPAC was going to strike an agreement with Trump's company before that news was made public. The three men, along with some friends who were tipped, then purchased shares in DWAC. Then the shares rose in value after the Trump Media deal was announced. The Shvartsmans pleaded guilty in early April, [admitting](#) they made more than \$22 million illegally. Garelick has pleaded not guilty.

For the latest on these cases click here:

- Digital World Acquisition Corp. v Arc Global Investments II LLC , 2024-CA-001061-NC, Circuit Court of the Twelfth Judicial Circuit, Sarasota County, Florida
- Arc Global Investments II LLC v Digital World Acquisition Corp. , 2024-0186, Delaware Court of Chancery
- United Atlantic Ventures LLC v Trump Media , 2024-0184, Delaware Court of Chancery
- Trump Media & Technology Group v. United Atlantic Ventures, Florida Circuit Court, 12th Judicial Circuit (Sarasota)
- US v. Shvartsman , 23-cr-307, US District Court, Southern District of New York (Manhattan)

Elon Musk Has Entered the 'Please Clap' Stage of His Megalomania

 [thedailybeast.com/elon-musk-has-entered-the-please-clap-stage-of-his-megalomania](https://www.thedailybeast.com/elon-musk-has-entered-the-please-clap-stage-of-his-megalomania)

Anthony L. Fisher

April 1, 2024

Opinion 

LET THAT SINK IN

The X boss is begging you still to care about the once-influential social media app he very quickly made worthless.

opinion



Photo Illustration by Elizabeth Brockway/The Daily Beast/Getty

Remember when Jeb Bush ran for president? (No one will judge you harshly if you don't.) The son of a former president, the brother of another, and a successful two-term governor—Jeb was the GOP money's first choice in 2016. He might not have been the presumptive nominee, but at the start, it was his race to lose.

Then, as the New Hampshire primary approached—and a deranged political novice named Donald Trump was poised to trounce both him and the rest of the field—“low energy” Jeb went viral for sheepishly asking a town hall crowd to “please clap” for the speech they didn’t realize he had just finished.

ADVERTISING

No one could accuse Elon Musk of being low energy, but over the past few weeks, the Tesla and X boss has channeled Jeb’s desperate need for validation—as the house burned down around him.



Musk recently posted, “Please forward links to X posts to your friends so they know what’s actually happening... Some people still believe the legacy media!”

This plea to users to tell their friends where the REAL news could be found came a day after NBC News cited data that showed X had lost about 23 percent of its daily active users in the U.S. since Musk bought Twitter in Oct. 2022—and later rebranded it X. (Worldwide, the site’s lost 15 percent of active daily users.)

The report also said Musk had managed to chase away 75 of the top 100 advertisers in the U.S. He put a punctuation mark on this dubious achievement in Nov. 2023—after endorsing a tweet pushing a notorious antisemitic conspiracy theory as “the actual truth”—by telling fleeing companies to go fuck themselves.

The anti-woke podcaster Konstantin Kisin tweeted the day after Hamas’ Oct. 7 massacres in Israel that “Yesterday demonstrated why turning Twitter into X has changed everything... If you don’t believe me, look at how the media covered yesterday... The worldview shared by most elites no longer has a monopoly over what we see with our own eyes. That alone is worth \$44 billion.” (Like a master petting his dog on the head, Musk replied, “Good thread.”)

Among Musk sycophants, this is an article of faith. “The media” only lies to you, and Elon Musk’s barely moderated social-media site has liberated the unvarnished truth for the masses.

But, as anyone with even a passing interest in verifying facts can tell you, Musk's X is worthless in a breaking news situation. Anonymous, fake, malicious accounts now have the coveted "blue check" of verification, and their posts are prioritized all over their site.

During every major breaking news event since Musk sold verification for \$8/month (or just gave the blue checks away for free to political commentators he likes), X is a fetid swamp of misinformation. To cite a recent example, the Baltimore bridge tragedy added copious amounts of unbridled racism to the flood of fake news, as well.



And as someone who works in the opinion journalism field, I've found Musk's X to be almost as inessential when it comes to keeping my pulse on "the discourse." Whereas Twitter—for all its many faults—was once a place where you could see serious arguments and narrative-shaping happening in real time, the infinite scroll of X's \$8 blue checks in the replies makes it all but impossible to know how widely shared tweets are being received by anyone not in Musk's ideological tribe.

For all of Musk's populist talk about making the site a more egalitarian place of robust disagreement, free of ideological gatekeepers, the new X is a cloistered feedback bubble of MAGA, Intellectual Dark Web, and racist edgelords.

It's worth noting, but is far too voluminous to document in one column, that Musk regularly spreads false conspiracy theories and fake news sites, including a recent propaganda video pushing the Great Replacement Theory and alleging that Democrats nationwide are in on the plan. (Anti-woke billionaire investor Bill Ackman further boosted the video, declaring it "credible.")

"...he's still puffing his chest out with the bravado of an anti-woke, Western civilization-saving, alpha male. But scratch his tender shell and you'll find a scared, overcompensating man who's probably smart enough to know it's over."

During the chaotic months in 2022 when Musk tried to buy Twitter, then tried to get out of the deal, before ultimately coughing up \$44 billion, Musk fan Bari Weiss said of the controversy regarding the imminent management change: "He wants free speech. Those who hate him don't."

So how's that going? Business might be cratering and the site's completely lost its cachet as a news hub, but surely Musk made X the haven for free speech that he promised, right?

Only if you ignore his arbitrary suspensions of journalists he doesn't like, his delegation of words like "cisgender" as hate speech, his deplatforming and shadow-banning of links to competitors like Substack, his compliance with foreign governments to do their censorship bidding, his speech-chilling threats to sue organizations that observed how much more bigoted content is on the site since he bought it, and his completely bogus (and recently dismissed) suit against the Center for Countering Digital Hate (CCDH).

In tossing that case, Judge Charles Bryer said: "Sometimes it is unclear what is driving a litigation, and only by reading between the lines of a complaint can one attempt to surmise a plaintiff's true purpose. Other times, a complaint is so unabashedly and vociferously about one thing that there can be no mistaking that purpose. This case represents the latter circumstance. This case is about punishing the Defendants for their speech." (Matt Taibbi, one of his hand-picked Twitter Files stenographers, has even publicly lamented that Musk has failed to live up to his free speech warrior hype.)

But other than that, Mrs. Lincoln, how was the play?

Elon Musk, Joe Rogan, and the Apocalyptic 'Centrists'

'JUST ASKING QUESTIONS'

Anthony L. Fisher



He may readily dole out grandiose, alpha male bravado about saving Western civilization and fearlessly defending free speech—but methinks Musk doth overcompensate too much.

Scratch his tender shell and you'll find a scared, flailing man who's probably smart enough to know it's over.

As far as his X-periment goes, this is Elon Musk's "Please Clap" era.



Anthony L. Fisher

Senior Opinion Editor

@anthonyLfisher Anthony.Fisher@thedailybeast.com

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit www.djreprints.com.

<https://www.wsj.com/business/autos/tesla-fatal-autopilot-crash-trial-33936b42>

BUSINESS | AUTOS

Tesla Trial to Size Up Cause of Fatal Autopilot Crash: Driver or Tech

Automaker says driver in 2018 accident wasn't properly engaged; family says company oversold the software's capabilities

By [Ryan Felton](#) [Follow](#)

April 8, 2024 5:30 am ET



Autopilot is available on all new Teslas and is designed to help with driving tasks such as steering.
PHOTO: PAUL HENNESSY/ZUMA PRESS

Tesla TSLA **5.34%** ▲ is preparing for one of the biggest tests of its driver-assistant Autopilot: defending the company's position that drivers, not the automaker, are ultimately responsible for crashes that involve the technology.

In a wrongful-death suit set for trial this week, a jury will determine who is at fault in the 2018 fatal crash involving 38-year-old Apple engineer Walter Huang. The driver died on Highway 101 in California after his Model X sport-utility vehicle crashed into a highway barrier while he was using Tesla's driver-assistance technology.

Huang's family is going after Tesla in a distinctive fashion by questioning whether the automaker oversold Autopilot's capabilities and didn't take sufficient actions to prevent customers from misusing the technology.

Tesla says Huang is responsible because he was playing a videogame while the vehicle was engaged in Autopilot. Government investigators and the Huangs agree that he was distracted in the moments leading up to the crash, but the family says Tesla is at fault because of its marketing of Autopilot.

If the Huangs prevail, the suit could represent a major financial liability for Tesla, potentially spurring additional cases that seek notable awards. The automaker is facing other disputes involving Autopilot.

"Every plaintiff's lawyer that has one of these cases will be watching this," said Matthew Wansley, associate professor at Yeshiva University's Cardozo School of Law, who has researched automated-driving systems and criticized Tesla's marketing of the technology.

"The damage award could be significant here," he said, adding that juries in these cases typically award damages based on the victim's lost income.

Tesla didn't respond to requests for comment from The Wall Street Journal. Jury selection for the case starts Monday in San Jose, Calif., with opening arguments to follow as early as Thursday. The trial is expected to last several weeks.



Tesla is facing other disputes involving Autopilot. PHOTO: JUSTIN SULLIVAN/GETTY IMAGES

A history of scrutiny

Several agencies have been investigating Autopilot, including the Justice Department and Securities and Exchange Commission, which have launched separate probes examining whether Tesla misled customers and investors about how Autopilot performs.

The National Highway Traffic Safety Administration has also been examining Autopilot and the automaker's more expansive tech called "Full Self-Driving Capability" for years, raising concerns that not enough guardrails are built-in to ensure drivers use the systems appropriately. The regulator has launched more than 40 investigations into accidents suspected to be tied to Tesla's Autopilot that resulted in 23 deaths.

Autopilot is available on all new Teslas and is designed to help with driving tasks such as steering and lane changes typically on highways. The Full Self-Driving upgrade features navigation on city streets.

Tesla sells subscriptions to enhanced versions of Autopilot as well as to Full Self-Driving. Tesla Chief Executive Elon Musk has said such sales could be significant profit drivers for the company.

The automaker says the Autopilot software isn't designed for fully autonomous driving and allows for drivers to take control when the technology is engaged. Tesla says its website and user manuals make clear that the software requires active driver supervision.

The system deploys a series of warnings to alert drivers if they aren't paying attention to the road. In December, Tesla issued a safety recall that updated the software underpinning Autopilot, adding more warnings for drivers to ensure they "adhere to their continuous driving responsibility," the company wrote in a regulatory filing.

Tesla said it made the changes to resolve an investigation by regulators.

The automaker has prevailed in the last two trials, with jurors in the most recent one finding the company wasn't responsible for the crash because they found no manufacturing defect with Autopilot.

Huang family suit



The 2018 fatal crash involved a Model X sport-utility vehicle that struck a highway barrier in California.
PHOTO: KTVU/ASSOCIATED PRESS

In the Huang case, the family alleges Tesla drivers were sold on the idea that Autopilot was safer than a human-operated car, but the automaker knew the technology had serious flaws that customers wouldn't expect to encounter based on how Autopilot was marketed.

On the morning of the March 2018 crash, Huang was making his commute to work after dropping his son off at preschool. With Autopilot engaged while on the highway, Huang's Model X approached a dividing area that sits between travel lanes of the highway and an exit ramp.

The Autopilot system moved the vehicle off the highway and into the dividing area, and then struck a barrier at about 70 miles an hour. Huang died as a result of blunt force trauma injuries sustained in the crash.

His family's attorneys say Tesla is to blame for the incident because reasonable drivers believe Autopilot is safe and can navigate highway roads, according to court filings, citing statements and advertising by Musk and the carmaker.

Among the family's evidence is an email from former Tesla President Jon McNeill. Two years before Huang's crash, McNeill emailed the company's head of Autopilot and Musk, saying he had driven several hundred miles in a Model X with the technology activated.

"I got so comfortable under Autopilot, that I ended up blowing by exits because I was immersed in emails or calls (I know, I know, not a recommended use)," McNeill wrote in a March 25 email that year.

One of the Huang family's attorneys read the email during a deposition, according to a transcript reviewed by the Journal. The Journal couldn't obtain the full text of his message.

Prove your case

The Huangs will have to demonstrate that Tesla could have improved its warning system for drivers who used Autopilot, which by then had been in use for a little more than two years, said Richard Cupp, law professor at Pepperdine's Caruso School of Law.

Tesla has said Huang's hands weren't detected on the wheel for six seconds before the crash, and that he knew his vehicle had trouble using Autopilot at this particular spot on the highway before, citing testimony from Huang's wife and text messages. The company also says Huang was playing a videogame on his phone at the moment of impact.

"The sole cause of this crash was his highly extraordinary misuse of his vehicle and its Autopilot features so that he could play a videogame," Tesla said in a recent court brief.

Tesla has strong support for its argument that Huang was misusing Autopilot in the seconds before the crash, Wansley said, a point his family's attorneys concede in court filings.

But the case highlights the issue of drivers becoming too complacent with partially automated technology, Wansley said.

"These crashes are happening because misuse happens all the time," said Wansley, adding that a significant verdict could force the company to do more to ensure drivers are responsible.

We Want to Hear From You

Are you a Tesla owner who has video and data from a crash that occurred while autopilot was engaged? Tell us about it in the form below and a reporter may reach out to you for a future story.

Bloomberg Law

Research Trail

My Work

000888

Help

Account

Litigation

Search Litigation

?

Select Sources

Go

Home

Practice Centers

Litigation

Transactional

Business

Practitioner Tools

News & Analysis

Laws & Regulations

Secondary Sources

Manage Subscription

Litigation

April 8, 2024, 4:00AM PDT

Tesla Faces Trial Over Apple Engineer's Fatal Autopilot Crash

By Dana Hull

- Driver's family blames swerve on defect in Tesla technology
- Company claims Walter Huang was distracted with video game

Bloomberg Law News 2024-04-08T14:48:23202104424-04:00

Tesla Faces Trial Over Apple Engineer's Fatal Autopilot Crash

By Dana Hull2024-04-08T07:00:01001-04:00

Driver's family blames swerve on defect in Tesla technology

Company claims Walter Huang was distracted with video game

Tesla Inc. is headed for its highest-profile trial yet over a crash blamed on Autopilot, the driver-assistance system Elon Musk has billed as crucial to his pursuit of self-driving cars.

The electric-vehicle maker prevailed in two previous trials in California after juries found the accidents, one fatal and one not, were due to driver error rather than the company's technology. Each of the trials – and more that are scheduled in coming months in California and Florida – clash with Musk's mantra that Teslas are the safest cars ever made.

The trial set to to kick off this week in state court in San Jose centers on Walter Huang, a 38-year-old Apple Inc.engineer who was killed on the way to work when his Model X veered off the highway and slammed into a roadside barrier at about 71 miles (114 kilometers) per hour. A federal safety agency's investigation of the accident found that Huang was probably distracted with a video game app on his phone, while also pointing to "limitations" with the Autopilot system.



Walter Huang

Source: Family of Walter Huang

What is Autopilot and why is it controversial?

Tesla's website describes Autopilot as "an advanced driver assistance system that enhances safety and convenience behind the wheel." The company says that Autopilot enables its vehicles to steer, accelerate and brake automatically, but that the system's features require "active driver supervision and do not make the vehicle autonomous."

Musk has [touted](#) fully autonomous driving for 10 years as the way of the future – and has frequently predicted his engineers were on the cusp of mastering the technology. That has triggered [false advertising claims](#) against Tesla by consumers as well as civil and criminal [government investigations](#).

Tesla has also faced [increasing regulatory scrutiny](#) over the safety of Autopilot and the company's more sophisticated system, Full Self-Driving, including multiple investigations into alleged defects. In December, Tesla rolled out over-the-air software updates for more than 2 million vehicles after the National Highway Traffic Safety Administration [said](#) Autopilot doesn't do enough to guard against misuse.

What is Tesla accused of in the trial?

Huang's widow and children claim in their lawsuit he believed his 2017 Model X "was safer than a human-operated vehicle," but that it failed to perform as it should have. The family alleges that the Autopilot software became confused and caused the car to swerve out of its lane because it had not been trained to detect barriers in areas where one highway merges with another.

Lawyers for the Huangs are also trying to make a bigger point that Musk, as the face of Tesla, has for years aggressively promoted Autopilot to the public as better than human drivers despite its limitations. They claim the marketing of the driving-assistance features set "reasonable expectations" among consumers – even if they didn't understand the technology – that the system would not affirmatively steer their cars into barriers or fail to deploy emergency braking.

Finally, the Huangs claim that California's highway department is partly to blame for failing to fix the cushioned barrier that had recently sustained damage from another crash. Had it been repaired, they allege, it might have absorbed the impact of the Model X collision and saved Walter Huang's life.



Emergency personnel at the scene where Walter Huang's Tesla Model X crashed into a roadside barrier in Mountain View, California.

Source: KTVU-TV/AP

What is Tesla's defense?

Tesla says the sole cause of the crash was Huang's "highly extraordinary misuse of his vehicle and its Autopilot features" so that he could play a video game while driving.

The company says Huang knew that Autopilot didn't make his Model X autonomous, but choose during morning rush hour traffic to play Sega's *Total War: Three Kingdoms*. During the 19 minutes he was driving in Autopilot mode before he crashed, Huang's hands were not detected on the steering wheel 34% of the time, including the final six seconds, Tesla has said in court filings.

Who is expected to testify at the trial?

Attorneys for both Huang's family and Tesla are expected to call current and former Tesla engineers to the witness stand for what will likely be highly technical testimony. Musk is not slated to testify.

How is this case different from the previous trials?

Huang's crash in Silicon Valley near where Teslas are manufactured was one of the first known fatalities with Autopilot engaged, which drew extensive media coverage, blog posts by Tesla defending its technology and a [forensic investigation](#) of the accident by the National Transportation Safety Board. There were no NTSB probes of the two California crashes that were the focus of jury trials in 2023.

Legal experts say the NTSB's factual findings can be introduced at trial, where expert witnesses will cite them to reconstruct what happened in the accident. But the agency's conclusions in its 96-page 2020 report – finding that Huang, Tesla and the state highway department were all to blame – can't be shared with the jury.

Tesla accused in lawsuit of cheating California workers out of wages

 [reuters.com/legal/tesla-accused-lawsuit-cheating-california-workers-out-wages-2024-04-05](https://www.reuters.com/legal/tesla-accused-lawsuit-cheating-california-workers-out-wages-2024-04-05)

Daniel Wiessner

A Tesla supercharger is shown at a charging station in Santa Clarita, California, U.S. October 2, 2019. REUTERS/Mike Blake/File Photo Purchase Licensing Rights , opens new tab

April 5 (Reuters) - Tesla (TSLA.O) , opens new tab is facing a new proposed class action lawsuit accusing the electric carmaker of a slew of wage law violations against factory and warehouse workers in California, as the company is already facing allegations of workplace bias and union busting.

Two former employees at Tesla's Fremont, California, assembly plant filed the lawsuit in a Sacramento federal court on Thursday seeking more than \$5 million in damages on behalf of thousands of Tesla workers across the state.

They claim Tesla violated various California labor laws by failing to pay overtime and provide meal and rest breaks, not providing paid sick leave or reimbursing employees for work-related expenses, and failing to provide written descriptions of quotas that workers were required to meet.

Tesla did not respond to a request for comment on the accusations.

The lawsuit comes as Tesla is trying to fend off claims in multiple lawsuits that it tolerated rampant race discrimination and harassment of Black workers at the Fremont plant and other California facilities. The company has denied wrongdoing.

Last week, a federal judge declined to dismiss a case by the U.S. Equal Employment Opportunity Commission, which enforces federal anti-discrimination laws. Tesla is also being sued by a California civil rights agency and a class of 6,000 workers, and recently settled a lawsuit by a Black former factory worker on undisclosed terms after a jury awarded him \$3.2 million.

Tesla is also facing claims that CEO Elon Musk violated workers' labor rights by suggesting in a 2018 tweet that employees would lose stock options if they unionized, and that the company illegally interfered with a union drive at a New York facility. Tesla has denied wrongdoing in the New York case, and has said Musk in his tweet was merely pointing out that most unionized workers do not receive stock options.

In a separate case in November, a U.S. appeals court said Tesla did not violate federal labor law by barring factory workers from wearing T-shirts supporting a union campaign.

Bloomberg Law

Research Trail

My Work

000888

Help

Account

Class Action

Search Class Action

?

Select Sources

Go

Home

Practice Centers

Litigation

Transactional

Business

Practitioner Tools

News & Analysis

Laws & Regulations

Secondary Sources

Manage Subscription

Class Action
April 5, 2024, 1:11 PM PDT
X Rebuffs Musk Deposition as Harassment in Twitter Layoffs Case
By Jennifer Bennett
Documents

- N.D. Cal. Docket
- Company Letter Brief

- Musk lacks relevant unique knowledge of claims, X says
- Can't use case as 'back door' for info on others, letter says

Bloomberg Law News 2024-04-08T14:41:50844224427-04:00
X Rebuffs Musk Deposition as Harassment in Twitter Layoffs Case

By Jennifer Bennett 2024-04-05T16:11:06000-04:00
Musk lacks relevant unique knowledge of claims, X says
Can't use case as 'back door' for info on others, letter says

A former Twitter Inc. worker's attempt to make Elon Musk sit for a deposition is "nothing more than a thinly veiled attempt to harass" the billionaire, the company told a federal court.

The ex-employee urged the US District Court for the Northern District of California to make Musk sit for a seven-hour deposition. But Musk, who purchased the social media platform in 2022 and renamed it to X, doesn't possess unique knowledge relevant to the worker's job-loss claims, and the worker hasn't exhausted less intrusive discovery methods, X said in a Thursday letter brief.

Musk acquired Twitter for \$44 billion and almost immediately began a wave of layoffs. Plaintiff Eitan Adler says he's one of the workers who lost his job in that carnage, although the company argues it parted ways with him for cause. Adler's proposed class case is one of many suits alleging violations of the federal Worker Adjustment and Retraining Notification—or WARN—Act and state variation, which require a certain amount of notice before certain mass firings.

Twitter is now part of Musk's X Corp., which is also named as a defendant here. Musk, who stepped down as Twitter's CEO in June 2023 but remained as chief technology officer, isn't a defendant in this suit, although other workers have brought their own layoff claims against him. The social media platform also faces multiple actions alleging it ran afoul of laws prohibiting discrimination on the basis of age, sex, and disability.

Adler in March asked the Northern District of California to make Musk sit for questioning, arguing he was "personally responsible" for setting Twitter policies and strategies after he bought the company, and "was adamant about cutting costs and massively reducing the size of Twitter's workforce."

https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XBLFL93S000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly... 1/3

But Adler hasn't "pointed to any evidence at all (and X is aware of none) indicating that Musk even knew who Adler was," the company said.

The law firm Lichten & Liss-Riordan PC filed more than 10 of the employment cases against the platform, including this one, and nearly 2,000 individual arbitration actions related to the layoffs. The parties already agreed to a consolidated deposition instead of making Musk appear multiple times for questioning, according to Adler's March 13 letter.

It's true that discovery produced in one of these cases can be used in others, but that doesn't mean Adler can "circumvent the proper scope of discovery" and use this suit "as a 'back door' method" to get information that's only relevant in the other matters, X said.

Morgan, Lewis & Bockius LLP represents X.

The case is Adler v. Twitter , N.D. Cal., No. 3:23-cv-01788, letter filed 4/4/24 .

To contact the reporter on this story: Jennifer Bennett in Washington at jbennett@bloomberglaw.com

To contact the editor responsible for this story: Drew Singer at dsinger@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law

Contact Us

View Full Desktop Site

Brazil judge opens inquiry into Musk after refusal to block accounts on X

 [reuters.com/technology/musk-challenges-brazils-order-block-certain-x-accounts-2024-04-07](https://www.reuters.com/technology/musk-challenges-brazils-order-block-certain-x-accounts-2024-04-07)

Anthony Boadle

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

BRASILIA, April 7 (Reuters) - A standoff between Elon Musk and Brazil escalated on Sunday when a Supreme Court judge opened an inquiry into the billionaire after Musk said he would reactivate accounts on the social media platform X that the judge had ordered blocked.

Musk, the owner of X and a self-declared free speech absolutist, has challenged a decision by Justice Alexandre de Moraes ordering the blocking of certain accounts. He has said X, formerly known as Twitter, would lift all the restrictions because they were unconstitutional and called on Moraes to resign.

Neither Musk, X nor Brazilian authorities have disclosed which social media accounts were ordered blocked. X first posted about the order to block on Saturday but it was not immediately clear when the order was issued.

Moraes is investigating "digital militias" that have been accused of spreading fake news and hate messages during the government of former far-right President Jair Bolsonaro and is also leading an investigation into an alleged coup attempt by Bolsonaro.

Musk, in an X post on Saturday evening, accused Moraes of "brazenly and repeatedly" betraying the constitution and people of Brazil.

"This judge has applied massive fines, threatened to arrest our employees and cut off access to X in Brazil," he said in the post.

"As a result, we will probably lose all revenue in Brazil and have to shut down our office there. But principles matter more than profit."

The billionaire has pledged to legally challenge the order blocking X accounts where possible.

Moraes responded on Sunday by adding Musk to the investigation he is leading into fake news on social media, and opening an inquiry into what he called an obstruction of justice.

In his decision, Moraes said: "X shall refrain from disobeying any court order already issued, including performing any profile reactivation that has been blocked by this Supreme Court."

If X fails to comply with the order to block certain accounts the company will be fined 100,000 reais (\$19,740) per day, the judge said in a statement released to media.

President Luiz Inacio Lula da Silva's leftist government expressed support for Moraes, with Solicitor General Jorge Messias criticizing Musk and calling for the regulation of social media networks to prevent foreign platforms from violating Brazilian laws.

"We cannot live in a society in which billionaires domiciled abroad have control of social networks and put themselves in a position to violate the rule of law, failing to comply with court orders and threatening our authorities," Messias said in a post on X.

Last year, Moraes also ordered an investigation into executives at social messaging platform Telegram and Alphabet's (GOOGL.O) [\[link\]](#), opens new tab Google, who were in charge of a campaign criticizing a proposed internet regulation bill.

The bill puts the onus on internet companies, search engines and social messaging services to find and report illegal material, instead of leaving it to the courts. It would also impose hefty fines for failures to do so.

(This story has been refiled to say 'into', not 'to', in the headline)

The Technology Roundup newsletter brings the latest news and trends straight to your inbox. Sign up here.

Reporting by Anthony Boadle in Brasilia; Editing by Matthew Lewis and Edwina Gibbs

Anthony Boadle
Thomson Reuters

Anthony has covered Brazilian politics since 2012, the narrow 2022 election of leftist President Lula following four years of right-wing President Jair Bolsonaro, and the turbulence faced by Brazilian democracy. He has reported from Chile under General Pinochet and from Havana under Fidel Castro. He has also covered U.S.-Latin American affairs from Washington 1995-2002. Anthony holds an M.A. in Politics from Essex University.

The Importance of Board Minutes

K [dandodiary.com/2024/04/articles/director-and-officer-liability/the-importance-of-board-minutes](https://www.dandodiary.com/2024/04/articles/director-and-officer-liability/the-importance-of-board-minutes/)

April 8, 2024



By Kevin LaCroix on April 8, 2024
Posted in Director and Officer Liability



From time to time, I am asked to speak directly to corporate boards of directors. I find these opportunities endlessly fascinating. Among other things, I learn so much from the directors' questions.

One frequently recurring question I get is:

what can directors do to avoid litigation or to be in a position better defend themselves if they are sued. The first thing I always talk about when asked these kinds of question is the importance of board minutes. Because this is one of my go-to talking points when I meet with boards, I was particularly pleased to see the recent post on the *Harvard Law School Forum on Corporate Governance* blog written by Leo E. Strine, Jr., the former Delaware Supreme Court Chief Justice and Chancellor, in which Strine highlights the importance of board minutes in corporate litigation. Strine's comments are essential reading for anyone concerned with the liabilities of corporate directors. Strine's April 4, 2024 article can be found [here](#).

Strine opens his article by noting that in the last decade corporate minutes have become increasingly important in corporate and securities litigation, particularly as plaintiffs are increasingly using pre-lawsuit books and records requests to attempt to bolster their suits. The importance of corporate records, and board minutes in particular, has been manifested in several important ways:

1. Impact on the Books and Records Request Process: The quality of formal board documents such as board minutes and advisor presentations significantly affects how the books and records request process unfolds. If the board records document why the board acted as it did, "the courts have generally refused to allow books and record petitioners access to informal information like texts and emails." However, where decisions are not documented to the minutes or other records, and appear to have been made through

informal communications, “the courts have required production of wide-ranging discovery like texts and emails” that may enable the petitioner to consider filing a complaint for breach of fiduciary duty.

2. Impact on Dismissal Motions in Caremark Cases: On the one hand, when the book and records incorporated in a complaint show that directors attempted to address a compliance risk, and thus refute the inference of a lack of good-faith effort, *Caremark* complaints are dismissed. On the other hand, if the books and records contain no indication of efforts to address a compliance risk, the absence of evidence of effort contributes to an inference of the absence of good faith effort to fulfill *Caremark* duties and thus to a dismissal motion denials.

3. Impact on Corporate Litigation Generally: Where the corporate records were timely prepared, evidence careful deliberations and proper reasons for board action, the courts have given them credence, and they help corporate defendants win motions to dismiss and trial and defeat motions for preliminary injunctions. However, when minutes are prepared and approved in bulk after a transactional or investigative process has concluded, or even worse, after a complaint has been filed on the basis of a preliminary proxy, courts give them little weight as evidence and resolve doubts about them at the pleading stage in favor of the plaintiffs.

Because of the importance of a disciplined corporate minute process, and in order to take advantage of the benefits of documenting corporate conduct and to avoid the downsides of failing to do so, there are best practices companies can follow, as Strine outlines in his article:

- Have a general protocol for minuting meetings and be thoughtful when deviating from that protocol;
- Transform the minuting approval process into an active, iterative part of a reasoned, deliberative process;
- Ideally, minutes for the prior meeting should be approved at the very next meeting;
- Ideally, key minutes should be approved at meetings, not by written consent;
- Make sure minutes and advisor presentations cover key evolving issues and tie up loose ends;
- Use approved minutes to craft important documents, such as preliminary proxies and committee reports, in the most careful, credible manner.

Strine also emphasizes the importance for corporate board to “realize the connection between quality documentation practices, integrity in decision-making, and the judicial perception of both corporate fiduciaries and corporate lawyers.”

While the main thrust of Strine's article is that a disciplined process for the creation and approval of board minutes results in "lower, regulatory and reputational risk," he notes a further benefit from having disciplined process for documenting the basis of corporate action; that is "it will also lead to better business decisions, more ethical behavior, and a stronger company."

By crafting and approving minutes and other corporate records as part of an "iterative, active process of thinking in a business-like way about important issues," the result is "a more lively and active deliberative process ...in which it is more likely that all reasonable perspectives will be vetted, and the board's eventual decision is well-grounded."

In a perfect world, all companies would incorporate the lessons in Strine's article into their new board member onboarding process. Well-advised boards will understand and heed his counsel and take his remarks into account when they plan and execute their board processes. I know that in the future I plan on keeping his article at the ready when I am once again preparing to meet with a corporate board.

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit www.djreprints.com.

<https://www.wsj.com/business/airlines/faa-to-probe-loss-of-engine-cover-on-southwest-airlines-boeing-jet-4e648436>

BUSINESS | AIRLINES

FAA to Probe Loss of Engine Cover on Southwest Airlines Boeing Jet

The incident is the latest involving Southwest-operated Boeing planes in recent weeks

By [Kimberley Kao](#) [Follow](#)

Updated April 8, 2024 9:31 am ET



A Southwest Airlines Boeing 737-800 taking off last year. PHOTO: PAUL CHRISTIAN GORDON/ZUMA PRESS

The Federal Aviation Administration is investigating an incident in which an engine cover fell off a Southwest Airlines-flown Boeing BA -0.60% ▼ 737-800 jet during takeoff from Denver on Sunday.

The FAA said Flight 3695, which was headed for Houston, returned safely to Denver International Airport around 8:15 a.m. after its crew reported that an engine cover fell off during takeoff and struck a wing flap.

The aircraft was towed to the gate upon landing, the FAA said.

Southwest said maintenance teams were reviewing the aircraft and apologized for the delay. The passengers were moved to another aircraft.

A Boeing spokesperson referred the request to Southwest for information about the jet and the airline's fleet operations.

The 737-800 is a variant of Boeing's 737 Next-Generation aircraft.

The incident Sunday is the latest under investigation by the FAA related to engine and other issues of Southwest-operated Boeing planes in recent weeks.

Last week, a Southwest Boeing 737 flight bound for Las Vegas was canceled after an engine caught fire shortly after the plane taxied from the gate at Lubbock Preston Smith International Airport in Texas. Last month, a Southwest Boeing flight from Austin, Texas, turned around midflight after its crew reported a possible engine issue, according to the FAA.

The crews for two separate Southwest Boeing flights on March 22 reported issues related to a flap and an engine, respectively, the FAA's website shows.

Write to Kimberley Kao at kimberley.kao@wsj.com



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Justices Urged To 'Shut The Door' On Meta Disclosure Suit

By **Jessica Corso**

Law360 (April 5, 2024, 10:27 PM EDT) -- The U.S. Supreme Court should "shut the door" on private securities lawsuits that could create a bloated disclosure regime and hurt businesses and investors alike, the U.S. Chamber of Commerce said Friday in a brief backing Meta Platforms Inc.'s call for the justices to hear a shareholder proposed class action over the Cambridge Analytica data abuse scandal.

The Securities Industry and Financial Markets Association also signed on to the amicus brief, which calls on the Supreme Court to take up a Meta's case after the Ninth Circuit **revived the lawsuit** against the company last October.

The shareholders accuse Meta of failing to disclose risks to the company tied to Cambridge Analytica's harvesting of the data of millions of users of Facebook, which is owned by Meta.

They say that Meta's stock price dropped 13%, equal to about \$50 billion in Facebook's market value at the time, following the 2018 revelations.

But the Chamber and SIFMA said that the risk disclosures that form the basis of the investors' claim are supposed to cover potential future risks to the business and not past events, as is the case here.

They say that there has been "a wave of event-driven, hindsight-based securities fraud suits" based on a failure to disclose past events "that somehow relate to those future risks."

"Fundamental securities law principles ought to shut the door on those claims," the brief said.

The amici said that allowing the Ninth Circuit's decision to stand could lead to a situation where companies disclose every single incident, even ones that companies have no reason to believe will harm their bottom line.

The decision "all but guarantees that every incident that, with the full benefit of hindsight, can be said to have harmed a public company's business will spawn securities fraud claims alleging that the company should have disclosed the event sooner," the brief said.

That's not helpful for investors, who will have to wade through extremely lengthy disclosure statements as a result, SIFMA and the Chamber argued.

Meta asked the Supreme Court to hear the dispute last month, saying that the Ninth Circuit had adopted **"extreme outlier positions"** compared with other courts.

The amici are represented by Judson Littleton and Daniel Richardson of Sullivan & Cromwell LLP, Tyler Badgley and Maria Monaghan of the U.S. Chamber Litigation Center and Kevin Carroll of the Securities Industry and Financial Markets Association.

Meta and its executives are represented by Joshua S. Lipshutz, Katherine Moran Meeks, Trenton Van Oss, Brian M. Lutz, Michael J. Khan and Raena Ferrer Calubaquib of Gibson Dunn & Crutcher LLP.

The shareholders are represented by Bernstein Litowitz Berger & Grossmann LLP, Goldstein Russell & Woofert LLC and Robbins Geller Rudman & Dowd LLP.

The case is Facebook Inc. et al. v. Amalgamated Bank et al., case number 23-980, in the Supreme Court of the United States.

--Additional reporting by Lauren Berg. Editing by Brian Baresch.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

AT&T Faces Investor Suit Over \$43B WarnerMedia Spinoff

By **Katryna Perera**

Law360 (April 3, 2024, 8:34 PM EDT) -- A Warner Bros. Discovery shareholder accused AT&T and its CEO John Stankey of hiding how serious the company's problems were as it spun off its \$43 billion WarnerMedia unit, alleging that caused Discovery to pay far too much when it merged with its fellow news and entertainment giant.

Davant Scarborough filed a **derivative shareholder suit** on Wednesday alleging that, among other things, AT&T Inc. and Stankey knowingly omitted roughly \$350 million in start-up costs from WarnerMedia's projections and budgets that were provided to Discovery Inc. ahead of the 2021 deal.

The **all-stock deal**, which closed in April 2022, saw AT&T receive \$43 billion, and WarnerMedia and Discovery merge into a business that was 71% owned by AT&T shareholders and 29% owned by Discovery shareholders.

Scarborough says that in the lead-up to the deal, AT&T misled Discovery by knowingly concealing \$350 million in start-up costs for WarnerMedia's streaming news service CNN+. According to the complaint, then-CNN President Jeff Zucker raised internal alarms that the costs needed to be disclosed, but AT&T chose to withhold the information.

Scarborough says Discovery was also misled about other aspects of WarnerMedia's business, including that the company had "largely halted" the external content sales critical to its revenue generation.

"External content sales involve selling a show produced by a WarnerMedia-owned studio to a network or streaming service. For example, years ago, the Warner Bros. Television studio created and sold the popular sitcom Friends to broadcast network NBC, where Friends originally aired for many years," the complaint states. "Unbeknownst to Discovery ... WarnerMedia largely stopped such external content sales in favor of hoarding shows for streaming service HBO Max, throwing off the financial projections for WarnerMedia that AT&T provided to Discovery and rendering AT&T's representations to Discovery misleading."

The complaint states that due to these misrepresentations and omissions, Discovery "massively" overpaid for WarnerMedia and assumed \$40.4 billion in debt to fund a payout to AT&T in the deal.

The truth began to come to light shortly after the deal closed in April 2022. According to the complaint, in reporting WarnerMedia's results for the first quarter of 2022, AT&T stated that WarnerMedia's operating income for the quarter had fallen to \$1.3 billion, down 32.7% year-over-year, "as a result of continued investments in HBO Max as well as in the launch of CNN+ at the end of the quarter."

According to Scarborough, the company announced that same day that CNN+ was shutting down. On this news, the complaint states, Warner Bros. Discovery's stock fell 6.8%, from \$23.01 per share on April 20, 2022, to \$21.45 per share on April 21, 2022.

In a conference call on April 26, 2022, executives addressed the results, and Warner Bros. Discovery Chief Financial Officer Gunnar Wiedenfels said CNN+ had been an investment initiative that didn't have an "attractive enough" return profile, the complaint states.

"Because WarnerMedia had made 'a lot of chunky investments that are lacking what I would view as a solid analytical financial foundation and ... [return on investment] hurdles that I would like to see for major investments,' Wiedenfelds concluded that '2022 very much looks a little messier than probably what I had hoped for,'" according to the suit.

Following the call, Scarborough says, Warner Bros. Discovery stock fell again by 7.8% from \$21.50 per share on April 25, 2022, to \$19.83 per share on April 26, 2022.

Finally, in August 2022, Warner Bros. Discovery acknowledged that the projections AT&T had provided were "vastly overstated," and the company disclosed that, having "now had an opportunity to fully assess legacy WarnerMedia's financials post closing," it "determined that certain legacy WarnerMedia budget projections that were made available to us prior to closing, varied from what we now view as legacy WarnerMedia's budget baseline post closing," resulting in significantly lower earnings projections, the suit says.

As a result, Scarborough adds, the company said it was "starting from a less favorable position compared to our expectations."

These disclosures caused Warner Bros. Discovery's stock to fall again, by 16.5% from \$17.48 per share on Aug. 4, 2022, to \$14.59 per share on Aug. 5, 2022, the complaint says.

Scarborough seeks damages, attorney fees and a jury trial.

In a statement to Law360 on Wednesday, a spokesperson for AT&T said: "The claims in this lawsuit are inaccurate. During the due diligence for the merger, we were transparent about WarnerMedia's finances and business, and any suggestion otherwise is wrong."

Counsel for Scarborough did not immediately respond to requests for comment.

Scarborough is represented by Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach, Jackson Warren and Jacob D. Jeifa of Andrews & Springer LLC, and Christopher Lyons, Tayler Bolton, Chad Johnson, Noam Mandel, Jonathan Zweig and Desiree Cummings of Robbins Geller Rudman & Dowd LLP.

Counsel information for the defendants was not immediately available.

The case is Scarborough v. AT&T Inc. et al., case number 1:24-cv-00420, in the U.S. District Court for the District of Delaware.

--Editing by Kristen Becker.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Healthcare Company Hid Rising Costs Before IPO, Suit Says

By **Sydney Price**

Law360 (April 3, 2024, 8:20 PM EDT) -- Elder-focused healthcare company Agilon Health was hit with an investor's proposed class action in New York federal court alleging that the company failed to acknowledge ahead of its initial public offering that it had been affected by rising medical costs for providers.

The Indiana Public Retirement System filed suit against Agilon on Tuesday in the U.S. District Court for the Southern District of New York. According to the complaint, Agilon, which partners with healthcare networks of primary-care physicians across the U.S., went public in April 2021. The company operates by taking on financial risk for patients attributed to it through its physicians under contract, and it is financially liable for all healthcare services required by those patients, according to the suit.

Agilon has told the public that through its model, primary-care providers can receive guaranteed compensation, with an additional financial incentive to treat their patients in a more holistic fashion, according to the suit.

Agilon claimed that its business model allowed it to avoid a rise in uses and medical care costs affecting other medical providers, but the suit alleges that Agilon was suffering from "these same adverse trends." Agilon failed to disclose that the providers in its network were set to experience a surge in patient demand for medical services significantly above the historical rate, which was partly related to the outbreak of the COVID-19 pandemic and would hurt Agilon financially, the suit claims.

In addition to Agilon, the suit's defendants include Agilon CEO Steven J. Sell, former Chief Financial Officer Timothy S. Bensley, several other executives and directors and three of Agilon's initial public offering underwriters — Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC and Bank of America Securities Inc.

The class period begins April 15, 2021, the day Agilon launched its IPO, and extends to Feb. 27, 2024. The registration statement, which became effective April 15, was false and misleading because it did not disclose that the purported cost-saving benefits of Agilon's business model were just short-term side effects of the pandemic.

These effects would subside as the pandemic waned, and many patients who had delayed elective procedures as a result of the pandemic would resume seeking treatment, according to the suit.

"Agilon was experiencing up to three times higher costs in 2023 as compared to 2022 and had suffered tens of millions of dollars in excessive costs not revealed to investors," the suit states.

The truth regarding Agilon's costs began to emerge Nov. 2, 2023, the day Agilon released its third-quarter 2023 financial results, the suit alleges. The company revealed that its medical margins were \$108 million for the quarter, far below analyst consensus estimates, due in part to \$9 million in previously unreported prior-year claims, according to the suit. Agilon executives revealed that the company had suffered higher use rates earlier in the year, despite previous claims to the contrary, leading it to add \$30 million to its reserves because of the potential for higher use trends to continue, the suit states.

In response to analyst questions, the defendants again denied that Agilon was undergoing abnormal

use trends, the suit alleges.

Agilon shares fell \$2.23, about 13%, to close at \$14.66 on Nov. 3, according to the suit.

Another share decline followed Agilon's next earnings announcement in January, the suit alleges. On Jan. 5, the company said it had incurred higher medical expenses than previously revealed and, as a result, it was lowering its 2023 expected medical margin to a range of \$340 million to \$360 million, or approximately 24% below its already reduced guidance, and 36% below its original guidance.

That day, Agilon shares fell \$3.45, or about 29%, to close at \$8.63 on Jan. 5, according to the suit.

On Feb. 27, Agilon revealed its medical costs and use rates were even higher than it had previously represented, according to the suit. That day, Agilon disclosed that its 2023 medical margin was \$299 million for the year — lower than the range of \$340 million to \$360 million provided just a few weeks earlier.

Among other things, Agilon also revealed an additional \$38 million in net costs from the fourth quarter, and \$13 million in costs attributable to prior periods, the suit states.

Agilon shares fell 44 cents, or about 7%, to close at \$6.04 on March 1, according to the suit.

Over the next several days, the price of Agilon shares continued to decline, falling to a low of \$5.66 per share on March 6, more than 85% below the class period high, the suit states.

The suit claims that Agilon and the individual defendants acted with actual knowledge of wrongdoing or reckless disregard, and violated the Securities Act and the Securities Exchange Act. The Indiana Public Retirement System seeks damages with interest.

Counsel for the plaintiff and a representative of Agilon did not immediately respond to requests for comment on Wednesday.

The Indiana Public Retirement System is represented by Samuel H. Rudman and Brian E. Cochran of Robbins Geller Rudman & Dowd LLP.

Counsel information for Agilon and the other defendants was not immediately available on Wednesday.

The case is Indiana Public Retirement System v. Agilon Health Inc. et al., case number 1:24-cv-02506, in the U.S. District Court for the Southern District of New York.

--Editing by Karin Roberts.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Publix Wants Ga. High Court Input On Opioid Public Nuisance

By **Emily Field**

Law360 (April 5, 2024, 6:58 PM EDT) -- Grocery chain Publix has asked the Ohio federal court overseeing the opioid multidistrict litigation to send questions to Georgia's high court about whether that state's law allows public nuisance claims over a healthcare provider's dispensing of prescription narcotics.

Publix said Wednesday that the bellwether case from Cobb County, Georgia, relies on the theory that its opioid dispensing practices created a public nuisance but that the state high court has never applied public nuisance laws to the sales of legal prescription opioids or as a way to remedy alleged malpractice. And public nuisance laws have never been applied as a way for local governments to recoup the costs of public services, Publix said.

"Moreover, the Georgia Supreme Court is better positioned to apply Georgia public nuisance law in this context," Publix said. "Courts nationwide cannot agree on the proper application of state public nuisance law to prescription opioids, which favors deference to Georgia's Supreme Court."

One of the questions Publix is asking the Georgia high court to resolve in the bellwether case brought by Cobb County is whether under state law the failure of a licensed healthcare provider to meet a professional standard can be considered a public nuisance and if so, does that claim require proof of malpractice.

Under state law, a public nuisance is one that harms "all persons that come within the sphere of its operation," though its effects may vary, according to the motion.

However, the high court hasn't addressed the issue of how the "all persons" standard applies in the context of sales of legal, uncontaminated products by a healthcare provider, Publix said.

"Plaintiff has not and could not seriously suggest that all who came into contact with Publix's Cobb County stores, or even just its pharmacies, are always injured by that contact," Publix said. "And plaintiff faces unique challenges of proof depending on whether it is required to establish that Publix's alleged lack of sufficient policies to prevent diversion of opioids damaged, e.g., all customers of Publix, all persons who had a prescription filled by a Publix pharmacist, or even just those (but also all) persons who had an opioid prescription filled by Publix."

Additionally, the Fourth and Sixth Circuits have asked the state supreme courts of West Virginia and Ohio to weigh in on whether the opioid epidemic can be considered a public nuisance under those states' laws.

Last week, counsel for two Ohio counties that won a \$650 million verdict against Walmart, CVS and Walgreens told the Ohio Supreme Court during oral arguments over the issue that opioids are a "unique" problem.

David C. Frederick of Kellogg Hansen Todd Figel & Frederick PLLC told the Ohio justices that Lake and Trumbull counties can claim that the opioid epidemic is a public nuisance that can be remedied because — as they showed at trial — the issue wasn't that the narcotics were defective.

Instead, the counties claimed that the pharmacies failed to monitor for suspicious prescriptions, he said.

"The allegation here and the proof at trial was not that opioids are defective, it's that they're dangerous," Frederick said. "The problem here was that the pharmacies failed to police their dispensing practices."

Representatives for Publix and the plaintiffs didn't immediately respond to requests for comment on Friday.

Publix is represented by Michael P. Kohler of Miller & Martin PLLC.

The plaintiffs' executive committee is represented by Jayne Conroy of Simmons Hanly Conroy LLP, Joseph F. Rice of Motley Rice LLC, Paul T. Farrell Jr. of Farrell & Fuller and Peter H. Weinberger of Spangenberg Shibley & Liber LLP.

The multidistrict litigation is In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Editing by Rich Mills.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Tribes And McKinsey Take Final Step In \$39.5M Opioid Deal

By **Joyce Hanson**

Law360 (April 4, 2024, 9:52 PM EDT) -- A California judge signed off Thursday on the completion of a \$39.5 million nationwide settlement deal that resolves all opioids litigation brought by federally recognized tribes against McKinsey & Co.

U.S. District Judge Charles R. Breyer's order in California federal court marked the final step in the comprehensive settlement of all claims by tribes across the United States with McKinsey. The claims accused the management consultant of contributing to the prescription opioid crisis by working with pharmaceutical companies to push addictive opioid drugs.

Judge Breyer noted that the McKinsey tribal settlement agreement was dated Aug. 16, and the settlement went into effect Dec. 8.

Approximately 365 tribes participated in the settlement, which was open to all 574 federally recognized tribes, whether or not a tribe filed litigation against McKinsey, steering committee tribal representative Lloyd B. Miller of Sonosky Chambers Sachse Miller & Monkman LLP told Law360 on Thursday.

"Today's order is the final step in a comprehensive settlement of all claims by Indian tribes across the United States," Miller said.

The amount of funds given to tribes was determined by a formula regarding the distribution of prescription opioids, according to Miller.

"If you had 1,000 pills per capita going into a tribal community, that community per capita would be receiving greater compensation for the tribal government to provide substance abuse services than a community where there were only 100 pills per capita going into that community," he said.

Tribes hit hard by the opioid crisis are located in the Upper Great Plains states, the Rocky Mountain region, the Pacific Northwest, "and notably, Oklahoma," Miller said.

McKinsey said in an undated statement released in 2023 that funds would be distributed to tribes in January 2024.

"Settlement funds will be allocated among tribes using the inter-tribal plan of allocation approved and adopted in the related Purdue Pharma LP [opioid] bankruptcy," McKinsey said. "This is the same allocation used to allocate most of the earlier nationwide tribal opioid settlements."

Fifteen percent of the settlement funds were set aside to pay attorney fees, and the balance of 85% was paid to participating tribes.

Miller said that tribes have so far recovered more than \$1.5 billion for Indian Country stemming from the prescription opioid epidemic, and it's starting to make a difference.

"Tribes are able to hire substance abuse counselors and put people into outpatient and inpatient treatment," he said. "Some tribes are constructing treatment facilities."

Tribes, as well as health insurance plans, said in June in a joint status report that **they were**

nearing a deal with McKinsey to settle their claims. The status report came after McKinsey and a group of school districts, cities and counties **told Judge Breyer in October 2022** that they had reached a settlement in principle to resolve those plaintiffs' claims.

The plaintiffs **launched** the sprawling McKinsey litigation in June 2021, amid a nationwide legal reckoning for opioid drugmakers, distributors, suppliers and marketers who pushed the highly addictive painkillers over the past two decades. Before the MDL against Purdue's consulting firm, McKinsey cut a \$640 million deal in February 2021 with attorneys general from all 50 states.

Counsel for McKinsey did not immediately return requests for comments Thursday.

The plaintiffs are represented by Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein LLP.

The plaintiffs' steering committee tribal representative is Lloyd B. Miller of Sonosky Chambers Sachse Miller & Monkman LLP.

McKinsey is represented by James L. Bernard of Stroock & Stroock & Lavan LLP and Ingrid S. Martin of Todd & Weld LLP.

The MDL is In re: McKinsey & Co. Inc., National Prescription Opiate Consultant Litigation, case number 3:21-md-02996, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins, Henrik Nilsson and Jeff Overley. Editing by Dave Trumbore.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

2nd Circ. Revives Coinbase Securities Class Action

By **Jessica Corso**

Law360 (April 5, 2024, 2:29 PM EDT) -- The Second Circuit on Friday revived a proposed class action accusing crypto trading platform Coinbase of selling unregistered securities, saying that competing user contracts left it open for interpretation as to who, exactly, was the direct seller of dozens of tokens trading on the exchange.

A three-judge panel of the appellate court revived some claims against Coinbase after a lower court judge **threw the case** out last year on the basis that contractual agreements entered into between the crypto company and its users in 2021 made it clear that Coinbase did not hold title in the coins being traded on its website.

But the Second Circuit said there was more than one agreement in use during the proposed class period and that an earlier agreement in 2019 contained language that indicated users were buying tokens directly from Coinbase.

That means that site users can continue to press claims that Coinbase was selling unregistered securities, the panel ruled in a unanimous summary order.

"In light of the varying language in different versions of the user agreement in effect during the class period, the district court could not treat the December 2021 version as conclusive for purposes of evaluating the legal sufficiency of the amended complaint," the court ruled.

Jordan Goldstein of Selendy Gay PLLC, one of the attorneys representing the plaintiffs, told Law360 in an email statement on Friday that he was grateful that the court has permitted the class action to move forward.

"On behalf of our clients and others who have traded on Coinbase, we look forward to pursuing these claims," Goldstein said.

In response to a request for comment, Coinbase passed along a comment posted by chief legal officer Paul Grewal on the social media site X.

Grewal said that the company appreciated the Second Circuit ruling because it confirmed that "contracts matter."

"We appreciate the Second Circuit confirming today what is clear under the federal securities law: there's no private liability for the secondary trading of digital assets on exchanges like Coinbase," he said.

The panel also revived state law claims against Coinbase, saying that U.S. District Judge Paul A. Engelmayer was incorrect that he didn't have jurisdiction over those claims.

The lead plaintiffs are pressing claims that Coinbase violated California, Florida and New Jersey laws on behalf of subclasses of citizens of those three states.

The Second Circuit did, however, uphold the dismissal of some claims made against Coinbase under the Securities Exchange Act of 1934, reasoning that the plaintiffs provided insufficient detail surrounding the transactions that allegedly gave rise to those claims.

Christopher Underwood, Louis Oberlander and Henry Rodriguez **filed the lawsuit** in 2022 on behalf

of Coinbase users who they claim lost money trading cryptocurrencies on one of the company's two exchanges.

Circuit Judges Reena Raggi, Pierre Leval and Joseph Bianco sat on the panel for the Second Circuit.

Coinbase users are represented by Jordan Goldstein of Selendy Gay PLLC and Steven Bloch of Silver Golub & Teitell LLP.

Coinbase is represented by Lara Flath, Jay Kasner, Alexander Drylewski and Abigail Davis of Skadden Arps Slate Meagher & Flom LLP.

The case is Underwood v. Coinbase Global Inc., case number 23-184, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Patrick Reagan.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

9th Circ. Revives Pump-And-Dump Action Against Cartoon Co.

By **Katryna Perera**

Law360 (April 5, 2024, 10:38 PM EDT) -- The Ninth Circuit on Friday revived a securities class action accusing children's entertainment company Genius Brands International Inc. of running a pump-and-dump scheme in its stock, and in doing so likened the court's mission to that of the heroes of the company's cartoon production "Rainbow Rangers."

U.S. Circuit Judge Salvador Mendoza Jr. wrote the **opinion** for the panel, reviving the bulk of a proposed shareholder class action accusing Genius Brands of trying to inflate its stagnant stock prices and enrich executives and long-term shareholders by touting its "tenuous" connections to celebrities and exaggerating the growth of its most popular cartoon and streaming service.

The suit was **tossed in 2022** after a district court judge found that the proposed investor class did not adequately allege deceptive practices by Genius.

However, on Friday, the appeals court came to the case's rescue when it reversed many of the lower court's findings, concluding that the shareholders adequately pled claims such as that Genius had concealed its relationship with a stock promoter and misrepresented a potential acquisition by Disney or Netflix.

"On the children's show 'Rainbow Rangers,' Rosie Redd, her fellow Rangers, and their trusty unicorn sidekick Floof use their superpowers to save Earth from disaster," Judge Mendoza wrote on behalf of the unanimous panel. "Our judicial power is slightly less sweeping, but today we use it to save portions of a securities-fraud complaint from erroneous dismissal."

Among other things, the panel found that the district court erred in concluding that Genius had not misled investors regarding its relationship with promotion company PennyStocks.

According to the opinion, Genius told investors that it had not hired or paid anyone to solicit purchases of its securities. This was clearly misleading, the panel said, because when the statement was made, Genius had already employed PennyStocks to write and disseminate favorable articles about the company to boost its share price.

"Genius had compensated PennyStocks with more than 90,000 shares of Genius common stock and, in return, PennyStocks solicited the purchase of Genius's stock through its articles," the opinion states.

The panel also noted that Genius initially did not have an affirmative duty to disclose its relationship with PennyStocks to investors.

"If Genius had been silent, it likely would not have misled investors. But Genius was not silent; it affirmatively represented ... that it had not 'paid or agreed to pay to any person any compensation for soliciting another to purchase any other securities of the company,'" the opinion states. "Therefore, Genius was required to disclose its relationship with PennyStocks so as not to render its statements about solicitation [misleading.]"

The district court also erred in dismissing shareholders' claim that Genius misled them when it retweeted Financial Insider articles speculating about a Disney or Netflix acquisition of Genius, the panel said Friday.

The district court held that investors failed to allege a "meaningful" share price increase for loss causation following the retweets, but the panel said Friday the suit adequately alleges that Genius' stock price would have been lower if not for the tweets.

According to the opinion, following the Financial Insider articles, Genius announced that it would jointly own the collected works of the famed comic book author Stan Lee. This was not what investors expected, as it had nothing to do with a sale to Disney or Netflix, so the company's share price fell, the opinion states.

"Standing alone, the Stan Lee announcement was, of course, good news. But the shareholders plausibly allege that the market understood the announcement as bad news because Genius's failure to mention the Disney or Netflix buyout signaled that no such buyout would take place," the opinion states. "In other words, [investors] plausibly allege 'that the market understood' the Stan Lee announcement ... 'to be a revelation' that Genius's ... retweet of the second Financial Insider article was false or misleading."

The one dismissal by the district court that the Ninth Circuit affirmed was investors' claim related to Arnold Schwarzenegger. According to the opinion, the suit alleged that a Genius tweet about Schwarzenegger investing in the company was misleading because, in reality, the former California governor and actor was only developing a new show with Genius.

The district court dismissed the claim, saying the shareholders did not allege a "moment where the truth about these statements was revealed." The Ninth Circuit panel agreed on Friday, saying the supposed "corrective disclosure" that shareholders identify speaks to something different.

"While the tweet asserted that Schwarzenegger would invest in Genius, the [disclosure] indicated that Genius had compensated Schwarzenegger in connection with [the show] 'Superhero Kindergarten,'" the opinion states.

"Investing in Genius and developing programming with Genius are not mutually exclusive; Schwarzenegger could have done both. Indeed, he is a man known for his ability to do many things, like act and run a state government," the opinion further states. "Accordingly, we cannot say that, on the basis of the August [disclosure], the 'market understood' that the [identified] tweet was false."

In a statement to Law360 on Friday, Raymond Sulentic of Glancy Prongay & Murray LLP, counsel for the investors, said they were pleased with the outcome of the appeal and looked forward to continuing to prosecute the case.

Counsel for Genius Brands did not immediately respond to requests for comment on Friday.

U.S. Circuit Judges William A. Fletcher and Salvador Mendoza Jr. sat on the panel for the Ninth Circuit, along with U.S. District Judge Karen E. Schreier of the U.S. District Court for the District of South Dakota, sitting by designation.

The investors are represented by Robert V. Prongay, Ex Kano S. Sams II and Raymond D. Sulentic of Glancy Prongay & Murray LLP.

Genius Brands is represented by Marisa Antonelli, Michael L. Charlson and Elizabeth Matthews of Vinson & Elkins LLP.

The case is Ali Alavi et al. v. Genius Brands International Inc. et al., case number 22-55760, in the U.S. Court of Appeals for the Ninth Circuit.

—Additional reporting by Sarah Jarvis. Editing by Peter Rozovsky.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

BitMEX Can't Ax Investor Suit After 2nd Circ.'s Binance Ruling

By **Dorothy Atkins**

Law360 (April 4, 2024, 5:18 PM EDT) -- A New York federal judge has refused to toss a proposed class action accusing cryptocurrency platform BitMEX and its executives of using their "God access" to customer accounts to manipulate trades and liquidate the accounts, finding that under the Second Circuit's recent Binance ruling, the transactions occurred in the U.S.

In an **11-page order** Wednesday denying a motion to dismiss, U.S. District Judge Andrew L. Carter Jr. rejected BitMEX's arguments that plaintiff investors cannot invoke the Commodity Exchange Act's private right of action provision due to extraterritoriality issues.

The judge noted that the Second Circuit's ruling last month in **Williams v. Binance**  **clarified** that a domestic transaction occurs if "irrevocable liability" was incurred in the U.S., and such liability may be attached at more than one transactional step and in multiple locations.

Judge Carter found that the investors' complaint sufficiently alleges that U.S.-based BitMEX customers not only entered into terms of use agreements in the U.S., but they also bought tokens from the U.S. and the BitMEX trading desk that caused the liquidations of their holdings operated from Manhattan.

"Plaintiffs have sufficiently alleged a domestic transaction, overcoming the hurdle of extraterritoriality, and, contrary to defendant's assertions, have also sufficiently pleaded their claims, which are timely," the order says.

The ruling keeps alive **litigation** investors Brett Messieh of Tampa, Florida, and Drew Lee of New York, New York, initially filed in April 2020 against HDR Global Trading Ltd., which owns cryptocurrency trading platform BitMEX, HDR's CEO Arthur Hayes, HDR's Chief Technical Officer Samuel Reed and HDR's co-founder Ben Delo.

The latest rendition of the complaint, which was filed in March 2023, additionally names as a defendant Greg Dwyer, BitMEX's first employee who managed its insider trading desk and was the head of business development.

The suit accuses the defendants of manipulating prices and failing to tell customers about alleged insider trading.

HDR was launched in 2014 with its principal office in Providence Mahé, Seychelles, and it operated BitMEX out of an office in Manhattan. HDR also created a Hong Kong-based subsidiary, ABS Global Trading Ltd., in 2017 to oversee technical aspects of the BitMEX platform, including providing security services and implementing the user interface traders use to buy and sell products, according to court documents.

When BitMEX launched, it attracted new retail traders by offering investors "100X leverage trades," which was 20 times higher than the common ratio in trading, according to the complaint. The investors also say the company would automatically liquidate a customer's contracts when their values fell below certain levels.

When a contract is liquidated, BitMEX would profit off the liquidations by seizing all of the investor's remaining collateral for the contract and placing the profits in an insurance fund, which BitMEX could

tap at any time, according to the complaint.

The suit alleges the company staffed its trading desk with three workers who had "God access" to customer accounts and their private information, and then used that private information to make strategic trades in order to liquidate the highest number of customer accounts.

After customers became aware of the trading desk in April 2018, the suit alleges the company continued to manipulate prices against retail traders, using anonymous so-called burner accounts and blocking customers from trading, falsely blaming it on technical glitches and limitations.

The investors additionally allege BitMEX manipulated prices of assets on other exchanges and flouted financial regulators worldwide by operating as an unregistered exchange, even though its workforce is based in the U.S. and 20% to 30% of its customers were in the U.S.

The five-count complaint alleges multiple violations of the Commodity Exchange Act, or CEA, including price manipulation, the illegal use of a manipulative device, and aiding and abetting, and it seeks to represent a proposed class of investors who purchased Bitcoin and Ethereum derivative products on BitMEX's exchange since Feb. 28, 2016.

In May, the company defendants asked the court to throw out the litigation, arguing that the claims are time-barred and the foreign-based entities are shielded from CEA private right of action liability due to extraterritoriality concerns.

After briefing on the dismissal motion was complete, the Second Circuit issued an opinion last month in *Williams v. Binance*, providing clarity on whether certain crypto exchange transactions occur in the U.S., and Judge Carter ordered additional briefing on any potential impact of the Second Circuit's decision.

After the briefing, Judge Carter notified the parties on March 31 that he planned to deny the motion to dismiss, and he published his order elaborating on his reasoning Wednesday.

The order notes that the investors characterize the crypto trades as swaps, while the company claims the trades are futures, "illustrating the complexities involved in attempting to shoehorn new investment vehicles into rubrics employed with traditional securities or commodities."

The judge concluded that the investors have sufficiently alleged an irrevocable liability incurred in the U.S., thereby creating a domestic transaction shielded from extraterritoriality limits on the CEA's private right of action.

The judge also concluded that the investor claims are not time-barred by a two-year statute of limitations, because the investors weren't initially aware that earlier liquidations were the result of alleged fraud, and they assumed that the liquidations were the result of natural market forces.

Judge Carter additionally found that the lawsuit sufficiently alleged "several affirmative omissions and misrepresentations" by defendants by claiming they falsely blamed customer account lockouts on cyberattacks and technical glitches and by falsely claiming that customer account trading information would be "hidden," among other alleged misstatements.

"Although these allegations must be pleaded with particularity, there is no requirement that they be pleaded with subatomic specificity, particularly prior to discovery," the order says.

Judge Carter added that the defendants' other defense arguments, including their argument that the investors haven't alleged a viable damages claim, are "without merit."

The judge set the next telephonic case management conference for April 8.

The investors' counsel, Jordan A. Goldstein of Selendy Gay PLLC, said Thursday that he and his investor clients are gratified that Judge Carter has acknowledged the strength of the claims and permitted the action to proceed.

"We look forward to prosecuting this class action against BitMEX, Arthur Hayes and the other

defendants," Goldstein said.

Dwyer's counsel declined to comment Thursday, and counsel and representatives for the other defendant parties didn't immediately respond to requests for comment Thursday.

The investors are represented by Jordan A. Goldstein and Oscar Shine of Selendy Gay PLLC.

HDR Global Trading and its affiliates are represented by David C. Esseks and Todd S. Fishman of Allen & Overy LLP.

Delo is represented by Patrick J. Smith and Selbie L. Jason of Clark Smith Villazor LLP and Harlan A. Levy and Allen M. Thigpen of Foley Hoag LLP.

Hayes is represented by James J. Benjamin Jr. and Peter Altman of Akin Gump Strauss Hauer & Feld LLP.

Reed is represented by Douglas K. Yatter and Hanyu Xie of Latham & Watkins LLP.

Dwyer is represented by Jenna Dabbs and Michael Ferrara of Kaplan Hecker & Fink LLP.

The case is Brett Messieh et al. v. HDR Global Trading Ltd. et al., case number 1:20-cv-03232, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Elise Hansen, Stewart Bishop and Reenat Sinay. Editing by Michael Watanabe.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Boeing Can't Ditch Ill. Securities Fraud Suit Over 737 Max

By **Hailey Konnath**

Law360 (April 4, 2024, 10:30 PM EDT) -- An Illinois state judge on Thursday refused to throw out Boeing investors' suit accusing the aerospace company of misleading and lying to investors following the deadly Lion Air and Ethiopian Airlines crashes involving Boeing's then-new 737 Max jets, according to an order entered in Cook County Circuit Court.

Cook County Judge Mary Colleen Roberts denied a motion to dismiss at a hearing, directing The Boeing Co., former CEO Dennis Muilenburg and former Chief Financial Officer Gregory D. Smith to answer the investors' complaint by May 20.

Judge Roberts didn't elaborate on her rationale in the short, written order entered following the hearing. Boeing and counsel for the investors didn't immediately respond to requests for comment late Thursday.

In their suit, a handful of investors say Boeing and the executives have tried to "lie their way out of the consequences of an aeronautical catastrophe of their own making." While Boeing has long enjoyed a strong reputation for safety and "engineering prowess," that reputation was damaged after the Lion Air and Ethiopian Airlines crashes in 2018 and 2019, respectively, according to an amended complaint filed in September.

Lion Air Flight 610 plunged into the sea shortly after takeoff from Jakarta, Indonesia, killing 189. Five months later, Ethiopian Airlines Flight 302 crashed in a similar fashion, killing 157.

According to the investors, Boeing's design and assembly of the 737 Max involved numerous problems — and lies told to the Federal Aviation Administration. In particular, the investors pointed to the Max's "Maneuvering Characteristics Augmentation System," which has been linked to the crashes.

In the year that followed those crashes, Boeing and its executives repeatedly told investors "lies and misleading half-truths" about the incidents as well as Boeing's ability to rebound, the investors claimed.

As an example, the investors said Boeing and its executives falsely denied that the maneuvering system could ever seize control of a flight and also rejected the notion that they had concealed this possibility.

When the truth was revealed, Boeing's stock prices plummeted, the shareholders said.

"Plaintiffs bought Boeing stock in reliance on these lies and half-truths and lost tens of millions of dollars as a result," the shareholders said.

The plaintiffs include PWCM Master Fund Ltd., Pentwater Equity Opportunities Master Fund Ltd., LMA SPC and Pentwater Unconstrained Master Fund Ltd. They say they purchased Boeing stock between October 2019 and March 2020. They're seeking unspecified damages as well as attorney fees and costs.

Boeing is no stranger to securities litigation over its 737 Max line of jets, especially in light of recent safety incidents. The company is facing **another suit** in Virginia federal court, with investors claiming that Boeing and its top brass repeatedly made false and misleading statements about the integrity of

the design, engineering and certification process for the jets, while prioritizing profits over safety.

That emphasis led to "poor quality control standards in the production of its commercial aircraft, such as the 737 Max, resulting in a heightened risk of manufacturing flaws which could render the company's new airplanes unsafe," according to the suit, which was filed shortly after the Jan. 5 blowout of a midcabin panel aboard an Alaska Airlines Flight.

The 737 Max 9 jet involved in the incident was delivered to Alaska Airlines in October 2023.

Also, earlier this week, an Illinois federal judge said that some pending suits over the Ethiopian Airlines crash **will go to trial late this year**, although he left it up to the parties to decide which of the dozens of remaining cases will go before a jury. Boeing had argued that a trial date shouldn't yet be scheduled, asking for more time for settlement negotiations.

Last month, the Texas attorney general opened an investigation into Spirit AeroSystems Holdings Inc., a company that produces fuselages for Boeing's 737 jets, pointing to apparent manufacturing defects that have caused recent dangerous events.

Boeing has announced that its president and CEO Dave Calhoun **will exit the company** at the end of the year, and the chair of its board will also step down, as the American aerospace giant overhauls its leadership ranks amid an enduring 737 Max crisis.

The investors are represented by A. Colin Wexler and Joseph L. Hollihan of Goldberg Kohn Ltd. and Thomas E. Redburn Jr., Maya Ginsburg and Joshua Nelson of Lowenstein Sandler LLP.

Counsel information for Boeing wasn't immediately available.

The case is PWCM Master Fund Ltd. et al. v. The Boeing Co. et al., case number 2022L009328, in the Circuit Court of Cook County, Illinois.

--Additional reporting by Celeste Bott, Spencer Brewer and Sydney Price. Editing by Jay Jackson Jr.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Morgan Stanley, Goldman Sachs Can't Duck Archegos Claims

By **Hailey Konnath**

Law360 (April 4, 2024, 8:03 PM EDT) -- A New York appellate court on Thursday affirmed a decision refusing to dismiss ViacomCBS investors' claims against Morgan Stanley, Goldman Sachs and a long list of banks over the collapse of Archegos Capital Management, finding that investors plausibly identified statements the banks made that could have been misleading.

The New York Supreme Court's First Judicial Department mostly upheld a lower court's February decision, agreeing that the financial institutions that underwrote Viacom stock made statements — ahead of Viacom's offerings in 2021 — that could be found misleading. The banks had a duty to disclose any transactions that affect the stock price, but they didn't specifically do so in their offering materials, according to the decision.

Rather, the banks stated that they "may engage in transactions that ... affect the price of" the stock, the First Judicial Department said. That could be found misleading if they already fully intended to do so, and "especially given that the transactions would certainly not 'raise or maintain' the price of the stock, the appellate court said.

"At this procedural stage, the lock-up and allotment agreements also could be found misleading, in that they arguably suggest that defendants did not intend to perform significantly greater transactions," the court said. "A reasonable investor could find it significant that while Viacom was offering \$4 billion of equities, the [banks] planned to sell their own holdings of Viacom, which amounted to much more."

The investors are in the midst of discovery against the financial institutions, which they blame for "massive losses" after Archegos, a limited partnership family office, failed to meet margin calls in March 2021 and experienced sudden losses estimated to be in the billions.

According to the investors, led by Camelot Event Driven Fund, the banks underwrote \$3 billion in Viacom stock and then failed to tell investors that their brokerage arms were set to dump millions of shares of the same stock on the market in connection with Archegos' trades. Consequently, the investors said they saw trading prices for their shares fall by 50%.

In looking to dismiss the investors claims, the banks had argued that they can't be liable because of the ethical wall or information barrier between their underwriting and brokerage departments.

But the First Judicial Department disagreed, finding that the investors have adequately alleged that the financial institutions didn't implement any such barrier that would prevent the flow of pertinent information.

"At the pleading stage, the mere possibility that such barriers may have existed does not warrant dismissal of the complaint," the appellate court said.

The First Judicial Department also shot down the banks' argument that they would have had to reveal confidential information about their clients if they had made further disclosures, saying "that is not necessarily the case."

"Defendants could simply have disclosed that the underwriters held positions in Viacom's stock and that they intended to sell those positions, which would lower the price of the offering stock," the

appellate court said. "They did not have to mention Archegos."

Additionally on Thursday, the First Judicial Department upheld dismissal of the investors' claims against Viacom, finding that the lower court was correct in finding that Viacom couldn't have disclosed what it didn't know.

For that same reason, the First Judicial Department diverged from the lower court's ruling and dismissed claims against some nontrading underwriters that had been sued. The appellate court also determined that banks BNP Paribas and MUFG Securities America, in this situation, are nontrading underwriters that should be freed from the suit, a finding the lower court had declined to make because it had rejected the nontrading underwriters' motion to dismiss.

"None of these defendants is alleged to have engaged in total return swaps with Archegos," the appellate court said.

BNP and MUFG are affiliated with entities that did, but affiliated corporations should be treated as separate, the court added.

However, Wells Fargo "provided prime brokerage services to Archegos," meaning that it must continue fighting the claims, according to the decision.

"Drawing inferences in favor of plaintiffs, even if it did not engage in total return swaps, it could — and, allegedly, did — issue margin calls and sell the shares that it held as collateral," the First Judicial Department said.

Earlier this year, the New York judge overseeing the case **certified a class** of investors who bought Viacom stock in its March 2021 secondary public offering or in an initial public offering of preferred stock it held at the same time. At the time, New York County Supreme Court Justice Andrew Borrok rejected the banks' argument that the class definition should be narrowed, holding that while it may be appropriate to narrow the class definition later in the litigation, it didn't make sense to do so at the current stage.

In November, the First Judicial Department ruled that the investors **could continue pursuing discovery** against the financial institutions despite a discovery stay imposed on stockholder class actions in federal court. It was a ruling of first impression on an issue that narrowly avoided the scrutiny of the U.S. Supreme Court **in 2023**.

The banks didn't immediately respond to requests for comment late Thursday, and counsel for the investors declined to comment.

The lead plaintiff is represented by Bernstein Litowitz Berger & Grossmann LLP.

Morgan Stanley and Goldman Sachs are represented by Paul Weiss Rifkind Wharton & Garrison LLP and Skadden Arps Slate Meagher & Flom LLP.

BNP Paribas and MUFG are represented by Latham & Watkins LLP.

Wells Fargo is represented by Sidley Austin LLP.

J.P. Morgan Securities LLC, Citigroup Global Markets Inc. and a number of other bank defendants are represented by Simpson Thacher & Bartlett LLP.

The case is Camelot Event Driven Fund etc. et al. v. Morgan Stanley & Co. LLC et al., case number 2023-00983, in the Supreme Court of the State of New York, Appellate Division, First Judicial Department.

--Additional reporting by Emilie Ruscoe and Jessica Corso. Editing by Rich Mills.

Update: This story has been updated to include additional counsel information for the banks.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

MoneyLion's Woes Draw Del. Suit Against SPAC Insiders

By **Sydney Price**

Law360 (April 4, 2024, 9:39 PM EDT) -- Investors have sued the sponsor of a blank-check company and several of its directors and controllers in Delaware's Chancery Court, accusing them of overvaluing a merger with digital finance platform MoneyLion, which was sued by the Consumer Financial Protection Bureau in 2022.

Kyle Martel and Joe Bryant alleged in a complaint filed Wednesday that directors and controllers of Fusion Acquisition Corp., a special purpose acquisition company controlled by Fusion Sponsor LLC, had a "perverse incentive" to complete the MoneyLion merger. They accused the defendants of entering the deal to avoid liquidation of the SPAC in December 2021 that would have been required if it did not close a business combination within 18 months of its June 2020 initial public offering.

In addition to Fusion Sponsor, former Fusion Acquisition CEO John James, former Chief Financial Officer Jeffrey Gary and some of the other former directors and controllers of the blank-check company are defendants in the lawsuit.

Shares of Fusion Acquisition, known as FAC, were valued at \$10 in the merger agreement, but the investors said there was less than \$7 in net cash underlying each share.

Now, MoneyLion's "stock price plummeted, trading at the equivalent of \$2.37 per share as of March 28, 2024, with FAC's public stockholders left holding the bag," the complaint read.

Since FAC's share value was inflated by the MoneyLion deal, the SPAC correspondingly had to inflate its value with false and misleading projections in its proxy statement, Martel and Bryant alleged.

On Sept. 8, 2021, two weeks before the stockholders approved the combination, the SPAC's insiders issued a proxy supplement that further inflated the proxy projections, the investors added.

"As time went on, it became apparent that the proxy projections and revised projections were fabrications and that the company had no realistic prospects of achieving them," they wrote.

MoneyLion's stock price plummeted about a year later in September 2022, after the CFPB announced it had filed suit against the company and accused it of overcharging military service members and their dependents, the shareholders noted. **In its complaint**, the CFPB asserted that MoneyLion violated the Consumer Financial Protection Act and the Military Lending Act. Shares of MoneyLion fell nearly 30% following the CFPB's statement of its suit, according to the investors' suit.

On Nov. 23, 2022, MoneyLion disclosed that its stock was at risk of being delisted from the New York Stock Exchange due to its price falling to less than \$1 per share over a consecutive 30-trading day period, the filing continued.

The shareholders said MoneyLion conducted a 1-for-30 reverse stock split in April 2023. On Thursday, MoneyLion's shares closed at \$70.08, or about \$2.34 — 1/30 of the closing price — when the reverse stock split is factored in.

The CFPB's suit against MoneyLion was **paused in December** ahead of the U.S. Supreme Court's ruling on the CFPB's funding structure.

"New MoneyLion's post-redemption and post-merger performance confirms the unfairness of the merger to the legacy MoneyLion stockholders who based their decision not to redeem on the false and misleading information set forth in the proxy," Martel and Bryant told the Chancery Court.

The pair accused the SPAC insiders and sponsor of breaching their fiduciary duties and unjust enrichment. They seek damages on behalf of the proposed class of shareholders.

Counsel for Martel and Bryant and a representative of MoneyLion did not immediately respond to requests for comment Thursday.

The investors are represented by Carl L. Stine, Adam J. Blander and Timothy D. Brennan of Wolf Popper LLP, Kelly L. Tucker and Jonathan C. Millis of Grant & Eisenhofer PA, and Michael Klausner of Stanford Law School.

Counsel information for the defendants was not immediately available.

The case is Martel et al. v. Fusion Sponsor LLC et al., case number 2024-0329, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jon Hill. Editing by Covey Son.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Crypto Bank, Chair Blast FTX Investors' 'Gatling Gun' Claims

By **Katryna Perera**

Law360 (April 4, 2024, 8:47 PM EDT) -- A crypto bank and its chairman have urged a Florida federal judge to toss a second amended complaint from FTX investors alleging they helped Sam Bankman-Fried abscond with \$8 billion in customer assets, saying the investors "employ a Gatling gun approach to pleading."

Deltec Bank and Trust Co. Ltd. and Jean Chalopin filed a dismissal **motion** on Tuesday, arguing the FTX investors have once again failed to properly plead their claims by "wildly firing a barrage of baseless conclusions and implausible inferences at defendants in the hope that something will hit its target."

But the investors' allegations against Deltec and Chalopin are all "blanks." The claims are "a loud burst of irrelevant, editorialized, and often patently false statements crafted to shock and fool the reader into believing commonplace banking activity is somehow evidence of participation in a wide-ranging conspiracy," the motion states.

Deltec and Chalopin say the claims against them fail for two reasons — lack of personal jurisdiction and lack of standing.

Regarding jurisdiction, the defendants argue that the investors are improperly trying to rely on Florida's long-arm statute to establish personal jurisdiction for all the claims. To establish jurisdiction through Florida's long-arm statute, the nonresidential defendant must have been engaged in "substantial and not isolated activity" that is "continuous and systematic" within the state. Deltec and Chalopin say that standard has not been met.

"Plaintiffs affirmatively allege and admit that Deltec Bank is 'an offshore bank licensed and operating in The Bahamas' and that Mr. Chalopin is 'domiciled in The Bahamas,'" the motion states. "Plaintiffs do not (and cannot) allege that Deltec Bank's contacts are so 'continuous and systematic' that it is essentially 'at home' in Florida, and likewise do not (and cannot) allege that Mr. Chalopin has any ties to the state that would satisfy a general jurisdiction analysis."

The investors also fail to establish that they have standing to bring their claims against the bank and chairman, according to the motion. The second amended complaint does not allege any facts showing that the investors' alleged injuries are traceable to any alleged wrongful conduct by Deltec or Chalopin, the motion contends.

Additionally, the investors do not claim that any of their funds were deposited or transferred through Deltec, according to the motion.

Deltec and Chalopin further argue that the second amended complaint fails to adequately plead any plausible legal claim against either of them, including that they were engaged in a conspiracy with Bankman-Fried and FTX.

"Plaintiffs never allege Mr. Chalopin (or Deltec Bank) entered into any kind of conspiracy agreement with SBF, FTX, or anyone else; the date, location or terms of any such agreement; or what actions Mr. Chalopin took ... to assist the 'FTX Group's' fraud," the motion argues.

"Nor does the SAC include even a single allegation that Mr. Chalopin personally participated in or

knew about any banking transactions or Telegram chats involving SBF, FTX, or Alameda," the motion further says. "After multiple attempts, it is clear plaintiffs simply cannot make any such allegations."

Finally, the bank and chairman argue that even if the court were to "look past" these pleading deficiencies, the complaint should still be dismissed on forum non conveniens grounds.

"Florida is not the appropriate forum for this action because the defendants, witnesses, documents, and activities are all alleged to reside, be located, or otherwise have taken place in the Bahamas," the motion asserts.

Deltec, Chalopin and Washington-based Moonstone Bank were sued **last July** by FTX customer Connor O'Keefe, who lost money in the exchange's collapse.

The lawsuit claims that Chalopin developed close ties with Bankman-Fried and that Chalopin and the banks knew that the FTX founder was using customer assets to pay for luxury goods and to prop up the hedge fund Alameda Research.

However, according to the lawsuit, the defendants kept quiet about the alleged fraud because it also financially benefited them. O'Keefe claims, for example, that Alameda invested \$11.5 million in Moonstone in January 2022, nearly doubling its net worth at the time. And Deltec received a loan of \$50 million from an entity controlled by Ryan Salame, CEO of FTX's Bahamian subsidiary.

The suit is a sprawling multidistrict litigation focused on FTX's collapse. In March, the investors reached a **set of settlements** with Bankman-Fried's former inner circle as well as with seven promoters who agreed to pay a total of \$1.3 million.

Caroline Ellison, who led Alameda, ex-FTX Chief Technology Officer Zixiao "Gary" Wang and former FTX engineering head Nishad Singh agreed to voluntarily provide information and testimony in the investors' lawsuit. The filing noted that the trio will also cooperate in good faith to resolve the claims against them.

If the terms of the settlements are met, the class will attest to the executives' cooperation and submit a letter to the court ahead of each of their sentencing hearings. Ellison, Wang and Singh each pled guilty in connection with the fraud that led to FTX's downfall and **cooperated with the government** in the criminal case against Bankman-Fried, who was **sentenced to 25 years** last month for defrauding customers out of billions.

During a phone call with Law360 on Thursday, Adam Moskowitz of The Moskowitz Law Firm PLLC, called Deltec's and Chalopin's dismissal motion "silly."

"I just don't think they're living in the same world we are," he said, noting that the suit's evidence shows that Deltec was conducting weekly wire transfers with FTX US, which hampers the defendants' argument for lack of jurisdiction.

"How do they address the massive wire transfers that were happening every week?" Moskowitz said. "Because there is clearly a connection with the U.S., it's not just about Florida."

Counsel for Deltec and Chalopin declined to provide further comment on Thursday.

The investors are represented by Adam M. Moskowitz and Joseph M. Kaye of The Moskowitz Law Firm PLLC, David Boies, Alexander Boies and Brooke A. Alexander of Boies Schiller Flexner LLP, James R. Swanson, Kerry J. Miller, Molly L. Wells and C. Hogan Paschal of Fishman Haygood LLP, and Joseph R. Saveri, Christopher Young and Itak K. Moradi of Joseph Saveri Law Firm LLP.

Deltec and Chalopin are represented by Desirée Moore, Daniel Hayes and Joseph B. Isenberg of Venable LLP.

The case is In Re: FTX Cryptocurrency Exchange Collapse Litigation, case number 1:23-md-03076, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Jessica Corso and Aislinn Keely. Editing by Kristen Becker.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Snowflake Investor Accuses Brass Of Insider Trading

By **Jessica Corso**

Law360 (April 4, 2024, 9:29 PM EDT) -- A Snowflake Inc. investor filed a lawsuit Thursday against the cloud data platform's leadership team, accusing company insiders of shedding over \$1 billion worth of stock at inflated prices while knowing about or recklessly disregarding a scheme to misrepresent sales data following the company's \$3.3 billion public debut.

Patrick Murphy filed the derivative lawsuit in Delaware federal court asking that current and former board members as well as members of management be forced to return the more than \$1.8 billion they allegedly earned selling Snowflake stock between 2020 and 2022.

Murphy says that the stock was sold at the height of Snowflake's financial success while it was trading for over \$200 per share in the years following its **initial public offering**. Snowflake closed its trading day on Thursday at around \$151 per share, according to data from the New York Stock Exchange.

The lawsuit ties the decline in the stock price to revelations that the company wasn't going to experience the triple-digit growth company leaders had predicted.

That's because the cloud computing company was over-hyping its popularity by providing steep discounts to customers who later declined to renew at the regular, higher prices, according to Murphy. The 60-page complaint also accuses Snowflake's sales team of providing customers with more consumption credits than they could make use of, thereby jeopardizing future sales.

The lawsuit claims that the revelation in 2022 that the company was slashing the following year's product revenue growth projections by 65% to 67% caused the stock price to fall by nearly 30% over a weeklong period.

The individual defendants were privy to the information on the inflated sales figures while other investors were not, making the \$1.8 billion in stock sales a case of insider trading, according to Murphy.

In addition to returning that money and any other "unjust compensation," Murphy is asking that the company be forced by the court to institute governance reforms "to protect the company and its investors from a recurrence of the damaging events described."

"As a direct and proximate result of the individual defendants' breach of their fiduciary duties, the company has suffered damage, not only monetarily, but also to its corporate image and goodwill," according to the complaint.

"Such damage includes, among other things, costs associated with defending securities lawsuits, severe damage to the share price of the company, resulting in an increased cost of capital, the waste of corporate assets, and reputational harm," Murphy states.

In addition to the derivative suit, Snowflake is also facing a proposed shareholder class action filed in California in February that alleges securities fraud, according to Murphy's complaint.

A Snowflake representative declined to comment.

Murphy is represented by Thomas McKenna and Gregory Egleston of Gainey McKenna & Egleston, and Ryan Ernst of Bielli & Klauder LLC.

Counsel information for Snowflake and its board of directors wasn't immediately available.

The case is Murphy v. Sloatman et al., case number 1:24-cv-00426, in the U.S. District Court for the District of Delaware.

--Editing by Kristen Becker.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Perrigo Inks \$97M Deal With Investors In Securities Fraud Suit

By **Henrik Nilsson**

Law360 (April 5, 2024, 10:13 PM EDT) -- A class of investors suing Perrigo Co. PLC asked a New Jersey federal judge Friday to approve a \$97 million settlement after the court trimmed several claims in the suit alleging the pharmaceutical company's executives made misleading statements to defeat a potential \$29 billion takeover attempt.

The investors said the settlement comes after almost seven years of litigation, four in-person mediation sessions, 40 depositions and review of more than 519,000 documents, according to the motion for preliminary approval.

The defendants have denied the claims asserted against them but agreed to pay the \$97 million to avoid continued litigation, according to court documents.

"The \$97 million recovery is significant in absolute terms and constitutes an excellent recovery on the narrowed claims that would likely remain if this case proceeded to trial, which this court has stated do not 'seem to be that significant' and are 'sort of ... small,'" the investors said.

Lead counsel Pomerantz LLP and Bernstein Litowitz Berger & Grossmann LLP intend to request up to 20% of the settlement in attorneys' fees and expenses not to exceed \$4.5 million. The remaining amount after costs and fees will go to authorized claimants, who are entitled to at least \$10, according to the motion.

The class includes all persons who bought Perrigo stock between April 21, 2015 and May 2, 2017 on the New York Stock Exchange and the Tel Aviv Stock Exchange, as well as those who owned Perrigo stock as of Nov. 12, 2015 and held those stocks through Nov. 13, 2015, according to the motion.

Perrigo investors filed the securities fraud class action in 2016, claiming that executives made several misrepresentations overvaluing the company to garner enough shareholder support to defeat a \$29 billion **hostile takeover attempt** by Mylan.

A judge in 2018 cut a number of claims in the suit, leaving intact allegations that the company hid its involvement in an alleged scheme to fix the prices of generic drugs and that it misled investors about difficulties tied to its 2015 acquisition of European drugmaker Omega Pharma NV.

U.S. District Judge Renée Marie Bumb in August **threw out all remaining claims** against Perrigo's former chief financial officer, Judy Brown, and granted partial summary judgment in favor of former CEO Joseph Papa.

Judge Bumb found that plaintiffs "barely raised just enough facts" to assert that a price-fixing scheme between Perrigo and its competitors existed but had no evidence that Brown or Papa were involved in the pricing of Perrigo's generic drugs or knew about any alleged scheme to fix those prices.

"The record shows that Brown was not a member of any Perrigo drug pricing committee and she was not involved in setting pricing for the company's generic drugs," the judge ruled.

Even if Brown learned about price increases in the course of doing her job, the judge said that investors "have presented no evidence that she learned of the reasoning for the increases — that is,

whether the increases flowed from collusive behavior or not."

She also accused the investors of mischaracterizing a statement Papa made about fluctuations in generic drug pricing by taking it out of context, saying they were "warping his words" in order to manufacture an issue.

She also cast doubt on the price-fixing allegations against Perrigo since the claim against Papa and Brown had been defeated.

The judge put off a summary judgment decision on the issue, however, instead calling for more briefing to determine whether any other Perrigo executives may have known about the alleged price-fixing scheme. She stayed the motion for summary judgment in November in light of settlement talks, according to the docket.

The parties engaged in settlement discussions on and off during this period. A mediator's proposal was reached in February, which both sides accepted, according to Friday's motion.

The investors argued that the deal "provides a favorable result for class members because it allows an immediate recovery and removes the considerable possibility that class members could recover nothing, particularly in light of the risks and uncertainties of proving their remaining claims at trial and prevailing in inevitable post-trial appeals."

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

The investors are represented by Joshua B. Silverman, Omar Jafri, Jeremy A. Lieberman and Thomas Przybylowski of Pomerantz LLP, and Gerald H. Silk, James A. Harrod and Jessie L. Jensen of Bernstein Litowitz Berger & Grossmann LLP.

Perrigo is represented by Alan S. Naar of Greenbaum Rowe Smith & Davis, and Katherine St. Romain and Jason S. Kanterman of Fried Frank Harris Shriver & Jacobson LLP.

Papa is represented by Reed Brodsky of Gibson Dunn & Crutcher LLP.

The case is Roofer's Pension Fund v. Papa et al., case number 1:16-cv-02805, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Jessica Corso. Editing by Alex Hubbard.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Exxon Mobil Asks Court To Keep Certain Files From Investors

By **Spencer Brewer**

Law360 (April 5, 2024, 10:22 PM EDT) -- Exxon Mobil Corp. and its officers say that the plaintiffs in a proposed shareholder class action have demanded a substantial trove of documents that goes beyond what's typical in class certification discovery, asking a Texas federal judge to issue a protective order against the proposed production Thursday.

Exxon investor Mendi Yoshikawa **sued the oil giant in 2021**, accusing it of overvaluing its Permian Basin holdings by billions of dollars, causing Exxon's stock price to drop after reports circulated that federal securities regulators were looking into the valuation.

Yoshikawa accused Exxon of misleading investors about the value of one of its most promising oil and gas assets — its properties located in the top-producing domestic oil reserve, the Permian Basin in northwest Texas.

After The Wall Street Journal reported on Jan. 15 that the U.S. Securities and Exchange Commission launched an investigation into a whistleblower's claim that workers were coerced into overestimating the speed at which wells could be drilled in the area to make the properties seem more valuable, Exxon share prices fell by close to 5%, Yoshikawa said.

Yoshikawa alleges that Exxon's actions leading up to the price drop violated federal securities laws and injured potentially thousands of investors.

The plaintiff has asked the company to review a staggering amount of documents, Exxon says, totaling over 200,000. That number is more typical in substantive merits discovery than at the class certification stage, it says.

"Given plaintiffs' refusal to agree to any reasonable compromise, defendants have no other option than to seek a protective order from this court," Exxon said in the motion for a protective order.

The company has specifically asked the court to issue a protective order that would confirm that the defendants don't need to collect and review documents from executives Darren Woods and Liam Mallon during class certification discovery.

Per Exxon's account, the court stayed all discovery except that related to class certification. The plaintiffs asked for a swathe of documents as class certification requests, but Exxon refused "to run custodial searches in response to merits-related requests."

The court then compelled Exxon to produce the documents. Exxon says it repeatedly negotiated with the plaintiffs to appoint appropriate custodians and hash out other details, but the two sides weren't able to come to an agreement.

"Plaintiffs' insistence that defendants collect and produce broad swaths of documents from Woods and Mallon is the type of disproportionate request that merits relief," the energy giant said.

Last year, Exxon **largely evaded the brunt** of the proposed class action after the judge ruled that the investors didn't establish a strong inference of scienter. However, U.S. District Judge David C. Godbey allowed their scheme liability claims against Exxon and a former senior manager to proceed.

Exxon is represented by Noelle M. Reed, Abigail E. Davis, Wallis M. Hampton, Michelle L. Davis, Michael W. Restey Jr. and Brent M. Hanson of Skadden Arps Slate Meagher & Flom LLP.

The plaintiffs are represented by Lewis T. LeClair of McKool Smith PC, John Rizio-Hamilton, Rebecca E. Boon, Kate W. Aufses, R. Ryan Dykhous, Matthew Traylor of Bernstein Litowitz Berger & Grossmann LLP and Daniel L. Berger, Barbara J. Hart, Caitlin M. Moyna and Rachel A. Berger of Grant & Eisenhofer PA.

The case is Yoshikawa v. Exxon Mobil Corp. et al., case number 3:21-cv-00194, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Gina Kim. Editing by Jay Jackson Jr.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Ex-CEO Reaches Legal Fee Agreement With Trump-Tied SPAC

By **Rose Krebs**

Law360 (April 4, 2024, 3:32 PM EDT) -- A Delaware vice chancellor has signed off on an agreement between Donald Trump-tied Digital World Acquisition Corp. and its former CEO to have the venture pay his legal costs related to federal probes and litigation in multiple states.

On Wednesday, Vice Chancellor Lori W. Will approved a stipulated order submitted by Patrick Orlando and DWAC by which DWAC will pay its ex-CEO's legal costs incurred in responding to U.S. Securities and Exchange Commission and U.S. Department of Justice probes of the special purpose acquisition company and activities surrounding it.

Also, DWAC will advance Orlando costs associated with litigation, including a Florida state court suit, along with the expenses incurred for having to bring the advancement suit in Delaware Chancery Court, referred to as "fees-on-fees," the order said.

"Plaintiff is entitled under the charter, bylaws and indemnity agreement to payment of all reasonable advancement expenses and fees-on-fees," the order said. "DWAC reserves the right to contest the reasonableness of future requests for advancements, but does not contest the fees-on-fees."

Orlando **sued DWAC** in Chancery Court last month, seeking to have the company pay his legal expenses, including those for litigation over his activities in the workup to a take-public merger with Trump Media & Technology Group, which operates the Trump-focused Truth Social platform.

Last month, DWAC shareholders **approved** the proposal to acquire the former president's social media platform and take it public despite unresolved litigation tied to the merger.

In his Chancery suit, Orlando asserted that provisions of an indemnity agreement, bylaws and a certificate of incorporation entitled him to have DWAC cover his costs for certain legal proceedings and investigations.

Orlando was fired as DWAC's CEO in March 2023 over concerns about "unprecedented headwinds" facing the venture, the SPAC said at the time.

Multiple suits are pending, meanwhile, involving Orlando-controlled ARC Global Investments II LLC, as DWAC's sponsor, and allegations of fiduciary duty breaches targeting Orlando, among other issues.

One of the cases for which Orlando demanded to have DWAC cover his costs is a Florida state court case in which DWAC accused him of breaching his fiduciary duty and not acting in the best interests of DWAC by interfering with the merger.

Wednesday's order said DWAC will pay his costs in the Florida suit, along with those from other litigation and the SEC's and DOJ's "ongoing investigations with respect to Digital World Acquisition Corp. and its current and former officers and directors."

Orlando will submit his fee and expense demands monthly and DWAC is reserving its right to dispute amounts sought, including to the extent it "cannot determine whether the fees incurred are reasonable," the order said.

Also, a Delaware attorney representing Orlando must certify that the attorney reviewed each invoice,

and "in his/her professional judgment" found the fees and expenses to be reasonable, the order said.

Last week, Orlando and ARC Global **were hit** with a suit in Chancery Court by ARC Global members who argued that they validly removed Orlando as managing member and that he has no authority to act on their behalf.

On Tuesday, Orlando and ARC Global filed a motion to dismiss the complaint, asserting the suing members hadn't shown they received the required consent to validly remove Orlando.

Counsel for Orlando and Digital World Acquisition Corp. did not immediately respond Thursday to a request for comment.

Orlando 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. Bondi, Traci Zeller and Nicholas J. Griepsma of Paul Hastings LLP.

The case is Orlando v. Digital World Acquisition Corp., case number 2024-0264, in the Court of Chancery of the State of Delaware.

--Additional reporting by Lauren Berg, Jeff Montgomery, Tom Zanki, Leslie A. Pappas and Jessica Corso. Editing by Robert Rudinger.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Wells Fargo Hit With Del. Suit Targeting Account Abuses

By **Jeff Montgomery**

Law360 (April 4, 2024, 6:41 PM EDT) -- Citing billions of dollars in regulatory agency sanctions, fines and judgments and allegedly chronic disregard of "red flag" reports and fake account investigations, a Wells Fargo & Co. stockholder has sued 23 current and former bank directors and officers in Delaware's Court of Chancery, seeking derivative recoveries for the losses.

Common stockholder Nancy Miser's 110-page **complaint**, filed late Wednesday, focuses on harm to the company brought to light during more than a decade of complaints, litigation, government agency findings and congressional investigations into Wells Fargo consumer and mortgage lending and banking practices.

Highlighted in the suit is a U.S. Consumer Financial Protection Bureau report in 2022 characterizing Wells Fargo as carrying out a "rinse-and-repeat cycle of violating the law" through conduct that "has harmed millions of American families."

The agency made the observation after ordering the bank to pay more than \$2 billion to more than 16 billion consumer accounts and a \$1.7 billion fine — which eclipsed its previous largest, \$1 billion fine, also assessed against Wells Fargo.

"This stockholder derivative action is brought to ensure the individual defendants are held accountable for their ongoing breaches of fiduciary duty related to the wrongdoing that has now spanned more than a decade," the suit said.

Conduct leading to the sanctions included assessment of illegal interest charges on auto and mortgage loans, wrongful repossessions, surprise overdraft fees, incorrect bank account charges and misapplication of auto and mortgage loan payments.

Wells Fargo released a statement early Friday that it was reviewing the Delaware suit and did not have a comment on specific claims.

"Wells Fargo is a different company today, having made significant progress toward improving our risk and control infrastructure, as demonstrated by our regulators terminating six consent orders since 2019. While we have made progress, our work is not complete, and the risk and control work remains Wells Fargo's top priority," the company said.

With regard to allegations of discrimination in home lending claims, the company said, "We are confident that we follow relevant government-sponsored enterprise guidelines in our decision-making and that our underwriting practices are consistently applied regardless of a customer's race or ethnicity."

Included in the flagged conduct were "fake account" opening practices dating to as long ago as 1998 in which bank employees resorted to opening false accounts in customer names to meet unrealistic management production goals for new deposit, credit card and payment accounts. The practice led to some 1.5 million fake deposit accounts and nearly 600,000 fake credit card accounts.

The suit observed that "an investigation by Congress into Wells Fargo's customer abuses and violations of financial consumer protection laws" in 2020 "exposed the fact that Wells Fargo's public comments to its legal compliance and reform and remediation were false." Instead, the lawmakers

found that the bank was focused on escaping an unprecedented Federal Reserve Board order in 2018 capping its total assets at \$1.95 trillion.

"Despite the plethora of regulatory actions and lawsuits, there is reason to doubt Wells Fargo's ability to operate within the boundaries of the law," the suit said.

Miser's suit hit the Delaware court one day after a federal judge in San Francisco ordered consolidation of five proposed class lawsuits accusing the company of attempting to obscure — through inconspicuous mailings — customer eligibility for compensation after they were unknowingly signed up for Wells Fargo financial products.

The Delaware suit, among other demands, seeks an order directing Wells Fargo to take all necessary steps to improve its corporate governance and regulatory compliance. Included is a call for a stockholder vote on reform and oversight resolutions.

Also sought is restitution from those named in the suit, including disgorgement of profits, benefits and other compensation.

Nancy Miser and the proposed class are represented by Ryan M. Ernst of Bielli & Klauder LLC, Gustavo Bruckner, Samuel J. Adams and Ankita Sangwan of Pomerantz LLP, and Rusty E. Glenn. Kip B. Shuman and Brett D. Stecker of Shuman Glenn & Stecker.

Counsel information for the defendants was not immediately available Thursday.

The case is Nancy Miser, derivatively on behalf of Wells Fargo & Co. v. John D. Baker II et al., case number 2024-0323, in the Court of Chancery of the State of Delaware.

--Editing by Linda Voorhis.

Update: This story has been updated with comments from Wells Fargo.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

9th Circ. Unconvinced Judge's Past Job Hurt Tesla Investor

By **Emily Sawicki**

Law360 (April 4, 2024, 9:02 PM EDT) -- The Ninth Circuit on Thursday refused to revive claims brought by a short-seller accusing Tesla Inc. and CEO Elon Musk of using social media to artificially inflate the company's stock, ruling that the plaintiff wasn't prejudiced by a district judge's former employment with the predecessor of a firm that represented Tesla for a portion of the litigation.

A three-judge panel declined to reverse the dismissal of investor Aaron Greenspan's claims against Tesla and Musk while also denying Greenspan's bid to remove the California federal judge he said should have recused himself from the suit due to his former employment at a firm that eventually became Cooley LLP. Greenspan had alternatively argued that the jurist could have referred the recusal bid to another judge.

"A motion for recusal can be decided by the judge who is asked to recuse," the panel said.

Greenspan, a Tesla investor and self-described short-seller, sued Musk and Tesla in May 2020 in a **wide-ranging pro se complaint** that initially included 10 claims against Tesla and Musk, plus a Tesla shareholder and customer named Omar Qazi and Qazi's company, Smick Enterprises Inc.

Greenspan filed an initial 63-page complaint in the U.S. District Court for the Northern District of California that accused all four defendants of libel, securities violations and market manipulation for their use of social media.

U.S. District Judge James Donato eventually granted Greenspan leave to file a total of four amended complaints, despite having already filed more than 4,000 pages of pleadings in the case by the time he requested a fourth try at lodging the claims. The final version, filed in August 2021, included claims of defamation per se, copyright infringement and securities fraud.

By that time, he had already begun pushing to boot Judge Donato from the case. In a July 2021 recusal motion, he argued that the jurist's prior work for a predecessor of Cooley LLP was prejudicial because the judge had worked at the firm during the same time as an attorney representing Musk and Tesla before the district court. Musk and Tesla were first represented by internal counsel for Tesla, but Cooley attorneys Aarti G. Reddy and John C. Dwyer stepped into the litigation in July 2020, after Judge Donato was assigned to the case, according to the recusal bid.

Greenspan argued that Judge Donato was "conflicted on account of his prior employment at Cooley LLP," but less than two weeks after Greenspan moved for the judge to remove himself from the case, Judge Donato denied the request.

"Greenspan's main argument for recusal is that I was a partner many years ago at Cooley Godward LLP, which is currently known as Cooley LLP and represents defendants Musk and Tesla in this case," the judge said.

"My prior affiliation with Cooley Godward and attorney Dwyer are not grounds for disqualification," Judge Donato later added. "I withdrew as a partner from Cooley Godward in 2009 to join another law firm. I have not worked at Cooley or with attorney Dwyer since 2009. I have presided as a district judge over several other cases in which Cooley has appeared as counsel for a party, without any motions for disqualification or withdrawal."

Dwyer no longer represents Tesla or Musk, court records show.

Judge Donato dismissed the suit with prejudice in May 2022, telling Greenspan he had not made an argument to effectively counter dismissal motions entered by Musk and Tesla.

"The dismissal is with prejudice because Greenspan has been afforded every consideration as a pro se litigant, including the extraordinary opportunity of filing five massive complaints, and has not been able to plausibly allege those claims," Judge Donato said in the order. "A sixth try is not warranted."

Judge Donato's refusal to recuse himself from the case formed part of the argument Greenspan made in his July 2022 appeal to the Ninth Circuit, detailed in the 70-page opening brief he filed in October of that year. In it, **Greenspan argued** that the court used outdated pleading standards when it threw out his claims, relying on the Private Securities Litigation Reform Act of 1995, or PSLRA, rather than the Federal Rules of Civil Procedure.

Greenspan also argued that the "district court was not impartial," because Judge Donato did not disclose that his wife's legal consulting business was allegedly "being paid by both of the law firms that represented Tesla defendants during the course of the district court litigation."

Further, Greenspan said the court abused its discretion in denying a Rule 60(b) motion that would allow him to continue pursuing his copyright claim. The investor also fought to revive his defamation claim against Musk, arguing that other courts have found that Musk "should not get away with libel simply because his medium of choice, Twitter, is sometimes used informally."

In Thursday's decision, the three-judge panel affirmed Judge Donato's dismissal and declined to undo the judge's refusal to recuse himself or refer the recusal to another judge.

The panel found the PSLRA does not conflict with the Federal Rules of Civil Procedure, and its automatic stay provision may be "read harmoniously" with the rules. Similarly, the PSLRA is "nearly identical" to pleading standards in the rules, the panel determined.

Greenspan's argument regarding the district court's denial of his Rule 60(b) motion failed, the panel said, because the motion "improperly attempts to relitigate the merits of the dismissal of his copyright claim." The panel found that the court had not erred when it denied Greenspan's attempt to enter new evidence, since he had "failed to demonstrate that his evidence would have likely changed the outcome of the case had it been produced earlier."

Judge Donato was also right to dismiss the defamation claim because "a reasonable factfinder" couldn't find that the contested statement was asserted as an objective fact, the panel ruled, quoting from case law established in 2003's **Lieberman v. Fieger**. 📌

U.S. Circuit Judges Andrew D. Hurwitz and Anthony Johnstone and U.S. District Judge Brian Morris, sitting by designation, sat on the panel for the Ninth Circuit.

Greenspan and representatives for the other parties did not immediately respond to requests for comment Thursday.

Greenspan is representing himself.

Musk and Tesla are represented by Michael Lifrak of Quinn Emanuel Urquhart & Sullivan LLP.

Qazi and Smick are represented by Karl S. Kronenberger and Jeffrey M. Rosenfeld of Kronenberger Rosenfeld LLP.

The case is Greenspan v. Qazi et al., case number 22-16110, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Kevin Penton and Dorothy Atkins. Editing by Rich Mills.

Jury Finds Pharma Exec 'Shadow Traded' With Inside Info

By **Bonnie Eslinger**

Law360 (April 5, 2024, 6:17 PM EDT) -- A California federal jury found Friday that a former Medivation executive is liable for using inside information from his company when he purchased stock in rival pharmaceutical maker Incyte, in a novel civil "shadow trading" case brought by the U.S. Securities and Exchange Commission.



The U.S. Securities and Exchange Commission has won its case against a former Medivation executive, convincing a jury that he used material, nonpublic information about his own company to trade in the stock of a similarly situated company. (Aaron M. Sprecher via AP)

After an eight-day trial, the jury deliberated for just over two hours before reaching its decision, finding that the SEC established by a preponderance of the evidence that Matthew Panuwat is liable under a civil misappropriation theory of insider trading.

The trial in the case against Panuwat, 47, a former business development executive at biopharmaceutical company Medivation Inc., **kicked off in San Francisco** on March 25. The SEC showed jurors evidence that Panuwat bought his stock options seven minutes after Medivation CEO David Hung sent an email saying top bidder Pfizer Inc. was ready to sign a deal that weekend to buy Medivation.

During closing arguments Friday morning, a lawyer for the SEC, Bernard Smyth, told jurors that Panuwat had committed insider trading.

"Mr. Panuwat purchased Incyte call options because he had confidential inside information that he believed would move Incyte's stock," Smyth said. "He traded a mere seven minutes after receiving an email confirming Medivation's acquisition was on track to be publicly announced in just a few days."

Panuwat's explanation for why he made the trades in Incyte is not probable and sidesteps key facts, the lawyer said.

"It ignores coincidence after coincidence and requires you to check your common sense at the door," Smyth said.

Panuwat's lawyer, Jack DiCanio of Skadden Arps Slate Meagher & Flom LLP, told jurors that his client had been unfairly "set up" by the SEC.

"We have seen how one of the most powerful agencies of the United States government reverse-engineered a case against my client," DiCanio said.

The seemingly suspicious timing of Panuwat's trading in Incyte — as presented to the jury — was nothing more than a construct created by the SEC, DiCanio said.

"The SEC's counsel, in some ways, was right," DiCanio said. "You know what? It wasn't a coincidence."

While his client received hundreds of emails in August 2016, the month when the sales process for Medivation was drawing to a close, the SEC chose to focus on the email that was closest to Panuwat's Incyte trading, DiCanio said. That was the email from Medivation CEO Hung.

"They made up this myth that Dr. Hung's email was somehow materially different, more definitive, the smoking gun," DiCanio said. "They're the ones that chose that email out of all of those emails, because it was close in time."

Shadow trading, a novel theory, is said to occur when a corporate insider uses material, nonpublic information about their own company to trade in the stock of a similarly situated company. The SEC told jurors that Panuwat made \$120,000 by buying stock in Incyte.

During the trial, an **SEC economist opined** that confidential news of Medivation's 2016 sale announcement would have an expected positive "spillover effect" on the rival's stock price. Later, the defense called a former Medivation finance vice president to the stand who **challenged the assertion**, saying the two companies weren't competitors and that he wouldn't expect their stock prices to rise in tandem.

On Wednesday, **Panuwat told jurors** he didn't think his Incyte Corp. trading violated securities laws, and he also said he didn't base his decision to buy the call options on confidential information he was provided through his involvement in Medivation's sale process.

Panuwat was later **cross-examined** by a lawyer with the SEC who noted that while the defendant had provided jurors with a detailed justification for why he purchased the Incyte call options in August 2016, he didn't provide that explanation when investigators with the federal agency first questioned him about the trades in May 2020.

Prior to deliberations Friday, U.S. District Judge William H. Orrick instructed the jury on the elements that the SEC had to prove to establish liability.

The jury had to find that Panuwat owed a duty of "trust, confidence or confidentiality" to Medivation and that as a result of his employment he had nonpublic information that was material to Incyte. The SEC also had to show that Panuwat bought the Incyte call options on the basis of that information, which he knew was confidential and material, and "acted recklessly" as to whether he had Medivation's permission to trade on it.

The judge also told jurors that they didn't have the job of considering the remedies provided by law for the SEC's claim and that any potential remedies shouldn't be a consideration when deciding whether the government had proven its case.

After the verdict was read and the jury discharged, the judge told the two sides that he wanted to discuss

potential remedies at an April 17 hearing. He also asked whether the parties wanted to see if they could reach an agreement on their own.

"If it is a useful thing to have a magistrate judge, I have one in mind to help you think about remedies without obviously waiving your rights to appeal where things are," Judge Orrick said.

As they left the courtroom, DiCanio and Panuwat did not respond when asked for comment on the jury's decision.

SEC enforcement director Gurbir Grewal, who has pushed back on the "shadow trading" label, did so again in a statement Friday, saying what Panuwat did was "insider trading, pure and simple."

The SEC is represented in-house by Monique C. Winkler, Susan F. LaMarca, Bernard B. Smyth, Jason M. Bussey and Matthew G. Meyerhofer.

Panuwat is represented by Jack P. DiCanio, Caroline Van Ness, Joshua S. Brown and Andrew J. Woo of Skadden Arps Slate Meagher & Flom LLP, and James W. Spertus, Anthony Pacheco, Kirsie E. Luther, Payton Lyon and Maura Riley of Spertus Landes & Josephs LLP.

The case is Securities and Exchange Commission v. Panuwat, case number 3:21-cv-06322, in the U.S. District Court for the Northern District of California.

--Additional reporting by Jessica Corso. Editing by Michael Watanabe.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Oracle Gets Wiretap Claim Cut From Data Collection Fight

By **Dorothy Atkins**

Law360 (April 4, 2024, 7:35 PM EDT) -- A California federal judge on Wednesday trimmed a proposed class action alleging Oracle illegally sold internet users' "electronic profiles," finding that new allegations that executive Larry Ellison admitted Oracle's new technology was "scaring the lawyers" aren't enough to show tortious intent to plead a viable Electronic Communications Privacy Act claim.

In a 10-page order, U.S. District Judge Richard Seeborg dismissed for good two specific claims in sprawling litigation accusing Oracle America Inc. of amassing a vast number of detailed profiles, or digital "dossiers," on millions of people worldwide.

The judge agreed to cut the consumers' intrusion upon seclusion claim brought under Florida common law and a claim under the Federal Wiretap Act, also known as the Electronic Communications Privacy Act.

In his ruling, Judge Seeborg agreed with Oracle that the latest rendition of the complaint failed to identify any particular "electronic space" where named plaintiff Jennifer Golbeck had a reasonable expectation of privacy in which Oracle allegedly intruded.

"The fact Golbeck may have kept her [computer] devices password-protected does not change the fact that her 'communications with websites' constituted open conduct on the web rather than activity in a private place," the order said.

The judge also held that the consumers failed to show Oracle had the requisite tortious motivation to invoke the crime-tort "exception to the exception" in the ECPA, which permits certain wiretaps if the communicator has given prior consent as long as the party intercepting the communication does not have tortious or criminal intent.

"Plaintiffs fail plausibly to allege Oracle's underlying motivation in collecting and selling data about internet users was anything other than to generate revenue," the order stated.

The ruling is the latest chapter in a proposed class action **initially launched** by Johnny Ryan, Michael Katz-Lacabe and Golbeck in August 2022, claiming Oracle collects personal data using several tools, including software code stored on web browsers that collect users' data, allegedly without consumers' knowledge or consent.

The consumers claim Oracle has made \$42.4 billion in annual revenue selling personal information — including addresses, race, political views, location and retail purchases — of anyone who uses the internet for everyday activities. They say the company collects this information with its Oracle ID Graph and related marketing products.

Additionally, the company allows third-party data brokers to "traffic in" personal data on its Data Marketplace without web users' knowledge or permission, the suit states, adding that Oracle also partners with more than 65 such major data brokers.

Judge Seeborg **cut earlier renditions** of the complaint in October 2023, he has given the consumers multiple shots at amending it.

In the latest version of the complaint, the consumers beefed up their allegations about statements

made publicly by Ellison, Oracle's chief technology officer, claiming he admitted to the alleged misconduct by stating during a September 2016 OpenWorld keynote speech that Oracle's new technology was "scaring the lawyers."

The complaint claims Ellison specifically described the amassing of profiles by Oracle's ID Graph, and he "flippantly acknowledged that Oracle's profile-building conduct was privacy invasive, potentially illegal, and was 'scaring the lawyers.'"

Ellison said "[Oracle's conduct] is a combination of real-time looking at all of their social activity, real-time looking at where they are, including, micro-locations — this is scaring the lawyers who are shaking their heads and putting their hands over their eyes — knowing how much time you spend in a specific aisle of a specific store and what is in that aisle of a store," according to the complaint.

The new complaint also adds allegations that Oracle has publicly criticized Google's alleged "shadow profiles," which are purportedly the same profile-creating practices Oracle is accused of, and Oracle has told legislators that Google's conduct violates privacy rights. Additionally, the new complaint specifically says that an anonymous former Oracle employee posted online that Oracle intentionally didn't update its data opt-out tool, which is "purposefully never updated and knowingly inaccurate."

But Oracle filed a motion to dismiss, asking the judge only to throw out two claims for good and said it would respond to the other allegations once the judge rules on its motion.

During a **hearing on the motion last week**, Judge Seeborg said he doubted that the new allegations addressed his concerns regarding the viability of the ECPA and intrusion upon seclusion claims. And in his order Wednesday, the judge agreed to throw out the claims without leave to amend.

The judge concluded that none of the statements by Ellison that were added to the latest complaint plead tortious intent for the purposes of the ECPA claim, nor do the new allegations made by the anonymous former Oracle employee.

"At most, it supports the unremarkable proposition that an Oracle employee thought the company could be investing more resources into protecting users' privacy," the order said.

Judge Seeborg additionally rejected the consumers' arguments that Oracle's past public criticisms of Google's data collection practices show Oracle had tortious intent in this case.

Ultimately, the lawsuit's misrepresentation theory establishes only that Oracle had a privacy policy in August 2022 that was allegedly at odds with its data collection practices as late as May 2021, but not that Oracle collected or sold consumer data with tortious intent.

Judge Seeborg additionally held that the suit doesn't plausibly allege third-party websites did not consent to Oracle's data interceptions.

Counsel for the parties and representatives for Oracle didn't immediately respond to requests for comment Thursday.

The consumers are represented by Michael W. Sobol and David T. Rudolph of Lieff Cabraser Heimann & Bernstein LLP.

Oracle is represented by Tiffany Cheung of Morrison Foerster LLP.

The case is Michael Katz-Lacabe et al. v. Oracle America Inc., case number 3:22-cv-04792, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger, Craig Clough and Gina Kim. Editing by Kristen Becker.

Starbucks Tells Judge Union Dealings Aren't 'Mission Critical'

By **Rachel Riley**

Law360 (April 5, 2024, 8:45 PM EDT) -- Starbucks denied Friday that complying with federal labor law was "mission critical" to its business as it urged a Washington state judge to dismiss a shareholder suit accusing company leaders of union busting, which they say tanked Starbucks' reputation.



Starbucks urged a Washington state judge to dismiss a shareholder lawsuit accusing leaders of the coffee-selling giant of union busting. (Photo by Xavi Lopez/SOPA Images/Sipa USA via AP Images)

The company and the individual defendants argue the suit should be **dismissed** because the two shareholder plaintiffs haven't alleged that they demanded action from the board prior to prefiling, and that the board rejected those demands. The case also doesn't fit into one of the **handful of circumstances** in which plaintiffs are excused from the "demand futility" prerequisite to filing a shareholder derivative suit — including that board members did nothing about a "mission critical" concern, an attorney for Starbucks said during a Friday hearing.

"While Starbucks believes its partners are important to its success, that does not mean that unionization and compliance with the NLRA are mission critical to Starbucks' business," said Gregory L. Watts of Wilson Sonsini Goodrich & Rosati PC, representing the company and the individual defendants.

Counsel for the shareholders retorted that Starbucks indicated to the contrary, in both public statements about how important its employees — called "partners" — are to its business, and in U.S. Securities and

Exchange Commission filings acknowledging how its response to organizing could negatively affect customer perception of the brand.

Investor Joe W. Trimm **first filed** the suit last July against Starbucks Corp., former Starbucks CEOs Howard Schultz and Kevin R. Johnson, and 10 current and former board members. Trimm is joined by fellow shareholder Andre Rodney in an amended version of the complaint, filed in November, which names additional corporate leaders as defendants.

At Friday's hearing, Watts pointed to a series of occasions in 2022 when Starbucks' board discussed employee relations or unionizing activity, including a presentation to the board that June from outside counsel and former National Labor Relations Board Chairman Philip A. Miscimarra. The company has also maintained three different corporate committees involved in monitoring union-related issues.

But Justin Reliford of Scott + Scott Attorneys at Law LLP, representing the shareholders, accused Starbucks of trying to "move the goalpost" for a derivative shareholder suit to survive a motion to dismiss. He argued that the shareholders have cleared that hurdle by alleging that the directors utterly failed to establish a monitoring and reporting system to ensure that management followed the law when responding to union activity.

"Instead they turned a blind eye while management ran amok," and the company has experienced reputational harm and lost money as a result, Reliford said. "The company gets no credit for creating committees that don't do their job."

He characterized the efforts cited by the company as "too little, too late."

The suit alleges that in November 2022, Trimm requested minutes and materials from any board meeting in which the board discussed certain topics including employee unionization and labor law compliance. The board agreed to produce a mere 12 pages of meeting minutes from one board meeting and one committee meeting, according to the lawsuit.

Watts said during the hearing that those 12 pages represented all the information the company was required to produce under Washington law.

King County Superior Court Judge William L. Dixon V suggested that Starbucks could've gone beyond its legal duty and disclosed more documents to provide clarity to the court regarding the board's actions in addressing union concerns. He remarked that while the company isn't obligated to provide additional material, the court is still left "in the position of not having the information."

Otherwise, Judge Dixon said little during the hearing and told the parties upon closing that he would "reserve ruling and get back to you on this."

The parties were also at odds on the significance of **hundreds of complaints** that have been filed with the National Labor Relations Board against Starbucks in recent years.

The shareholders' recent brief opposing the dismissal bids cites 1,456 NLRB cases filed against Starbucks since unionizing began at a store in Buffalo, New York, and "the hundreds of findings of unlawful conduct" by administrative law judges across the nation.

Reliford called the complaints evidence of "black-letter violations of the NLRA," adding that Starbucks' attorneys are downplaying them because the company has not yet exhausted its appeals in cases where a judge has made findings. Given the widespread nature of the anti-union tactics, Schultz and other "people at the top" are the most appropriate targets for the suit, the shareholders' attorney said.

Watts, however, said that the NLRB complaints reflect "missteps alleged at the store level and not a companywide strategy." He said that the only definitive finding of wrongdoing was a case in which a store manager in Seattle told a barista to stop handing out union pins.

Siding with the NLRB March 28, the D.C. Circuit **determined** the manager violated federal labor law by barring the worker from passing out the pins, the first time a federal appeals court has weighed in on a board decision against Starbucks.

The other defendants are Sara Kelly, Dennis Brockman, Mellody Hobson, Richard E. Allison Jr., Andrew Campion, Jorgen Vig Knudstorp, Satya Nadella, Isabel Ge Mahe, Clara Shih, Joshua Cooper Ramo, Javier

G. Teruel and Mary N. Dillon.

The shareholders are represented by Justin Reliford and Elizabeth K. Dragovich of Scott + Scott Attorneys at Law LLP, Kim D. Stephens and Rebecca L. Solomon of Tousley Brain Stephens PLLC and Stephen J. Oddo of Robbins LLP.

Starbucks and the individual defendants are represented by Gregory L. Watts of Wilson Sonsini Goodrich & Rosati PC.

The case is Joe W. Trimm v. Howard Schultz et al., case number 23-2-12444-8 SEA, in the King County Superior Court.

--Additional reporting by Sydney Price. Editing by Leah Bennett.

All Content © 2003-2024, Portfolio Media, Inc.