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COMMENTARY

Goldman Sachs: Getting the Last Word on Class Certification

The U.S. Court of Appeals for the Second Circuit's decision has broad potential implications for companies seeking to defeat certification of class claims based on violations of the federal securities laws.

April 11, 2024 at 12:00 PM

Commentary

By Susan E. Hurd | April 11, 2024 at 12:00 PM



Last year, the putative securities fraud class action brought against the Goldman Sachs Group, Inc., which had been litigated for 13 years, ended quietly via an agreement by the parties. The plaintiffs agreed to dismiss all claims with prejudice, with the parties to bear their own costs. The plaintiffs, thus, walked away with no recovery or settlement, despite having three times achieved certification of an investor class before the U.S. district court. The plaintiffs had also defended certification in a record three appeals to the U.S. Court of Appeals for the Second Circuit and an appeal to the U.S. Supreme Court.

The fact that this ongoing class certification saga came to an end with so little fanfare obscures the importance of the “final word” on class certification we are left with in the case. On Aug. 10, 2023, the Second Circuit issued what turned out to be the final opinion on certification in *Arkansas Teacher Retirement System v. Goldman Sachs Group*. The Second Circuit vacated the most recent certification order by the district court and remanded with instructions to decertify the class.

The Second Circuit's decision has broad potential implications for companies seeking to defeat certification of class claims based on violations of the federal securities laws. The decision provides a road map for defendants on arguments that could defeat certification and potentially end the case without the need to endure years of costly discovery. If the motion to dismiss is denied, most defendants in securities cases choose to settle rather than wage a protracted legal battle. The lessons learned from the *Goldman* case have the power to change this dynamic by providing defendants with an early opportunity to make potential case-killing arguments.

The last *Goldman* decision is significant in two respects. First, it makes clear that the generic nature of an alleged misrepresentation is not only relevant to the discussion at class certification but could also be dispositive and require denial of certification. The *Goldman* case directs that, even though the genericness analysis may overlap with other issues that are typically reserved for later in the case (like materiality), a court must consider the generic nature of the alleged misstatements. This makes good sense. A case should not proceed for potentially years to come if it is predicated on generic statements that typically do not engender investor reliance.

Companies often make aspirational public statements about their business principles that, in effect, say they aspire to be good corporate citizens. Such statements cannot be fairly construed as a guarantee against anything that could possibly go wrong. *Goldman* stands for the proposition that a court must consider evidence at class certification

regarding whether a challenged statement lacks sufficient substance such that it could not have had an impact on the trading price of the stock at issue. The notion that the alleged misstatements impacted the stock price is the fundamental tenet on which all securities class actions are supposed to be based.

Second, *Goldman* is important because it empowers defendants to defeat certification by pointing out a fundamental mismatch between statements at the end of the class period that supposedly reveal the truth of the underlying fraud and the defendants' prior alleged misstatements. For too long, plaintiffs have been able to prevail by simply pointing to the disclosure of bad news at the end of the class period that was accompanied by a stock price decline. Very often, no critical examination took place regarding whether it made sense to link the subsequent bad news to the prior alleged misstatements. Instead, a fundamental (and potentially fatal) mismatch between the supposed truth and the alleged misstatements was kicked down the road, which gave rise to pressure on the defendants to settle before such challenges could be ruled upon.

Goldman followed a typical pattern where the plaintiffs relied on a risk factor discussion in the company's SEC filings (i.e., a warning of possible conflicts of interest) and then claimed that the falsity of these prior statements was later revealed when the SEC announced an enforcement action regarding alleged conflicts of interest at Goldman and various media outlets began publishing stories on these issues. The Second Circuit in *Goldman*, however, made clear that a court must consider whether the general risk factor and the later, more specific allegations on the same topic are a sufficient match for one another. All publicly announced bad news is not created equal. Unless the supposedly true negative facts actually correct the prior alleged misstatements, then you are in effect sanctioning a program of investor insurance against any price declines a stock might experience. Moreover, a duty to disclose more by defendants at the time of the alleged misstatements would be triggered only when that which was disclosed was sufficiently specific.

In *Goldman*, the supposed curative disclosures were highly specific, but the alleged misstatements were not. The Second Circuit held that simply because the two sets of statements involved the same general subject matter (i.e., conflicts of interest) was insufficient to certify a class. One could not reasonably infer that the later, more specific statements that led to price declines could serve as proof that the defendants' prior statements on the same topic had an inflationary impact on the stock price. In acknowledging that a critical examination must take place into whether the required match exists, *Goldman* arms defendants with a means by which to weed out at a much earlier stage of the proceedings fundamentally doomed theories of liability. This is precisely the type of rigorous examination of the requirements for class certification that should take place under rules of civil procedure and prior Supreme Court precedent.

Susan E. Hurd, a partner in the Atlanta office of Alston & Bird, has represented companies and their executives in securities class actions, derivative cases, merger litigation, and SEC investigations. She has secured earlier dismissals for clients and defended them on appeal, including before the U.S. Supreme Court. She regularly advises clients on "big ticket" litigation issues and has defeated class certification.

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April 10, 2024, 9:15 AM PDT

'Smart Window' Maker View Inc. Dodges Investors' Accounting Suit

By Matthew Bultman

- Suit stems from issues related to window warranty accounting
- Lead plaintiff Stadium Capital didn't have standing, judge says

Bloomberg Law News 2024-04-11T09:51:38815058194-04:00

'Smart Window' Maker View Inc. Dodges Investors' Accounting Suit

By Matthew Bultman 2024-04-10T12:15:51000-04:00

- Suit stems from issues related to window warranty accounting
- Lead plaintiff Stadium Capital didn't have standing, judge says

View Inc. beat a shareholder lawsuit stemming from accounting errors revealed after the maker of so-called smart windows went public through a blank-check deal.

Stadium Capital LLC, the lead plaintiff in the case, sold its shares in View before the errors were revealed. Stadium therefore didn't have standing to sue the company for securities fraud, Judge Beth Labson Freeman in the US District Court for the Northern District of California said in a Tuesday decision.

While recent court filings added a new plaintiff, David Sherman, Freeman said circuit precedent "is clear that a new plaintiff such as Sherman cannot be added to save a lawsuit from dismissal where the sole named plaintiff never had standing."

Silicon Valley-based View, which makes smart glass panels that adjust in response to the sun, went public in 2021 by merging with CF Finance Acquisition Corp. II, a blank-check company affiliated with investment firm Cantor Fitzgerald LP.

Several months later, View said its audit committee was investigating the adequacy of its previously reported warranty accrual. View in November 2021 said the committee found there had been certain misstatements, according to court filings, which were alleged to have caused stock prices to dip.

The problem, Freeman said, is Stadium didn't own View stock by November 2021, having already sold its shares.

"Because Stadium Capital sold its shares before the truth was revealed, Stadium Capital was not injured by the alleged misrepresentations," Freeman said.

View filed for bankruptcy on April 2 in an effort to reduce its \$359 million debt load.

Kaplan Fox & Kilsheimer LLP represents the lead plaintiff. Munger Tolles & Olson LLP represents View. Winston & Strawn LLP represents Cantor.

The case is Mehedi v. View, Inc. , N.D. Cal., No. 21-cv-06374, 4/9/24 .

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United Airlines Poison Pill Hit With Shareholder Challenge

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0375](#)

Bloomberg Law News 2024-04-11T10:53:28263766698-04:00

United Airlines Poison Pill Hit With Shareholder Challenge

By Mike Leonard 2024-04-10T15:23:46000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0375

An investor sued United Airlines Holdings Inc. and its board members Wednesday, saying the airline's corporate poison pill is an illegal anti-takeover tactic disguised as an effort to preserve valuable tax assets.

The lawsuit, filed in Delaware, seeks to block an investor vote on a proposal to renew United's "shareholder rights plan," which works by triggering a major stock dilution event if any stockholder or consortium acquires a 4.9% stake. The complaint zeroes in on a daisy-chain clause taking an aggressive view of when investors count as a group based on an "agreement, arrangement, or understanding" among them.

The allegations echo a recurring theme in Delaware's Chancery Court, where shareholders are increasingly taking aim at the new generation of defensive strategies deployed by corporate boards seeking to fend off stockholder influence campaigns. The rising tide of activists—emboldened by recent changes such as the universal proxy—is now colliding with "weaponized" nomination bylaws, repurposed poison pills, and shareholder agreements that favor insiders.

Read More: [Poison Pills Targeting Activists Push Judges to Draw New Lines](#)

Although rights plans with a 5% or lower activation threshold are narrowly legal to preserve net operating loss carryforwards threatened by arcane tax laws, the daisy-chain provision shows the actual purpose of United's pill is to protect its sitting directors, according to the proposed class action. The measure's real aim is "thwarting any realistic threat of stockholder activism," the suit says.

United declined to comment Wednesday.

The new case follows a week after the same investor, represented by the same law firms, brought virtually identical claims April 3 challenging the poison pill adopted by LSB Industries Inc., which is allegedly facing a potential shareholder activism campaign by affiliates of Ravenswood Investment Co.

‘Corporate Agendas’

According to the United lawsuit, the proposal to renew the poison pill would ratify the board’s move to extend the measure’s sunset date shortly before it expired in December. United, which emerged from post-9/11 bankruptcy with NOLs worth \$7 billion, previously sought to protect the assets by barring investors from gaining the 5% stake that carries potential tax implications, according to the complaint.

The airline allegedly adopted the poison pill after its NOLs ballooned to roughly \$11 billion by late 2020, when the Covid-19 pandemic was battering the travel sector. The specific features of the poison pill the company adopted at the time show that the NOL-related justification given by its board was a pretext, the suit says.

The daisy-chain clause allegedly takes a hub-and-spoke view of investors that enter into agreements, arrangements, or understandings with the same third party, aggregating their ownership stakes toward the 4.9% threshold even if they’re “unaware of each other’s existence.” But agreements among shareholders concerning “anything other than economic ownership” are irrelevant to the tax code sections affecting NOLs, according to the complaint.

“Such AAUs do, however, pose a threat to the directors’ incumbency and corporate agendas,” the lawsuit says.

United’s pill mirrors a rights plan struck down in the last major Delaware ruling on poison pills, which invalidated provisions adopted by Williams Cos., according to the complaint. The decision made clear that “a 4.9% trigger is extraordinary and the use of such a trigger is reserved solely for pills carefully tailored to protect NOL assets,” the suit says.

The investor leading the litigation, Colleen Witmer, is represented by Bernstein Litowitz Berger & Grossmann LLP, Fields Kupka & Shukurov LLP, and RM Law PC. United and its board haven’t yet made court appearances.

The case is Witmer v. Kirby , Del. Ch., No. 2024-0375, complaint filed 4/10/24 .

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DocuSign Heads Allegedly Misframed Demand Before Record Selloff

By Ben Miller

- COURT: N.D. Cal.
- TRACK DOCKET: [3:24-cv-02139](#)

Bloomberg Law News 2024-04-11T10:54:20712188283-04:00

DocuSign Heads Allegedly Misframed Demand Before Record Selloff

By Ben Miller 2024-04-10T13:20:44000-04:00

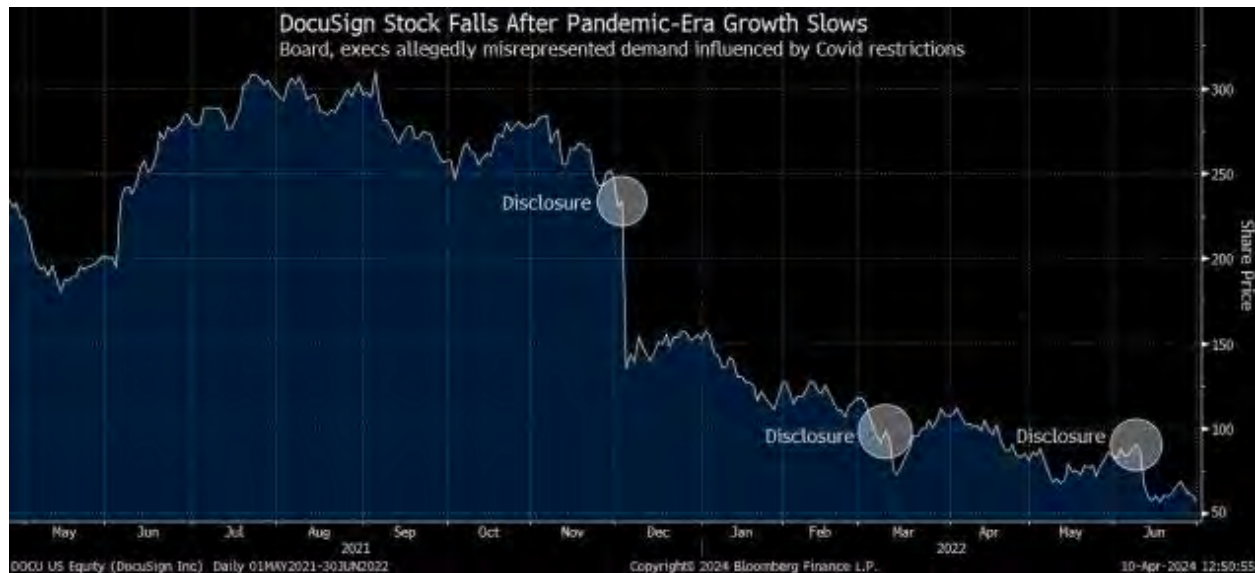
- COURT: N.D. Cal.
- TRACK DOCKET: [3:24-cv-02139](#)

DocuSign Inc.'s directors and top executives failed to publicly attribute accelerated growth and high demand to Covid-19 pandemic restrictions for more than two years before the stock's biggest selloff on record, a shareholder derivative suit says.

The e-signature software developer's public filings allegedly portrayed the company's growth in 2020 and 2021 to a sustainable shift in demand for its services, concealing that demand was waning as pandemic restrictions were lifted, according to the complaint filed Tuesday in US District Court for the Northern District of California.

DocuSign also didn't disclose that competition from Adobe Inc. and difficulties selling its contract management product presented obstacles to maintaining the pandemic-driven growth levels, the complaint says.

In December 2021, the company disclosed a drop in billings, representing to investors that the slow-down had been predicted despite former chief financial officer Michael Sheridan's statement on an earnings call that the increased demand for DocuSign products was a "new normal." The day after that disclosure, DocuSign's stock fell 42% to \$135.09 on Dec. 3, 2021. That was the stock's biggest single-day drop since its 2018 market debut, according to data compiled by Bloomberg.



The company then made two additional disclosures in 2022, which revealed that the earlier growth had been fueled by pandemic restrictions, according to the complaint. DocuSign announced quarterly financial results on March 10, reporting the lowest billings growth the company had ever experienced since going public. DocuSign's share price fell more than 20% the next day to close at \$75.01 per share on March 11, 2022.

In another announcement of quarterly results, DocuSign disclosed on June 9 of that year that it had experienced even lower billings growth than the previous quarter, setting a new all-time low, according to the complaint.

The following day, the company's share price dropped 25% to \$65.93 on June 10. That same day, analysts weighed in on the disclosures and Wolfe Research downgraded DocuSign's rating, citing the company underestimating the pandemic's impact and drastic reduction in billing guidance. The next trading day, the company's stock price fell again by 10% to \$59.12 on June 13, the complaint says.

Four of the defendants, including ex-CEO Daniel Springer and former chief financial officer Cynthia Gaylor, sold shares of DocuSign stock while its price was allegedly inflated during the period of misrepresentations, garnering collective proceeds of more than \$248 million, according to the complaint.

Shareholder Carrie Alexander seeks to recover damages on behalf of the company for the defendants' alleged Securities Exchange Act violations between March 27, 2020 and June 13, 2022, as well as legal fees.

A separate class action is currently pending in the same Northern California district court, alleging similar misrepresentations related to increased demand during the pandemic.

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

The Rosen Law Firm PA represents the plaintiff.

The case is Alexander v. Springer , N.D. Cal., No. 3:24-cv-02139, complaint filed 4/9/24 .

Apple asks judge to reconsider order in AirPods Max suit

DJ [dailyjournal.com/articles/377978-apple-asks-judge-to-reconsider-order-in-airpods-max-suit](https://www.dailyjournal.com/articles/377978-apple-asks-judge-to-reconsider-order-in-airpods-max-suit)

Apr. 10, 2024

Apple's attorneys have asked a San Francisco judge to reconsider his order requiring notification of a "vanishingly small number" of California customers that the lead plaintiffs in a putative class action lawsuit over Apple's AirPods Max headphones have settled their claims and want to dismiss the case.

Attorneys for Apple, Inc. asked a San Francisco judge Tuesday to reconsider his order requiring both parties to notify a "vanishingly small number" of California customers that the lead plaintiffs in a putative class action lawsuit over Apple's AirPods Max headphones had settled their claims and want to dismiss the case.

Tuesday's hearing stems from the joint request for dismissal of the putative class action filed after the two lead plaintiffs agreed to a confidential settlement with Apple in September 2023. The complaint accused Apple of knowingly selling the headphones with a "latent" condensation defect that allegedly damaged the proper use of the product.

Apple's attorneys denied any wrongdoing throughout the litigation and claimed that the lead plaintiffs themselves had received sufficient customer service regarding the issues with their AirPods Max.

On March 6, Superior Court Judge Andrew Y.S. Cheng ordered the parties to submit a notice of dismissal to each of the potential class members. Attorneys for both sides agreed that they could only provide an estimated number of plaintiffs and that tracking down each potential class member would be burdensome. Cheng took their reconsideration request under submission.

"Apple's estimate, which it provided in its February 8, 2024 joint submission, was just that — an estimate of the number of potentially affected California consumers," Apple's attorneys, Matthew D. Powers and Kelsey M. Larson from O'Melveny & Myers LLP. wrote in their motion for reconsideration. "But that estimate does not correspond to any particular individual —and Apple has no way to identify which customers fall within its estimate of potentially affected customers. This is because Apple does not specifically track corrosion due to condensation — the alleged defect here — for warranty return purposes. Because of

the nature of the alleged defect, Apple cannot determine whether any particular customer's device was returned because of corrosion without performing an engineering breakdown and analysis of that device (which Apple does not do for all devices.)"

The plaintiffs' attorneys are: Jason H. Kim of Schneider Wallace Cottrell Konecky LLP; Shanon J. Carson and Amey J. Park of Berger Montague PC.

The notice for dismissal is required in the case because the parties' joint brief in support of the dismissal notes that any putative class members would not be barred from filing a lawsuit in the future.

"In responding to the Court's question concerning the number of potential class members that could exist in California, based on Apple's best estimates, it is Apple's position that the number of putative class members is vanishingly small," the joint filing states. "Apple estimates that based on this data, approximately 353 consumers in California were potentially affected by the alleged defect, and that many of these consumers received warranty service under the existing warranties."

At the heart of the matter is the plaintiffs' claim that their AirPods Max headphones were latently defective and built-up condensation in the ear pads. The plaintiffs' attorneys detailed the alleged defect in a second amended complaint and claimed that Apple was not honoring their warranty on the product. *Keeley et al. v. Apple, Inc.*, CGC21589534 (S.F. Sup. Ct. filed Feb. 1, 2021)

#377978

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Judge rejects \$285K settlement over law firm's data breach

DJ [dailyjournal.com/articles/377993-judge-rejects-285k-settlement-over-law-firm-s-data-breach](https://www.dailyjournal.com/articles/377993-judge-rejects-285k-settlement-over-law-firm-s-data-breach)

Apr. 11, 2024

The judge cited concerns about the calculation of the settlement fund, the cy pres choice for uncashed settlement checks, and the damages to the named plaintiff and others, former clients of The Zalkin Firm, which was hit by a data breach.

A San Diego federal judge denied a \$285,000 preliminary settlement proposal between a putative class of sexual assault plaintiffs and The Zalkin Law Firm PC over a data breach that exposed personal information and case files from 524 clients.

U.S. District Judge M. James Lorenz said the cy pres choice for uncashed settlement checks would not benefit class members, that case citations supporting the deal were not analogous, and the damages to the named plaintiff and others were not fully addressed.

The unopposed settlement motion was filed in February by Scott E. Cole of Cole & Van Note on behalf of the named plaintiff, Ariana Deats. The firm defendant is represented by Manatt Phelps & Phillips LLP.

The plaintiffs' counsel said Wednesday they will be filing a new motion to address the judge's concerns, expressed in a Tuesday order that denied the proposal without oral argument.

The Zalkin Law Firm, which represents many sexual abuse plaintiffs, was accused of failing to protect Deats and 523 other former clients from a cyberattack that occurred in April 2023. Information such as Social Security numbers and images of attorney notes that contained abuse details were stolen and shared on the dark web by a cybercriminal group, the lawsuit stated.

In February, the parties agreed on a \$285,000 non-reversionary settlement fund to be split among 523 clients. In addition, the plaintiffs' counsel requested attorney fees up to \$99,750. The named plaintiff requested a service award of \$3,500. *Ariana Deats v. The Zalkin Law Firm PC*, 3:23-cv-02005 (S.D. Cal., filed Oct. 30, 2023).

However, Lorenz questioned how the proposed fund was calculated. "Although plaintiff asserts the settlement 'is an extraordinary result,' this opinion is not adequately supported," Lorenz wrote. "Plaintiff provides only a cursory opinion of class members' potential recovery

after trial and is vague in weighing of the strengths and weaknesses of plaintiff's case."

In an email Wednesday, Cole, on behalf of the plaintiff, did not directly address the judge's concerns but stated, "We'll be filing a motion with additional information ... which we believe will satisfy the court's preliminary concerns."

The defense counsel representing the firm at Manatt Phelps did not respond to an email or phone call by press deadline Wednesday.

According to a declaration Cole filed in February, the fund, which would have paid each of the class members around \$300, was a "strong recovery" in comparison to what other California data breach cases achieved through trial where the value per class member hovered in the \$5 to \$10 range, Cole wrote.

"Plaintiff's analysis is based almost entirely on prior settlements of data breach cases," Lorenz wrote in the order. "[H]owever, the cases cited appear to involve only personally identifiable data. They are not analogous because, according to plaintiff herself, her case involves 'extraordinarily sensitive information.' This is an apt description as her case involves medical information of sexual abuse and harassment victims in addition to personally identifiable information."

Lorenz also said that because neither party provided an explanation of their proposal to distribute any uncashed settlement checks to Child USA as a cy pres recipient, the settlement couldn't be approved. "In the absence of an explanation, Child USA appears to lack the close nexus required to ensure that the class member will ultimately benefit from the award," Lorenz wrote.

#377993

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Judge reinstates Wawa class action fee award shot down by appeals court

 [reuters.com/legal/litigation/judge-reinstates-wawa-class-action-fee-award-shot-down-by-appeals-court-2024-04-10](https://www.reuters.com/legal/litigation/judge-reinstates-wawa-class-action-fee-award-shot-down-by-appeals-court-2024-04-10)

Mike Scarcella

Vacant gas pumps are shown after a Wawa gas station sold out of fuel ahead of the arrival of Hurricane Dorian in Pompano Beach, Florida, U.S. August 30, 2019. The station was anticipating arrival of a fuel truck so they could reopen the pumps. REUTERS/Joe Skipper Purchase Licensing Rights , opens new tab

April 10 (Reuters) - A U.S. judge on Wednesday approved \$3.2 million in legal fees for consumer lawyers who led a data privacy case against convenience store chain Wawa, reinstating an award that a federal appeals court last year saw as potentially unreasonable.

In a 52-page order , opens new tab, U.S. District Judge Gene Pratter in Philadelphia said the original amount of \$3.2 million was reasonable for the work the plaintiffs' lawyers performed in the case against Wawa, which was sued over a 2019 data breach.

Wawa agreed to settle the case for \$12.2 million, offering \$9 million in gift cards and other compensation to a class of 22 million consumers. Class members claimed only about \$2.9 million, however, so the award for fees and expenses ended up being greater than how much consumers recovered.

The 3rd U.S. Circuit Court of Appeals in November overturned , opens new tab the fee award and ordered Pratter to take a "closer look." The court directed Pratter to examine "the ratio between the fee award and amount recovered by the class members, and side agreements between class counsel and the defendant."

The consumer plaintiffs' lawyers and a representative for Wawa did not immediately respond to requests for comment on Wednesday.

Theodore Frank, director at the Hamilton Lincoln Law Institute and the Center for Class Action Fairness, opposed the first fee award of \$3.2 million. His appeal was the centerpiece of the 3rd Circuit's decision to vacate the award and order a fresh analysis.

Frank on Wednesday told Reuters that "it's hard for me to imagine a legal way to award that much money given the ratio of fees to class benefit." He said he was still weighing Pratter's decision, and did not immediately say whether he would appeal anew to the 3rd Circuit.

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In Wednesday's ruling, Pratter concluded that Wawa had a chance but declined to fight the plaintiffs' fee request.

There was no provision in the settlement that might have blocked Wawa from objecting, Pratter wrote, and she found the requested fee was in line with other similar cases.

Pratter also said the court has discretion to "consider either the amounts made available to the class or the amounts claimed by the class when considering the reasonableness of a fee award."

The case is *In re Wawa Inc Data Security Litigation*, U.S. Court of Appeals for the Eastern District of Pennsylvania, No. 2:19-cv-06019.

For consumer plaintiffs: Sherrie Savett of Berger Montague; Roberta Liebenberg of Fine, Kaplan and Black; Benjamin Johns of Shub & Johns; and Linda Nussbaum of Nussbaum Law Group

For Wawa: Kristin Hadgis, Gregory Parks and Michael Kenneally of Morgan, Lewis & Bockius

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Reporting by Mike Scarcella

Documents

- **COURT:** C.D. Cal.
- **DOCKETS:** Nos. [2:24-cv-02761](#), [2:24-cv-02860](#), [2:24-cv-02879](#), [2:24-cv-02885](#), [2:24-cv-02890](#), [2:24-cv-02894](#), and [2:24-cv-02898](#)

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City of Hope Hit With Class Actions Over 2023 Data Breach (1)

By Christopher Brown 2024-04-10T13:38:35000-04:00

COURT: C.D. Cal.**DOCKETS:** Nos. 2:24-cv-02761, 2:24-cv-02860, 2:24-cv-02879, 2:24-cv-02885, 2:24-cv-02890, 2:24-cv-02894, and 2:24-cv-02898

City of Hope National Medical Center is facing at least seven proposed class actions alleging it failed to protect the personal information of nearly 830,000 people that was exposed in a data breach that took place over a three-month period in 2023.

Plaintiffs in the separate lawsuits alleged that City of Hope, a cancer treatment and research center, failed to implement adequate data-security measures, comply with industry data-security standards, properly train its employees, or provide timely and adequate notice of the incident.

Information exposed in the breach included names, contact information, email addresses, phone numbers, dates of birth, Social Security numbers, driver's-license numbers, bank-account and financial information, medical records, medical histories, medical conditions, and patient-ID numbers, according to one complaint filed Aug. 4 and six filed Aug. 9 in the US District Court for the Central District of California.

City of Hope said in a statement: "Caring for our patients, and all of the people who place their trust in us, is a top priority, and we take information security very seriously. We are very sorry for any concern this incident causes."

Patients and other victims of the breach have been injured in the form of invasion of privacy, increased risk of fraud and identity theft, lost time and out-of-pocket costs incurred responding to the breach, reduced value of their personal information, anxiety and emotional distress, and increased exposure to junk calls and spam emails, the complaints said.

The plaintiffs seek to represent nationwide classes and California sub-classes of people whose information was compromised in the breach.

The lawsuits bring a variety of claims, including negligence, negligence per se, breach of implied contract, invasion of privacy, unjust enrichment, breach of fiduciary duty, breach of confidence, and violations of the California Unfair Competition Law, the Consumer Privacy Act, the Customer Records Act, the Confidentiality of Medical Information Act, and Declaratory Judgment.

The plaintiffs are seeking various forms of relief, such as compensatory damages, statutory damages, punitive damages, credit monitoring services, restitution, injunctive relief, attorneys' fees and costs, and pre- and post-judgment interest.

Turke & Strauss LLP represents Rodriguez. Milberg Coleman Bryson Phillips Grossman LLC represents Saurenmann. Kopelowitz Ostrow PA and Consumer Protection Firm PLLC represent Lopez. Lyon Firm represents Delapaz. Levi & Korsinsky LLP and Law Offices of Todd M. Friedman PC represent Ridley. Edelson Lechtzin LLP represents Krause. Almeida Law Group LLC represents Julian.

The cases are Rodriguez v. City of Hope Nat'l Med. Ctr. , C.D. Cal., No. 2:24-cv-02761, case filed 4/4/24 ; Saurenmann v. City of Hope , C.D. Cal., No. 2:24-cv-02860, case filed 4/9/24 ; Lopez v. City of Hope Nat'l Med. Ctr. , C.D. Cal., No. 2:24-cv-02879, case filed 4/9/24 ; Delapaz v. City of Hope , C.D. Cal., No. 2:24-cv-02885, case filed 4/9/24 ; Ridley v. City of Hope Nat'l Med. Ctr. , C.D. Cal., No. 2:24-cv-02890, case filed 4/9/24 ; Krause v. City of Hope , C.D. Cal., No. 2:24-cv-02894, case filed 4/9/24 ; and Julian v. City of Hope Nat'l Med. Ctr. , C.D. Cal., No. 2:24-cv-02898, case filed 4/9/24 .

(Company comment added in paragraph four.)

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Walmart defends sunscreen as 'reef friendly'

 legalnewsline.com/stories/657650661-walmart-defends-sunscreen-as-reef-friendly

April 11, 2024

Federal Court

Spencer Sheehan of Sheehan & Associates, P.C. | spencersheehan.com

TAMPA, Fla. (Legal Newsline) - Walmart is arguing a class action lawsuit accusing it of destroying the ocean's coral reef is ridiculous.

The case, filed Nov. 13 in Florida federal court, argued that despite Walmart's sunscreen being labeled as "Reef Friendly, it actually contains ingredients that are harmful to reefs.

It is being pursued by a controversial class action lawyer who has filed hundreds of cases and has been described as a "wrecking ball" by one of the judges tired of hearing them. Attorney Spencer Sheehan is also awaiting his punishment from a New York federal judge who held him in contempt last year.

"Plaintiff does not state that she did not like the Product, that it caused health problems, or that it in fact did harm coral reefs—or even that she used the Product near a coral reef," Walmart's March 29 motion to dismiss says.

"Instead, she takes issue with the inclusion of avobenzone, homosalate, octisalate, and octocrylene, which she contends makes the 'reef friendly' label false and misleading. These claims are baseless."

An asterisk on the phrase "Reef Friendly" directs consumers to the back of the packaging for its definition, which is that the sunscreen is compliant with Hawaii's SB2571. That law banned oxybenzone and octinoxate from sunscreens.

The lawsuit does not allege the presence of those chemicals but does four others not subject to the Hawaii law that Walmart bases its "Reef Friendly" claim on.

The suit claims named plaintiff Nakiah Alvarado would not have paid \$4.88 for her sunscreen had she known those four chemicals were in it. Walmart says she and Sheehan filed suit rather than seeking a refund pursuant to an express guarantee on the sunscreen.

The chemicals - avobenzone, homosalate, octisalate and octocrylene - are listed as inactive ingredients on the label.

William Wright of West Palm Beach has teamed with Sheehan for the lawsuit. Walmart is represented by Evelyn Cobos and others at Greenberg Traurig in Miami and Los Angeles.

How Walmart's privileged documents led to \$101 mln jury verdict for ex-supplier

 [reuters.com/legal/government/column-how-walmarts-privileged-documents-led-101-mln-jury-verdict-ex-supplier-2024-04-10](https://www.reuters.com/legal/government/column-how-walmarts-privileged-documents-led-101-mln-jury-verdict-ex-supplier-2024-04-10)

Alison Frankel

The logo of a Walmart Superstore is seen during the outbreak of the coronavirus disease (COVID-19), in Rosemead, California, U.S., June 11, 2020. Picture taken June 11, 2020. REUTERS/Mario Anzuoni/File Photo Purchase Licensing Rights , opens new tab

April 10 (Reuters) - A former Walmart supplier won a \$101 million verdict , opens new tab on Tuesday from an Arkansas federal jury that found Walmart breached its agreement to buy millions of boxes of nitrile gloves in the first 18 months of the COVID pandemic.

London Luxury, which was crippled when Walmart canceled the deal to buy 72 million boxes of gloves, persuaded jurors that Walmart ditched the agreement not because of problems on London Luxury's end but because of the collapse of Walmart's plan to resell the gloves to a medical equipment supplier at a hefty profit.

And according to London Luxury's lawyers at Holwell Shuster & Goldberg, Walmart (WMT.N) , opens new tab can blame its own privileged documents, in part, for helping them make their client's case.

"Over and over, the documents contradicted what Walmart witnesses said," said London Luxury counsel Brendon DeMay in an interview on Wednesday. "It was part of a pattern."

Before I explain how Holwell Shuster was able to pierce Walmart's privilege, I should note that Walmart prevailed on its counterclaim that London Luxury's CEO persuaded the Walmart executive who was its primary liaison with the company to breach his duty to the company with the promise of a future business relationship.

The jury awarded Walmart \$350,000 in damages based on evidence , opens new tab that London Luxury's CEO was plotting , opens new tab with his Walmart liaison to open their own nitrile glove factory in Florida.

A Walmart spokesperson said the company does not believe the jury's breach-of-contract verdict is supported by the evidence that emerged at trial and is weighing its post-trial options.

Walmart also reiterated that the real story is the alleged scheme between London Luxury and its since-fired employee. At trial, Walmart asserted that London Luxury wooed the employee with a swanky trip to Miami and the promise of a future partnership.

"The jury's findings that London Luxury engaged in tortious conduct vindicate what Walmart has argued from day one: This case is about allegations of London Luxury's unethical behavior," the Walmart statement said. "We expect our suppliers to live up to the highest ethical standards, and we look forward to continuing to make our case in court that behavior like London Luxury's is unacceptable."

Walmart was represented by Jones Day, which did not respond to my query.

So how did Holwell Shuster get its hands on Walmart documents?

Earlier this year, as U.S. District Judge Timothy Brooks of Fayetteville weighed summary judgment motions, Walmart told Holwell Shuster that it intended to call one of its in-house lawyers to testify about the initial February 2021 agreement between Walmart and London Luxury. That agreement was a key point of dispute: Walmart insisted that the employee who signed the deal had essentially gone rogue and entered into the agreement without authorization.

Walmart said the lawyer would offer only limited testimony to rebut London Luxury's assertion that she had reviewed and approved the agreement. The company said it was waiving privilege for her testimony, but only over the limited time period before the execution of the agreement.

Holwell Shuster contested the proposed limited waiver. A week before the in-house lawyer's deposition, the firm asked Brooks to order Walmart to produce an array of privileged documents based on Walmart's plan to call the lawyer as a trial witness.

Walmart protested, but in a March 8 opinion [\[link\]](#), opens new tab, Brooks ruled that Walmart was required to turn over all of the lawyer's documents that it had designated as privileged, except for those dated after the start of the litigation and those related to Walmart's internal investigation of the London Luxury deal.

And that wasn't all. The judge also ruled that Walmart could not claw back inadvertently produced documents in which Walmart employees discussed legal advice from another Walmart in-house lawyer. This lawyer had concluded that the February agreement was enforceable. Walmart waived privilege about his assessment, Brooks said, when non-legal employees repeated and discussed his advice.

In addition, Brooks said that Walmart had implicitly waived privilege over documents from a third in-house lawyer who had advised the company on its prospective deal with the medical equipment outfit slated to buy the gloves that London Luxury supplied to Walmart. The judge ordered Walmart to turn over all of her pre-suit documents (except for those related to the internal investigation) to Holwell Shuster.

Brooks' order came too late for Holwell partner Priyanka Timblo to get hold of Walmart's privileged documents before her deposition of the in-house lawyer on the company's witness list. But at trial, Timblo said, she was able to use privileged materials to undermine the lawyer's contention that she hadn't reviewed the February agreement and would have sounded an alarm if she had.

"The documents showed she had not been straight with us in her deposition," Timblo said.

In another example of how privileged documents affected the trial, DeMay said he was questioning a Walmart witness who denied that the company canceled its deal with London Luxury because of the collapse of its plan to resell the gloves to the medical equipment company. DeMay said he was able to confront the witness with emails that said the medical equipment company had, in fact, ditched the deal.

He later told jurors during his closing argument [\[link\]](#), opens new tab that the Walmart witness' testimony was "a lie" disproved by the company's own documents. (The email exchange he cited was one of a batch of documents Walmart produced during the trial, as Holwell Shuster continued to press the company to turn over all of the material encompassed by Brooks' order.)

DeMay's closing argument emphasized the contrast between testimony from several Walmart witnesses, including the in-house lawyer questioned by Timblo, and the privileged material that Walmart was forced to disclose. The documents, he told jurors, proved that the company was lying when it sought to scapegoat its allegedly rogue employee and impugn the quality of London Luxury's products.

If there is a lesson from Holwell Shuster's fight to see Walmart's privileged documents, DeMay said, it's that lawyers should keep pushing to find out what's hidden beneath that cloak. "We kept pestering the judge," said DeMay, who noted that London Luxury's CEO is now planning to revive the company. "But you don't know what's there until you get the documents. You have to be persistent."

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Alison Frankel
Thomson Reuters

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NEWS

In Talc DQ Hearing, Beasley Allen's Andy Birchfield Testifies: 'It Never Crossed My Mind'

Andy Birchfield, of Beasley Allen, took the stand on Wednesday to fend off Johnson & Johnson’s allegations that he breached his ethical duties by working with one of its former lawyers to come up with a proposed \$19 billion talc settlement.

April 10, 2024 at 07:24 PM

Litigation



Amanda Bronstad
staff reporter



What You Need to Know

- Johnson & Johnson has alleged that Birchfield partnered with James Conlan, who was outside counsel while as a partner at Faegre Drinker Biddle & Reath until 2022.
- In a New Jersey courtroom, Birchfield said he viewed Conlan’s company, Legacy Liability Solutions, as an opportunity.
- When asked, 'Do you believe that you are a side-switching lawyer?', Conlan replied, 'No. I’m not practicing law, for one thing.'

Andy Birchfield took the stand on Wednesday to fend off Johnson & Johnson’s allegations that he breached his ethical duties by working with one of its former lawyers to come up with a proposed \$19 billion talcum powder settlement.

Johnson & Johnson has alleged that Birchfield, of Beasley Allen, partnered with James Conlan, who was outside counsel while as a partner at Faegre Drinker Biddle & Reath until 2022, to push a the proposal, which was more than double the \$8.9 billion settlement offered last year in the bankruptcy of subsidiary LTL Management.

In a New Jersey courtroom on Wednesday, Birchfield told Johnson & Johnson attorney Steve Brody, of O’Melveny & Myers in Washington, D.C., that he viewed Conlan’s company, Legacy Liability Solutions, as an opportunity.

“It’s true that Jim Conlan is the CEO of Legacy, and it is true that Jim Conlan worked at Faegre while Faegre was working with J&J,” he said. “None of that was part of the evaluation of this process. We did not need any of the information that Jim Conlan would have had as a lawyer.”

Jeffrey Pollock, a partner at Fox Rothschild in Princeton, New Jersey, who represents Birchfield, objected numerous times to Brody's questioning, including that of Conlan, who testified for most of the day. Much of his objections centered on Brody's discussion of documents that weren't part of the record.

"Either put up or shut up," Pollock said at one point.

The hearing, before Atlantic County Superior Court Judge John Porto and U.S. Magistrate Judge Rukhsanah Singh, both in New Jersey, comes after Johnson & Johnson filed [motions to disqualify](#) Birchfield, in Montgomery, Alabama, and his firm, from leadership of the talc litigation. Beasley Allen principal Leigh O'Dell is co-lead plaintiffs' counsel in the talc multidistrict litigation.

Both Porto, the judge in the talc multicounty litigation in New Jersey state courts, and Singh, in the talc multidistrict litigation in the U.S. District Court of New Jersey, found that more evidence was needed.

The motions are centered on the second Chapter 11 case of LTL, in which Johnson & Johnson had arranged to resolve 60,000 talc cases for \$8.9 billion. Birchfield and other plaintiff lawyers, most of whom represent ovarian cancer victims, opposed the deal.

On cross-examination, Brody asked Birchfield why he never let Johnson & Johnson know he was working with Conlan, its former lawyer, on an alternative proposal.

"It never crossed my mind," he said on Wednesday.

He also asked why Birchfield's firm didn't work with any other companies that acquire and manage mass tort liabilities.

"You chose to work with the one that had Johnson & Johnson's former lawyer from the talc matters as its CEO, didn't you?" he asked Birchfield.

"Legacy came to us," Birchfield responded. "They laid out this proposal that would be a path to the finality that we understand that J&J had been seeking—finality outside bankruptcy."

'We Got No Response'

The testimony comes on the second day of an evidentiary hearing. Erik Haas, Johnson & Johnson's worldwide vice president of litigation, and outside counsel Jim Murdica, of Barnes & Thornburg, testified on the first day of the hearing that [they were shocked](#) when they found out Birchfield was working with Conlan.

Haas, in that March 26 testimony, called it an "egregious violation" of their ethical duties, and Murdica said he was "kind of dumbfounded" when he discovered a privilege log disclosed in the talc multidistrict litigation revealing the two had been working together as early as April 2023, about six months before they originally learned about the alliance in an Oct. 18 letter from Conlan to Haas and other Johnson & Johnson executives.

In Wednesday's testimony, Conlan, who joined Faegre Drinker in 2020 after decades at Sidley Austin, said his job was to discuss "obstacles and opportunities" to Johnson & Johnson regarding resolving the talc litigation, including through bankruptcy. But Jones Day, White & Case, and Weil Gotshal & Manges took the lead on representing Johnson & Johnson in bankruptcy matters.

On Feb. 2 of last year, three days after the U.S. Court of Appeals for the Third Circuit struck down LTL's first bankruptcy, he wrote Haas and Johnson & Johnson CEO Joaquin Duato with Legacy's first proposal to acquire its talc liabilities. The letter informed them that, as part of the proposal, he reserved the right to meet with plaintiffs' firms with talc clients.

"We got no response," he told Brody. "No 'yes,' no 'no', no 'maybe,' no confidentiality objection. Nothing."

Because of that letter, he said, he didn't believe it was necessary to alert Johnson & Johnson's representatives when he met with Birchfield, starting on May 2 of last year.

"We frankly thought we'd put them on notice," he said.

But Brody noted that letter didn't mention Beasley Allen or its lawyers. In fact, he said, Conlan didn't disclose he was working with Beasley Allen until his Oct. 18 letter.

"Do you believe that you are a side-switching lawyer?" Pollock asked Conlan.

"No," he replied. "I'm not practicing law, for one thing."

"At any point in time, did you ever disclose a single J&J confidence to Andy Birchfield?" Pollock asked.

"Absolutely not," Conlan responded.

When asked about the \$19 billion settlement figure, Conlan told Pollock that Johnson & Johnson's market capitalization fell by nearly that amount on the day the Third Circuit tossed its first LTL bankruptcy.

"The market traded the stock down \$18 billion," he said. "It recovered some later that day, but it was clear the market really didn't like this liability."

Porto said the hearing would continue into a brief third day at a later date yet to be determined.

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David Boies can't ignore clients' liability releases by 'simply invoking' name 'Epstein,' sanctions bid says

 [abajournal.com/news/article/sanctions-bid-says-david-boies-cant-ignore-clients-liability-releases-by-simply-invoking-the-name-epstein](https://www.abajournal.com/news/article/sanctions-bid-says-david-boies-cant-ignore-clients-liability-releases-by-simply-invoking-the-name-epstein)

Ethics

By Debra Cassens Weiss

April 10, 2024, 12:35 pm CDT

David Boies is the chairman and a managing partner at Boies Schiller Flexner. An April 8 motion seeks sanctions against Boies and law firm co-managing partner Sigrid McCawley. (Photo by Kathy Anderson/ABA Journal)

Co-executors of the estate of convicted sex offender and multimillionaire financier Jeffrey Epstein are seeking sanctions against two Boies Schiller Flexner leaders for filing a proposed class action lawsuit against them, even though the lead plaintiff and other victims had signed “ironclad” liability releases in return for “massive monetary payouts.”

The April 8 motion seeks sanctions against Boies Schiller chairman David Boies and law firm co-managing partner Sigrid McCawley, Law360 reports.

The agreement signed by lead plaintiff Danielle Bensky “expressly releases” the co-executors from liability, the motion says. Boies negotiated the terms of the release, which contained McCawley’s signature, according to the motion.

“Simply invoking the name ‘Epstein’ in this case does not change the law and cannot excuse plaintiffs’ counsel’s effort to end-run well-established legal principles that favor final resolution of claims in return for release from liability,” the sanctions motions says.

The defendants seeking sanctions are Darren K. Indyke and Richard D. Kahn. Indyke was Epstein’s personal lawyer, and Kahn was his accountant, according to the class action suit, filed in February in federal court in New York City.

Law360 had previous coverage.

The money used to create the victims’ compensation fund came from a trust created by Epstein and revised two days before he hanged himself while in prison, according to the suit.

The suit alleges that Indyke and Kahn facilitated the sex trafficking when they obtained “large stacks of cash” that Epstein used to pay hush money and recruit underage victims into his sex-trafficking operation, according to the previous Law360 story. Bank withdrawals were structured to avoid reporting requirements, according to the suit.

The suit says the co-executors concealed the extent of the Epstein enterprise from Bensky and the class action plaintiffs after Epstein’s death and publicly denied that they were an integral part of the operation.

The motion for sanctions says Boies and McCawley offered four rationales for voiding the release in discussions before the suit was filed. The rationales are “frivolous,” the motion asserts.

Those rationales are that the co-executors procured the release by fraud, that they provided no consideration for the liability release, that they exceeded their authority by having the release cover them, and that there was no release from claims that arose after New York gave adults a one-year window to sue for past abuse under the Adult Survivors Act.

Boies and McCawley released a statement to the ABA Journal that said the defendants’ attempts to seek sanctions “are as hollow as they are typical. Threats and intimidation may have been an effective tool for silencing vulnerable young girls alone and without anyone to represent or support them. That time has [passed]. The brave survivors of Epstein’s abuse cannot now be intimidated into silence. Mr. Indyke, Mr. Kahn and their counsel should be further ashamed for trying.”

The sanctions bid “fails for many independent reasons,” the statement said.

“To begin with, defendants don’t even claim that all victims provided releases. Moreover, any release of defendants procured through their control of Epstein’s estate would be invalid under New York law, including as procured by fraud and duress. In addition, with respect to many of plaintiffs’ claims, any purported release would be invalid because the claims did not exist at the time of the purported release but only arose when New York later passed a statute authorizing the claims. (There can be no dispute that under New York law, a purported release of a future claim is void.)”

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April 11, 2024, 3:00AM PDT
Quinn Emanuel Inks \$40 Million Deal to Fund Private Equity Suits
By [Emily R. Siegel](#)
Exclusive

- Funding giant Longford Capital will provide \$40 million in new deal
- Quinn Emanuel has represented Apollo, KKR, Carlyle Group in court

Bloomberg Law News 2024-04-11T12:39:48839973876-04:00
Quinn Emanuel Inks \$40 Million Deal to Fund Private Equity Suits

By Emily R. Siegel 2024-04-11T06:00:14000-04:00
Funding giant Longford Capital will provide \$40 million in new deal
Quinn Emanuel has represented Apollo, KKR, Carlyle Group in court

Quinn Emanuel Urquhart & Sullivan will receive \$40 million in litigation funding from Longford Capital to finance lawsuits for private equity firms and their portfolio companies.

The deal, announced Thursday, will offer funding for private equity clients who want to pursue litigation without harming profit and loss statements, according to the law firm. Quinn Emanuel said liquidity challenges posed by high interest rates make outside funding particularly attractive for private equity companies.

Funding will be available for private equity clients across different types of litigation, said Jonathan Bunge, co-chair of Quinn Emanuel’s national trial practice and managing partner of the Chicago office. That sets it apart from the firm’s previous arrangements with Longford and others, in which funding was decided on a case-by-case basis, he said.

“There might be a reason, given their business model, why they don’t want to pursue a valid claim held by a portfolio company because of the impact that might have on the portfolio company’s earnings,” Bunge said. “What we’re trying to do is listen to those concerns of our clients and come up with an alternative that they might find attractive.”

Quinn Emanuel has represented some of the largest private equity firms, including Apollo Global Management, KKR, and The Carlyle Group. With more than 1,000 lawyers, it is one of the largest litigation firms in the country, bringing in more than \$1.6 billion in gross revenue in 2022, according data from The American Lawyer.

Longford will provide financing for attorneys fees and costs, while also offering private equity clients the option of investing directly with the company. The funder will treat legal claims as corporate assets that can be monetized, it said, after underwriting and due diligence.

This approach will enable Quinn Emanuel’s clients to realize revenue and reduce liquidity challenges they’re facing, according to William Farrell, Longford’s managing director and co-founder.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XF0873HK000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93...> 1/3

"The long-term benefits will persist once interest rates stabilize and once the market opens up again for PE transactions," Farrell said. "In the short term—I'm thinking 24, 36 months— this is a really interesting solution."

The funding will finance business disputes, such as breach of contract, fraud, and intellectual property cases. Much of those fights among private equity companies are waged behind closed doors in arbitration.

Big Law and Funding

Litigation finance is a \$15.2 billion industry in which investors fund lawsuits in exchange for a portion of any award. It's become increasingly attractive to Big Law firms, even as the overall market for deals slows.

The largest US law firms were involved in 35% of new funding commitments last year, up from 28% in 2022, according consultant Westfleet Advisors. Total funding commitments fell by 14% over the same period.

Growing awareness and acceptance of the industry has contributed to the embrace from big law firms, said Farrell, but these firms also tend to handle the complex litigation that commercial litigation funders find appealing.

"We like cases that are on the larger side," he said. "The average amount in controversy of a Longford investment is over \$100 million and firms like Quinn Emanuel are best positioned to be able to handle the sophistication of a case of that size."

Bunge said the expense of complex litigation opens the door to alternative fee arrangements.

"There's just an interest among potential litigants to understand what alternatives might be to a straight hourly model," he said. "It's a good way to deal with upfront expenses in a way that might be attractive."

Longford Capital is a private investment company based in Chicago that provides capital to law firms, companies, government agencies and other entities involved in large-scale commercial disputes. It bills itself as one of the first litigation funds in the United States as well as among the world's largest. It has \$1.2 billion in assets under management.

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Randazzo's death clouds path forward on criminal, civil FirstEnergy bribery cases

[cleveland.com/open/2024/04/randazzos-death-clouds-path-forward-on-criminal-civil-firstenergy-bribery-cases.html](https://www.cleveland.com/open/2024/04/randazzos-death-clouds-path-forward-on-criminal-civil-firstenergy-bribery-cases.html)

By Jake Zuckerman, jzuckerman@cleveland.com Andrew J. Tobias, andrew.j.tobias@cleveland.com

April 11, 2024

- Updated: Apr. 11, 2024, 10:29 a.m.|
- Published: Apr. 11, 2024, 9:00 a.m.



Former FirstEnergy CEO Chuck Jones, at left, and former Public Utilities Commission of Ohio Chairman Sam Randazzo, at right, prepare to leave the Summit County Court of Common Pleas after their Feb. 13, 2024 arraignment. (David Petkiewicz/Cleveland.com)

This article includes references to suicide.

COLUMBUS, Ohio – The death of a former state regulator has wrenched state and federal criminal cases accusing him of accepting a \$4.3 million bribe from a power company before doing its bidding inside Ohio's government.

Sam Randazzo was found dead Tuesday in what Franklin County officials said was a "suspected suicide." He was 74.

Two criminal cases against Randazzo are pending after his death. The attorney general also brought a civil case against Randazzo that froze millions of dollars of his money. And FirstEnergy investors are still suing the company, in part for its officials allegedly paying Randazzo \$4.3 million shortly before he took office. Randazzo pleaded not guilty and said the payment was not a bribe, but a contractual obligation.

The charges against Randazzo and his businesses, years in the making, now stand on uncertain ground.

The federal government arrested ex-Ohio House Speaker Larry Householder for taking a separate, multimillion dollar bribe from FirstEnergy in July 2020. Months later, FBI agents were seen raiding Randazzo's home and leaving with boxes of material. By the summer of 2021, FirstEnergy said in a deferred prosecution agreement that it bribed both Householder and Randazzo.

Late last year, the federal government charged Randazzo with an 11-count indictment. The state followed suit soon thereafter, also charging businesses of Randazzo's that were allegedly part of the scheme. The state also charged two top FirstEnergy officials – CEO Chuck Jones and executive and lobbyist Mike Dowling – accused of orchestrating the bribes. The prosecutors say Randazzo helped draft and pass legislation passing a bailout worth more than \$1 million to FirstEnergy. He also voted to waive a regulatory review of FirstEnergy's costs to customers and spending – a review Jones and Dowling saw as financially perilous for the company.

Before Tuesday, Randazzo was the only remaining federal criminal defendant. Householder was sentenced to 20 years in prison. Former Ohio Republican Party Chairman turned lobbyist Matt Borges was sentenced to five. Two conspirators – FirstEnergy Solutions lobbyist Juan Cespedes and Householder's political adviser Jeff Longstreth – pleaded guilty to racketeering charges and agreed to cooperate. They have not been sentenced, suggesting the federal investigation remains active.

A fifth conspirator, lobbyist Neil Clark, died by suicide in early 2021. Prosecutors subsequently dropped the charge against him.

U.S. Attorney for the Southern District of Ohio Ken Parker, through a spokeswoman, declined to comment on Randazzo's death. As of Wednesday afternoon, his office made no formal motion to drop the indictment.

The charges against Randazzo will likely be dropped, according to David DeVillers, who in his former role as U.S. Attorney brought the first charges in the FirstEnergy cases. The government might find a way to go after his assets as a form of restitution, but you can't put a dead person on trial. And any statements he may have made to investigators before his death are no longer of evidentiary value, said DeVillers.

"For all practical purposes, it's gone," he said.

He said federal charges against Jones and Dowling are unlikely as well. Federal prosecutors must heed the U.S. Department of Justice's policy known as the "Petite principal," which prohibits them from prosecuting a case if a state reaches a decision on the merits. While there are exceptions to the rule, they're rare, he said.

Randazzo's death won't affect the state case, Ohio Attorney General Dave Yost said Wednesday after the governor's State of the State. He said Randazzo's death is a tragedy, and he feels bad for the family.

"We're not dismissing any charges, we're not dismissing any defendants," he said.

The state's indictment names Randazzo, Jones and Dowling, plus two businesses solely owned and operated by Randazzo. Yost also brought a civil lawsuit against FirstEnergy and Randazzo. Earlier this year, the Ohio Supreme Court ruled for Yost in allowing the state to freeze millions of Randazzo's assets. That case is now stayed by a Franklin County Common Pleas judge, who ruled the case overlaps so significantly with the criminal charges that a stay was needed to protect Randazzo's Fifth Amendment rights against self-incrimination. It's unclear how his death will alter that reasoning.

Randazzo's death doesn't necessarily mean the end of the cases against his LLCs, which could have money the state wants, according to Jonathan Entin, a retired professor of constitutional law at Case Western Reserve University. Randazzo's estate would need to determine how or whether to mount a defense.

"The LLCs are legal persons in their own right," he said. "So the fact that Randazzo is no longer alive doesn't necessarily mean that the government is somehow unable to proceed against them."

A Yost spokeswoman said the office would notify the state court that the case against Randazzo is "abated by death." But she said his death does not affect a corrupt enterprise charge and that his companies will remain defendants.

Roger Sugarman, an attorney for Randazzo, didn't respond to inquiries. Richard Blake, another Randazzo attorney, didn't respond to a text message. But speaking to The Columbus Dispatch, he said Randazzo was "tarred and feathered in the media by the prosecutors in this case before having an opportunity to address the charges."

It's unclear how rare it is to see two conspirators in the same criminal nexus die by suicide, as Randazzo and Clark did, but there are some examples. J. Clifford Baxter, the former vice chairman of Enron Corp., the modern-day archetype of corporate crime, died by suicide in 2002. Bernie Madoff and his wife, according to the New York Times, attempted to die by suicide in 2008 after the former admitted to engineering the largest Ponzi scheme in history.

Suicides happen, DeVillers said, particularly to those who are released from detention before their trials.

House Minority Leader Allison Russo, a Columbus area Democrat, speaking to reporters Thursday, called the suicides "heartbreaking."

"What I think is particularly tragic is that the lives and livelihoods of individuals and families that have been destroyed because of this corruption," she said.

There's no guarantee that the Jones and Dowling cases will go to trial, so Randazzo's death could mean there won't be an actual trial where all evidence is shown and all parties face their accuser.

To Entin, the greatest mystery is how much of House Bill 6, which was passed as a result of FirstEnergy's bribery, will remain Ohio law. State lawmakers repealed a nuclear bailout and "decoupling" provision, the most lucrative pieces of the law narrowly written to FirstEnergy's benefit. But HB6 also included a ratepayer-funded bailout through 2030 of two coal plants owned by American Electric Power and other Ohio utility companies. And it also decimated the state's clean energy laws.

"The trial does provide a very formal way to get a big piece of the story told, even if not the whole thing," Entin said. "But it's still striking, with all of these developments, that there are still pieces of HB6 that are on the books and will stay on the books."

If you or someone you know needs help, the national suicide and crisis lifeline in the U.S. is available by calling or texting 988. There is also an online chat at 988lifeline.org

Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.

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DeWine, Husted won't comment on Rendazzo's death amid corruption trial

5 news5cleveland.com/news/politics/ohio-politics/gov-dewine-lt-gov-husted-wont-comment-on-rendazzos-death-amid-largest-corruption-trial-in-ohio-history

Morgan Trau

April 10, 2024



COLUMBUS, Ohio — A second person accused in the largest corruption scheme in Ohio history has died in a suspected suicide. Leaders and lawmakers shared their thoughts — except the two men at the top of the state: Gov. Mike DeWine and Lt. Gov. Jon Husted.

The governor gave his State of the State address Wednesday, focusing mainly on children and education, but the speech came under the shadow of the death of former chairman of the Ohio Public Utilities Commission Sam Rendazzo, who had been indicted on dozens of charges related to the House Bill 6 scandal.

Rendazzo, 74, was found Tuesday by Columbus firefighters in a building he owned, according to a spokesperson.



His death is being investigated as a "suspected suicide," the coroner's office said. A ruling on the cause and manner of his death will be made following a scheduled autopsy.

"Sam was tried and convicted in the media before he even had a chance to defend himself at trial," Rendazzo's attorney Richard Blake told me, confirming it was suicide.

RELATED: Ex-PUCO chairman Sam Randazzo, indicted in corruption scheme, dies by 'suspected suicide'

Randazzo pleaded not guilty in both state and federal court after he was charged with dozens of crimes related to bribery and embezzlement. He allegedly received more than \$4.3 million in bribes from FirstEnergy, according to Department of Justice officials and Attorney General Dave Yost.

Randazzo is allegedly a major player behind the House Bill 6 scandal. FirstEnergy has already admitted to bribing Randazzo with the millions so that he could help the company behind the scenes — in one way — by pushing and helping to create H.B. 6. Back in 2019, Ohio House Speaker Larry Householder took a \$61 million bribe in exchange for legislation to give FirstEnergy a \$1 billion bailout, named H.B. 6, all at the expense of the taxpayers.

Former FirstEnergy CEO Chuck Jones, former FirstEnergy Senior Vice President Michael Dowling and Randazzo were all hit with state bribery charges. Each pleaded not guilty during their joint arraignment in mid-February. They are accused of masterminding the corruption scheme.

If the autopsy confirms that it was suicide, he would be the second defendant accused in the scandal who died by suicide. Neil Clark, a lobbyist accused of bribery, died after pleading not guilty in 2021.

Fast Facts

In March 2023, a jury found that Householder and former GOP leader Matt Borges, beyond a reasonable doubt, participated in the racketeering scheme that left four men guilty and another, Clark, dead by suicide.

In late June that year, federal judge Timothy Black sentenced Householder to 20 years in prison. Borges got five years. The two surviving defendants — Jeff Longstreth and Juan Cespedes — took plea agreements early on, helping the FBI, and are still awaiting their sentencing. The feds are asking for zero to six months for them.

Executives

Ohio Gov. Mike DeWine

In February, DeWine defended his top advisor after a criminal indictment alleged she knew about millions going to Randazzo prior to his appointment to power by the governor.

Former Chief of Staff Laurel Dawson helped vet Randazzo after her family had already received a \$10,000 loan from him. The governor's team insists she didn't know the millions was a bribe payment.

RELATED: Gov. DeWine defends top advisor after indictment questions how much she knew about H.B. 6 scandal

DeWine's office said it did not have an immediate comment on Randazzo's death on Tuesday and declined to comment on Wednesday.

Back in December, I asked DeWine in a one-on-one interview if he regretted appointing Randazzo to the PUCO.

"Oh, look, if I knew what I know now, if I knew that — I certainly would not have appointed Sam Randazzo to that position," the governor responded.

But typically, when H.B. 6 documents are released about the administration, they focus on his second in command.

Ohio Lieutenant Gov. Jon Husted

Before Husted became DeWine's running mate, FirstEnergy gave him \$1 million through a dark money group in 2017, according to records obtained by a group of news organizations, including News 5's media partner the Ohio Capital Journal; Floodlight, the Energy News Network and the USA TODAY Network Ohio Bureau were also a part of the coalition.

Husted is accused of being cozy with FirstEnergy executives, even being dubbed the "Golden Boy for FirstEnergy" by Clark.

"The Husted campaign never received this donation and is not affiliated with any of these groups," spokesperson Hayley Carducci told News 5.

[Click or tap here to read the full investigation.](#)

Husted and his team had no comment when asked about Randazzo and his death.

The L.G. is expected to run for governor in 2026 — against Attorney General Dave Yost.

Attorney General Dave Yost

Yost talked candidly with reporters both before and after the State of the State address.

"I was shocked, like everybody else, and saddened," Yost said. "You don't want to see anybody go like that."

However, the prosecutor said he doesn't think it will affect his case against the trio. However, a civil case has frozen Randazzo's assets – which likely means the freeze will remain in place.

"We're not dismissing any charges," Yost said. "We're not dismissing any defendants."

"The action taken by the prosecutors on this case unquestionably contributed to his mental state and final actions," Randazzo's attorney, Richard Blake, told me.

Yost didn't appreciate Blake's insinuation of guilt.

"Both federal and state prosecutors were doing their jobs," Yost responded. "A tragic outcome, but nobody bears responsibility for his actions except him."

Yost will continue fighting for justice, he told us prior to the State of the State address.

I asked if we should expect this death to impact any future defendants, such as anyone in state leadership.

"I have declined to take future questions, I'm going to continue to do that," he responded. "If there are any further results of the investigation, we will bring those, like the other things, to court and make our case there."

H.B. 6 and lawmakers

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

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

RELATED: Following legal scandal, Ohio utility companies try to raise costs — again

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

There are numerous bipartisan efforts to repeal H.B. 6 totally and to put forward ethics laws. None have gone anywhere.

House Speaker Jason Stephens

I asked Stephens for his thoughts on Randazzo's death.

"I will remind everyone I was not here during House Bill 6, I was not appointed until October of 2019," Stephens said. "I never knew Mr. Randazzo. I feel sad for the family... It's a very difficult situation."

Stephens has one of the coal plants in his district and has shown no signs of wanting to repeal the bailouts.

I asked him if he still doesn't want to repeal H.B. 6, given the dozens of additional charges filed since the last time I asked.

"It was vetted – every line of the of House Bill 6 was looked at," he said, explaining that there were committees to evaluate the pros versus cons of the corrupt legislation.

The speaker explained that in the previous General Assembly, part of H.B. 6 was repealed, but the lawmakers chose to keep the coal plant money and energy efficiency standards.

Then, in the 134th General Assembly, lawmakers passed H.B. 128 — which took out funding for nuclear power plants.

"The real issue we have in Ohio is we have incredible economic growth... the problem we have is we do not have enough power," Stephens continued. "When the winds not blowing and the sun's not shining – we have to have baseload power, whether that's nuclear, whether that's coal, whether that's gas – if we're going to be able to solve the problem of continuing economic growth, we have to have an energy policy in Ohio to meet that demand for power."

He is supportive of H.B. 79, though, which could potentially save Ohioans money on their electric bills by restoring the ability for utilities to create voluntary energy efficiency programs.

"Repealing the provisions of House Bill 6, that was passed... five years ago, after it's been reviewed and vetted, and we've had other energy bills – I think that's just so far in the past that we need to look at what we are dealing with today," Stephens argued. "Five years from now is much more important."

Yes, the issues will continue through court and "whatnot," he added.

"But as far as policy goes, the energy policy in Ohio, we need to be focused on the next 5, 10, 20 years."

Senate President Matt Huffman

Following Stephens, I asked Huffman the same two questions.

"It's a tragedy, obviously whenever someone takes their life," Huffman said. "To honest with you, I didn't know him personally.... I don't think it's really appropriate for me to comment."

When it comes to repealing H.B. 6, Huffman doesn't want to repeal the policy around energy efficiency.

However, he is more open to evaluating the coal plants.

"I never think that we should say 'Because something happened five years ago or 20 years ago' that we should say 'We're not going to talk about it anymore,'" he stated, directly addressing Stephens' comment.

"It's the Ohio revised code – it's been revised," he said. "I think we always continue to look at these things – and that, certainly, would be on the table."

Huffman's comment toward Stephens isn't unexpected, as the two are rivals and do not like each other.

House Minority Leader Allison Russo and Dems

"What is I think particularly tragic, is that the lives and the livelihoods of individuals and families that have been destroyed, is because of this corruption," Russo said. "It's heartbreaking and it's sad. There is no joy or no victory in any of that."

She and the rest of the Dems have continued to advocate for bipartisan legislation that promotes transparency and prevents corruption.

"The culture of corruption here has tentacles that are very long in the halls of the Statehouse and state government," Russo added. "And, without a doubt, it took many people at the highest levels of government, either blatantly ignoring warning signs or creating a pathway for that corruption to happen."

Russo said that thinks as the investigation continues, more public officials will be found out. She didn't name specific people but said that someone ignored warning signs or did damage control so that the PUCO appointment would move forward.

"Who has the power to do that?" she asked rhetorically. "I think all of us who are in elected office, we know at the end of the day; it is usually the elected official who has, ultimately, the power and the authority to say yes or no."

Russo and Senate Minority Leader Nickie Antonio are upset that not one bill has been passed that would prevent another H.B. 6 scandal from happening.

"It's a fact that at the highest levels of the DeWine-Husted administration, they acted on behalf of corporate interest and against the public interest, against taxpayers and against consumers," Russo said. "That failed leadership is why Ohio remains one of the most corrupt states in this country, and Ohioans deserve better."

I asked her thoughts on Stephens' comments about moving forward.

“Well, it's difficult to move forward when we're still learning things about this corruption scandal – and when people are still paying for this corruption scandal,” she said. “We've said all along because of the lack of reforms, both on the campaign financing side, the lack of ethical reforms and the lack of reforms as it relates to PUCO, specifically, that we have an environment that is ripe for another corruption scandal in the future.”

FirstEnergy made secret \$1 million payment for 'Husted campaign' in 2017, documents show

 1.next.westlaw.com/Document/I2ed50940f74d11ee9cd9ddabb544930d/View/FullText.html

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2024 WLNR 4002189

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April 10, 2024

FirstEnergy made secret \$1 million payment for 'Husted campaign' in 2017, documents show

Jake Zuckerman; cleveland.com

COLUMBUS, Ohio - FirstEnergy Corp., at the onset of what would become one of the biggest public corruption schemes in state history, gave a \$1 million "dark money" contribution to a nonprofit backing Lt. Gov. Jon Husted, new records show.

The contribution, which has not previously been reported, came from the company in 2017 to Freedom Frontier, a political 501(c)(4) nonprofit that can accept unlimited funds from corporations without disclosing the source. FirstEnergy's internal records classify the payment as for the "Husted campaign." In 2017, Husted was a top contender for the Republican nomination to become Ohio governor before he agreed to join the ticket of now-Gov. Mike DeWine. The move avoided an expensive GOP primary, cemented their front-runner status and gave the pair a formidable war chest.

The seven-figure payment was revealed in the 2022 deposition of a FirstEnergy executive testifying in a lawsuit brought by shareholders. The shareholder lawsuit is one of several legal tentacles growing out of a bribery scandal that sent a former Ohio House speaker to prison and resulted in the indictments of the state's former top utility regulator. Joseph Storsin, a company vice president, testified on FirstEnergy's behalf.

Among the subjects was a Jan. 21, 2020, email sent to Dowling's executive assistant, detailing the company's nonprofit contributions from year 2017. The payment was made to an independent expenditure group, not Husted's campaign.

Hayley Carducci, a spokeswoman for Husted, said Tuesday that the Husted campaign is not affiliated with the group. She did not answer additional questions. Husted is laying the ground work for a 2026 run for governor.

Cleveland.com/The Plain Dealer obtained the 600-page deposition via public records request. A DeWine spokesman did not respond to an inquiry Tuesday.

FirstEnergy has previously admitted to bribing ex-House Speaker Larry Householder with \$60 million routed through dark-money nonprofits and the state's former top utility regulator Sam Randazzo with \$4.3 million. In exchange, FirstEnergy sought preferable regulatory treatment from Randazzo and help from both men in passing House Bill 6 - 2019 legislation to bail out the company's nuclear plants via a \$1 billion infusion from ratepayers.

In 2021, the company paid a \$230 million penalty to avoid a conspiracy charge and agreed to cooperate with the federal government. Householder has been sentenced to 20 years in federal prison and still faces state charges. Randazzo pleaded not guilty to state and federal charges. However, he was found dead by apparent suicide Tuesday at the age of 74. Ex-FirstEnergy CEO Chuck Jones and executive and top lobbyist Mike Dowling are facing state bribery charges alongside Randazzo.

Team DeWine and FirstEnergy

Neither DeWine nor Husted have been accused of criminal or civil wrongdoing in connection with the passage of HB6 or Randazzo's appointment. But the new payment adds to a growing known total of "dark money" (a reference to the untraceable nature of the contributions) to support the two men at the height of state politics. That includes:

- On Oct. 10, 2018, FirstEnergy officials met privately with DeWine and Husted at a Republican Governors Association fundraiser, according to testimony from Householder's trial. The next day, the company wrote the RGA a \$500,000 check, tax records show. The RGA spent about \$1.7 million supporting DeWine and Husted in the weeks that followed, records show.
- Another FirstEnergy-funded nonprofit contributed \$300,000 to a nonprofit backing DeWine and \$75,000 to another backing his daughter in a countywide campaign in Southwest Ohio, tax records show.

FirstEnergy spokeswoman Jennifer Young said the company is unable to respond to questions about the Freedom Frontier payment due to ongoing litigation.

Along with a money trail, records stemming from the investigations show DeWine and Husted repeatedly intervening to ensure Randazzo's appointment and pass a nuclear bailout, which DeWine eventually signed.

On Dec. 18, 2018, Jones, Dowling, DeWine and Randazzo had dinner together in downtown Columbus. From there, Dowling and Jones went to Randazzo's house to discuss a \$4.3 million payment and his possible interest in joining the Public Utilities Commission of Ohio as its chairman, according to text messages and other records released in the various investigations. The money came through just after the New Year.

DeWine appointed Randazzo to the job weeks later, despite a warning from a former aide regarding Randazzo's alleged "opaque and undisclosed" ties to FirstEnergy. Randazzo, according to the Associated Press, publicly credited Husted and DeWine's chief of staff Laurel Dawson with talking him into applying.

In early 2019, Dawson knew that Randazzo had received a \$4.3 million payment from FirstEnergy, according to the state's indictment against Randazzo. However, DeWine has said he didn't know about this until around the time the FBI raided Randazzo's condo in November 2020. Court filings show Dawson listed as a criminal witness for the state. She still works as a senior counselor to DeWine.

At the time, DeWine also employed Dan McCarthy, a former FirstEnergy lobbyist, as his legislative director. McCarthy helped found FirstEnergy's nonprofit, Partners for Progress, that funneled about \$15 million from the company to a nonprofit Householder controlled. McCarthy resigned as DeWine's legislative director to return to lobbying, but the governor has since appointed him as a regulator on the Ohio State Racing Commission as well.

Other records released through the various investigations show that DeWine and Husted performed "battlefield triage" to save Randazzo's nomination after an advocacy researcher first unearthed financial records tying FirstEnergy to Randazzo's companies. And texts from Jones and Dowling mention Husted lobbying state lawmakers to extend the terms of FirstEnergy's bailout.

"On July 16, 2019, Dowling reported to Jones that, according to 'our intel,' Randazzo, D. McCarthy, and J. Husted were 'still trying to get [FirstEnergy Solutions] some more years' of subsidies," according to a FirstEnergy-produced aid Storsin relied on for his deposition.

Untraceable

Dowling, in a presentation to FirstEnergy's Corporate Governance Committee in February 2018, provided a blunt assessment of why FirstEnergy likes 501(c)(4) nonprofits.

"Our preferred manner of giving is through section 501(c) groups, as these are considered 'dark money' because they are not required to disclose where the donations come from," he said.

A review of the Freedom Frontier payment is instructive. Freedom Frontier in its 2017 tax return wasn't required to disclose who provided its \$2.2 million in contributions. During the 2017-2018 election cycle, Freedom Frontier gave more than \$1 million to "Ohio Conservatives for a Change," a federal super PAC backing Husted's campaign.

Freedom Frontier is registered out of a PO box in Washington D.C. A phone number on its tax forms has been disconnected. Its stated mission is to support grassroots efforts "seeking to educate the general public on various economic and national security issues."

News reports at the time noted the Freedom Frontier money flowing to Ohio Conservatives for Change, but none identified the source of the funds.

The new documents show that in 2017 the company gave \$5 million to a nonprofit supporting then-President Donald Trump, and about \$6 million supporting two nonprofits involved in the Householder bribery affair, among others.

Catherine Turcer, executive director of Common Cause Ohio, said the records showing the payment is another example of why Ohio needs greater transparency in political spending. We're still learning about public officials proximity to a bribery scandal after years of a swarm of criminal, civil, and regulatory investigations, she said.

The complicated picture is a feature and not a bug, she said. The system is built to hide malfeasance.

"What we do know from this is the governor and lieutenant governor are very comfortable in a dark money system and figured out how to maximize the loophole in transparency to benefit themselves, their friends, and their family," she said. "The governor and lieutenant governor have figured out a way to make dark money work for them."

Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.

---- Index References ----

Company: FIRSTENERGY CORP.

News Subject: (Crime (1CR87); Fraud (1FR30); Government (1GO80); Lobby & Pressure Groups (1LO18); Regulatory Affairs (1RE51); Social Issues (1SO05))

Industry: (Electric Utilities (1EL82); Energy & Fuel (1EN13); Utilities (1UT12); Utilities Regulatory (1UT69))

Region: (Americas (1AM92); North America (1NO39); Ohio (1OH35); U.S. Midwest Region (1MI19); USA (1US73))

Language: EN

Other Indexing: (Freedom Frontier; FirstEnergy Corp.)

Word Count: 1293

End of
Document

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By Matt Levine
Opinion

But that divide seems unstable right now. For one thing, prosecutors and judges seem skeptical. Here is a 2018 law firm memo asking "Is the mosaic theory as a defense to insider trading dead," and I occasionally [quote](#) the time US Supreme Court Justice Sonia Sotomayor told a lawyer that there are "regulations to stop" companies "talking to analysts."

But for another thing, modern markets really are more professional and efficient and competitive than they used to be, and the bar for what is material *to investors* probably is lower. If you are an analyst at a hedge fund, and you spend all your time thinking about a couple of dozen companies, and you buy lots of alternative data and talk to lots of experts and do lots of investigating of those companies, and you generally wring every possible insight out of public information to inform your trading decisions, well, analysts at a dozen other hedge funds are doing the same thing.

And if somebody at a company came to you and said "hey here's a little piece of news that will move our stock by 0.5% next week," that's huge! Your portfolio manager runs a highly levered, factor-neutral, short-term investing strategy; if you can regularly bring her 0.5% idiosyncratic weekly profits, that translates into vast riches for all of you. Algorithmic trading firms mint billionaires by being right 51% of the time; a little bit of reliable edge, in modern markets, is hugely valuable. It makes no sense to say that it's not material.

I talk a lot about stocks, but this is true everywhere. We [talked a few weeks ago](#) about a weird email from the US Labor Department's Bureau of Labor Statistics to a list of "super users" of its inflation data, giving a bit of detail about why publicly announced inflation data was surprising. At the New York Times, Ben Casselman and Jeanna Smialek have more about the super users:

The Bureau of Labor Statistics shared more information about inflation with Wall Street "super users" than previously disclosed, emails from the agency show. ...

Emails obtained through a Freedom of Information Act request show that the agency – or at least the economist who sent the original email, a longtime but relatively low-ranking employee – was in regular communication with data users in the finance industry, apparently including analysts at major hedge funds. And they suggest that there was a list of super users, contrary to the agency's denials. ...

Many of the recipients appear to have been in-house economists at large investment banks such as Barclays, Nomura and BNP Paribas.

Others work for private research firms, which sell their analysis to investors. And some recipients appear to have been analysts at large hedge funds such as Millennium Capital Partners, Brevan Howard and Citadel, which trade directly on their research.

The emails were never *material*, exactly. But:

There is no evidence in the emails that the employee provided early access to coming statistical releases or directly shared other data that wasn't available to the public. In several instances, the employee told users that he couldn't provide information they had requested because it would require disclosing nonpublic data.

But the emails show that the employee did engage in extended, one-on-one email exchanges with data users about how the inflation figures are put together. Such details, though highly technical, can be of significant interest to forecasters, who compete to predict inflation figures to hundredths of a percentage point. Those estimates, in turn, are used by investors making bets on the huge batches of securities that are tied to inflation or interest rates.

I think that there was once a view that sending hedge funds an inflation data release in advance is obviously bad, but answering their technical questions after the information is released is fine. The super users were the ones who really cared about the data, and helping them understand it better was good customer service and didn't really hurt anyone else. But I'm not sure people think that anymore.

Pawan Passi

Pawan Passi was the head of equity syndicate at Morgan Stanley. Big banking clients – corporations, private equity firms – would sometimes come to Morgan Stanley for block trades, saying “we’re going to sell a big block of stock in Company X after the close today and we will want a bid from you, but don’t tell anyone, this is highly confidential.” Passi would then [call some of his favorite hedge fund customers](#) and say “hey, there’s a big block of Company X coming after the close today, get ready.” The hedge funds would then short the stock, knowing that they would be able to buy at a discount in the block trade and make a quick profit. Morgan Stanley would be better positioned to win the block trade, because it had already lined up buyers (the hedge funds). Good for Morgan Stanley, good for Passi, good for the hedge funds.

Bad for the client – the seller of the block – who expected Morgan Stanley to keep the deal confidential and who probably got a lower price on the trade. Eventually this was discovered, Passi was fired, Morgan Stanley paid a big fine, Passi paid a smaller fine and was banned from the securities industry for a year, and presumably the Morgan Stanley clients whose block trades were leaked – [firms like Blackstone, Oaktree and Cinven](#) – were mad about it, though when Bloomberg News asked them they declined to comment.

On the other hand, presumably the hedge fund customers were pleased with the customer service they got from Passi, and sad to see it end. *They were [never accused of wrongdoing](#)*, and they got to keep their profits. “I know who my daddy is,” one of them told Passi. And now Bloomberg’s Sridhar Natarajan, Ava Benny-Morrison, and Katherine Burton [report](#) :

A former Morgan Stanley banker who was punished in the block-trading probe that rattled Wall Street joined one of the firms that was the recipient of confidential information he leaked.

Pawan Passi was hired by Frank Fu’s CaaS Capital Management, according to people familiar with the matter. CaaS made its name partnering with banks as they sought buyers for block trades, becoming one of the biggest US funds dedicated to buying big chunks of stocks.

I love it. Really the least they could do! Presumably Passi’s knowledge of the block trade market will be helpful to a block trade specialist. But also developing a reputation for helping out down-on-their-luck equity syndicate bankers should be helpful to a block trade specialist. If your business is partnering with banks for block trades, being nice to the bankers might encourage more banks to partner with you.

Honestly though this story would be funnier if Passi turned up, not at CaaS or one of the other hedge funds he helped, but at Blackstone or Oaktree or one of the other private equity firms he *harmed*. Really Blackstone should hire him as its head of block trades. On the one hand, probably bad incentives. On the other hand, he knows all the tricks.

Starlink

The basic rule is that neither public nor private companies are allowed to lie to their investors to raise money. Securities fraud is securities fraud, whether you are public or private.

The [more advanced rule](#) is ... look, things are a bit laxer for private companies. (Not legal advice!) A public company is, in some sense, always on the record: If a public-company chief executive officer says something on television or social media, the stock will move, and if it later turns out to be false then someone will sue. A private company does not have that risk, since its stock doesn’t trade; its main risk of committing fraud is when it raises money directly from investors. If its CEO says something false on television, the company can clean that up later when it does a financing round, sending out an offering memo that says “by the way our CEO said some numbers on TV last month, but here are the real numbers.”

There are other advantages. Private companies have fewer shareholders who are generally more loyal and less likely to sue, and their disclosures are less likely to fall into the hands of the US Securities and Exchange Commission.

Here's another one. If you are a public company in the US, you have to report your financial results under US generally accepted accounting principles. You are, in some circumstances, allowed to talk about alternative numbers that *don't* comply with GAAP, but the SEC dislikes it, and generally pushes companies to emphasize the GAAP numbers rather than the non-GAAP ones, and in any case to reconcile the two. You can't just go around saying "we are profitable, adjusting for certain costs," and leave it at that. You have to show your work, and you have to lead with the fact that you are unprofitable.

Meanwhile if you are a private company, you are not allowed to *lie*; you are not allowed to present financial information that is *misleading*. But are you always held strictly to GAAP? Do your investor presentations have to start with the bad news that you have negative net income, rather than the good news that you have positive "community-adjusted EBITDA" or whatever? Nah, you are a private company, nobody expects you to be GAAP profitable, your sophisticated investors know what information they need, and you can give them that. You have a bit more leeway to report results according to accounting principles that are acceptable to *you*, rather than ones that are *generally* accepted.

In practice this means that many private companies are "profitable," on some bespoke adjusted basis, long before they are profitable as a matter of GAAP net income. Here are Bloomberg's Kiel Porter, Loren Grush, and Edward Ludlow on [SpaceX](#) :

SpaceX's prized Starlink satellite business is still burning through more cash than it brings in.

People familiar with the finances of one of the world's most valuable private companies say Starlink has – at times – lost hundreds of dollars on each of the millions of ground terminals it ships, casting doubt on claims by Chief Executive Officer Elon Musk and the company's top brass that the business is in "profitable territory."

Starlink, which provides space-based internet service to more than 2.6 million customers, often strips out the hefty cost of sending its satellites into space to make the non-public numbers look better to investors, these people said, asking not to be identified discussing private information. They describe the company's accounting as "more of an art than a science" and say it's not actually profitable based on an operational and ongoing basis.

I am always on the lookout for private companies that report customized profitability metrics that make them look *less* profitable than GAAP would, but I never seem to find any.

Oh McKinsey

The basic analysis of banking is:

- 1. A bank owns a pile of assets: loans, bonds, etc. Say they are worth \$100 today.
- 2. The bank is funded mostly by senior claims on those assets: bank deposits and other forms of debt that really should get paid back. Say the bank has \$90 of debt outstanding against its \$100 of assets.
- 3. The bank also has a little sliver of equity: its shareholders have the residual claim on those assets, after the senior claims paid back. Here the bank has \$10 of equity; depositors and other creditors are entitled to the first \$90 of the bank's assets, but anything left over – currently \$10 – goes to the shareholders.
- 4. The shareholders, therefore, have a close-to-the-money *call option* on the bank's assets: If the assets turn out to be worth more than \$90, the shareholders get the excess, but if they turn out to be worth less than \$90, the shareholders get nothing. In particular, if the assets turn out to be worth zero – if all \$100 of assets turn out to be fake and the bank is worthless – then the shareholders only lose their \$10; the other \$90 of the losses fall on the depositors. (Or the deposit insurance fund, the taxpayers, etc.)
- 5. This option is more valuable if volatility is higher. If the bank's assets have a 50/50 chance of ending up worth \$98 or \$102, then the shareholders will get back either \$8 or \$12 after paying off the debt, for an expected value of \$10. (And the depositors will always get back their \$90.) If the bank's assets have a 50/50 chance of ending up worth \$70 or \$130, then the shareholders will get

back either \$0 or \$40, for an expected value of \$20. And the depositors will get back \$90 in the good case, but only \$70 – a catastrophe, a bank failure – in the bad case.

- 6. The bank's executives have fiduciary duties to shareholders, and probably own a lot of stock themselves, so they want to make the stock more valuable.
- 7. Again, the theoretically correct way to make the stock more valuable is to make the assets more volatile, to make the bank riskier, to increase the value of the shareholders' option.
- 8. Everything *else* about banks – bank regulation, prudential supervision, capital and liquidity requirements, deposit insurance, rules about bonuses and clawbacks, bank culture and training, speeches by politicians, depictions of banks in popular culture – is about mitigating this essential problem. The essential problem is that, if you look at a bank's capital structure with some financial sophistication but also some naivety, you will say "wait the bank works for the shareholders, the shareholders have an at-the-money option on the assets, and the way to increase shareholder value is to increase the volatility of those assets."

Many stories about banks are that story, the story of someone looking at a bank's balance sheet with financial sophistication and also naivety and saying "hey what about some more risk?" Here's a great one [from Bloomberg's Todd Gillespie](#) :

A cadre of McKinsey & Co. consultants strode into a meeting with Houston's most prominent local bank to dwell on the problem bedeviling thousands of regional banks: How to stay relevant.

"The thing that I laugh at, though, is they had a chart," said Steve Stephens, the CEO of Amegy Bank, recalling the presentation to the board of its parent company in late 2022. McKinsey's message was that banks such as Amegy could find a lucrative business niche, like the so-called specialty regional banks that it spotlighted in slides, he said.

"Well, that was First Republic, Silicon Valley Bank and Signature," said Stephens, all of which collapsed last year. "It's specialization that got them."

This was good advice, that McKinsey gave him! Find a niche, specialize, make a big bet: Diversification makes you safer but reduces the variance of your returns; specialization increases the variance and thus the likelihood of making a lot of money for shareholders. Also the likelihood of going to zero.

Ed Thorp

The famous story about mathematician, card counter and hedge fund pioneer Ed Thorp is that he figured out the Black-Scholes formula for option pricing before Black, Scholes and Merton did, but, unlike them, he didn't publish it. They did, and won a Nobel Prize. He just made a ton of money *using* the formula before everyone else knew about it. Possibly there is a good life lesson there. Here's a [Bloomberg Businessweek Q&A with Thorp](#) about how he has perhaps discovered the secret to eternal life but is being relatively chill and low-key about it:

Less well known is that Thorp has devoted his talents as much to health and longevity as to beating casinos and markets. At 91 he's remarkably healthy and vigorous. Although he's no longer running marathons or doing serious weight training, Thorp jogs and works out at the gym regularly. He weighs 155–2 pounds above his weight at age 17—and can do two chin-ups and 15 pushups. He analyzes scientific literature and manages his regimen carefully. ...

Bloomberg Businessweek: We've heard you quoted as saying you "beat the dealer, beat the market and are going to beat the man upstairs." Is that right?

I think I said something like that. Well, maybe I'd modify it to "push the man upstairs back as far as I can."

He gets into details on his approach, which involves diet, exercise, some supplements, and apparently not yet transfusions of young people's blood because "I'm not under pressure to stretch for these things that might work because I'm doing OK right now," but "if I were in bad shape, I might need to take some risk to get into less bad shape." He also mentions that he missed out on investing in Renaissance Technologies in the 1980s, because he "learned that [Jim Simons] smoked in meetings" and "just didn't want the exposure." (To smoke, presumably, not to Renaissance's strategy.) You can construct a rough hierarchy of Thorp's priorities in which trading profits come ahead of academic glory, but longevity comes ahead of trading profits. Seems like a reasonable hierarchy.

Sheep

A feature of modern finance is that "environmental sustainability" is a financial product. There are financial engineers, working at hedge funds and banks, whose job is to structure and source and package and sell units of environmental sustainability. There are many ways to create units of environmental sustainability, and eventually modern finance will find all of them. Sometimes this means solar power or carbon capture, sometimes it means [creative accounting for not cutting down trees](#), and sometimes you will find yourself working at a hedge fund and spending your time hiring sheep to mow your lawn:

Wall Street investors are deploying flocks of sheep to trim the grass covering their solar panel installations as they seek to burnish their green credentials and win local support for sometimes divisive new renewable energy projects. ...

The number of solar power sites using sheep to graze the grass and pervasive Russian thistle that grow around panels has risen 10-fold over the past two years, according to not-for-profit trade body the American Solar Grazing Association. ...

Jonathan Kett, executive director of special projects at DE Shaw Renewable Investments (Desri), said: "We typically sign contracts for what we call vegetation management, which is just a fancy way of saying 'cutting the grass and weeds', and in a lot of our portfolios we consider whether sheep are a practical option . . . in some instances it's a really natural fit."

"We're not the ones out there shepherding the sheep around and getting in water and stuff," he added.

That is from George Steer at the Financial Times, and the whole article is like that, both thought-provoking and soothing. How do the hedge funds find the sheep? Oh, mostly wandering farmers:

Solar power companies and farmers team up in "quite a grassroots kind of way", said ASGA president Nick Armentrout. "Often it's as simple as there's a solar site under construction or constructed and a neighbouring farmer just stops in there and asks questions."

I spent a great deal of time this morning imagining the hedge fund renewables investor leaning against a fence, surveying the construction site, chewing on a stalk of straw, when a neighboring farmer wanders up to ask questions and strike a sheep-lawn-mowing deal. I think it will be the opening scene of my Cormac McCarthy-influenced finance novel.

The sheep are not just good at mowing the lawn, they are also good at maintaining a rural vibe so that neighbors do not object:

Desri's executive director of development Liz Peyton said that in cases where land had been used for agriculture prior to the construction of a solar site, "it can be a hard transition for local communities".

"If they know that the land isn't going to be used for a dairy farm, but that sheep will still be grazing, that helps to ease some of the hesitance around the change," Peyton added.

On the other hand, *are* the sheep good at mowing the lawn? There are contrarian views:

"The sheep didn't like to eat the weeds we needed them to eat, plus their hair kept getting caught in the inverters, causing equipment damage," said a spokesperson for a Florida-based renewable energy group who asked not to be named.

"Considering all those factors, they wound up not saving money [compared with] traditional mowing," the person said. "[The sheep] were super cute, and our customers loved them, but alas."

Yes right the sheep still need to make financial sense.

Things happen

Chinese Cement Maker Halted After [99% Crash](#) in 15 Minutes. Bond Trader Places [Record SOFR Futures Bet](#) on Eve of Inflation Data. How the [US Steel Takeover](#) Became About Biden and Swing States. OpenAI and Meta ready new AI models capable of 'reasoning.' EU court rules in favour of Russian oligarchs Fridman and Aven in blow to sanctions regime. NYSE Is Trying to Get [Japanese Companies](#) to List in the US. HSBC to Sell Argentina Business in Latest Market Exit. Starbucks Is Designing [Quieter Stores](#) to Make Sure It Gets Your Order Right. The Real Estate Nightmare Unfolding in Downtown St. Louis. Billionaires' playgrounds': the \$1mn fees upending Florida's golf clubs. The Merchant Banker Who Could Win the Masters.

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- 1. I'm not **sure** this is true. Arguably Passi's leaks made the market price of the stock more **accurate** – it reflected the expected impact of the block – and reduced his risk bidding on the block, allowing him to make a more aggressive bid than if he had to guess at the price impact. You could imagine Morgan Stanley's bids being systematically higher with pre-sold/leaked block trades than with fully at-risk block trades. The problem is that many of these trades were bid out to multiple banks, so there's a decent chance that **one** bank would underestimate the risk and bid higher for a non-leaked trade than it would for one whose impact was fully reflected in the price. In any case, the clients told Morgan Stanley to keep the blocks confidential, which presumably means **they** thought that leaks would get them a worse price.
- 2. [I assume they gave some quite vivid comments **to** Morgan Stanley*.
- 3. Also there is a small regulatory arbitrage here: Passi is still barred from the securities industry, meaning that he is barred from working at a broker-dealer or investment adviser, but "CaaS used to call itself a 'global investment manager' but now says it's a 'single family office,'" so Passi is allowed to work there.
- 4. To be fair: "A representative for McKinsey declined to comment. That 2022 presentation was meant to provide an overview on the trends shaping the banking industry and the three failed banks were highlighted among about two dozen firms to showcase how investors were valuing them, according to another person who saw the deck and declined to be identified discussing private information."
- 5. Well, Black didn't, because he died and Nobels aren't awarded posthumously, but that feels like a technicality and the Nobel citation discusses him prominently. Another technicality that some people sometimes get fussy about is that it is "the Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel," not quite a Nobel Prize.

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News from Bloomberg Terminal

April 11, 2024, 9:59 AM PDT

Tech Employees Want to Diversify

By Matt Levine

(Bloomberg Opinion) --

Oh hey it's a podcast

Programming note! We are trying something new around here. It's a podcast. There's going to be a Money Stuff podcast, in which I'll discuss topics from that week's column and other financial news with my friend Katie Greifeld, a Bloomberg reporter and television anchor.

It will come out on Fridays, starting tomorrow, and we are all going to be very chill and laid-back about it? This is an experiment, we'll see how it goes, and I'm sure it will change over time as we figure out what it is. Perhaps we'll answer reader questions, probably we'll have guests, we'll see. If you want Money Stuff, but in podcast form, then there is some chance that this will be the podcast for you.

If that sounds interesting, you can check out Money Stuff: The Podcast at Apple, Spotify, or wherever you get your podcasts, as one says when one is a podcaster. You can listen to the trailer now, and the first episode will be out tomorrow afternoon.

Hedging

If you work at a big public technology company, you might get a large chunk of your pay in the form of stock in your company. Over time, you will accumulate a lot of stock; a lot of your net worth might consist of shares in your company. This is good, this is what the company wants, this aligns incentives: If you own a lot of stock, you will work hard so the company does well so your stock will go up.

On the other hand, *you* may not like it. You have a lot of undiversified risk: A lot of your financial net worth is tied up in one company, and a lot of your human capital is tied up in that same company, and if the company goes under you will lose everything. And while it is nice to align incentives, if you are one of thousands of well-paid employees at a large public tech company, there might not be all that much *you personally* can do to shape the company's destiny.

So you might want to diversify. The easy way to do this is to sell your stock and buy an index fund. Your stock probably has vesting periods and restrictions, so you can't sell all it as soon as you get it, but if you've been there a long time you will have lots of unrestricted shares and can sell down.

But tech stocks mostly go up, so if you've been there a long time and are selling shares you got years ago, you will have large capital gains. That's nice for you, really, but it does mean you have to pay taxes when you sell your stock and buy index funds.

On the other hand, what you could do is:

Start a *partnership* with some other people who happen to own stocks in *other* tech companies. There are lots of those people: If you're a well-paid Meta engineer with a bunch of stock, you can probably find well-paid Amazon and Alphabet engineers who also own a bunch of their companies' stocks.

Contribute your shares to the partnership, in exchange for a stake in the partnership. You put in \$1 million of Meta stock for 1/3 of the partnership; your friends put in \$1 million of Amazon and Alphabet stock in exchange for 1/3 stakes in the partnership.

Now, instead of owning \$1 million of Meta stock, you own a one-third share in a somewhat more diversified \$3 million pot of stocks. (And you can expand this to more stocks for more diversification.)

The advantage is that, while selling your stock for cash and then reinvesting the cash in an index fund is a taxable transaction, contributing your stock to a partnership in exchange for a share of that partnership is not. And if you do it right, you can make the partnership's holdings look a lot like an index fund. (Not tax advice! It is not in fact quite as simple as this, though this is the right general idea. 1)

It is not trivial to do this right, *for you*: You have to get the technical tax structuring right, plus what are the odds that you know a bunch of other engineers at other companies with exactly the right amounts of stock to contribute? But with enough well-paid engineers at big public tech companies, it is sensible for someone else to do this at scale and offer it as a product. Bloomberg's Eliyahu Kamisher reports:

Known as an exchange fund or a swap fund, the product is familiar to the super rich. Now, share-price rallies at companies such as Meta Platforms Inc. and Nvidia Corp. are creating an opportunity to offer the structure to moderately wealthy techies as well, says Srikanth Narayan, founder of San Francisco-based Cache.

"The mission is to make these financial products – that have typically been in the upper echelon – available more broadly," said Narayan, a former engineer at Uber Technologies Inc. "All of my friends and colleagues are talking about the same thing, which is that more of their net worth is tied up in a single stock." ...

Cache's swap-fund offering enables participants to pool their stock holdings together, creating a more diversified collection of assets. Investors then get shares of the fund equivalent to their contributions, giving them the benefits of more varied holdings without having to sell their stock.

There's a limit to how much stock of a particular company Cache can accept because the swap fund is designed to mirror the tech-heavy Nasdaq, Narayan said. Currently, he can bring in more Amazon.com Inc. and Microsoft Corp. shares, and he's seeking stock from non-tech Nasdaq companies such as PepsiCo Inc. and Costco Wholesale Corp.

Here are more details from Cache. Kamisher notes that, if this really takes off (so far it's pretty small), it could be bad for tax revenue; California gets a lot of money from tech equity compensation. But that effect depends on what this product *replaces*. If it replaces "sell your stock and buy index funds," it will lower tax revenue. If it replaces "just hold onto your stock until you retire," it won't.

Me, though, I'm more interested in what it could do for incentives. Presumably the big tech companies pay their employees with lots of stock (in part for accounting reasons sure but also) in order to align incentives and motivate the employees. 2 You would expect that a lot of Meta employees own a lot of Meta stock, a lot of Alphabet employees own a lot of Alphabet stock, a lot of Amazon employees own a lot of Amazon stock and so forth. Each company has employees with strong financial incentives – not just the desire for raises and bonuses, but also the desire to increase the value of their existing stock – to help their company win in the general competition among tech giants.

But what if all of the midlevel employees of all of these companies ended up owning diversified portfolios of all of them? What if workers in Big Tech were compensated with, effectively, a portfolio of Big Tech Index shares? (Plus Costco, if Cache can find any. 3) What does that do for competition?

"Should index funds be illegal," I sometimes ask around here: If every public company is owned by diversified investors who also own all of its competitors, will those companies have less incentive to compete? One of the main responses to this concern is that, while the *institutional shareholders* are mostly diversified, the *executives and employees* tend to own concentrated positions in their employers' stocks, so *they* are motivated to compete. And they run the company from day to day. But what if the employees were all diversified too?

PCAOB/KPMG

Here are three stylized facts about accounting:

1. If you are a junior or mid-level accountant at a big public accounting firm, you probably know a lot about accounting. Your accounting training is reasonably fresh in your mind, and you are applying it all day in your job as an accountant.
2. If you are a quite senior accountant at a big public accounting firm, you might know *ever so slightly less* accounting? Your accounting training occurred a long time ago. Your day job involves a lot of managing people, schmoozing clients and setting firm strategy; you probably spend less time in the details of technical accounting questions than you used to. You didn't get to where you are today *exclusively* by being good at accounting, though that probably helped; you owe your promotions to some other, less accounting-related skills.
3. Accountants are subject to continuing-education requirements, where professional bodies, regulators and their firms require them to periodically take classes on accounting and pass exams to make sure they still know accounting stuff.

When you combine those stylized facts, you get stories like this:

From 2012 to 2015, and again from January 2020 to July 2023, [Marc] Hogeboom served on KPMG Netherlands' Management Board. ...

In 2018, Hogeboom solicited subordinates in the Firm to assist him with passing a test in connection with mandatory training for audit supervisors. Eventually, a subordinate on one of his audit engagement teams agreed to sit with him and assist while he took the online test. ...

In 2020, while serving as the Head of Assurance, on the Firm's Management Board, and in its Regulatory Office Core Team, Hogeboom prevailed upon several subordinate members of his engagement team to share test answers with him by accompanying him while he took online training tests.

Yesterday the US Public Company Accounting Oversight Board, which regulates US accountants, fined the Dutch unit of the global accounting firm KPMG NV \$25 million because "widespread improper answer sharing occurred at the firm over a five-year period and that the firm made multiple misrepresentations to the PCAOB about its knowledge of the misconduct." 4 KPMG Netherlands employees had to take lots of internal training courses, some of the courses had tests that they had to pass, a lot of it was online, and apparently nobody took the tests that seriously so they regularly shared answers with each other:

From at least October 2017 through 2022, hundreds of KPMG Netherlands personnel, including partners, were involved in improper answer sharing related to training tests, and in some cases the NBA Knowledge tests. This misconduct occurred primarily through emails attaching documents or images containing the contents of the tests and/or answers to test questions. KPMG Netherlands personnel also jointly took tests that were intended to assess individual knowledge.

Some of this was peer employees sharing the answers with each other, but some of it was the bosses specifically demanding that their underlings help them take the tests. Makes sense! The bosses are good at managing people; the underlings are good at accounting.

There are lots of cases like this; KPMG itself had another one in 2022. Cheating on internal exams is for the PCAOB a little like improper cell-phone use for the US Securities and Exchange Commission. It's a perpetual cash cow – every bank has people who did business on personal cell phones, every accounting firm apparently has people who cheated on training exams – and, while it isn't particularly bad in itself, perhaps it is a sign of bigger problems. For one thing, it is bad if accountants are unethical and cheat on exams. For another thing, it's bad if they can't pass the exams without cheating! They're supposed to know accounting.

But you don't want to overstate that. The problem here does not seem to be that they didn't know accounting. The problem is that they didn't take the trainings or exams seriously; they did not see the trainings as essential to their work as accountants, but as meaningless administrative box-checking to be done as quickly as possible before they got back to their actual jobs. Actually sometimes they were in such a hurry to get back to their actual jobs that they left early and made someone else finish checking the boxes:

In 2021, another senior leader at the Firm, the Supervisory Chairman, engaged in improper answer sharing. ... Shortly after joining the Supervisory Board, the Supervisory Chairman received assistance from a staff member while taking two mandatory trainings that the Supervisory Board had assigned to the Supervisory Chairman. The staff member sat next to the Supervisory Chairman while he took the two training tests, and the staff member finished one of the tests for the Supervisory Chairman when he left for a meeting before completing the test.

I guess if your boss tells you to finish his mandatory training exam for him, you have to do it? Does seem like a problem though.

Change of control

Many companies have debt agreements that include a "change of control put." If the company has a change of control, the creditors can demand their money back immediately, often at a premium. This can be a big deal. If a company has bonds outstanding that are due in 2030 and trade at 80 cents on the dollar, and then it has a change of control, it might have to buy the bonds back immediately at 101. It will need to come up with a lot of money, probably by borrowing it at more expensive rates.

The intuition here is that, often, when a company is taken over, its debt becomes riskier: If you are a bondholder of some reasonably stable public company, and then it gets bought in a leveraged buyout and loaded up with more debt, you will be sad; your debt will lose value. The deal that you originally struck with the company has changed, and you'll want to get out.

What is a change of control? There are lots of ways for a company to change hands, some of which are bad for creditors and some of which aren't. The rough idea is that if the company is acquired for cash, that's probably bad. So an all-cash merger is normally a change of control, or a sale of "all or substantially all" of the assets, or someone (a person or firm) acquiring a majority of the stock. Whereas an all-stock merger with another public company is less likely to hurt the credit, and so normally does not trigger a change of control put. 5

Here's a weird one, though: Arguably *losing a proxy fight* is a change of control. If an activist buys stock in a public company and agitates for change, or a hostile bidder proposes a takeover, and the company rejects the proposal, so the activist/bidder launches a proxy fight to get her own candidates on the board of directors, and the company fights back, and the activist/bidder wins and gets a majority of directors, then:

1. In some real sense, the activist or hostile bidder has taken control of the company: Her allies now control the board and can change the company's policies or approve a sale.
2. That is, in expectation, bad for creditors: The activist will typically want the company to be more levered and riskier than the incumbent board did, and the hostile bidder will probably acquire the company in a way that is bad for its debt.

And so it is common for debt agreements to have a change of control put for losing a proxy fight. Technically the way this is written is that it is a change of control for a majority of the company's board of directors to not be "continuing directors," where a continuing director is either (1) a director who is in place at the time of the debt deal or (2) a new director who was approved by a majority of the previous continuing directors. So the board can amicably replace itself over time, but if it is replaced all at once by a hostile slate, that's a change of control.

This strikes me as a basically correct intuition about creditors' interests, but it causes a problem. The problem is that management can use the change of control put as a weapon in the proxy fight. It can say: "Look, we have all this debt outstanding, and we are not in the best financial shape. (Thus the proxy fight!) If we lose this proxy fight, the debt will all come due immediately at 101 cents on the dollar. We won't be able to refinance all that debt immediately, and so losing the proxy fight will cause the company to go bankrupt. So vote for us!"

That is a bit harsh, to tell shareholders that they *can't* vote for an alternative board of directors because that would bankrupt the company. It is not a good look for the incumbent directors to threaten to blow up the company unless they keep their jobs. There is a solution, though it is a bit of a silly one: The incumbent board can just "approve" the activist's candidates, for purposes of the change of control put. This way, if the company loses the proxy fight, the activist's directors are still "continuing directors" and the change of control put isn't triggered. Of course, the provision is there in the first place because creditors really *don't* want the company to lose a proxy fight. But somebody's interests will suffer, and if the board can help shareholders while being a bit rude to creditors it probably should.

Anyway Bloomberg's Jef Feeley and Mike Leonard reported Tuesday:

Macy's Inc. has "weaponized" its debt agreements as part of a proxy fight with a pair of investment firms, putting its financial future at risk, a pension fund claimed in suing the retailer.

The takeover defense, which Macy's is threatening to deploy in a fight with Arkhouse Management and Brigade Capital Management, would accelerate the payment of more than \$1.5 billion in debt and burden the company's finances, according to the lawsuit.

From the complaint:

If half of the Board is replaced in a proxy contest, that would constitute a Change of Control under the terms of the Relevant Notes unless the incumbent Board simply "approves" the dissident nominees. The incumbent directors can approve dissident director nominees for the limited purpose of disabling debt acceleration while simultaneously recommending that stockholders vote to elect the incumbent candidates over the dissident candidates. Moreover, under well-established Delaware law, the incumbent directors have a duty to approve dissident nominees unless they have a good faith belief that the dissidents are known looters or would implement a business program that would cause the Company to be unable to meet its legal obligations to creditors.

If the Company were forced repurchase the Relevant Notes at 101% of their principal, it could be devastating to Macy's financial health. Overall, the Company has \$1.059 billion outstanding under the Relevant Notes and only \$1.034 billion in cash and cash equivalents as of February 3, 2024. ...

Moreover, the Federal Reserve's current federal funds target interest rate is 5.25% to 5.5%, which means if Macy's was forced to refinance the Relevant Notes in the near future, it would have to pay significantly higher interest rates.

Therefore, a loyal board acting in the best interests of the Company and not motivated by a desire to perpetuate its term in office would do everything in its power to avoid triggering the Change of Control provisions in the Relevant Notes in connection with a contested director election unless the dissident candidates were criminals or known looters.

Arkhouse and Brigade don't seem like "known looters," and in fact this thing seems to be going the way hostile takeover fights normally go, with a grudging transition to friendliness. Bloomberg's Crystal Tse reported yesterday:

Macy's Inc. named two new directors nominated by activist investor Arkhouse Management Co., which agreed to end its effort to seek majority board representation as it attempts to acquire the department-store operator.

Richard Clark and Richard Markee will join the board and its finance committee that oversees acquisition proposals, according to a statement from the retailer Wednesday. Macy's is "continuing to engage" with Arkhouse and Brigade Capital Management on their proposal to acquire the company, the company said.

Settling a proxy fight doesn't trigger the puts. Of course presumably if Arkhouse and Brigade *acquire the company*, that *will* be a change of control. But that will be their problem, not the shareholders'.

Who controls a company?

A reader, knowing how fond I am of this sort of thing, sent me three articles in *Bicycle Retailer and Industry News* with the following perfect sequence of headlines:

"Scott Sports replaces CEO 'to refresh' brand" (March 29)

"Beat Zaugg says he's still CEO of Scott Sports" (April 1)

"Police called to Scott Sports headquarters" (April 4)

Honestly that's all you need to know, but the details are pretty good too. From the April 1 story:

Industry veteran Beat Zaugg, who has been an owner of Scott Sports since 1998, says he remains the brand's CEO, a minority shareholder and chairman of its parent company board, despite a news release Friday saying that the board had fired him.

"This announcement was made to destabilize the company and its employees," Zaugg told BRAIN on Monday; he said the announcement had been made via a PR agency that works for Scott's majority shareholder – Korea's Youngone – not Scott Sports.

...

However, the PR firm responded to BRAIN later on Monday with a statement from the Scott Corporation board insisting that Youngone representatives have a majority on the board and had voted to terminate Zaugg.

"We understand that it may be difficult for Mr. Zaugg to accept his termination (given his long-standing role as CEO). But this is ultimately irrelevant as a matter of law: the ultimate decision body of a company is the board of directors and the board is clearly entitled to terminate the employment with the CEO," the statement read in part. ...

Zaugg conceded that Youngone controls a majority of the board, but said the board did not terminate him correctly. "So far they did it wrong," he told BRAIN, without elaborating. "This has to be my secret for the time being," he said.

Every dispute of this kind has a paragraph like that: Generally the dispute is between the majority shareholder and the chief executive officer, and the CEO can't usually deny that (1) the majority shareholder owns a majority of the shares and (2) that ultimately gives them the power to fire him. So the CEO is reduced to saying "well, sure they *could* fire me, but they have to follow proper procedures, and they forgot to send the notice of the board meeting by registered mail so nyah nyah nyah nyah nyah here I still am." Usually the CEO stands on some minor, debatable point of procedure. This is the first time I've seen a CEO stand on a secret point of procedure. I like this guy's style.

Also the April 4 story contains a tantalizing hint that the Swiss police might *regularly* be involved in disputes like this:

Fribourg police spokesperson Bertrand Ruffieux told Euro Day France: "Nothing serious happened. We intervened in a civil matter, a dispute between managers. In this type of case, the police are called to the scene to find a way to open a discussion, and for people to understand each other. But there are no injured or anyone arrested."

Like you call the Swiss police and the Corporate Disputes Unit shows up with sirens blaring and they get out the bullhorn and shout "we have a copy of your bylaws right here! Don't do anything rash! A quorum of your board of directors is on the way!"

Things happen

Cocoa's Surge Is Drawing Africa's Farmers Back to the Bean. BlackRock loses appeal over UK tax on \$13.5bn BGI deal. Top Crypto Exchanges Look to Move Beyond Settlements With U.S. Regulators. Grant Thornton retirees escalate revolt over private equity deal. Managers to shut or convert \$220bn of US money market funds before rule change. Hedge fund takes on shipping magnates over oil tanker deal. "Vulture holdouts of the Elliott-Argentina variety in sovereign debt restructurings aren't really a thing now." UnitedHealth Chair, Executives Sold \$102 Million in Stock Before US Probe Became Public. Vertex Pharmaceuticals to Acquire Alpine Immune Sciences for \$4.9 Billion. The Hidden Costs of Homeownership Are Skyrocketing. Vietnamese property tycoon sentenced to death over \$12bn fraud. Instagram to Start Blurring Nude Images in Messages to Protect Teens. This disruptive late-night train commuter is ... a horse.

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1. In particular: "In the 1960s, the federal government tried to squash exchange funds by banning tax-free swaps into partnerships with more than 80% of their assets in liquid investments such as stocks. Wealth managers skirted the measure by putting 79% of the fund in liquid assets and the rest in holdings such as real estate."
2. Though the Information reported yesterday that "Amazon will give many U.S. corporate employees the option of reducing the amount of stock they receive next year by a quarter in exchange for more cash, according to an internal memo reviewed by The Information. In doing so, Amazon joins a growing list of tech companies, including Tesla and Shopify, that are putting less emphasis on equity compensation as a way to motivate workers."
3. Can it? In 2023, Amazon paid \$24 billion of stock-based compensation, a bit more than 4% of revenue and about 1.2% of its current market cap. Meta paid \$14 billion of stock-based comp, about 10% of revenue and 1% of market cap. Costco paid \$774 million of stock-based comp, about 0.3% of revenue and 0.2% of market cap. Pepsi paid about \$380 million (0.4%, 0.2%). Just not a ton of Costco and Pepsi engineers walking around with big stock grants looking for swap funds.
4. KPMG Netherlands does enough US-related accounting work, and had enough exams on US auditing standards, that the PCAOB has oversight over it.
5. For a sample, see page 11 of this 2012 indenture governing some Macy's Inc. bonds: "'Change of Control' means the occurrence of any of the following: (1) the direct or indirect sale, lease, transfer, conveyance or other disposition (other than by way of merger or consolidation), in one or a series of related transactions, of all or substantially all of the properties or assets of the Guarantor and its subsidiaries taken as a whole to any Person other than the Guarantor or one of its subsidiaries; (2) the consummation of any transaction (including, without limitation, any merger or consolidation) the result of which is that any Person becomes the beneficial owner, directly or indirectly, of more than 50% of the then outstanding number of shares of the Guarantor's Voting Stock or other Voting Stock into which the Voting Stock of the Guarantor is reclassified, consolidated, exchanged or changed, measured by voting power rather than number of shares; (3) the Guarantor consolidates with, or merges with or into, any Person, or any Person consolidates with, or merges with or into the Guarantor, in any such event pursuant to a transaction in which any of the outstanding shares of the Guarantor's Voting Stock or the Voting Stock of such other Person is converted into or exchanged for cash, securities or other property, other than any such transaction where the shares of the Guarantor's Voting Stock outstanding immediately prior to such transaction constitute, or are converted into or exchanged for, a majority of the Voting Stock of the resulting or surviving Person or any direct or indirect parent company of the resulting or surviving Person immediately after giving effect to such transaction; (4) the first day on which a majority of the members of the Guarantor's Board of Directors are not Continuing Directors; or (5) the adoption of a plan providing for the liquidation or dissolution of the Guarantor."

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April 10, 2024, 1:32 PM PDT

DeFi Exchange Creator Uniswap Labs Says SEC Warns of Lawsuit (1)

By Olga Kharif and Muyao Shen

- The SEC sees decentralized exchanges as under its purview
- Uniswap Labs said it will fight any agency action: executive

Bloomberg Law News 2024-04-11T09:48:41178471866-04:00

DeFi Exchange Creator Uniswap Labs Says SEC Warns of Lawsuit (1)

By Olga Kharif and Muyao Shen2024-04-10T16:32:37405-04:00

- The SEC sees decentralized exchanges as under its purview
- Uniswap Labs said it will fight any agency action: executive

Uniswap Labs, the creator of the largest decentralized trading platform on Ethereum, said the US Securities and Exchange Commission has warned that it faces a potential enforcement action for operating as an unregistered exchange and broker dealer.

The SEC's Enforcement Division served Uniswap with a Wells Notice, notifying the company that it plans to recommend a legal action against it, the firm said in a blog statement. A representative for the SEC declined to comment.

Chairman Gary Gensler has long said that decentralized crypto exchanges aren't really decentralized and fall under its purview. The claims that Uniswap is an unregistered broker dealer and exchange are similar to cases the agency brought against centralized exchanges Coinbase Global Inc. and Binance last year, according to Marvin Ammori, chief legal officer for Uniswap.

"The base underlying subtext of the entire SEC action is that most tokens are securities," Ammori said Wednesday during a conference call.



Bloomberg

Decentralized exchanges have long argued that they are structurally different than centralized exchanges, and are simply pieces of software that people use for trading without intermediaries. Decentralized exchanges accounted for more than 27% of all crypto trading volume over the last 24 hours, while centralized exchanges accounted for the rest, according to data tracker DeFi Llama, which lists more than 400 DeFi exchanges. In addition to Uniswap, other large DeFi trading platforms include Jupiter, PancakeSwap and Orca.

Uniswap's UNI token fell around 11% to \$10 on Wednesday. Prices of other native tokens of decentralized exchanges are down by similar amounts, according to data compiled by CoinGecko.

"The SEC is trying to kill innovation that we think is inevitable," said **Mary-Catherine Lader**, Uniswap's chief operating officer, said during the call. "We are looking forward to winning."

(Updates with Uniswap comments, SEC allegations, starting in the first paragraph.)

--With assistance from **Austin Weinstein**.

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Dave Liedtka

Legal tech company Disco gets new CEO after co-founder's messy exit

 [reuters.com/legal/legalindustry/legal-tech-company-disco-gets-new-ceo-after-co-founders-messy-exit-2024-04-10](https://www.reuters.com/legal/legalindustry/legal-tech-company-disco-gets-new-ceo-after-co-founders-messy-exit-2024-04-10)

Sara Merken

REUTERS/Andrew Kelly/ Purchase Licensing Rights , opens new tab

April 10 (Reuters) - Legal technology and artificial intelligence company CS Disco has hired a new chief executive following the exit of its former leader amid sexual misconduct allegations last year.

The Austin-based electronic discovery software maker said Wednesday that Eric Friedrichsen will start as president and CEO on April 29. He takes over from interim CEO and board member Scott Hill, who has held the role since co-founder Kiwi Camara's abrupt departure last September.

Friedrichsen was CEO of expense management software company Emburse until January.

"I am proud of the way the DISCO team responded to a very difficult year in 2023 by recommitting to our customers and each other," Hill said in a statement. He called Friedrichsen the right leader "to successfully write DISCO's next chapter."

Camara stepped down as CEO after the company's board opened an investigation into allegations that he groped a young female employee, the Wall Street Journal reported in September, citing anonymous sources. The Journal in October also reported on employee concerns with how Disco handled clients and product issues. The company defended its customer practices.

Camara has not publicly responded to the misconduct claims, and he could not immediately be reached for comment on Wednesday.

Paul, Weiss, Rifkind, Wharton & Garrison was hired to review the company's workplace policies, with Washington, D.C.-based partner Jeannie Rhee leading the engagement, a firm spokesperson said.

A Disco spokesperson said the review was "fully completed" by the law firm, but declined to share details about any findings.

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Disco separately said in a U.S. Securities and Exchange Commission filing in January that Luke McNeal, its senior vice president of global sales, was leaving the company immediately "as a result of actions inconsistent with the company's standards."

The Disco spokesperson declined to elaborate on the reasons for McNeal's exit. McNeal did not immediately respond to a request for comment via LinkedIn.

Disco, Camara and the company's chief financial officer, Michael Lafair, were hit with a securities class action after Camara's exit, accusing the defendants of misleading investors about the company's financial condition.

Cooley partner Aric Wu, who is representing the defendants in the lawsuit in Texas federal court, did not immediately respond to a request for comment.

Disco in 2021 became one of a small number of legal technology companies to go public. The company, which launched in 2013, grew out of Camara & Sibley, a Texas litigation boutique that Camara helped found.

The company sells artificial intelligence-powered products for lawyers, and in December released a generative AI tool.

Reporting by Sara Merken

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April 11, 2024, 3:00 AM PDT

UnitedHealth Chair, Officers Sold Stock Before US Probe Surfaced

By John Tozzi and Anders Melin

- News broke on Feb. 26 that the firm got DOJ notice in October
- Chairman, three executives sold shares between those dates

Bloomberg Law News 2024-04-11T09:50:46233149048-04:00

UnitedHealth Chair, Officers Sold Stock Before US Probe Surfaced

By John Tozzi and Anders Melin2024-04-11T06:00:00004-04:00

- News broke on Feb. 26 that the firm got DOJ notice in October
- Chairman, three executives sold shares between those dates

UnitedHealth Group Inc. Chairman **Stephen Hemsley** and three senior executives netted a combined \$101.5 million from stock sales made over four months leading up to when the public became aware of a federal antitrust investigation.

The sales occurred between Oct. 16, a week after the largest health insurer in the US reportedly received notice of the Justice Department probe, and Feb. 26, the day before Bloomberg News and others published stories about the investigation. The stock dropped after the investigation was widely reported.



Stephen Hemsley

Photographer: Jonathan Alcorn/Bloomberg

There's no indication that the trades were executed according to scheduled trading plans in filings related to the transactions. UnitedHealth said officers and directors must get clearance to trade shares, and that trading is limited to certain windows that often open after earnings reports. The trades in question were approved, a spokesperson said. The company reported third-quarter earnings on Oct. 13.

Typically a company's general counsel would declare a blackout period barring trading in light of a sensitive investigation, according to **John C. Coffee Jr.**, a corporate governance expert at Columbia Law School. "Apparently, this did not happen" at UnitedHealth, he said in an email.

The DOJ is reviewing whether UnitedHealth's acquisitions have consolidated its position in some markets in a way that violates antitrust laws, according to a person familiar with the probe who asked not to be identified discussing a nonpublic investigation. The agency has reportedly been looking at potential monopolies in the managed-care industry since at least mid-2023.

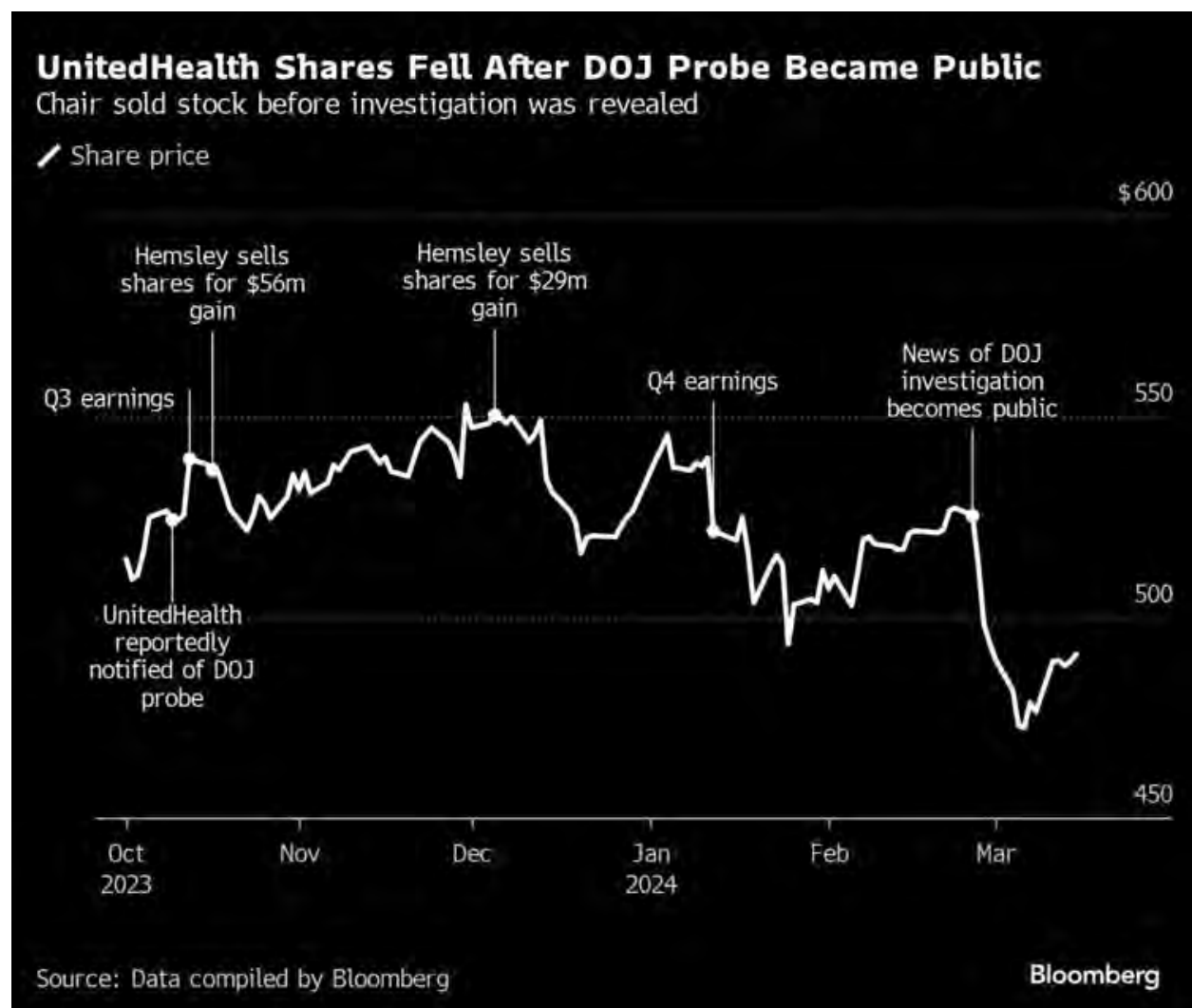
UnitedHealth hasn't explicitly acknowledged the probe and declined to say when Hemsley and the others were informed of it. When asked about the trades, a spokesperson for the insurer said "these directors and officers followed our protocols and received approval from the company."

UnitedHealth declined to make Hemsley, the other people involved in the trades, or its general counsel available for interviews, and a spokesperson said they had no comment beyond the company's response.

The company says in regulatory filings that it is subject to "routine, regular and special investigations, audits and reviews" from various state and federal agencies, including the DOJ.

Disclosure Question

Shares of UnitedHealth fell 5.2% in two trading sessions on Feb. 27-28, after the probe was widely reported in financial media. It was first reported Feb. 26 in the Examiner News, a local publication in New York state. The stock has fallen about 15% so far this year through Wednesday's closing price compared with an 8% gain in the S&P 500 Index.



Whether the investigation should have been disclosed to shareholders hinges on if it's considered material, said Charles Elson, founding director of the Weinberg Center for Corporate Governance at the University of Delaware.

The fact that shares fell after the news leaked “would suggest some materiality to investors,” he said. UnitedHealth says all material information is included in its periodic filings.

Share sales by top leaders are usually vetted by a company’s general counsel, Elson said. They evaluate whether the company must disclose any additional information to the market before the trades occur, he said.

“The question is, when they first were aware of the investigation, was it viewed as material?” Elson said.

Also weighing on the stock is a cyberattack on the company’s Change Healthcare subsidiary. The attack knocked out crucial data and payments systems, sowing chaos throughout the health-care industry.

UnitedHealth operates the largest US health insurer, UnitedHealthcare, and a growing network of clinics, surgery centers, home-care providers and other services under its Optum division. Hemsley has served as chairman since he stepped down as chief executive officer in 2017 after more than a decade at the helm.

On Oct. 17 and Dec. 5, Hemsley exercised a portion of his stock options set to expire in 2024. He sold the shares he’d acquired the same day, netting him \$84.9 million, according to filings.

Brian Thompson, CEO of the UnitedHealthcare insurance unit, on Feb. 16 exercised options and sold shares, netting him \$15.1 million, according to Bloomberg calculations. Days later, Chief Accounting Officer Tom Roos sold shares worth about \$450,000.

Chief People Officer **Erin McSweeney** on Oct. 16 exercised options and offloaded shares for a net gain of \$1.09 million, filings show.

Hemsley’s options were set to expire in February and November 2024, the filings show. The options held by Thompson and McSweeney had several years left until expiration.

While it’s not unusual for executives to periodically sell shares, Hemsley rarely sold stock while he served as CEO. Starting in 2020, he began offloading at irregular intervals: three times that year and again in 2021, then once in 2022, filings show. His net proceeds from each transaction have ranged from around \$13 million to as much as \$70 million. The Oct. 17 transaction, which netted him \$55.7 million, is among the biggest he’s done in recent years.

Hemsley remains a significant UnitedHealth shareholder with more than 1 million shares valued at more than \$450 million, held directly and in trusts, according to data compiled by Bloomberg. Each of the three executives also still hold shares in the company.

McSweeney and Roos have occasionally sold shares in recent years. This is the first year that Thompson has sold shares since he became CEO of the insurance division in 2021, at which point he had to start reporting his transactions.

--With assistance from **Leah Nylen**.

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BUSINESS

Boeing Reveals Executives Got an Extra \$500,000 in Private Jet Perks

Plane maker revises disclosures for personal trips by CEO and other executives after Journal investigation

By [Andrew Tangel](#) [Follow](#) and [Mark Maremont](#) [Follow](#)

Updated April 11, 2024 12:54 pm ET



Boeing Chief Executive David Calhoun. PHOTO: AARON SCHWARTZ/ZUMA PRESS

An internal Boeing **BA -0.81% ▼** review found that Chief Executive David Calhoun and other top executives took personal trips worth more than \$500,000 on the company's private jets and other planes that were improperly recorded as business travel.

The review and correction, which Boeing disclosed in a securities filing, was prompted by a Wall Street Journal investigation last year into the executives' use of the company's fleet of private jets, people familiar with the matter said.

Boeing's review found that some flights by the executives in 2021 and 2022 "were not previously classified as perquisites by the company but should have

been classified as such in accordance with SEC rules and guidance,” the company said in its proxy filing April 5.

Executives may dart between their residences, work sites and personal destinations such as vacation spots with portions of the trips being officially counted as personal or business trips. In general, private-jet flights taken for commuting purposes may be considered a perquisite, and thus taxable income, while flights between two company offices may not be. The pandemic and increased working from home has complicated the matter.

When executives use a company jet for personal travel, it typically counts as taxable income. The Internal Revenue Service said earlier this year it will begin auditing dozens of companies over the personal use of corporate jets by executives.

Boeing’s executive flight operations unit and its board of directors scrutinize personal use of company aircraft, the Journal previously reported. Boeing said in its proxy that flights to attend outside board meetings or speaking engagements may count as perquisites under SEC rules.

Boeing’s board requires Calhoun to use the company’s private jets for personal travel, not just business, for security reasons. The company recently said the CEO was stepping aside, part of a shake-up after a Jan. 5 midair blowout and production problems.

Other executives in the revised disclosure—finance chief Brian West; recently departed commercial chief Stan Deal and defense chief Ted Colbert—may also use Boeing’s fleet of private jets for personal trips. For these executives, the revisions include some personal flights on charter, leased or commercial aircraft.

Last year, Boeing said the company followed all laws and regulations when it came to classifying executives’ aircraft use: “As it relates to the tracking and categorization of flights, we have professionals and subject matter experts who help us strictly comply.”

In the September 2023 article, the Journal reported that Calhoun and other executives hadn’t relocated to the plane maker’s headquarters in Arlington, Va.

Instead, flight records suggested the CEO flew from his two homes to the main office and other Boeing locations via the company's fleet of private jets.



Stan Deal, then a Boeing executive, at the Dubai Air Show last year. PHOTO: CHRISTOPHER PIKE/BLOOMBERG NEWS



Boeing's Ted Colbert at a news conference in Dubai in 2019. PHOTO: KAMRAN JEBREILI/ASSOCIATED PRESS

Some other company executives have worked out of offices near their homes, the Journal reported. Boeing opened a small new office near the Connecticut homes of West and treasurer David Whitehouse.

Calhoun addressed the Journal's article at an internal meeting with employees in November, saying he wanted executives to travel and spend time visiting its operations.

"I don't want anybody, by the way, to misinterpret a silly article that got published in The Wall Street Journal about me traveling a lot," Calhoun said,

according to a recording of the meeting the Journal reviewed. “That’s my objective. That is what I want to do. That is what I want everybody at the enterprise level to do.”

In its proxy filing, Boeing reported \$514,000 in personal flights on company aircraft for Calhoun in 2023, part of his total compensation of \$33 million that year. The revisions concerned the prior two years. The revised 2022 tally for Calhoun’s personal flights came to about \$332,000, an increase of \$93,000 from the company’s calculation last year, according to securities filings. For 2021, the tally increased by \$49,000.

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US accuses Regeneron of fraudulent price reporting for eye drug

 [reuters.com/legal/us-justice-department-files-complaint-against-regeneron-alleges-fraudulent-drug-2024-04-10](https://www.reuters.com/legal/us-justice-department-files-complaint-against-regeneron-alleges-fraudulent-drug-2024-04-10)

Nate Raymond, Dan Whitcomb

The Regeneron Pharmaceuticals company logo is seen on a building at the company's Westchester campus in Tarrytown, New York, U.S. September 17, 2020. Picture taken September 17, 2020. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

BOSTON, April 10 (Reuters) - The U.S. Justice Department on Wednesday accused Regeneron Pharmaceuticals (REGN.O) , opens new tab of manipulating Medicare's drug-pricing process by inflating the average sales price for its expensive macular degeneration drug Eylea.

The department, in a complaint , opens new tab filed in federal court in Boston, alleged the drugmaker failed for years to report how it paid hundreds of millions of dollars to subsidize Eylea purchases by reimbursing drug distributors for credit-card processing fees.

Those payments were made to ensure that specialty drug distributors would accept credit cards from doctors and retina practices purchasing Eylea while continuing to charge physicians a lower price, according to the lawsuit.

The drug, which the Tarrytown, New York-based company began marketing in 2011, is approved by the U.S. Food and Drug Administration for treating conditions including wet age-related macular degeneration, which impairs vision.

The medication has a wholesale acquisition cost of \$1,850 per vial, and the department said it was a leading expense for Medicare, the government healthcare program for people 65 and older, with more than \$25 billion paid out from 2012 to 2023.

The lawsuit said that by not reporting to Medicare all price concessions for Eylea, the drugmaker violated the False Claims Act, which prohibits submitting a false claim to the government for payment.

"By doing so, Regeneron greatly inflated the costs of its drug to Medicare over many years and enhanced its revenues," acting U.S. Attorney Joshua Levy of Massachusetts said in a statement.

Regeneron in a statement called the allegations without merit and said its reimbursement of costs incurred by specialty distributors were lawful. It said it would "vigorously defend itself in court."

The case is the latest by the U.S. Attorney's Office in Massachusetts against Regeneron concerning Eylea.

An ongoing lawsuit filed in 2020 accused the drugmaker of using a charity that helps cover Medicare patients' drug costs as a means to pay kickbacks for using Eylea. The company denies wrongdoing.

Wednesday's case began as a whistleblower lawsuit filed in 2020 by three people who worked for Regeneron. It was filed under the False Claims Act, which allows whistleblowers to sue companies to recover taxpayer funds paid out based on false claims.

The cases are filed initially under seal to allow the Justice Department a chance to investigate and decide whether to intervene. Whistleblowers are entitled to a share of any financial recovery.

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Reporting by Dan Whitcomb; editing by Costas Pitas and Leslie Adler

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April 11, 2024, 9:14 AM PDT

PE Firms Probed Over Withholding Information in Deal Review

- Official confirms probes involve merger notification forms
- KKR disclosed probe into adequacy of its previous filings

By Leah Nylen

(Bloomberg) --

The US Justice Department is looking into whether some private equity firms intentionally withheld information from antitrust enforcers during deal reviews to avoid the possibility of acquisitions being blocked, a senior official said Wednesday.

The move comes as top enforcers at the Federal Trade Commission and the DOJ's antitrust division are taking a close look at the multitrillion-dollar private equity industry under Biden Administration's aggressive antitrust enforcement agenda.

Richard Mosier, former special counsel for private equity in the DOJ's antitrust division, said the agency has "renewed focus" on making sure that private equity firms comply with the federal law known as the Hart-Scott-Rodino or HSR Act. In addition to a notification form, the law requires a submission of documents including studies, analyses and reports prepared for the company's board or executives about a deal.

Mosier said the concerns largely revolve around companies' failure to turn over all required documents and the agency isn't looking at "accidental" situations where a company forgets about one or two things.

Companies that "try to game the system, they run the risk of having that HSR and perhaps prior HSRs scrutinized. The person who signs the form opens themselves up to liability," said Mosier, speaking at a conference in Washington.

Comments by some FTC commissioners including Chair Lina Khan display an "open animus towards a specific business model" used by private equity, said Rebekah Goshorn Jurata, general counsel for the American Investment Council, a lobbying group for the industry. "It's unfounded and not based on empirical data or evidence," she said, speaking at the same event.

Mosier declined to name any companies caught up in the probe. But KKR & Co. previously disclosed that the Justice Department was looking at the accuracy of its merger notification filings for some transactions in 2021 and 2022. In December, the company said it received a grand jury subpoena over the accuracy of its filings, an indication that the agency had opened a criminal probe.

KKR declined to comment. The Justice Department didn't immediately respond to a request for comment.

Mosier in February transferred to the Federal Trade Commission, where he is now focused on mergers and conduct focused on hospitals and physician groups.

He cited February remarks by another senior DOJ official who said private equity firms must fully comply with the merger notification law and that failure to provide disclosure represents “an existential threat” to merger enforcement.

The DOJ also has a sweeping investigation of overlapping board seats that is focused on the sector. The enforcement push relies on a rarely invoked antitrust prohibition against so-called interlocking directorates, where the same individuals or entities have board seats at competing businesses. In February, the FTC also launched an inquiry into private equity firms’ investments in the healthcare sector.

(Updates with details of HSR Act, additional comments starting in 6th paragraph.)

--With assistance from Yiqin Shen and Allison McNeely.

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Judge's Citi Stock Saga to Get Recusal Input From Parties

By Jacqueline Thomsen and Evan Weinberger

- Fifth Circuit judge disclosed Citigroup stock in child's account
- Recusal saga now part of CFPB credit card-fee dispute

Bloomberg Law News 2024-04-11T09:49:37528029845-04:00

Judge's Citi Stock Saga to Get Recusal Input From Parties

By Jacqueline Thomsen and Evan Weinberger 2024-04-10T18:50:58000-04:00

- Fifth Circuit judge disclosed Citigroup stock in child's account
- Recusal saga now part of CFPB credit card-fee dispute

Litigants in a suit over the Consumer Financial Protection Bureau's credit card late fee rule are set to say whether a federal appeals judge should disqualify himself from the case over a stock ownership controversy.

Judge Don Willett of the US Court of Appeals for the Fifth Circuit is under scrutiny after it was revealed that he disclosed a financial stake in Citigroup Inc. The bank is second-largest credit card issuer and a member of three of the trade groups suing to block the CFPB rule.

Willett said in a statement that he's "painstaking" about his recusal duties, and that the roughly \$2,000 investment is part of his child's education savings account.

Some legal experts said the amount and the holding appears tangential, and that attorneys in the case should've made clear that Willett might have a conflict.

Others said it was obvious from court papers that Willett should've considered recusal, and that he may need to step away.

"There's no reason to believe that he did any of this for financial reasons. But that's not the only reason you recuse," said Louis Virelli, a professor at Stetson University Law School.

The CFPB raised potential disqualification after Willett authored the majority opinion in a 2-1 decision blocking a federal trial judge's order that the case be transferred out of Texas to the federal court in Washington.

Judge Amy Berman Jackson of the US District Court for the District of Columbia on Wednesday terminated the case on her docket, but left the door open to take it up again if the litigation is sent back to Washington.

And on Thursday, parties on both sides are expected to file papers expressing their views on whether Willett, a Donald Trump appointee, should recuse.

All of this plays out as federal judges face more questions over whether they're hearing cases in which they might have a financial interest, and as the Fifth Circuit in particular is eyed over its handling of high-profile litigation.

Unclear Line

Federal law says US judges shouldn't hear cases in which they, their spouses, or minor children have a financial interest in the subject matter of a case or in a party to the proceeding.

It's unclear whether Willett's Citigroup holdings crossed a recusal line.

Cassandra Robertson, a professor at Case Western Reserve University School of Law, said that ethics rules require recusal if judges have an economic stake in a company that's a litigant in a case over which they're presiding.

Trade group membership shouldn't fall into that category, she said.

"Is this a conflict that the judge should have seen? I say, no, this is the kind of thing that courts have pretty uniformly said is not a conflict," Robertson said.

Even if Willett met the technical standards for staying on the case, he should've taken into account Citigroup's status as a major credit card issuer when considering whether to recuse, said Leslie Abramson, a professor at the University of Louisville Law School.

"As long as he owns that stock, and it's not part of a mutual fund, he needs to be paying attention," he said.

Federal judges typically rely on software that compares a lawsuit's parties or those who might be affected by a case's outcome to a list of people or entities whose involvement might disqualify them from hearing a case. In this instance, Willett said the Fifth Circuit's "conflicts database screens every known variation of Citigroup."

Willett said he also sought guidance from the circuit's ethics adviser in the case, and that he was told "there was no basis for recusal" as Citigroup wasn't a party and wasn't flagged by the attorneys as an entity "financially interested in the outcome of the litigation."

Recusal Loopholes

Questions over Willett's financial holdings highlight a shortcoming in recusal guidelines, Kedric Payne, the senior director of ethics at the Campaign Legal Center, said.

The standard only discusses financial stakes in litigants and a case's outcome. But in many instances, particularly in challenges to federal regulations, litigation is filed by trade groups like the US Chamber of Commerce, the American Bankers Association, and the Consumer Bankers Association in the credit card late fee suit.

Ethics standards may need to be updated to account for judges' financial stakes in companies that are members of those trade groups, Payne said.

Sarah Turberville, director of The Constitution Project at the Project on Government Oversight, a watchdog, said the automated conflicts screening is "woefully insufficient," particularly when associations and non-profits file litigation on behalf of corporate interests.

"That said, it strains credulity to believe that a federal court judge could see the plaintiffs in the case—the US Chamber, the American Bankers Association, to name a few—and not observe that his stock holdings in member banks would create a conflict," Turberville said in an email.

President Joe Biden in 2022 signed into law requirements that federal judges and Supreme Court justices reveal their stock purchases and sales as they happen, and mandated that the federal judiciary start publicly posting those financial disclosures online.

The law was passed after the Wall Street Journal reported that over 100 federal judges were hearing cases that involved companies in which they or their immediate family members owned stock.

Willett said that the CFPB didn't update a form listing parties with a financial interest with "large credit card issuers" until Monday morning, three days after the panel ruling. "Judges evaluate recusal on an ongoing basis, and this supplementation, while belated, will help me and my colleagues evaluate our recusal obligations going forward," he said.

Murky Future

If Willett finds he should recuse himself, he'll step back from hearing the case. It's unclear whether another judge will replace him on the three-judge panel, or if an entirely new panel will be drawn.

Jennifer Ahearn, senior counsel for the Brennan Center for Justice at NYU Law's Judiciary Program, said there's not a "well-trodden path" on what should happen with Willett's prior ruling, if the judge does recuse himself, as the financial conflict doesn't appear to be egregious.

"If the situation is not very extreme and then it's not really clear what can be done, it leads us to believe that there's not realistically going to be anything that can be done at this stage," Ahearn said.

But whether Willett's financial stake in Citigroup is minor doesn't matter as much as the perception of conflicts of interest, Virelli said.

For that reason, if Willett recuses, the Fifth Circuit should take the time to reconsider the lower court's transfer order.

"What happens in these cases is too often judges feel that rehearing the case is much more of a burden than it really is," Virelli said.

Gabe Roth, executive director of the transparency group Fix the Court, said that part of the issue might stem from the fact that this was fast-moving litigation, in which the plaintiffs asked the Fifth Circuit to promptly make a ruling.

"Things are moving very quickly so I don't think Judge Willett deserves a huge amount of blame," Roth said.

Roth also noted that Willett has been forthcoming about the steps he took to see whether he should've recused, and shared comments with the media about the stock holdings.

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New Quarterly Accounting Disclosure Plan on Tap for This Year

By Nicola M. White

- FASB to release new proposal for public comment by year's end
- Stems from 2018 SEC update that cut some agency disclosure rules

Bloomberg Law News 2024-04-11T09:50:20897397623-04:00

New Quarterly Accounting Disclosure Plan on Tap for This Year

By Nicola M. White 2024-04-10T17:38:45000-04:00

- FASB to release new proposal for public comment by year's end
- Stems from 2018 SEC update that cut some agency disclosure rules

US accounting standard-setters will take another stab at clarifying which financial statement footnote information companies have to reveal quarterly versus what's only required once a year.

The Financial Accounting Standards Board on Wednesday voted to release a new proposal for public comment that attempts to clean up the board's interim disclosures accounting guidance, outlined in ASC 270.

FASB's research staff has worked behind the scenes for months to weed through the guidance, remove duplicative references, and draw up a table of all disclosures that should be required every quarter. The proposal will be released in the third quarter of the year, a FASB spokesperson said.

FASB's journey to streamline its interim disclosure requirements stems from the Securities and Exchange Commission's move in 2018 to eliminate agency disclosure requirements it said duplicated FASB accounting rules. As it turns out, some of the requirements weren't actually in FASB's rulebook.

The SEC's deleted requirements—formerly included in Regulation S-X, Rule 10-01, Interim Financial Statements—mandated disclosure for events that occurred after the end of a company's most recent fiscal year that have a material effect on the business.

FASB in November 2021 set out to replicate the SEC's dropped requirements for US generally accepted accounting principles, or GAAP, but it turned out to be more work than FASB expected. Audit firms and trade groups gave the 2021 proposal mixed feedback, with many saying they needed more specific guidance.

FASB member Christine Botosan said she thought the standard-setter would be able to turn its guidance on interim reporting requirements into a "one-stop shop" for all things related to quarterly reporting, but it wasn't so simple.

"That is just a pipe dream," Botosan said.

The public will have 90 days to weigh in on the forthcoming plan once it's released to the public.

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POLITICS

Trump Media director accused of 'hacking' files in attempted corporate 'coup': Lawsuit

PUBLISHED WED, APR 10 2024 4:42 PM EDT UPDATED 3 HOURS AGO



Kevin Breuninger
@KEVINWILLIAMB

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KEY POINTS

- Investment firms led by the former CEO of the SPAC that merged with Donald Trump's media company allege that their files were hacked and stolen by a current member of the media company's board of directors.
- The firms in a federal civil lawsuit accuse board member Eric Swider of plotting a "coup" to replace Patrick Orlando as CEO of the SPAC, Digital World Acquisition Corp.
- Trump Media & Technology Group Corp., which owns Truth Social and trades under the ticker DJT, soared in its stock market debut but those gains have since erased.



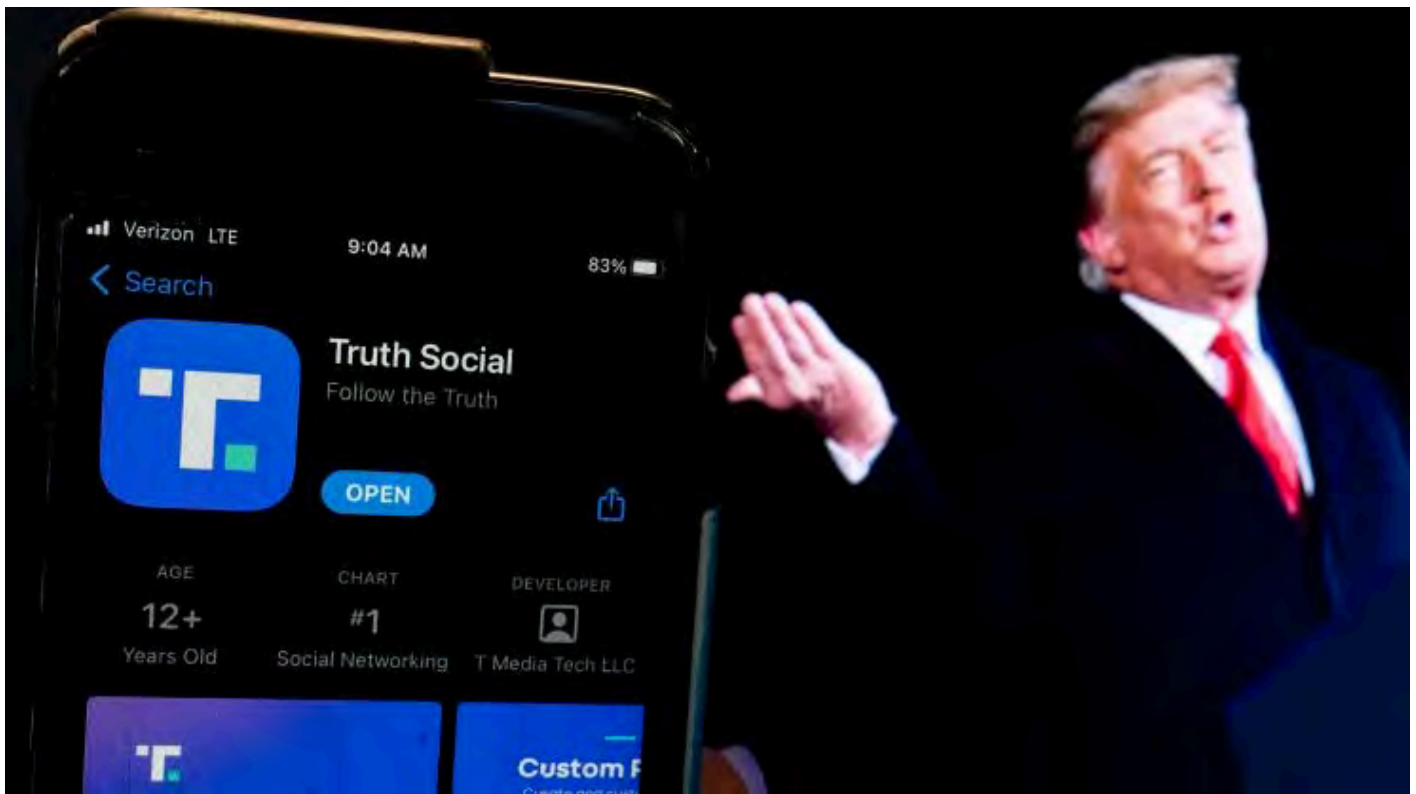
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This photo illustration shows an image of former President Donald Trump next to a phone screen that is displaying the Truth Social app, in Washington, DC, on February 21, 2022.

Stefani Reynolds | AFP | Getty Images

Investment firms led by the former CEO of the SPAC that merged with [Donald Trump](#)'s media company allege that their files were hacked and stolen by a current member of the media company's board of directors.

In a federal civil [lawsuit](#) filed in South Florida last month, the firms accuse board member Eric Swider of plotting a coup in early 2023 to replace Patrick Orlando as CEO of the special purpose acquisition company, Digital World Acquisition Corp.

As part of that attempted ouster, Swider and others allegedly "stole access" to the firms' computer systems and then "used the stolen information to attack" Orlando, according to the lawsuit.

It was "an audacious scheme to seize control of and enlarge their holdings," claims the suit, which was filed by Benessere Investment Group and ARC Global Investments II.

The suit seeks damages and an injunction "prohibiting the use of the stolen information and to stop the Defendants hacking" the firms' files.

That blank check company last month completed a [merger](#) to take [Trump Media & Technology Group Corp.](#) [+](#) public, allowing it to trade on the Nasdaq Stock Market. The company, which owns the Trump-centric social media app Truth Social and trades under the ticker DJT, soared in its stock market debut but those gains have since erased.

On Wednesday alone, the share price fell nearly 9%. Since April 1, the stock has lost almost 45% of its value.

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The Florida lawsuit is just one in a series of messy and dramatic legal disputes that have come to define Trump Media's rocky road to an IPO, and its equally turbulent first weeks as a public company.

DWAC in July settled [fraud charges](#) with the Securities and Exchange Commission, though the agency found the SPAC had submitted "materially false and misleading" filings.

Trump Media in late March sued its co-founders over alleged [mismanagement](#) of the merger, and is seeking to bar them from owning the company's stock.

Those co-founders have [sued Trump Media](#) in Delaware Chancery Court over their stake in the company.

Critics, meanwhile, have labeled the company a [meme stock](#) and a "[scam](#)." They point to the company's reported net loss of \$58.2 million on revenue of just \$4.1 million in 2023.

Trump Media did not immediately respond to CNBC's requests for comment on the lawsuit. Emails sent to addresses that belonged to Swider and co-defendant Alexander Cano, DWAC's former president, did not immediately receive responses.



In an interview with [Wired](#), which first reported the lawsuit earlier Wednesday, Swider denied all of the allegations against him.

“I just think he’s never let go [of] the fact that I replaced him,” Swider told the outlet. “I don’t know why it offends him so bad.”

The alleged hack

The Florida lawsuit, which was filed shortly before the late March merger, presents Orlando as successful in his efforts to bring DWAC into a merger agreement with Trump Media.

It alleges that Swider misled DWAC’s directors and business partners by publishing “false and misleading representations of what was occurring” at the company.

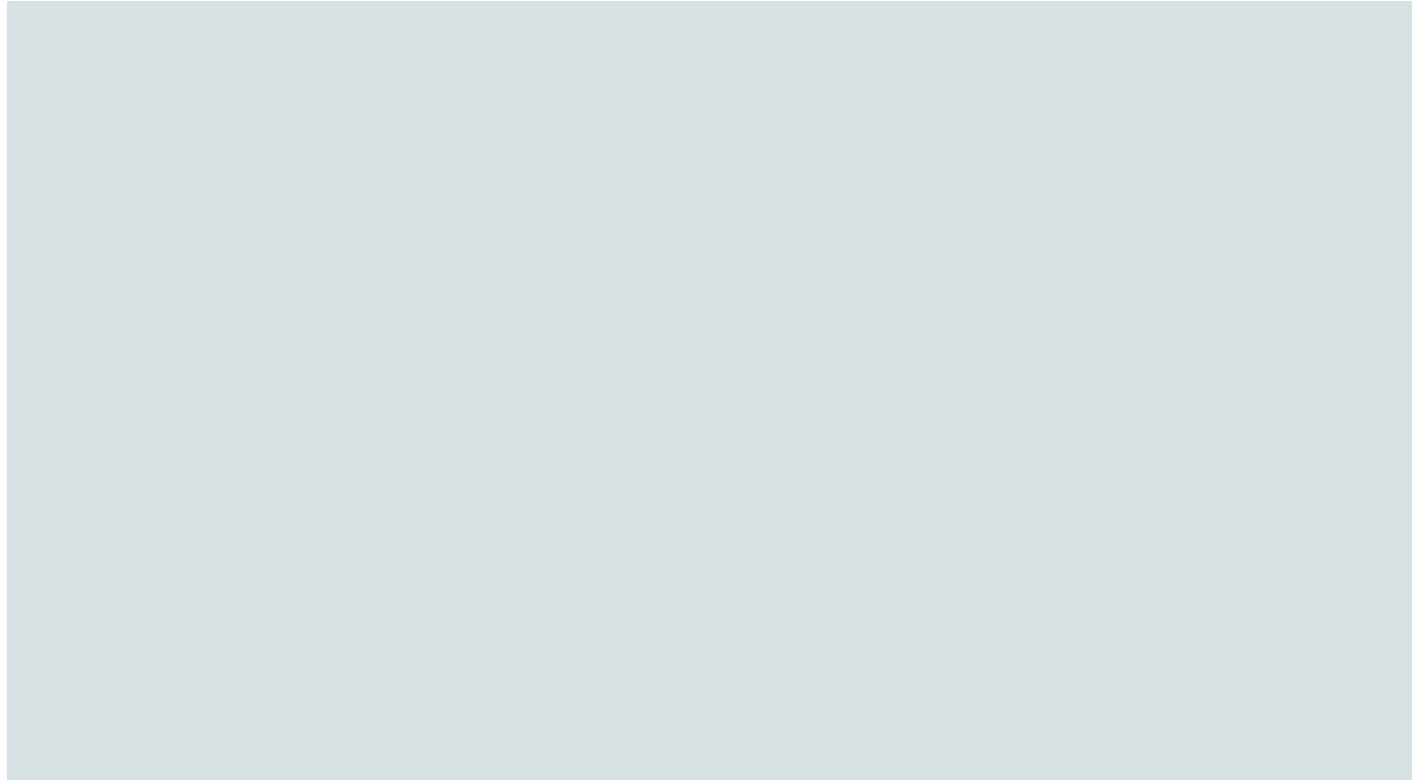
He also allegedly “offered outsized compensation to the other directors he enlisted to collude with him in exchange for supporting his coup d’état.”

Swider stood to massively increase his compensation through his accession to CEO of DWAC — but he also wanted to take control of ARC II, which owned about 19% of DWAC prior to the merger, according to the lawsuit.

Trump Media in an April 1 regulatory filing reported that ARC II owns 6.9%, or about 9.5 million shares, of the post-merger company.

Information about ARC II was held in an account on an electronic file storage website owned by Benessere, the suit says.

To access the account, which “stores the lifeblood” of both investment firms, Swider allegedly enlisted Cano, Orlando’s former assistant. The firms accuse Swider of promising to make Cano the president of DWAC in exchange for access to the account.



A woman uses her phone in front of screens displaying trading information about shares of Truth Social and Trump Media & Technology Group, outside the Nasdaq Market site in New York City, U.S., March 26, 2024.

Brendan Mcdermid | Reuters

Cano agreed, and Swider “made good on his promise,” while also providing Cano with a convertible note worth 165,000 shares of DWAC’s stock — an award valued at more than \$6 million at the time, the suit alleges.

Swider said in the interview with Wired that Orlando voted for Cano’s award, adding that he never hired Cano as his assistant, as the suit alleges.

The lawsuit says that Cano since February 2023 repeatedly accessed the storage account and “immediately” provided the information within it to Swider.

Swider then used it to email “false and defamatory claims” about Orlando to ARC II’s members, according to the suit.

In a March 5 email — included in the lawsuit as “Exhibit A” — Swider accused Orlando of “failure to maintain a fiduciary responsibility” to ARC II, among a litany of other claims.

“Patrick has threatened me with pending litigation for speaking out to fellow membership holders so I want to be clear about this. I am not disparaging Patrick,” Swider wrote in the email.

“I am sure he is an amazing Human being, Honest. hard working. Looking out for your best interest. He is good looking. He is cool. I like him. Nothing in this email is meant to be defamatory. He has been great as a leader. Patrick- you are Awesome!!”

Orlando later discovered the email because Swider “failed to remove Orlando’s wife from the mailing list,” according to the lawsuit.

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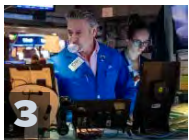
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Tesla investor may put forward collective bargaining motion at AGM

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Gwladys Fouche, Marie Mannes

Item 1 of 2 A view of cars outside of a Tesla service centre as workers picket, in Upplands Vasby, north of Stockholm, Sweden December 15, 2023. REUTERS/Marie Mannes/File photo

[1/2]A view of cars outside of a Tesla service centre as workers picket, in Upplands Vasby, north of Stockholm, Sweden December 15, 2023. REUTERS/Marie Mannes/File photo
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- Norwegian pension fund KLP considers shareholder proposal
- Fund says Musk underestimates worker dispute
- Tesla has said Swedish conditions already meet demands
- KLP excluded Tesla from its sustainable funds last year

OSLO/STOCKHOLM, April 11 (Reuters) - Tesla (TSLA.O) , opens new tab investor KLP may ask the automaker's annual general meeting to address CEO Elon Musk's reluctance to engage in collective bargaining, the Norwegian pension fund said on Thursday.

A strike by Tesla mechanics in Sweden, among the country's longest labour disputes, has for months disrupted the automaker's operations and attracted the concern of several Nordic institutional investors.

On Monday, Musk said "the storm had passed on that front". But the strike is continuing and the union leading the action told Reuters this week it may ramp it up.

KLP, Norway's largest pension fund, was a signatory to a December letter sent by Nordic investors expressing their concern about the strike in Sweden and Tesla's reluctance to acknowledge a right to collective bargaining.

"That Elon Musk is saying that the 'storm has passed' is just his way to underestimate the conflict and the issue," Kiran Aziz, KLP's head of responsible investments, told Reuters.

"The conflict is still going and Musk does not really want to understand that collective bargaining is the backbone of the Nordic labour model."

Tesla did not immediately respond to a request for comment. It has previously said its Swedish employees have as good, or better, terms than those the union is demanding.

Aziz said Tesla had not answered the December letter, and KLP was now "trying to figure out how to escalate".

When KLP disagrees with the management of a company in its portfolio, it first tries to establish a dialogue with the company, before moving to outline its expectations to the board, Aziz said.

"The next step with Tesla could be filing a shareholder proposal at its annual general meeting," she said, without elaborating on its contents.

"We will continue to pursue this issue regardless of what Musk thinks so one advice would be that Tesla starts to respond on queries from investors."

KLP holds 900,000 Tesla shares worth some 1.7 billion crowns (\$157 million). Last summer it removed Tesla shares from its sustainable funds.

"We did that before the strikes began, because our portfolio managers were seeing that it would come to some controversy," Aziz said. "The Tesla holdings is still in the other funds."

(\$1 = 10.8039 Norwegian crowns)

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Reporting by Gwladys Fouche in Oslo and Marie Mannes in Stockholm; editing by Philippa Fletcher

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Gwladys Fouche
Thomson Reuters

Oversees news coverage from Norway for Reuters and loves flying to Svalbard in the Arctic, oil platforms in the North Sea, and guessing who is going to win the Nobel Peace Prize. Born in France and with Reuters since 2010, she has worked for The Guardian, Agence France-Presse and Al Jazeera English, among others, and speaks four languages.



Marie Mannes
Thomson Reuters

Stockholm-based company news correspondent who mainly covers anything to do with retail and industrial companies in Sweden as well as other sectors with Swedish companies. She previously covered the general Nordic stock market from Gdansk, reporting on a range of subjects, from companies exiting Russia to M&As and supply chain concerns. Marie has degrees in journalism and international relations and is keen on finding stories that drive the market and that have unreported elements to it.

Tesla strike in Sweden continues, union says, contradicting Musk

 [reuters.com/business/autos-transportation/tesla-strike-sweden-continues-union-says-contradicting-musk-2024-04-10](https://www.reuters.com/business/autos-transportation/tesla-strike-sweden-continues-union-says-contradicting-musk-2024-04-10)

Marie Mannes, Gwladys Fouche

A Tesla sign is displayed over a Tesla showroom in Malmo, Sweden, December 14, 2023. REUTERS/ Tom Little/FILE PHOTO Purchase Licensing Rights , opens new tab

STOCKHOLM/OSLO, April 10 (Reuters) - A strike by Tesla (TSLA.O) , opens new tab mechanics in Sweden, among the country's longest labour disputes, continues to disrupt operations, a union said on Wednesday, and is drawing scrutiny from investors despite Elon Musk saying the storm is over.

For months Tesla has been under pressure in the Nordics, with sympathy actions since October backing Swedish IF Metall's mechanics' demand for a collective agreement.

Postal workers, garbage collectors, repair centres, port workers, electricians, and cleaners are among those that have refused to handle Tesla business, forcing the company to find alternative ways of running its operations.

"I think the storm has passed on that front," Musk, who has been vocal about his opposition to unions, said on Monday in a live chat on his social media platform X. "I think things are reasonably good in Sweden."

The U.S. carmaker does not manufacture in Sweden, but its electric vehicles are serviced there by more than 120 mechanics.

IF Metall says it remains in dispute with Tesla.

"The strike in Sweden is still very much ongoing, our members are on strike," IF Metall spokesperson Jesper Pettersson told Reuters, adding the union was considering ramping up action.

"(Tesla) want to make an impression that business is as usual for them, but we know - and they know - that that's not entirely true."

Tesla did not immediately respond to a request for comment. It has previously said its Swedish employees have as good, or better, terms than those the union is demanding.

INVESTOR PRESSURE

Musk's comment on Monday came in response to a question from the CEO of Norway's \$1.6 trillion wealth fund, which owns 1% of Tesla's stock and is its eighth-largest investor, LSEG data shows.

The fund also raised the issue with Tesla chair Robyn Denholm in March, it told Reuters.

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In 2022, the fund backed a shareholder proposal asking Tesla to adopt a policy on respecting rights to freedom of association and collective bargaining.

"(We) will continue to follow up on our expectations," said a fund spokesperson.

In December, some Nordic pension funds and other investors sent a letter to Tesla voicing concern. One fund, PensionDanmark, sold its shares in Tesla over the issue.

The ethics watchdog for four of Sweden's state pension funds, with a combined Tesla stake worth 314 million euros at end-2023, said this week it has discussed the strike with the automaker.

The head of the AP Funds' Council on Ethics, Jenny Gustafsson, told Reuters it had highlighted to Tesla how the Swedish model of collective bargaining is "well established and has provided stability and predictability in the Swedish labour market".

DISRUPTING OPERATIONS

Tesla's Model Y remained Sweden's most sold car in the first quarter of 2024. The group's overall registrations in the country declined some 8% year-on-year in the January-March period, broadly in line with the market, data from industry association Mobility Sweden showed.

One union supporting IF Metall's strike said Tesla's operations had still been affected.

"They have been forced to change their way of bringing cars into Sweden and Tesla employees have to handle waste and garbage themselves at the workshops," said Elin Lornbo of the Transport Workers' Union, which is blocking the company from delivering cars to Sweden by ship.

The transport union has said that it believes Tesla is bypassing the blockade by bringing cars in on trucks or by train.

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Reporting by Marie Mannes in Stockholm and Gwladys Fouche in Oslo; Editing by Elaine Hardcastle

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US sets first standard to curb 'forever chemicals' from drinking water

 [reuters.com/world/us/us-sets-first-standard-curb-forever-chemicals-drinking-water-2024-04-10](https://www.reuters.com/world/us/us-sets-first-standard-curb-forever-chemicals-drinking-water-2024-04-10)

Valerie Volcovici

WASHINGTON, April 10 (Reuters) - The U.S. Environmental Protection Agency on Wednesday announced its first-ever drinking water standard to protect people against toxic "forever chemicals" found in many household and everyday items, and offered \$1 billion to states for public water system testing, the agency's first major move to curb the cancer-causing chemicals.

The final rule will affect 6% and 10% of the 66,000 public drinking water systems in the United States and is projected reduce exposure to the group of 15,000 chemicals known as per- and polyfluoroalkyl substances (PFAS) for approximately 100 million people. It would avoid tens of thousands of deaths that have been linked to PFAS, according to the agency.

Dubbed "forever chemicals" because they do not easily break down in the human body or environment, PFAS is found in hundreds of consumer and commercial products, including non-stick pans, cosmetics, firefighting foams and stain resistant clothing.

"The first national drinking water standards for PFAS marks a significant step towards delivering on the Biden-Harris Administration's commitment to advancing environmental justice, protecting communities, and securing clean water for people across the country," said Brenda Mallory, chair of the White House Council on Environmental Quality, in a statement.

Signage is seen at the headquarters of the United States Environmental Protection Agency (EPA) in Washington, D.C., U.S., May 10, 2021. REUTERS/Andrew Kelly/File Photo
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Experts have predicted that the release of new regulations will spur more PFAS-related litigation. Last year alone, lawsuits accusing major chemical companies of polluting U.S. drinking water with toxic PFAS chemicals led to over \$11 billion in settlements.

A study released last year by the U.S. Geological Survey found that nearly half of U.S. tap water samples contain PFAS.

The EPA rule will set limits for five individual PFAS chemicals: PFOA, PFOS, PFNA, PFHxS, and HFPO-DA. All public water systems have three years to complete their monitoring for these chemicals and must inform the public of the level of PFAS measured in their drinking water.

In cases where PFAS is found at levels that exceed the standards, the water systems are required to install systems to reduce PFAS in their drinking water within five years.

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Documents

The limits include an enforceable 4 parts per trillion (ppt) limit on perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) in drinking water. The agency set a non-enforceable maximum contaminant level goal for PFOA and PFOS at zero, reflecting research showing that no level of exposure is risk-free from cancer and other diseases.

The rule also sets a limit of 10 ppt on three other categories of PFAS in drinking water, including perfluorononanoic acid (PFNA), perfluorohexane sulfonate (PFHxS), and "GenX" chemicals. GenX chemicals are made by the Chemours Co., which owns the trademark, to produce fluoropolymers used in semiconductor chips.

The rule also set a limit on mixtures of each of those substances, in addition to perfluorobutanesulfonic acid (PFBS).

Up to 6,700 water systems serving about 100 million people, or between 6% and 10% of all the drinking water systems in the US, will be affected by the new standards, according to the EPA.

"I think the frequency of detections at these levels are going to be more than EPA is contemplating," Edelstein said. "It's going to be everywhere."

It could cost water utilities nationwide up to \$40 billion in capital investments and \$3.8 billion annually to comply with the standards, said Chris Moody, regulatory technical manager for the American Water Works Association.

The EPA estimated that it could cost \$1.5 billion for utilities to comply with the rule, with benefits also totaling \$1.5 billion. About \$1 billion in infrastructure funding will be available to help water systems test for PFAS and remove it. An additional \$12 billion is available for general drinking water system improvements.

Ratepayers could be on the hook for hundreds or thousands of dollars in additional drinking water costs as water systems pay for PFAS testing and the technology to remove the chemicals if they are detected, Tom Dobbins, CEO of the Association of Metropolitan Water Agencies, said in a statement.

"This rulemaking represents a multi-billion-dollar unfunded mandate that will be borne by water system ratepayers across the country," Dobbins said, adding that federal infrastructure dollars available to support PFAS testing and removal are insufficient.

The EPA's cost-benefit justification for the standards will be targets of litigation, said Anna J. Wildeman, counsel at Troutman Pepper Hamilton Sanders LLP in Washington and a former Trump administration official in EPA's Office of Water.

"The significant cost of the rule coupled with the debatable benefits may be compelling on judicial review," she said.

The EPA's enforceable maximum contaminant level (MCL) for mixtures is also likely to be challenged in court because the agency didn't find enough evidence to establish an MCL for PFBS individually, Wildeman said.

Worth the Cost

Supporters of the new standards recognize the compliance costs but say they're worth it.

"I think EPA's conclusion that the benefits of the rule justify the cost is very well supported by the record," said Katherine O'Brien, senior attorney at Earthjustice, an environmental law firm. "EPA is making a very substantial investment to support water systems who are going to need to pursue technological solutions to clean up drinking water."

The new standards provide "a ton of relief" to communities that have suffered from PFAS pollution in drinking water for years, said Jean Zhuang, senior attorney for the Southern Environmental Law Center.

"The regulated community has pushed back heavily against any control of PFAS pollution in this country," Zhuang said. "We hope there won't be litigation, but expect it."

Reduced cancer risk and other public health benefits that come with less PFAS exposure make the new standards one of the Biden administration's most significant environmental regulations, Radhika Fox, former EPA assistant administrator overseeing the Office of Water, said in an interview Wednesday.

But it's expensive to ensure drinking water is PFAS-free, she said.

"These drinking water facilities aren't responsible for the contaminants that are there," she said, adding that funding from the infrastructure law is an important "down payment" that will help water systems comply with the new standards.

Water systems worried about compliance costs should contact EPA right away for technical assistance, and reach out to administrators of the state revolving funds, which distribute federal assistance for drinking water system upgrades at the state level, Fox said.

But ultimately, states and the federal government are going to have to "continue to identify additional resources" to help water systems remove PFAS, she said.

Essential Substances

PFAS are known as "forever chemicals" because they remain in the environment indefinitely, are considered carcinogenic, and include coatings such as Teflon used in cookware.

The substances can be found in about 45% of US drinking water sources, including public water systems and private water wells, US Geological Survey scientists estimated in 2023.

Chemours, one of the largest PFAS producers, defended the use of the substances and said it is reviewing the standards.

The company has "serious concerns" about the science EPA used to justify the standards and has taken steps to address legacy constituents, spokeswoman Cassie Olszewski said in an email.

"Fluorine chemistries are essential and can be made responsibly," she said.

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BDO Fights SEC's 'Misdirected' Call For 2nd Circ. Rehearing

By **Jessica Corso**

Law360 (April 10, 2024, 9:19 PM EDT) -- BDO USA LLP is urging the Second Circuit not to reconsider a decision that freed the firm from private litigation over AmTrust Financial Services Inc.'s financial restatements, saying the court should not heed "misdirected concerns" from the U.S. Securities and Exchange Commission about the ruling's supposed impact on shareholders' ability to sue public company auditors.

A Second Circuit **ruling** in August that upheld BDO's dismissal from shareholder litigation over AmTrust's financial restatements was not as broad as the SEC fears it might be, the auditor told the appellate court in a Tuesday brief urging it against rehearing the dispute.

The ruling partially revived a proposed class action lawsuit accusing AmTrust of making a series of misstatements about its finances dating back to 2012 that required the insurer to restate its financials and ultimately sank the company's stock.

The three-judge panel also ruled that BDO, AmTrust's outside auditor, was properly dismissed from the case, finding a certification that an audit performed in accordance with applicable standards was too generic to be material to investors.

BDO argues the panel made the correct decision, saying the Second Circuit should not authorize a panel rehearing based on the SEC's "misdirected concern" that no auditor opinion can ever be found material to investors, which the auditor argued is not what the court said in this case.

"[T]his Court explicitly limited its opinion to the factual allegations 'in this case,'" BDO said in its Tuesday brief.

Moreover, adopting the SEC's position could "drastically expand the federal securities fraud laws," by allowing investors to sue over any audit deficiency, "even those with no impact on financial reporting to investors, e.g., those relating to documentation and supervision," BDO said.

"The SEC does not cite to any authority in any jurisdiction to support its sweeping and extreme position, which would throw open the courthouse doors to every audit violation, whether small or large, regardless of any impact on the issuer's financial statements," the brief said.

Despite not being a party to the private litigation, the SEC filed an amicus curiae brief in February at the behest of the Second Circuit, which urged the agency to weigh in after three former SEC chief accountants and deputy chief accountants filed a brief backing AmTrust investors' calls to revive the claims against BDO.

The agency urged the court to reconsider its materiality analysis on the BDO certification, arguing investors rely on such statements to make investment decisions and that the statements are not immaterial simply because the language is standardized.

"A false certification concealing a deficient audit has independent significance: it eliminates the basis for investors' reliance on the auditor and subjects investors to increased (and hidden) risk," the SEC said. "It thus matters to investors regardless of whether the specific deficiencies resulted in misstated financial statements."

In 2018, the SEC **temporarily barred** three former BDO accountants from auditing publicly traded companies for releasing an AmTrust audit report before the underlying auditing work was completed.

BDO is represented by Timothy Hoeffner, Jason Gerstein and Ludwig von Rigal of McDermott Will & Emery LLP.

The SEC is represented in-house by Brooke Wagner, Megan Barbero, Michael Conley and Daniel Staroselsky.

The investors are represented by Andrew Love, Samuel Rudman, David Rosenfeld, Mark Millkey, William Geddish and Robert Gerson of Robbins Geller Rudman & Dowd LLP, Jeremy Lieberman of Pomerantz LLP, Thomas McKenna of Gainey McKenna & Egleston and Kim Miller of Kahn Swick & Foti LLC.

The case is New England Carpenters Guaranteed Annuity and Pension Funds et al. v. AmTrust Financial Services Inc. et al., case number 20-1643, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Aaron Keller. Editing by Drashti Mehta.

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Class Attys Seek Big Payday For \$100M Pattern Energy Deal

By **Rose Krebs**

Law360 (April 10, 2024, 4:18 PM EDT) -- Class attorneys are urging the Delaware Chancery Court to approve a \$100 million settlement to end state and federal court litigation over Pattern Energy Group Inc.'s \$6.1 billion go-private sale in 2020 and award them \$26 million in fees for a deal they say is the largest of its kind in the Chancery's history.

In a brief made public Tuesday, attorneys representing lead plaintiff Jody Britt in the Chancery case and an investor plaintiff group referred to as "the Water Island Funds" in the Delaware district court litigation say that the proposed global settlement is fair and reasonable and that the fee bid is warranted because "counsel obtained a substantial benefit for the class."

"The settlement — which is to counsel's knowledge the largest settlement of Revlon claims in this court's history and only the fifth nine-figure cash settlement achieved in a class action in this court — is the result of over three years of hard fought and complex litigation in state and federal court, where a class recovery of any amount was far from assured," the brief said.

Delaware's Supreme Court established what is commonly referred to as the Revlon doctrine in its landmark 1986 decision in *Revlon v. MacAndrews & Forbes Holdings*, which set standards by which boards are required to make reasonable efforts to get the best deal for a company.

Investor plaintiffs in the Chancery and federal court suits alleged that the renewable power venture's \$6.1 billion go-private sale in 2020 was beset by unfair conduct and conflicts.

"Collectively, plaintiffs' counsel in the Chancery and federal actions developed a damning record of fiduciary misconduct and violations of the federal securities laws," the brief asserts.

The work by class attorneys included "reviewing over 300,000 documents (comprising over 2,000,000 pages); deposing 30 individuals over the course of 53 days across the two actions; and engaging in extensive expert discovery," the brief said.

A global settlement was reached in August, "just eight weeks before trial in the federal action," according to the brief.

Settlement documents were filed in Chancery Court in December, detailing a proposed deal by which Pattern Energy Group Inc. would pay \$100 million to resolve claims in both courts.

"For purposes of administrative convenience and efficiency, and to effectuate a single global settlement of both the Chancery action and federal action, the settling parties have agreed to submit this stipulation for approval and administration through the Court of Chancery only," a stipulation of settlement said.

The settlement was struck in late August after multiple mediation sessions, and "the parties entered into a binding settlement term sheet that achieves a global resolution of all claims asserted in the actions" in early September, the stipulation said.

Pattern Energy Group and other defendants make no admission of wrongdoing, fault or liability, the stipulation said.

Vice Chancellor Morgan T. Zurn scheduled a hearing for May 3 to consider the settlement.

Any fee and expense award approved by the court would be paid from the settlement fund, as would taxes and other costs, the stipulation said. Class attorneys are seeking a fee award of roughly \$26 million and reimbursement for about \$2.8 million in litigation expenses, according to the brief made public Tuesday.

Also, lead plaintiffs in the Chancery and federal actions are each seeking \$25,000 "incentive awards" as compensation for their role in the litigation, the brief said. If approved by the court, the \$50,000 in incentive awards sought would be deducted from any fee and expense award, the brief said.

"Plaintiffs' counsel respectfully submit that the 27% fee sought here — after payment of counsel's litigation expenses — is eminently fair given the stage at which the actions settled," the brief asserts.

Attorneys for the investor plaintiffs will "jointly allocate the fee and expense award among themselves," the stipulation said, and any disputes about the amounts to be divided among the attorneys will be sent to a mediator.

If approved, the settlement would bring an end to consolidated Chancery litigation dating back to 2020.

In 2021, Vice Chancellor Zurn **let most of the claims** in the suit stand, saying Britt raised reasonably conceivable claims that the deal was tilted toward an inferior bid from buyer Canadian Pension Advisory Board. The suit alleged that private equity investor Riverstone Holdings LLC and others exerted unfair control over the deal and acted in bad faith.

The district court litigation, which also dates back to 2020, alleges that Pattern Energy Group misled investors during its \$6.1 billion go-private sale. Last year, a federal judge **narrowed the class** in that case to include only those investors who still held their shares of the company at the time that merger closed.

In December, U.S. District Judge Maryellen Noreika entered an order directing parties in the federal case "to proceed with obtaining approval and administration of the settlement through the Court of Chancery."

The class in the Chancery Court is defined as: "All record and beneficial owners of PEGI common stock, as of March 16, 2020 (the date of the consummation of the merger), who received merger consideration," excluding defendants and certain other parties, the stipulation of settlement said.

Goldman Sachs & Co. LLC, which according to a court document served as a financial adviser to Pattern Energy Group in connection with the sale, was one of the defendants that signed off on the stipulation of settlement along with Pattern Energy Group Inc., certain of its directors and officers, and Riverstone and affiliates.

Counsel for the investor plaintiffs declined to comment Wednesday.

Counsel for the other parties didn't immediately respond Wednesday to requests for comment.

The investors are represented by Ned Weinberger, Mark Richardson, Michael C. Wagner, Brendan W. Sullivan, Jiahui (Rose) Wang and John Vielandi of Labaton Keller Sucharow LLP, Chad Johnson, Noam Mandel, Desiree Cummings, Jonathan Zweig, Cristelle Rabban, Ana Avalos Cuellar, Sabrina Tirabassi and Mason Roth of Robbins Geller Rudman & Dowd LLP, Brian Schall and Rina Restaino of The Schall Law Firm, Andrew J. Entwistle, Vincent R. Cappucci and Jessica A. Margulis of Entwistle & Cappucci LLP, Marc M. Seltzer and Krysta Kauble Pachman of Susman Godfrey LLP, Christopher J. Kupka of Fields Kupka & Shukurov LLP, and Sue L. Robinson, Brian E. Farnan and Michael J. Farnan of Farnan LLP.

Pattern Energy Group Inc. and certain directors or officers are represented by A. Thompson Bayliss, April M. Ferraro and Christopher F. Cannataro of Abrams & Bayliss LLP and Alan S. Goudiss and K. Mallory Brennan of Shearman & Sterling LLP.

Other directors are represented by Matthew D. Stachel, Jaren Janghorbani, Geoffrey Chepiga and Erin Morgan of Paul Weiss Rifkind Wharton & Garrison LLP.

Riverstone is represented by Rudolf Koch, Matthew D. Perri and Andrew L. Milam of Richards Layton & Finger PA and Matthew A. Schwartz and Julia A. Malkina of Sullivan & Cromwell LLP.

Goldman Sachs & Co. LLC is represented by Stephen C. Norman, Jaclyn C. Levy and Ellis H. Huff of Potter Anderson & Corroon LLP and David B. Hennes, Martin J. Crisp and Ethan M. Weinberg of Ropes & Gray LLP.

The state court case is In re Pattern Energy Group Inc. Stockholders Litigation, case number 2020-0357, in the Court of Chancery of the State of Delaware.

The federal court case is In re Pattern Energy Group Inc. Securities Litigation, case number 1:20-cv-00275, in the U.S. District Court for the District of Delaware.

--Additional reporting by Jeff Montgomery and Emilie Ruscoe. Editing by Rich Mills.

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Comparing Corporate Law In Delaware, Texas And Nevada

By **John Lawrence, Danny David and Nathan Thibon** (April 10, 2024, 6:29 PM EDT)

In January, hours after the Delaware Court of Chancery rejected Tesla Inc.'s \$55.8 billion compensation package for CEO Elon Musk, Musk posted on X, "I recommend incorporating in Nevada or Texas if you prefer shareholders to decide matters."

Days later, he reincorporated one of his high-profile private companies, Neuralink Corp., from Delaware to Nevada, and another, Space Exploration Technologies Corp., from Delaware to Texas, and declared he would seek a vote of public company Tesla's stockholders to also move its corporate home to Texas. Should others take Musk's advice and follow his lead?

For decades, Delaware has been the corporate home to an extraordinary number of U.S. businesses and the de facto home for U.S. corporate law. While the state's population just barely cracks the million mark, more than 1.9 million entities now call Delaware their registered home — including more than 68% of the Fortune 500, and nearly 80% of all U.S. companies issuing initial public offerings.[1]

But Delaware has not always held this mantle. At the start of the 20th century, New Jersey was the most popular locale for corporate charters, buoyed by the state's low taxes and its then-innovative broad grant of powers to corporations.

Delaware was able to step into New Jersey's position through a mix of imitation — Delaware's General Corporation Act of 1899, which still underlies the state's corporate law today, borrowed heavily from the popular New Jersey law — and good fortune, as New Jersey soon after adopted a more restrictive view of corporate registration, leaving Delaware with the law more favored by many corporations.[2]

Could this shift be happening again? Other states have long tried to woo corporate charters and their accompanying tax dollars from Delaware, but the question has recently picked up considerable steam.

Tearing a page from Delaware's own 100-year-old playbook, states like Nevada and Texas have tried selling businesses on the advantages of incorporation within their borders through favorable changes to their corporate laws and other systemic changes that they promise will provide the benefits historically enjoyed through incorporation in Delaware, but with even more corporate freedom and less risk of damaging litigation.

These states' efforts have been buttressed by high-profile corporate moves and the perception that Delaware courts have in recent years tightened the reins on corporations and expanded stockholders' abilities to maintain lawsuits against companies and their officers and directors.

We do not believe Delaware is at risk of losing its throne any time soon, but there can be no doubt that businesses are increasingly at least considering incorporating or reincorporating outside of



John Lawrence



Danny David



Nathan Thibon

Delaware.

Delaware, Nevada and Texas each provides a good foundation of corporate law, grounded in fiduciary duties and governance practices that can allow a business to thrive commercially while also providing essential guardrails that can protect investors, drive investment and incentivize returns.

But at their margins, there are differences that can make each relatively more or less appropriate or appealing for any given corporation depending on that corporation's needs and ambitions.

Delaware may still be the right answer for many, but as they do with any major decision, decision-makers are right to weigh the pertinent considerations and make an informed decision on where to incorporate given their particular circumstances.

Many factors will drive that decision, and the following provides a brief overview of several differences generally applicable to corporations that may be deciding between Delaware, Nevada and Texas.

Differences in Director Fiduciary Duties

Each of these states requires corporate directors to comply with certain enumerated fiduciary duties, broadly fashioned to ensure that their decisions align with the corporation's interests.

In all three states, these fiduciary duties include the duty of care, which requires each director to take an active role in the decision-making process and to make informed decisions, and the duty of loyalty, which requires that each act in the best interests of the corporation. Texas also prescribes a duty of obedience, which forbids officers and directors from exceeding the scope of their powers.

However, unlike Delaware, both Texas and Nevada by statute permit directors to consider interests beyond the maximization of the corporation's long-term value in exercising these duties.[3]

Nevada permits consideration of "[t]he long term or short-term interests of the corporation ... [or its] ... stockholders," "[t]he interests of the corporation's employees, suppliers, creditors or customers," or "[t]he interests of the community or of society" when assessing the interests of the corporation.[4]

Texas permits consideration of both "the long-term and short-term interests of the corporation and of the corporation's shareholders," and "any social purpose specified in the corporation's certificate of formation." [5]

Thus, an entity that believes its directors should explicitly consider such elements in discharging their fiduciary duties, or that allowing its directors to do so may decrease the likelihood of unwarranted stockholder litigation or otherwise be beneficial, may favor incorporation in Nevada or Texas.

Of course, the impact of that decision on potential stockholders' investment decisions should also be contemplated.

Relatedly, these states also differ in when and how each permits exculpation of officers and directors for breaches of fiduciary duty.

Both Texas and Delaware allow corporations to include in their articles of incorporation provisions exculpating directors from personal liability for breaching the duty of care, but not the duty of loyalty, and Delaware also recently expanded this option to senior corporate officers.[6]

Nevada by statute automatically exculpates director and officer liability for any breach of fiduciary duty, shielding those individuals from personal liability unless their breach of a fiduciary duty involved intentional misconduct, fraud or a knowing violation of law, though the articles of incorporation may remove or restrict this automatic exculpation.[7]

Differences in Standards of Review

Differences in how courts will review directors' compliance with these duties can also be meaningful.

Under each state's law, most decisions will be reviewed under the deferential business judgment standard. However, both Delaware and Texas also provide for stricter standards of review in certain circumstances.

When the decision is made by a board that is not majority independent and disinterested, or involves a transaction with a controlling stockholder, Delaware law provides instead for an entire fairness standard of review that places the burden on the directors to show that both the transaction process and resulting economics were fair.

Delaware also imposes a third standard of review — enhanced scrutiny, lying between business judgment and entire fairness — for transactions that result in a change of control.

These burdens may be shifted back to the plaintiff or removed and returned to business judgment through use of special committees and stockholder votes.

Texas law does not provide quite so stringent heightened standards, and is generally more deferential to the decisions of fiduciaries than Delaware, but case law does subject to stricter judicial scrutiny transactions in which a fiduciary derived a personal benefit.

Nevada, at the other end of the spectrum from Delaware, explicitly rejects the use of any standard other than the business judgment standard, even in the case of interested transactions.[8]

There are potential benefits and drawbacks to each review regime. The potential for a stricter standard of review may provide some comfort, either to those forming the entity or to prospective stockholders. But it also may lead to a need for more complex corporate processes for certain transactions, potentially making the entity less nimble and efficient.

Litigation is expensive, and plaintiff-stockholder claims following significant transactions have become an industry, imposing a deal tax often more focused on settlement economics than legitimate corporate oversight.

Thus, it is not so simple to say, as some commentators have, that Delaware's system is more stockholder-friendly, with Texas' and Nevada's more management- and director-friendly. There are genuine and important interests of stockholders that can be served by being chartered in a state where deal litigation and other corporate stockholder litigation is less likely.

Differences in Court Systems and Case Law

Of course, the existence of a significant body of stockholder litigation can also be beneficial.

The Delaware Court of Chancery has decided seemingly countless complex corporate disputes during its history, and its written opinions are rightfully known for being thoughtful and well-written.

The result is a well-developed body of case law that endeavors to help provide corporations with predictability and guidance long before any corporate action ever reaches a court.

There is real value in knowing a future challenge will be decided by the talented Delaware Court of Chancery and having a good sense of how its experienced jurists will view the dispute if it lands before them.

It is no coincidence that courts in many states — including Texas and Nevada — look to Delaware Court of Chancery decisions in applying their own analogous laws. There is no better or more prolific source commenting on or applying general corporate law than the Court of Chancery's vast body of opinions.

The appointment process is designed to insulate the chancellor and six vice chancellors from politics; each is appointed to a 12-year term, and the seven positions are split 4-3 between the two major political parties.

In 2000, Nevada created its own business courts, modeled in part on Delaware's Court of Chancery, as part of its efforts to create a so-called Delaware of the West.[9]

These courts' jurisdiction is broader than the equity jurisdiction of the Delaware Court of Chancery, and they have unique procedures that can help resolve disputes more quickly than they would be in Nevada's other state courts.

All judges are elected by the people as general jurisdiction judges, and then appointed by the chief judge of the district to serve on the business courts.

Though they have been hearing cases for more than 20 years, however, the trial courts do not issue published written decisions, so there remains a dearth of case law on many issues that regularly come before the courts. As a result, the outcome of individual disputes that reach the courts can be more unpredictable than in Delaware.

The Texas Legislature created the Texas business courts in 2023, and they will begin hearing cases later this year. The goal, as in Nevada, is to create a specialty court with experience in corporate and other business issues, but as currently conceived, the court will also have broader jurisdiction than the Delaware Court of Chancery.

Judges at both the trial court and appellate level will be appointed by the Texas governor and confirmed by the Texas Senate to two-year terms. While there is currently little written case law in Texas, the business courts will be required to issue written opinions that over time should help flesh out Texas' corporate case law, adding to the predictability of acting as a Texas corporation.

Differences in Stockholder Rights

The three states' laws also have meaningful differences in the information and litigation rights they provide to a corporation's stockholders.

Delaware General Corporation Law Section 220, for example, can provide a powerful tool to a stockholder seeking access to a corporation's books and records when that stockholder demonstrates it has a proper purpose for doing so; for example, to investigate wrongdoing or mismanagement, or value the stockholder's shares.

This access is limited — even where it meets its burden, the stockholder's access is constrained to only those records essential to its purpose, which in the typical case stops at board-level materials like corporate minutes and resolutions.

While a benefit to the individual stockholder making any request — and to all stockholders, if the requestor is truly adding value by investigating a legitimate material issue the corporation is not otherwise adequately addressing — the volume and breadth of these requests can be a significant expense and burden on the corporation and feed the litigation culture that begets additional cost and distraction.

Nevada stockholders' information rights are much more restrictive, limiting the right to major stockholders and even then, only for specific documents.[10] Nevada law establishes two tiers.

First, a stockholder who has owned shares for at least six months or controls at least 5% of outstanding shares may request the articles of incorporation, the bylaws and a stock ledger.

To access books of account and financial records, however, a stockholder must own 15% of the corporation's issued and outstanding shares. Notably, corporations are exempted from providing these records if they give shareholders a detailed, annual financial statement or comply with U.S. Securities and Exchange Commission reporting requirements.

Texas' statutory stockholder information right is similar to Delaware's,[11] with some procedural differences, though there is little case law interpreting it.

Texas' civil procedure code also allows would-be litigants to petition to take limited presuit discovery "to investigate a potential claim or suit"[12] — a tool that stockholders could attempt to use to buttress and supplement their books and records rights.

Texas law has other aspects, however, that help limit unjustified derivative litigation. While all three states permit stockholders to bring suit derivatively in the name of the corporation if they meet certain demand or demand futility requirements, Texas's law includes a procedure that results in relatively few such claims even being attempted.

First, the stockholder must make a formal written demand on the board — there is no demand futility option — and then cannot bring suit until either the demand is rejected or 90 days have passed, unless the stockholder can show irreparable injury will otherwise result.

If the board decides to commence an inquiry into the allegations, discovery is stayed while that inquiry occurs. And if that inquiry results in a majority of the independent and disinterested directors deciding that pursuing the claim is not in the company's best interests, the suit must be dismissed.

Conclusion

The above just scratches the surface on the myriad differences between these three states' corporate law that decision-makers will want to consider.

But although each state's corporate law is distinct, it bears reminding that at their foundations they are more alike than they are different. Each imposes similar meaningful fiduciary duties on corporate officers and directors and provides courts and stockholders with means to ensure those duties are followed.

The predictability and comprehensiveness of Delaware law, as well the perception of outside investors' comfort with that law, will likely continue to attract most corporations for the foreseeable future.

But the rise of additional options with robust corporate law and related court systems, with differences that may make them more appropriate for some corporations to consider, will ensure that these competing regimes evolve in a manner that meets the needs of all stakeholders going forward.

John Lawrence is a partner at Baker Botts LLP.

Danny David is a managing partner at the firm and leads the firm's executive committee.

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[1] Delaware Division of Corporations: 2022 Annual Report, accessed at <https://corp.delaware.gov/stats/>.

[2] See Samuel Arsht, A History of Delaware Corporate Law, 1 Del. J. Corp. L. 1, (1976).

[3] See *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 253 (Del. Ch. 2014).

[4] Nev. Rev. Stat. 78.138.

[5] Tex. Bus. Org. Code §21.041

[6] Compare Tex. Bus. Orgs. Code §7.001(b)-(c), with DGCL §102(b)(7).

[7] Nev. Rev. Stat. §78.138.

[8] *Guzman v. Johnson*, 483 P.3d 531 (Nev. 2021); *Chur v. Eight Judicial Dist. Ct.*, 458 P.3d 336 (Nev. 2020).

[9] See Hon. Mark Denton and Hon. Elizabeth Gonzalez, "Business Court" (2008), accessed at <https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/21387>.

[10] Nev. Rev. Stat. 78.105, 78.257.

[11] Tex. Bus. Orgs. Code § 21.218.

[12] Tex. R. Civ. P. 202.1(b).

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Ginkgo Bioworks SPAC Investors Sue In Del. After Stock Drop

By Jeff Montgomery

Law360 (April 10, 2024, 2:12 PM EDT) -- Investors in the blank check company that took biotech firm Ginkgo Bioworks Inc. public in September 2021 have sued the venture's founders and insiders for unjust enrichment and fiduciary breaches in Delaware's Court of Chancery, alleging that the deal was propped up by false and misleading claims.

The 95-page suit, filed late Tuesday, alleged that the deal was built on a sham, pre-deal, **\$15 billion valuation** of Ginkgo, supported by claims of "key" customers led by individuals who were actually parties with close ties to a special purpose acquisition company, or SPAC, Soaring Eagle Acquisition Corp., that was central to the deal.

According to the complaint, revelations about Ginkgo's unsupported biotech claims and conflicts and pre-deal misrepresentations drove the newly public company's stock price from a high of nearly \$14 per share in late 2021 to little more than \$1 within months of closing on the take-public deal.

Stockholders already have filed multiple class suits in the U.S. District Court for the Northern District of California, now pending consolidation, seeking damages based on similar allegations and alleging that insiders were able to collect tens of millions of dollars despite post-closing stock drops.

"Legacy Ginkgo's valuation was absurd and its claimed revenues were built on a house of cards," the Chancery Court complaint said. It noted that the target company, "legacy" Ginkgo, claimed to have developed a system for cell-programming that allows its labs to "grow" products through bio-engineering of a particular strain of yeast.

Blank-check companies, also called SPACs, are shell entities that raise money through an initial public offering, with cash raised earmarked for future acquisitions. Their popularity for some going-public company deals has spun off a series of suits alleging the transactions include terms that benefit early investors while keeping public shareholders uninformed about risks.

"Many, if not all, of Legacy Ginkgo's key customers were not independent of Legacy Ginkgo," the complaint said. Instead, the company's books were "fraught with related party transactions" involving overlapping officers and directors who worked out of pre-deal Ginkgo's own offices.

"Legacy Ginkgo and its key investors funded these OpCos, which in turn would use that funding to purchase Legacy Ginkgo services," the complaint said. "Due to these round-trip transactions, Legacy Ginkgo claimed that it was bringing in revenue from independent, third party customers. It was not."

Directors and others affiliated with the SPAC, Soaring Eagle, were accused of being uninterested in fulfilling their fiduciary duties to the company and investors and focused instead on "simply unlocking their massive payday."

Among other alleged failures, deal architects touted to investors that Soaring Eagle's pre-deal SPAC stock was worth \$10 per share, when it was actually valued at less than \$7.50 per share. Directors and others behind the deal also allegedly knew to be false target company claims that Ginkgo's purported \$345 million of unencumbered free cash would increase to \$7.6 billion between 2021 and 2025.

Aided and abetted by pre-merger Ginkgo parties, the suit said, "the Soaring Eagle board of directors

issued a materially false and misleading proxy, resulting in Soaring Eagle acquiring an over-valued company and exposing the company to significant risk of loss for violations of the federal securities laws."

Holders of illiquid stock in then-private, pre-deal Ginkgo saw hundreds of millions of shares "suddenly become tradable" with the SPAC closing, the complaint said.

The suit seeks recovery of damages sustained by the company "as a result of the individual defendants and the sponsor's breaches of fiduciary duties and unjust enrichment," along with a ruling pre-deal Ginkgo parties named in the suit aided and abetted the breaches.

Also sought are corporate reforms and "extraordinary equitable or injunctive relief," including "attaching, impounding, imposing a constructive trust on, or otherwise restricting the proceeds of individual defendants and the sponsor's trading activities or their other assets so as to assure that plaintiff on behalf of Ginkgo has an effective remedy."

Terms of the SPAC's formation allowed the sponsor of the deal, Eagle Equity Partners III LLC to turn its \$25,000 founder's investment into 43.125 million shares initially worth \$430 million at \$10 per share. Even after a plummet from a post-closing \$14 per share to around \$1 currently, EEP III's 43.125 million shares were deemed worth approximately \$51.75 million, the complaint said."

Neither counsel for stockholder Dylan Newman nor Ginkgo Bioworks immediately responded to request for comment.

Stockholder Dylan Newman is represented by Samuel L. Closic and Seth T. Ford of Prickett Jones & Elliott PA and Brian J. Robbins, Craig W. Smith and Shane P. Sanders of Robbins LLP.

Counsel information for those named in the Delaware suit was not immediately available.

The case is Dylan Newman, et al, v. Eagle Equity Partners III LLC, et al, case number 2024-0361, in the Court of Chancery of the State of Delaware.

--Editing by Alex Hubbard.



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'Smart' Glass Maker View Escapes SPAC Merger Suit For Good

By **Katryna Perera**

Law360 (April 10, 2024, 3:38 PM EDT) -- "Smart" glass manufacturer View Inc. has permanently beaten a proposed investor class action over an internal probe it announced following its go-public merger with a special purpose acquisition company, with a California federal judge ruling that the lead plaintiff did not own View stock when the identified corrective disclosures occurred.

U.S. District Judge Beth Labson Freeman issued an **order** on Tuesday saying lead plaintiff Stadium Capital LLC has failed to plead loss causation and, therefore, doesn't have standing to sue.

The order states that Stadium Capital owned View stock in August 2021 but had sold all of its shares by Sept. 24, 2021, just before View announced in November 2021 that an internal investigation had revealed that the company's previously stated financial statements didn't accurately reflect certain liabilities it had related to warranties.

According to the order, Stadium Capital argued that when it did own View stock in August 2021, a partial corrective disclosure occurred when the company announced the start of the internal investigation. This announcement qualifies as a corrective disclosure because the announcement "explicitly stated that the investigation related to View's previously disclosed warranty accrual," the order states.

However, Judge Freeman disagreed on Tuesday and said Stadium Capital has failed to point to any authority under which it is able to show loss causation.

"The court holds that lead plaintiff Stadium Capital cannot attribute its losses to the August 2021 announcement — and thus fails to allege loss causation — because Stadium Capital sold its stock before the truth of the underlying falsehood was revealed," the order states. "Put differently, because Stadium Capital sold its shares before the truth was revealed, Stadium Capital was not injured by the alleged misrepresentations."

And because Stadium Capital cannot show an injury, it does not have standing, the judge added.

She also rejected the argument that a new plaintiff can be added to the suit to save it from dismissal, saying that a new plaintiff cannot be added where the sole plaintiff never had standing, and tossed the suit's claim that Stadium Capital had been deceived by the merger's proxy statement, finding once again that the plaintiff had sold its shares before that.

"Although plaintiff bought more View stock, any alleged economic harm from those purchases was not caused by the proxy statement because those purchases occurred after the vote solicited by the proxy statement," the order states. "Thus, Stadium Capital does not have and never had standing for the [Section] 14(a) claim alleged in the second amended complaint."

With Tuesday's ruling, View has escaped the suit for good. Last May, Judge Freeman **granted dismissal** for similar reasons but allowed Stadium Capital to replead its claims.

Counsel for View declined to comment on Wednesday and representatives for the parties did not immediately respond to requests for comment.

Stadium Capital is represented by Laurence D. King, Blair E. Reed, Frederic S. Fox and Donald R. Hall

of Kaplan Fox & Kilsheimer LLP.

View Inc. is represented by John W. Berry and John M. Gildersleeve of Munger Tolles & Olson LLP.

Defendant Vidul Prakash is represented by Anna Erickson White and Ryan M. Keats of Morrison & Foerster LLP.

The other individual defendants are represented by Jeffrey L. Steinfeld, James P. Smith III and Thania Charmani of Winston & Strawn LLP.

The case is Mehedi et al. v. View Inc. et al., case number 5:21-cv-06374, in the U.S. District Court for the Northern District of California.

--Additional reporting by Emilie Ruscoe. Editing by Rich Mills.

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United Airlines Hit With Chancery Suit Over Poison Pill

By **Jeff Montgomery**

Law360 (April 10, 2024, 7:51 PM EDT) -- A United Airlines Holdings Inc. stockholder sued the carrier and its directors in Delaware Chancery Court on Wednesday, accusing the airline of lining up a vote to preserve a prohibited, board-entrenching poison pill while publicly linking the measure to allowable protection of tax-advantaged net operating loss claims.

Colleen Witmer's proposed class action seeks an order for a temporary, preliminary and permanent injunction barring the airline from using any of what the suit described as misleading proxies supporting the alleged anti-takeover measure in advance of its May 22 annual meeting. The company had planned a shareholder vote on that date for a board-approved extension of the challenged provision through Dec. 4, 2026.

According to the complaint, United had long relied on a "pill," or stockholder rights plan, to protect NOLs by doling out large numbers of fractional shares with full share voting power — diluting existing voting clout — if an entity or individual acquired more than 4.99% of the company's stock and posed a risk to the tax assets.

"The law is clear: a pill with a 4.99% trigger is extraordinary and the use of such a trigger is reserved solely for pills carefully tailored to protect NOL assets," the complaint said. "Where directors, bent on entrenchment, lard what is supposed to be a rare and special-purpose NOL pill with anti-takeover provisions, they breach their fiduciary duties."

Nevertheless, in 2020, airline directors adopted an expansive stockholder rights agreement that potentially went beyond NOL protections by including a "sprawling" definition of beneficial owner, Witmer claimed. Under its terms, the percentages held by multiple stockholders could be lumped together to trigger the pill if the shares were found to be subject to an "agreement, arrangement or understanding" regarding votes, according to the complaint.

The aggregation presumption also included a "daisy chain" feature that allowed the company to assume links among stockholders who might be unaware of others in the alleged group, the suit said.

Witmer contended that United's board is misleading stockholders by issuing a proxy that is silent "concerning the deterrent effect of the amended NOL pill on stockholder activism and coordination" as well as the entrenching effect the provision has with respect to the current board.

The complaint described United's pill as "an unreasonable response to any perceived threat to NOL carryforwards, since it sweeps far more broadly than necessary to preserve the company's tax attributes." Instead, the shareholder said, the 4.99% threshold and "boundless" daisy chain and agreement, arrangement or understanding features work "to stifle corporate democracy."

Among other flaws, the suit said, United's proposal fails a test established in the Delaware Supreme Court's [**Unocal Corp. v. Mesa Petroleum**](#) decision of 1985. That ruling declared that a board takeover defense must show a threat to the corporation and be a "proportional and reasonable" response.

United's definition of beneficial owner, in contrast, "extends beyond economic ownership and can be triggered by stockholders entering into [agreements, arrangements or understandings] concerning anything, without limitation," Witmer's suit said. It added separately: "Curtailing the entire universe of AAUs is a plainly unreasonable response to the threatened loss" of tax-advantaged NOL assets.

"Prompt judicial intervention is necessary to vindicate the stockholder franchise, ensure that any vote on the amended NOL pill is fully informed" and to permanently enjoin the pill's operation until after a trial, the suit said.

United Airlines declined to comment on the suit late Wednesday.

Colleen Witmer and the proposed class are represented by Gregory V. Varallo, Daniel E. Meyer, Jeroen van Kwawegen and Edward Timlin of Bernstein Litowitz Berger & Grossmann LLP and William J. Fields, Christopher J. Kupka and Samir Shukurov of Fields Kupka & Shukurov LLP.

Counsel information for United Airlines Holdings Inc. and its directors was not immediately available.

The case is Colleen Witmer et al. v. J. Scott Kirby et al., case number 2024-0375, in the Court of Chancery of the State of Delaware.

--Editing by Haylee Pearl.

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DeFi Platform Uniswap Discloses SEC Enforcement Notice

By **Aislinn Keely**

Law360 (April 10, 2024, 5:10 PM EDT) -- The firm behind decentralized crypto exchange Uniswap said on Wednesday that the U.S. Securities and Exchange Commission had notified the firm that it may soon face an enforcement case.

Uniswap Labs said in a blog post Wednesday that earlier that day it had received a Wells notice from the SEC telling the firm that the agency's Division of Enforcement plans to recommend a legal action against Uniswap Labs.

While Uniswap did not share the content of the notice, Chief Legal Officer Marvin Ammori said during a press briefing that the issues appear to be whether the platform operated as an unregistered securities exchange or an unregistered broker.

"The base, underlying subtext of the entire SEC action is that most tokens are just securities," Ammori said. "We think that is wrong. We think the SEC will be proven wrong in court."

In a statement to Law360, the SEC said it would neither confirm nor deny a possible investigation.

Other SEC **cases** against crypto **platforms** like Coinbase, Kraken and Binance have brought claims that the platforms operate as unregistered securities exchanges, clearing houses and broker-dealers. While it's not clear whether similar claims will be brought against Uniswap Labs, Ammori said in a post to social media site X that "[t]he Uniswap Protocol, web app, and wallet don't meet the legal definitions of securities exchange or broker."

"The SEC has authority only over 'securities' — not any asset represented by a particular file format or technical standard," Ammori wrote.

Ammori also said the Wells notice "is disappointing, but is not unexpected from this SEC," calling the move "another abuse of power" from the regulator. The document is effectively a courtesy notice from the agency's Division of Enforcement warning a company that an investigation has yielded potential violations and the division plans to recommend that the SEC file an enforcement action.

"If the SEC had authority over our self-custodial, non-intermediated products, it could tell us how to register them. It can't and so it doesn't," he said on X.

In its blog post, Uniswap Labs highlighted the SEC's ongoing lawsuits against other crypto platforms, which continue to play out alongside a Third Circuit challenge from Coinbase **demanding rules for crypto**.

"Taking into account the SEC's ongoing lawsuits against Coinbase and others as well as their complete unwillingness to provide clarity or a path to registration to those operating lawfully within the U.S., we can only conclude that this is the latest political effort to target even the best actors building technology on blockchains," the blog post says.

The Uniswap protocol is a decentralized marketplace, which allows users to hold their assets themselves and transact without middlemen through direct automated transactions and the platform's automated market maker. Automatic market makers see users trade against a pool of tokens, rather than directly matching buyers and sellers. Uniswap was one of the first and most

successful decentralized marketplaces.

In its blog post, Uniswap Labs emphasized that it does not believe its proprietary token, UNI, is a security, nor does it believe the SEC can bring a claim that the platform operates as a securities exchange or broker. It also argued that the SEC doesn't have authority from Congress to bring a case.

Uniswap Labs CEO Hayden Adams said in his own post on X that he and his firm are "ready to fight."

"This fight will take years, may go all the way to the Supreme Court, and the future of financial technology and our industry hangs in the balance," Adams said.

Uniswap confirmed on Wednesday that it has retained law firm Debevoise & Plimpton LLP, including attorney Andrew Ceresney.

--Editing by Alanna Weissman.

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Hyundai, Kia Engine Fire Deal OK'd With 60% Atty Fee Cut

By **Mike Curley**

Law360 (April 10, 2024, 10:27 PM EDT) -- A California federal judge has given final approval to a settlement ending a second consolidated class-action litigation alleging Hyundai and Kia sold vehicles with defective engines prone to fires, while awarding plaintiffs' attorneys only \$3.4 million of the \$8.9 million they requested.

In an **order** filed Tuesday, U.S. District Judge Josephine L. Staton echoed her findings in the preliminary approval **order last year**, saying the relief provided in the settlement is reasonable and prevents further harms.

The settlement's terms include an extended warranty for free inspections and necessary repairs for 15 years or 150,000 miles; recalls and product improvements for certain models; reimbursement for qualifying repairs at authorized shops; goodwill payments for inconvenience due to repair delays; and reimbursement for expenses related to transportation, lodging and meals for proposed class members stranded by a qualifying failure or fire, among other things.

The judge further found that the class' response to the settlement was mostly positive, with only about 2% of class members polled opposing it, and only 287 members opting out, or about .014% of the more than 2 million affected vehicles.

While there were some objections to the settlement, the judge overruled them. According to the order, some of the objectors raised issues involving vehicles and defects not included in the litigation. Other objections did not call into question the adequacy of the settlement, but instead thought the deal could have included more, the judge wrote, while the concerns of other objectors were adequately addressed by the settlement.

The proposed class action was first filed in **December 2018**, before it was amended twice to add several named plaintiffs. Other actions were filed and all the cases were eventually consolidated in September 2021 as In re: Hyundai and Kia Engine Litigation II, according to court records.

The drivers alleged Hyundai Motor Co. and its affiliate Kia Corp. knew about an engine defect that led to hundreds of their vehicles "spontaneously bursting into flames" but that the companies failed to warn customers. They said the defect in certain vehicles with gasoline direct-injection engines can cause the cars to catch fire in "non-collision" circumstances, meaning drivers have an "increased risk of accident, injury or death."

A previous suit making similar allegations — In re: Hyundai and Kia Engine Litigation I — settled in **March 2021**. According to Tuesday's order, the suits in the present consolidated case make the same types of allegations, but for vehicles not covered in the prior settlement.

In the order, Judge Staton wrote that the \$8.9 million in requested fees was based on a \$5.1 million lodestar with a multiplier of 1.74, with \$1.8 million of that lodestar requested by attorneys who had been part of In re: Hyundai and Kia Engine Litigation I, and the remaining \$3.3 million requested by attorneys from Short et al. v. Hyundai Motor America Inc. et al., a late addition to the consolidated suit, which initially alleged a different defect before discovery showed the vehicles had the same alleged defect.

For the Engine I attorneys, Judge Staton found that their hourly rates were reasonable, and most of

their stated hours were reasonable — reducing the hours for the Law Office of Adam R. Gonnelli by 10% because he billed routine and delegable tasks at a partner rate — but declined to award a multiplier.

According to the order, the attorneys haven't shown that this case is particularly complex or novel compared to other automotive class actions, the Engine I attorneys conducted themselves as expected, with their experience reflected in their rates, and a multiplier is not appropriate in a statutory fee case like this, the judge wrote.

As such, the judge awarded the Engine I firms \$1.8 million.

For the Short firms, Judge Staton found that their rates were reasonable, but docked their hours by 20% for inefficient litigation and block billing. According to the order, those firms included hours spent during intra-office strategy conferences, which a paying client would not compensate counsel for.

In addition, the block billing practice makes it difficult for the court to assess the reasonableness of the hours requested, the judge wrote.

The judge further imposed a negative multiplier on the Short firms' lodestar, finding that the pre-consolidation litigation didn't meaningfully affect this settlement agreement.

However, the judge rejected Hyundai and Kia's argument that the Short attorneys should get no attorney fees at all, saying while they may not have affected the terms of the settlement agreement — most of which are modeled after the settlement in Engine I — the Short litigation and its class certification deadline may have impacted this settlement's timing by putting additional pressure on Hyundai and Kia to settle sooner.

As such, the judge put a 0.5 multiplier on the reduced lodestar for an award of just under \$1.6 million for the Short firms.

The judge applied the same multipliers to the requested fees, awarding the Engine I firms \$38,857 and the Short firms \$127,342 in fees.

Finally, the judge awarded class representatives who were deposed \$5,000 each, and those who were not deposed \$3,500 each.

A Hyundai spokesperson said late Wednesday, "Hyundai is pleased with the court's decision to approve the Engine II settlement, which the court determined to be fair, adequate, and reasonable. The comprehensive settlement is a reflection of our commitment to customer satisfaction and resolves class action litigation involving customers of certain vehicles equipped with Theta II MPI, Nu GDI, and Gamma GDI engines."

A Kia spokesperson echoed the sentiment, saying that automaker is likewise pleased with the settlement's approval.

An attorney for the plaintiffs declined to comment Wednesday.

The drivers are represented by Steve W. Berman and Rachel E. Fitzpatrick of Hagens Berman Sobol Shapiro LLP, Matthew D. Schelkopf and Joseph B. Kenney of Sauder Schelkopf LLC, Gretchen Freeman Cappio, Ryan McDevitt and Adele Daniel of Keller Rohrback LLP, Bonner C. Walsh of Walsh PLLC and Adam Gonnelli.

Hyundai and Kia are represented by Shon Morgan, Homin Ban and Cristina A. Henriquez of Quinn Emanuel Urquhart & Sullivan LLP.

The case is In re: Hyundai and Kia Engine Litigation II, case number 8:18-cv-02223, in the U.S. District Court for the Central District of California.

--Additional reporting by Lauren Berg, Linda Chiem and Hailey Konnath. Editing by Janice Carter Brown.



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Pfizer Unit Cuts \$39M Deal Ending Effexor Antitrust Claims

By **Henrik Nilsson**

Law360 (April 10, 2024, 10:25 PM EDT) -- A proposed class of direct buyers asked a New Jersey federal judge on Tuesday to approve a \$39 million settlement to end allegations that Pfizer Inc. unit Wyeth engaged in a scheme with Teva Pharmaceuticals to delay generic competition for the antidepressant drug Effexor XR.

The direct buyer plaintiffs **asked** U.S. District Court Judge Peter G. Sheridan to sign off on the \$39 million deal, which would end the antitrust claims and patent fraud allegations first filed over a decade ago. Various drug buyers sued Wyeth in 2011 over claims it fraudulently obtained three patents for the extended-release formula of Effexor XR, pursuing a series of sham suits to keep generic versions off the market and making deals with Teva and other generic drugmakers to stave off competition.

The deal only ends the direct buyers' litigation against Wyeth, but not Teva, according to the motion for preliminary approval. Wyeth denies any liability but agreed to pay the money to avoid costly continued litigation, according to court documents.

"Pfizer firmly believes that all claims that have been or are asserted against Pfizer's subsidiary Wyeth in this case are factually and legally without merit," a Pfizer spokesperson told Law360 in an email. "As this case has already gone on for over twelve years, considerations led the company to determine that the proposed class settlement in this case is fair, reasonable and the best way to resolve this litigation. Under the proposed agreement, Pfizer and Wyeth do not admit to any liability or wrongdoing."

Lead counsel Hagens Berman Sobol Shapiro LLP, Berger Montague, Faruqi & Faruqi LLP, Taus Cebulash & Landau LLP, NastLaw LLC and Barrett Law Group PA intend to seek attorneys' fees of up to one-third of the settlement fund, along with reimbursement of costs and fees associated with the long-running case. The deal also includes a service award of \$100,000 for each of the three named plaintiffs, according to the motion.

The proposed class includes all persons or entities in the U.S. who bought Effexor XR or related generic versions directly from the defendants from June 14, 2008, through May 31, 2011.

In the wake of the direct buyers' 2011 lawsuit, indirect purchasers of Effexor and retailer plaintiffs including Rite Aid Corp. and Walgreen Co. filed their own **related suits**. The court later coordinated the direct buyers' case with those other suits.

In 2014, the court **dismissed the bulk** of the direct purchasers' antitrust claims against the defendants over a settlement in which Teva allegedly agreed to delay launching a generic version of the antidepressant in exchange for a promise from Wyeth not to market its own generic version of the drug during Teva's 180-day exclusivity window.

The plaintiffs had argued that the settlement was worth about \$500 million to Teva, but the court concluded that they didn't have enough data to support that estimate. That made it impossible to apply the U.S. Supreme Court's requirements for pay-for-delay cases under **FTC v. Actavis** to the Effexor claims, according to the 2014 order.

The drug buyers **appealed**, and the Third Circuit **reversed** the lower court's order in 2017 and

reinstated the direct buyers' claims.

The case proceeded to discovery. In March 2020, three months before the close of fact discovery, the court referred the case to mediation and issued a stay, according to Tuesday's motion.

The direct buyers said on Tuesday that the parties reached the deal on March 21 after "extensive mediation proceedings," which involved questions concerning the \$500 million payment and whether that payment caused the entry of generic versions of Effexor XR on the market to be delayed.

"The settlement ensures that class members will receive a cash settlement payment now and that the litigation against Wyeth (but not Teva) will end, avoiding continued litigation, potential appeals, and further delay," the direct buyers said.

A counsel for the plaintiffs declined to comment. Counsel and representatives for Teva did not immediately return a request for comment.

The plaintiffs are represented by Peter S. Pearlman and Matthew F. Gately of Cohn Lifland Pearlman Herrmann & Knopf LLP, David F. Sorensen and Caitlin G. Coslett of Berger Montague, Thomas M. Sobol and Gregory T. Arnold of Hagens Berman Sobol Shapiro LLP, Peter Kohn and Neill W. Clark of Faruqi & Faruqi LLP, Barry S. Taus and Kevin S. Landau of Taus Cebulash & Landau LLP, Dianne M. Nast of NastLaw LLC and by Don Barrett of Barrett Law Group PA.

Wyeth is represented by Raj Gandesha of White & Case LLP and Liza M. Walsh of Walsh Pizzi O'Reilly Falanga LLP.

Teva is represented by William H. Trousdale of Tompkins McGuire Wachenfeld & Barry LLP and Jay P. Lefkowitz, Devora W. Allon, Karen N. Walker and Alexandra I. Russell of Kirkland & Ellis LLP.

The case is In re: Effexor XR Antitrust Litigation, case number 3:11-cv-05479, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Vin Gurrieri. Editing by Dave Trumbore.



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Union Pacific Can't Duck Biometric Privacy Lawsuit

By **Celeste Bott**

Law360 (April 10, 2024, 6:16 PM EDT) -- An Illinois federal judge on Wednesday again refused to dismiss a third amended complaint claiming that Union Pacific violated the state's biometric privacy law when it collected truck drivers' fingerprints without their informed consent, rejecting several new arguments raised by the railroad in its bid to ditch the suit.

U.S. District Judge LaShonda Hunt held Wednesday that at this stage of the case, both Union Pacific's new and renewed arguments aren't enough to warrant dismissal of the suit, brought by lead plaintiffs David Fluery and Alvin Turner. They claim Union Pacific violated the Illinois Biometric Information Privacy Act by requiring them and other drivers to use a fingerprint-scanning device to gain access to its rail yards without ever getting the drivers' permission or disclosing its data collection policies.

Union Pacific argues that the suit's allegations of recklessness — under BIPA, a court can award up to \$5,000 for each intentional or reckless violation but only up to \$1,000 for each negligent one — aren't sufficient, but Judge Hunt was of the same mind as other judges who have already determined a plaintiff is not required to make specific allegations about a defendant's mental state to successfully plead a BIPA claim.

"This court agrees with the rationale of the majority of courts that have considered the issue," she said. "Rules 8 and 12 do not require plaintiffs to plead specific facts regarding defendant's mental state to show entitlement to the forms of relief available under BIPA."

The railroad also took issue with the drivers' assertion that their biometric data was disclosed to a third party, but Judge Hunt said they had done enough at this stage in alleging Union Pacific disclosed their information to multiple third-party technology providers in connection with the installation, maintenance and operation of the automated gate system.

"Although these allegations do not explain exactly how the disclosure between defendant and the third parties took place, it is reasonable to infer that defendant at least disclosed biometric information to third parties engaged in work on the automated gate system, which is all that is required at the pleading stage," Judge Hunt said. "In addition, as plaintiffs note, defendant's biometrics consent agreement expressly references disclosure to third parties."

As for Union Pacific's argument that Turner lacks standing to sue because his biometrics were destroyed within the timeframe required under BIPA, that's an issue of fact that shouldn't be resolved now, according to the judge.

She noted that the railroad is relying on an employee declaration that Turner's biometrics were destroyed in 2021, while the plaintiffs question that position because they received Turner's biometrics from the defendant during discovery, despite claims they'd been destroyed.

"The parties' reliance on extraneous information illuminates the reason why defendant's request for dismissal on these grounds should be denied — there are factual issues that must be resolved before the court can make any determination about whether Turner's biometrics were properly destroyed under BIPA," Judge Hunt said. "Although the court has no reason to doubt the statements of defendant's employee, defendant did not provide evidence to support his contentions about Turner's interactions with defendant, the status of Turner as an authorized driver in the system, and the destruction of biometrics."

And the employee's statement that Turner's biometric data was permanently destroyed isn't worth

much without more information "about how the biometrics were stored, whether there were backups and copies (apparently there was at least one back up pursuant to the litigation hold), and whether any biometrics disclosed to third parties had also been destroyed," the judge added.

Judge Hunt also rejected Union Pacific's contention that the suit is preempted by the Federal Aviation Administration Authorization Act, which provides no state may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier."

The railroad has made no showing of any impact on its prices, routes or services, Judge Hunt said, echoing a similar ruling in a BIPA case brought by truck drivers against BNSF Railway in denying dismissal on those grounds.

The case against Union Pacific has been rife with delays and prickly discovery disputes, having been paused twice in favor of hearing from Illinois' top justices and having otherwise received multiple briefing and filing extensions.

In November 2022, for example, a federal magistrate judge said he wouldn't order Union Pacific to turn over personal identifying information and consents it allegedly collected from truck drivers entering its facilities because it was clear the parties were essentially phoning in the request without meaningfully conferring to resolve their differences.

And in April of last year, he refused to give the parties a four-month discovery deadline extension because the parties had presented only a "skeletal" motion to support their request, which he said was "unacceptable."

In December, a federal magistrate judge ordered the railroad to produce finger-scan data, saying Judge Hunt may eventually need it and that "district court judges don't like surprises in their cases."

Fluery is represented by Myles McGuire, Evan M. Meyers, David L. Gerbie, Brendan Duffner and Joseph M. Dunklin of McGuire Law PC and Jon Loevy, Michael I. Kanovitz and Tom Hanson of Loevy & Loevy.

Union Pacific is represented by Melissa A. Siebert, Christopher S. Hennessy and Lauren Gibbons of Cozen O'Connor.

The case is Fluery v. Union Pacific Railroad Co., case number 1:20-cv-00390, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Lauraann Wood. Editing by Marygrace Anderson.