

Diagnostic Testing Company Hit With COVID-Related Securities Suit

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April 17, 2024



By Kevin LaCroix on April 17, 2024
Posted in Coronavirus



The COVID-19 pandemic was a disruptive event with the consequences continuing to reverberate through the economy

and the business environment, in ways that not only affect companies' operations and financial performance, but, for at least some companies, in ways that lead to securities class action litigation. So even though the initial COVID-19 outbreak in the U.S. was over four years ago, businesses continue to experience operational consequences from the pandemic, in some cases resulting in securities suits. The latest example is the lawsuit filed late last week against medical testing and diagnostic company QuidelOrtho Corporation, whose testing services revenue declined as the coronavirus transitioned to endemic status. A copy of the April 12, 2024, complaint against QuidelOrtho can be found [here](#).

Background

QuidelOrtho provides respiratory disease medical diagnostic testing. Since the outbreak of COVID-19, the company has generated a significant amount of its revenue from COVID-19-related testing. The company's revenues have, according to the company, "very high margin."

In May 2022, as the coronavirus outbreak was transitioning to endemic status, the company reassured investors that it was well-positioned to maintain stable high revenues from its respiratory business. The company also aimed to launch its new flagship product, "Savana RVP4 Test, which tests for COVID and other respiratory conditions. However, during the class period, the new product was not approved for use in the U.S.

In February 2024, the company reported disappointing fourth quarter results. The earnings miss was attributed to lower endemic COVID-19 revenues due to distributor destocking. The company cut its 2024 forecast, including a significant cut in COVID-19 revenue guidance.

The company's share price declined over 32 percent on this news. In April 2024, the company announced that it had withdrawn its FDA submission for approval of the Savana RVP 4 product. The company's share price declined a further ten percent.

The Lawsuit

On April 12, 2024, a plaintiff shareholder filed a securities class action lawsuit in the Southern District of New York against the company and certain of its executives. The complaint purports to be filed on behalf of investors who purchased the company's securities between February 18, 2022, and April 1, 2024.

The complaint alleges that the defendants failed to disclose: "(a) that QuidelOrtho sold more COVID-19 test to its distributors and pharmacy chain customers than they could resell to healthcare providers and end customers; (b) that excess inventories of COVID-19 tests existed throughout the supply chain; (c) that as a result of (a)-(b) above, QuidelOrtho's distributors and pharmacy chain customers were poised to significantly reduce their COVID-19 test orders; (d) that undisclosed problems created a heightened risk that the Savanna RVP4 Test would experience a delayed commercial launch in the United States; (e) that as result of (a)-(d) above, Defendants lacked a reasonable basis for their positive statements about QuidelOrtho's business, financials, and growth trajectory."

The complaint alleges that the defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder. The complaint seeks to recover damages on behalf of the plaintiff class.

Discussion

I fully expected that the COVID-related securities litigation phenomenon was fully played out in 2023 and that we would see few if any further COVID-related suit filings this year. However, the COVID-related securities suits continue to be filed. By my count, this new lawsuit is the sixth COVID-related securities suit to be filed in 2024 (compared to only nine in all of 2023, including no lawsuits at all after the end of August 2023). Since the initial COVID outbreak in the U.S. in March 2020, there have been a total of 77 COVID-related securities suits filed.

This lawsuit, like most of the other cases that have been filed this year, reflect a fact pattern involving a company whose fortunes initially rose due to the pandemic-related conditions, but whose fortunes ebbed as the pandemic eased. This company's circumstances also underscore what a disruptive event the pandemic was, in ways that challenged and continues to challenge many companies.

The continuing filing of COVID-related suits, and even more to the point, the fact patterns involved in the cases that continue to be filed, underscores just how disruptive an event the pandemic was for so many businesses. The upshot for me is a concern that as the pandemic's disruptive effects continue to ripple through the economy and business environment, many companies will continue to experience operating impacts, which in turn could lead to further COVID-related securities class action lawsuit filings. In other words, the COVID-related securities litigation phenomenon could well have further to run. At this point it seems likely that we continue to see further COVID-related lawsuit filings as the year progresses.

Column: US appeals court decision may deter M&A disclosure-only shareholder suits

 [reuters.com/legal/government/column-us-appeals-court-decision-may-deter-ma-disclosure-only-shareholder-suits-2024-04-16](https://www.reuters.com/legal/government/column-us-appeals-court-decision-may-deter-ma-disclosure-only-shareholder-suits-2024-04-16)

Alison Frankel

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April 16 (Reuters) - A long-awaited decision issued on Monday by the 7th U.S. Circuit Court of Appeals could make it easier for companies involved in M&A deals to fight back against shareholder lawsuits demanding beefed-up disclosures in proxy filings.

The appeals court ruled , opens new tab that class action watchdog Ted Frank of the Hamilton Lincoln Law Institute can intervene to protest \$322,500 in mootness fees that pharmaceutical company Akorn agreed to pay to shareholder lawyers in exchange for their dismissal of lawsuits challenging Akorn's proxy disclosures in its \$4 billion merger with Fresenius Kabi (FRES.M3) , opens new tab. (The merger was later abandoned for other reasons.)

The appellate panel — Judges Frank Easterbrook and Diane Wood, ruling after the death of fellow panel member Michael Kanne — remanded the cases to the trial court with instructions to reopen the cases and allow Frank to participate.

But more broadly, the 7th Circuit questioned the business model of shareholder firms that file lawsuits challenging M&A proxy disclosures and then dismiss their suits when defendants agree to make additional disclosures and pay shareholder lawyers a mootness fee.

"The upshot: Money moves from corporate treasuries to plaintiffs' lawyers; the investors get nothing, yet the payment diminishes (though only a little) the market price of each share," Easterbrook wrote.

The 7th Circuit reminded trial judges that they already have a statutory tool to shut down abusive securities litigation. The Private Securities Litigation Reform Act, wrote Easterbrook, includes a provision that requires trial judges to issue specific findings at the conclusion of every case asserting claims under the Securities and Exchange Act that the lawsuit had merit. That provision, in turn, directs trial judges to consider the requirements of Rule 11 of the Federal Rules of Civil Procedure, which prohibits the filing of a lawsuit for improper purposes, including needlessly increasing the cost of litigation.

Since Frank, as an intervenor, contends that the Akorn shareholder suits were filed solely for the purpose of extorting mootness fees, the 7th Circuit instructed the trial judge to entertain arguments on that assertion under the court's statutory authority.

Shareholder lawyer Juan Monteverde of Monteverde & Associates, who is seeking mootness fees in the Akorn case, did not respond to my query. Monteverde's counsel at the 7th Circuit, Daniel Geyser of Haynes and Boone, declined to comment on the ruling and said he will not be participating in the case going forward.

There's a long procedural history in the Akorn litigation, which began in 2017 and was argued at the 7th Circuit way back in 2020. The mootness fee business model has changed a bit in the intervening years. Shareholder firms, as I've written, now avoid filing disclosure-only M&A lawsuits as class actions, opting instead to file complaints on behalf of individual shareholders whose lawsuits are even less likely to draw scrutiny from trial judges. The mootness fee scale has also reportedly dropped significantly since the Akorn suits began, with defendants now typically paying less than \$50,000 to dispose of disclosure-only suits.

Nevertheless, two deal lawyers told me on Tuesday, these "deal tax" cases remain ubiquitous. Nearly every big M&A deal, the lawyers said, generates demands from shareholder firms for additional proxy disclosures — and ensuing mootness fees. Sometimes, said Marcie Lape of Skadden, Arps, Slate, Meagher & Flom, plaintiffs' firms don't even bother to file a lawsuit, instead threatening litigation in a demand letter and settling quickly for a mootness fee.

So will the 7th Circuit decision discourage these demands? Trial judges, after all, have had the explicit authority to police frivolous Exchange Act suits for nearly 30 years but almost never exercise that power.

The 7th Circuit, said Lape, seems to be inviting trial courts to step up their scrutiny of disclosure-only lawsuits. But real change, she said, will only come if judges accept that invitation or if more shareholders move to intervene in disclosure-only suits to protest mootness fee agreements.

Law professor Jill Fisch of the University of Pennsylvania Carey Law School, who has co-written landmark studies on disclosure-only settlements and accompanying mootness fees, told me she's optimistic that the 7th Circuit opinion, written by the influential Easterbrook, will in fact prompt federal trial judges to be more wary of M&A disclosure-only suits.

"Judge Easterbrook getting this out there, explaining why these lawsuits are a problem, is incredibly powerful," Fisch said. Companies contemplating pre-suit demand letters from shareholder firms, she said, can now point to Easterbrook's opinion to argue that if plaintiffs' lawyers make good on their threats to sue, they face the risk of sanctions.

The opinion also offers ammunition, Fisch added, to shareholders who might want to intervene to block mootness fee payouts because the 7th Circuit laid out why the fees impact all investors, not just the shareholders who sued over disclosures.

I should note that courts have from time to time denied mootness fee requests by shareholder firms when companies have refused to pay up. The issue for defendants, though, is that it's almost always cheaper for companies to pay a mootness fee to plaintiffs' lawyers than to pay their own lawyers to contend that shareholder firms do not deserve a payout.

Frank told me on Tuesday that Hamilton Lincoln had moved away from the issue of unwarranted mootness fees in the four years since he argued the Akorn case but that he will re-evaluate that shift after the 7th Circuit's opinion.

"This changes the playing field," he said. "Hopefully, the ruling is a deterrent."

Like Fisch, Frank said that at the very least, the 7th Circuit decision should give new leverage to companies that don't want to accede to demands from shareholder firms, driving down the cost of mootness fee settlements.

As Skadden's Lape said, we'll have to wait to see if trial judges heed the 7th Circuit's call for more rigorous scrutiny of private settlements in M&A disclosure lawsuits. If a few judges in California and New York, where most securities suits are filed, follow Easterbrook's guidance and toss disclosure-only shareholder complaints, it could at last be the beginning of the end of deal tax litigation in federal court.

Read more:

No fees for you! N.Y. judge rejects lawyers' \$250K request in M&A suit

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Shareholders' lawyers to 7th Circuit: Trial judges have no power to police mootness fees

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Reporting By Alison Frankel

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NEWS

7th Circuit Lets Shareholder Intervene in Mootness Fees Spat

“It seems to us that, as an investor in Akorn whose shares’ value was affected by the merger and the mootness fees, Frank has a claim in common with the main action; how could it be otherwise?” Judge Frank Easterbrook wrote for the court.

April 16, 2024 at 05:44 PM

Securities Litigation



Avalon Zoppo



The U.S. Court of Appeals for the Seventh Circuit on Monday said a shareholder should have been allowed to intervene in a class action and weigh in on a dispute over the controversial payment of “mootness fees” to plaintiffs attorneys.

Here, Akorn Inc. shareholders brought several lawsuits against the pharmaceutical company alleging its proxy statement asking investors to approve a merger failed to disclose information in violation of federal securities law. The shareholders agreed to dismiss the suits as moot after Akorn added disclosures to the proxy statement.

Akorn then paid \$322,500 in mootness fees to plaintiffs’ counsel.

But the Seventh Circuit said the lower court was wrong to not permit shareholder and class action watchdog Theodore Frank to seek an order requiring plaintiffs’ counsel to give up the \$322,500 in mootness fees. Frank argued that the additional disclosures Akorn made were worthless for shareholders, so the plaintiffs’ attorneys should not be rewarded for it.

“It seems to us that, as an investor in Akorn whose shares’ value was affected by the merger and the mootness fees, Frank has a claim in common with the main action; how could it be otherwise?” Judge Frank Easterbrook wrote for the court. “After all, Frank is a member of the proposed classes. And since class counsel and Akorn are looking out for their own interests rather than those of the class, intervention is appropriate. We hold that Frank is entitled to participate as a party.”

The Seventh Circuit stated that “mootness fees” are part of a growing practice by plaintiffs firms to bring class actions seeking more disclosure in proposed mergers, then to voluntarily dismiss the claims when the parties agree on additional disclosures and payment of mootness fees. Courts do not weigh in on the fees because the plaintiffs ultimately do not move for class certification.

Easterbrook, joined by Judge Diane Wood, said Frank is entitled to move for relief before the trial court and challenge the voluntary dismissal and mootness fees.

The Seventh Circuit said federal law requires the lower court judge to determine whether the lawsuits were proper at the moment they were filed using Rule 11’s good-faith standards, which entails notice and an opportunity to be heard.

“Those steps have not been put in motion, given the denial of Frank’s motion to intervene, but they should occur on remand,” Easterbrook wrote. “Because Rule 11(c)(4) gives the district judge discretion over the choice of sanction, the court would be entitled to direct counsel who should not have sued at all to surrender the money they extracted from Akorn. But selecting an appropriate remedy (if any) should await resolution of the proceedings under §78u–4(c)(1) and, derivatively, Rule 11.”

U.S. District Judge Thomas Durkin, citing the court’s inherent authority, said the cases should’ve been dismissed outright and ordered plaintiffs’ attorneys to surrender the mootness fees. Durkin, of the Northern District of Illinois, said the voluntary dismissals and accompanying settlements “obviously took place in an effort to avoid the judicial review this decision imposes.”

The Seventh Circuit said it was “inclined to agree” with Durkin, but that a formal motion for relief from Frank was still needed and that the parties were entitled to be heard on the matter.

Judge Michael Kanne also sat on the Seventh Circuit panel that heard oral arguments in the case in 2020 but died in 2022.

Skadden, Arps, Slate, Meagher & Flom partner Marcie Lape, who has been watching the case unfold over several years, said the court seemed to signal its belief that district courts should use their available tools to discourage frivolous merger challenges and put an end to the payment of mootness fees where a case clearly lacks merit.

“The Seventh Circuit seems to invite a broader use of Rule 11 to thwart abusive litigation practices in merger challenge litigation, but we will have to see whether other courts take up that invitation,” Lape stated via email. “Courts historically have shown reluctance to use Rule 11 except in extraordinary circumstances.”

And she said the opinion is a warning for plaintiffs attorneys who seek mootness fees by filing meritless merger challenges.

“For plaintiffs’ attorneys, this is a caution light—they will need to consider whether they will be sanctioned if they file frivolous disclosure claims in the hope of a quick payday,” Lape added. “They may also try to resolve more demands without actually filing suit and thus avoiding Rule 11. But without a real threat of litigation, why would a defendant settle?”

A [study](#) in the Vanderbilt Law Review estimated that shareholders’ lawyers received at least \$23 million in mootness fees in 2017.

The Seventh Circuit rendered its decision in *Alcaarez v. Akorn*.

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April 17, 2024, 8:50AM PDT
Garrett Motion Investors Fail to Revive Lawsuit Over Liabilities
By [Martina Barash](#)
Documents

-  [Court Opinion](#)
-  [2d Cir. Docket](#)

Bloomberg Law News 2024-04-17T12:34:57906708798-04:00
Garrett Motion Investors Fail to Revive Lawsuit Over Liabilities

By Martina Barash 2024-04-17T11:50:24000-04:00

Garrett Motion Inc. investors didn’t adequately allege the Honeywell International Inc. spinoff’s leaders intended to deceive them when touting the business despite crushing asbestos liability to Honeywell, the Second Circuit affirmed Wednesday.

“Because Garrett’s high leverage relative to its competitors and the onerous terms of the Honeywell obligations were public information, it is unlikely that Garrett believed it could deceive investors as to the long-term viability of its capital structure,” the US Court of Appeals for the Second Circuit said in an unsigned, unpublished opinion.

Garrett, which filed for Chapter 11 bankruptcy protection in September 2020, “acknowledged the risks posed by its capital structure many times” in the period leading up to its bankruptcy, the court said.

The case is *In re Garrett Motion Inc. Sec. Litig.*, 2d Cir., No. 23-668, unpublished 4/17/24 .

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Mobile Game Company Skillz Beats Investor Suit at Ninth Circuit

By Matthew Bultman

- Suit over company's finances followed report from short-seller
- Court says investors didn't identify misleading statements

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Mobile Game Company Skillz Beats Investor Suit at Ninth Circuit

By Matthew Bultman 2024-04-16T14:32:28000-04:00

- Suit over company's finances followed report from short-seller
- Court says investors didn't identify misleading statements

A federal appeals court upheld a decision throwing out a securities fraud lawsuit accusing mobile game platform Skillz Inc. of misleading investors about its finances.

Investors said the platform painted an overly rosy picture of Skillz's paid user engagement and didn't disclose that download rates for popular games were falling, among other things.

But Skillz didn't make any false or misleading statements, the US Court of Appeals for the Ninth Circuit said in an opinion Tuesday.

The platform regularly reported various engagement metrics, including user numbers, the Ninth Circuit said. The court also noted that download rates for games would naturally fluctuate over time.

Skillz's statement that its business could suffer if some games became less popular "is not misleading both because it states a truism and because the statement did not quantify any game's overall popularity," the court said in its unpublished opinion.

Games available on Skillz's platform includes titles such as Blackout Bingo, Solitaire Cube and Jewel Blitz. The company went public in December 2020 by merging with blank-check company Flying Eagle Acquisition Corp., run by Hollywood veteran Harry Sloan.

The potential class action, filed in 2021, followed a report from short-seller Wolfpack Research, which said that downloads had started to drop for three games that made up almost 90% of Skillz's revenue.

Judge Richard Seeborg in the Northern District of California dismissed the case in March 2023.

Lowey Dannenberg PC and Hagens Berman Sobol Shapiro LLP represent the investors. Latham & Watkins LLP represents Skillz.

The case is *Jedrzejczyk v. Skillz Inc.*, 9th Cir., No. 23-1549, 4/16/24.

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Securities Law News

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Attack Allowed on Attorneys' Fees for Merger Disclosures (1)

By Martina Barash

- 'Mootness fees' paid for no benefit to class, objector says
- Rule 11 provides roadmap for courts to address practice

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Attack Allowed on Attorneys' Fees for Merger Disclosures (1)

By Martina Barash 2024-04-16T09:49:12000-04:00

- 'Mootness fees' paid for no benefit to class, objector says
- Rule 11 provides roadmap for courts to address practice

Ted Frank, a frequent class action settlement objector, may pursue the return of attorneys' fees and sanctions in the largely resolved lawsuits that sought additional disclosures in drugmaker Akorn Inc.'s proxy documents for a merger with Fresenius Kabi AG.

Participation by Frank, an Akorn shareholder, is appropriate "since class counsel and Akorn are looking out for their own interests rather than those of the class," the US Court of Appeals for the Seventh Circuit said Monday.

The Private Securities Litigation Reform Act provides a mechanism for courts to review so-called "mootness fees" when a corporation quickly makes the requested disclosures and pays the suing investors' attorneys' fees, Judge Frank H. Easterbrook said for the appeals court. That mechanism is "mandatory" court review of parties' and attorneys' compliance with Federal Rule of Civil Procedure 11(b), governing representations to the court, he said.

"It's a tremendously important decision," said Jill Fisch, a professor at the University of Pennsylvania Carey Law School. "It's long overdue. It brings to light a practice that federal courts have not paid sufficient attention to," she said.

The decision alerts federal judges to a problem they may not have noticed, she said: "filing lawsuits to extort a fee."

Marcie Lape, who defends companies in securities litigation, said the Seventh Circuit “seems to be signaling its belief that district courts should use their available tools to discourage frivolous merger challenges and put an end to the payment of mootness fees where a case clearly lacks merit.”

But courts “historically have shown reluctance to use Rule 11 except in extraordinary circumstances,” said Lape, who’s with Skadden, Arps, Slate, Meagher & Flom LLP in Chicago. “For there to be a real change to the playing field, we will either need to see an increase in courts evaluating merger challenge cases for compliance with Rule 11 at their inception or an increase in shareholder interventions challenging the actions,” she said.

The Delaware Court of Chancery said such suits are disfavored in a 2016 case, *In re Trulia Inc. Stockholder Litig.* , and the Seventh Circuit has taken up the issue before.

But Fisch said she doesn’t know of rulings ordering sanctions. Most of it is “just kind of flying under the radar of the federal courts,” she said.

The challenge for the courts is that the suit isn’t always filed as a class action, leaving the court with no role, and sometimes it’s just settled with a demand letter rather than a suit, she said.

Frank, an attorney and frequent class action objector, will be able to ask the lower court, the US District Court for the Northern District of Illinois, for sanctions or other remedies, the Seventh Circuit said. The Fresenius merger was abandoned for reasons unrelated to the suits, the court said.

Judge Diane Wood joined the opinion. Judge Michael S. Kanne died after the appeals were argued.

The O’Bell Law Firm LLC and Levi & Korsinsky LLP represented Jorge Alcarez, the plaintiff in the lead case. Jones Walker LLP represented Akorn. The Hamilton Lincoln Law Institute, with which Frank is affiliated, and the office of the Salt Lake City attorney general represented Frank.

The case is *Alcarez v. Akorn, Inc.* , N.D. Ill., No. 18-2220, 4/15/24 .

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NEWS

ClaimScore, AI-Powered Claim Validation Software Provider, Announces \$3.15 Million in Funding

ClaimScore's claim validation software evaluates claims for class action settlements as they come in, scoring them depending on propensity for fraud or legitimacy.

April 17, 2024 at 12:00 PM

Class Actions



Cassandre Coyer



ClaimScore, which provides artificial intelligence-powered claim management and anti-fraud solutions for class action settlements, announced the closing of a \$3.15 million seed funding round led by ROC Venture Group, on Wednesday.

The provider's seed round was oversubscribed by \$1.15 million, which means that the funding exceeded ClaimScore's initial target raise amount of \$2 million. This funding comes just short of a year and a half since ClaimScore secured an angel round of \$1 million in December 2022.

Since then, the provider released its proprietary anti-fraud solution for [commercial use](#) in January, and announced a partnership with class action settlement solutions provider [Angeion Group](#) last month.

Bob Gallo, an entrepreneur, former financial adviser and now CEO of ClaimScore, told Legaltech News that the provider seeks to leverage the funding to continue to expand its offerings.

"Ultimately, we want to expand that into some other class actions arenas—potentially mass tort. We're looking at several [areas]," Gallo said. He added that the team is also exploring expanding its reach to serve broader areas of fraud beyond class actions.

ClaimScore's claim verification software was built in response to a spike in fraudulent claims being filed to class action settlement administrators who were suddenly facing tens of millions of claims to sift through and validate, Gallo told Legaltech News. Up until recently, claims were authenticated using what Gallo described as a "group and slash" method, grouping claims with a common characteristic—say, an IP address for example—and eliminating them, and so on.

Leveraging AI, including machine learning, Gallo said that ClaimScore uses a "multidimensional evaluation" method to look at each claim individually and in real-time to determine propensity toward fraud or legitimacy.

“We weigh it. We still don’t use a single criteria. ... We came up with a scoring system. And every individual starts out with a perfect score of 1000. And we are evaluating each and every claim. We’re not grouping anybody. So you start out with 1000. And then once our algorithms go through it, you get what we call deduction codes,” he said.

Claims that receive a 700 or above score meet a “passing score”—similarly to how credit scores are determined.

Looking ahead, Gallo noted that ClaimScore will likely consider raising some funding again due to investors’ interests.

“We will see. Chances are yes. But we’re in a strategic position. We’ve got access to additional resources in terms of capital and investment as we go forward. So we’re super excited about that because we don’t have to think about it as much but when that time comes, we’ll open up the conversation,” he said.

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Meet the Law Firms Behind a Major Gasoline Antitrust Class Action

In effect, the defendants' cartel is a "per se unlawful restraint of trade" under state antitrust and competition laws, the complaint alleges.

April 16, 2024 at 03:29 PM

Antitrust

By Adolfo Pesquera | April 16, 2024 at 03:29 PM

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



The Dallas firm Burns Charest is lending its expertise as part of a coalition of law firms seeking to certify an antitrust class action against shale oil producers accused of price fixing.

The lawsuit, which can be viewed on [Law.com Radar](#), was filed in the U.S. District Court for the District of New Mexico, where Chris Dodd of Dodd Law Office is local counsel.

Other firms for the plaintiffs include Sharp Law of Prairie Village, Kansas, and Steven Williams Law of San Francisco.

Burns Charest and Sharp Law have experience litigating antitrust, class actions and energy industry cases.

Their lawsuit, [Foos v. Permian Resources Corp.](#), is the latest in a series of antitrust lawsuits brought against the same independent shale oil producing companies. [Law.com reported](#) recently that five such lawsuits were filed in January; four of those were consolidated in Las Vegas, Nevada by U.S. District Judge Gloria Navarro.

However, on April 4, Navarro recused herself from the cases. According to the court docket, Navarro recused “due to the court’s preexisting conflict with Exxon and its newly discovered financial relationship with defendant Pioneer Natural Resources.”

The same day, the cases were assigned to Chief Judge Miranda M. Du and Magistrate Judge Maximiliano D. Couvillier III.

Defense

The lead case in the Nevada lawsuits is *Courtmanche et al v. Permian Resources Corp.*, case number 2:24cv00198.

Four of the named defendants in the New Mexico lawsuit are based in Texas—Permian Resources and Diamondback Energy Inc., both of Midland; EOG Resources Inc. of San Antonio; and Occidental Petroleum Corp. of Houston.

Also named are Chesapeake Energy Corp. and Continental Resources Inc., both of Oklahoma City, Oklahoma; and Hess Corp. of New York.

Defense counsel has not yet appeared in the New Mexico complaint and have not filed answers in the Nevada lawsuits.

The Nevada lawsuits all have the same defendants and are represented by:

- Vinson & Elkins for Permian Resources
- Latham & Watkins for Chesapeake Energy Corp.
- Proskauer Rose for Continental Resources
- Winston & Strawn for Diamondback Energy
- Baker Botts for EOG Resources
- Wachtell, Lipton, Rosen & Katz for Hess
- Kirkland & Ellis for Occidental Petroleum
- Gibson, Dunn & Crutcher for Pioneer Natural Resources

Alleged Gasoline Pricing Scheme

As is alleged in the earlier cases, the plaintiffs are consumers of petroleum-based fuel products and the claim the defendants conspired to coordinate and constrain domestic shale oil production to maintain higher prices for retail gasoline.

The defendants are independent shale oil “swing producers,” meaning they have to ability to adjust production levels rapidly in response to changes in market conditions, the complaint said.

The plaintiffs allege that between 2017 and 2023 the defendants met regularly with each other and with the Organization of Petroleum Exporting Countries (OPEC) to coordinate their collective oil output.

The lawsuit relies on numerous public statements made by the defendants that allegedly confirm those discussions, “and the exchange of confidential information.”

“Defendants also confirmed that they discussed with each other and OPEC their production strategies, future investment plans, and price targets,” the complaint claimed.

The complaint argues that after nations recovered from the COVID-19 pandemic crude oil prices rose rapidly. The Russian-Ukraine war and the subsequent sequestering of Russian oil tightened supply and exacerbated pricing.

Historically, shale oil swing producers would take advantage of such a tight market for crude oil by increasing production, but they did not do so, the complaint claimed.

“Defendants’ agreement to limit their respective shale production volumes has had the effect of fixing and/or stabilizing at an artificially high-level U.S. (and global) crude oil

prices, which in turn fixed and/or stabilized retail gasoline prices in the United States at an artificially high level,” the plaintiffs allege.

In effect, the defendants’ alleged cartel is a “per se unlawful restraint of trade” under state antitrust and competition laws, the complaint claims.

Occidental, responding to a request for comment, said, “Occidental denies that it engaged in any of the conduct alleged by the plaintiffs’ attorneys and intends to vigorously defend itself against this meritless lawsuit.”

Requests for comment were made directly to the corporate defendants through their media and/or investor relations contacts. The others did not immediately responded.

This suit was surfaced by Law.com Radar, a cutting edge solution for new suit alerts from federal and state courts. Law.com Radar delivers AI-enhanced case summaries and daily case reports from more than 1,100 courts-all backed by the industry’s most trusted source for legal news and data. [Click here](#) to get started and be first to act on opportunities in your region, practice area or client sector.

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April 17, 2024, 7:27 AM PDT
Xerox Workers Get Fee Award Cut After \$4.1 Million 401(k) Deal
By [Jacklyn Wille](#)
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- Federal judge backs 25% fee award instead of requested 33%
- Lawsuit centered on use of affiliated 401(k) plan recordkeeper

Bloomberg Law News 2024-04-17T11:09:35884558056-04:00
Xerox Workers Get Fee Award Cut After \$4.1 Million 401(k) Deal

By [Jacklyn Wille](#) 2024-04-17T10:27:35000-04:00
Federal judge backs 25% fee award instead of requested 33%
Lawsuit centered on use of affiliated 401(k) plan recordkeeper

Lawyers who negotiated a \$4.1 million class settlement with Xerox Corp. over its 401(k) plan are entitled to one-fourth the settlement value as attorneys’ fees, a federal judge said in an order declining to award the full amount requested.

The lawyers’ bid for nearly \$1.4 million in fees—one-third of the settlement amount—is “above the median and mean for cases of similar size, complexity, and subject matter,” Judge Sarala V. Nagala said Tuesday. An award of just over \$1 million—one-fourth of the settlement—is more in line with similar cases, given that the attorneys haven’t shown that this case is unique or that they faced “exceptional risk” justifying a higher award, the judge said.

Nagala awarded the attorneys \$155,000 in litigation and settlement expenses, and she approved service awards of \$5,000 for each of the three named plaintiffs.

The lawsuit, filed in 2021 in the US District Court for the District of Connecticut, says Xerox entered the retirement plan recordkeeping business in the early 2010s and hired itself to service the 401(k) plan covering its employees. Xerox allegedly continued this relationship until early 2021, forcing plan participants to pay excessive fees that benefited the company’s bottom line.

Nagala allowed the case to advance in 2022, saying the employees plausibly alleged that Xerox breached its fiduciary duties under the Employee Retirement Income Security Act by hiring recordkeepers whose steadily increasing profits ultimately flowed to Xerox.

The parties’ settlement, which Nagala approved in February, covers about 36,000 people and represents about 29% of the employees’ total estimated damages.

The employees are represented by Nichols Kaster PLLP and Garrison, Levin-Epstein, Fitzgerald & Pirrotti PC. Xerox is represented by Morgan, Lewis & Bockius LLP.

The case is Carrigan v. Xerox Corp. , 2024 BL 129910, D. Conn., No. 3:21-cv-01085, 4/16/24 .

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Law firm Winston & Strawn settles lawsuit over copycat court filing

 [reuters.com/legal/litigation/law-firm-winston-strawn-settles-lawsuit-over-copycat-court-filing-2024-04-16](https://www.reuters.com/legal/litigation/law-firm-winston-strawn-settles-lawsuit-over-copycat-court-filing-2024-04-16)

Blake Brittain

Signage is seen outside of the law firm Winston & Strawn LLP in Washington, D.C., U.S., August 30, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

April 16 (Reuters) - U.S. law firm Winston & Strawn has agreed to settle an unusual copyright lawsuit from a much smaller firm that claimed Winston's attorneys copied one of its court filings "nearly verbatim," according to a document filed in New York federal court on Tuesday.

U.S. District Judge Denise Cote discontinued the case and said , opens new tab that Chicago-founded Winston and Boston-based patent law firm Hsuanyeh Law Group told her they had settled their dispute.

A lawyer for Hsuanyeh declined to comment. The Winston attorneys named as defendants and the firm's lawyer in the case did not immediately respond to requests for comment and more information about the settlement.

Winston, which has close to 1,000 lawyers, and Hsuanyeh, which lists six lawyers on its website, represented separate companies facing patent lawsuits from Unification Technologies LLC in Texas federal court over computer data storage technology. The 2023 cases were consolidated and later settled.

Hsuanyeh founder Hsuanyeh Chang filed a motion to dismiss the case against his client Phison Electronics last August. According to Hsuanyeh, a Winston attorney reached out later that day to call the filing "impressive," and the firm filed a nearly identical version for its client Silicon Motion the next day.

Hsuanyeh sued Winston and four of its attorneys in December, marking a rare copyright-infringement case over court filings. Hsuanyeh requested monetary damages and a court order blocking Winston from "infringing copyrighted works of other law firms."

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Winston told Hsuanyeh that "no case has ever held that a law firm's copying of a co-defendant's motion constitutes infringement," according to an email included with Hsuanyeh's complaint.

The firm denied violating copyright law in a court filing last month.

The case is Hsuanyeh Law Group PC v. Winston & Strawn LLP, U.S. District Court for the Southern District of New York, No. 1:23-cv-11193.

For Hsuanyeh: Lance Liu

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For Winston: Sean Anderson of Winston & Strawn

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Did Winston & Strawn cross an ethics line in a copycat court filing?

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Reporting by Blake Brittain in Washington

Blake Brittain

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Blake Brittain reports on intellectual property law, including patents, trademarks, copyrights and trade secrets, for Reuters Legal. He has previously written for Bloomberg Law and Thomson Reuters Practical Law and practiced as an attorney.

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April 16, 2024, 10:44 AM PDT

Matt Levine's Money Stuff: Trump Media Has More Stock Coming

By Matt Levine

Opinion

Bloomberg Law News 2024-04-17T09:51:07518776745-04:00

Matt Levine's Money Stuff: Trump Media Has More Stock Coming

By Matt Levine 2024-04-16T13:44:36407-04:00

Trump Media

Trump Media & Technology Group announced some product news today, which I for one was not expecting. It has previously said that it had “begun testing” a streaming video platform, and today it announced that it “has finished the research and development phase of its new live TV streaming platform” and plans to roll it out. There are not many details about the rollout, though the platform will focus on “content that has been cancelled, is at risk of cancellation, or is being suppressed on other platforms and services.”

As of noon today, Trump Media's stock was down about 13%, because the market expected the streaming platform to be further along, with more details on the rollout and monetization plans and content partnerships. Obviously I'm kidding. That's not why. I don't really think the market has much in the way of organized expectations for Trump Media's products or business. As far as I can tell, zero sell-side research analysts cover the stock. Probably more or less nobody bought the stock in anticipation of a better streaming announcement today and then had to unwind the trade this morning.

No, probably the stock was down this morning, after closing down 18% yesterday, for this reason:

Donald Trump's social media startup tumbled on Monday, extending a two-week slump, after the company took a first step toward allowing the former president and other insiders to capitalize on their stakes.

Trump Media & Technology Group Corp., parent of Truth Social, filed to register shares, including those linked to warrants. The move could ultimately bring forward sales from insiders that are currently not permitted until September.

Here is that registration statement, which is not a surprise — Trump Media was obligated to register these shares — but which is, I suppose, new. The very rough numbers are :

Trump Media has about 136.7 million shares outstanding.

- Of those, about 28.7 million shares are held by public shareholders and trade freely.
- About 78.8 million shares are held by Donald Trump, which he can't sell until late September.
- The remaining 30 million-ish shares are mostly held by other sorts of insiders: Trump's partners in starting the company, early investors, the promoters of the special purpose acquisition company that took it public. Many of these are also subject to lockups that end in September.
- People — early investors, hedge funds — also own *warrants* to buy about another 21.5 million shares at \$11.50 per share. Those warrants should be exercisable soon — when that registration statement gets through US Securities and Exchange Commission review — and, if the stock is still above \$11.50 (it closed at \$26.61 yesterday), you'd expect the holders to exercise the warrants and sell the shares.
- If the stock stays above \$17.50 for the next week or so, the company will issue 40 million new shares to insiders, 36 million of them to Trump himself.

So there are on the order of 200 million total shares (shares currently outstanding plus shares soon to be issued), of which perhaps 30 million are currently trading. In the next few weeks, another 20 million might come on the market. By September, another 150 million shares could *theoretically* come on the market, though it's not like all the insiders will dump their shares as soon as they can. Right?

Your simple model could be that there is a stable-ish price for Trump Media as a meme stock with 30 million shares to trade, but the price for a meme stock with 50 million shares to trade, or 200 million, would be proportionally lower.

Or I guess a model for a meme stock could go something like this. It starts with a burst of *attention*: In Trump Media's case, the stock soared in October 2021, when the special purpose acquisition company first announced (the existence of and) its merger with Trump Media, and then again in January 2024, when the merger looked likely to close, and in March, when it did. And these bursts of attention took Trump Media's stock price way, way, way, way, way beyond what seemed to be justified by its fundamentals (as a money-losing company with \$4 million of revenue). That is sort of the definition of a meme stock.

Then what? Well:

1. *Probably* that attention — and thus the stock price — will decay over time, if nothing else happens. If Trump Media's stock is literally and purely a stock-market token of fondness for Donald Trump, and never announces new products or makes any money, then *probably* its retail investors will lose interest and the stock will drift

down. This is not *necessarily* true, and you could imagine — I have imagined — the token taking on an economic life of its own with no long-term connection to the fundamentals of the business. But my best guess is that a stock can't trade forever as a pure meme.

- 2. The bull case is that the company grows into the stock price: Use all that attention, and the money that it can raise, to build products and justify its valuation. You know, make some product announcements, have earnings, that sort of thing.
- 3. The bear case is ... look, it has never been particularly difficult to identify the likely bagholders in the Trump Media trade? Or the timing? This is a stock with (1) a bunch of retail investors buying, (2) a bunch of hedge funds who have warrants that they can probably exercise this month or so and (3) a bunch of insiders (really one main insider) who need money and will be able to sell their stock in September or so. If the attention persists until they can sell — or if there are product announcements or positive earnings along the way that keep the stock up — then, I mean, what do I know, but wouldn't you expect them to extract as much of the meme-stock value as possible for themselves?

When Trump Media went public as a meme stock, it set off a race between its business and its big shareholders' ability to sell. This week brought news on both sides — the streaming plans for the business, the warrant share registration for the sales — and, uh. The stock is down.

Meanwhile here is a quite grim Washington Post story interviewing some of the shareholders:

Jerry Dean McLain first bet on former president Donald Trump's Truth Social two years ago, buying into the Trump company's planned merger partner, Digital World Acquisition, at \$90 a share. Over time, as the price changed, he kept buying, amassing hundreds of shares for \$25,000 — pretty much his "whole nest egg," he said.

That nest egg has lost about half its value in the past two weeks as Trump Media & Technology Group's share price dropped from \$66 after its public debut last month to \$32 on Friday. But McLain, 71, who owns a tree-removal service outside Oklahoma City, said he's not worried. If anything, he wants to buy more.

"I know good and well it's in Trump's hands, and he's got plans," he said. "I have no doubt it's going to explode sometime."

As with many meme stocks, there are conspiracy theories about what could possibly be keeping Trump Media trading at only 800 times trailing revenues:

Todd Schlanger, an interior designer at a furniture store in West Palm Beach who said Trump had been one of his customers ... suspects the recent drops in share price have been the result of "stock manipulation" from an "organized effort" to make the company look bad. There's no proof of such a campaign, but Schlanger is convinced. "It's got to be political," he said, from all the "liberals that are trying to knock it down." ...

Carol Swain, a prominent conservative commentator in Nashville who previously taught political science at Vanderbilt University ... suspects stock manipulation, arguing that “the people who hate Donald Trump would do anything to try to hurt him.” As for Truth Social itself, she said she posts there only sparingly and prefers X, where she has 35 times as many followers. “I have always wanted not to just preach to the choir,” she said.

McLain, the tree service owner in Oklahoma, said he believes the stock could “go to \$1,000 a share, easy,” once the media stops writing so negatively about it and the company works through its growing pains. The company’s leaders, he said, are being “too silent right now” amid questions about the falling share price, but he suspects it’s because they’re working on something amazing and new.

I hope he’s happy with the streaming announcement.

Hunterbrook

We have talked a few times about Hunterbrook, the hedge fund that is also a newspaper:

1. Hunterbrook Media is a media organization that publishes general news and investigative journalism.
- 2. Before publishing an investigative story, it runs it by Hunterbrook Capital, its affiliated hedge fund.
- 3. If the investigation looks like it will move the market, Hunterbrook Capital will do a trade to profit from the investigation.
- 4. These profits pay for Hunterbrook Media’s newsroom.

Earlier this month, Hunterbrook launched its website with a big investigative report on United Wholesale Mortgage, which Hunterbrook Media accused of misconduct; Hunterbrook Capital shorted the stock of its parent company, UWM Holdings Corp. (The stock closed yesterday down about 7.5% from where it was before the report.)

Hunterbrook was back yesterday with a big investigative report on Posco, the Korean conglomerate, which Hunterbrook Media accuses of complicity with the junta in Myanmar :

A major source of the money that the junta uses for jet fuel and weapons is Myanmar’s four offshore gas projects. Of those, the Shwe project, operated by Posco International Corp. in joint ownership with an entity controlled by the junta, has been the most profitable in recent years, according to a report by the U.N. Special Rapporteur on the situation of human rights in Myanmar. The report claims Shwe provided over a half billion dollars per year to the regime in the two years after the coup, helping fund a \$1 billion spending spree for arms, including fighter jets, attack drones, assault helicopters, tank parts, and advanced missile systems.

The purchases have enabled what the U.N. Special Rapporteur called “probable crimes against humanity,” including murder, torture, sexual violence, and the pillaging of villages.

After the coup, major energy companies from Organisation for Economic Co-operation and Development member countries that were operating Myanmar's offshore gas projects left, citing human rights violations. Not Posco.

Posco not only chose to stay, but continued to pour in hundreds of millions of dollars to increase production at the Shwe gas project, even as evidence of junta atrocities grew.

But right at the top there is a statement that "Hunterbrook Media's investment affiliate, Hunterbrook Capital, did not take any positions related to this article."

Why not? Why would Hunterbrook invest resources in doing a big international investigation, find alleged wrongdoing at a publicly traded company, and then not trade? Let me propose a few theoretically possible answers:

1. Sometimes, in investigating a company, Hunterbrook Media will find stuff that (1) is bad for the world and (2) the public ought to know about, but (3) is not bad *for business*. "A big international trading company is complicit in human rights abuses" might just be that kind of story? Doing business with bad people might be morally bad, but good for the bottom line. As a journalistic endeavor, Hunterbrook Media might want to call attention to these abuses. As a profit-seeking hedge fund, Hunterbrook Capital might pass. (Posco International's stock *is* down this week.)

- 2. Sometimes, in investigating a company, Hunterbrook Media's journalists might learn of wrongdoing from inside sources at the company, and might rely on leaked internal documents to support it. Probably not — Hunterbrook says "we avoid talking to insiders, depending instead on publicly available information" — but perhaps sometimes the journalists are tempted. These are, after all, traditional tools of investigative journalism. But — as we discussed the first time Hunterbrook appeared in this column — they are risky tools for *hedge funds*. Trading based on inside sources and internal documents is arguably illegal insider trading. You could imagine Hunterbrook Media doing some traditional investigative journalism, and then Hunterbrook Capital saying "nope, this has inside information, we have to pass."

- 3. Sometimes Hunterbrook Media will do an investigation that (1) reveals a good trade and (2) gets through compliance, but perhaps Hunterbrook Capital will pass on the trade in order to build up the credibility of Hunterbrook Media. "See, it's real investigative journalism; it's not *just* finding trades for a hedge fund." They are playing a long game here, and I suppose the goal is to become a trusted investigative news outlet rather than just another activist short fund publishing occasional splashy short reports.

- 4. Sometimes, in investigating a company, Hunterbrook Media will find out bad stuff about a company in South Korea. And it will take its results to Hunterbrook Capital, which will say "ah yes, this is great, this will crush the stock." And they'll run it by compliance, which will say "ah yes, this is all based on public information, you're free to trade on it." And Hunterbrook Capital will decide to put on a big short bet against the company. And then it will remember that South Korea's stock market currently bans short sales, whoops!

Whistleblowers and short sellers

One thesis you could have is:

1. Activist short selling of fraudulent public companies is a social good: It is good that there are people out there who are investigating public companies, finding the ones that are doing bad stuff, shorting their stocks and publicizing the bad stuff. It is good that there is a market incentive to discover and disclose financial fraud; it makes markets fairer and more efficient and more honest.

- 2. The incentives are, however, insufficient. Activist short selling is *hard*. Most stocks go up. The bad ones are often expensive to short due to high stock-borrow costs. If you get your activist short report wrong, you will get sued. The companies that you short will get mad and seek vengeance. Short sellers are widely misunderstood and disliked, and there's a risk of criminal investigation or getting run over by a meme stock.

- 3. For all those reasons, there is less activist short selling than would be socially optimal.

- 4. The government should correct this market failure by subsidizing activist short selling. If you are an activist short seller, and you short a company because you think it's a fraud, and you turn out to be right, the government should write you a check — in *addition* to your winnings on your trade — to encourage you.

When I write it like that it seems ... wrong? As a general matter, it's not obvious that the best use of government resources is to subsidize *any* sort of hedge funds. Also, some of the problems with short selling are imposed by the government — the hazy criminal investigations, for instance — and it might be more efficient to get rid of those problems than to offset them with subsidies.

Nonetheless this is a real thing that the government actually does! Sort of. Here's a fun paper by Alexander Platt of the University of Kansas School of Law titled "The Shortseller Enrichment Commission?: Whistleblowers, Activist Short Sellers, and the New Privatization of Public Enforcement":

Two developments have transformed the detection of corporate fraud in the last decade: the SEC whistleblower bounty program (WBP) and the rise of activist short sellers. The WBP offers up financial bounties to individuals who bring forward actionable information about securities fraud. Activist shorts conduct due diligence to identify overvalued public companies, take short positions, reveal the negative information, and then enjoy trading profits if and when the stock tanks. Considered separately, these institutions are widely regarded as socially valuable innovations that help deter fraud.

But, it turns out, they are not fully separate. Activist shorts have been participating actively and effectively in the WBP – both directly (submitting tips, filing claims, and winning awards) and indirectly (partnering with insider tipsters). Their participation has transformed the WBP into an undercover outsourcing program; a new way for the SEC to pay private professionals to do work that traditionally has been done by SEC staff.

This privatization might be defensible, indeed laudable, if it yielded more efficient deterrence than what the SEC could achieve on its own. Unfortunately, it likely does not. The SEC may be paying activist shorts for information they would have made public even without the prospect of bounty (because of their trading strategy). In such cases, the public bounty payment does nothing to incentivize additional fraud detection and is merely a windfall for the recipient. Those funds could be better spent by expanding the SEC's own enforcement capacity.

We have talked before about the increasing synergies between activist short selling and whistleblowing. Notably, when we discussed Hunterbrook's first published investigation of a public company, I noted that it shorted the stock, got long a competitor's stock, filed some lawsuits and also filed an SEC whistleblower complaint. "If you can find out bad news about companies, there are a lot of ways to make money," I wrote. Possibly too many.

Silence is not securities fraud

Under US securities law, if a company *says something false*, it can be sued for securities fraud, but if it *neglects to mention something true and important*, it can't. There are lots of qualifications to that second part, to the point that I kind of discount it, but we talked yesterday about a Supreme Court decision holding that "pure omissions" are not securities fraud. I wrote:

You could imagine pure silence being misleading. For instance, you could imagine things that the market would *expect to be disclosed* if they happened, so that *not* disclosing them sort of implies that they didn't happen. If a company's chief executive officer died suddenly, and the company didn't tell anyone for a few weeks, that would be weird! The company hasn't *lied*, but everyone kind of went around assuming that the CEO was alive, and the company didn't bother to correct their mistaken impression.

Readers emailed to suggest considerable improvements over that hypothetical example. Seil Kim pointed me to a 2023 paper that he wrote with Seungjoon Oh with this amazing footnote:

As an extreme example, one of the sample firms in this study, Badger Paper Mills, delayed its announcement of the death of its CEO for about two months until the next scheduled regular board meeting. According to one of the directors, "the board decided to wait to disclose the search for Cosgrove's replacement until it also had news of a new board member" (Milwaukee Journal Sentinel, October 30, 2000). Interestingly, the SEC explicitly states that the death of an officer or director does not trigger an 8-K filing (<https://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm>).

And Evan Hughes pointed out a slightly different real case from Sweden in 2016:

Swedish measurement technology firm Hexagon has defended the time it took to announce the arrest of its chief executive for alleged insider trading after it came to light he was under arrest during last week's earnings call with analysts.

After being detained in Sweden on Oct. 26, Ola Rollen was allowed by the Swedish Economic Crime Authority to present Hexagon's third-quarter results in a conference call on Oct. 28, the agency told Reuters on Tuesday, adding two of its police officers were with Rollen during the call.

Analysts on the call were not told Rollen had been arrested or that police were in the room.

Yes, right, weird thing not to mention.

Things happen

Inside CVC's tortuous decision to go public. UBS Is Said to Face \$20 Billion Capital Hit Under Swiss Plan. A \$10 Billion Copper Mine Is Now Sitting Idle in the Jungle. Justice Department to File Antitrust Suit Against Live Nation. German watchdog finds EY's Wirecard audits grossly negligent. Superdry to Quit London Stock Exchange in Major Rescue Plan. Long-Shot Bidder Drops Effort to Revive Failed Trucker Yellow. Raiffeisen Bank trumpets Russia growth plans in dozens of job ads. The Latest Scandal in Chess: Walking Too Loudly. Armed felon could get 7 years in prison after tirade at Brooklyn Dunkin' Donuts.

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- 1. See page 17 of the merger proxy for the rough breakdown, Donald Trump's Schedule 13D for more recent numbers and the lockup terms, and the registration statement for the warrant numbers.
- 2. It is not generally optimal for holders to exercise an option early, but (1) this situation is weird and (2) as is typical with SPAC warrants, Trump Media can (and probably should) effectively force them to exercise if the stock is above \$18. (See page 55 of the registration statement.) If the stock is below \$18 but above \$11.50, it's less obvious that the warrants would be exercised, though apparently a lot of warrant holders are hedged with the expensive-to-borrow stock and so might exercise early.
- 3. I see about 5.9 million shares of short interest, so maybe more like 36 million shares effectively available to trade.
- 4. Yesterday Hunterbrook Media also published a related, shorter story about Danieli & C. S.p.A., a publicly traded Italian company, which allegedly "has been involved in restarting junta-owned steel mills in Myanmar with links to arms manufacturers"; there too Hunterbrook Capital took no positions.
- 5. The really daring one is the stock borrow requirement: If the government just allowed naked short selling, it would be cheaper and easier to short stocks! But naked short selling makes people much, much, much angrier than regular short selling, so I can only mention this one in a footnote.

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Trump Mastered The Art of the SPAC Deal. Cashing Out Is Harder

By Bailey Lipschultz and Tom Maloney

- Trump Media stake may bring over \$1 billion despite share drop
- De-SPAC executives often struggle to realize large payouts

Bloomberg Law News 2024-04-17T09:50:31056249807-04:00

Trump Mastered The Art of the SPAC Deal. Cashing Out Is Harder

By Bailey Lipschultz and Tom Maloney2024-04-16T14:12:28813-04:00

- Trump Media stake may bring over \$1 billion despite share drop
- De-SPAC executives often struggle to realize large payouts

The value of Donald Trump's stake in his media startup may have shrunk since going public through a blank-check merger, but on paper, it's still worth a lot. The question for the former president is, should he decide to sell, how much he could actually extract.

At its peak last month, Trump's 58% stake in Trump Media & Technology Group Corp. was worth as much as \$6.3 billion. Trump and other insiders are unable to sell due to a six-month lockup agreement. That didn't stop other shareholders who rode a 270% rally from cashing out — following the deal, the shares lost roughly two thirds of their value in a matter of weeks.

Such a plunge is not unheard of for firms that use special purpose acquisition companies to go public. More than a fifth of de-SPACs, those who complete such deals, that debuted since 2019 are trading below \$1 each, data compiled by Bloomberg show. Most SPACs go public at a price of \$10 per share.



Trump has given no public indication he intends to sell, but if he does, he may look to the example of the insiders who benefited handsomely from some of the splashiest SPAC deals at the height of the boom. The former president might still pocket hundreds of millions — not a bad return on a company that took in just \$4.1 million in revenue last year.

Trump Media said in response to a request for comment on Donald Trump's path to cashing out of the firm that reporting on it would be "utterly baseless" and partisan, "without any conceivable sign anywhere that he plans to do so."

Read More: Trump Media's \$5.3 Billion Selloff Deepens as 270% Rally Fizzles

Briefly Billionaires

The founders of biotech firm Ginkgo Bioworks Holdings Inc. were briefly billionaires in late 2021 after their company went public in a SPAC deal that sent shares soaring to a \$29 billion valuation in its first months as a public company. But by the time they began selling in late 2022, the company's share price had crashed from a high of \$14.92 to a little over \$3.

Still, three of the founders — Jason Kelly, **Barry Canton** and **Reshma Shetty** — steadily sold, liquidating between 20% and 30% of their original stakes over the following 18 months. Although the sales went for roughly \$2 a share on average, it was enough to net them more than \$125 million in proceeds.

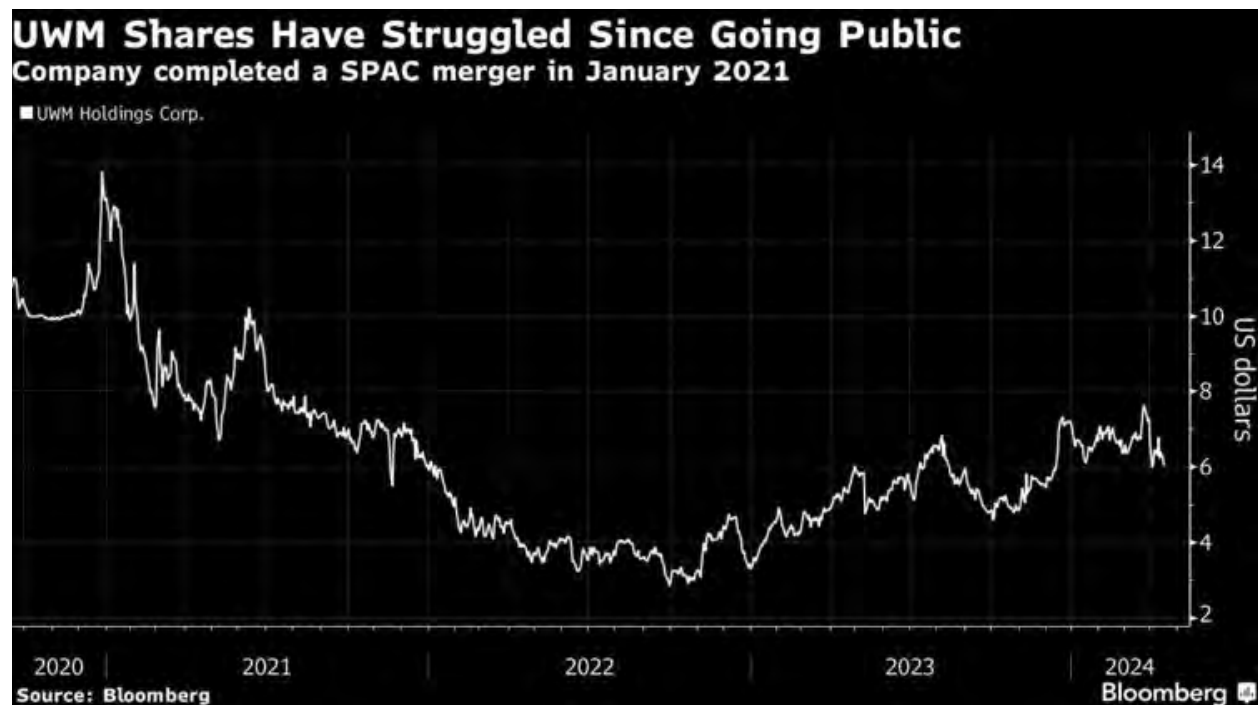
Representatives for Ginkgo Bioworks, where all three are still executives, didn't immediately respond to requests for comment.

A similar 80% plunge for Trump Media would still suggest proceeds of roughly \$1 billion for the former president. That's more than twice as much as his most valuable real estate holding and would cover the money he owes from recent legal rulings.

Selling isn't the only way founders can get liquidity. When mortgage originator UWM Holdings Corp. went public in a January 2021 SPAC merger, Chief Executive Officer **Mat Ishbia** owned a stake worth more than \$11 billion. Roughly 20 months later, shares had sunk 75% from their highs.

Instead of selling shares and adding to the pressure, Ishbia arranged a loan using his stake as collateral. He pledged more than half of the company's shares, worth some \$4.6 billion, days before he bought the Phoenix Suns basketball team for a record \$4 billion in February last year when UWM was trading below \$5 a share.

A representative for UWM and Ishbia didn't immediately respond to requests for comment.



Not all founders cash out from their SPAC deals, of course. Take **John Ruiz**, founder of insurance reimbursement recovery firm MSP Recovery Inc. The company went public at a \$32.6 billion valuation, giving Ruiz a paper fortune — briefly — of \$21 billion. Nearly two years after, Ruiz hasn't sold any of his stake and the company is valued around \$120 million. In fact, Ruiz has lent the company money to help it stay afloat.

A representative for Ruiz and MSP didn't immediately respond to requests for comment.

Trump Media Insiders

Any move to free Trump Media insiders from the six-month lock-up agreement preventing them from selling would be potentially fraught. Though the newly public company's board could waive the sales restrictions, the optics would likely signal to investors that a rush of selling is on the horizon, and would also open them up to potential shareholder lawsuits.

Trump is embroiled in a lawsuit with two co-founders who claim he tried to dilute their stake. A Delaware judge granted a request to amend the suit to include accusing Trump of retaliating by locking up their shares for six months, which they claim will cause "irreparable harm" to their finances. Trump is subject to the same lockup.

Read more: Why Trump's Social Media Firm Is Awash in Legal Cases: QuickTake

The stock's roughly 70% slide from a debut peak has cost the pair some \$415 million on paper. For Trump, his paper returns have spiraled roughly \$4.4 billion — and that doesn't count the additional windfall he and other Trump Media insiders are on track to reap.

The company announced on Tuesday that it had finished the research phase of its new live TV streaming platform, according to a press release. It plans to offer Truth Social over-the-top streaming apps which are expected to host news, religious and family-friendly content.

Trump is also facing four criminal prosecutions as he campaigns to return to the White House. The first criminal trial started Monday in Manhattan, where he's accused of falsifying business records to hide a hush-money payment to a porn star before the 2016 election. He described the case as an outrage and a persecution.

Read More: Trump Trial Off to Slow Start With Ex-President Appearing Bored

As part of the SPAC deal, Trump Media insiders are slated to get another 40 million shares as long as the stock holds above the \$17.50 mark for another six trading days. It was trading at around \$23 per share on Tuesday.

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Alison Frankel reposted



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...

And here we go - Tesla seeks to reincorporate in Texas, and for ratification of the 2018 pay package (teeing up a waste challenge)

sec.gov/ix?doc=/Archiv...

3:38 AM · Apr 17, 2024 · 29.4K Views



4



34



93



14



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Reply



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In addition to the waste challenge, I expect about 300 billion 220 requests from Tesla SHs, not to mention perhaps interesting requests for clarification from the SEC.



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14



1.5K



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Delaware SCT's grant of interlocutory review on TripAdvisor is well timed, but of course that will take months to resolve:



@annmlipton@esq.social @AnnMLipton · Apr 16

Del SCT to determine whether TripAdvisor reincorporation to Nevada was a conflicted transaction meriting entire fairness review:
[news.bloomberglaw.com/health-law-and...](https://news.bloomberglaw.com/health-law-and-...)



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17



2.5K



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AHAHAHAHA

Proposal Four Notice: For purposes of Section 204 of the DGCL (as defined below), as a meeting on April 16, 2024, the Board determined that the 2018 CEO Performance Award (as defined below) may be deemed to be a "defective corporate act" as defined in Section 204 of the DGCL to be ratified. The date of such "defective corporate act" is March 21, 2018. The Board concluded that the nature of the "failure of authorization" as defined in Section 204 of the DGCL in respect of the 2018 CEO Performance Award was the failure of the 2018 CEO Performance Award to have obtained the necessary stockholder approval due to certain defects in the disclosures in the Company's proxy statement for the 2018 Special Meeting. The Board has approved the ratification of the defective corporate act. Pursuant to Section 204 of the DGCL, any claim that the defective corporate act ratified hereunder is void or voidable due to the failure of authorization, or that the Delaware Court of Chancery should declare in its discretion that a ratification in accordance with this section not be effective or be effective only on certain conditions must be brought within 120 days from the applicable validation effective time. The information contained in this section of the notice is being provided solely for purposes of any ratification pursuant to Section 204 of the DGCL and not for any other purpose.



2



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21



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Proposal Four Notice: For purposes of Section 204 of the DGCL (as defined below), at a meeting on April 16, 2024, the Board determined that the 2018 CEO Performance Award (as defined below) may be deemed to be a “defective corporate act” as defined in Section 204 of the DGCL to be ratified. The date of such “defective corporate act” is March 21, 2018. The Board concluded that the nature of the “failure of authorization” as defined in Section 204 of the DGCL in respect of the 2018 CEO Performance Award was the failure of the 2018 CEO Performance Award to have obtained the necessary stockholder approval due to certain defects in the disclosures in the Company's proxy statement for the 2018 Special Meeting. The Board has approved the ratification of the defective corporate act. Pursuant to Section 204 of the DGCL, any claim that the defective corporate act ratified hereunder is void or voidable due to the failure of authorization, or that the Delaware Court of Chancery should declare in its discretion that a ratification in accordance with this section not be effective or be effective only on certain conditions must be brought within 120 days from the applicable validation effective time. The information contained in this section of the notice is being provided solely for purposes of any ratification pursuant to Section 204 of the DGCL and not for any other purpose.



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For those of you watching, I believe Tesla is using a ... creative ... definition of defective corporate act so that'll be part of the incoming s'holder waste challenge

1 3 29 1.6K



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dying

Then, on January 30, 2024, the Delaware Court of Chancery (the "Delaware Court") issued the *Tornetta* Opinion, the post-trial opinion finding that, among other things, the Board breached its fiduciary duties in approving the 2018 CEO Performance Award for our Chief Executive Officer, Mr. Musk, which had been unanimously approved by our independent directors and approved by approximately 73% of all votes cast by our disinterested stockholders in 2018 and that rescission of the 2018 CEO Performance Award was the appropriate remedy. Following the *Tornetta* Opinion, on January 30, 2024, Mr. Musk ran a poll on X asking whether Tesla should "change its state of incorporation to Texas, home of its physical headquarters?" Of 1,102,554 votes on X, 87.1% were in favor. The following day, Mr. Musk posted on X that "Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas." Mr. Musk made other posts on X regarding the same subject in the days following the *Tornetta* Opinion. Notwithstanding these communications, redomestication is a Board decision, not a decision for a chief executive officer. And on February 4, 2024, the Board met to discuss these issues, among others, including the multi-year history of Company discussions regarding a potential redomestication.

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it doesn't have judges

ing factors in the Special Committee's view, Texas is Tesla's home state; Texas law on corporate constituencies would better align with Tesla's mission-driven culture; Texas has an established and respected business court and the largest body of case law in the country, whereas Texas just created a business court. The Special Committee balanced these considerations and concluded that, in its business judgment, it is in the best interests of Tesla and all of its stockholders for the Company to reincorporate in Texas. The Special Committee, in this evaluation, included an examination of the effect of the

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the sharpest cut (@ProfRobAnderson that is your beeper)

advisors considered, among other things, related to market practices, that a company's U.S. state of incorporation is not a factor commonly used in valuation methodologies. The Special Committee's financial advisor also considered whether there was evidence of a "Delaware premium" through three quantitative analyses. First, they evaluated four market-implied valuation multiples from 2019 through 2023 for Fortune 500 companies, enterprise value/revenue.



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the sharpest cut (@ProfRobAnderson that is your beeper)

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2024 Proxy Statement

enterprise value/EBITDA; market capitalization/earnings; and market capitalization/book value. They did not find any observable valuation premium attributable to Delaware incorporation. Second, the Special Committee's financial advisor also analyzed market return metrics for Fortune 500 companies from 2014 through 2023, and similarly found no observable premium attributable to Delaware incorporation. Finally, the Special Committee's financial advisor reviewed four case studies of redemptions from Delaware to Texas over the last decade. They reported no observable pattern between redemption and total stockholder return over the periods studied. In addition, the Special Committee considered conclusions from its academic advisor that existing academic literature strongly suggests that a "Delaware premium" is non-existent or unknowable.

The Special Committee concluded, based on the advice of its financial and academic advisors, that there is no reason to believe that being incorporated in Delaware increases Tesla's market value. Of the S&P 500, approximately 35% are domiciled outside of Delaware.



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9



1.4K



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randomly if companies move out of Delaware but keep looking to Delaware for their legal rules it's gonna be like training AI on other AI products

corporation and the consideration of a company's U.S. state of incorporation in valuation methodologies. In addition, the Special Committee considered that Delaware law has addressed a number of issues impacting public companies that Texas law has not (yet), including Caremark oversight claims, public company conflicted controller transactions, and intermediate scrutiny of defensive tactics. However, Texas's silence in these areas does not mean that Texas law is or will be meaningfully different from Delaware law. Texas courts often look to Delaware law to fill gaps in Texas law, and the Special Committee and its advisors concluded that there was no reason to believe that Texas law would provide substantially lesser litigation rights than Delaware in areas where it is currently silent. The Special Committee and its advisors identified two important



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22



1.7K



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i love this as a reason, omg

reason, we have no material operations in Delaware. Our executives and managers operate out of Delaware. We do not have our Board meetings in Delaware, and the otherwise visit Delaware as part of their site visits. It was chosen as our state of incorporation solely because of its legal framework. As discussed above, the Special Committee found no advantage to remaining incorporated in Delaware that justifies a state being the Company's legal home and its physical home.



4



17



2.7K





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i love this as a reason, omg

...rison, we have no material operations in Delaware. Our executives and managers operate out of Delaware. We do not have our Board meetings in Delaware, and the otherwise visit Delaware as part of their site visits. It was chosen as our state of incorporation solely because of its legal framework. As discussed above, the Special Committee found no advantage to remaining incorporated in Delaware that justifies a change in the Company's legal home and its physical home.

4 8 17 2.7K



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holy crap i was cited in tony casey's report, that's it, i'm all in favor of this move, forget everything bad i said

2 13 1.4K



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Because of the nature of the ratification process, the Special Committee did not substantively re-evaluate the amount or terms of the 2018 CEO Performance Award and did not engage a compensation consultant. It did not negotiate with Mr. Musk. The Special Committee determined that none of those steps would have been consistent with ratification. The Special Committee noted that the Board previously decided in January 2018 that the 2018 CEO Performance Award was fair, and noted that Ms. Wilson-Thompson was not on the Board at that time. The Special Committee further noted that the defendants in *Tornezza* will be appealing the ruling because they believe the compensation plan is fair and should be upheld as agreed. The Special Committee assessed only whether the 2018 CEO Performance Award, as it was previously agreed to, should be ratified by stockholders at this time based on the facts that currently exist. The Special

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hmm

Uncertainty Regarding Mr. Musk's 2018 Performance Award

The Company's 2018 CEO Performance Award was first approved by the Board in January 2018. The award has been pending for nearly two years. The Special Committee noted that the award is subject to ratification by our stockholders at the upcoming annual meeting. The Special Committee noted that the uncertainty regarding the Company's 2018 CEO Performance Award may be challenged in these novel circumstances by the vote. It is possible that the seeking of Ratification delay and resource consumption beyond costs associated in the *Tornezza* case. The Special Committee noted that the uncertainty regarding the Company's 2018 CEO Performance Award may not fully resolve the uncertainty regarding the Company's 2018 CEO Performance Award. The Special Committee and its advisors noted that they could not predict how the 2018 CEO Performance Award would be treated under these circumstances.

Considerations and Risks Associated with the Award

The Board also consider the following considerations and risks associated with the award:

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Deb Elias @sailEbeD · 5h

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"defective corporate act" = cyber truck

1 3 61

Tesla Inc

Tesla asks shareholders to approve move to Texas and ratify Elon Musk's pay

Delaware court previously voided chief executive's \$56bn remuneration



Shareholder backing of Elon Musk's pay deal will potentially cancel a payout of \$5bn in shares that would have been made to lawyers who worked on the case © Gonzalo Fuentes/Reuters

Peter Campbell and **Jonathan Wheatley** in London 5 HOURS AGO



Tesla has asked its shareholders to approve moving its state of incorporation from Delaware to Texas, fulfilling chief executive Elon Musk's promise in February after a Delaware court voided his \$56bn pay package.

Robyn Denholm, chair of Tesla's board, wrote to shareholders on Wednesday asking them to approve the [move to Texas](#) and to ratify Musk's pay package, which they previously approved at a meeting in 2018.

If successful, the decision will mean Musk collects shares worth \$47.8bn at today's share price.

The votes will take place at the company's annual meeting on June 13.

“We do not agree with what the Delaware Court decided, and we do not think that what the Delaware Court said is how corporate law should or does work,” Denholm wrote to shareholders. “So we are coming to you now so you can help fix this issue.”

Shareholder backing of Musk’s pay deal will also potentially cancel a [payout of \\$5bn](#) in shares that would have been made to lawyers who worked on the case. Attorneys for shareholders who defeated the original pay package in the Delaware court had asked for a multibillion-dollar share award as payment.

The vote “could undermine the basis for the . . . request for an award of attorneys’ fees of approximately \$5bn in Tesla stock”, the letter to shareholders added.

The vote is a chance for shareholders to re-endorse Musk’s leadership of the company, at a time when [Tesla](#)’s sales have fallen in the face of slowing demand and rising competition.

The company will report first-quarter earnings next week, with investors [braced for a drop in profitability](#).

Four of Tesla’s top 10 institutional shareholders contacted Denholm to complain about the Delaware ruling, Tesla said in the investor letter.

After the Delaware decision in January, [Musk](#) asked users of X, his social media platform, to vote on whether Tesla should shift its domicile to Texas. After 87 per cent voted in favour, Musk said he “will move immediately to hold a shareholder vote to transfer state of incorporation to Texas”.

Wednesday’s shareholder letter sets out in granular detail how the board sought to justify the decision to shift to Texas on governance grounds, while keeping with the wishes of Musk to move.

“Notwithstanding these communications, redomestication is a board decision, not a decision for a chief executive officer,” it said.

After meeting in early February without Musk or his brother Kimbal, Tesla’s board convened a special committee to study the plans. This group briefly considered an option to domicile Tesla outside the US, but then drew up a shortlist of 10 states, before whittling the options down to Texas and Delaware.

Studying other companies with domiciles outside Delaware, including Apple, Nike and Microsoft, the letter said it found “no convincing evidence that reincorporating in Texas would affect Tesla’s market value” and concluded that “a ‘Delaware premium’ is non-existent or unknowable”.

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FT Alphaville Tesla Inc

Tesla's Q1 is going to be a wreck. Will anyone care?

Pedal to the metal, balls to the wall, margins to the floor



© Getty Images

Bryce Elder 6 HOURS AGO



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“We are hard-pressed to think of any other precedent of a company of Tesla’s size basing its path of success on such binary bets,” writes Barclays, apropos the latest thing:

**Whole Mars Catalog (Supervised)** · Apr 16, 2024 · @WholeMarsBlog · [Follow](#)

"Elon is betting the company on autonomy! Has he lost his mind?"

What do you expect from a guy who bet his car company on electrification in 2003?

Elon Musk @elonmusk · [Follow](#)

Not quite betting the company, but going balls to the wall for autonomy is a blindingly obvious move.

Everything else is like variations on a horse carriage.

4:23 PM · Apr 16, 2024



7.1K



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Sensibly, Barclays doesn't define *which* binary bet.

This month we've had [Reuters report](#) that Tesla was cancelling its long-promised mass-market EV, known as Model 2, and using the same platform to make a robotaxi. (Shortly after tweeting that "Reuters is lying (again)", Musk scheduled a robotaxi reveal for August 8.) A detailed [follow-up](#) from Electrek on Monday reported that Model 2 work had indeed been "completely defunded" and that the project was "effectively scratched right now as Tesla is putting all resources into its self-driving effort."

We've also had [14,000 job cuts](#) at Tesla and the departure of senior execs, with VPs [Drew Baglino](#) and [Rohan Patel](#) both exiting. We've also had Tesla cut the premium-tier driver assistance subscription price in half to \$99 a month. We've also had reports that deliveries of Cybertruck, its last-but-one halo product, have been paused and that its accelerator has a [tendency to jam](#).

Tesla has not officially commented on these or any other reports. Tesla has no press office. Emails go unanswered, including all the ones we've sent about when Tesla will hold an investor vote on moving its [corporate registration to Texas](#), which Musk said on February 1 would be happening "immediately".

But back to the current thing. Barclays analyst Dan Levy says that cancelling Model 2 in favour of a purpose-built robotaxi “would further drive a wedge between the ‘rational’ and ‘exuberant’ Tesla bulls.”

“

The “rational” bull case argument for Tesla is primarily based on the expectation that it will see an iPhone style consolidation of the auto market outside of China, with Tesla’s lead in EVs enabling dramatic share gains, especially as the legacy Western OEMs have struggled mightily on cost. Model 2 was set to be the big step forward in taking additional share. This group of investors generally views Robotaxi (i.e. fully autonomous vehicles running on the Tesla network) as a very long-dated opportunity.

The thing with Model 2, says Levy, was that it could realistically be delivered as early as next year. It was something tenable on the horizon, so was a reason to look past the current EV sales slump.

Without it, investors can only look forward to a collection of binary bets (AI and energy storage stuff as well as the robot chauffeurs and butlers). Throwing more resources at moonshots might be encouraging for those who see Tesla’s car manufacturing business as the stub of a Jetson’s-based investment case but everyone else is likely to be “increasingly uncomfortable in underwriting the story”, Levy says in an April 8 note.

Musk’s pivot to moonshots since then has been dramatic, so Tesla’s first-quarter results due April 23 are probably going to be awful. When faced with a 20 per cent quarter-on-quarter slump in deliveries there are not enough costs to cut, and while consensus forecasts have been grinding lower, they’re probably not low enough.

Figure 1. Barclays vs. Consensus summary

Company		Revenue			EBITDA		EBIT		EPS	
\$mn, except per share		PT	1Q24	FY24	1Q24	FY24	1Q24	FY24	1Q24	FY24
TSLA	Barclays Prior	\$225	\$23,837	\$101,882	\$3,857	\$16,603	\$2,341	\$10,299	\$0.63	\$2.72
	Barclays Current	\$180	\$21,254	\$93,993	\$2,938	\$14,311	\$1,422	\$8,072	\$0.41	\$2.20
	Consensus	\$191	\$22,589	\$104,565	\$3,423	\$15,515	\$1,676	\$8,764	\$0.54	\$2.81

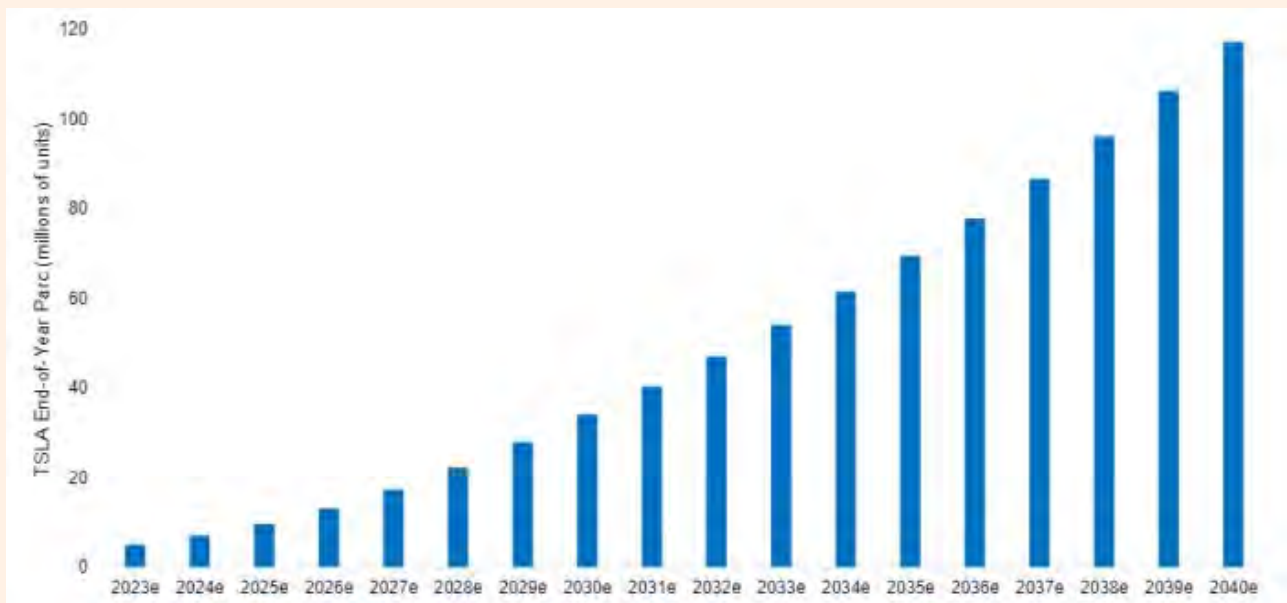
Note: Cons. est's as of 4/16/2024.

Source: Barclays Research, Bloomberg Consensus

Barclays forecasts that Tesla will print its first negative free-cashflow quarter since Q1, 2020, as bloated inventories eat into working capital. It expects gross margin excluding regulatory credits could hit just 14.6 per cent, which would be a 2.6 percentage point deterioration from the previous quarter. That would put Tesla's auto profitability back to where it was in 2017, shortly after the launch of the Model 3.

Will the margin guidance be any better? And even if it is, will it be believed? Tesla started the year with about 100,000 unsold vehicles and added another 45,000 and 50,000 in the first quarter. Though price cuts have so far done very little to stimulate demand, there's no other strategy available to shift all that spare inventory.

Barclays also expects Tesla's 2024 delivery volume to be flat. A year of stalled growth might make some predictions, like the below fleet size chart from a December-dated Morgan Stanley note, look a wee bit fanciful:



The surprise, given all that, is [how little Tesla has derated](#). Things could be a lot worse. If Tesla weren't the only pure-play publicly traded meme stock for a man with a \$44bn loudhailer, they probably would be.

Tesla

Share price, \$

— Tesla



Source: LSEG via markets.ft.com

© FT

The usual pattern around Tesla results is for the stock to rally from an initial sell-off.

Barclays finds that in the week of earnings or a deliveries update, the stock is down 7 per cent on average. But in weeks without official news — when it's just Musk's tweets and the surrounding ecosystem of grift and nonsense — the stock is up 1 per cent on average.



That's why all the robotaxi stuff is difficult to call.

Tesla's business — well, the bit that sells cars rather than hype — has been visibly in trouble for more than a year. Investor who came in expecting a bump-free glide towards the global EV mass market should have sold already, while bargain hunters attracted by last year's slump will probably have been stopped out by this year's slump.

That leaves only the meme jockeys and futurologists. For them, going all-in on robotaxis may sound great for the 2030-something forecasts, and an earnings tape-bomb is just a speed bump.

Meanwhile, in the corner of a Tesla dealership near you, a mocked-up Optimus is surveying with unseeing eyes the deserted shop floor:

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Wall Street wants answers from Elon Musk on Tesla's Model 2 car

By [Hyunjoo Jin](#), [Norihiro Shirouzu](#) and [Chris Kirkham](#)

April 17, 2024 7:43 AM PDT · Updated 2 hours ago



[1/2] Tesla, X (formerly known as Twitter) and SpaceX's CEO Elon Musk attends the AI Safety Summit at Bletchley Park in Bletchley, Britain on November 1, 2023. Leon Neal/Pool via REUTERS/File Photo [Purchase Licensing Rights](#)

[Summary](#) [Companies](#)

- [Investors clamor for clarity on whether Tesla will build affordable Model 2](#)
- [Tesla stock fell on Reuters report of Model 2 cancellation, rose after Musk replied on X, fell again on job-cut news](#)
- [Some investors applaud idea of skipping affordable car, focusing on robotaxis](#)

April 17 (Reuters) - Elon Musk has kept investors hanging since he issued cryptic social posts following an [exclusive April 5 Reuters report](#) that Tesla had scrapped its plans for a \$25,000 "Model 2" electric vehicle.

"Reuters is lying," Musk wrote in one post that day, without identifying any inaccuracies.

Nearly two weeks later, with no concrete updates from Musk, Tesla investors are restless. Some are demanding clear answers on the Model 2, along with Musk's plans for arresting a sales slide amid falling electric-vehicle demand globally and rising competition from cheap Chinese EVs.

Tesla's move to [lay off more than 10% of its global workforce](#) and a handful of senior executives, made public Monday, added to shareholder jitters.

"The street wants and NEEDS answers" when Tesla ([TSLA.O](#))  holds an earnings call scheduled for April 23, wrote analysts for Wedbush Securities after the layoffs were revealed. They cited a months-long "horror show" of bad Tesla news and called for a clear "strategic vision ... with Model 2 a key component."

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Wedbush Senior Equity Analyst Dan Ives told Reuters that Musk's silence on the Model 2 was "gut-wrenching" to Tesla investors "because it's so instrumental to the growth story."

Ross Gerber, president and CEO at Gerber Kawasaki Wealth & Investment Management and a Tesla investor, put it more bluntly. "There's no point in even investing in Tesla if they don't come out with this car," he said.

Musk and Tesla did not respond to requests for comment for this story or the April 5 report.

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Feedback

The Street also wants clarity on another key aspect of the April 5 story: That after ditching the affordable-car project, Tesla plans to move forward with a self-driving robotaxi on the same small-car platform.

Another Musk post that same day raised as many questions as answers: "Tesla Robotaxi unveil 8/8," he wrote, implying some version of the self-driving vehicle might be ready by August, but giving no details. Industry experts call the notion that Tesla will quickly produce a road-ready robotaxi unlikely, given the [steep engineering and regulatory challenges](#).

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Tuesday evening, Musk posted again on his social media site X about Tesla's focus on self-driving vehicles: "Not quite betting the company, but going balls to the wall for autonomy is a blindingly obvious move. Everything else is like variations on a horse carriage."



Since the April 5 Reuters report, some investors have cheered the idea of focusing on robotaxis instead of the Model 2. Musk's two initial posts helped reverse losses in Tesla's stock, which dropped 6% after the Reuters report on the affordable model.

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Feedback

Still, Musk's remarks left investors guessing over what vehicle Tesla plans to build next – and, critically, on what timeline. The stock dropped again with Monday's news of the layoffs, and is now down more than 45% since a recent peak in July.

Tesla remains the world's most valuable automaker with a market capitalization of about \$500 billion, higher than that of Toyota, the world's biggest automaker by volume.

The April 5 report on the Model 2 cited four sources with knowledge of Tesla's strategy and company messages describing the project's termination. Company messages reviewed by Reuters show a person described by a source as a Model 2 program manager telling employees not to inform suppliers "about program cancellation."

"You all have done incredible work and those learnings will carry over into all future programs that you work on," the manager wrote, advising staffers to "tie things off and document things properly" and handle "remaining items for us to close out before moving on."

INVESTORS 'AWAIT CLARITY'

With no answers from Musk, analysts have issued a flurry of advisories on Tesla's growth prospects both with the Model 2 and without it.

An analysis from Deutsche Bank, echoing others, noted: "we await clarity from Tesla." It described a Model 2 cancellation as "completely thesis-changing," saying it would cause investors betting on Tesla's mass-market growth to throw in the towel, making way for "AI/tech investors with considerably longer time horizons" for robotaxi development.

Wedbush sees a bleak outlook without the Model 2. Wedbush analysts wrote last week that killing the vehicle would be a "debacle" for Tesla's growth prospects and that a robotaxi was no "magic model" to replace it.

Musk had said as recently as January that Tesla would deliver the Model 2 in the second half of 2025, confirming an exclusive Reuters report on those plans. "For the company to do a 180 in the course of three months would be 'Twilight Zone,'" said Ives, of Wedbush. Tesla, Ives said, was already late in launching the development of the long-promised affordable model.

"A lot of this is self-inflicted – no adult in the room," he said.

Currently, the cheapest Tesla is the Model 3 sedan, which sells at a U.S. price of about \$39,000. The automaker has cut prices for the 3 and the Model Y crossover as electric-vehicle demand has softened worldwide and China EV makers have dominated the entry-level sector.

Models 3 and Y, Tesla's only current volume sellers, are aging and due for redesigns. Tesla has struggled to produce its more expensive and experimental Cybertruck in volume, in part because of manufacturing issues with its innovative 4680 battery. Tesla told investors earlier this month that sales of all its vehicles had dropped by 8.5% in the first quarter, the first decline in nearly four years.

Chinese EV makers such as BYD are already doing a brisk business in EVs selling at prices as low as \$10,000 in China. Chinese smartphone and appliance maker Xiaomi (1810.HK)  shocked the industry this month with its first car, a sport sedan priced at about \$30,000 that racked up more than 100,000 orders in less than a week.

'BRILLIANT' AND 'GUTSY' MOVE

Some investors welcome the idea of canceling the Model 2 to focus on robotaxis. One fan is Gene Munster, managing partner at Deepwater Asset Management, which owns Tesla shares. Munster said he doesn't believe Musk actually denied the April 5 Reuters report, as many investors assumed.

"He didn't mention anything about Model 2," Munster said. "He just said Reuters is a liar. But he calls everybody liars."

That elusiveness, combined with Musk's subsequent "robotaxi unveil" post, leads Munster to believe Tesla is in fact shelving the Model 2 to focus on a robotaxi – a strategy he applauded. Munster called the move "brilliant" and "gutsy" because it could vault Tesla to the next generation of transportation. Autonomous vehicles, he said, will be "a higher-margin business by orders of magnitude."

Jake Bleicher, portfolio manager at Carson Wealth Management Group, a Tesla investor, agreed Tesla could potentially leap ahead of Chinese EV rivals with a truly autonomous vehicle. But he said Musk should have something concrete to unveil in August, given the promise implied by his "8/8" post.

Musk has vowed for years that self-driving Teslas are right around the corner.

"If Aug. 8 rolls around and Tesla says, 'We're going live with robotaxi in five or six cities,' I think that's enough to get the stock moving," Bleicher said.

If the progress is less tangible, he said, investors "will be scared."

"Especially with the profit margin on (Tesla) vehicles dropping dramatically over the last two years," Bleicher said, "it's become less about the vehicles and more about the promises that Musk makes."

Feedback

Stay up to date with the latest news, trends and innovations that are driving the global automotive industry with the Reuters Auto File newsletter. Sign up [here](#).

Reporting by Hyunjoo Jin in San Francisco, Norihiko Shirouzu in Austin, Texas, and Chris Kirkham in Los Angeles. Writing by Brian Thevenot. Editing by Michael Williams

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Tesla's Strategy Shifts Are Following Elon Musk's AI Whims

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By Max Chafkin

(Bloomberg) --

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Must-Reads

- BlackRock is on the hunt for billions in Saudi Arabia.
- President Joe Biden is calling for higher tariffs on Chinese steel and aluminum.
- Saudi Arabia and the United Arab Emirates called for maximum "self-restraint" to prevent wider war in the Middle East.

Three months ago, on Tesla Inc.'s last earnings call, Elon Musk attempted to calm investors who were nervous about the company's flagging sales growth by talking up its progress on what he described as a "next generation low-cost vehicle." He suggested it was almost ready to be unveiled. The car, which fans have often described as the Model 2, would fulfill Musk's original "master plan" to make electric vehicles truly affordable. Musk promised it would be made in a "revolutionary" factory that would take advantage of what he described as Tesla's "most important competitive characteristic," which was its "manufacturing technology."

That's all out the window. Instead, investors have watched the company's shares plummet—they're down almost 40% on the year—as Musk has reversed course, announcing a series of moves that seem like either a desperate bid to reverse the declining stock price or a self-destructive attempt to undo everything that made him among the most admired entrepreneurs in America. Or maybe both of those things at once. As with so many of Musk's post-Twitter antics, the sudden strategy shift has overtones that feel almost Shakespearean—except now Musk seems intent on playing both the mad king and his fool.

On Monday, Musk took a short break from riffing about the "woke mind virus" attacking National Public Radio to announce the largest layoff in Tesla's history. This came on the heels of reports that he had suddenly decided to either cancel or indefinitely postpone the low-cost vehicle that only months ago he'd presented as crucial to any future growth prospects.

Musk denied the original Reuters report on the cancellation, but then in a series of posts on X more or less confirmed it, making clear he was going to prioritize a different product, a so-called robotaxi. Never mind that Musk has touted autonomous Teslas as just around the corner for nearly a decade, or that he has made no apparent progress in getting regulatory approval, or that his current “full self-driving” software does no such thing.

As if to hammer home the point, the company's top battery and powertrain executive, Drew Baglino, resigned amid the purge. Dan Ives, an analyst who's normally among the most enthusiastic Tesla bulls, referred to Baglino's loss as “an absolute gut punch” amid a “Category 5 perfect storm of weak demand.”

The thing about this “storm” is that it's largely self-created. Yes, electric vehicle sales have slowed across the board, but Musk's trollish antics on X have probably alienated the types of people who were previously most likely to buy an EV—that is, big-city liberals. (To put it in terms that Musk might better understand, Tesla was popular among those suffering from the aforementioned mind virus.) By contrast, MAGA, Musk's new political identity, has traditionally been hostile to anything climate-related. Donald Trump, whom Musk has tacitly endorsed as a presidential candidate, is no fan, either.

But really it's stranger than that: Musk's appeal has always been at least partly rooted in the fact that he was an industrialist, not a software guy. While the rest of Silicon Valley made apps, he was building actual cars (and rockets). Now, though, Musk seems intent on deemphasizing that part of his identity in favor of dreams of self-driving software and artificial general intelligence, all while paying himself \$56 billion.

It's an audacious move, which Musk might have previously described as a “bet-the-company” moment. What's odd, though, is that Musk doesn't need to bet the company now. Tesla, to his credit, has grown into a mature, sprawling automaker that proudly sells one of the world's most popular cars. For reasons that may be known only to Musk, he's turning his back on all of that in favor of the fad of the moment, AI. Next week's earnings call, on April 24, should be interesting. —*Max Chafkin*, Bloomberg Businessweek

LISTEN: On this week's episode of the *Elon, Inc.* podcast, the panel further discusses the Tesla job cuts, plus Musk's upcoming trip to India and what it might mean for the carmaker and Starlink. You can find *Elon, Inc.* on Apple, Spotify, iHeart and the Bloomberg Terminal.

If You're Hiding From Your Insurance Bill ...

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April 17, 2024, 6:35 AM PDT



Elon Musk.

Photographer: Jordan Vonderhaar/Bloomberg

Tesla Chair **Robyn Denholm** criticized the Delaware Chancery Court's January decision, writing in the proxy that it amounted to second-guessing shareholders who had approved Musk's performance-based award in 2018. Chief Judge Kathaleen St. J. McCormick described the company's directors as "supine servants of an overweening master" and said they hadn't looked out for the best interests of investors.

"Because the Delaware Court second-guessed your decision, Elon has not been paid for any of his work for Tesla for the past six years that has helped to generate significant growth and stockholder value," Denholm wrote to investors.

The shareholder who sued Tesla over the CEO's compensation criticized it as excessive and opaque. Musk, who runs six companies, said early this year he preferred to work on artificial intelligence and robotics products elsewhere unless he owns a 25% stake in Tesla. He currently owns about 13% of the company, according to data compiled by Bloomberg.

Tesla shares fell 1% shortly after the start of regular trading. The stock has tumbled 37% this year as an expected slowdown has given way to a surprise drop in vehicle deliveries. Earlier this week, the company announced plans to cut global headcount by more than 10%, and two senior executives left.

Special Committee



Robyn Denholm.

Photographer: Hilary Wardhaugh/Bloomberg

Tesla's board formed a special committee this year consisting of director **Kathleen Wilson-Thompson** and a group of advisers to determine two things: whether it should remain incorporated in Delaware, and whether to call another shareholder referendum on Musk's pay concurrently with a vote on a possible reincorporation in a different state.

In a written report, the committee said the votes ought to be done in parallel. Otherwise, the effort to move Tesla's corporate domicile could be wrongly seen as a way to possibly grant Musk a new pay package that he couldn't get in Delaware.

Negotiating a new pay package would take time and lead to incurring billions of dollars in additional compensation expense, the filing said. Ratifying the 2018 package will be faster and "avoid a prolonged period of uncertainty regarding Tesla's most important employee."

The special committee's report noted that Tesla and the other defendants in the Delaware case plan to appeal the ruling. The new referendum will let investors "decide for themselves if they think Musk's compensation is fair, in light of what he achieved and its impact on stockholders."

Shareholder Support

Dozens of institutional shareholders have contacted Tesla and expressed support for the 2018 compensation plan, including four of the top 10, according to the filing. The carmaker also said that thousands of retail investors have sent letters and emails to the board expressing the same sentiment.

Tesla cited a letter Denholm had received from T. Rowe Price Group Inc., one of the automaker's biggest shareholders, which called the ruling "a negative surprise," and suggested that the package be put up for another vote.

"With the benefit of hindsight, we don't think there can be any serious argument over whether the award was aligned with investors' long-term interests," the asset manager wrote. "It is not reasonable for investors to expect to re-absorb the canceled options and consider all that value creation to have been delivered to us for no consideration."

All-In on Texas

The effort to move Tesla's incorporation adds to the fallout from the decision to void Musk's compensation, which already has prompted the billionaire to relocate several of his closely held companies. He said in February that SpaceX had filed to move to Texas from Delaware. That came shortly after Neuralink Corp., the brain technology startup founded by Musk, was reincorporated in Nevada.

In a post at the time on his social-media site, X, Musk said, "If your company is still incorporated in Delaware, I recommend moving to another state as soon as possible."

The filing shows Tesla considered nine other states as alternatives to Delaware before narrowing its choice down to California, Nevada, New York or Texas. It settled on the state where it's headquartered and opened its newest EV plant two years ago.

"Tesla is all-in on Texas," the company said. "Tesla's corporate identity is increasingly intertwined with Texas."

Read More: Musk Boosts Headcount by 86% at Biggest Site of Texas Empire

Director Votes



Kimbal Musk.

Photographer: David Paul Morris/Bloomberg

Tesla also will ask investors to reelect two directors at the upcoming shareholder meeting: Musk's brother, **Kimbal**, and **James Murdoch**, the son of media mogul Rupert Murdoch. Kimbal Musk, a director since 2004, is the longest-serving member of the carmaker's eight-person board. Murdoch joined in 2017.

The two were among the directors who last year agreed to return more than \$735 million in stock awards and cash to settle an investor lawsuit accusing board members of improperly giving themselves massive compensation packages.

Among the other disclosures in its filing, Tesla said it paid around \$200,000 to Musk's social-media site formerly known as Twitter, as part of a multiplatform advertising campaign. The company also spent roughly \$2.9 million last year and early this year to provide security to Musk via a company he owns and organized.

(Updates share move in the sixth paragraph.)

--With assistance from **Catherine Larkin** and **Kelly Gilblom**.

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BUSINESS

Tesla Wants Shareholders to Approve Elon Musk's Pay Package. Again.

Multibillion-dollar compensation deal was previously struck down in Delaware court; Tesla also moves to incorporate in Texas

By [Alyssa Lukpat](#) [Follow](#) and [Denny Jacob](#) [Follow](#)

Updated April 17, 2024 11:00 am ET



Elon Musk. PHOTO: TINGSHU WANG/REUTERS

The fight over Elon Musk's pay is back.

Tesla's **TSLA -0.54% ▼** board asked shareholders to again vote in favor of its CEO's multibillion-dollar pay package. The board approved the pay proposal in 2018, but a Delaware court in January struck it down because it said the approval process was "deeply flawed."

The board, in a proxy filing Wednesday, said it still stands behind the pay package, valued at a maximum of \$55.8 billion, that shareholders previously approved. The EV maker also detailed the Delaware court case to give shareholders more information about the negotiations that led to the original pay package and the criticisms raised by the judge in the ruling.

It isn't clear, though, whether re-proposing the same pay package with additional information will satisfy concerns about the approval process, as stated by the Delaware court and the shareholders that supported the lawsuit.

The new proposal also raises questions of whether the company can propose pay for work already done.

"They're trying to do it over and fix the process," said Edward Rock, a law professor at New York University.

Rock, who teaches corporate law and corporate governance, said Tesla this time is trying to be more transparent about how it would pay Musk. Rock said the Delaware court took issue not with the amount of pay but with how the pay package was awarded without adequate disclosures to shareholders.

In addition to the Musk pay package, Tesla is seeking to move its incorporation from Delaware to Texas, where the company is headquartered. Such a relocation wouldn't affect the pay case because it relates to actions taken while Tesla was incorporated in Delaware, legal experts say.



Tesla is adjusting to falling retail demand for electric vehicles. PHOTO: LI JIANGUO/ZUMA PRESS

The proposals up the ante over Musk's pay at a time when Tesla's shares are sliding and the company has lost billions of dollars in market cap. The automaker's growth is slowing as the market for electric vehicles cools. And the company is in the midst of cutting 10% of its staff as it recalibrates to a lower demand for its cars.

Tesla shares dropped 1.5% Wednesday morning. The stock is down about 38% so far this year.

The vote is likely to reignite questions over Musk's close ties to the Tesla board and how it plans to compensate its chief executive, a serial entrepreneur with an array of other business interests. Separate from the 2018 pay package, Musk has been seeking more voting power in Tesla. The billionaire owns about 13% of Tesla as of Dec. 31, according to FactSet, making him the company's largest shareholder.

Ahead of its annual shareholder meeting in June, Tesla has proposed that shareholders ratify Musk's 2018 pay package, which consisted of a 10-year grant of stock options with 12 vesting tranches based on the company reaching a market capitalization of at least \$650 billion while also hitting various revenue and profit targets. The company cleared the last of those hurdles in 2022.

The judge in the Delaware case, Chancellor Kathaleen McCormick, criticized the process for securing approval of Musk's compensation, citing Musk's "extensive ties" with board members and agreed to rescind the package, which at the time was valued at a maximum of \$55.8 billion.

A spokesman for Delaware's chancery court, where the pay-package case was heard, declined to comment Wednesday.

Robyn Denholm, the chair of the board, asked shareholders in a letter released Wednesday to vote to approve Musk's pay package.



Robyn Denholm, chair of Tesla's board of directors, asked shareholders to vote to approve Musk's pay package. PHOTO: BRENT LEWIN/BLOOMBERG NEWS

“Because the Delaware Court second-guessed your decision, Elon has not been paid for any of his work for Tesla for the past six years that has helped to generate significant growth and stockholder value,” she wrote. “That strikes us—and the many stockholders from whom we already have heard—as fundamentally unfair, and inconsistent with the will of the stockholders who voted for it.”

In the proxy filing, Tesla included a report from a special committee of the board, which laid out the details of the Delaware court ruling compared with the pay package, making the case that shareholders can utilize the details to make an informed decision.

“We suggest simply subjecting the original 2018 package to a new shareholder vote, accompanied by expansive disclosure as to the process undertaken and the potential conflicts of interest that were considered at the time,” the special board committee’s report said.

Tesla said there is only one Tesla board member on the special committee: Kathleen Wilson-Thompson. Rock, the NYU law professor, said it’s unusual for committees to have fewer than three members.

Tesla said many of its stockholders disagreed with the court’s decision and four of its 10 largest shareholders asked for a meeting with the board chair to discuss the issue.

Courts typically give boards deference on pay decisions, and it is rare for a judge to strike down a compensation deal. But McCormick concluded that Musk’s role as a “superstar CEO,” with an almost 22% equity stake in the company and close ties with the directors, “dominated the process that led to board approval of his compensation plan.” She said Musk and Tesla were unable to prove that shareholders were sufficiently informed about the deal before being asked to approve it.

“In the final analysis, Musk launched a self-driving process, recalibrating the speed and direction along the way as he saw fit. The process arrived at an unfair price,” she wrote.

The case stemmed from a lawsuit filed by a shareholder who argued the pay package should be rescinded, claiming that Tesla's board of directors breached their fiduciary duties to investors.

Musk is asking shareholders to approve the company's corporate conversion to Texas from Delaware. "2024 is the year that Tesla should move home to Texas," according to the filing. "We have received letters from thousands of Tesla stockholders—large and small—supporting a move home to Texas. We have heard you, and now we formally ask that you speak in a meaningful way: and vote in favor of taking Tesla to our business home of Texas."

In February, Musk asked Tesla to decide whether to incorporate in Texas. He said in a post on X at the time, "Never incorporate your company in the state of Delaware." Companies have long sought Delaware for lenient incorporation laws but some have complained about the increase in shareholder litigation filed in recent years.

Tesla Wednesday asked shareholders to re-elect two directors, Kimbal Musk and James Murdoch, to the board.

Corrections & Amplifications

Chancellor Kathaleen McCormick struck down Elon Musk's compensation deal in January. A previous version of this article incorrectly said the ruling was from February. (Corrected on April 17)

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Securities Law

April 17, 2024, 9:18 AM PDT

Elon Musk Pay Vetted by Sidley, Ex-Kirkland Partner, Tesla Says

By Brian Baxter

- Two Sidley partners working with Delaware’s Abrams & Bayliss
- University of Chicago Law School’s Tony Casey is also involved

Bloomberg Law News 2024-04-17T12:37:31733073789-04:00
Elon Musk Pay Vetted by Sidley, Ex-Kirkland Partner, Tesla Says

By Brian Baxter 2024-04-17T12:18:110000-04:00
Two Sidley partners working with Delaware’s Abrams & Bayliss
University of Chicago Law School’s Tony Casey is also involved

Sidley Austin is advising the Tesla Inc. special committee recommending that shareholders approve a \$56 million pay package for the company’s top executive, Elon Musk.

Kristin Seeger, a member of Sidley’s executive committee and co-leader of its global commercial litigation and disputes practice, and fellow partner John Skakun III took the lead on the work, Tesla disclosed in a proxy filing Wednesday.

More than 40 Sidley lawyers helped the duo compile a report on behalf of Kathleen Wilson-Thompson, a Tesla director and former practicing lawyer, who along with her advisers was part of a special committee the board formed.

The Delaware Chancery Court in January voided Musk’s compensation package approved by shareholders in 2018, claiming directors hadn’t served the best interest of investors. The Austin, Texas-based automaker will hold a second vote at its June 13 annual meeting.

Tesla’s special committee also decided to call a separate vote the same day on whether to move the company’s state of incorporation to Texas from Delaware. Musk publicly excoriated Delaware following his courtroom loss.

Sidley, Seeger, Skakun, and Tesla didn’t immediately respond to requests for comment.

The Sidley lawyers worked alongside A. Thompson Bayliss, a name partner at Delaware’s Abrams & Bayliss, and University of Chicago Law School Professor Anthony “Tony” Casey, a former partner at Kirkland & Ellis.

The board’s special committee interviewed multiple law firms to determine its outside counsel, according to Tesla’s proxy statement. Sidley is independent because it never represented Musk and collected only \$12,601 for handling two small matters for Tesla in 2017 and 2021, the committee determined.

Abrams & Bayliss handled two prior matters for Tesla at the suggestion of other outside counsel at Quinn Emanuel Urquhart & Sullivan and Wachtell, Lipton, Rosen & Katz, according to the proxy. Those matters collectively generated about \$378,800 in legal fees for Abrams & Bayliss, Tesla said.

Casey, a tenured professor at the University of Chicago Law School, has no social or financial connections to Tesla, Musk, or any Musk-related entity, the company's proxy said.

Before becoming a partner at Kirkland, Casey was an associate at Wachtell, a high-powered firm that sued Musk last year seeking to collect a \$90 million success fee from its takeover work for Twitter Inc. That dispute is in arbitration.

Sidley is representing several former Twitter executives—including the company's ex-legal and policy chief Vijaya Gadde—who have sued Musk over \$128 million in severance stemming from their termination following his \$44 billion acquisition of the social media service in 2022.

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April 17, 2024, 6:37AM PDT
Musk, X Get Discovery Paused in Twitter Severance Pay Lawsuit
By [Jacklyn Wille](#)
Documents

-  [Docket](#)
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- Motion to dismiss is ‘potentially dispositive,’ judge says
- About \$500 million in severance benefits at issue in suit

Bloomberg Law News 2024-04-17T11:09:05854311606-04:00
Musk, X Get Discovery Paused in Twitter Severance Pay Lawsuit

By Jacklyn Wille 2024-04-17T09:37:04000-04:00
Motion to dismiss is ‘potentially dispositive,’ judge says
About \$500 million in severance benefits at issue in suit

Laid-off Twitter employees who say they’re owed severance benefits after Elon Musk’s takeover of the company can’t seek discovery from Musk or X Corp. until a California federal court decides whether to dismiss the proposed class action.

The defendants’ motion to dismiss, which says there’s “no such thing” as a Twitter severance plan, is “potentially dispositive of the entire case,” Magistrate Judge Robert M. Illman said Tuesday. This warrants pausing discovery in the case until the motion is resolved, Illman said.

The nine-month-old lawsuit says thousands of former Twitter employees are together owed at least \$500 million under the company’s severance plan. The lawsuit bring claims under the Employee Retirement Income Security Act on behalf of about 6,000 employees laid off since November 2022 who allegedly haven’t received the plan’s promised benefits, which workers say can be as high as six months’ base pay plus one additional week of pay for each full year of service.

Musk and X said the case should be dismissed because there’s no ERISA severance plan under which to award benefits.

The workers’ own allegations show that Twitter’s severance payments were calculated and distributed in lump sums using a single formula that hinged on “ministerial calculations,” the defendants said. These allegations don’t show an “ongoing administrative scheme” that could qualify as an ERISA-governed benefits plan, according to their motion.

The case is assigned to Judge Trina L. Thompson of the US District Court for the Northern District of California.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XFJNR7RC000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6L...> 1/2

Musk and X are also facing a \$128 million lawsuit by four ex-Twitter executives, including former CEO Parag Agrawal, who say they weren't properly paid severance benefits after the takeover.

Sanford Heisler Sharp LLP represents the workers. Morgan, Lewis & Bockius LLP represents the defendants.

The case is *McMillian v. Musk*, 2024 BL 129921, N.D. Cal., No. 3:23-cv-03461, 4/16/24.

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Documents

- Docket
- Tort claimants' committee objection
- Unsecured creditors' committee joinder
- State of Maryland objection

- Rite Aid has struck deals with the Justice Department, pharmaceutical distributor McKesson Corp, some states, and committees representing unsecured creditors, opioid victims, and other tort claimants. However, one of the groups representing tort claimants on Monday opposed the company's inclusion of an employment guarantee for CEO Jeffrey Stein, who was brought on around the time of the bankruptcy filing.

If a bankruptcy judge approves the plan, Stein will receive a \$20 million "success fee" when Rite Aid emerges from bankruptcy, the tort claimants' committee said. Stein would also collect a \$300,000 monthly salary, the objection said. The tens of thousands of individuals, communities, and businesses "that were harmed by the debtors' misconduct in fueling the opioid crisis" would collectively receive less than Stein, the committee said.

"The only issue nearly all of the constituencies have agreed upon from the outset of these cases is their mutual disgust at Stein's attempt to walk away with an obscene jackpot," according to the filing in the US Bankruptcy Court for the District of New Jersey.

The committee noted that the proposed success fee is the same amount—\$20 million—that all of Rite Aid's unsecured creditors are set to receive when the company exits bankruptcy. The settlement also includes for those creditors another \$27.5 million over time, rights to some stock in the reorganized company and rights to potential future litigation.

Stein's pay would be "at least four times" the amount chief executives of other bankrupt companies have been paid, the court filing said. A separate committee of unsecured creditors and a group of 14 states, represented by the Commonwealth of Pennsylvania, joined in the tort claimants' objection.

Rite Aid didn't immediately respond to a request for comment.

The company filed for Chapter 11 last year aiming to rework its debt, close unprofitable stores, and resolve opioid-related lawsuits. Rite Aid has been shuttering unprofitable stores and sold its pharmacy benefits manager unit, Elixir, to MedImpact Healthcare Systems for \$575 million in December.

A hearing on the plan is scheduled for April 22.

Government objections

The DOJ's bankruptcy watchdog, known as the US Trustee, on Monday challenged the plan as well, taking issue with what it said are overly broad releases and improper injunction provisions. The state of Maryland also objected, saying that the bankruptcy proceedings have provided inadequate notice to creditors, depriving those who don't have resources of the ability to "protect themselves."

The state, which says thousands of customers in Maryland have died from overdoses "after receiving controlled substance prescriptions from Rite Aid," also opposed a provision of the plan that the state says would improperly eliminate government claims.

Kirkland & Ellis LLP and Cole Schotz PC represent Rite Aid. Sherman, Silverstein, Kohl, Rose & Podolsky PA and Akin Gump Strauss Hauer & Feld LLP represent the tort claimants' committee. Maryland's Office of the Attorney General represented the state. Kelley Drye & Warren LLP and Kramer Levin Naftalis & Frankel LLP represent the unsecured creditors' committee.

The case is In re: Rite Aid Corp. , Bankr. D.N.J., No. 23-bk-18993, objection 4/15/24 .

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Opinion **Inside Business**

Why Boeing chief's \$33mn pay is hard to justify

Dave Calhoun was awarded a 45% increase in total pay last year

PEGGY HOLLINGER



Dave Calhoun took over as CEO of Boeing in 2020 in the wake of two fatal crashes that revealed serious flaws in the company's safety culture and operations © Getty Images

Peggy Hollinger 5 HOURS AGO



It is hard to believe that anything could render Elon Musk speechless. But when news broke that outgoing Boeing chief executive Dave Calhoun had been given a 45 per cent increase in total pay last year, the Tesla boss could only respond on his social media platform X with an exclamation mark.

Musk earlier this year lost his rights to a \$56bn share-based pay package, a sum deemed “unfathomable” by a Delaware judge. And while [Calhoun's \\$33mn package](#) of pay and stock awards for 2023 pales into insignificance next to Musk's, it is equally unfathomable given Boeing's performance over the past year.

Even before a [door panel blew off](#) an Alaska Airlines 737 Max 9 aircraft mid-flight in January, Boeing had been the subject of a string of safety and operational controversies in its commercial aircraft division during 2023. Data analysis errors on the 787, problems with parts on the 737, and issues with anti-icing systems were just a few of the issues that raised questions over its operational performance.

[Calhoun](#) took over as chief executive in 2020 in the wake of two fatal crashes that revealed serious flaws in the company's safety culture and operations. Yet despite repeated assurances that Boeing was addressing the bad old habit of focusing on financial returns at the expense of engineering expertise, a close reading of a proxy statement published this month shows how little has been accomplished, at least when it comes to annual incentives.

"In 2023, the Company Performance Scores for all three business units were weighted 75 per cent towards financial performance and 25 per cent towards operational performance," Boeing said in the document, published this month ahead of May's annual general meeting.

It took the Alaska Airlines incident for the board to rethink that approach, the document reveals. For the commercial aircraft division, the metrics have been tweaked to base 60 per cent of the annual awards on operational performance and 40 per cent on financial targets. The conditions remain in favour of financial performance for other divisions of defence and space, and global services.

There have been other welcome changes to remuneration criteria for 2024, including basing operational performance on the criteria of safety and quality. But by only adjusting these criteria this year, [Boeing's](#) board is in essence admitting that it failed to adopt the cultural change that Calhoun himself has been demanding from the rest of the business for the past four years.

To be fair to Calhoun, the headline number for his remuneration package for 2023 looks significantly more generous than it was in real life. In cash terms, the Boeing boss took home \$5mn in pay vs \$7mn in 2022, according to the company. He also waived his right to a \$2.8mn incentive payment after the Alaska Airlines incident.

Nevertheless, he was still given \$30mn in stock awards last year — up from \$8.5mn in 2022. Due to the sharp share price decline since the January incident, these awards are currently worthless. But he has 10 years to exercise his rights, which means 2023 might still be a lucrative year for Calhoun if his successors manage to turn things around.

Airbus vs Boeing: share price performance during Calhoun's ten

Stocks rebased (\$)

FINANCIAL TIMES

Since taking over as chief executive Calhoun has received close to \$100mn in pay and share awards. He will be entitled to the best part of another year's remuneration before he retires at the end of this year.

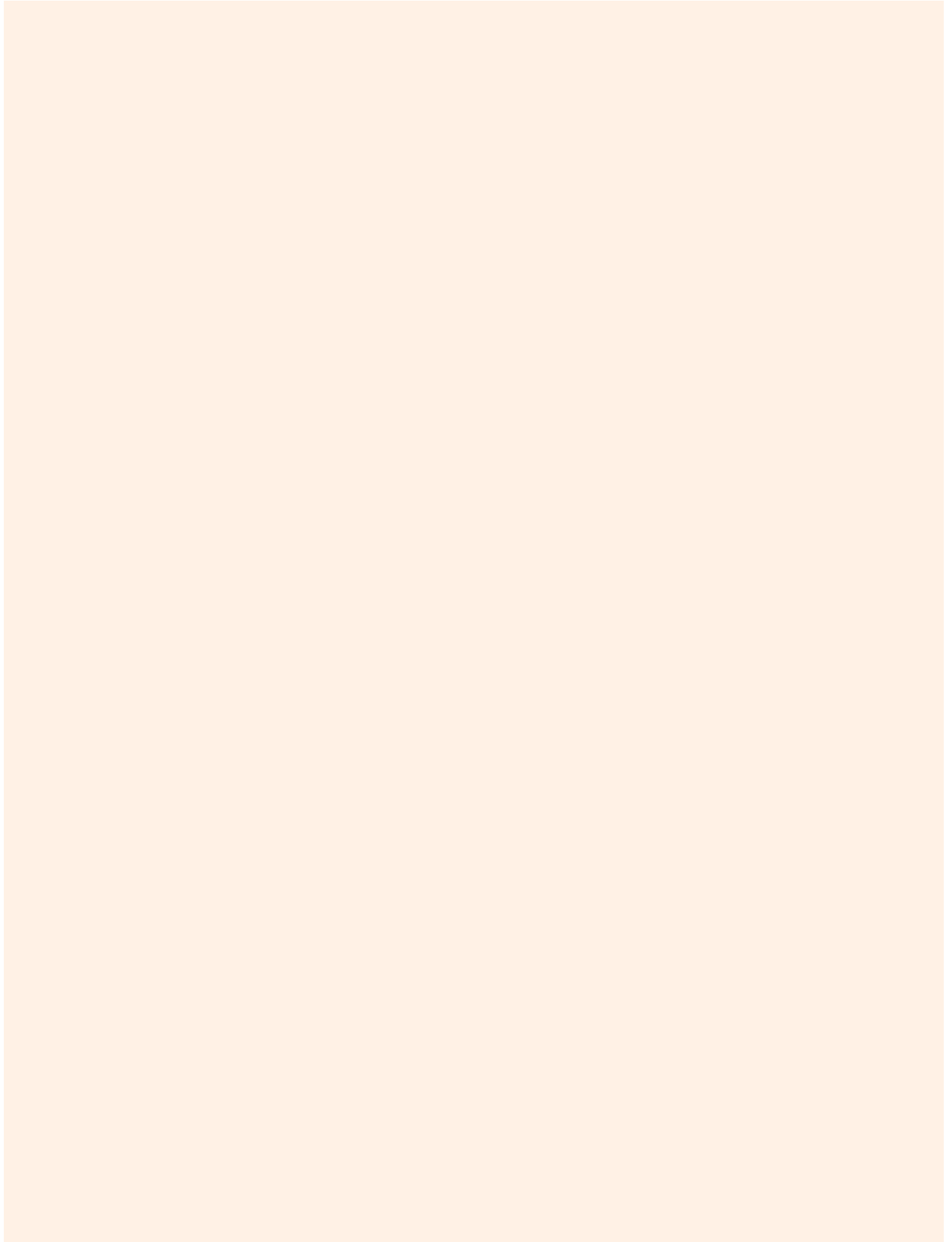
Boeing benchmarks executive pay against packages at other big US companies such as ExxonMobil. Last week Exxon revealed that its chief executive, Darren Woods, had [received remuneration of \\$36.9mn last year](#), slightly more than Calhoun and almost four times as much as the heads of Shell and BP. But Woods presided over the company's second most profitable year. That is not the case at Boeing.

Boeing does not benchmark its chief executive's remuneration against the most obvious peer, Airbus, perhaps because pay packages in Europe are generally far less generous than in the US. Airbus's chief executive Guillaume Faury is no exception. He received less than €6mn in pay and share awards for 2023, a year when Airbus continued to outperform Boeing.

Shareholders across the globe are notoriously acquiescent when it comes to votes on directors' pay. But Boeing is a case where generosity has its limits. Investors should think twice before waving the 2023 executive packages through at next month's AGM.

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Boeing Has 'Long Way to Go' to Reset Its Safety Culture

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April 17, 2024, 8:37 AM PDT

- Senator says US regulators need to take hard stance on Boeing
- Boeing defends its 787 aircraft amid whistleblower claims

By Julie Johnsson, Allyson Versprille and Emily Birnbaum

(Bloomberg) --

US lawmakers challenged Boeing Co. to expend the necessary time and effort to reset its safety culture and criticized the planemaker's relationship with regulators as too cozy.

Boeing needs to be judged by what it does, not by what it says it's doing, Senator Tammy Duckworth said in her opening remarks at the Senate Commerce Committee on Wednesday.

The Federal Aviation Administration, for its part, has been too soft at times policing the company. That, in turn, "sends an unmistakable message to both Boeing and its employees that bad behavior is acceptable," Duckworth said.

"There's still a long way to go to bring an effective safety culture back to Boeing," the Democratic Senator from Illinois said.

The hearing was the first of two in Washington on Wednesday to explore Boeing's safety record in the wake of a near-catastrophic accident in January, as well as two crashes of 737 Max aircraft a few years ago. The second panel is focused on claims by a Boeing engineer turned whistleblower, who alleges the company has cut corners in the production of its 787 airliner, placing profitability over safety.

As a result, the aircraft might show premature signs of fatigue because the company failed to properly close gaps in the fuselage sections when they are pieced together, he has alleged.

Threatened, Sidelined

In 10 pages of written testimony, Boeing engineer Sam Salehpour said he's observed "a culture that prioritizes speed of production over safety and quality and incentivizes management to overlook significant defects in Boeing's airplanes."

"Despite what Boeing officials state publicly, there is no safety culture at Boeing and employees like me who speak up about defects with its production activities and lack of quality control are ignored, marginalized, threatened, sidelined, and worse," he said in the written testimony.

Salehpour said that in June 2021, he invited about 30 Boeing employees to a meeting to discuss his concerns about excessive force compromising safety by deforming the fuselage barrels as they were fitted together. He said his direct manager forced him to have a shorter meeting with “only a few of my requested attendees.”

After he escalated his concerns, the responses from above became increasingly hostile, Salehpour said. Ultimately, he was transferred to the 777 program in retaliation for his whistleblower activity.

Boeing defended the safety and manufacturing of its marquee 787 Dreamliner, saying it had found no evidence of airframe fatigue after extensive testing of its carbon-fiber fuselage and heavy maintenance checks of nearly 700 of the jets already flying commercially.

“Under FAA oversight, we have painstakingly inspected and reworked airplanes and improved production quality to meet exacting standards that are measured in the one-hundreds of an inch,” the company said in a statement issued before the start of the hearings. “We are fully confident in the safety and durability of the 787 Dreamliner.”

Since a Boeing 737 Max 9 aircraft suffered the loss of the fuselage section in January, the FAA has tightened oversight of Boeing, forcing the company to slow down production and sending staff into their factories to review processes. The manufacturer has been given 90 days to come up with a comprehensive response and fix its production.

No-Show

Senator Maria Cantwell, the Washington Democrat whose state is home to Boeing's 737 Max factory and who chairs the Senate Commerce Committee holding the first Boeing hearing, said she expects the company to comply with that timeline.

Boeing executives aren't present at either hearing, though the company has said it's cooperating with the hearings. The company's absence was “frustrating,” said Senator Eric Schmitt, a Republican from Missouri.

Senator Richard Blumenthal, the Connecticut Democrat chairing the second session, said today he expects Chief Executive Officer David Calhoun to appear “as part of our ongoing inquiry,” and that today's hearing is the first of several. Cantwell also said she will hear from the FAA and from Boeing.

Boeing's promise to overhaul its safety practices following two 737 Max crashes in 2018 and 2019 have “proved empty,” Blumenthal said at the hearing.

“We know it was empty because of incidents that have occurred since then,” adding that Boeing is at “a moment of reckoning, a moment years in the making.”
(Updates with comments from second hearing)

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April 17, 2024, 6:34 AM PDT

Autodesk Shares Drop Amid Questions on 10-K Issues: Street Wrap

By Jeran Wittenstein

Bloomberg Law News 2024-04-17T10:16:36189396562-04:00

Autodesk Shares Drop Amid Questions on 10-K Issues: Street Wrap

By Jeran Wittenstein2024-04-17T09:34:45698-04:00

(Updates to market open.)

Autodesk shares are down as much as 7.6%, after the software company said it won't file its annual report within the 15-day extension period as it continues an investigation into free cash flow and non-GAAP operating margin practices. Analysts said the news was disappointing.

- Stock trading at its lowest since November
- Citi (buy, PT \$307)
- "Though the company is highlighting the subject/scope of the investigation remains unchanged, and that the investigation simply needs more time, the additional delay makes us more concerned that this issue could be more complex and we're less confident it won't have any impact on results/targets/guidance"
- Barclays (overweight, PT \$310)
- The news is "disappointing because the expectation was for a quick resolution," but "it does not sound like this investigation will result in restatements or pulled guidance"
- "It is comforting to hear that the scope of the investigation has remained the same"
- William Blair (outperform)
- "The delay is not expected to have an immediate impact to the listing or trading of the company's common stock" and the company "has emphasized it intends to take the necessary steps to regain compliance as soon as feasibly possible"
- Bloomberg Intelligence

- Autodesk's accounting issues "likely center around its new transaction model and probably won't end up reducing free cash flow"
- [Click here for the report](#)

More detail:

- The company said it expects to receive notification from Nasdaq that it's not in compliance with timely filing requirements for continued listing; such a notification isn't expected to have an immediate effect on the listing or trading on the Nasdaq Global Select Market, Autodesk said
- Autodesk will have 60 calendar days after receipt of a Nasdaq notification to submit a plan for regaining compliance and the company said it intends to take the necessary steps to regain compliance "as soon as practicable"
- NOTE: April 2, Autodesk Falls After Disclosing Internal Probe Into Accounting

Statement

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April 17, 2024, 4:30AM PDT

Wildfires Are Upending Some of the Safest Bets on Wall Street

By Olivia Raimonde and Mark Chediak

- US utility debt has long been favored by risk-averse investors
- But companies blamed for sparking blazes see their assets drop

Bloomberg Law News 2024-04-17T12:36:34I02271255-04:00

Wildfires Are Upending Some of the Safest Bets on Wall Street

By Olivia Raimonde and Mark Chediak2024-04-17T07:30:000000-04:00

US utility debt has long been favored by risk-averse investors

But companies blamed for sparking blazes see their assets drop

When the Texas Panhandle went up in flames this winter, the news spread fast on Wall Street. An electric utility by the name of Xcel Energy Inc. was getting blamed for the massive blaze – a lawsuit pointed the finger at its dilapidated equipment – and this was making the company’s investors very nervous.

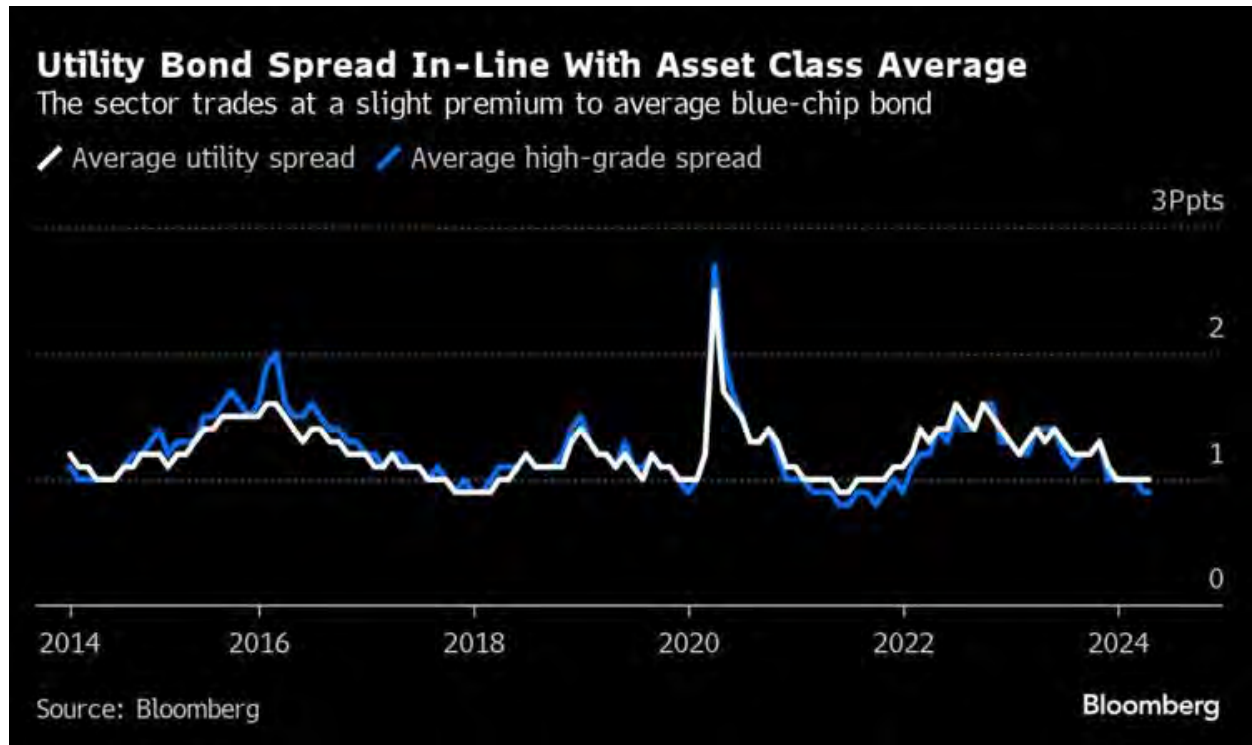
Throughout the morning of Feb. 29, investors unloaded shares. By [early that afternoon](#) , the stock was down nearly 10%. Bond prices were sinking too, triggering a spike in Xcel’s yields. For money managers who had long treated the utility’s bonds as an uber-safe asset – something almost akin to a US Treasury note – the rout, while brief, was jarring.

It sent the latest in a series of warnings on climate change to an investing community that’s plowed some \$1.7 trillion into the stocks and bonds of power companies that trade on Wall Street. For years, these assets have been seen as safe bets for retirement and insurance funds for a simple reason: Selling electricity is about as steady, and crucial, an industry as there is. These businesses are regulated monopolies and, the thinking has gone, too important too fail.

But as climate change exacerbates droughts and wildfires, and utilities often take the blame for starting them, their assets are increasingly at risk. Few industries in America will be more directly impacted by fires – both physically and financially – than the power sector, experts say.

Already the financial pain is piling up. Over the past eight months, investors have driven down the value of Hawaiian Electric stock by 73% after the company was blamed for the deadly Maui blaze. Its bond due in 2045 is trading at 62 cents on the dollar. A few years earlier, shares of PG&E Corp. plunged after it caused wildfires in California that would eventually force it to declare bankruptcy. And fires have stuck PacifiCorp with such heavy losses that its parent company Berkshire Hathaway said it could wipe out all of its energy division’s profits. **Warren Buffett**, Berkshire’s chairman, admitted he made a [“costly mistake”](#) in not anticipating the surge in these expenses.

"Investors realize this is a big problem, but they don't know how big of a problem it is for a particular utility," says Michael Wara, a wildfire expert and director of the climate and energy policy program at Stanford University. They're essentially "flying blind," he says. "A bad September afternoon wildfire can cause the stock to fall by 80% or as a bond investor, you could land as an unsecured creditor in a bankruptcy proceeding."



The losses have, so far at least, been more acute and lasted longer on the stocks side than the bond side. This makes a certain amount of sense. While soaring costs may erase profits – the lifeblood of any thriving stock – the too-important-to-fail element to these utilities means that in many cases state governments will prop them up enough to allow them to keep paying their debts. Still, to **Andy DeVries**, an analyst for CreditSights Inc., investors are shrugging off the "hidden risk" that wildfires and litigation pose to their portfolios.

"This risk is not a one-time thing," says DeVries, who has covered debt markets for more than two decades. "It's not a cyclical thing. It's here to stay, and it's going to get worse."

Wildfires have been breaking out more frequently and burning more and longer as the climate changes – with blazes seen from the US west to Canada, Siberia and the Australian bush.



A firefighter extinguishes hot spots following the Smokehouse Creek Fire in Texas in March.

Source: Bloomberg

Read More: [Big Texas Blaze Shows Power-Line Fires Are Widespread Threat](#)

The Smokehouse Creek Fire erupted in northern Texas in late February. Over the course of almost three weeks, it charred more than one million acres and even spread into western Oklahoma. The blaze destroyed power lines, homes and cars and killed [thousands](#) of livestock animals and two people.

"These investors are looking to sleep at night – and now, all of sudden, they are waking up to wildfires," says DeVries.

Xcel was promptly [sued](#) before investigators had officially determined the cause. In an unusually swift determination, a state probe found that a broken wooden [pole](#) owned by Xcel toppled in high winds and started the blaze. Kevin Coss, a representative for Xcel, says the company has and will continue to enhance its fire-risk mitigation efforts.

"We have already advanced a number of wildfire risk reduction initiatives," Coss says. "Like all energy companies, we are navigating changes in weather and climate-induced impacts on our operations."

Many utilities are being forced to borrow more in corporate debt markets, straining their finances, to upgrade aging infrastructure and pay off claims. This has pushed sales of utility bonds up at a faster clip than those in other blue-chip industries, according to data compiled by Bloomberg.

Buffett's PacifiCorp sold \$3.8 billion of investment-grade bonds this year to, in part, help fund settlement claims related to fires that broke out in Oregon. Edison International's Southern California Edison – which agreed in February to pay \$80 million to resolve a lawsuit related to blazes in 2017 – issued \$3.6 billion of bonds in the past six months, according to data compiled by Bloomberg.

Even Xcel sold an \$800 million note in February, only to see its yield over US Treasuries quickly balloon to a peak of 1.62 percentage points, from 1.25 points when it was issued. It's the type of blowout in so-called risk premiums typically seen in riskier junk debt – not an investment-grade utility bond.

"You want to be very careful," says Arvind Narayanan, co-head of investment-grade credit at Vanguard Group.



About a quarter of credit-rating downgrades in the industry over the past five years have been related to extreme weather events, according to Fitch Ratings. Xcel lost its A- credit rating when S&P Global Ratings cut the company to just three steps from junk. Its outlook remains negative, implying that further downgrades are possible.

"When we talk to the rating agencies and investors, they are right up front asking: 'What does your wildfire mitigation plan look like?'" says Randy Howard, general manager of the Northern California Power Agency, which represents several locally-owned utilities. "It's one of the first questions they ask today."

Credit scores are crucially important to utilities, one of the most capital intensive industries in the US, says Emily Fisher, the general counsel for the Edison Electric Institute, the main industry group for investor-owned utilities. That's because investment-grade companies can typically raise cash more cheaply in corporate debt markets than those with riskier scores.

Hence the effort by utilities to inform federal lawmakers about the issue and lobby for reforms at the state level. Utah, for example, has adopted legislation that caps utility wildfire liabilities, while California set up a wildfire insurance fund meant to backstop utilities involved in catastrophic blazes. That, a cap on shareholder utility liabilities and other regulatory reforms helped stabilize the finances of the state's utilities after PG&E and Edison were blamed for multi-billion-dollar fires.

PG&E was recently upgraded by all three major credit assessors, leaving the company's credit score just one notch below investment grade, says **Jonathan Arnold**, vice president of investor relations for PG&E. The protection afforded by the wildfire fund has allowed PG&E to make billions of dollars of investment in fortifying its grid against blazes, Arnold adds.

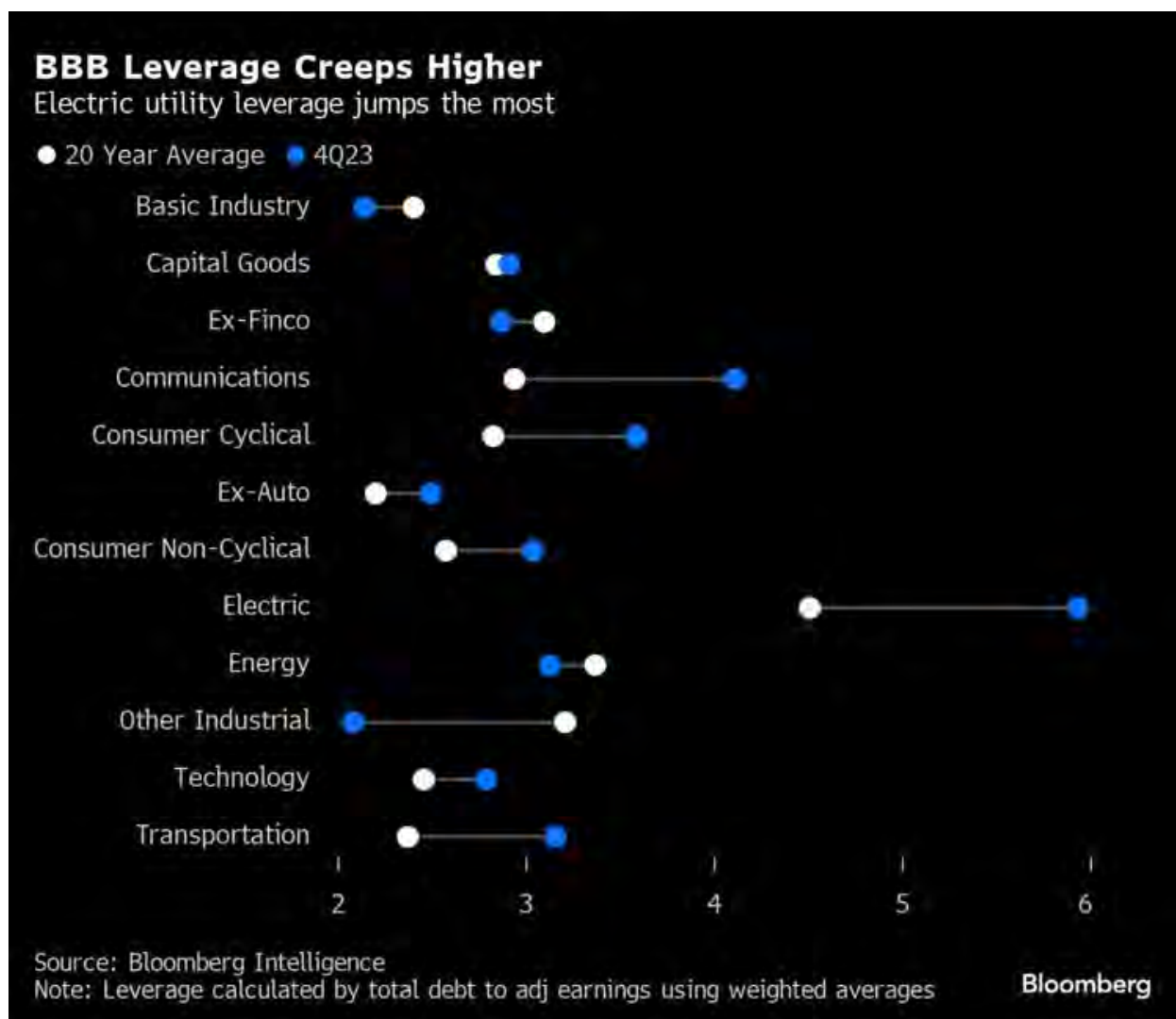
"Constant access to affordable capital, which is essential for a healthy utility and to keep customer rates low, is threatened by unchecked wildfire litigation," says Tiffany Erickson, communications director at PacifiCorp. A spokesperson for Edison International also pointed to recent credit upgrades, which came alongside fire-risk reduction efforts and the state fire insurance fund. Hawaiian Electric declined to comment.

Recent fires have been "a wakeup call" to Portland General Electric Co.'s Chief Financial Officer **Joe Trpik**. In a 133-page wildfire mitigation plan, his company laid out projects that aim to minimize risk that the utility would ever be responsible for future wildfires. The company's projected operating and maintenance costs for 2024 is more than [\\$815 million](#).

The trick, for Trpik and other power executives, is financing for these projects while still transitioning toward greener energy – and without cranking up customer bills too much and fanning inflation.

"Here in Oregon, we are seeing, feeling and experiencing the impacts of climate change," he says. "It's a challenge. It's not something anyone should take lightly."

Read More: [Portland General Electric Eyes Bonds for Wildfire Prevention](#)



Stanford's Wara says investors should do their due-diligence and press utilities about the precautions they've taken to reduce wildfire risk. Climate experts consistently warn that extreme weather events are going to happen more frequently and at higher intensities, and wildfires are notoriously challenging to predict.

"You're always looking over your shoulder when something happens," says **Mike Sanders**, head of fixed income at Madison Investments, which manages \$25 billion. "There is enough to worry about in the investing world other than a fire in Texas."

--With assistance from **Sam Geier** and **Bre Bradham**.

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Cashed Check Kills VW Emissions Deal Appeal, 9th Circ. Says

By **Henrik Nilsson**

Law360 (April 16, 2024, 11:03 PM EDT) -- The Ninth Circuit on Tuesday threw out an attempt to unravel an \$80 million deal resolving consolidated consumer litigation alleging Volkswagen and Porsche manipulated emissions and fuel-economy tests for nearly 500,000 gas-powered vehicles, saying the objector has already cashed his portion of the settlement.

In an **unpublished opinion**, the three-judge panel dismissed objector Wesley Lochridge's appeal of the district court's approval of the \$80 million settlement as moot, saying he released the automakers from all claims when he cashed the settlement check.

"Thus, by accepting the settlement payment, Lochridge effectuated the individual release," the panel stated. "And, because the individual release remains in effect even if the settlement approval is 'reversed and/or vacated on appeal,' there is no relief we can provide."

U.S. District Judge Charles R. Breyer signed off on the **\$80 million settlement** in October 2022, after **tentatively approving** it a few months earlier. The so-called Porsche Gasoline Litigation **accused** VW and Porsche of deploying "creative engineering" schemes that left consumers with gas-powered Porsche Boxsters, Cayennes, Caymans, 911s, Panameras and other luxury vehicle models from 2005 to 2020 that didn't meet emissions and fuel-economy performance standards.

Under the Porsche settlement agreement, class members would be divided into three groups receiving cash payments: fuel economy, Sport+, and other class vehicles.

Consumers in the fuel economy group, who said they were misled into overpaying for cars marketed as having high fuel-economy ratings, would get \$250 to \$1,109 per vehicle, depending on their car's revised fuel economy ratings and how long they had their vehicle.

Class members in the Sport+ group, who asserted that they bought vehicles with a high-performance Sport+ mode that emitted pollutants beyond legal limits, would receive an automatic cash payment of \$250.

And those in the other class vehicles group, whose cars might've been conceivably impacted by the testing practices at issue in the litigation, could receive up to \$200 per vehicle, depending on how many claims were submitted.

If an "extraordinary" claims rate causes the allocation to the other class vehicles group to fall below \$150 per vehicle, then Volkswagen and Porsche have agreed to throw in another \$5 million into the settlement fund, bringing the total pot to \$85 million, according to court documents.

Lochridge, a consumer in the fuel economy class, objected to the third other class vehicles group, arguing the group was the largest by far and would end up draining settlement funds when its members suffered no damages.

He contended in an Aug. 1 **opening brief** to the Ninth Circuit that results from the exhaustive testing done for the purposes of settlement "are unequivocally clear that there are 'no potential deviations' in fuel efficiency or emissions."

Therefore, according to Lochridge's filing, the other class vehicles group members don't have any

Article III standing to collect any damages in light of the U.S. Supreme Court's 2021 decision in **TransUnion LLC v. Ramirez** , which held that plaintiffs must establish they were concretely harmed by a statutory violation to have standing.

But the Ninth Circuit on Tuesday said "undisputed" evidence shows Lochridge already received money and therefore has released the automakers from the claims.

The panel was similarly unpersuaded by Lochridge's counterargument. Lochridge said that the Ninth Circuit in its 2018 ruling in **Low v. Trump University LLC**  **held that an objector** who seeks to unseat a settlement has standing on appeal.

"Lochridge only waived his rights under the individual release described in the settlement, as Low necessarily recognizes, 'if [he] is bound by the settlement, and of course, if [he] prevails here, the settlement is necessarily undone,'" Lochridge argued in his opening brief.

But the panel on Tuesday rejected that argument.

"Although the Low objector 'submitted a settlement claim,' she did not receive and cash a check in settlement of that claim. ... Accordingly, Low did not address the mootness issue presented here," the panel said.

Additionally, the panel said Lochridge failed to support his argument that the claims administrator acted improperly by contacting him directly instead of his counsel, saying he "presents no evidence to this effect." The panel also found that he didn't show a valid basis for rescission.

Counsel for the parties did not immediately return requests for comment Tuesday.

The settling consumer plaintiffs are represented by Lieff Cabraser Heimann & Bernstein LLP, Bailey Glasser LLP, Baron & Budd PC, Beasley Allen Law Firm, Bleichmar Fonti & Auld LLP, Boies Schiller Flexner LLP, Branstetter Stranch & Jennings PLLC, Carella Byrne Cecchi Olstein Brody & Agnello PC, Casey Gerry Schenk Francavilla Blatt & Penfield LLP, Cotchett Pitre & McCarthy LLP, Levi & Korsinsky LLP, DiCello Levitt, Hagens Berman Sobol Shapiro LLP, Hausfeld LLP, Heygood Orr & Pearson, Keller Rohrbach LLP, Motley Rice LLC, Robbins Geller Rudman & Dowd LLP and Roxanne Conlin & Associates PC.

Lochridge is represented by Robert W. Clore and Mikell A. West of Bandas Law Firm PC.

Volkswagen and Porsche are represented by Sharon L. Nelles and Laura Kabler Oswell of Sullivan & Cromwell LLP.

The appellate case is Lochridge v. Settlement Class Representatives and Settlement, case number 22-16898, in the U.S. Court of Appeals for the Ninth Circuit.

The multidistrict litigation is In re: Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation, case number 3:15-md-02672, in the U.S. District Court for the Northern District of California.

--Additional reporting by Linda Chiem. Editing by Lakshna Mehta.



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Under Armour Insurers To Cover Disputes In 2 Policy Periods

By **Elizabeth Daley**

Law360 (April 16, 2024, 8:15 PM EDT) -- Under Armour's excess insurers must provide additional coverage to the company in connection with a consolidated securities class action, derivative matters and government investigations, a Maryland federal court announced.

In his **opinion** issued in March, but redacted and refiled Monday, Senior U.S. District Judge Richard D. Bennett wrote that although insurers argued they shouldn't have to cover Under Armour beyond one policy period because all claims were related, an endorsement added to the policy doomed their arguments.

"Where an endorsement conflicts with the main policy, the endorsement controls," Judge Bennett wrote, explaining that an endorsement amended the policy's single claims provision to deny coverage for claims that "arise out of [1] the same fact, circumstance, situation, event, or wrongful act, or [2] facts, circumstances, situations, events or wrongful acts that are logically or causally related."

Judge Bennett found that the 2017 securities class action filed by Brian Breece against Under Armour and its executives was unrelated to shareholder derivative demands or a government investigation of the company.

The U.S. Securities and Exchange Commission began investigating Under Armour in June 2017 for possible violations of federal securities laws, according to court records.

Under Armour had submitted the Breece complaint and certain derivative demands under the 2016 to 2017 policy, but sought additional coverage under the 2017 to 2018 policy for the government investigation and ongoing matters, according to the court. The insurers attempted to argue that all the issues were related, but the judge disagreed.

He found the matters unrelated, saying "the government investigations trigger the 2017-2018 policies," while in the Breece matter, an amended complaint allowed him to find allegations of "a different wrongful act" under the 2017-2018 policy

"This Court sees no basis in the 2017-2018 primary policy's definition of claim to treat the new allegations automatically as part of the same claim as the wrongful acts alleged in the original Breece Complaint," he wrote of the amended allegations.

Furthermore, the class action claims were not related to the government investigation because they involved different parties and "focus on overlapping, but not identical, time periods, raise different theories of liability, rely on different evidence, and seek different relief," the judge wrote. They could therefore be covered under different policy periods, the judge found.

Additionally, he wrote that "later shareholder derivative matters include allegations wholly absent from the Breece Complaint and the earlier shareholder demands made during the 2016-2017 policy period," finding that the later policy period was applicable to **these allegations** as well.

He added that "the derivative matters containing allegations related to the government investigations trigger coverage under the 2017-2018 policies."

The initial 2017 Breece complaint alleged Under Armour made "false and overly optimistic public

statements" about its projected net revenue and growth rate along with "allegedly misleading statements regarding inventory growth, discounting, and margin decline," the judge explained.

The early shareholder derivative demands made in 2016 and 2017 by Chad Sorenson and Shawn Luger, respectively, as well as others, "concerned alleged false and misleading statements" regarding the impact of the bankruptcy of Under Armour's customer, The Sports Authority, on the brand's "financial outlook in early 2016, as well as claims of insider trading," the judge said. Some of those demands resulted in lawsuits, he added.

Meanwhile, "the government investigations focused on 22 certain sales and accounting practices employed by Under Armour," the judge said, noting "such allegations were wholly absent from the Breece Complaint and early derivative demands."

Though the judge granted Under Armour judgment on the pleadings, he noted that a breach of contract claim by the brand remains a "triable issue."

Endurance American Insurance Co., which **initially led the 2022 case** against Under Armour concerning its directors and officers coverage, seeking around \$10 million in reimbursement from the company, reached an agreement with the brand and was dropped from the case in 2023, the judge said.

Without admitting or denying anything, Under Armour agreed to pay a \$9 million civil penalty to settle a 2021 SEC order charging the company with misleading investors, according to court records.

Representatives of the parties did not immediately respond to requests for comments Tuesday.

The insurers are represented by John Ritchie Solter Jr. of Azrael Franz Schwab Lipowitz & Solter LLC.

Under Armour is represented by Michael T. Sharkey of Perkins Coie LLP.

The case is Endurance American Insurance Co. v. Under Armour Inc., case number 1:22-cv-02481, in the U.S. District Court for the District of Maryland.

--Editing by Nick Petruncio.



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'Wide As The Ocean': Apple Judge Pans Investor Deal Release

By **Dorothy Atkins**

Law360, Oakland, Calif. (April 16, 2024, 10:49 PM EDT) -- A California federal judge declined Monday to preliminarily approve Apple's nonmonetary settlement in a derivative-shareholder suit over claims it secretly slowed iPhones, criticizing the deal's release of claims that "relate" to the case as overbroad and noting that, "in practice, lawyers argue that 'relate' is as wide as the ocean."

U.S. District Judge Yvonne Gonzalez Rogers' comments came during a hearing in Oakland on Apple investors' motion for preliminary approval of a settlement under which investors' counsel would receive \$6 million in fees and expenses, while Apple and its top brass agreed to make "policy, corporate governance and oversight reforms" for at least four years to address transparency concerns about the company's iPhone updates.

Judge Gonzalez Rogers said she won't preliminarily sign off on the settlement with the release provision as it's currently written because the proposed agreement defines "settled defendants' claims" as "all claims that arise out of, are based upon, or relate to the commencement, litigation, or settlement of the actions."

The judge noted that she doesn't typically approve deals that resolve claims in related litigation, particularly in scenarios such as this one in which there is another ongoing securities fraud action that the court officially related to the current derivative suit in March 2020.

"I rarely if ever use the word 'relate' in a case that releases claims," she said. "In practice, lawyers argue that 'relate' is as wide as the ocean, and I don't see the need to have it when you have other words that do effectively the same thing. ... Why do you need that additional phrase?"

The investors' counsel, Shane P. Sanders of Robbins LLP, replied that the parties may have "overlawyered this," and Apple's counsel agreed to look into the issue.

Judge Gonzalez Rogers added that "one would hope" that the proposed nonmonetary settlement doesn't release claims in the securities fraud litigation, but she added that "the argument can be made that it does."

"I just don't like the word in this context, so you're going to have to talk to your clients," she said. "I'm not going to approve it with that word in there, so figure it out. I think that's the only time it comes up, but you should double-check."

Judge Gonzalez Rogers also took issue with the suggestion in the investors' motion for preliminary approval that the court doesn't need to consider the merits of the settlement at the preliminary approval stage and instead should only address the merits of the deal during a final approval hearing.

The judge observed that she's been seeing similar language in motions in other proposed class actions, and the language is unhelpful.

"I don't waste time. If there's a major problem with your motion [for preliminary approval] you're going to hear about it now, because why would I wait until final approval to explain that to you?" the judge said.

Judge Gonzalez Rogers added that she doesn't understand the new trend, but it can lead to the

suggestion that there's never an appropriate time for the court to raise concerns about the merits of a deal.

"Then you get to final approval [hearing], and you say, 'Well your honor, you already approved it preliminarily.' I've seen it a couple of times, and I think it's a problem," the judge said. "It's certainly not how we deal with these things in this jurisdiction."

For his part, Sanders assured the judge that the value of the proposed settlement is hundreds of millions of dollars, and he and his co-counsel plan to submit more documentation supporting the deal at the final approval stage.

The judge set the next hearing in the case for July 16.

The proposed settlement seeks to resolve a lawsuit filed in August 2019, alleging that Apple's officers and directors breached their fiduciary duties to their shareholders, wasted corporate assets and were unjustly enriched by covering up the tech giant's plan to trick iPhone owners into thinking their older phones no longer worked well and "coercing" them into upgrading their iPhones "on accelerated timetables."

After independent investigations unearthed the truth, Apple was forced to admit to "planned obsolescence" in December 2017, prompting extensive consumer backlash and sprawling investor litigation, including derivative suits, which were consolidated on Judge Gonzalez Rogers' docket in 2020, and related to separate securities fraud litigation over Apple's iPhone sales in China.

In the current suit, the investors lodged claims against Apple officers and directors, including breach of fiduciary duty, waste of corporate assets and unjust enrichment claims.

In June 2020, the judge **appointed** Robbins LLP and WeissLaw LLP as co-lead counsel, but around that time the litigation was stayed to allow the parties to negotiate. No dispositive motions were filed in the case, and in March, the investors **asked the judge** to preliminarily sign off on the deal.

Under the proposed agreement, Apple said it would require its general counsel to report to the board's audit and finance committee on any material compliance issues. Apple also agreed to add its chief compliance officer to the board's "risk oversight" committee and to require the compliance officer to report any concerning risks discussed to the board's audit and finance committee.

The proposed settlement requires Apple to amend its charter for the risk oversight committee, and requires that the CCO implement and supervise a protocol that would escalate potential product regulatory compliance risks so that information is communicated to the appropriate individuals at the company "prior to remedial action and related disclosures."

The compliance officer is also tasked with reviewing iPhone release notes in advance of the implementation of an iOS update involving changes to "performance management" to ensure the disclosures are transparent and timely.

Apple also pledged to maintain web pages with information about lithium-ion batteries and unexpected shutdowns, notify consumers of any material change to their phones' performance due to an iOS update, "and inform consumers of the option to service the iPhone battery once performance has become significantly degraded."

The deal also requires the co-chairs of the board's disclosure committee to review transcripts of earnings calls, so they can recommend corrections, clarifications or other explanations to the public.

Apple **informed** Judge Gonzalez Rogers in March that it cut a \$490 million deal to resolve the related shareholder class action accusing the company and its top brass of misleading investors about iPhone sales in China in a legal fight that was slated for a September jury trial. A hearing on that motion is set for April 30 in Oakland before Judge Gonzalez Rogers.

In February 2023, a different California federal judge **granted final approval** to Apple's \$500 million settlement to end multidistrict litigation filed on behalf of iPhone users who asserted claims related to the same updates.

The investors are represented by Shane P. Sanders of Robbins LLP and David C. Katz of WeissLaw LLP.

Apple and its executives are represented by Alexander K. Talarides of Orrick Herrington & Sutcliffe LLP

The case is In re: Apple Inc. Stockholder Derivative Litigation, case number 4:19-cv-05153, in the U.S. District Court for the Northern District of California. The related securities case is In re: Apple Inc. Securities Litigation, case number 4:19-cv-02033, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger. Editing by Dave Trumbore.

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9th Circ. Upholds Tossing Skillz Gaming Tech Investor Suit

By **Sydney Price**

Law360 (April 16, 2024, 9:59 PM EDT) -- The Ninth Circuit on Tuesday upheld a decision to toss a proposed class action claiming that mobile gaming company Skillz Inc. misled investors about its technology prior to a 2021 merger with a special purpose acquisition company, ruling that issues with the gaming software do not make the company's statements false or misleading.

The three-judge panel of the Ninth Circuit said in its opinion that the investors did not adequately allege facts showing that Skillz misled investors by overstating the technical features of its gaming platform.

Skillz Inc. investors urged the Ninth Circuit earlier this month to revive the suit, which was initially **dismissed** in March 2023. Christian Levis of Lowey Dannenberg PC, counsel for the investors, told the court at **oral arguments** that the company and its executives publicly misstated its revenue growth, its user metrics and Skillz's gaming platform's technical capabilities, specifically about its synchronous gaming software.

But the Ninth Circuit said on Tuesday that even assuming that Skillz lacked the capacity to handle developer needs and was still working out bug defects, imperfections in its software do not render the company's statements that its platform enables synchronous games false or misleading.

"The federal securities laws do not create an obligation to disclose all potential kinks in a software program and the failure to disclose such kinks does not render general positive statements about the program false," the opinion states.

In their suit, the investors alleged a series of misstatements by the San Francisco-based company and its top brass before its SPAC merger that allowed Skillz executives to cash out nearly a quarter billion dollars in shares in a March 22, 2021, secondary offering at artificially inflated prices, while investors lost once the misstatements were corrected in April and May 2021.

Levis also argued during the hearing that the company didn't clearly disclose its monthly active user, or MAU, revenues and that it later admitted its MAU growth did not necessarily correlate to revenue for the business, because not all users were paying subscribers. He added that the company saw a nearly 9% stock drop following a May 4, 2021, call with analysts who asked to clarify its MAU and revenue statistics.

Melanie Blunschi of Latham & Watkins LLP argued on behalf of Skillz and its executives that the lawsuit does not meet the stringent pleading requirements to state a viable securities fraud claim, and that the complaint does not allege any of the MAU statistics.

Blunschi defended Skillz's disclosures. She also argued that Skillz was always clear it could only make money from users who were paying to use the platform, and that the company always disclosed the percentage of paying MAUs, which she acknowledged fluctuated.

The Ninth Circuit agreed on Tuesday, saying that Skillz's early emphasis on MAUs was not materially misleading, as only users who initially used the platform through a free download could later be converted into paying users.

Skillz is still facing other litigation regarding its disclosures. Last month, another investor, Laurie A.

Hanna, filed a public version of a heavily redacted derivative shareholder complaint against Skillz, its top brass and dozens of Skillz investors in Delaware Chancery Court. Hanna alleges the defendants, including Paradise, dumped "massive" amounts of Skillz stock in March 2021 in allegedly illegal trading just ahead of timed negative public disclosures that caused the stock to plummet days.

Counsel for the parties in the appellate case did not immediately respond to requests for comment on Tuesday.

U.S. Circuit Court Judges Andrew D. Hurwitz and Anthony Devos Johnstone and U.S. District Judge Brian Morris sat on the panel.

The investor appellants are represented by Christian Levis, David C. Harrison, Andrea Farah and Scott Vincent Papp of Lowey Dannenberg PC, Robert C. Schubert and Willem F. Jonckheer of Schubert Jonckheer & Kolbe LLP and Reed R. Kathrein and Wesley A. Wong of Hagens Berman Sobol Shapiro LLP.

Skillz and its executives are represented by Melanie Blunschi, Matt Rawlinson, Daniel Gherardi and Clarissa Lu of Latham & Watkins LLP.

The case is Thomas Jedrzejczyk et al. v. Skillz Inc. et al., case number 23-15493, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dorothy Atkins. Editing by Vaqas Asghar.

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Israeli Ad Tech Co. Overhyped Microsoft Ties, Investor Claims

By **Emilie Ruscoe**

Law360 (April 16, 2024, 10:51 PM EDT) -- Ad tech company Perion Network and some of its current and former executives face a proposed class action alleging its investors were damaged after its strategic partner Microsoft Bing "unilaterally" changed its search advertising pricing.

In a **suit filed Tuesday** in Manhattan federal court, plaintiff Craig Beisner claimed the company violated federal securities laws by misleading investors about the relative stability of, and risks in, its relationship with tech giant Microsoft, which the investor described as Perion's "most significant search partner and largest source of revenue."

According to Beisner, nearly half of Perion's 2023 revenue came from search advertising, Beisner said, and nearly 34% of Perion's total revenue that year came from Microsoft. Perion is based in Holon, Israel.

Beisner cited market records showing trading prices for Perion shares fell by about 40% from over \$21 to about \$12.50 after the company said in early April that it expected to make around \$600 million in 2024, down from the \$870 million revenue estimate it offered in February.

According to Beisner's suit, Perion's April 8 revenue revision came as it told investors that it saw less search advertising activity on Bing than it had assumed it would.

In its announcement, Perion said that the falloff in search advertising was the result of "changes in advertising pricing and mechanisms implemented by Microsoft Bing in its search distribution marketplace."

Perion told investors that the Bing changes contributed to decreased search volume overall, as well as to a reduction to a key ad revenue metric, for Perion and its fellow Microsoft Bing distribution partners.

Microsoft is not named as a defendant.

The April announcements stand in stark contrast to the statements the company made in February 2021, when it characterized its partnership with Bing as a "sustainable, predictable stream of revenue."

Between February 2021 and April 2024, Beisner claimed, Perion "touted [its] strong relationship with Microsoft to investors" and painted a rosy picture of its allegedly robust search advertising business.

In reality, Beisner said, Perion's search advertising business "was not a reliable and significant growth driver and was in fact in decline [and] Perion's long-term relationship with Microsoft and search services agreement would not provide stability for Perion's search advertising business."

The investor also pointed to the times Perion emphasized its investment in artificial intelligence and to Microsoft's investment in ChatGPT, in support of its contention that its search advertising business would remain a robust revenue generator for the ad tech company.

"Perion's AI technology and Microsoft's investment in ChatGPT would not protect or grow Perion's search advertising revenue," Beisner said in his suit.

The investor also claimed that while the company was talking up its search advertising business, it was "steadily shifting focus away from search advertising to its display advertising business, including connected TV."

Alongside Perion, Beisner's suit names the company's former CEO Doron Gerstel, its current CEO Tal Jacobson and its current Chief Financial Officer Maoz Sigron.

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

Beisner is represented by Jeffrey C. Block and Sarah E. Delaney of Block & Leviton LLP.

Counsel information for the defendants wasn't immediately available Tuesday.

The case is Beisner v. Perion Network Ltd et al., case number 1:24-cv-02860, in the U.S. District Court for the Southern District of New York.

--Editing by Michael Watanabe.

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Autonomy CEO Pressured JPMorgan Over Analyst, Jury Told

By **Bonnie Eslinger**

Law360 (April 16, 2024, 11:39 PM EDT) -- An ex-JPMorgan stock analyst testifying Tuesday in the criminal fraud trial of former Autonomy CEO Michael Lynch told jurors that the software company founder responded with hostility when his research reports questioned its growth, and that Lynch offered JPMorgan millions in business if he were taken off the Autonomy beat.

Lynch is on trial, alongside Autonomy's former vice president of finance, Stephen Chamberlain, for felony counts of conspiracy and fraud that, if convicted, could put them behind bars for more than 20 years. Lynch, who reaped about \$804 million from the sale of Autonomy, is also charged with an additional count of securities fraud. The high-profile trial **began March 18** and is slated to possibly run into June.

On Tuesday, a former JPMorgan technology analyst assigned to cover Autonomy took the stand. Daud Khan, who is now managing director of investment banking at Peel Hunt in London, said he covered Autonomy from around 2002 until 2011.

Khan told jurors that he had a positive relationship with Lynch until early 2008, when he wrote a report that questioned how much of Autonomy's growth came from its acquisitions of other companies.

The resulting conclusion was that "Autonomy is overstating the organic growth of the business," Khan said.

Prior to publication of the report, Khan sent a draft to Lynch to check for accuracy and to get comment from the company, as was JPMorgan's practice.

The Autonomy CEO responded quickly and forcefully, saying it shouldn't be published since it had numerous factual inaccuracies, Khan said.

"I was surprised ... given that up until that point our relationship with very good," the witness said. "It was quite a hostile reaction."

Khan said he later learned that Autonomy's chief operating officer and general counsel, Andrew Kanter, had also written to his boss with the same message.

The next week, Khan said he and his boss, the head of research for his JPMorgan unit, sat down with Lynch and Autonomy CFO Sushovan Hussain, later adding that he subsequently revised his report with more substantiation for his conclusion and added Autonomy's comments. His boss, David Knox, backed him up in telling Autonomy's senior management that the crux of his report would remain the same.

Then, on the eve of publication, Kanter contacted Knox by email, suggesting that they had "evidence from institutional investors that I've been doing things that I shouldn't have been doing," Khan said. "I don't remember the exact wording ... and that they believed that this would be passed on to the Financial Services Authority, FSA, which is my regulator."

As a result, Knox took the time to listen to all of Khan's calls, which were recorded as required by the FSA.

"He essentially said there's nothing wrong with anything that you said in these calls, and therefore we're going to publish tomorrow," Khan said.

Prosecutor Robin Leach asked Khan if he ever heard from the Financial Services Authority about anything related to what Kanter said about his calls.

"Never, never then, or never in the future," Khan said.

Two years later, in 2010, Khan learned that Lynch and others at Autonomy had met with the investment banking side of JPMorgan. A colleague from that team came to him after the meeting and said Autonomy had shown them prepared slides suggesting Khan's research was inaccurate.

Khan told jurors he was later told by one of JPMorgan's research executives — Khan said he could only remember his first name, Jose — that Autonomy had proposed having the investment bank act as adviser to Autonomy in a future transaction.

"Essentially, what he told me was that ... this could be \$5 million worth of fees to JPMorgan," Khan said. "What they wanted in return was that I'd be removed as the coverage analyst of the stock."

The proposal was sent up the chain to JPMorgan's New York office, which rejected the offer.

The research executive told him that the word from New York came back that "Daud is not worth \$5 million but the reputation of JPMorgan is worth significantly more than \$5 million," Khan told the jury.

The trial continues Wednesday.

When HP purchased Autonomy in August 2011, the tech giant touted Autonomy's financial performance. The government's case is that Lynch and Chamberlain used a variety of accounting tricks to make Autonomy's revenue growth look better than it was.

The government also brought charges against Hussain, who was convicted on related charges in 2018 and subsequently **sentenced to five years** in prison.

In addition to the criminal cases in the United States, parallel civil proceedings brought by HP have been **ongoing in London** since 2015, with a London judge ruling in 2022 that Lynch and Hussain had used dishonest accounting techniques to "induce" HP to buy the firm. Earlier this year, at the start of a second-phase damages trial in the **U.K. civil case**, HP asked the court to order Lynch and Hussain to pay more than \$4 billion to make up the difference between what it paid for Autonomy and the true price of the British company.

The government is represented by Robert S. Leach, Adam A. Reeves and Kristina N. Green of the U.S. Attorney's Office for the Northern District of California and Zachary Abrahamson of the U.S. Department of Justice's Antitrust Division.

Michael Lynch is represented by Christopher J. Morvillo, Celeste Koeleveld and Daniel S. Silver of Clifford Chance LLP and Jonathan M. Baum, Reid H. Weingarten, Brian M. Heberlig, Michelle L. Levin, Nicholas P. Silverman and Drew C. Harris of Steptoe LLP.

Stephen Chamberlain is represented by Gary S. Lincenberg, Ray S. Seilie and Michael C. Landman of Bird Marella Rhow Lincenberg Dooks & Nessim LLP.

The case is U.S. v. Mike Lynch et al., case number 3:18-cr-00577, in the U.S. District Court for the Northern District of California.

--Additional reporting by Richard Crump and Christopher Crosby. Editing by Michael Watanabe.



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BIPA Judge Laments Blown Discovery Deadlines — Again

By Celeste Bott

Law360 (April 16, 2024, 7:10 PM EDT) -- An Illinois federal judge on Monday scolded Union Pacific and the truck drivers suing it over alleged biometric privacy violations for missing a sixth discovery deadline, saying the results of multiple discovery extensions he's allowed over five years of litigation have been "disappointing, to say the least."

U.S. Magistrate Judge Jeffrey Cole opened his ruling musing that a "seemingly uncomplicated" lawsuit claiming the railroad failed to get the informed consent required under Illinois' Biometric Information Privacy Act from truck drivers before they scanned their fingerprints to gain access to its facilities had been anything but. Instead, it's "engendered four tries at an operative complaint and fairly regular and repeated court involvement in discovery," the judge said.

"At this point, from an objective perspective, one has to wonder if discovery in this case hasn't passed the tipping point in terms of being 'proportional to the needs of the case,'" the judge said, suggesting that the discovery has been "excessive and needless" and citing a 2015 article by two trial attorneys that postulates litigation is slow and costly "because lawyers waste so much time fighting."

"In any event, as this case moved into its fifth year, the parties did not meet another fact discovery deadline — a deadline they had selected," Judge Cole went on. "The return on investment of granting discovery extensions has been disappointing, to say the least."

It's been a familiar refrain for Judge Cole in this case, who **chided the parties** for an "unacceptable" bid to get a four-month extension on all discovery deadlines with a "skeletal" motion last year. Months before that, he'd **denied a different discovery motion** and said it was clear the parties hadn't been working together in good faith and were "phoning it in."

On Monday, the judge denied the latest discovery motion brought by lead plaintiffs David Fleury and Alvin Turner, which included a bid to see communications among counsel for the railroad and for Nascent or Remprex, the companies that licensed the automatic gate system software to Union Pacific and sold it the hardware, respectively. But he ordered Union Pacific to compile a privilege log with 30 days as to the relevant documents sought.

Nascent and Remprex aren't defendants in the suit, but have received third-party subpoenas, and Union Pacific argues the three share a common interest and their correspondence is therefore privileged, according to the ruling.

"In this instance, from a general perspective, it is not difficult to see that the defendant has some common legal interests with its software and hardware providers in a BIPA case. BIPA launched a thousand ships of litigation, a fleet of them from the law firms on the plaintiff's side of this case alone," Judge Cole said.

But just as parties can't make a blanket claim of attorney-client privilege, they also can't make blanket claims of common interest doctrine applicability as Union Pacific is trying to do here, he said.

"It must instead assert the common interest doctrine on a document-by-document basis, as it is limited to those documents that fall within that interest," he said.

Representatives of the parties could not be immediately reached for comment Tuesday.

Earlier this month, the district judge presiding over the case **refused to dismiss** the truck drivers' third amended complaint, rejecting several new arguments raised by the railroad in its bid to ditch the suit.

The drivers are 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.

--Editing by Kelly Duncan.

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Crypto Co. Can't Be Sued Over 'Scam Token,' 2nd Circ. Hears

By Aislinn Keely

Law360 (April 16, 2024, 11:08 PM EDT) -- The business, founder and venture capital backers behind decentralized cryptocurrency exchange Uniswap Labs told the Second Circuit that a New York federal judge was right to dismiss a suit from investors who claimed they bought scam tokens on the platform since the business didn't enter into any contract with buyers.

In a response to investors' attempt to **revive the suit**, Universal Navigation Inc., which does business as Uniswap Labs, and its founder, Hayden Adams, said Friday the investors still haven't stated a claim against them. According to Uniswap Labs, the fact that the investors used the software it built to buy the scam tokens isn't enough to establish a contract between the investors and the exchange.

The investors claimed Uniswap Labs and its venture capital backers failed to address "rampant fraud" on the Uniswap platform and that they profited off transactions between buyers and issuers of scam tokens.

But U.S. District Judge Katherine Polk Failla **found** in August 2023 that the firm that built the decentralized exchange was the wrong defendant for the claims, saying the unidentifiable issuers of the phony tokens were to blame.

At the time, Judge Failla said it was the first time a court HAD decided whether Section 29(b) of the Securities Exchange Act of 1934 applied to a decentralized cryptocurrency exchange. The statute nullifies contracts that violate securities laws.

But Uniswap Labs reiterated to the Second Circuit on Friday that the smart contracts underpinning the platform don't create any legal contract between the developer of the code and its users in this case, because Uniswap Labs had no dealing with the scam tokens.

"Plaintiffs do not plausibly allege that Labs was a counterparty to any of their token transactions or even was a liquidity provider with respect to the tokens," argued Uniswap Labs and Adams in **their brief**. "Indeed, plaintiffs do not plausibly allege that Labs ever owned, controlled, possessed or sold any of the tokens to anyone. Plaintiffs therefore fail to plead contractual privity with Labs."

Uniswap Labs and Adams developed the Uniswap protocol, which is a decentralized marketplace that allows users to hold their assets themselves and transact directly with the help of an automated market maker, which has users trade against a liquidity pool of tokens instead of a match between buyers and sellers.

The investors have argued that Uniswap Labs owns the title to the tokens traded on the protocol. However, Uniswap Labs has asserted that buyers interact directly with the liquidity pools that are governed by decentralized smart contracts, not the exchange, and it doesn't have any ownership or control over the tokens.

It also developed the Uniswap interface, the website that makes it easier to transact with the on-chain protocol. According to the company, transacting with the interface also doesn't constitute a contract since the site itself doesn't execute any transaction. The company also argued the investors "misleadingly conflate" Uniswap Labs, the decentralized protocol and the website, "referring to them all without distinction as 'Uniswap.'"

Uniswap Labs also reiterated that it never urged any investors to purchase the scam tokens.

"At most, plaintiffs allege that Labs solicited the use of the protocol in general — not any of the tokens," the brief says.

Like Uniswap Labs, Adams argued the investors haven't shown any contract with him either.

Paradigm Operations, Andreessen Horowitz and Union Square Ventures, which provided financial backing for the Uniswap project, **said in their own brief** that the investors are seeking to hold liable "a group of unaffiliated investors in a technology company" for alleged scams perpetrated by unidentified issuers.

"No court has ever imposed liability on parties so remote and attenuated from the alleged transactions," the venture capital firms said.

Like Uniswap Labs, the venture capital firms argued they aren't sellers of the tokens, nor did they solicit any investors to purchase them.

While the investors claimed the venture capital backers indirectly had control by having some stake in Uniswap Labs, the firms argued this can't be since Uniswap Labs doesn't have control over the tokens. Even if Uniswap Labs did have control, that wouldn't mean any title passed to its backers, the venture capital firms argued.

The Uniswap Foundation, a nonprofit that supports the growth of the protocol, **joined the arguments** of Uniswap Labs and its backers, but asserted the nonprofit "has no place in this litigation," in part because the complaint "attempts to impute the actions of Labs, a separate entity, to the Foundation."

The investors had previously argued the nonprofit is an alter ego of the firm, but the Foundation argued the investors haven't shown any of the characteristics of the two being a single entity under Delaware law.

Counsel for the investors, James Serritella of Kim & Serritella LLP, said in a statement to Law360 on Tuesday that the Second Circuit upheld claims similar to his clients' when it revived **another securities class action** against Coinbase earlier this month.

That proposed class action, Underwood v. Coinbase Global Inc., accused the cryptocurrency exchange of selling unregistered securities. While the lower court tossed the case on the grounds that user agreements made clear Coinbase did not hold the title to the tokens, the Second Circuit found that other user agreements created ambiguity as to who was the direct seller of the tokens.

"As we intend to argue in our reply, the Uniswap defendants largely sidestep that decision and fail to address several points in our opening brief, including defendants' own admissions as to their control of the Uniswap protocol," Serritella said.

Serritella also highlighted that Uniswap Labs **disclosed last week** that it received a Wells notice from the U.S. Securities and Exchange Commission, which notified the firm it may soon face an enforcement case over alleged registration violations. The SEC has not confirmed or denied the investigation. Uniswap Labs has vowed to fight any suit that may come down.

"Courts are moving fast to catch up to the technology, and we firmly believe that when the dust settles, the Second Circuit will hold that the defendants are not immune from following securities laws," Serritella said.

Counsel for the defendants did not immediately respond to a request for comment Tuesday.

The investors are represented by James R. Serritella and Justin Stone of Kim & Serritella LLP.

Uniswap Labs, Adams and Union Square Ventures are represented by Elliot Greenfield, Maeve L. O'Connor and Brandon Fetzer of Debevoise & Plimpton LLP.

Andreessen Horowitz is represented by Benjamin A. Naftalis, Douglas K. Yatter, Samir Deger-Sen, Peter Trombly and Susan E. Engel of Latham & Watkins LLP.

Paradigm Operations is represented by Alexander C. Drylewski and Tansy Woan of Skadden Arps Slate Meagher & Flom LLP.

The Uniswap Foundation is represented by Jason P. Gottlieb, Michael Mix and Vani Upadhyaya of Morrison Cohen LLP.

The case is *Risley v. Universal Navigation Inc.*, case number 23-1340, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Jessica Corso and Katryna Perera. Editing by Lakshna Mehta.

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Del. Justices OK Midcase Review Of TripAdvisor Move

By **Leslie A. Pappas**

Law360 (April 16, 2024, 5:23 PM EDT) -- Delaware's Supreme Court will consider whether the Court of Chancery properly denied TripAdvisor's motion to dismiss a shareholder lawsuit over its corporate move to Nevada, finding that a midcase appeal of the ruling involves a question of law and could be "beneficial."

The six-page **order** from Chief Justice Collins J. Seitz Jr., Justice Karen L. Valihura, and Justice Gary F. Traynor said the application for interlocutory review "meets the strict standards for certification" under Rule 42(b) — the rule governing midcase appeals — and the court would accept it "in the exercise of our discretion."

"Certainty regarding the standard of review applicable to a decision to reincorporate in another jurisdiction would be beneficial, the Interlocutory Opinion involves a question of law regarding reincorporation in another jurisdiction that was decided for the first time in this state, interlocutory review may terminate the litigation, and the likely benefits of interlocutory review outweigh the probable costs," Justice Valihura wrote on behalf of the three-member panel.

Shareholders **sued** TripAdvisor, its holding company, Liberty TripAdvisor Holdings Inc., and more than a dozen of its officers and directors last April, alleging that they had voted to redomesticate both companies in Nevada in an effort to avoid frivolous litigation from investors.

Dennis Palkon, a shareholder of TripAdvisor, and Herbert Williamson, a Liberty shareholder, argued that Nevada has been making efforts to "provide a 'no-liability corporate safe haven'" that would free the company's officers and directors from just about any liability arising from the operation and supervision of their companies.

The defendants sought to dismiss the shareholder suit, **arguing** that Nevada would not be a "get-out-of-jail-free" card for the company's top officers.

Vice Chancellor J. Travis Laster **denied the motions to dismiss** in February, while nevertheless refusing to block the travel planning giant's reincorporation in Nevada.

The decision got wider-than-normal public scrutiny because it came shortly after SpaceX and Tesla Inc. founder Elon Musk **announced he would reincorporate** SpaceX from Delaware to Texas.

TripAdvisor sought a midcase review of the **Feb. 20 decision**, but Vice Chancellor Laster **denied the application** in March, saying defendants hadn't shown it was "exceptional" enough to merit an interlocutory review.

In his **memorandum opinion denying the interlocutory appeal**, the vice chancellor noted that Delaware rules didn't permit him to consider certain external factors, such the "disproportionate media attention" that his decision had received. Nevertheless, he said, the state's highest court has the prerogative to accept such a case on wider grounds.

"The justices might conclude that given the media attention and practitioner-driven stormlets over Delaware's place in the corporate universe, Delaware's highest court should weigh in," the vice chancellor wrote.

Counsel for the parties did not immediately respond Friday to Law360's request for comment.

The shareholders are represented by Gregory V. Varallo, Andrew E. Blumberg, Mae Oberste and Daniel E. Meyer of Bernstein Litowitz Berger & Grossmann LLP, Jeremy Friedman, David Tejtcl, Christopher Windover, and Lindsay La Marca of Friedman Oster & Tejtcl PLLC, Jason Leviton, Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax and Robert Erikson of Block & Leviton LLP and D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC.

Liberty TripAdvisor Holdings Inc. and its directors are represented by Kevin R. Shannon, J. Matthew Belger, Jaclyn C. Levy, Christopher D. Renaud and Justin T. Hymes of Potter Anderson & Corroon LLP and Matthew W. Close, Jonathan B. Waxman, Abby F. Rudzin and Asher Rivner of O'Melveny & Myers LLP.

TripAdvisor Inc. and the company's directors are represented by Bradley R. Aronstam and S. Michael Sirkin of Ross Aronstam & Moritz LLP and John A. Neuwirth, Evert J. Christensen Jr. and Stefania D. Venezia of Weil Gotshal & Manges LLP.

The case is Dennis Palkon and Herbert Williamson v. Gregory B. Maffei et al., case number 2023-0449, in the Court of Chancery of the State of Delaware.

--Additional reporting by Lauren Berg and Jeff Montgomery. Editing by Linda Voorhis.

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Hedge Fund Asks Court To Toss REIT's Suit In Takeover Row

By **Spencer Brewer**

Law360 (April 16, 2024, 7:46 PM EDT) -- New York hedge fund Blackwells Capital LLC fired off the latest shot in its ongoing board takeover spat with a Texas-based hotel real estate investment trust, asking Monday for a federal judge to toss a lawsuit aimed at warding off the proxy contest.

Blackwells says that Braemar Hotels & Resorts Inc. wants to stave away a proxy contest because its stock has tanked 90% over the past 10 years, and the company doesn't want to face shareholders' ire.

"The complaint is simply Braemar's incumbent directors' latest gambit to entrench themselves and avoid an open stockholder vote on their re-election," the hedge fund said in its motion to dismiss. "As a matter of clear law, however, the gambit fails."

The hotel REIT hasn't shown how the federal court has jurisdiction over the case because corporations are "creatures of state law." Additionally, the company doesn't have standing to sue under Securities Exchange Act laws governing disclosures during proxy contests, the hedge fund says.

The company's primary claim doesn't meet the pleading standard requirements of the Private Securities Litigation Reform Act, a law aimed at stanching frivolous securities lawsuits. The hedge fund says Braemar intentionally made its bylaws ambiguous, and it can't use that vagueness to keep Blackwells from nominating candidates to the company's board of directors.

The hedge fund says it was forthcoming about its bid to buy the company and subsequent withdrawal of that offer. Braemar's claims that Blackwells wants to stack the company's board while secretly planning to buy it aren't actionable under federal securities law, it says.

"Once elected, Blackwells nominees will not have the ability to sell Braemar without the consent of its stockholders," the hedge fund said. "Braemar's contention is thus clearly a pretextual gambit meant to avoid a contested director election."

Blackwell's nominees would be beholden to the company's shareholders, it says. If Braemar truly believes that the election of new directors could result in an underhanded company sale beneath the feet of shareholders, "they are welcome to present that argument to whomever they like in their solicitation for votes in the director elections."

Both sides have sparred after a bid from Blackwells to buy Braemar went pear-shaped in late 2023. Braemar **sued last month**, saying the hedge fund wanted to run an illegal proxy contest to take control of the company's board of directors while hiding plans to buy it.

In late 2023, Blackwells submitted a written proposal to acquire all of Braemar's outstanding equity interests. Blackwells refused to give Braemar basic information about the bid, the hotel REIT says, including any evidence that Blackwells could secure the needed financing.

Instead of answering Braemar's questions, Blackwells responded with "baseless litigation threats, and launched a proxy contest to elect its hand-picked purported nominees to the board," Braemar said in the complaint.

Earlier this month, Blackwells **sued in kind**, calling Braemar an "underperforming real estate company that has been egregiously mismanaged by its board of directors."

"The board is chaired by defendant Montgomery J. Bennett, who in recent years has engaged in a troubling series of self-dealing transactions designed to further his own financial interests," the hedge fund said in the complaint.

Under Bennett's leadership, Braemar has paid well above market value in a series of transactions with other firms that are subsidiaries of Ashford Inc., a company in which Bennett owns a substantial stake, according to Blackwells. Bennett is the board chair and CEO of Ashford Inc.

Fees paid to external manager Ashford and Bennett ballooned to \$61 million in 2023, nearly doubling just in the past two years to a figure representing almost half of the company's entire market value, Blackwells alleged in a statement.

Earlier this month, Blackwells told Braemar investors it **planned to stack the board** with its own nominees.

Braemar is in a pitiful state despite its exceptional assets, the hedge fund said at the time. Over the last 10 years, it added, the share price has dropped 90% — and during that same period, the management fees paid to an Ashford subsidiary have ballooned by 575%.

Representatives for Braemar and Blackwells didn't immediately respond to a request for comment.

Braemar is represented by M. Scott Barnard and Tabitha M. Kempf of Akin Gump Strauss Hauer & Feld LLP and Adam K. Magid, Samuel G. Mann and Sanders Keyes Gilmer of Cadwalader Wickersham & Taft LLP.

Blackwells is represented by Robert Ritchie and K. Virginia Burke DeBeer of Vinson & Elkins LLP.

The case is Blackwells Capital LLC v. Braemar Hotels & Resorts Inc. et al., case number 3:24-cv-00894, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Charlie Innis and Grace Dixon. Editing by Jay Jackson Jr.