

Business Law Prof Blog

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Thursday, April 18, 2024

Tesla and Waste

By Ann Lipton

Yup, we have another opportunity for Elon Musk to make new law.

This time, it comes in the form of an extraordinary proxy statement recommending that shareholders vote to ratify the compensation package that Chancellor McCormick invalidated in *Tornetta v. Musk*, and that they vote to reincorporate the company in Texas.

There are many many questions raised and I'm sure I'll be revisiting a bunch of them over the next couple of months, but I'm zeroing in on one in particular: the pay package ratification vote. Can they really do that?

And hoo boy did this get long, so behind a cut it goes; however, I personally find the most interesting part to be the realpolitik of it all if it ends up in a courtroom, so knowledgeable readers may want to skip to that part at the end.

More under the jump

Let's leave aside the obvious issues of the independence of the special committee of one, namely, Kathleen Wilson-Thompson, the suggestion that only a captured board would even make these proposals, whether the proxy statement is complete and accurate, all of which I am sure will be the subject of future controversy. Let's assume it all is what it is at face value. Then the question becomes, can a majority shareholder vote restore the 2018 package?

Tesla argues initially that this would be a ratification of a defective corporate act under DGCL 204. If we accept that under Delaware law, board actions are "twice tested" – first for statutory authorization, and second for compliance with fiduciary obligations – then DGCL 204 would seem to be designed to handle problems with the former, not the latter, and is inapplicable here.

So that brings us to the common law issue. Can a board choose to award the pay package for past work, subject to shareholder ratification upon disclosure of the complete facts?

Certainly, a board could award backpay in order to ensure Musk's *future* services. That is, if Elon Musk were to say, I refuse to serve as Tesla CEO unless you restore my old pay package (presumably, in addition to granting a new one), that would be a legitimate reason for the board to restore the old award.

The problem is, Musk isn't saying that. Nothing in the proxy suggests he's said anything like that, and of course, in her *Tornetta* decision, Chancellor McCormick found that Musk never had any intention of stepping away from Tesla.

So now we have a narrower question: Can the board choose to grant a pay package of that size simply as a reward for *past* work, that has already been accomplished and can't be taken back?

For sure, boards award bonuses and rewards to people for their past work all the time, even when not contractually obligated to do so. In fact, there's a line of Delaware cases approving retroactive awards for "extraordinary" past work if amounts involved are not "unreasonable," *Blish v. Thompson Automatic Arms Corporation*, 64 A.2d 581 (Del. 1948), or upon an executive's retirement, *Zucker v. Andreessen*, 2012 WL 2366448 (Del.Ch. June 21, 2012).

But – though I suppose you could make the argument – it's very difficult to say those cases would apply here, because those situations, too, have forward-looking elements: continuing employees may be motivated to perform well in the future, retiring employees offer consideration to the company (assistance with succession planning, extension of confidentiality agreements, see *Zucker*, 2012 WL 2366448 at *8), and of course, in general, *other employees* can see the awards and may be motivated to offer similar service in hopes of receiving their own.

None of that is relevant here. Tesla is not arguing the award is necessary to secure Musk's future services and it's not like there are comparable Tesla employees out there looking to Musk's compensation as a model for themselves. Plus, McCormick *already* concluded that the amount was *unreasonable*.

Making the problem even more difficult, Tesla itself does not offer much of an economic justification for restoring the old pay package. The only *reasons* being offered for restoring the package are:

Stockholders Want To Speak For Themselves....

A Ratification Vote Cures *Tornetta*'s Disclosure Criticisms.

Ratification Could Avoid Further Uncertainty Regarding Musk's Compensation And Motivation.....

Seeking Ratification Now Potentially Avoids A Criticism Of The Reincorporation Vote.

Seeking Ratification Now Potentially Avoids Other Costs....

Let's take these justifications one by one.

"Shareholder democracy" sounds great on a poster but anyone will tell you, a Delaware corporation "is not a New England town meeting."

Disclosure is all fine and good but it's not by itself an economic justification for the award.

The claim that ratification will eliminate uncertainty is undercut by the accompanying footnote: "Of course, even a favorable ratification vote by stockholders may not fully resolve this matter. The Committee and its advisors cannot predict with certainty how a vote to ratify Musk's compensation would be treated under Delaware law in these novel circumstances." Seems to me, it's only going to inspire additional litigation.

I actually agree, seeking ratification under Delaware law avoids the suggestion that reincorporation is being sought just to give Musk his pay package back, but it's not a primary justification in the first instance.

Which brings us to the final rationale: avoiding other costs. What costs are those?

For one, the report mentions the lawyers' fees in the original *Tornetta* action. I won't weigh in on the legal effect that ratification would have on those fees, but I can count, and Musk's comp package costs a lot more than paying the fees, if you're doing a trade.

Another cost avoided is the time to negotiate a replacement compensation package "in order to motivate him to devote his time and energy to Tesla," coupled with something about the tax effects of a new package. And the proxy states, cryptically, "the Special Committee did not seek to negotiate a new compensation package with Mr. Musk and there is no such new compensation package planned by the Company."

The problem is, don't we expect they're going to consider a new package on a go forward basis at some point? Before *Tornetta* came down, Musk tweeted that very thing: that the board was waiting for *Tornetta* before negotiating a new deal. He demanded 25% of the company so he could develop AI, there were headlines about it. Are they seriously suggesting that if Musk gets his back pay, there won't be any future comp packages?

Hey, that might something the SEC could ask about.

But more generally, let's say – fine. The point is this in an award intended for the *future*, to motivate him.

Then we have another problem, which is Wilson-Thompson did not evaluate the fairness of the package to ensure Musk's future motivation, nor did she hire a compensation consultant or financial advisors to assist with that endeavor. According to the proxy statement, "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."

Instead, check out this language from Wilson-Thompson's report:

The Committee did not renegotiate the amount or terms of Musk's 2018 compensation plan. That would not have been, in the Committee's view, ratification; that would have functionally been a new compensation process and a new compensation plan, to be judged on their own substantive merits. The Committee also did not evaluate whether the amount or terms of Musk's 2018 compensation plan were fair, or opine on the *Tornetta* ruling about its fairness. The Board previously decided in January 2018 that the compensation plan was fair, and Wilson-Thompson was not on the Board at that time. Moreover, the defendants will be appealing the *Tornetta* ruling because they believe the compensation plan is fair and should be upheld as agreed. The Committee assessed only whether *this 2018 compensation plan*, as it was previously agreed to, should be ratified *at this time*, based on the facts that currently exist.

(emphasis in original)

Tesla seems to be trying to have it two ways: this is both a new compensation package, with new board consideration and new shareholder approval, in light of facts that exist today, *and* an old one. By saying it's an old one, Tesla can claim there was no need to reconsider the substance of it; by saying it's a new one, Tesla can claim that the process was done correctly, with an independent board committee and full disclosure to shareholders.

Legally, there's a reason for the slipperiness. McCormick found that Musk was a controlling shareholder when he negotiated the original grant, and under *Kahn v. M & F Worldwide Corp*, 88 A.3d 635 (Del. 2014), controlling shareholder transactions must be negotiated by an independent committee, and conditioned on disinterested shareholder approval, from the outset. There's no path to offer those protections midway through negotiations, because of the risk that the protections themselves will be traded for concessions to the controller. Or, more simply, the tainted original negotiations may improperly serve as an anchor once the protections are in place – and I can't think of anything more anchoring than Wilson-Thompson explicitly refusing to reconsider the substantive merits of the original grant.

So. If this is all part of the original transaction, it violates *MFW*. But if it's an entirely new grant, we need a reason for it – and we're back to the part where the only economic reason is future motivation, which was not actually considered by Wilson-Thompson in any kind of rigorous way.

Wilson-Thompson's report refers to "fairness." Fairness is something to strive for, but the reason that McCormick found the package was *unfair* was because the shareholder vote was tainted by misleading disclosures, and the board was captured by Musk, who manipulated their deliberative process, resulting in a compensation award that was far beyond what was needed to secure his services, given that, as a large Tesla shareholder, he already had plenty of motivation to increase Tesla's value. Moreover, she also found the compensation package was short-termist in its goals and, well, looking at Tesla's stock price as of this posting, it's hard not to agree.

Plus, we all know what Musk does with extraordinary excess wealth: he uses it to pursue outside projects, like Twitter, which only draw his attention away from Tesla, rather than toward it.

More generally, Delaware corporations are supposed to maximize shareholder wealth; fairness, like any other virtue, is only to be pursued instrumentally, in service of that end. *Cf.*, *Verition Partners v. Aruba* ("Orr pursued the HP deal ... because of loyalties to constituencies beyond the stockholders. In the grander scheme of life, I find that commendable. For the narrow purpose of Delaware corporate law, those competing loyalties are factors that a court has to weigh."); *eBay Domestic Holdings v. Newmark*, ("I personally appreciate and admire Jim's and Craig's desire to be of service to communities. The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment.").

Usually, behaving "fairly" will motivate employees and other constituencies to perform well in the future, but, in this case, once again, that's off the table.

Which means, awarding back pay in this instance looks like – a gift. A sheer gift to Musk out of gratitude for his past work for Tesla.

Gifts are nice. Gifts are fine. But a gift of corporate assets with no corresponding benefit falls into the legal category of "waste." In fact, the classic "waste" cases – there are very few, it doesn't happen often – were sort of like this fact pattern, i.e., a board decides to award a large pay package to a founder/insider, with no plausible benefit to the firm.

Technically, waste is a kind of ultra vires act undertaken by the board that can only be ratified by a *unanimous* shareholder vote, rather than simply a majority vote. See *Harbor Financial Partners v. Huizenga*, 751 A.2d 879 (Del. Ch. 1999).

To be sure, as Steve Bainbridge pointed out on exTwitter, that standard fits somewhat uncomfortably alongside more modern approaches to Delaware law, because – as VC Laster has written – today, waste is viewed less as ultra vires than as a kind of bad faith fiduciary breach. And fiduciary breaches, usually, can be cured with a simple majority vote of the disinterested shareholders. So there’s certainly an *argument* that the old unanimity standard should be rejected in favor of the modern rule.

That may be a tough lift, though. Does that mean other kinds of bad faith acts can be ratified by shareholders? What if the board violates *Caremark* by failing to adopt a surveillance system to identify legal violations; can that be cured by a majority shareholder vote?

More generally, by hypothesis, we’re assuming a transaction that leeches wealth from the firm with no plausible corresponding economic benefit. The shareholder vote is *itself* predicated on the notion – legally – that shareholders are acting to pursue their economic interests. And in a world where boards are legally obligated only to pursue wealth maximization, there’s something to be said for a rule that shareholders cannot ratify board action that is, again, by hypothesis, economically irrational and wealth-decreasing.

That *said*, consider what happens if/when this ends up in court. If shareholders vote to reject the pay package, then we’re done. So while there might be all kinds of skirmishes over board independence and proxy disclosures and what not, we’ll only get to “pure” arguments about the limits on economically irrational action in the event that the shareholders have voted in favor.

Tesla has a large retail shareholder base, but if the resolution passes, almost certainly some large institutions will have supported it. The proxy statement mentions certain unnamed large institutions have *already* indicated their support, and includes a letter from T. Rowe Price, arguing that it would only be “fair” to award Musk his backpay.

It may be *difficult*, as a factual matter, to argue that the pay package is economically irrational if large institutional shareholders vote in favor of it. After all, are we claiming that giants like BlackRock and T. Rowe Price are voting to give away corporate assets?

I don’t find that plausible but Tennessee and Mississippi do; they’re suing BlackRock alleging *exactly* that, namely, that it is pursuing a climate change agenda to achieve its own environmental goals rather than to maximize wealth for investors. And any number of academic luminaries have written extensively about the conflicts faced by large asset managers, and have proposed that their influence be reduced in various ways.

I also keep thinking about the bind these funds are in. There is something gut-level appealing about “deal’s a deal” logic, and that’s the argument in T. Rowe Price’s letter. I could even imagine something vaguely wealth-maximizing about demonstrating that a corporation lives up to its commitments, which would put us back to economic justifications

for ratifying the package. But then we're also back to grappling with – as the letter does not – the factual findings by McCormick that Musk manipulated the deal to his advantage and Tesla misled shareholders about it in the proxy. If T. Rowe Price or any other institutional investor thinks Musk should get backpay in a “deal's a deal” way, my question is, what do they think of McCormick's factual conclusions? Do they disagree that they were misled? Do they think the process problems don't matter? I'm not saying either of those things are off the table, actually, but I am saying a clearer articulation would be helpful.

And then there's the elephant in the room. If large asset managers vote to restore the grant – which is still shockingly rich, even though Tesla's stock price has tumbled well below the original milestones – the suspicion will be that they're doing it not to motivate Musk to perform well or to reward him for past performance, but to *keep* Musk from further sabotaging the company, by, say, tweeting “Tesla stock price too high” or pursuing AI in his outside ventures while using Tesla data.

One of the more interesting details to come out of the *Tornetta* litigation was that ISS, apparently, pulled its punches in its recommendation on the original package, hesitating to openly accuse the Tesla board of a lack of independence. Coerced votes – under threat that the company will be torpedoed if shareholders don't approve a particular course of action – do not have a ratifying effect under Delaware law.

But, of course, *proving* coercion would be difficult here; we might suspect it, but certainly nothing in the proxy statement hints at it. Let's just say discovery into large shareholders' true motives would be. Entertaining, if we ever got that far.

So, there is a real case for waste here, and, at least until the law changes, waste can only be ratified unanimously. Still, the easiest practical strategy for a court might simply be to say, it's implausible to think that large asset managers would vote for something economically irrational, therefore it's not economically irrational, therefore it's not waste, and therefore a unanimous vote is not necessary. I don't find that especially *satisfying*, but it's certainly the path of least resistance, if that's where we end up.

I'll finish with this: I kind of assume we'll see an enormous amount of *political* pressure on the large asset managers to vote this way or that way, to demonstrate their support/lack thereof of Elon Musk personally. (Same for the recommendations of the proxy advisors.) Which is, you know, how we do corporate governance now, but also is yet another example of the conflicts institutional shareholders might face.

Pinned



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...

Normally, I ignore these things, and let the work speak for itself, but in this case I think asking questions is fair, so, I will state.

I left BLBG in 2013 as an associate. I have no continuing interest in the firm or any of its cases. I have no investment in any stock -

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...

- other than through general mutual funds, and I have not performed any form of paid advocacy work since 2013.

Do with that what you will.



340





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...

Post in haste, regret at leisure. Me on Musk, Tesla, and corporate waste:

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8



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KSAlberta @k_salberta@masto.ai @ksalberta.bsky.sc @k_salberta · 3h ...

I think you meant to write that "it's hard not to agree" when referring to McCormick's reference to short-term goals and Tesla's current share price. A great read, and if nothing else, Tesla does generate some very interesting legal questions. Not a good reason to buy it!



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541



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ah thanks. post in haste, etc.

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Joe Dudek @JoeDudekJD · 49m

You know what haste makes ...

...



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75



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oh no

...



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Eric Child  @childejc · 1h

Each month I give my labour for the benefit of my employer.

...

I do this on the understanding that at the end of each month they will pay me the amount promised in my contract with them.

Are you suggesting that such payments are discretionary because they are made after the fact?...

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Tesla tries legal 'Band-Aid' to revive Musk's huge pay deal

 [reuters.com/legal/tesla-tries-legal-band-aid-revive-musks-huge-pay-deal-2024-04-18](https://www.reuters.com/legal/tesla-tries-legal-band-aid-revive-musks-huge-pay-deal-2024-04-18)

Tom Hals, Jody Godoy

Item 1 of 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

[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 , opens new tab

April 18 (Reuters) - Tesla (TSLA.O) , opens new tab and Elon Musk are seizing upon an obscure provision in corporate law to attempt to restore Musk's \$56 billion pay package, in an untested move that could again mire the company in litigation, legal experts said.

The electric vehicle maker on Wednesday proposed putting Musk's 2018 pay deal to a shareholder vote, even though a Delaware judge voided it in January.

Tesla is using a little-known section of Delaware's corporate law that lets companies fix procedural defects that would otherwise nullify their boardroom decisions.

Tesla called the approach "novel" in its securities filing and said the special board committee that approved it could not predict how it would be treated under Delaware law.

Eric Talley, a professor at Columbia Law School, said the provision is meant to be a "Band-Aid" for technical boardroom mistakes, not to undo major court rulings.

Tesla said in the proposal that thousands of shareholders were incensed over the ruling by Delaware Chancellor Kathaleen McCormick, who found that Tesla directors were not independent when they recommended the "unfathomable" package and failed to negotiate with Musk.

McCormick ruled after years of litigation and a week-long trial that those and other key details were withheld from investors before they voted to approved the pay package.

Tesla proposed to fix that in two ways. In an attempt to remove board conflicts, it had an independent director, Kathleen Wilson-Thompson, review the 2018 pay deal to decide if it was in the best interest of shareholders.

In addition, it will give shareholders the chance to vote again after reviewing McCormick's findings. Shareholders will have 120 days to challenge the proposal if it is approved.

Tesla did not attempt to correct the flaws in the negotiations that McCormick identified. The company did not propose a new pay package to Musk or hire new compensation consultants to review the record-smashing pay deal, according to the company's proposal.

If shareholders approve, Talley and others said it could make it easier for Musk to win on appeal in the Delaware Supreme Court, because it could shift the burden to the plaintiffs to prove Musk's pay was unfair. In the trial, Musk had to prove the pay and the process were fair.

But other experts said the proposal was all but guaranteed to invite more shareholder lawsuits.

In part, that is because the pay package took effect in 2018 and rewarded Musk if Tesla hit certain milestones, which it soon did. Musk received options [\[link\]](#), opens new tab to purchase around 304 million Tesla shares at a deep discount, although he never exercised those options.

Ann Lipton, a corporate law professor at Tulane University, said it is unclear Tesla if can now pay Musk not for achieving future milestones, but for past performance. She said it could be considered a waste of corporate assets.

"They are saying we are essentially giving him money because we like him so much and for no other reason. That is not something you can just ratify with a majority shareholder vote," she said.

The proposal announced by the company on Wednesday raises questions of whether boardroom decisions that allegedly breach fiduciary duties to investors can be wiped clean by leaving it to shareholders, rather than a judge, to decide what is acceptable.

Delaware law experts said they were unaware of precedents for overcoming a court ruling by using a shareholder vote in this way.

"That's the \$56 billion question," said Larry Hamermesh, a professor with Widener University Delaware Law School. "Their position clearly is that all we need to do is have the stockholders say, 'Oh, no, we, we hear you chancellor, but this is okay with us.'"

Reporting by Tom Hals in Wilmington, Delaware; Editing by Amy Stevens and Jamie Freed

Tom Hals
Thomson Reuters

Tom Hals is an award-winning reporter with 25 years of experience working in Asia, Europe and the United States. Since 2009 he has covered legal issues and high-stakes court battles, ranging from challenges to pandemic policies to Elon Musk's campaign to end his deal for Twitter.

Mapping Tesla's Road From Delaware to Texas, and Big Musk Payday

By Jef Feeley and Madlin Mekelburg

Bloomberg Law News 2024-04-18T10:18:00889038327-04:00

Mapping Tesla's Road From Delaware to Texas, and Big Musk Payday

By Jef Feeley and Madlin Mekelburg2024-04-17T15:05:27903-04:00

Elon Musk's car company on Wednesday proposed to grant him the same \$56 billion pay package that its shareholders approved six years ago — and that Delaware's top business law judge shot down in January as excessive.

In a proxy filing, Tesla Inc. calls for the compensation plan to be ratified all over again, despite the judge's decision, and also asks investors to shun Delaware and vote for Tesla to reincorporate in Texas. A special committee the company formed this year urged that the two matters be voted on together so the Texas move wouldn't be seen as a way to grant Musk a pay deal he couldn't get in Delaware.

Read More: Tesla Asks Investors to Approve Musk's \$56 Billion Pay Again

The carmaker will convene its annual meeting on June 13, and investors will have their say on both proposals.

What are the legal ramifications? Here are some answers.

What's next in the Delaware case?

The judge scheduled a July 8 hearing to decide whether lawyers for the Tesla shareholder who brought the case should get \$6 billion in Tesla stock as a legal fee for their successful challenge to Musk's compensation plan. Once she makes that ruling and issues a final order in the case, Musk is free to ask the Delaware Supreme Court to review her decision on his pay.

How do Tesla's proposals affect the case?

Unless the court's decision is reversed on appeal, the pay package is void under Delaware law. But if the shareholders approve the move to Texas as Tesla's corporate home and it is finalized, any new challenge to Musk's pay would have to be filed there, said Charles Elson, a retired University of Delaware professor who founded the school's Weinberg Center for Corporate Governance.



Elon Musk

Photographer: Nathan Laine/Bloomberg

Why do Musk and Tesla want to move to Texas?

Musk and his fellow directors say the court's decision was wrong and hope Texas law will provide more latitude for big corporate decisions, like the board's blessing of the largest executive pay package in history. The Tesla board says Musk got extraordinary performance out of the company, met his targets and deserves the pay that the shareholders approved. Musk has launched a "Ditch Delaware" campaign to encourage other business titans to switch their companies' incorporation. So far he's gotten little response.

Read More: [Tesla Investors Sound Off to Judge Who Voided Musk Pay Plan](#)

Why Texas in particular?

Musk moved Tesla's headquarters to Austin in 2021 from California after criticizing that state's Covid restrictions. Texas has been luring companies for years by touting its low taxes and light regulatory touch. Being Tesla's legal home would dovetail with the state's push to develop its own business court system. Legal experts expect Texas to prove more forgiving to directors and executives when it comes to reviewing corporate acts such as the approval of pay packages.

Is that new business court up and running?

No. The courts won't even go into operation until September, and Texas officials are struggling to recruit judges with the requisite experience in complex business litigation. The starting salary for a judge on a Texas business court would be \$140,000, while a Delaware Chancery judge starts at almost \$185,000.

Any chance a Tesla shareholder could sue in Delaware to block a move to Texas?

Yes. Any Tesla shareholder could sue over the move, arguing investors' rights are being improperly weakened by shifting the company to a state with less stringent corporate governance rules. In fact, there's a pending case involving a challenge to the move of online travel company Tripadvisor to Nevada that could affect a Tesla move. The Delaware Supreme Court recently agreed to review a judge's finding that Tripadvisor has the power to relocate.



Chancellor Kathaleen St. J. McCormick
Photographer: Eric Crossan/AP Photo

Why was Tesla incorporated in Delaware in the first place?

Delaware is the incorporation capital of the US, with more than 1 million businesses set up in the state. Almost 70% of Fortune 500 companies are incorporated there, mostly to take advantage of Delaware's nearly 100 years of corporate law rulings and its Chancery Court, which can quickly hear corporate litigation without a jury. The court's jurists — such as chief judge **Kathleen St. J. McCormick**, who wrote the 200-page decision that sank Musk's compensation deal — are recognized as business law experts.

Read More: Musk Pay Package Voided, Threatening World's Biggest Fortune

Has Musk already yanked any of his other companies from Delaware?

Yes. He moved his closely held SpaceX to Texas in February. Since the space exploration company isn't public, shareholders didn't get a vote on the move. In a social media post celebrating the move, Musk urged, "If your company is still incorporated in Delaware, I recommend moving to another state as soon as possible." He reincorporated his privately held brain implant company Neuralink Corp. to Nevada earlier this year as well.

The Tesla case is *Tornetta v. Musk*, 2018-0408, Delaware Chancery Court (Wilmington).

--With assistance from **Dana Hull**.

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NEWS

Ninth Circuit Affirms Dismissal of Securities Claims Against Gaming Platform

The three-judge panel ruled that the shareholders hadn't provided adequate facts to support their claims that Skillz, represented by Latham & Watkins, misled them.

April 17, 2024 at 02:46 PM

Securities Litigation



Ellen Bardash



The U.S. Court of Appeals for the Ninth Circuit has affirmed dismissal of a securities action against mobile games platform Skillz, finding the company hadn't oversold the platform's success to investors.

The five-page [opinion](#) released Tuesday ends the appeal of a Northern District of California decision brought by short-sellers claiming they purchased stock at a price Skillz artificially inflated by touting overall growth while failing to disclose relevant user engagement metrics.

The three-judge panel, which heard arguments on April 1, wrote that the shareholders hadn't provided adequate facts to support their claims that Skillz, represented by Latham & Watkins, misled them in four areas: the company's investments in synchronous gaming, its disclosure of monthly active users rather than the average revenue per paying user, the rate at which game downloads were declining and the risks of promotional incentives available to users.

"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 court stated in reference to shareholder allegations involving flaws in Skillz' software.

The court also wrote the plaintiffs could have accessed the information they claimed was omitted from disclosures through documents that were already public.

Skillz Inc. is the surviving entity of a 2020 de-SPAC merger, with Flying Eagle Acquisition Corp. acquiring Skillz, which is headquartered in Las Vegas, at a \$3.5 billion valuation.

The original [complaint](#), filed in May 2021, said Skillz "exemplified the problem with SPACs," stating SPAC management's incentive to close a deal regardless of the target's value conflict with investors' interests.

Critics of the blank check acquisition vehicles that saw a surge in popularity around 2020 have argued that misalignment motivates SPAC management to misrepresent or omit information about the target company in order to make the transaction more attractive to investors, an argument plaintiffs' counsel claimed held true in the Skillz acquisition.

Neither the district court nor the Ninth Circuit stated the de-SPAC circumstances of the allegations in the case played a role in their motion to dismiss analysis.

Plaintiffs' counsel with Lowey Dannenberg and Schubert Jonckheer & Kolbe did not immediately respond for comment.

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April 17, 2024, 2:56 PM PDT

GEO Group Leaders, Investors Get First Approval to Settle Suit

By Martina Barash

Bloomberg Law News 2024-04-18T10:24:55784630362-04:00

GEO Group Leaders, Investors Get First Approval to Settle Suit

By Martina Barash 2024-04-17T17:56:26000-04:00

Plans to improve corporate governance at The GEO Group Inc., offered by both sides to settle a suit over representations about the prison operator's financial condition, are sufficient for preliminary approval of the deal, a federal court ruled.

The green light to proceed to a settlement hearing came Tuesday from Judge Rodney Smith of the US District Court for the Southern District of Florida.

- The shareholder derivative suit alleges that GEO directors harmed the company by downplaying the financial risk from lawsuits over inadequate Covid-19 protections at its facilities, estimated internally at tens of millions of dollars in liability and \$20 million in legal costs
- A separate securities class action against GEO settled for \$3 million, receiving final approval from Smith in November 2023
- Proposed reforms at GEO include a chief compliance officer position, director education, and a reporting hotline, according to the approval request

Moore Kuehn PLLC, Rigrodsky Law PA, and William J. Cook, who practices in Tampa, Fla., represent investor Rui Zhang. Akerman LLP and King & Spalding LLP represent GEO and its directors.

The case is Zhang v. Zoley , S.D. Fla., No. 9:21-cv-82061, 4/16/24 .

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Honeywell Spinoff Defeats Investor Appeal Over Liabilities (1)

By Martina Barash

- Garrett Motion's upbeat statements targeted by investors
- Complaint didn't adequately show intent, 2d Circuit says

Bloomberg Law News 2024-04-18T10:21:1161861868-04:00

Honeywell Spinoff Defeats Investor Appeal Over Liabilities (1)

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

- Garrett Motion's upbeat statements targeted by investors
- Complaint didn't adequately show intent, 2d Circuit says

Garrett Motion Inc. investors didn't adequately allege the Honeywell International Inc. spinoff's leaders intended to deceive them when touting the business despite its 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, also "acknowledged the risks posed by its capital structure many times" in the period leading up to its bankruptcy, the court said.

Shareholders in another Honeywell spinoff, Resideo Technologies Inc., alleged that Honeywell arranged for the home automation company to take on failing business lines and billions of dollars in environmental liabilities. Resideo settled with the investors for \$55 million in 2022, and a derivative suit resulted in a commitment to internal governance reforms there. Meanwhile, Honeywell itself paid \$10 million to settle a shareholder suit alleging it made misleading statements about asbestos-related liabilities stemming from its acquisition of Bendix Friction Materials, which used asbestos to manufacture automobile brakes.

The Garrett investors asked the Second Circuit to reinstate their case because they had adequately alleged recklessness by the company and its leaders, allowing for an inference of deceptive intent, or scienter.

The appeals court disagreed. “The inference of scienter is not compelling because Garrett’s liabilities and the terms of the Honeywell indemnity were public information, and Garrett spoke candidly about the risks posed by its capital structure on numerous occasions” from late February 2020 up to just before the bankruptcy filing, the period covered by the complaint.

Judges John M. Walker Jr., William J. Nardini, and Steven J. Menashi served on the panel.

Entwistle & Cappucci LLP represented the investors. Quinn Emanuel Urquhart & Sullivan LLP represented Garrett.

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

(Updated with detail from opinion and context in fourth through eighth paragraphs.)

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April 17, 2024, 7:52 AM PDT

Clean Harbors Inks Class Deal in Challenge to 401(k) Plan Fees

By Jacklyn Wille

- Parties say settlement details will be made public in June
- Boston federal judge declined to dismiss case last year

Bloomberg Law News 2024-04-18T10:25:34866087147-04:00

Clean Harbors Inks Class Deal in Challenge to 401(k) Plan Fees

By Jacklyn Wille 2024-04-17T10:52:26000-04:00

- Parties say settlement details will be made public in June
- Boston federal judge declined to dismiss case last year

Clean Harbors Environmental Services Inc. announced plans to settle a proposed class action by a former employee who says the waste management company mismanaged its retirement plan by offering pricey investments and high-cost stable value funds.

The parties reached a tentative class settlement and plan to submit the deal for court approval by June 14. Their notice, filed Tuesday in the US District Court for the District of Massachusetts, didn't include details about the terms of the agreement.

The lawsuit says Clean Harbors filled its \$813 million retirement plan with expensive retail share class mutual funds when the same investments were available at lower cost. The lawsuit also challenges the plan's stable value funds, which allegedly carried high fees that drove more than \$4.6 million in losses.

Judge George A. O'Toole Jr. allowed the case to advance in August, saying that claims of fiduciary imprudence under the Employee Retirement Income Security Act are "context specific," and that it's a "heavy lift" for retirement plan sponsors to have these cases dismissed outright.

Hundreds of lawsuits challenging retirement plan fees have been filed in federal courts over the past few years, and dozens of employers have agreed to class-wide settlements. Recently announced deals include those signed by Spectrum Health System for \$6 million, Wake Forest University Baptist Medical Center for \$3.8 million, Omnicom Group Inc. for \$2.45 million, VCA Inc. for \$1.5 million, Pactiv Evergreen Services Inc. for \$725,000, and Taylor Corp. for \$485,000.

Maersk Plans to Settle Would-be Class Suit Over 401(k) Plan Fees

By Jacklyn Wille

- Judge hasn't yet issued ruling on merits of ERISA lawsuit
- Hundreds of employers have been sued over retirement fees

Bloomberg Law News 2024-04-18T10:25:59031424157-04:00

Maersk Plans to Settle Would-be Class Suit Over 401(k) Plan Fees

By Jacklyn Wille 2024-04-17T11:26:19000-04:00

- Judge hasn't yet issued ruling on merits of ERISA lawsuit
- Hundreds of employers have been sued over retirement fees

Maersk Inc. reached a deal to settle a proposed class action challenging the the administrative fees charged by its employees' 401(k) plan.

Maersk and plaintiff Charlene Leon reached a tentative agreement to settle the seven-month-old lawsuit and plan to submit details of the deal for court approval by June 7, they said in a joint status report filed Tuesday in the US District Court for the Western District of North Carolina.

Leon's lawsuit says Maersk, a container shipping company, mismanages its \$766 million retirement plan by forcing workers to pay average annual administrative fees of \$190, when participants in similar plans paid about \$47 per person for administrative services.

Leon also takes issue with Maersk's alleged practice of charging different fees to active employees and plan participants who are no longer with the company. Forcing former employees to subsidize the cost of retirement plan administration for active workers is a violation of the Employee Retirement Income Security Act's fiduciary duties of loyalty and prudence, according to the lawsuit.

Maersk said in a December court filing that the case should be dismissed, disputing Leon's authority to sue and saying she brought "cookie-cutter" claims that have "become commonplace in recent years."

Hundreds of lawsuits challenging retirement plan fees have been filed in federal courts over the past few years, and dozens of employers have agreed to class-wide settlements. Recently announced deals include those signed by Spectrum Health System for \$6 million, Wake Forest University Baptist Medical Center for \$3.8 million, Omnicom Group Inc. for \$2.45 million, VCA Inc. for \$1.5 million, Pactiv Evergreen Services Inc. for \$725,000, and Taylor Corp. for \$485,000.

The case against Maersk is assigned to Judge Robert J. Conrad Jr., who hasn't ruled on the merits of the dispute.

Walcheske & Luzi LLC and Fitzgerald Hanna & Sullivan PLLC represent Leon. Morgan, Lewis & Bockius LLP and Johnston, Allison & Hord PA represent Maersk.

The case is Leon v. Maersk Inc. , W.D.N.C., No. 3:23-cv-00602, status update 4/16/24 .

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Google, US states defend \$700 mln Play store antitrust settlement

 [reuters.com/legal/transactional/google-us-states-defend-700-mln-play-store-antitrust-settlement-2024-04-18](https://www.reuters.com/legal/transactional/google-us-states-defend-700-mln-play-store-antitrust-settlement-2024-04-18)

Mike Scarcella

The logo of Google LLC is seen at the Google Store Chelsea in New York City, U.S., January 20, 2023. [REUTERS/Shannon Stapleton Purchase Licensing Rights](#) , opens new tab

April 18 (Reuters) - Google and all 50 U.S. states have urged a federal judge to approve a sweeping \$700 million consumer settlement to resolve claims that the tech giant inflated app store prices, after the judge in February questioned whether the proposed deal went far enough.

In a pair of court filings late Wednesday, Google and the states told U.S. District Judge James Donato in San Francisco that the settlement was “fair, reasonable, and adequate.”

The states touted , opens new tab the amount of the settlement and the changes that the Alphabet (GOOGL.O) , opens new tab unit promised to implement as part of the agreement. Google in its filing , opens new tab said its commitments to overhaul its app store Play were “unprecedented.” Both sides called the accord a compromise. Donato previously questioned the adequacy of the small sums that individual consumers might receive in the deal, and asked for more information about the restrictions on Google's conduct included in the settlement.

Google and the California attorney general's office, which helped lead the states' coalition, did not immediately respond to requests for comment.

Attorneys for the states announced the proposal in December, resolving claims that Google violated antitrust law by imposing too tight of a grip on app distribution and payments. Google denied the allegations but said it was taking steps to allow for greater competition.

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Google as part of the settlement agreed to make it easier for developers to tell users about other ways to pay for purchases within apps and for consumers to download apps directly from the web.

The deal included \$630 million for consumers and \$70 million for the states. The states in their new filing said they anticipate \$515 million being available for eligible consumers, after accounting for legal fees and other costs. The states said the average award will be about \$4.41.

The states said they and consumers could sue again after a seven-year window if Google does not abide with the settlement — a provision they called a "a hard-fought win."

Donato is also weighing a related case against Google that was filed by "Fortnite" maker Epic Games.

Epic defeated Google at trial last year, and now has asked the court to impose an injunction that the game maker has called greater in scope than the states' deal. A hearing in Epic's case is scheduled for next month.

The case is *In re Google Play Consumer Antitrust Litigation*, U.S. District Court, Northern District of California, No. 3:20-cv-05761-JD.

For states: Paula Blizzard of California Attorney General's Office; and other states attorneys general

For Google: Brian Rocca of Morgan, Lewis & Bockius; Glenn Pomerantz of Munger, Tolles & Olson

Read more:

[Apple denies violating US court order in Epic Games lawsuit](#)

[Epic Games proposes Google app store reforms after antitrust win](#)

[Legal fees could top \\$120 million from Google's app store settlement](#)

[Google to pay \\$700 million to US consumers, states in Play store settlement](#)

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Reporting by Mike Scarcella

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BEST PRACTICES

10 Things to Keep in Mind When Picking a Jury

Richard Gabriel, president of Southern California trial consulting firm Decision Analysis Litigation Strategies, says modern jurors are coming to cases more set in their opinions, but certain best practices still apply.

April 17, 2024 at 07:30 AM



Ross Todd
Editor/columnist



Richard Gabriel, the president of Southern California trial consulting firm **Decision Analysis Litigation Strategies**, says that in the run-up to trial many lawyers develop a “warrior mentality” as if they’re preparing for battle. Others, believing they have the better evidence and experts, develop “a little bit of sense of entitlement or arrogance.”

Unsurprisingly, Gabriel, who has worked on more than 2,000 trials in one form or another, said neither of those approaches are effective when it comes to getting jurors to go your way.

“The truth is, you really don’t convince jurors, jurors convince themselves,” said Gabriel, speaking as part of a web presentation sponsored by the ABOTA Foundation yesterday. “So allowing for space and really thinking [of] the role of the advocate more as somebody to put their arm around a juror and say, ‘Let’s walk through this together and see if we can figure this out’, allows the jury space to solve the riddle, the puzzle, the mystery in your case.”

Gabriel has helped spearhead [The Trust in Justice](#) project, an effort co-sponsored by ABOTA to better understand what’s driving the well-documented erosion of confidence that Americans have in the criminal and civil justice system. He said modern jurors tend to come to cases with more firmly-held beliefs that they are more vocal about than in years past. But he said sussing out the biases that might make a juror a bad candidate for your case remains consistent. Here are 10 basic points Gabriel encouraged every lawyer to consider when preparing to pick a jury.

1. Have a Jury Selection Plan

Gabriel said that lawyers need to think through much more than just their potential questions for prospective jurors. How does the judge you’re in front of conduct jury selection? Will there be attorney-conducted *voir dire*, or will the judge do all the questioning? Will the judge allow a supplemental juror questionnaire? Gabriel said that getting some agreement with the other side to do even a short, two-page questionnaire can get some valuable information in your hands. “Jurors are more candid when they have to put something down in writing,” he said.

Gabriel also said you want to know how the judge in your case handles for cause and peremptory challenges. He said he was in federal court in the Eastern District of Texas a couple months ago on a civil case. Rather than the three peremptory strikes he was accustomed to, the judge allowed each side to use as many strikes as they wanted to get down to the jury

of eight. “It changed our total jury selection process,” Gabriel said.

Just knowing the setup of the courtroom is important, Gabriel said. Does the judge have new jurors fill empty seats or have jurors that have made the cut slide down and backfill seats with the new jurors added on to the end? Knowing how things will run in the courtroom will change how you chart your prospective jurors and track their responses to questions.

2. Don't Indoctrinate Jurors

Gabriel said that he can understand the desire to plant a theme or highlight some perceived strength of your case during jury selection. But he said that judges tend to allow such limited *voir dire* these days that taking time to plant those seeds with jurors is a secondary concern. “I always want to look at how do we get the best information we can in the limited time we have,” Gabriel said. “Once you're saying indoctrination stuff, you're wasting a lot of time.”

One other problem: If a juror seems to agree with some key point that you're making about your case, “you can then put a big red target on their backs for the other side to strike.”

“My philosophy is always hide your good jurors, reveal your bad jurors,” Gabriel said.

3. Identify Juror Experience and Attitudes

If you're on an employment case, you'll want to elicit information about panel members' work history. If you're in a conservative jurisdiction, perhaps you want to ask about attitudes towards tort reform. But keep the topics you ask about focused, Gabriel said. “If we can identify really what those three to five main bias areas are, that usually, I think, can stand us in better stead,” he said.

4. Ask Open-Ended Questions

Most attorneys are trained to control answers in talking to witnesses, but open-ended, and even ambiguous questions invite potential jurors to show you what they're actually thinking on a potential topic. Gabriel said that if he were working on the defense side of the Manhattan criminal trial underway against Donald Trump, he would simply ask panel members “What do you think of Donald Trump?”

It's a pretty broad, general question, but it “invites the juror to go wherever their mind goes.” That, in turn, reveals a lot about the juror's personality, mindset, and thought process, he said.

5. Really Listen to Jurors

Gabriel said when possible it's important to have someone taking notes and capture the responses of panel members. “They're telling me phrases and stuff that [is] important to them,” Gabriel said. He said sometimes you can even incorporate jurors' own words and phrases into your opening statements and examinations. He said that although you may think the evidence is the most important element of your case, it's actually the audience. He said the ultimate question is: “How do I help them to identify with my case as much as possible?”

6. Facilitate Dialogue

Gabriel said that one of the best ways to get a better picture of who the jury is going to be as a whole is to get them interacting in *voir dire*. For instance, you can ask potential jurors about what they think about a response just given by one of their colleagues on the panel. “I want to see how they play off each other because I want to kind of create almost a mini deliberation in *voir dire*,” Gabriel said. “I can see how jurors are going to work with each other or not work with each other.”

7. Watch Non-Verbals

Here again, Gabriel said that it's useful to have a colleague keeping an eye on the broader panel to see if anyone is reacting—either positively or negatively—to a certain line of questioning through body language or facial expressions. He also said not to be shy about calling on a juror who seems to be skeptical of something you're saying. Attacking those sorts of reactions head on can yield useful information.

8. Don't Ask Whether Someone Can Be "Fair and Impartial" or "Set It Aside"

This one is pretty simple: If you're setting up a for cause challenge, don't rehabilitate the juror yourself.

9. Target High Risk Jurors

Gabriel said that in reality you're not picking the whole jury. You're picking a jury of one, two or three jurors who are going to be your opinion leaders. He brought up the example of a large shareholder lawsuit where he was working with the plaintiffs in Washington, D.C. last year. He said there was a woman on the panel—a government attorney—who seemed like she might side with the plaintiffs. However, Gabriel said she came across as such a strong leader that it raised another set of risks. "We just said, 'Look, she is so opinionated, so strong, that she's going to take this jury wherever she wants to go,'" Gabriel said. "We said, 'If she goes against us, we're sunk.'" They ultimately used a strike on her. "We felt she probably was going to be good for us. We just didn't want to take the risk," he said.

10. Look at the Whole Panel When Making Strikes

Gabriel said there's a difference between a "not great" juror and one that is truly bad for your side. "Sometimes if you use a strike on them, another juror will come into the panel who might be even worse, and it changes the panel dynamic," Gabriel said. If the opinion leaders on your panel are strong and favorable to you, it might be time to stop striking, he said.

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Judge rejects key expert in paraquat lawsuits, tosses first cases set for trial

 [reuters.com/legal/litigation/judge-rejects-key-expert-paraquat-lawsuits-tosses-first-cases-set-trial-2024-04-17](https://www.reuters.com/legal/litigation/judge-rejects-key-expert-paraquat-lawsuits-tosses-first-cases-set-trial-2024-04-17)

Brendan Pierson

The logo is seen at the headquarters of agricultural chemical maker Syngenta in Basel, Switzerland August 6, 2019. REUTERS/Arnd Wiegmann Purchase Licensing Rights , opens new tab

April 17 (Reuters) - A key expert witness in lawsuits claiming that Syngenta's herbicide paraquat causes Parkinson's disease cannot testify in court, a federal judge ruled Wednesday, dismissing the first four cases over the product that were set to go to trial.

Lawyers for agricultural workers suing Syngenta and Chevron (CVX.N) , opens new tab, which sold paraquat before 1986, had sought to have Cornell University professor Martin Wells testify that occupational exposure to the chemical can cause the disease. Without that testimony, U.S. District Judge Nancy Rosenstengel found, the trials cannot go forward.

Rosenstengel's ruling does not apply directly to the more than 5,000 other cases centralized in her court in East St. Louis, Illinois. She ordered the plaintiffs' lawyers and the companies to propose another set of cases for trial, which will give the plaintiffs a chance to offer a new expert.

Rosenstengel, in barring Wells from testifying , opens new tab, said his analysis of the data relied on "unscientific cherry-picking." She also said it was a "red flag" that his view "has not been adopted or independently validated in any peer-reviewed scientific analysis outside of this litigation."

Lead attorneys for plaintiffs in the litigation — Khaldoun Baghdadi of Walkup, Melodia, Kelly & Schoenberger; Sarah Doles of Levin, Papantonio, Rafferty, Proctor, Buchanan, O'Brien; and Peter Flowers of Meyers & Flowers — said in a joint statement that they disagreed with the ruling and would appeal it, and that they looked forward to taking a new set of cases to trial.

"We will continue to prosecute these cases on behalf of the thousands of American farmworkers diagnosed with an incurable and debilitating disease because of their exposure to paraquat," they said.

The companies have denied that paraquat causes Parkinson's, a progressive nervous system disease that causes tremors and difficulty moving.

Chevron said in a statement that the decision affirmed that "despite hundreds of studies conducted over the past 60 years, the scientific consensus is that paraquat has not been shown to be a cause of Parkinson's disease."

A Syngenta spokesperson said the company was pleased with the ruling, which it called "consistent with decades of peer-reviewed scientific literature."

Several hundred paraquat cases are also pending in state courts, most in California. The first state court trials could happen later this year.

The paraquat litigation was, for a time, the most heavily advertised mass tort litigation by plaintiffs' lawyers. Cases were centralized before Rosenstengel in June 2021.

Paraquat has been on the market since the mid-1960s but has been banned in more than 60 countries. It is approved by the U.S. Environmental Protection Agency only for licensed users, often on large commercial farms.

The herbicide is currently marketed in the U.S. by Syngenta under the brand name Gramoxone. It has remained popular partly thanks to weeds becoming resistant to Bayer's Roundup, which is at the center of a separate mass tort litigation.

Syngenta is a subsidiary of Sinochem, a Chinese state-owned company.

The case is *In re: Paraquat Products Liability Litigation*, U.S. District Court for the Southern District of Illinois, No. 3:21-md-3004.

For plaintiffs: Khaldoun Baghdadi of Walkup, Melodia, Kelly & Schoenberger; Sarah Doles of Levin, Papantonio, Rafferty, Proctor, Buchanan, O'Brien; and Peter Flowers of Meyers & Flowers

For Syngenta: Ragan Naresh, Bradley Weidenhammer, Britt Cramer and Zach Holmstead of Kirkland & Ellis

For Chevron: Lee DeJulius and Sharyl Reisman of Jones Day

Read more:

MDL judge advances most paraquat claims against Syngenta, Chevron

As Roundup verdicts pile up, Bayer bets big on US appeals courts

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Reporting By Brendan Pierson in New York

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NEWS

Paraquat Judge Tosses Key Plaintiffs' Expert Over 'Methodological Contortions'

U.S. District Judge Nancy Rosenstengel, who is overseeing the paraquat multidistrict litigation, found that Dr. Martin Wells, a biostatistician and epidemiologist at Cornell University, used unreliable methodologies in concluding that exposure to the pesticide increased the risks of getting Parkinson's disease.

April 17, 2024 at 07:37 PM

Litigation



Amanda Bronstad
staff reporter



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

What You Need to Know

- Although limited to the four cases scheduled for bellwether trials, the ruling dealt a major blow to more than 5,000 paraquat cases in the multidistrict litigation.
- Wednesday’s ruling also comes about a year after the judge began ordering depositions and subpoenas after growing concern that 'a significant number of plaintiffs' did not 'plausibly allege exposure' to paraquat.
- Co-lead plaintiffs' lawyers said, 'We will continue to prosecute these cases on behalf of the thousands of American farmworkers diagnosed with an incurable and debilitating disease because of their exposure to paraquat.'

A federal judge dismissed a key plaintiffs’ expert in litigation over Syngenta’s paraquat herbicide after finding his conclusions were based on a “methodological flip-flop.”

Judge Nancy Rosenstengel, chief judge of the U.S. District Court for the Southern District of Illinois who is overseeing the paraquat multidistrict litigation, found that Dr. Martin Wells, a biostatistician and epidemiologist and a professor at Cornell University, used unreliable methodologies in concluding that exposure to paraquat, first sold in the 1960s to professionals to kill weeds and grasses prior to planting crops, causes Parkinson’s disease.

“Although Dr. Wells presents certain data points that support this conclusion, his proffered opinion required several methodological contortions and outright violations of the scientific standards he professed to apply,” Rosenstengel ruled in a 97-page opinion.

Rosenstengel held: “These methodological deficiencies, in turn, suggest that Dr. Wells failed to apply the same level of intellectual rigor to his work in the four trial selection cases that would be required of him and peers in a non-litigation setting.”

Although limited to the four cases scheduled for bellwether trials, her ruling dealt a major blow to plaintiffs’ lawyers, leading to more than 5,000 paraquat cases in the multidistrict litigation. Wells was the sole plaintiffs’ expert on general causation in those four lawsuits.

Wednesday’s ruling also comes about a year after Rosenstengel began ordering depositions and subpoenas after [growing concern that “a significant number of plaintiffs”](#) did not “plausibly allege exposure” to paraquat.

As a result of her ruling, the judge, in a separate order Wednesday, tossed the four bellwethers and gave both sides until May 10 to select 16 more cases for trials—eight from plaintiffs lawyers, and four from each defendant, Syngenta Corp. and Chevron USA Inc.

Co-lead plaintiffs attorneys—Khaldoun Baghdadi, of San Francisco’s Walkup, Melodia, Kelly & Schoenberger; Sarah Doles of Levin, Papantonio, Rafferty, Proctor, Buchanan, O’Brien, Barr & Mougey in Pensacola, Florida; and Peter Flowers of Chicago’s Meyers & Flowers—said they would be selecting new cases.

“The overwhelming body of research conducted by the world’s most well-respected scientific experts consistently supports the fact that paraquat enters the brain and causes Parkinson’s disease,” they wrote. “This dangerous herbicide is banned in over 70 countries because of its risks, including China, where Syngenta is based. Knowing about the risks associated with paraquat decades ago, Syngenta spared no expense funding journal articles by employees and consultants to manufacture doubt and continue profiting from paraquat in the United States.”

They added, “We will continue to prosecute these cases on behalf of the thousands of American farmworkers diagnosed with an incurable and debilitating disease because of their exposure to paraquat.”

“Syngenta is pleased with the multidistrict litigation court’s ruling excluding the plaintiffs’ sole general causation expert, which is consistent with decades of peer-reviewed scientific literature and the detailed, science-based review of regulatory authorities,” Saswato Das, a spokesman for Syngenta, represented by Kirkland & Ellis, said in a statement. “As the court noted, plaintiffs’ causation theory has not been adopted or independently validated in any peer-reviewed scientific analysis outside of this litigation.”

Chevron, represented by Jones Day, said in a statement that it should not be liable because it never manufactured paraquat and hadn’t sold the herbicide since 1986.

“The court’s decision affirms what Chevron has long asserted—that despite hundreds of studies conducted over the past 60 years, the scientific consensus is that paraquat has not been shown to be a cause of Parkinson’s disease,” Chevron said in a statement. “And, in January 2024, following a thorough review of relevant studies, the EPA concluded that ‘Parkinson’s disease is not an expected health outcome of pesticidal use of paraquat.’”

‘Very Definition of Unscientific Cherry-Picking’

The ruling comes about a year after Rosenstengel began issuing orders to obtain more information about the paraquat cases. She ordered Syngenta and Chevron to depose plaintiffs in dozens of cases and, later on, made plaintiffs subpoena third parties, such as employers and feed stores, for records backing up their exposure claims.

Those orders reflect criticism, particularly in the defense bar, that meritless cases are being drawn into multidistrict litigation. Syngenta and Chevron blamed hundreds of questionable paraquat cases on lead generators and aggressive advertising by the plaintiffs’ bar.

Under the U.S. Supreme Court’s 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals* and Federal Rule of Evidence 702, Rosenstengel heard expert evidence at an August hearing last year that lasted four days.

Wells testified that, based on his review of seven epidemiological studies, individuals exposed to paraquat tripled their risk of developing Parkinson’s disease.

In Wednesday’s opinion, Rosenstengel cited contradictory statements in two expert reports, one in 2022 and one in 2023, and depositions that Wells provided as part of the paraquat cases.

“The rebuttal report reflected a methodological sea change in Dr. Wells’ expert analysis as it provided much more granular and even previously undisclosed explanations of this study selection methodology,” she wrote. “Although the rebuttal report outlined a much more comprehensive selection process, certain eligibility and quality factors were either modified or newly added altogether.”

She found that Wells did not explain why he picked the studies he did to come to his conclusion and, in a “methodological flip-flop,” later suggested that at least one report he excluded, ostensibly due to low participation rates, didn’t find a statistically significant association between paraquat exposure and Parkinson’s.

“Indeed, he searched the epidemiological literature for data that supported his conclusion, while considering inconsistent evidence to be meaningless,” she wrote. “This is the very definition of unscientific cherry-picking.”

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- Expert testimony excluded over extensive method errors
- Without testimony, plaintiffs can't show necessary causation

Syngenta Defeats Initial Paraquat Parkinson's Bellwether Cases

By Shweta Watwe 2024-04-17T18:36:41000-04:00

- Expert testimony excluded over extensive method errors
- Without testimony, plaintiffs can't show necessary causation

Syngenta AG notched an early victory in sprawling litigation over the alleged link between paraquat exposure and Parkinson's disease, when a federal judge excluded plaintiffs' expert testimony in the first four bellwether trial cases.

The US District Court for the Southern District of Illinois on Wednesday granted judgment for the agribusiness company in those cases because the exclusion of testimony from the plaintiffs' sole general causation expert meant they couldn't establish a cause-effect link between exposure to the weedkiller and the disease.

The litigation involves more than 500 cases alleging that Syngenta and Chevron USA Inc. knew or should have known paraquat exposure could lead to Parkinson's but didn't warn agricultural workers. The herbicide has been used since the 1960s. The Environmental Protection Agency approved the continued use of paraquat in 2021 and reaffirmed that decision earlier this year following a second review of scientific literature.

Judge Nancy J. Rosenstengel said that although the plaintiffs' expert, Dr. Martin Wells, was an accomplished biostatistician and epidemiologist, "his proffered opinion required several methodological contortions and outright violations of the scientific standards he professed to apply."

Wells initially said his review process for conducting a meta-analysis of relevant scientific literature was holistic, but he didn't state his process, the judge said. According to his rebuttal report, Wells started with 36 epidemiological studies on the association between paraquat and Parkinson's and applied various eligibility criteria to get to eight studies.

"Dr. Wells' first report is entirely devoid of a search narrative that would allow other researchers to validate his process," Rosenstengel said. During a deposition, Wells said he couldn't remember how he found those first 36 studies. "As a result, any attempt to replicate his search for relevant literature would require a degree of clairvoyance that this Court does not possess."

Wells also didn't clearly explain what his inclusion and exclusion criteria was for his analysis but said he conducted a "holistic" review.

"Dr. Wells' reliance on an unwritten, 'holistic' methodology presents an ideal example of 'because I said so' expertise that is impermissible under Rule 702," Rosenstengel said.

Wells also failed to consistently define "occupational exposure," Rosenstengel said. Initially, he distinguished it from "community exposure," but didn't define that term either. In depositions he introduced the idea of "risk of dermal contact" and a exposure of 25 lifetime days.

"It is unclear from the record whether Dr. Wells' general causation opinion requires workplace exposure to paraquat, the 'risk of dermal contact,' 'direct exposure,' 'direct use,' or 'direct contact,'" Rosenstengel said.

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

The four plaintiffs are represented by Walkup Melodia Kelly & Schoenberger; Meyers & Flowers LLC; and Levin Papantonio Rafferty. Syngenta is represented by Kirkland Ellis LLP.

The case is In re Paraquat Prods. Liab. Litig. , S.D. Ill., No. 3:21-md-03004, 4/17/24 .

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Pesticides pose 'significant risks' in 20% of produce, report says

 [10news.com/pesticides-pose-significant-risks-in-20-of-produce-report-says](https://www.10news.com/pesticides-pose-significant-risks-in-20-of-produce-report-says)

Justin Boggs

April 18, 2024

According to new data released by Consumer Reports, most of the fruits and vegetables we eat have low levels of pesticides. Still, analysts said "pesticides posed significant risks in 20% of the foods" they examined.

Consumer Reports said significant levels of pesticides were found in bell peppers, blueberries, green beans, potatoes and strawberries.

More specifically, very high levels of pesticides were found in domestic bell peppers, blueberries (fresh and frozen) and potatoes. Among imports, very high levels of pesticides were found in blueberries (frozen), celery, collard greens, green beans, potatoes and strawberries (fresh and frozen).

Consumer Reports noted elevated levels of pesticides in U.S.-grown green beans, hot peppers, kale, mustard greens, spinach, frozen strawberries and watermelon. Among imports, elevated pesticide levels were indicated in bell peppers, fresh blueberries, hot peppers and kale.

The only organic food that raised concerns was imported green beans.

Consumer Reports said it conducted 30,000 fruit and vegetable tests. It said that organophosphates, and a similar type of pesticide called carbamates, were responsible for most of the risk to consumers.

"That not only means that most of the produce Americans consume has low levels of pesticide risk, but it makes trying to solve the problem much more manageable, by letting regulators and growers know exactly what they need to concentrate on," Brian Ronholm, head of food policy at Consumer Reports, said in the report.

The Centers for Disease Control and Prevention said, "When people are exposed over a long period of time to smaller amounts of these pesticides, they may feel tired or weak, irritable, depressed, or forgetful."

Consumer Reports says the public should consider whether purchasing organic produce is worth the extra cost.

"That's why, while we think it's always worth considering organic produce, it's most important for the handful of fruits and vegetables that pose the greatest pesticide risk," James E. Rogers, who oversees food safety at Consumer Report, says in the report.

The Food and Drug Administration says pesticides are "one strategy that farmers use to protect plants from pests, such as insects, fungi, and weeds."

The FDA said it tests domestic and imported produce for 800 types of pesticide residues. In a 2021 report, the FDA said that 96.7% of domestic and 89.3% of import foods were compliant with federal standards. No residues were found in 35% of domestic and 44.5% of import samples.

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Documents

- Complaint didn't specify what 'high' level of cadmium meant
- Unclear why Prop 65's level should be used as health baseline

Flaxseed Maker Defeats Suit Over Cadmium Non-Disclosure, for Now

- Complaint didn't specify what 'high' level of cadmium meant
- Unclear why Prop 65's level should be used as health baseline

But in the absence of allegations that any level of cadmium is unhealthy, Hayden's failure to articulate a standard for what constitutes a "high" level of cadmium means "there is no plausible basis to conclude that the health risks discussed could result from consuming the per-serving amount of cadmium" in the products, Gilliam said.

Hayden wanted to use the maximum allowable dose level for cadmium set by California's Proposition 65, which established a limit for certain chemicals above which products containing them must include a warning label. But he didn't explain why that was the correct reference point, Gilliam said.

"Why should the MADLs for *labeling* purposes be understood as equivalent with a cadmium cut-off for *health* purposes?" Gilliam said.

Gilliam also said that because Hayden didn't show the products were unhealthy or unsafe due to cadmium, the company's omission of the presence of cadmium wasn't actionable.

Hayden's breach of implied warranties claim also failed because he didn't show the level of cadmium in the products were tied to negative health risks.

Gilliam said the UCL claims were improperly pleaded because Hayden didn't show that a failure to test the products for heavy metals harms competition.

The claims were dismissed without prejudice, and Hayden has 21 days to file an amended complaint.

Hayden is represented by Crosner Legal PC.

Bob's Red Mill is represented by Perkins Coie LLP.

The case is Hayden v. Bob's Red Mill Nat. Foods Inc. , N.D. Cal., No. 4:23-cv-03862, 4/16/24 .

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Palm Beach cancer cluster drove down property values, Florida homeowners argue at appellate court

 [courthousenews.com/palm-beach-cancer-cluster-drove-down-property-values-florida-homeowners-argue-at-appellate-court](https://www.courthousenews.com/palm-beach-cancer-cluster-drove-down-property-values-florida-homeowners-argue-at-appellate-court)

Megan Butler

A sign stands at the road leading to the Raytheon facility Monday, June 10, 2019, in Marlborough, Mass. Raytheon Co. and United Technologies Corp. are merging in a deal that creates one of the world's largest defense companies. (AP Photo/Bill Sikes)

(CN) — A federal appeals court in Miami heard arguments Wednesday over whether a group of homeowners should be compensated after their properties dropped in value because of an aerospace company's mishandling of radioactive material.

The plaintiffs claim their properties in Acreage, a semi-rural residential community in western Palm Beach County, have been or could become contaminated, causing them to suffer a loss of both value and enjoyment of their land.

They sued Raytheon Technologies and Pratt & Whitney Group, the owners of the rocket and aerospace testing and manufacturing plant that sits 5 to 15 miles north of their properties, in 2013 — four years after the Florida Department of Health found that brain and central nervous system tumors had occurred at a statistically significant increased rate among children in Acreage. The cancer cluster was associated with ionizing radiation contaminants, the department said.

A jury found that Pratt & Whitney failed to exercise reasonable care in its handling and disposal of radioactive material on its West Palm Beach campus, but they did not find the company liable for the cancer stigma associated with the Acreage properties.

On appeal to the Eleventh Circuit, the homeowners argued that the trial judge erred by including an element of "negligent transport" in the jury instructions that caused confusion.

The homeowners say the the companies released toxic contaminants into the air, water and soil at the site and in the communities surrounding the plant, and that some of the contaminants migrated to the Acreage through groundwater or soil transport.

"Part of confusion for me," U.S. Circuit Judge Robert Luck said at Wednesday's hearing, "is there were different theories for the negligence claim, that somehow dirt being transported to the remediation facility ended up mixed in at the Acreage."

The Donald Trump appointee said the claim may not require proof that the materials were dumped at the Acreage property if they were already mishandled at the company's site.

The homeowners say the lower court created the implication that in order to find Pratt & Whitney was liable, the plaintiffs had to prove that the company failed to exercise reasonable care in the handling of its radioactive materials — and then, separately, that the company failed to exercise reasonable care in the transport of such materials.

"This was a particularly troublesome added burden since the transport was not performed by Pratt & Whitney but by third parties and the court struck plaintiffs' expert opinion regarding Pratt & Whitney's obligations to supervise their work and to investigate the means and measures they would use before being selected for the work," the group wrote in its brief to the Eleventh Circuit. "The court's failure to provide the concurring cause instruction plaintiffs requested only aggravated this confusion."

Representing Raytheon, one of the largest U.S. aerospace companies, attorney Sean Gallagher argued that the lower court's verdict form rightfully required the jury to conclude that Pratt & Whitney caused the cancer cluster in order to award the homeowners damages.

The homeowners also argue that they should have won class certification to assure wide relief for the Acreage community's loss in property value due to the cancer cluster. They sought to represent all past and current property owners of residential lots, including vacant and improved properties, in Acreage within the relevant time frame.

The group seeks to reverse the lower court's judgment and hold a new trial where their experts are admitted, along with their suggested verdict form for the negligence claim.

Attorney Mara Hatfield of the West Palm Beach firm Searcy Denney Scarola Barnhart & Shipley represented the plaintiffs.

Bill Clinton appointee U.S. Circuit Judge Charles Wilson and the Donald Trump-appointed U.S. Circuit Judge Barbara Lagoa rounded out the circuit judge panel. They did not signal when they intend to issue a ruling.

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April 17, 2024, 9:39 AM PDT

US Military Is Liable for Neighbors' PFAS Pollution, Court Told

By Pat Rizzuto

Documents

Docket

- Government's responsibility for PFAS damage laid out to court
- Pressure on private sector to mount if government not liable

Bloomberg Law News 2024-04-18T12:45:43542649448-04:00

US Military Is Liable for Neighbors' PFAS Pollution, Court Told

By Pat Rizzuto 2024-04-17T12:39:40000-04:00

- Government's responsibility for PFAS damage laid out to court
- Pressure on private sector to mount if government not liable

Federal law doesn't let the Department of Defense (DOD) injure its neighbors, adjacent properties, or their businesses by polluting their water, attorneys representing dozens of plaintiffs maintain.

"Like any other landowner, the government is subject to state tort liability when it causes water pollution," attorneys said in one of three sets of documents filed Tuesday in the US District Court for the District of South Carolina as part of national PFAS litigation.

Plaintiffs filed three groups of documents opposing the government's position that it's not liable for damage that states, businesses, and other parties across the US allege the military caused through its use and environmental releases of a fire suppressant, aqueous film forming foam (AFFF), that contains so called "forever chemicals," or per- and polyfluoroalkyl substances (PFAS).

District Judge Richard M. Gergel, who oversees the multidistrict litigation, will eventually rule about the government's liability for AFFF pollution generally, and around New Mexico's Cannon Air Force Base in particular. His decision will affect the pressure plaintiffs mount against PFAS and AFFF manufacturers; cleanup and damage claims communities make nationwide; and remediation and other funding states, tribes, and local governments may seek from taxpayers.

Government Responsible

The government has asked the court to dismiss all claims against it. The government's multi-pronged defense asserts plaintiffs' claims are barred because PFAS haven't historically been regulated and the Federal Tort Claims Act exempts discretionary functions from liability.

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The government also has maintained that it's exempt from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or Superfund, liability and pointed to efforts it's making to investigate sites and some cleanups. Finally, the government denies liability for damage caused at Cannon, which is the test case for the court to decide whether to allow claims against the government to proceed.

The DOD's freedom to decide what military actions it takes on its land "does not diminish its obligation as a landowner to take the precautions required by state tort law to avoid adverse impacts on its neighbors' land," wrote co-lead plaintiffs' counsel Paul Napoli of NSPR Law Services LLC in the overarching memorandum opposing the government's positions.

The Clean Water Act "expressly subjects the United States to liability under state tort law for water pollution," Napoli wrote.

The attorneys pointed to damage some federal food agencies have recognized that occurred to the Highland Dairy, which is adjacent to Cannon.

The 3,593-acre property held 6,000 cattle, all of which died from PFAS in their water or had to be slaughtered due to high concentrations of the chemicals in their milk. The farm, which employed about 40 people, generated about \$2.6 million in annual revenues, and was valued at \$18 million, is now "worthless" and suffered a business loss exceeding \$65 million, the attorneys wrote.

'Nation's Largest Polluter'

CERCLA "does not operate as a 'get out of jail free' card wherever and whenever the government asserts that it is engaged in response actions," especially when DOD "the nation's largest polluter—is the very party responsible for the contamination at issue," the plaintiffs' attorneys wrote in their response to the government's position on that law.

Finally, regarding damage around Cannon Air Force Base, the attorneys point to operating instructions the base issued in 2002 that said "AFFF must be kept out of storm drain inlets and the sanitary sewer system."

Yet, at least 45 separate accidental discharges of AFFF have occurred since those instructions were issued leading to the release of more than 4,500 gallons of AFFF, the attorneys wrote in a legal memorandum about the government's site-specific claims.

The government "cannot be permitted to escape responsibility on jurisdictional grounds when the conduct of its employees, on its land, pollutes or otherwise harms its neighbors," the attorneys said.

The case is *In Re Aqueous Film-Forming Foams Products Liab. Litig.* MDL 2873 , D.S.C., No. 18-mn-02873, Plaintiff's opposition motions filed 4/16/24 .

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US judge in credit card fee rule case doesn't have to recuse, panel says

 [reuters.com/legal/legalindustry/us-judge-credit-card-fee-rule-case-doesnt-have-recuse-panel-says-2024-04-18](https://www.reuters.com/legal/legalindustry/us-judge-credit-card-fee-rule-case-doesnt-have-recuse-panel-says-2024-04-18)

Nate Raymond

Now-U.S. Circuit Judge Don Willett appears before the U.S. Senate Judiciary Committee in Washington, D.C., for a hearing on his nomination to the federal bench on Nov. 15, 2017. U.S. Senate/Handout via REUTERS Purchase Licensing Rights , opens new tab

April 18 (Reuters) - A federal appeals court judge whose son owns Citigroup stock does not need to recuse himself from hearing a lawsuit by banking industry groups challenging a rule capping credit card late fees at \$8, a judicial ethics panel has concluded.

That determination was contained in an advisory opinion , opens new tab from the panel that was made public on Wednesday concerning whether those stock holdings meant U.S. Circuit Judge Don Willett must withdraw from hearing the challenge to the U.S. Consumer Financial Protection Bureau's new rule.

Willett, a member of the 5th U.S. Circuit Court of Appeals, turned to the U.S. Judicial Conference's Committee on Codes of Conduct for guidance after the CFPB had argued that large credit card issuers such as Citi had a financial interest in the outcome of the case that might warrant a judge's recusal.

The agency raised its concern three days after Willett, an appointee of Republican former President Donald Trump, wrote a 2-1 opinion on April 5 holding that a trial judge wrongly transferred the case from Fort Worth, Texas, to Washington, D.C.

Politico had after the ruling reported on Willett's interest in Citi, the nation's second-largest credit card issuer and a member of the U.S. Chamber of Commerce and American Bankers Association, two groups challenging the CFPB rule.

Willett in response to that article said that investment comprised about \$2,000 worth of Citigroup stock held in his son's Coverdell education savings account.

Willett is also set to be part of the three-judge panel that will hear a related request by the groups to block the rule, and his recusal would have shifted who would decide the matter.

But U.S. District Judge Gerald McHugh, serving as the acting chair of the Committee on Codes of Conduct, in the advisory opinion said the potential impact of the case on Citi's stock was, at best, "indirect and contingent."

"Even if it is true that the value of your son's stock could be affected by market forces based upon the outcome of this case, that does not by itself convert your son's stock ownership to a direct financial interest requiring recusal," McHugh wrote.

The CFPB had no immediate comment. The Chamber of Commerce did not respond to a request for comment.

At issue is a CFPB rule targeting what the agency has called "excessive" fees credit card issuers charge for late payments, which it estimated costs consumers \$12 billion per year.

Under that rule, credit card issuers with more than 1 million open accounts can only charge \$8 for late fees, unless they can prove higher fees are necessary to cover their costs. Issuers previously could charge up to \$30 or \$41 for subsequent late payments.

The case is Chamber of Commerce of the United States of America, et al, v. Consumer Financial Protection Bureau, 5th U.S. Circuit Court of Appeals, No. 24-10248.

For the plaintiffs: Michael Murray of Paul Hastings

For the CFPB: Justin Sandberg of the CFPB

Read more:

US court rejects transfer of credit card fees rule case amid focus on 'judge shopping'
Texas judge transfers lawsuit over card fees to Washington, D.C.

US judiciary says courts have discretion to adopt 'judge shopping' policy

Judge recuses from CFPB credit card fee rule case; conflicts raised

US regulator says trade groups judge-shopped for credit fee lawsuit

US consumer agency sued by banks, US Chamber over credit card late fee cap

Biden caps credit card late fees at \$8, probes US healthcare takeovers

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Reporting by Nate Raymond in Boston

Prince Harry may have to settle Murdoch lawsuit after Hugh Grant deal - lawyer

 [reuters.com/legal/british-actor-hugh-grant-settles-privacy-lawsuit-against-publisher-sun-court-2024-04-17](https://www.reuters.com/legal/british-actor-hugh-grant-settles-privacy-lawsuit-against-publisher-sun-court-2024-04-17)

Sam Tobin, Michael Holden

Item 1 of 2 Hugh Grant walks outside the High Court, in London, Britain April 27, 2023.
REUTERS/Maja Smiejkowska/File Photo

[1/2] Hugh Grant walks outside the High Court, in London, Britain April 27, 2023.
REUTERS/Maja Smiejkowska/File Photo [Purchase Licensing Rights](#) , opens new tab

LONDON, April 17 (Reuters) - British actor Hugh Grant has settled a lawsuit against the publisher of Rupert Murdoch's tabloid newspaper, The Sun, he said on Wednesday, while the lawyer for Prince Harry said the royal could also be "forced" to agree a deal.

Grant, alongside King Charles' son and others, was suing News Group Newspapers (NGN) for alleged widespread unlawful information gathering, including landline tapping, burglary and "blagging" confidential information about him.

His case was one of several which were eligible to go to trial at London's High Court in January, but the actor said he had reluctantly settled with NGN because he could be left with a multi-million pound legal bill if he rejected their offer now, even if he later won the lawsuit.

"News Group are claiming they are entirely innocent of the things I had accused the Sun of doing," Grant posted on X. "As is common with entirely innocent people, they are offering me an enormous sum of money to keep this matter out of court."

Grant, famous for films such as "Love Actually", "Paddington 2" and "Notting Hill", said if he was awarded less in damages after a trial than NGN had offered him now, he would be liable to pay the fees of both sides' lawyers.

"Rupert Murdoch's lawyers are very expensive," Grant said. "So even if every allegation is proven in court, I would still be liable for something approaching 10 million pounds in costs. I'm afraid I am shying at that fence."

David Sherborne, the lawyer for both Grant and Harry, told a hearing at the High Court in London on Wednesday that the prince and other claimants also face a similar predicament and have settlements "forced" upon them.

"The Duke of Sussex is subject to the same issues that (actress) Sienna Miller and Hugh Grant have been subject to, which is that offers are made (which) make it impossible for them to go ahead," Sherborne said.

NGN said the settlement with Grant was "in both parties' financial interests not to progress to a costly trial".

Miller settled a lawsuit against NGN in 2021, which her lawyers said at the time was because of the risk of having to pay millions of pounds in legal fees even if she won.

Grant has become a prominent campaigner on press reform since the phone-hacking scandal emerged more than a decade ago, and had joined forces with Harry in recent years. He had accused Sun journalists of using private investigators to tap his phone and burgle his house.

Grant had previously brought a lawsuit against NGN in relation to the now-defunct News of the World tabloid which was settled in 2012, a year after NGN issued an apology to victims and media magnate Murdoch shut the newspaper down following a public backlash over hacking.

NGN has always rejected allegations of any wrongdoing by staff at The Sun, having settled more than 1,300 cases – plus another 300 or so through its own compensation scheme.

However, the settlement of Grant's lawsuit, which focused exclusively on alleged wrongdoing at The Sun, raises questions about the sustainability of that long-held position.

"The Sun does not accept liability or make any admissions to the allegations," an NGN spokesperson said.

The settlement does reduce the chances of NGN facing a trial at all over claims of unlawful information-gathering, although, as Sherborne said, Harry's lawsuit continues. The prince has spoken repeatedly of his "mission" to purge the British press.

He and other claimants last month sought to drag Murdoch into the case, alleging he was personally involved in a cover-up of wrongdoing, with a ruling on their application still pending.

NGN says the claimants are using the lawsuits as a means to attack the tabloid press and that allegations against current and former staff are "a scurrilous and cynical attack on their integrity".

On Wednesday, NGN's lawyer Anthony Hudson asked the court to direct that the full trial currently listed to begin in January should instead be held to decide whether the claimants should have brought their lawsuits against the publisher earlier.

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Reporting by Sam Tobin and Michael Holden; Editing by Kate Holton, Alex Richardson, Toby Chopra and Jonathan Oatis

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April 18, 2024, 2:00 AM PDT

ChatGPT Will Come for Partners' Work in Contract Law, Says Prof

By Roy Strom

Column

Bloomberg Law News 2024-04-18T10:20:18491054174-04:00

ChatGPT Will Come for Partners' Work in Contract Law, Says Prof

By Roy Strom 2024-04-18T05:00:18000-04:00

Welcome back to the Big Law Business column . I'm Roy Strom, and today we look at a unique idea about how ChatGPT could transform the business of law. Sign up to receive this column in your inbox on Thursday mornings.

David Hoffman is a University of Pennsylvania law professor who specializes in contracts. When he looks into the future of contract disputes, he sees a world that's been dramatically altered by the technology underpinning ChatGPT. Big Law partners might not enjoy his view.

That's because of a simple argument Hoffman makes about generative artificial intelligence.

He says "generative interpretation" can replace the messy and expensive way lawyers currently hash out the meaning of words in legal agreements, using dictionaries and Latin canons.

"Giving courts a convenient way to commit to a cheap and predictable contract interpretation methodology would be a major advance in contract law," Hoffman wrote last year in a research paper that he co-authored with Yonathan Arbel, a University of Alabama law school professor. "As generative interpretation offers this possibility, we argue it can become the new workhorse of contractual interpretation."

The paper was an effort to educate judges on how the technology could be used to help them double-check their gut instincts.

But the downstream effect of judges actually adopting this method could have massive ramifications for the business and practice of law.

This is the transformative idea: If judges accept large language models as a valid way to interpret contested contract terms, parties drafting contracts could preemptively use those models to get ahead of predicted or potential disputes by letting the models decide the outcome. That would eliminate much of the uncertainty around contracts, making litigation rare.

"It 100% seems like a real fit. But the thing that's challenging is it's so core to what judges and lawyers think is their expertise that there will be a lot of push back," Hoffman said. "This is the partner work. This is the high-value work. It's not the low-value work we want to get rid of. This is the stuff we want to keep inside the castle."

Hoffman admits the idea sounds to many like science fiction. And he said he doesn't mind being dismissed as "an ivory tower academic."

The 60-page paper takes readers through real-life cases that turned on how words in contracts were interpreted. It describes how judges reached their conclusions, and then explains what the large language models thought of the results.

Some of the differences are stark.

In one example, GPT-4 disagreed 100% of the time with a New York Court of Appeals ruling that said Duke Ellington's record company could deduct from the musician's revenue fees it paid itself for services that used to be done by another company.

"Of course, even uniformity between powerful models cannot decide cases," Hoffman and Arbel write. "The point, rather, is to illustrate the value of LLMs as a convenient check against overconfidence, and a spur to greater reflection."

The authors also show that large language models can consider evidence outside of the simple words in a contract.

In another example, they asked GPT-4 to determine a case based on a contract alone. The LLM provided a 10% likelihood that one side will win. Then they asked the model to consider the contents of a real-life phone call that was part of the evidence at trial. The same side's odds of winning jumped to 75%.

"So convenient are today's LLMs, and so seductive are their outputs, that it would be genuinely surprising if judges were not using them to resolve questions of contract interpretation as we write this article, only a few months after the tools went mainstream," Hoffman and Arbel said in the paper.

Indeed, the paper cites a study by the National Judicial College, in which 17% of 332 surveyed judges said they had used ChatGPT in their jobs and liked it.

"The problem then is not *whether* courts will use LLMs as an aid to interpretation, but *how*," Hoffman and Arbel write.

Shock Factor

Still, there's a big difference between judges using the tool to aid in their work and parties to a contract choosing it as the method to interpret and potentially resolve disputes.

So, I asked Hoffman: How could that second step happen?

More parties first need to develop a trust of the models, he said, despite their flaws, which include an inability to describe why they reached a particular result.

Parties might then migrate to the models if there is a "huge shock" in traditional contract law. Perhaps New York courts, the current preferred venue for contract disputes, take an unexpected turn.

"There needs to be some big thing that happens where everyone says, 'We did not think about that,'" Hoffman said. "That's why it's not going to happen today. You need some kind of shock and consensus."

There is also a possibility that an enterprising law firm could develop the precedent with a powerful client. Hoffman compared the idea to Wachtell, Lipton, Rosen & Katz developing the poison pill in the 1980s. It was, in effect, a technological innovation that burnished the reputation of Wachtell and, later, Skadden.

A similar thing could happen with the first firm to adopt generative interpretation.

"You need to have a ton of market power so you can insist on your terms," said Hoffman, a former Cravath Swaine & Moore litigation associate. "You might think it comes from a West Coast firm who has a client which is aligned with them on the utility of driving down litigation costs and feels comfortable with the tech."

Hoffman's idea may not be something that will cause Big Law leaders to lose sleep tonight. They are likely, and rightly, concerned with more urgent challenges: Keeping high-performing partners and winning the next big piece of work.

But I credit Hoffman for thinking deeply about how generative AI could transform an important part of the legal market. His way of thinking might help other subject matter experts consider potential big changes AI might bring to their fields.

"I'm a contracts scholar. I see a huge problem that faces contracts scholars and lawyers, which is that legal interpretation is expensive and unpredictable," he said. "That's a problem lawyers ought to be interested in trying to fix. So my view was to ask: What's the vision of how these models will help us fix that problem?"

Worth Your Time

On Litigation Funding: Bench Walk Advisors saw an investment pay off when an Arkansas jury last week sided with London Luxury, a textile vendor that accused Walmart of backing out of a contract to buy more than \$500 million in Covid-era personal protective equipment. The litigation funder invested \$5.1 million in the case and others shortly before trial, Tatyana Monnay and Emily Siegel report.

On Legal Briefs: Winston & Strawn reached a settlement with a Boston boutique firm that accused it of ripping off its motion to dismiss brief while representing a different defendant against a common plaintiff, Kyle Jahner reports.

On Clare Locke: The small law firm known for taking on large media organizations is forging an alliance with the UK's Schillings and Australia's Giles George. The agreement, while not a formal merger, will see the firms share resources to serve cross-border clients, Brian Baxter reports.

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

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Shareholders Prod Big Tech, Entertainment Giants Over AI Risks

By Clara Hudson

- Shareholders to vote on AI bids at Alphabet, Meta this summer
- Earlier vote at Apple secured almost 40% of investor support

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Shareholders Prod Big Tech, Entertainment Giants Over AI Risks

By Clara Hudson 2024-04-18T05:00:20000-04:00

- Shareholders to vote on AI bids at Alphabet, Meta this summer
- Earlier vote at Apple secured almost 40% of investor support

Alphabet Inc. and Warner Bros. Discovery Inc. are the latest big companies facing upcoming shareholder proposals asking them to grapple with how fast-moving AI technology could harm workers and the public.

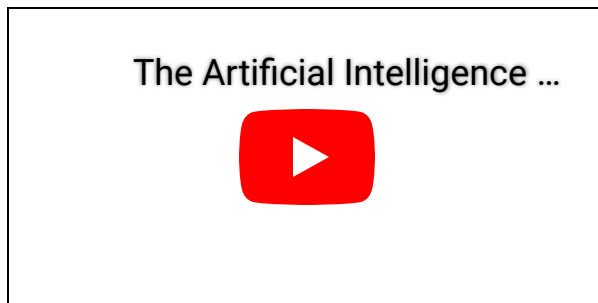
Investors want the companies to disclose risks that artificial intelligence could pose to their businesses and report on their ethical guidelines. Some other pending shareholder votes, such as one at Meta Platforms Inc., also highlight the risk of AI-produced misinformation or disinformation interfering in upcoming elections across the globe.

The flurry of investor interest has been focused largely on tech and entertainment companies so far, in part because last summer's Hollywood strikes spurred concern that AI could take credit from writers or be used to replicate actor likenesses. The AFL-CIO said it withdrew shareholder bids at Walt Disney Co. and Comcast Corp. after those companies agreed to disclose more information on the use of AI, but the labor group has similar campaigns underway that are poised for investor votes at Amazon.com and Netflix Inc.'s annual meetings.

AI-related proposals that already faced votes at Apple Inc. and Microsoft Corp. garnered an unusual amount of momentum for relatively new investor bids, though they both failed to gain the majority shareholder support needed to pass over opposition from company management. Companies have said in response to the proposals that they're already navigating AI risk and even raised the possibility that certain disclosures could give away sensitive information on their AI strategies.

“Obviously AI has captured everybody’s imagination and attention,” said Jonas Kron, chief advocacy officer of Trillium Asset Management, which has a proposal that could go to a vote at Alphabet this summer asking for governance changes on AI.

“It almost goes without saying at this point that it presents a risk and an opportunity for so many companies,” Kron said. “And as with many new technologies, the technology quickly outpaces our ability to manage it.”



Video: Can Laws Keep Up With AI's Fast Pace?

Potential for Harm

An AI-related shareholder proposal received some unusual fanfare at Microsoft’s annual meeting in December when former Nirvana bassist Krist Novoselic, a Microsoft shareholder, presented the proposal. Microsoft has launched an AI tool called Copilot and the company is investing in OpenAI, the creator of generative AI chatbot ChatGPT.

The proposal, filed by Arjuna Capital, asked Microsoft to report on AI risks and explain how the company plans to remediate potential harms, including misinformation and disinformation. About 21% of Microsoft investors voted in favor of the proposal.

Microsoft said in its proxy statement that it’s already committed to producing a report to the US government about its AI governance practices. The planned report will cover Microsoft’s approach to mitigating AI misinformation and disinformation risk.

Meta and Alphabet face similar shareholder proposals focused on misinformation and disinformation from Arjuna Capital. The proposal at Meta says the risks stem from the social media company’s recent development of generative AI conversational assistants and advertising tools. Arjuna’s misinformation proposal at Alphabet will also go to a vote alongside the Trillium proposal on AI governance.

“The AI arms race has resulted in greater risk taking as companies compete for market share,” said Natasha Lamb, a managing partner at Arjuna Capital, speaking about the upcoming proposals the firm has at Meta and Alphabet. “But risk taking without guardrails can lead to real world harm,” Lamb said, referencing the possibility “for malicious actors to propagate inaccurate and invented information” in elections.

At Apple's annual meeting in February, 37.5% of investors supported a shareholder bid asking the company to disclose more information about how it uses AI and navigates the technology's ethics.

An Apple employee who is also a member of a local union presented the shareholder proposal, raising concerns about the risk of workplace discrimination from AI algorithms. Also speaking at the meeting, CEO Tim Cook teased that the tech giant is planning breakthroughs in generative AI for later this year.

Apple's proxy statement said the demands of the proposal "could encompass disclosure of strategic plans and initiatives harmful to our competitive position and would be premature in this developing area."

Engaging With Workers

Up next for a vote in late May is an AFL-CIO proposal urging Amazon.com Inc. to establish a new board committee focused on human rights risks of AI. The proposal mentions for example that AI used in human resources decisions could result in employment discrimination. The AFL-CIO has similar submissions set for a vote at Warner Bros. and Netflix Inc.

"The use of AI in that industry had clearly become a material issue to investors," said Brandon Rees, deputy director of corporations and capital markets at the AFL-CIO's investment office, talking about the Hollywood strikes. "We believe that companies need to be engaging in a dialogue with their workers to best decide how AI should be incorporated into their business," he added.

Amazon pushed back against the proposal seeking a new director panel focused on AI-driven human rights risks, saying in its proxy statement that its board and board committees "are already overseeing human rights and other risks associated with artificial intelligence and machine learning."

The company said "it would be far more effective for the board committee already responsible for particular types of risks—such as human rights or human capital risks—to retain oversight responsibility for any additional risks associated with AI in those contexts."

None of the other companies with upcoming investor votes on AI responded to requests for comment for this article. Meta, Alphabet, Warner Bros. Discovery and Netflix have not yet issued their proxy statements with responses to the proposals.

AI Proposals

Investor bids target companies over a range of AI risk

Company	Proposal	Proponent	Annual Meeting
Amazon	New AI committee	AFL-CIO	May 22
Meta	Misinformation risk report	Arjuna Capital	Typically in May*
Alphabet	Board oversight	Trillium	Typically in June*
Alphabet	Misinformation risk report	Arjuna Capital	Typically in June*
Warner Bros. Discovery	AI transparency	AFL-CIO	June 3
Netflix	AI transparency	AFL-CIO	June 6

Source: Shareholder proposals

Note: *Not disclosed as of April 17, 2024

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New Rules

AI risk is heightened by new rules like the EU's AI Act, an upcoming law expected to take effect in the coming months which—like the shareholder proposals—aims to make sure AI systems are governed by safe and ethical principles. The Act bans what it deems “unacceptable risk” like using AI systems that could manipulate individuals or exploit them because of their age or disability, for example.

The upcoming law will apply to providers and developers of AI that are used in the EU even if the companies are based elsewhere.

The US has taken a less stringent touch. The White House issued an executive order late last year with sweeping security and privacy measures and other directives, including a requirement that developers share their safety test results with the US government.

Securities and Exchange Commission Chair Gary Gensler also gave companies a stern warning in December about misleading investors over their AI capabilities, a phenomenon that he called ‘AI washing.’

Developing Risk

Companies across industries are talking more about artificial intelligence in filings to investors, either about the opportunities or risks. Bloomberg Law reported in February that just over 40% of S&P 500 companies mentioned AI in their most recent annual report.

Many businesses are working on a range of AI priorities navigating everything from record-keeping to transparency. There's also the environmental impact of AI to consider, alongside how it could be used to favor certain backgrounds in recruiting, or even replace portions of the workforce.

Companies will also need to take care over how they present their AI policies to everyone from shareholders to employees and customers, said Arnaud Cavé, a director at FTI Consulting. "It's the same information, but you need to think very hard about how you communicate it best to different stakeholders," he said.

Niamh O'Brien, a consultant also at FTI, said the slate of AI shareholder proposals shows that investors want to see companies are prepared.

Producing third-party audits as well as progress reports are important to help demonstrate a company's preparedness, O'Brien said. While data privacy or cybersecurity policies can provide a helpful framework, navigating AI is a mammoth undertaking, she said.

"Companies are going to be using maybe hundreds of types of AI within their organization," she said. "And all of those will affect different stakeholders and have different impacts."

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Hawaii authorities vow swift investigation into wildfire while releasing timeline

 [courthousenews.com/hawaii-authorities-vow-swift-investigation-into-wildfire-while-releasing-timeline](https://www.courthousenews.com/hawaii-authorities-vow-swift-investigation-into-wildfire-while-releasing-timeline)

Keya Rivera

Lahaina town, once a bustling historic cultural center on Maui, was reduced to ruins by wildfires (Office of the Governor, State of Hawaii via Courthouse News)

HONOLULU (CN) — Hawaii's attorney general focused in a Wednesday conference on the timeline of the events prior to, during and immediately following the devastating Lahaina wildfires that destroyed the Maui town and killed over 100 people.

State Attorney General Anne Lopez presented the first report of her department's investigation into the wildfires on Wednesday. Phase one of the investigation culminated in a comprehensive timeline report lays out a minute-by-minute record of the progression of the inferno.

The attorney general's office emphasized that their investigation is not about how or who started the fire, but rather focuses on preparedness efforts, the impact of weather conditions and other fires occurring on Maui within the same time period.

Steven Kerber — Executive Director of the Fire Safety Research Institute, the contractor who has been tasked with investigating the incident — established that phase one is not an investigation into the origin of the fires.

That investigation is currently being conducted by the U.S. Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives. Kerber says ATF is aiming to have the Lahaina origin investigation report complete by the anniversary of the August 2023 catastrophe.

Lopez's presentation on the wildfires began with a call for empathy, as she reflected on her personal involvement in the response efforts.

"A few days after the wildfire, I was speaking to the governor and he and I were asking the same questions everybody else was, which is, how could something like this ever happened," said Lopez. "We both agreed that good governance demanded we investigate how state and government functions during this process."

Lopez made it a requirement that the investigation be completed in its entirety within the first 12 to 18 months, saying, "The people of Hawaii can't wait four or five years for this report to come out. We need to do it now. While things are still fresh in our minds so we can get to work."

Lead investigator Derek Alkonis explained how the timeline was compiled. The team began with gathering dispatch records, like communications between firefighters and police officers, which were processed and dropped into a timeline.

They also sought out information from local agencies like Hawaiian Electric, which has weathered a heavy dose of the blame for the fires.

Alkonis also credited most of the timeline information to Lahaina residents, who, along with social media posts, provided the clearest glimpse into the fire's progression and the emergency response.

"There was not good satellite coverage in this particular area," Kerber said Wednesday. "In some investigations you might see satellite thermal images of how the fire progressed. We didn't have any of that. So we really had to rely on the residents. We had to rely on the firefighters, the police department, and all of the responders."

Alkonis touched on weather conditions prior to the fires and showed photos of strong roofs were being ripped off of buildings. The rapidly spreading fires were fanned by winds up to 150 miles per hour coming from Hurricane Dora, which ultimately passed the islands without making landfall.

One notable revelation was the ability of embers from a fire to travel up to a mile away, bypassing nearby homes to spark new blazes at a distance.

"What I found most astonishing, is how the hurricane winds, the clouds, the dryness and the humidity all came together, and I know this sounds trite, but the perfect storm," Lopez said.

She ended the conference saying that she was proud of her team, but the investigation still had a long way to go. The second phase of the report should be complete around autumn of this year.

Phase two will analyze emergency management plans, policies, and procedures to understand what was done wrong or right. Phase three, the final report, will be released by the end of the year and will include a recommendation to prevent future disasters as well as an investigation into the origin of the Lahaina fires.

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DeWine Says Randazzo's Ties to FirstEnergy Were Well Known, But the Evidence of This is Lacking

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Marty Schladen, The Ohio Capital Journal

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The Ohio Channel

Sam Randazzo

The office of Gov. Mike DeWine has for months been saying that connections between the guy he picked to be the state's top regulator and a utility at the center of an epic bribery scandal were well known around Capitol Square when DeWine nominated him in January 2019.

If the relationship were common knowledge, it might seem more innocent that some in DeWine's administration knew the utility had paid the regulator \$4.3 million just before the governor nominated him. However, the administration has provided scant evidence that the claim is true — and there's considerable evidence suggesting it isn't.

The regulator, Sam Randazzo, died by suicide earlier this month and the utility, Akron-based FirstEnergy, has admitted to its role in a scandal that has sent one public official to prison for 20 years and seen yet another defendant die by suicide.

Meanwhile, DeWine's lieutenant governor, Jon Husted, won't talk about a \$1 million FirstEnergy contribution to a group supporting him. And DeWine himself hasn't explained what senior people in his administration with FirstEnergy connections knew about the scheme — in which \$61 million in bribes were paid for a \$1.3 billion ratepayer bailout.

Multiple ties

Among them is Laurel Dawson, who was chief of staff of the incoming DeWine administration at the beginning of 2019. At the same time, her husband, Mike Dawson, was a lobbyist for FirstEnergy.

A few weeks before, on Dec. 18, 2018, Gov.-elect DeWine and Lt. Gov.-elect Jon Husted had dinner at the Columbus Athletic Club with FirstEnergy CEO Chuck Jones and Vice President Micheal Dowling. At the dinner, they discussed whether Randazzo would be acceptable to head up the Public Utilities Commission of Ohio — the agency that was supposed to regulate the executives' utility, according to a state indictment of Randazzo, Jones, and Dowling that was filed in February.

After the dinner, the FirstEnergy executives drove about a mile to Randazzo's condo and negotiated a \$4.3 million payment to Randazzo, the indictment said. FirstEnergy later said the payment was a bribe in a deferred prosecution agreement with the U.S. Justice Department.

As PUCO chairman, Randazzo helped draft and lobby for the bailout law and did several other lucrative favors for FirstEnergy. His indictment said it capped off a decade-long relationship in which he was a paid "consultant" for FirstEnergy unbeknownst to his law firm or a group of industrial energy users on whose behalf Randazzo was supposed to be negotiating concessions.

The indictment says at least one person in the DeWine administration — Laurel Dawson — knew that Randazzo had gotten a huge payment from FirstEnergy in the weeks before DeWine nominated him to chair the PUCO at the beginning of February 2019.

Randazzo told "the Governor-elect through his incoming Chief of Staff that he had received \$4.3 million from FirstEnergy, which he claimed was final payment of a 'consulting agreement,'" Randazzo's indictment said.

For her part, Laurel Dawson is cooperating with the state prosecution, but she isn't commenting publicly.

Common knowledge?

In the months since the state indictment of Randazzo and the FirstEnergy executives, DeWine Press Secretary Dan Tierney has been saying that Randazzo's ties to FirstEnergy weren't news even at the time the governor was considering him in early 2019 to head the PUCO.

In February, he told Cleveland's News Channel 5, "it was well known that Randazzo was a paid consultant for FirstEnergy."

Tierney modified that somewhat, telling the Capital Journal earlier this month, "it was well known to our staff that Mr. Randazzo was an energy consultant, and it was well-known to them and many people that Mr. Randazzo was a consultant employed by First Energy."

However, it appears that Randazzo and FirstEnergy's top leadership went to great lengths to keep their relationship secret.

Many of the counts Randazzo was charged with have to do with his failure to report income from FirstEnergy on state ethics disclosures while he was PUCO chairman. A bill of particulars accompanying the indictment adds that Randazzo didn't disclose a 2015 consulting agreement with FirstEnergy to the members of his own law firm, McNees, Wallace and Nurick. Randazzo's membership agreement in the firm barred him from outside employment, the filing said.

Pressed on the matter this week, Tierney said in an email, "Mr. Randazzo testified numerous times at the General Assembly prior to his appointment to the PUCO. In addition, Mr. Randazzo served on the PUCO Nominating Council, which requires ethics disclosures. These were among the reasons Mr. Randazzo's relationships with utilities and FirstEnergy were well known at the Statehouse and on Capitol Square."

The Capitol Journal obtained Randazzo's disclosures from the Ohio Ethics Commission for the period he served on the PUCO Nominating Council — 2007 to 2017. "FirstEnergy" doesn't appear on any of them.

Tierney was informed of that and asked whether DeWine's office could point to any testimony Randazzo gave to the General Assembly in which he divulged his long, profitable relationship with FirstEnergy. Tierney didn't answer that question, saying instead, "My understanding is that Mr. Randazzo's business entities are listed on the ethics form(s), and those business entities not only were well known to be associated with Mr. Randazzo on Capitol Square, but also well known to have First Energy as clients."



Shell game

The entity that appears on Randazzo's ethics disclosures is the Sustainability Funding Alliance of Ohio — a group prosecutors accused Randazzo of using as a shell corporation to skim millions in FirstEnergy money earmarked for his industrial clients. The group's relationship with FirstEnergy was so secret that the corporation's top executives feared that a partial disclosure would tank Randazzo's nomination to the PUCO.

FirstEnergy Solutions — a subsidiary Jones and Dowling desperately wanted ratepayers to bail out — was going through bankruptcy. One of its filings mentioned the Sustainability Funding Alliance, which Randazzo had also listed on his ethics disclosures.

The FirstEnergy executives were in a panic about it and their communications show that the connection between their company and Randazzo's entity was far from well known.

The DeWine administration is "going to be mad at Sam (and hopefully not us) for not disclosing the financial relationship," Dowling texted Jones on Jan. 30, 2019, less than a week before DeWine nominated Randazzo. "That's Sam's responsibility."

When the nomination went through anyway, Dowling told Jones, "A bullet grazed temple," to which the FirstEnergy CEO replied, "Forced DeWine/Husted to perform battlefield triage."

“Secret for-profit entity”

In his email Monday, Tierney also said, “What media has described as the ‘dossier’ regarding Randazzo’s relationship with First Energy, which is a collection of public domain documents from the time in 2019, shows that much of this was colloquially known on Capitol Square and within the energy advocacy community.”

The “dossier” Tierney referred to was a 198-page document from a former aide warning DeWine about Randazzo’s murky relationships. It was delivered to Laurel Dawson on Jan. 28, 2019 — about a week before her boss nominated Randazzo.

Tierney said the document shows that Randazzo’s ties to FirstEnergy were well known. But the first page of the dossier says something quite different.

“Publicly available documents suggest that PUCO applicant Sam Randazzo has opaque, undisclosed financial ties to FirstEnergy that should be fully examined and made public,” it says. “The enclosed evidence demonstrates that Randazzo personally profits from a secret for-profit entity funded by FirstEnergy Solutions.”

Catherine Turcer, executive director of Common Cause Ohio, said that it’s past time for DeWine, Husted and their staffs to be much more forthcoming about their involvement in the bailout and about what DeWine and Husted did to investigate whether any member of the administration acted improperly.

“It makes sense to be as clear as possible about what actually happened,” she said. “And I don’t just want to hear from the governor. I want to hear from the lieutenant governor.”

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Matt Levine's Money Stuff: Elon Wants His Money Back

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Elon Wants His Money Back

By Matt Levine 2024-04-17T13:35:09154-04:00

Tesla

Tesla Inc. is an electric car company, but arguably its most important mission is generating cash for Elon Musk. This is not just me saying that. In 2017, Musk told a Tesla director that he needed billions of dollars from Tesla "so that I can put as much as possible towards minimizing existential risk by putting the money towards Mars." "Colonizing Mars is an expensive endeavor," a Delaware Chancery Court judge wrote this year. "Musk believes he has a moral obligation to direct his wealth toward that goal, and Musk views his compensation from Tesla as a means of bankrolling that mission." Maybe Mars was more of a 2017 thing, and in 2024 Musk has competing priorities (artificial intelligence, brain implants, Twitter), but the point is:

Elon Musk has big plans for the world, and a sense of moral mission in pursuing them.

- Those plans require a lot of capital.
- Except Tesla (now), which is a public company with about \$500 billion worth of liquid public stock, and which he can use for the other stuff.

I do not want to suggest that Tesla is purely Elon Musk's personal piggybank, because that's not true. It makes electric cars. It continues to invest in new projects. It has, historically, generated a whole lot of value for Tesla shareholders *other* than Elon Musk, though not as much recently. (It has lost more than 60% of its value since the peak in 2021.) But Tesla is *also* Musk's main piggybank, and he has a lot of needs. Musk went and solved the (difficult, capital-intensive) problem of electric cars, and now Tesla is his main source of wealth for solving the many other difficult, capital-intensive problems that interest him.

You know the story: In 2018, to satisfy Musk's Mars ambitions, Tesla's board granted him a package of conditional Tesla stock options that would be worth something like \$55 billion if Tesla succeeded wildly. It did: By 2021 Tesla was worth \$1.2 trillion, Musk got all the options, and for a time they were worth more than \$100 billion. He used his vast Tesla wealth — selling shares and borrowing against them — to fund his various other projects, like buying Twitter and also I am sure something Mars-related. By this year, he was back asking Tesla's board for more money. But meanwhile a disgruntled Tesla shareholder named Richard Tornetta had sued the company, arguing that Musk's pay package was illegal, and in January that Delaware judge ruled that it was. And so Musk's options disappeared, arguably making at least a theoretical dent in his ability to do Mars, AI, brains, tweets or whatever it is he's up to now.

Today Tesla filed a proxy statement for its 2024 annual meeting, asking shareholders to fix that problem and turn the money faucet back on. There are two specific asks:

1. That Delaware judge ruled that Musk's 2018 pay package was illegal in part because she found problems with the shareholder vote approving it. So Tesla is asking the shareholders to approve the 2018 pay package again, so Musk can get his options back.

- 2. It was a *Delaware* judge who ruled that Musk's pay package was illegal, because Tesla, like most big US public companies, is incorporated in Delaware. Presumably a *Texas* judge wouldn't do that, since Texas apparently loves Musk as a matter of state policy. So Tesla is asking the shareholders to approve reincorporating the company in Texas.

Each of these raises some complications.

First, the economics of re-approving the 2018 pay package. In 2018, Tesla's board granted Musk 12 tranches of stock options, each representing 1% of Tesla's stock at the time. The tranches would vest based on performance targets, particularly market capitalization targets: The first tranche vested if Tesla hit a \$100 billion market cap (up from about \$59 billion at the time of the grant), and the other 11 tranches would vest at \$50 billion increments, up to \$650 billion for the final tranche. He had 10 years to hit those milestones; he hit them in three. Today's proxy says:

The Board in 2018 believed that the hurdles for performance were exceptionally high, and subsequently, Mr. Musk met — and exceeded — each and every key milestone in the 2018 CEO Performance Award, milestones that have resulted in remarkable value creation for our stockholders.

And it quotes shareholder letters saying things like :

The requirements of the 2018 package were extraordinarily ambitious — and they were delivered. 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.

And:

My choice for Tesla being my primary investment is because of the pay package selected for Elon Musk. No different than many sales personnel, when you perform, you are awarded, sometimes very handsomely for it. To the opposite of this, many CEO's are awarded great sums even when the company in many cases, drastically fails to perform for its shareholders which is why I looked at them years ago and didn't choose them.

And, right, by 2021, all the milestones had been achieved. But Tesla's market capitalization, as of yesterday's close, was just a hair over \$500 billion; it was lower this morning. Four of the milestones — covering roughly one-third of Musk's options — have been *un*-achieved! Of course in 2018, shareholders could reasonably have said "if he gets this company to \$650 billion, that will be amazing, and we should reward him," and if later the market cap fell they'd have no argument for taking the rewards back. But they're being asked to re-approve the grants in 2024, and "we need to reward Musk for making this a \$650 billion company" is a bit of an odder ask when it's actually a \$500 billion company.

Second, the law of re-approving the pay package. It's actually not obvious that this would *work*. Here is *roughly* how Delaware executive pay law works :

In general, a company's board of directors can pay its chief executive officer whatever they think is fair, and a court won't second-guess them.

- *Unless* the CEO is also a "controlling shareholder," as Musk is, in which case a court will review the pay package for "entire fairness."
- If the shareholders, in a fully informed vote, approve the pay package, then the burden of proving that it is entirely fair falls on people who object to it.
- If they don't — or if the vote isn't fully informed — then the burden of proving entire fairness falls on Musk and the directors.

In January, the judge found that the shareholders had voted to approve the 2017 pay package, but that their vote was not fully informed, because they did not know about some of the conflicts of interest that the board had in creating the package. So the burden of proving it was fair fell on Tesla, and the judge concluded that it wasn't, writing that it was "an unfathomable sum" and suggesting that the board could reasonably have accomplished its goals while paying Musk less.

Now the shareholders will vote again. Let's assume that their vote this time will be fully informed. (They can read the judge's opinion! It's attached to the proxy statement!) But then Tarnetta could sue again, arguing that the pay package still isn't fair. This time, the burden of proof will be on him. But ... can't he prove his case by attaching the judge's previous opinion finding that the pay package wasn't fair? If the pay package wasn't fair in January, then arguably it isn't fair now, and shareholder approval might not fix that.

Now, I'm not sure that's right. But I'm not sure it's wrong, and neither is Tesla. The proxy statement says:

The Company is asking its stockholders to ratify the 2018 CEO Performance Award under Delaware common and statutory law. Delaware common law ratification permits a Delaware corporation to validate a corporate act where the actors that purported to effect it lacked requisite corporate authority to do so. Common law ratification can also extinguish claims for breach of fiduciary duty by authorizing an act that otherwise would constitute a breach. When properly implemented, common law ratification “reaches back” to validate the challenged act as of its initial enactment. The Company believes that, under the Tornetta Opinion, the 2018 CEO Performance Award is such an act that may be ratified under Delaware common law. ...

While the Company believes that the Ratification should be upheld by a Delaware court, the Special Committee noted that even a favorable vote by our stockholders to ratify the 2018 CEO Performance Award may not fully resolve the matter. The Special Committee and its advisors noted that they could not predict with certainty how a stockholder vote to ratify the 2018 CEO Performance Award would be treated under Delaware law in these novel circumstances.

As I previously wrote: “It is possible that the rule of this case is that Tesla is not allowed to pay Musk \$55.8 billion, no matter what its shareholders think, no matter how many of them vote to approve it in a fully informed vote. It’s enough to make you want to move to Texas.”

Third: Texas. I have written before about the problem with moving to Texas, which is that, if Tesla moves to Texas *just* to be able to pay Musk more, then some shareholder will sue in *Delaware* to *stop* it from moving, and a Delaware court might be sympathetic. I wrote:

So shareholders will go to the Delaware judge saying “Elon Musk tried to pay himself \$55 billion, and you stopped him from doing that because it was unfair to shareholders, and now he is trying to move Tesla to Texas so that he can (1) get rid of you and (2) pay himself \$75 *billion*, so you have to stop him again.” And I think that is an argument that the Delaware judge might find compelling? I mean, she did stop Musk from paying himself \$55 billion. Presumably this move will be even more offensive.

Since then, there was a February Delaware Chancery Court decision finding that TripAdvisor Inc.’s planned move from Delaware to Nevada might in fact be unfair to shareholders, and so was subject to court review, but refusing to *stop* the company from moving: If it turns out to be unfair to shareholders, the judge reasoned, then the shareholders can sue (in Delaware) for damages, but that’s not enough reason to stop the company from moving. So it now seems unlikely that a court would stop Tesla from moving. Still, probably lawsuits.

I also wrote:

I am sure that, when Tesla actually asks its shareholders to approve reincorporating in Texas, it will have good lawyers write a proxy statement emphasizing the many corporate benefits of Texas, the importance of attracting and retaining talent and the value that Musk provides to Tesla.

Texas is already our business home, and we are committed to it. Gigafactory Texas is one of the largest factories in the United States, covering 2,500 acres along the Colorado River. The Gigafactory is the manufacturing hub for our most innovative vehicles, including the Cybertruck and the Model Y. We have a significant number of manufacturing, operations, and engineering employees in Texas, and our executives are based there. Texas is where we should continue working towards our mission of accelerating the world's transition to sustainable energy, as we lay the foundation for our growth with our ramp and build of factories for our future vehicles and to help meet the demand for energy storage as well as with our progress in artificial intelligence via full self-driving and Optimus.

And, while the letter goes on to complain about the Delaware court decision, the proxy statement elsewhere suggests that the result might not have been different in Texas :

That is: Texas law is roughly the same as Delaware law, so it can't be the case that Tesla is moving to Texas to be able to pay Musk more. Now, I *think* that Texas will probably be more receptive to giant pay packages for Elon Musk than Delaware turned out to be, and I also think that Tesla thinks that. But I can't prove either of those things: Delaware courts have a lot of experience in considering conflicted transactions, CEO pay, etc., and Texas courts don't. It would be extremely funny if Tesla moves to Texas and gives Musk a giant new pay package in 2025, a shareholder sues, and a Texas court strikes it down. It's also entirely possible! The rules in Texas and Delaware are "essentially the same"! Supposedly!

5/10

In thinking through various scenarios for how any decision on reincorporation could play out, and observing the widespread interest in reincorporation and *Tornetta* from stockholders and the media, the Committee determined that disclosures for a possible stockholder vote on reincorporation would need to address Musk's compensation. Otherwise, a potential reincorporation could have been wrongly perceived as being made as a direct reaction to the *Tornetta* ruling, and with the intent to award Musk compensation in a different jurisdiction that he could not get in Delaware. And, if stockholders were not told of any then-existing plans for Musk's compensation, the reincorporation vote could be subject to attack as not fully informed.

Re-approving Musk's pay is a bit of unfinished business that Tesla needs to wrap up in Delaware so that it can move to Texas.

Breakup fees

I certainly do not give career advice around here, but just hypothetically:

1. If you are an investment banker, and you're unhappy with your pay this year, and a rival investment bank is looking to poach you for much more money, hear them out! What can it hurt.
- 2. If you meet with them, and everyone gets along well, and they offer you much more money, and you want to shop that offer to your current employer to try to get more money, go right ahead.
- 3. If that's your plan, though, maybe don't *sign an employment contract* with the new bank before shopping their offer to your old bank.
- 4. Or, if you *do* sign an employment contract with the new bank before shopping their offer to your old bank, make sure that the employment contract does not contain a non-negotiable "breakup fee" requiring you to pay back \$4 million to the new bank if you don't end up working there.
- 5. Or, if you *do* sign an employment contract with the new bank before shopping their offer to your old bank, and if the employment contract *does* contain a \$4 million breakup fee, and if you shop the offer to your old bank, and they want to keep you and make a good counter-offer and you decide to accept it: Make sure that, in your new deal with your old bank, there's a provision saying "if New Bank sues me to enforce that breakup fee, Old Bank will pay for my lawyers, and if New Bank wins that lawsuit, Old Bank will pay the \$4 million."

I can see how it might be hard to stick to Nos. 3 and 4. But in that case No. 5 really is essential. Fortunately it completely solves the problem, for you.

Here's a Bloomberg News story about Dean Decker, who was a real estate and gaming banker at Credit Suisse Group AG. He got paid \$1.1 million in 2015, "his lowest take-home in years," so he was receptive in 2016 when he was approached by Jefferies Financial Group Inc. "Play it out," he messaged a colleague about talking to Jefferies. "It certainly doesn't hurt to know options." Eventually Jefferies offered him a \$10 million guarantee with a \$4 million breakup fee, and in January 2017 he signed the offer letter. "By 5 p.m. on January 3, less than 24 hours after Decker signed his offer letter, he was negotiating with Credit Suisse for more money and a promotion," which he got, so he stayed.

Jefferies sued, the case wound its way through the courts, it seems like they might win and he'll have to pay back the \$4 million. Doesn't matter to him though:

Credit Suisse agreed to cover his legal bill — and any damages. Now, UBS will have to pick up the tab. UBS declined to comment.

Right I mean if Credit Suisse wanted to buy him back from Jefferies, it had to pay the full price. Anyway now he works at Banco Santander SA.

DXYZ N-2

We have talked a few times about the Destiny Tech100 fund, which has a very good pitch and a very embarrassing stock price. The pitch is that the fund (often called by its ticker, DXYZ) is a public, exchange-traded way for regular retail investors to get exposure to hot private startups like Stripe and SpaceX. The stock price, though, is way too high: DXYZ closed at \$43.50 yesterday, for a market capitalization of about \$475 million, a roughly 800% premium over its net asset value of roughly \$4.84 per share. If you bought a share of DXYZ yesterday, you got really very little exposure to its \$50 million portfolio of hot tech startups, and a lot of exposure to its meme-y stock market premium.

Last week, when the stock was at \$80, for a market cap of about \$875 million, I wrote:

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

Later, when the stock was even higher, I mentioned the obvious solution:

DXYZ should sell stock! So much stock. It should sell stock to the public at a 1,000% premium to its net asset value or whatever, and then use the money to invest in more stakes in more private companies. If you do enough of that, then:

1. You collapse the premium: Selling stock and buying the underlying assets will move the price of the stock closer to the price of the underlying assets.

2. You average into the valuation. Right now DXYZ has, call it, \$1 billion of stock and a \$50 million portfolio, a 1,900% premium. If it sells another \$1 billion of stock, and invests the proceeds into new private-company stakes, it will have \$2 billion of stock and a \$1.05 billion portfolio, a 90% premium. Progress!

There are some limits on this: DXYZ doesn't just have to raise the money; it also has to deploy it, to find good private companies (or their shareholders) who are willing to sell it shares at reasonable valuations.

Well, right. Yesterday DXYZ filed to sell up to \$1 billion more stock. "On April 12, 2024, the last reported sales price on the NYSE for our common stock was \$29.00 per share, which was at a premium of 499.17% to the net asset value per share of our common stock as of December 31, 2023," warns the first page of the prospectus, in bold. "This next step will accelerate our momentum in providing public access to private tech and continue building toward our target of 100 companies in the \$DXYZ portfolio," tweeted its founder, Sohail Prasad. If you have a \$50 million portfolio of private companies that trades at a \$475 million market cap, you really do have to sell more stock! You took \$1, invested it in private stock, and turned it into \$10 of public stock. Sell \$10 more of public stock, buy \$10 of private stock, and add \$100 more of public value. Then do it again; it's a perpetual motion machine.

Not really, of course. The filing did have the useful effect of reducing the premium. At noon today, DXYZ was trading at about \$35.20: still way above its net asset value, but getting closer.

Quis custodiet ipsos cellphones

Ahahahahahahahahaha hahahahahahahahaha hahahahahahaha:

The US Securities and Exchange Commission has blocked third-party messaging apps and texts from employees' work mobile phones, bringing its own practices closer to the standards it's enforcing for the industry.

The SEC's decision to block disappearing-messaging apps will help the agency improve its own record-keeping and address security vulnerabilities after one of its social-media accounts was compromised earlier this year. It follows about \$3 billion in fines imposed on financial firms to settle allegations that they failed to keep adequate records of work-related communications on mobile devices and apps such as Signal and Meta Platforms Inc.'s WhatsApp.

The scrutiny prompted Wall Street to overhaul how employees communicate on business matters using mobile phones. Meanwhile, the SEC took a hard look at policies covering its own staff's communications on agency-issued phones.

The agency has restricted access to third-party messaging applications, as well as SMS (short message service) and iMessage texts "to lower risk that our systems could be compromised and to enhance recordkeeping," an SEC spokeswoman said in an emailed statement.

Impeccable work, maybe the best thing the SEC has ever done.

Judging by SEC enforcement priorities, perhaps the *single worst financial crime* — the misconduct that might have generated the largest dollar value of recent SEC fines — is talking about business on personal cell phones. “Finance, ultimately, depends on trust,” SEC Chair Gary Gensler said, after one tranche of fines. “By failing to honor their recordkeeping and books-and-records obligations, the market participants we have charged today have failed to maintain that trust.” “Ultimately, everybody should play by the same rules,” he said after another one, “and today’s charges signal that we will continue to hold market participants accountable for violating our time-tested recordkeeping requirements.” That was in December 2021. A couple of years later, apparently the SEC has to play by those rules too.

I hope the banks will sue for their money back? I hope that the SEC’s enforcement lawyers came to a meeting with a bank’s top brass, and proceeded to berate them about how awful it is that some of their employees texted about business, and then the SEC lawyer’s phone buzzed and she pulled it out and was like “sorry do you mind if I answer this text, it’s about another case” and proceeded to text a reply. And the bank CEO was like “hang on did you just” and the SEC lawyer put her phone away and said “we’re not here to talk about me” and went back to berating him. Absolutely perfect financial regulation story right here.

Things happen

BlackRock’s Aggressive Hunt for Growth in Saudi Arabia. Wall Street Bank Leaders Hail IPO Market’s Budding Revival. Powell Dials Back Expectations on Rate Cuts. Booming AI demand threatens global electricity supply. Wildfires Are Upending Some of the Safest Bets on Wall Street. PwC Pushes Back at Evergrande Letter. Brazilian woman brazenly wheels elderly man’s corpse into bank to co-sign a loan for her. “We learned a strategy from the Multiamory podcast called ‘agile scrum,’ which was adapted from business-meeting models.” Axe for sheep. ‘Pablo Escobar’ cannot be registered as a trademark, EU court rules.

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- 1. That is: Musk has sold Tesla stock to raise money. He has pledged 238 million shares — worth about \$37 billion at today’s prices — to secure personal debt. Also, though, when he bought Twitter Inc., Twitter borrowed about \$13 billion from investment banks to pay some of the purchase price. That money was not secured by Tesla shares; it was not even personally guaranteed by Elon Musk. And yet it seems clear that those banks were jazzed to lend money to Twitter at now-catastrophic-looking terms because they had some thought process like “Elon Musk is super-rich and will own Twitter, so this should all work out for us.” Which is, I think, ultimately a function of his big Tesla stake.
- 2. There were also operational milestones, which Tesla hit; I assume that the market cap ones are binding. This is all described on pages 64 to 73 of today’s proxy statement.

- 3. The first quote here is from a letter from T. Rowe Price to Tesla's board, the second is from a letter to the Delaware court from a retail shareholder named Russell McClelland.
- 4. The first three pages of the January court decision give an overview of the rules.
- 5. You might disagree, but as a legal matter this seems pretty settled. Musk currently owns 20.5% of the stock, but the judge found in January that he is a controlling shareholder through his share ownership, "superstar CEO" status and dominance of the board. Or technically she found that he was a controlling shareholder in 2017, but I think the analysis is pretty much the same today.
- 6. The judge, carefully, wrote that Tesla "failed to prove that the Grant was the product of fair dealing or at a fair price," not that it *was* unfair; there is room for the outcome to change if the burden of proof does.
- 7. There are other interesting discussions of the differences between Texas and Delaware. I have mentioned the standard view that Delaware has more predictable business law, but the proxy argues otherwise: "The Special Committee and the Board considered the likely relative predictability of Delaware and Texas law based on differences in their judicial systems. Delaware has the most respected corporate judicial system in the country and has an extensive body of corporate case law. In contrast, Texas is in the process of forming a specialized business court system (which is set to open in September 2024) and has a smaller body of corporate case law. This factor did not alter the balance in the Special Committee's evaluation of Delaware and Texas. In making this determination, the Special Committee and the Board were persuaded by the broadly held academic view — echoed by at least three former Delaware Supreme Court Justices and one former Chancellor on the Delaware Court of Chancery — that Delaware law can be indeterminate because of its use of broad, flexible standards that are applied to individual cases in a highly fact-specific way. As described in the Special Committee Report, scholarship demonstrates a high level of reversal rate for decisions of the Delaware Court of Chancery. This focus on precise facts and circumstances means Delaware decisions may be less predictable for an innovative company like Tesla. Although Texas has less corporate case law, as the Special Committee's corporate law and governance expert pointed out, Texas 'has a more code-based corporate governance regime,' and so does not depend on cases to set out the law as much as Delaware."
- 8. This one is controversial, and some people will advise you never to do this: By getting an offer elsewhere, and then taking it back to your current employer, you have demonstrated disloyalty and lost their trust, things will never be the same, and you're better off starting fresh elsewhere. Obviously this will depend on your particular circumstances but, come on, in investment banking? How much loyalty do they expect?
- 9. This one is also debatable: It's risky to tell your employer that you are leaving, and you might want to have a buttoned-up deal before telling them, to avoid the risk of them somehow sabotaging it? Also your offer from the new bank might be very time-limited, and you might have to sign before you can even try to negotiate a better deal.
- 10. I mean, depends how you count. The SEC's phone crackdown dates from its 2022 fiscal year; that year, it extracted \$4.2 billion in total penalties, of which \$1.2 billion were for phones. In fiscal 2023, it extracted \$1.6 billion in penalties, of which about \$400 million were for phones. So roughly a quarter of all SEC fines these days are for cell phones. I don't think there's a bigger single category, though I could be wrong.

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Tesla shares fall as Deutsche Bank flags risks from focus on Robotaxi

 [reuters.com/business/autos-transportation/tesla-shares-fall-deutsche-bank-flags-risks-focus-robotaxi-2024-04-18](https://www.reuters.com/business/autos-transportation/tesla-shares-fall-deutsche-bank-flags-risks-focus-robotaxi-2024-04-18)

Reuters

Visitors check a Tesla Model 3 car next to a Model Y displayed at a showroom of the U.S. electric vehicle (EV) maker in Beijing, China February 4, 2023. REUTERS/Florence Lo/File Photo Purchase Licensing Rights , opens new tab

April 18 (Reuters) - Tesla shares (TSLA.O) , opens new tab fell to their lowest in more than a year on Thursday after Deutsche Bank raised concerns over the electric automaker's increasing focus on its autonomous vehicle products when profit is under pressure. The Elon Musk-led company's shares fell 2.7% to \$151.26 after the brokerage downgraded the stock to "Hold" and cut its price target to \$123 from \$189.

The brokerage's commentary follows Reuters report earlier this month that Tesla decided to cancel its long-promised inexpensive car that investors hoped would drive growth, while continuing to develop Robotaxis on the same vehicle platform.

Tesla has been pushing for greater adoption of its full self-driving advanced driver assistance software ahead of unveiling Robotaxi in August.

The brokerage said cracking the code on full driverless autonomy represents a significant technological, regulatory and operational challenge.

"The delay of Model 2 efforts creates the risk of no new vehicle in Tesla's consumer lineup for the foreseeable future, which would put downward pressure on its volume and pricing for many more years," Deutsche Bank analyst Emmanuel Rosner said.

As profitability takes a hit from price cuts to boost demand for its electric vehicles, Tesla earlier this week laid off more than 10% of its global workforce even as it continues to try to revive Musk's huge pay deal from 2018.

The company has asked its shareholders to reaffirm their approval of Musk's \$56 billion pay that was set in 2018, but was rejected by a Delaware judge in January.

Tesla shares fell to its lowest in nearly 15 months on Thursday, after shedding 37.4% of their value so far this year, making it the second worst-performing stock on the S&P 500 index (.SPX) , opens new tab.

Its market capitalization is set to fall by more than \$17 billion to about \$478 billion, if losses hold. Still the company remains the most valuable automaker in the world.

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April 18, 2024, 9:57 AM PDT

Jane Street Wants Its Secrets Back

By Matt Levine

(Bloomberg Opinion) --

Jane Street vs. Millennium

One sort of thing you could do, if you work at an investing firm, is say “I like Microsoft Corp., I think this artificial intelligence thing is big, I think the stock will go up.” And then you buy Microsoft stock with your firm’s capital, and hopefully it goes up.

Another sort of thing you could do, if you work at an investing firm, is design a complex software system that ingests millions of data points to find predictive signals and then uses those signals to make automated low-latency trades in multiple assets on multiple exchanges with limited human supervision. You write thousands of lines of code, you test the system, you put it into production, it runs on its own and hopefully it makes money.

And then one day, as these things go, you might leave your investing firm and go work for another one. What can you bring with you? Well, if your big idea at your old job was “we should buy Microsoft,” and you get to your new job, and on the first day you walk in and say “I like Microsoft, I think this artificial intelligence thing is big, I think the stock will go up,” then probably they will say “great, that sort of insight is exactly why we hired you, let’s buy Microsoft.” And you’ll buy Microsoft stock with your new firm’s capital. And if you then go have drinks with your former colleagues at your old firm, you might mention “hey I bought some Microsoft,” and they’ll be like “yeah, you always did like Microsoft,” and it’ll be a nice moment of reminiscence.

Whereas if your big idea at your old job was a complex software system ingesting millions of data points, and before you leave your old job you email the code to your Gmail account, and then you get to your new job, and on the first day you walk and and are like “gimme a sec guys, gotta Gmail myself my code so I can set it up my system to do trades for us,” there will be a stunned silence. I mean, for one thing, your trading strategy worked on your old firm’s software platform, and if you want to run it at your new firm you’ll probably need to rewrite it for their platform. But also, that software system you built is surely the intellectual property of your old firm, and if you use it at your new firm and the old firm finds out, you and your new firm will get very sued. Even if you do rewrite it for your new firm’s platform. Really, even if you never emailed it to yourself and just rewrite it, or approximate it, from memory. That system – its structure and methods and the ideas behind it – probably does belong to your old firm.

But there are a lot of other things you could do, if you work at an investment firm, that are somewhere between “buy Microsoft” and “build a complex software system.” We talked last month about a weird trade in Avid Bioservices Inc.’s convertible bonds: Avid forgot to do a fairly trivial administrative task required by its bond indenture, and as a result holders of the convertible could demand their money back, creating a pretty large windfall for them. If they noticed. Some holder or holders – I don’t know who, but I assume it’s a hedge fund – noticed, bought up the bonds cheap, accelerated them and got the windfall.

If you worked at that hedge fund, noticing the error and buying up those Avid bonds, and then you quit and moved to a different hedge fund, could you start buying up those Avid bonds for your *new* hedge fund? Does that count as stealing the intellectual property of your old fund? The intellectual property is something like “we read this indenture and noticed a glitch.” But the indenture is public, the glitch is public, the strategy is just noticing it. It seems weird to me to think that your old firm could sue you, saying “Avid’s mistake is our intellectual property and you’re not allowed to use it.”

That is, the *essential* sort of thing that you do, at an investing firm – the meta-task that everyone does – is identify market anomalies that can make you money. In the most general case, it is not clear how those anomalies could *belong* to your firm.

But I don’t know, that’s not legal advice.¹ In practice the way that hedge funds often address this is with non-compete agreements and gardening leave: If you leave your old firm, you are often contractually not allowed to start at your new one for some period of months or years. And in that time, the trades and strategies that you worked on at your old firm will become stale, so by the time you get to your new firm you probably won’t be able to replicate, or mess up, the trades your old firm is now doing.

Last week, Bloomberg’s Chris Dolmetsch reported:

Jane Street Group sued Millennium Management and two former traders over their alleged theft of a highly confidential and “immensely valuable” proprietary trading strategy.

In a complaint filed Friday in federal court in Manhattan, Jane Street said former traders Douglas Schadewald and Daniel Spottiswood, who resigned earlier this year to join Millennium, had been “intimately involved” in the development of the strategy. According to the suit, they are now using it at Izzy Englander’s hedge fund group in violation of confidentiality agreements.

Here is the complaint, which is redacted just enough to be tantalizing. Starting in about 2018, “Jane Street deployed significant resources” to develop trading strategies for, uh, [redacted]. I guess it has something to do with listed stock options in some non-US market.² What the researchers found shocked them:

The understanding and insights that resulted from this analysis and research, as well as the magnitude of the potential opportunities, were counterintuitive, unexpected, and initially met with significant skepticism and incredulity internally at Jane Street. However, the results of Jane Street’s analysis and research indicated there was tremendous potential opportunity if the trading concepts could be further developed and applied.

In 2023, they conducted an experiment and liked the results:

Jane Street risked substantial capital in trading activity to better understand (and verify) the tremendous opportunity presented by the Trading Strategy. ...

The analysis of the results of the 2023 Trading Investigation confirmed Jane Street’s initial findings – notwithstanding their facial improbability – and revealed that the market was [redacted] for certain classes of trades in the presence of specific market signals and underlying conditions.

Through the 2023 Trading Investigation, Jane Street identified certain signals and strategies, and methods of analyzing and interpreting those signals, that enabled Jane Street to reliably predict future market activity. Jane Street could then trade profitably based on these predictions.

So they put it into production and made buckets of money, while continuing to find it weird:

During his time at Jane Street, Schadewald stated that the Trading Strategy was “incredibly valuable,” “super valuable,” and continually emphasized to leadership “how valuable the trading is.” Schadewald also repeatedly stressed how unusual and counterintuitive the Trading Strategy was. ...

While at Jane Street, Spottiswood acknowledged how valuable and counterintuitive the Trading Strategy was, saying he was “shocked” and “surprised” by its results, and that it was “really awesome.”

This was presumably good for the traders – including Schadewald and Spottiswood – who were doing the trade. But, says the complaint, there was a way for them to do better: Shop their skills elsewhere. In February, Schadewald and Spottiswood left Jane Street for Millennium. They apparently got a good deal:

Based on conversations between Schadewald and his colleagues at Jane Street, Schadewald's compensation from Millennium [redacted].

Schadewald's compensation at Millennium is atypical and above-market as compared to a competitor's typical arm's length offer to a trader with Schadewald's experience and performance.

In general, it is a good sign for you if your compensation is "[redacted]." "[Redacted]" is not a higher amount of compensation than any determinate number, but it's pretty good.

The complaint says that Schadewald was hired to run a "pod" at Millennium, with its own allocation of capital and its own trading strategy. In general, multi-strategy "pod shops" like Millennium are always looking for new strategies that are not correlated with their existing strategies. Jane Street thinks that Schadewald's pod is doing the secret strategy developed at Jane Street³:

Despite the profitability of the Trading Strategy, Jane Street is aware of no competitor which has implemented a similar strategy – until Defendants did. Due to market dynamics and constraints, the entrance of a large competitor employing the same strategy at scale could not go unnoticed. ...

Within days of Schadewald's joining Millennium, Jane Street's profits attributable to the Trading Strategy decreased substantially, and the decrease accelerated in the period following Spottiswood's start at Millennium.

Unusually for the industry, they had no non-compete or gardening leave: "As a matter of [its] collaborative culture," the complaint says, "Jane Street does not typically require employees to sign non-compete agreements." (Apparently working at Jane Street is so nice and lucrative that people don't traditionally leave for competitors?) And:

While it is typical for traders transitioning between firms to take some period of time off, on information and belief, Schadewald and Spottiswood started at Millennium almost immediately.

I mean ... I wouldn't have said "it is typical for traders transitioning between firms to take some period of time off"? It's not, like, a nice social custom. I would have said "it is typical for firms to have non-compete agreements that *force* traders to take time off if they're leaving for another firm." Firms force traders to take time off so that their firm-specific trade knowledge has some time to decay. If you're free to start trading the minute you leave, maybe you will.

Anyway, Millennium started doing whatever it is doing, Jane Street's profits suffered, and it sent Millennium a letter saying "knock it off." Millennium declined; the complaint says that "Schadewald and Spottiswood claim they 'are entitled to put their own hard-earned skill and ability to work at [Millennium].'"

I don't know! Jane Street found a market anomaly, and made a lot of money trading it. Schadewald and Spottiswood – who traded on the anomaly at Jane Street – then took the anomaly to Millennium. What they took with them was apparently some sort of *strategy* – some way to reliably make money by trading in the [redacted] market – but it doesn't seem to have been an especially complex system. You can tell in part because of how quickly they allegedly spun it up at Millennium: Schadewald left Jane Street on Feb. 7, and Jane Street's profits were crushed by March. This sounds less like "Jane Street built an automated system to identify subtle market signals that they took to their new job," and more like "Jane Street noticed that Ruritanian equity index options were cheap on Thursdays, and they went to Millennium to buy those options on Thursdays."

Is that allowed? Schadewald and Spottiswood had nondisclosure/intellectual-property agreements while working at Jane Street; the complaint quotes them:

Schadewald agreed that "all intellectual property, including trade secrets, [] discoveries, concepts, [] know-how, [] models, methods, techniques, [and] processes [] ... shall belong to [Jane Street]." ...

Confidential Information does not include “information, knowledge or data that constitutes general skills, knowledge and experience,” “information known by the Undersigned prior to the Undersigned’s employment,” or “information publicly available, generally known or readily ascertainable from public sources,” *however*, the Schadewald IP Agreement required that Schadewald acknowledge that a “combination, integration or compilation of such information, either with or using [] Confidential Information, *is itself [] Confidential Information.*”

Was this trade “readily ascertainable from public sources”? Was it part of the general skills that they picked up at Jane Street and then brought to other jobs? Or was it a discovery, method, technique, etc., that is property of Jane Street? Jane Street invested a lot of time and effort into finding a market anomaly, and that anomaly was, it emphasizes, really weird and counterintuitive. Does that mean that Jane Street owns it?

Elon’s money

It is customary to say that, in 2018, Tesla Inc. gave Elon Musk a compensation package worth as much as \$55.8 billion. What it actually gave him was a series of options to buy about 304 million shares of Tesla stock for \$23.34 each,⁴ but only if he met certain performance goals over the 10-year term of his pay plan, mainly taking Tesla’s market capitalization from about \$59 billion (at the time he got the options) to \$650 billion. He accomplished those goals within three years, so he got all the options.

The \$55.8 billion number is pretty arbitrary: It represents how much the options *would* be worth at a Tesla market cap of *exactly* \$650 billion.⁵ In the event, Tesla’s market cap got as high as \$1.2 trillion in 2021, at which point Musk’s option package was worth more than \$100 billion. Tesla’s stock closed yesterday at \$155.45, for a market cap of about \$495 billion, making the options worth something like \$40 billion.⁶

But at the time they were granted, in 2018, Musk could not extract any money at all from them. He’d only be able to exercise them if he hit the performance targets, which he hadn’t yet. And because the \$23.34 strike price of the options was set to be the same as Tesla’s stock price at the time, even exercising the options, in 2018, wouldn’t make him a profit: He’d pay \$23.34 to get \$23.34 worth of stock, which he could just do in the open market. The options were worth \$0 if Tesla maintained the status quo; they’d only be worth anything to Musk if it grew a lot.

But the options weren’t *worth zero*, as an economic matter: There was some probability that Tesla *would* grow and he’d get to exercise the options and make \$55.8 billion, or more, or less. Finance has reasonably well-understood ways to put a single current numerical value on this uncertain distribution of potential future values. Tesla determined that the options were worth about \$2.3 billion at the time Musk got them: There was some chance they’d end up worthless, some chance they’d end up worth \$55.8 billion, some chance they’d end up worth \$100 billion or \$40 billion or any other nonnegative number, but, averaging over all those possibilities, the expected value was \$2.3 billion.⁷

If Tesla gave Musk a thing worth \$2.3 billion, that was an expense to Tesla, which reduced its net income. And so Tesla’s income statements reflected that \$2.3 billion expense over the period of Musk’s pay plan.⁸

Notice that Tesla had an expense of \$2.3 billion, while Musk got options that turned out to be worth more than \$100 billion at their peak. That’s a nice trade, a nice feature of stock-options-based compensation: The expense to Tesla turned out to be much lower than the actual value delivered to Musk.⁹

Anyway, this January a Delaware judge decided that Musk’s 2018 pay package was illegally big, and decreed that the options would vanish. And yesterday, Tesla asked its shareholders to re-approve the options, so that they will *not* vanish. We talked about various aspects of this yesterday, but one aspect that I neglected was the accounting.

What Tesla actually asked shareholders to do was to “ratify” the 2018 grant that the judge invalidated. Tesla’s theory is that a shareholder vote will fix the problem the judge identified and thus un-cancel Musk’s options: Everything will go back to the way it was. Tesla is not *sure* about that – it “could not predict with certainty how a stockholder vote to ratify the 2018 CEO Performance Award would be treated under Delaware law in these novel circumstances” – but that’s its best guess (and probably mine too).

If that works, then nothing has changed: Tesla granted Musk these options conditionally in 2018, he ended up earning all of them by 2021 and he still has them. They're worth \$40 billion today, and Tesla had an expense of \$2.3 billion over the last few years from giving him all those options.

But if it *doesn't* work, or if shareholders vote no, then:

1. I think Tesla gets back the \$2.3 billion of expenses? Its income is (was?) a bit higher, because the \$2.3 billion it thought it paid Musk disappeared.
2. Musk will probably want to replace the \$40 billion current value of that options package with, you know, another package worth \$40 billion.
3. Tesla's board will probably want to do that, to keep Musk committed to the company.
4. That would probably cost Tesla \$40 billion? Not just economically, but in the sense of reducing its accounting earnings by \$40 billion? In 2018, Tesla gave Musk a package that had some long-shot chance of being worth \$55.8 billion (or whatever), and that turns out to be worth \$40 billion today – but in 2018, the value of that long shot was only \$2.3 billion. But if it just gave him the \$40 billion again, that's worth \$40 billion. There's no uncertainty, and the accounting will reflect that.
5. Tesla's net income for the last *three* years totaled about \$33 billion, so paying Musk \$40 billion now would be, you know, a lot.

As Tesla's proxy statement says:

A new compensation plan would thus have a substantially similar dilution effect as the 2018 CEO Performance Award (assuming it is equity-based rather than cash). It would likely result in a very large, incremental accounting charge for compensation expense. For illustrative purposes, the Company's accounting team informed the Special Committee that a new grant of 300 million fully vested options – functionally equivalent to what Mr. Musk had before the Tornetta Opinion – would potentially result in an accounting charge in excess of \$25 billion, depending on certain timing and valuation factors.

By the way, the proxy also says:

The Special Committee also considered the possibility that ratification of Mr. Musk's 2018 CEO Performance Award could undermine the basis for the Tornetta plaintiff's request for an award of attorneys' fees of approximately \$5 billion in Tesla stock.

The lawyers who convinced a Delaware judge to take away Musk's \$55.8 billion (or whatever) options package then went and asked the judge for a \$5.6 billion fee for themselves, on the theory that they heroically saved \$55.8 billion for Tesla's shareholders. If the shareholders immediately vote to give that \$55.8 billion (or whatever) back to Musk, then it's harder for the lawyers to argue that they saved shareholders any money at all. Which makes it harder for them to argue for a big fee. Which saves the shareholders money.

Lambda loans

I have long been fond of a classic late-night dorm-room question of financial capitalism, which is: "What if people could sell stock in themselves?" Instead of borrowing money to go to college, you'd sell 10% of the equity in yourself to pay for college, and then when you graduated and got a good job you'd dividend out 10% of your income to your shareholders. Everyone loves talking about this! Drink every time someone says the words "adverse selection."

I sometimes get hung up on a dumb technicality, though. You can't *really* sell equity in yourself. You are not a corporation. You can do something sort of similar, a rough economic equivalent. You can write a contract that says "I will pay you 10% of my income forever," or whatever the actual terms are. (Most of the practical proposals are more like "A% of my income from B above a floor of \$C for D years, with a lifetime cap of \$E" than they are "10% of all my income forever.") And this contract creates ... I mean, I think I would call it "a debt"? It is a debt of indeterminate size; it is a debt whose payments are *conditional* on future facts (your income). But surely it is a *debt*. Surely if you *don't* pay, your "shareholders" don't go sue you in Delaware Chancery Court for a breach of fiduciary duties. They sue you in regular court for breach of contract, for not paying your debt.

We talked a few years ago about Lambda School, a coding academy that did not charge upfront tuition but entered into income-sharing agreements with its students, requiring them to pay “17% of their incomes for 24 months after landing a job that pays more than \$50,000 a year,” capped at \$30,000.

Yesterday the US Consumer Financial Protection Bureau settled a case against Lambda School’s successor, BloomTech, and its chief executive officer, Austen Allred, “for deceiving students about the cost of loans and making false claims about graduates’ hiring rates.” Much of this is standard consumer-finance stuff – BloomTech seems to have put a sunny spin on its job-placement data – but the part I found interesting was this:

BloomTech falsely claimed its “income share” agreements were not loans, did not create debt, did not carry a finance charge, and were “risk free.” In fact, the agreements are loans with an average finance charge of \$4,000. The loans carry substantial risk, as a single missed payment triggers a default and the remainder of the \$30,000 “cap” becomes due immediately. BloomTech further hid the cost and nature of the “income share” loans by not disclosing key terms like the finance charge and annual percentage rate, as required by law.

I mean! On the one hand, yes, absolutely, as a technical matter these things *must* be loans; there is nothing else that they could be. And perhaps the terms of the loans are harsh (the \$30,000 cap is due immediately on default?). And if you take the average amount repaid, and subtract the average amount borrowed, you can compute something like a (contingent, average) interest cost for the loans, and calculate an annual percentage rate or a range of APRs from that. And I can see how a consumer-debt regulator would say “this is consumer debt, our consumer debt regulations require APR disclosures, you didn’t disclose an APR, so pay a fine.”

On the other hand ... like, it’s *technically* false to say these things are “not debt,” but you know what they mean, right? They mean “this thing, economically, has the shape of equity: You pay nothing if you make nothing, and a lot if you make a lot; you hand over a share of your income rather than a fixed amount.” (Unless you miss a payment, oops.) There is some real explanatory power in leading with “this is not debt, but equity”; it does help people understand what the thing is. But the CFPB cares about the technicality, so they call it debt.

Private equity

A story that I would have told about private equity is that, in the olden days, a private equity fund was a couple of youngish ex-bankers who put up their own money and raised some money from outside investors to do leveraged buyouts of companies with very small equity checks, a novel and risky model in which all the participants – the fund’s founders, their outside investors, the lenders – were consciously taking big risks in the swashbuckler corners of the financial markets. And now, decades later, those private equity firms have become gigantic alternative asset managers that run hundreds of billions of dollars for insurance companies, with thousands of employees and much steadier and more diversified returns. Everything has become domesticated and institutionalized. You don’t invest with a private equity firm, these days, because you like the fire in the eyes of its 30-year-old founder; you invest because of its giant platform and suite of products and long track record.

Still you want a little fire in the eyes. Bloomberg’s Laura Benitez and Swetha Gopinath report:

The biggest backers of buyout firms are wielding their ever-growing bargaining power to drive increasingly tough deals. The latest in a string of investor demands is this: If you want our money, put more of yours in first. As a result, some private equity executives – at both big and small firms – are loading up on more debt and pledging personal assets to appease them. This includes their homes and other valuables as well as traditional collateral such as fees and stakes in other funds.

The equity contributions from buyout firms into new funds has jumped to an average of 5% from 2% last year, and in some cases as much as 20%, according to people familiar with the matter. It’s leaving some managers scrambling to find significant amounts of capital in often short time frames, the people said, asking not to be identified discussing private agreements.

To raise cash, some are taking out high-interest loans that can charge rates into the mid-to-high teens, and are often backed by holiday homes, cars, second businesses and art collections, the people said. Some banks are demanding that executives pledge the bulk, if not all of their personal assets, some of the people said.

"We are not going to invest in your private equity fund unless you'd lose your house if you mess up" just seems like more of a 1970s ask than a 2020s one, but I like it. Meanwhile of course the giant alternative asset managers are also in the business of lending each other money to invest in their funds:

Investec Plc and JPMorgan Chase & Co. are among banks providing such loans, according to people familiar with the matter. The industry's need for more capital has also given rise to several private credit lenders such as Ares Management, Oaktree Capital Management's 17Capital and Pemberton Asset Management, who have raised, or are raising funds to lend out.

So:

1. Do you think that the Ares and Oaktree professionals need to put a lot of their personal assets into those lending-money-to-private-equity-people funds? Do they have to borrow to do so? From each other? Or what?
2. There's going to be an absolutely amazing Money Stuff when Oaktree tries to seize an Apollo managing director's house after a fund does poorly.

AI returns

If you had a superintelligent robot, how could you use it to make money? Sell subscriptions to the robot? Predict stock prices and make trades? Ask it to dream up products that everyone will want to buy? Hack into banks? Targeted advertising? I don't know, but this question has an obvious meta-answer, which is: "Ask the superintelligent robot what the best way is to make money, and then do that." Maybe it's ads, I don't know, but I bet the robot does. Anyway here's a video of Sam Altman – it's old, but it's making the rounds again this week – telling an audience of venture capitalists, to somewhat nervous laughter, "once we build a generally intelligent system, basically we will ask it to figure out a way to generate an investment return for you." But this is plainly the correct answer! Any other answer would be wrong! "Ooh we'll sell ads on the superintelligent robot," no you won't, not if the robot has better ideas! The whole point of the robot is to have better ideas.

Things happen

Inside Amazon's Secret Operation to Gather Intel on Rivals. Hedge Fund 'Pod' Strategy Imitated by Pensions, Endowment. Bolt Co-Founder Pulled Strings on Unusual Stock Buyback, Suit Alleges. ARK Hits Out at Destiny in Race to Open Private Assets to Masses. Blackstone warns that private equity cannot return capital 'overnight.' Pension Funds Are Pulling Hundreds of Billions From Stocks. The \$1.6 Billion Quest to Build America's Tallest Skyscraper in ... Oklahoma. Tabs profile. "I've seen tons of rich people, billionaires come through and say, 'Oh, I'll join, how much is it, \$20K, \$50K, \$100K, a million? I don't care, I'll join.' And that's like the quickest way to not get invited."

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1. Here is a fun X thread from Giuseppe Paleologo running through the higher-profile lawsuits about this stuff, many of which seem to be more about code theft than idea theft. "These things are scary," he writes, "but the goal is keep things in a precarious equilibrium, where people defect, but not too much. ... To paraphrase @matt_levine, 'Everything is IP theft.' If your employer is unhappy, you can be a thief. Just enough to deter."
2. The complaint notes that Schadewald's background was trading S&P 500 index options, variance swaps and VIX futures at Barclays Capital, though he "had no significant experience trading in [redacted] prior to joining Jane Street," and that Spottiswood "was a trader on the options trading desk and reported to Schadewald" at Jane Street.
3. The complaint also mentions another way Jane Street learned of a competitor's entrance: "Jane Street's third party broker – used to execute the Trading Strategy – temporarily stopped processing Jane Street's orders on March 6 and 28, 2024, due to the broker [REDACTED] ... On information and belief, the new competitor caused the third party broker to exceed margin limits due to the execution of [REDACTED], mirroring Jane Street's Trading Strategy." Basically the trade has some capacity limit based on the margin limits of the broker Jane Street used; once Millennium allegedly got in, it used up the capacity.
4. That's not quite right; those numbers are adjusted for subsequent stock splits, so that they are comparable to Tesla's current share count and stock price. See page 66 of yesterday's proxy statement for the actual at-the-time numbers: The quantity was "approximately 20.3 million option shares equivalent to 303,960,630 shares of our common stock today after giving effect to stock splits," and the exercise price was the "Fair Market Value (FMV) of Tesla common stock on the grant date of January 21, 2018, which was \$350.02 per share of our common stock (based on the closing price on January 19, 2018, the last trading day prior to the grant date). Equivalent to \$23.34 per share of our common stock today after giving effect to stock splits."
5. I believe it comes originally from a table on page 18 of Tesla's 2018 proxy statement describing the plan.
6. That is, \$40 billion of intrinsic value, or value if he exercised them today. (The \$155.45 current stock price, minus the \$23.34 strike price, times 304 million.) The Black-Scholes value is probably a bit higher but let's not quibble; Bloomberg's OV calculator tells me the delta is around 99%.
7. Don't email me to complain about the phrase "expected value," I know. Page 55 of the 2019 proxy statement gives the value Tesla attributed to the award, \$2,283,988,504.
8. Page 123 of the Form 10-K for 2018 describes how the \$2.3 billion was amortized through the income statements.
9. The *per-share* expense to Tesla was higher because the options dilute the shares, but still. And of course if the market cap had stayed below \$100 billion, the options would have turned out to be worth \$0 to Musk, but Tesla would still incur an expense.

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Securities Law

April 18, 2024, 4:33 AM PDT

A \$9.5 Trillion Investor Group Wants Private Market Reforms (1)

By Frances Schwartzkopff

- Opacity is big concern, says Net Zero Asset Owner Alliance
- Demand comes as private credit to oil and gas industry booms

Bloomberg Law News 2024-04-18T13:00:22671640016-04:00
A \$9.5 Trillion Investor Group Wants Private Market Reforms (1)

By Frances Schwartzkopff2024-04-18T07:33:48037-04:00

- Opacity is big concern, says Net Zero Asset Owner Alliance
- Demand comes as private credit to oil and gas industry booms

Global ESG investors with \$9.5 trillion under management say it's time to demand more accountability from private markets, amid evidence they're increasingly absorbing fossil-fuel assets.

The Net Zero Asset Owner Alliance, whose 89 members include CalPERS , Zurich Insurance and Munich Re, is expanding its protocol to include all private asset classes. It previously excluded debt funds, directly held real estate debt funds and residential mortgage loans. The update, part of an ongoing expansion of asset classes targeted by NZAOA, means investors agree to a series of measures that add pressure on private markets to cut portfolio emissions.

The current lack of transparency around private holdings raises competition issues and imperils crossborder efforts to limit global warming to the critical threshold of 1.5C, said Günther Thallinger, chair of NZAOA and a member of the board of management at Allianz SE, the parent of Pacific Investment Management Co.

"I'm really very concerned," he said in an interview. "This is why we advocate so much that there should be reporting requirements and also regulatory requirements."

The value of private credit deals in the oil and gas industry has grown exponentially, rising to \$9 billion in the 24 months through the end of 2023, up from \$450 million arranged in the preceding two years, according to data compiled by analytics company Preqin . That's as many banks retreat from the sector in response to regulatory and investor demands.

The build-up of high-carbon assets inside private markets is "worrisome for us because at the end, we are investors and we need to show investment performance overall," Thallinger said.

And the more fossil-fuel assets end up in private hands, the harder it gets to pressure the sector to reduce its emissions, according to NZAOA. Engagement efforts suffer "significantly," Thallinger said.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/X4EDMD7G000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM...> 1/3

Under the new protocol, alliance members are required to target cuts of 40% to 60% in emissions by 2030 compared with 2019 levels, with no use of carbon credits till the next decade. Current requirements, which cover the five-year period to 2025, mandated cuts of 22% to 32%.

Global adoption of reporting standards set by the International Sustainability Standards Board, under the auspices of the IFRS Foundation, would contribute to a more level playing field, Thallinger said. While the European Union's Corporate Sustainability Reporting Directive provides a good model, its geographic scope is limited, Thallinger added.

CSRD requires an estimated 50,000 companies – both listed and unlisted – to report sustainability metrics, including emissions. The directive is still being phased in, with the largest companies due to publish the first reports in 2025.

CSRD represents a “very good standard,” Thallinger said.

“We want to have sustainability information, we want to have this audited, so that we can really do our investment decision-making in the classical sense,” he said. “We also would like to see analysts covering the full spectrum, but they also need to have an information flow that they can base their work on, and today this isn't the case.”

NZAOA is a part of the Glasgow Financial Alliance for Net Zero. GFANZ is co-chaired by Mark Carney, who is the chair of Bloomberg Inc.'s board and a former Bank of England governor, and Michael R. Bloomberg, the founder of Bloomberg News parent Bloomberg LP.

(Updates to add emission-cutting requirements in eighth paragraph.)

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FINANCE | INVESTING

Pension Funds Are Pulling Hundreds of Billions From Stocks

Some turn to bonds or private markets after major indexes' run to records

By [Heather Gillers](#) [Follow](#) and [Charley Grant](#) [Follow](#)

Updated April 18, 2024 6:45 am ET



Johnson & Johnson reduced the stock-allocation target for its pension fund. PHOTO: BRENDAN MCDERMID/REUTERS

Stock portfolios at large pension funds had a blockbuster run. Now, managers are cashing out.

Corporate pension funds are shifting money into bonds. State and local government funds are swapping stocks for alternative investments. The nation's largest public pension, the California Public Employees' Retirement System, is planning to move close to \$25 billion out of equities and into private equity and private debt.

Like investors of all kinds, the funds are slowly adapting to a world of yield, where they can get sizable returns on risk-free assets. That is rippling

throughout markets, as investors assess how much risk they want to take on. Moving out of stocks could mean surrendering some potential gains. Hold too much, for too long, and prices might fall.

For pension funds, which target specific investment returns to fund future obligations, this is a welcome change: It means they can take less risk and stay on track toward those goals. They can sell stocks, lock in price gains and move the money into bonds without sacrificing too much return. Or they can continue to push for higher returns without taking on much more risk.

While stocks have slumped recently, the S&P 500 remains just 4.4% below its record close. The index's 10% gain through the end of March marked its best first-quarter performance since 2019. Meanwhile, a persistently strong economy has pushed interest rates to multidecade highs.

The combination is leading large retirement funds to rotate their positions. Goldman Sachs analysts estimate that pensions will unload \$325 billion in stocks this year, up from \$191 billion in 2023.

"You don't want to give away all of those hard-earned gains," said Zorast Wadia, a principal and consulting actuary at Milliman. "You don't want to give it back if stocks fall."

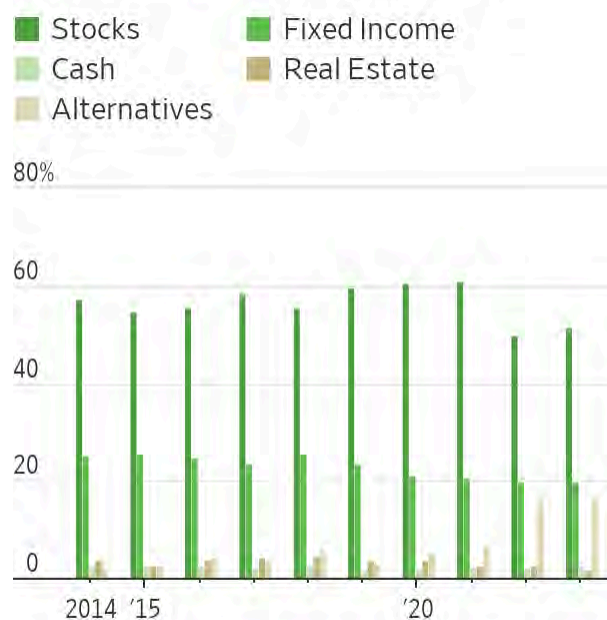
Pension funds for workers at companies and state and local governments together held about \$9 trillion at the end of 2023, according to Federal Reserve data. Many have been trying for years to come up with enough money to cover promised future benefits.

Big companies have mostly switched new hires to 401(k)-style retirement options, and have built up pension savings over the past two decades. Last year, they reported having enough to cover their liabilities for the first time since the 2008-09 financial crisis, Milliman found. As a result, corporate pension managers are investing less aggressively, with stocks making up less than one-quarter of investments.

State and local government pension plans mostly remain open to new workers and have around three-quarters of the money they need to cover future pension promises. They keep around half of their investments in stocks and more than

15% in other risky assets such as private equity, according to median figures from Wilshire Trust Universe Comparison Service.

Public pension fund asset mix, yearly



Note: Alternatives include private equity, private credit and hedge funds.

Source: Wilshire Trust Universe Comparison Service

The California Public Employees' Retirement System board voted in March to reduce its target stock allocation to 37% from 42% while ramping up investment in private equity and private debt. The fund expects those two asset classes to return 7% to 8% over the next two decades, compared with 6% to 7% for stocks. The \$494 billion fund had about 72% of assets needed to cover future pension promises as of June.

The \$260 billion New York State Common Retirement Fund, which serves police, firefighters and other public workers, is almost fully

funded. But officials still decided earlier this month to shift money into private equity, real estate and real assets after a change in state law increased the cap on private market investments. The fund is reducing its target stock allocation to 39% from 47%.

"The model projected very slightly higher return for very slightly lower risk" on the new asset mix, said director of asset allocation Michael Lombardi.

A different kind of state investment fund, the \$80 billion Alaska Permanent Fund Corp., is cutting back on equity risk. The APFC invests mineral revenue and other state money and has no benefit payment obligations.

The fund is in the process of reducing its stock portfolio from 36% of assets in fiscal 2023 to 32% in 2025, and canceled a plan to lower bonds to 18% from 20%. Higher rates mean APFC can still expect enough income from bonds to meet its investment target, returning 5 percentage points more than the consumer-price index, said Marcus Frampton, APFC's investment chief. Stocks' high prices relative to corporate earnings leave him concerned about losses.

Companies in the S&P 500 trade at around 24 times their past 12 months of earnings, above the five-year average of 22 times, according to FactSet.

Average asset mix for corporate pension plans



Note: Universe reflects pension plans sponsored by the largest 100 U.S. corporations; 2023 figures are preliminary.

Source: Milliman Pension Funding Study

“When it’s a very expensive stock market, bad things can happen,” Frampton said.

APFC’s reduction in stocks last year—and a decision to invest less money in shares of large, fast-growing companies—resulted in some missed gains in the fiscal year ended June 30, 2023. But APFC’s move helped free up enough money for the fund to keep around \$350 million in gold exchange-traded funds. As of Wednesday, gold futures have gained 31% since October.

Corporate pension plans, too, are embracing higher rates as a chance to lower risk without sacrificing as much income.

These plans often assemble bond portfolios that will pay out as promised pensions come due. Over the past two decades, they have moved more money into those bond portfolios and out of stocks.

Johnson & Johnson, the pharmaceutical and medical technology company, dropped the target stock allocation for its \$34 billion pension fund to 58% in 2023 from 62% in 2022. The company planned to put the additional money into bonds.

Aerospace and defense company RTX reported that public equity investment made up 19% of assets in 2023, down from 26% in 2022.

The move out of stocks bodes well for the long-term health of pension systems, said Timothy Braude, managing director and co-head of multiasset solutions at

Goldman Sachs.

“It is very easy to say you want to take risk down at moments when you have no ability to actually do so,” he said.

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Videos

New study calculates climate change's economic bite will hit about \$38 trillion a year by 2049

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Associated Press

(AP) — Climate change will reduce future global income by about 19% in the next 25 years compared to a fictional world that's not warming, with the poorest areas and those least responsible for heating the atmosphere taking the biggest monetary hit, a new study said.

Climate change's economic bite in how much people make is already locked in at about \$38 trillion a year by 2049, according to Wednesday's study in the journal *Nature* by researchers at Germany's Potsdam Institute for Climate Impact Research. By 2100, the financial cost could hit twice what previous studies estimate.

“Our analysis shows that climate change will cause massive economic damages within the next 25 years in almost all countries around the world, also in highly-developed ones such as Germany and the U.S., with a projected median income reduction of 11% each and France with 13%,” said study co-author Leonie Wenz, a climate scientist and economist.

These damages are compared to a baseline of no climate change and are then applied against overall expected global growth in gross domestic product, said study lead author Max Kotz, a climate scientist. So while it's 19% globally less than it could have been with no climate change, in most places, income will still grow, just not as much because of warmer temperatures.

For the past dozen years, scientists and others have been focusing on extreme weather such as heat waves, floods, droughts, storms as the having the biggest climate impact. But when it comes to financial hit the researchers found “the overall impacts are still mainly driven by average warming, overall temperature increases,” Kotz said. It harms crops and hinders labor production, he said.

“Those temperature increases drive the most damages in the future because they're really the most unprecedented compared to what we've experienced historically,” Kotz said. Last year, a record-hot year, the global average temperature was 1.35 degrees Celsius (2.43 degrees Fahrenheit) warmer than pre-industrial times, according to the U.S. National Oceanic and Atmospheric Administration. The globe has not had a month cooler than 20th century average since February 1979.

In the United States, the southeastern and southwestern states get economically pinched more than the northern ones with parts of Arizona and New Mexico taking the biggest monetary hit, according to the study. In Europe, southern regions, including parts of Spain and Italy, get hit harder than places like Denmark or northern Germany.

Only Arctic adjacent areas — Canada, Russia, Norway, Finland and Sweden — benefit, Kotz said.

It also means countries which have historically produced fewer greenhouse gas emissions per person and are least able to financially adapt to warming weather are getting the biggest financial harms too, Kotz said.

The world's poorest countries will suffer 61% bigger income loss than the richest ones, the study calculated.

"It underlies some of the injustice elements of climate," Kotz said.

This new study looked deeper than past research, examining 1,600 global areas that are smaller than countries, took several climate factors into account and examined how long climate economic shocks last, Kotz said. The study examined past economic impacts on average global domestic product per person and uses computer simulations to look into the future to come up with their detailed calculations.

The study shows that the economic harms over the next 25 years are locked in with emission cuts producing only small changes in the income reduction. But in the second half of this century that's when two different possible futures are simulated, showing that cutting carbon emissions now really pays off because of how the heat-trapping gases accumulate, Kotz said.

If the world could curb carbon pollution and get down to a trend that limits warming to 2 degrees Celsius (3.6 degrees Fahrenheit) above pre-industrial times, which is the upper limit of the 2015 Paris climate agreement, then the financial hit will stay around 20% in global income, Kotz said. But if emissions increase in a worst case scenario, the financial wallop will be closer to 60%, he said.

That shows that the public shouldn't think it's a financial "doomsday" and nothing can be done, Kotz said.

Still, it's worse than a 2015 study that predicted a worst case income hit of about 25% by the end of the century.

Marshall Burke, the Stanford University climate economist who wrote the 2015 study, said this new research's finding that the economic damage ahead is locked in and large "makes a lot of sense."

Burke, who wasn't part of this study, said he has some issues with some of the technical calculations "so I wouldn't put a ton of weight on their specific numerical estimates, but I think the big picture is basically right."

The conclusions are on the high end compared to other recent studies, but since climate change goes for a long time and economic damage from higher temperatures keep compounding, they “add up to very large numbers,” said University of California Davis economist and environmental studies professor Frances Moore, who wasn't part of the study. That's why fighting climate change clearly passes economists' tests of costs versus benefits, she said.

By SETH BORENSTEIN AP Science Writer

The Associated Press' climate and environmental coverage receives financial support from multiple private foundations. AP is solely responsible for all content. Find AP's standards for working with philanthropies, a list of supporters and funded coverage areas at AP.org.

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April 17, 2024, 9:20 PM PDT

Binance Converts Entire Billion-Dollar Emergency Fund Into USDC

By Ryan Weeks

- The company previously held a mix of cryptoassets in the fund
- Shift into USDC will improve fund's reliability, Binance said

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Binance Converts Entire Billion-Dollar Emergency Fund Into USDC

By Ryan Weeks2024-04-18T00:20:38391-04:00

- The company previously held a mix of cryptoassets in the fund
- Shift into USDC will improve fund's reliability, Binance said

The world's largest crypto exchange Binance has converted the entire pool of assets held in an emergency fund for users into USDC, the stablecoin issued by US firm Circle Internet Financial .

The Secure Asset Fund for Users (SAFU) was established in 2018 to serve a backstop for customers in "extreme situations", according to the exchange. Binance said in an announcement today it would be "transferring 100% of SAFU's assets to USDC."

Binance previously held funds in wallets comprising TUSD, BNB, Bitcoin, and Tether's USDT, according to a Binance Academy post.

The move to USDC, a stablecoin that aims to maintain a price level with the US dollar, is the latest strategic shift under Chief Executive Officer **Richard Teng** over the last five months.

Teng took the reins at Binance from **Changpeng "CZ" Zhao** in the wake of a Nov. 2023 plea deal with US agencies that led to giant \$4.3 billion fine. He has since overseen the [spinning off](#) of Binance's venture capital unit and a [tightening](#) of requirements for new token listings on the platform.

The SAFU fund is generally maintained at around \$1 billion, but has fluctuated in the past in tandem with market movements, Binance said in its announcement.

"Making use of a trusted, audited, and transparent stablecoin for SAFU further enhances its reliability and ensures it remains stable at \$1B," Binance said, adding that the value of the fund can be tracked in real time using a publicly available blockchain address.

Chris Holland, partner at HM, a Singapore-based compliance consultancy firm, said the "100% USDC composition gives certainty to the value of the fund in US dollar terms."

Read: [Why Stablecoins Still Worry the Fed as They Try to Go Mainstream](#)

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April 17, 2024, 6:01 AM PDT

Bitcoin ATMs Flood Black, Latino Areas, Charging Fees up to 22%

By Elijah Nicholson-Messmer and Ella Ceron

Bloomberg Law News 2024-04-18T10:19:17882479304-04:00

Bitcoin ATMs Flood Black, Latino Areas, Charging Fees up to 22%

By Elijah Nicholson-Messmer and Ella Ceron2024-04-17T09:01:03527-04:00

As digital assets roar back into the mainstream after an extended period of price declines, experts are warning about the risks of financial predation baked into of the industry's most analog expressions: machines that convert cash to Bitcoin.

Bitcoin teller machines, or BTMs, are physical kiosks that offer customers access to crypto conversions and are commonly located at gas stations, liquor or convenience stores and other places you might find a traditional automated teller machine for credit and debit cards.

The BTM industry surged during the pandemic: The number of installed units increased more than five-fold over four years to about 31,100 units nationwide, according to Coin ATM Radar. But a closer look into the BTM boom revealed that the machines are often disproportionately located in areas with a majority of Black and Latino residents, charging fees as high as 22% per transaction.

Bitcoin Depot, the largest US operator with about 7,300 BTMs as of April 8, charges some of the highest fees in the industry while touting financial inclusion, a concept that ensures that all customers, regardless of their socioeconomic standing, have access to such financial services as savings, credit and insurance. Over 80% of Bitcoin Depot's customers earn less than \$80,000 a year, according to a November 2023 investor presentation from the company.

"It looks like a good thing, but there's a whole lot of downsides to it," Franklin Noll, a lead payments specialist at the Federal Reserve Bank of Kansas City, said. "It's like a payday lender saying 'I can give you cash today for your check. I'll charge you 25% or 30% for it, but here you go.'"

A Bloomberg review of Bitcoin Depot locations and data from the Census Bureau shows that states with proportionally large Black and Latino populations tend to have more of the company's BTMs, especially in southern states like Georgia and Texas. Bitcoin Depot President and Chief Executive Officer Brandon Mintz dismissed any suggestion that the company targeted areas with underrepresented groups in deciding where to place its machines.

"Never in our history have we once targeted an area based on any sort of racial profile," Mintz told Bloomberg News. "Our focus is targeting areas that have low competition and that have populations that can support a Bitcoin ATM profitably."

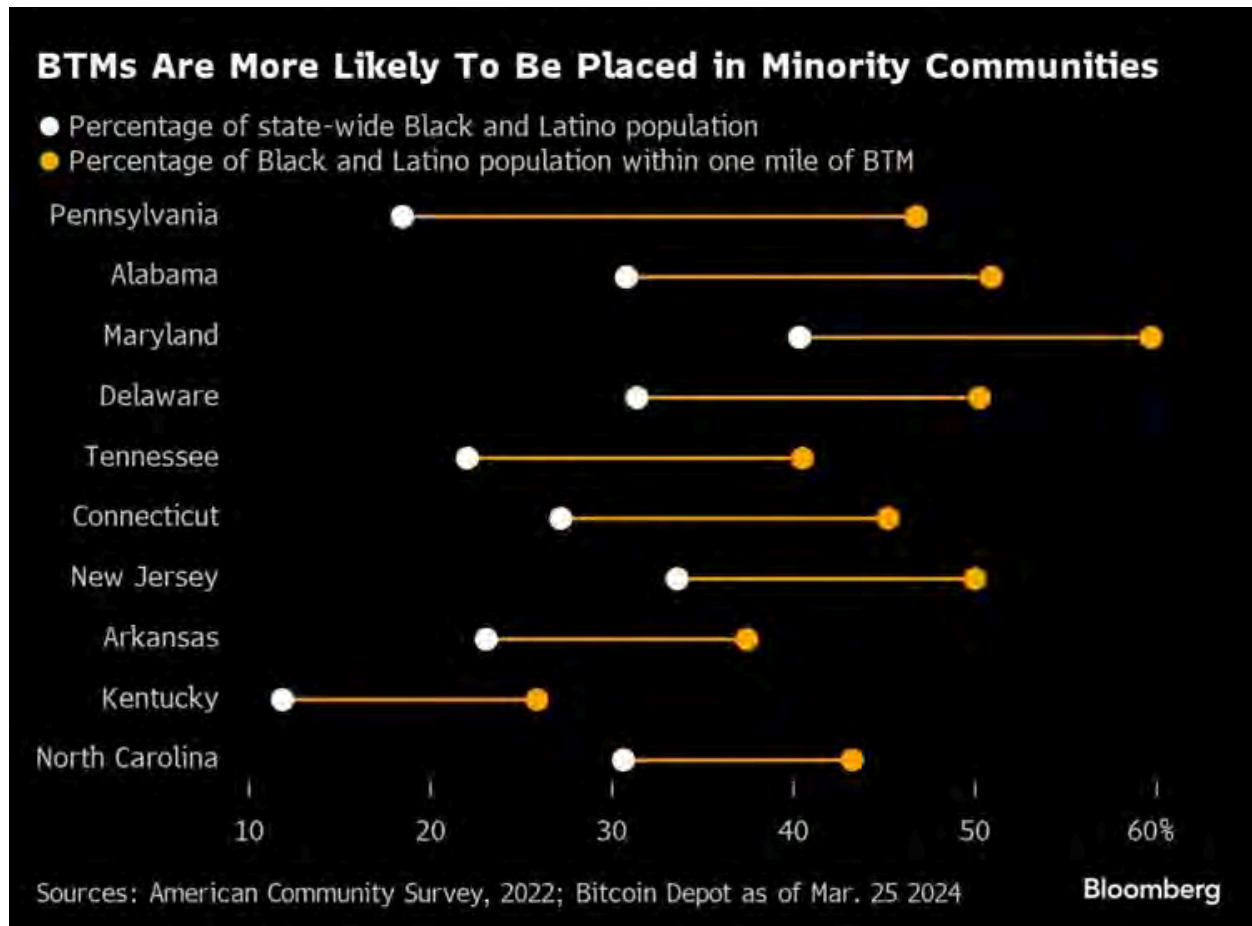
Placing the BTMs often requires the cooperation of local shop owners, though some are available at major gas stations and convenience stores like Circle K, Cumberland Farms and Jacksons Food Stores. Some machine operators pay the stores a small fee for the floor space. In other instances, store owners rent the machines from the operator.

Calls to stores in states across the country — including California, Indiana, New Jersey, and Maryland — yielded little knowledge about the BTMs. When asked how long the BTMs had been installed, the number of people who used them each day or about the kiosk's transaction fees, workers deferred questions to store owners, who weren't in, and rarely knew how the machine worked.

One restaurant owner in Essex, Maryland, who declined to give his name, said Bitcoin Depot paid \$145 a month for the kiosk that was installed a month ago. Another store owner in New Jersey, who identified himself only as Jai, said his store received \$200 a month for the kiosk, also operated by Bitcoin Depot.

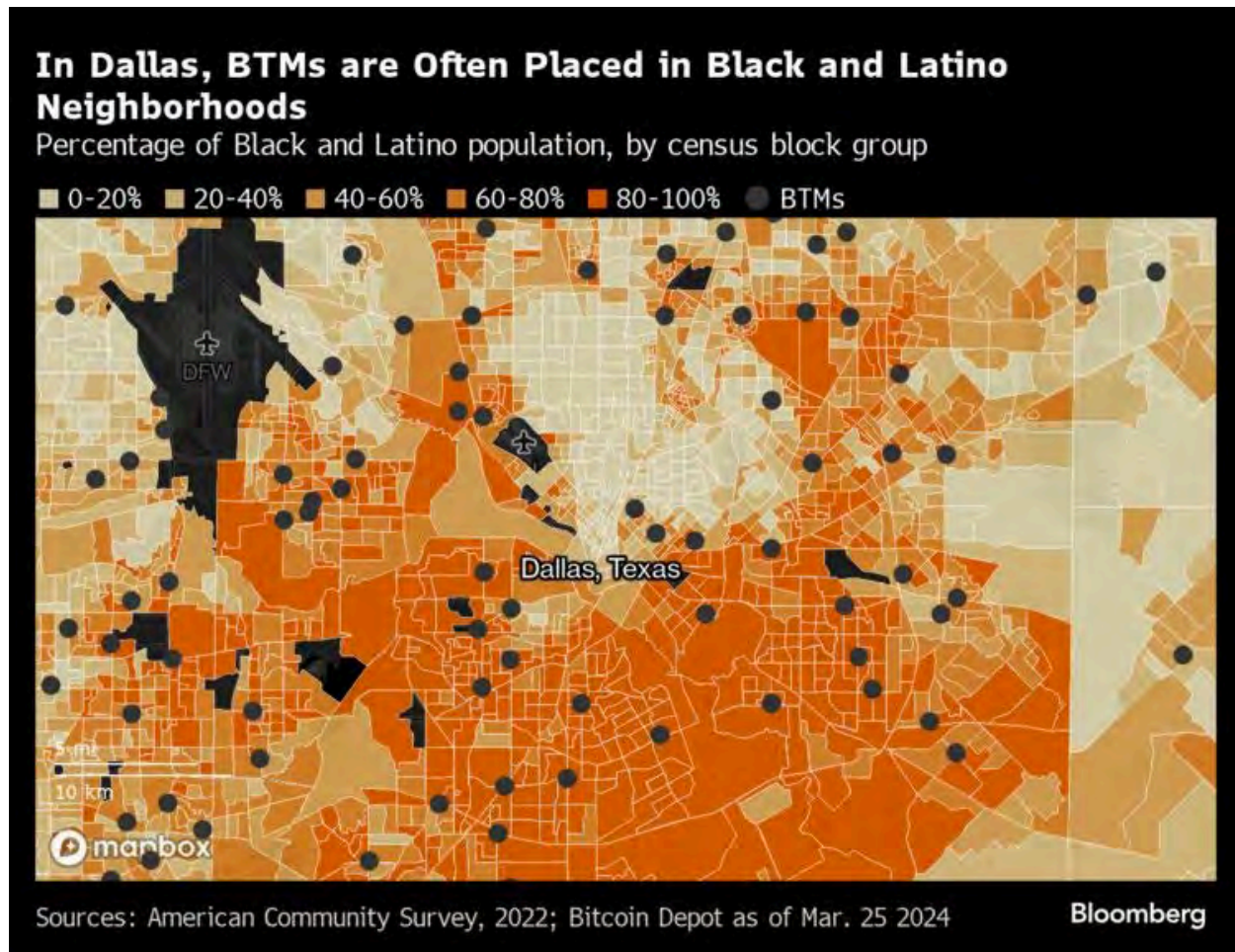
A spokesperson for Bitcoin Depot said that the company encourages store owners to have kiosk users reach out to the company's customer service directly should they have questions about the BTMs.

Fees at these BTMs vary from operator to operator; some include a flat transaction cost on top of a percentage fee based on the size of the transaction. Partly as a result of these fee structures, some researchers have described the BTM industry as a form of "predatory inclusion," where a business helps customers get access to a service in exchange for a high, sometimes hidden, cost.



In Alabama, the concentration of Black and Latino residents within a mile radius of Bitcoin Depot BTMs is 20 percentage points higher than the broader state average, per a Bloomberg analysis of location data and the 2022 American Consumer Survey. In Dallas, BTMs are consistently located in areas where the highest percentages of Black and Latino people live.

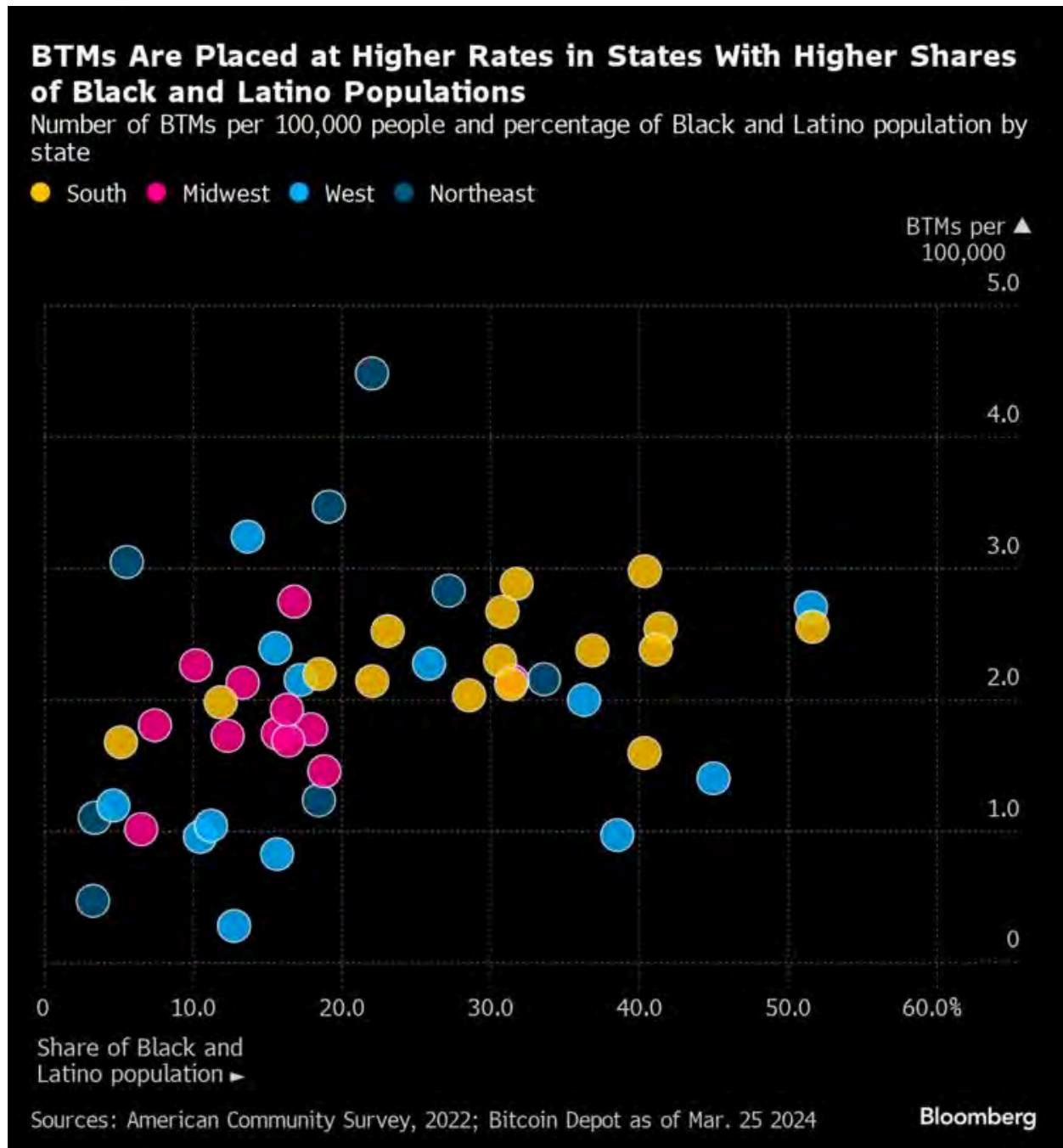
States in the Northeast, including Connecticut and New Jersey, show a similarly strong relationship. The West and Midwest have notably less pronounced connections. Filings from Bitcoin Depot have stated that “demographic data” is a consideration when deciding where to install new machines. Mintz said that when the company refers to demographic data, it’s only referring to “population and population density.”



Proponents of cryptocurrency often tout the asset as a way to reach unbanked people, who lack a more traditional bank account. In the US, that comprised 6% of adults in 2022, per the Federal Reserve. Black and Hispanic people were more likely to be more unbanked than their White counterparts.

A paper published by the Brookings Institution in October 2022 suggested the narratives that crypto can serve people without adequate access to physical or digital banks, as well as close racial wealth gaps through investment are often conflated.

"Until more evidence is available regarding the technology's progress or adequate consumer protections, policymakers should be wary of claims that crypto will bolster financial inclusion," Brookings Metro fellow Tonantzin Carmona wrote.



BTM industry practices are “very consistent with predatory financial services” including payday lending and subprime loans that target Black communities, according to Dr. Jocelyn Evans, the Henry W. Bloch endowed professor of finance and an associate dean at the University of Missouri-Kansas City.

"I don't know how they're helping the underserved community by giving them something where the cost is so excessive and it's so hard to convert it back to cash and you're almost guaranteed to lose money," said Evans, whose pending research report identified "a pattern of ethnic targeting" in the placement of BTMs in Kansas City. The report's scope included all BTM machines in the city and did not focus on Bitcoin Depot.

Cloudy Transaction Fees

Employees at local stores weren't aware of what the fees were on the BTMs. John Carlo Giovanni, a manager at Buy Rite Liquors in Ventnor City, New Jersey, said a machine tech once offered to walk him through how the machine worked, but that would require depositing at least \$20 to walk through the whole process. (The BTM at Buy Rite allows for purchases between \$20 and \$25,000.) The manager at Marrazzo's Market in Ewing Township, New Jersey, said he didn't know what the store's BTM transaction fees were.

On Bitcoin Depot ATMs accessed by Bloomberg, finding out what that fee might be required beginning a transaction. Typically, customers are prompted to confirm that they want to proceed with their purchase once they're notified of the rates, the company said.

Mintz, the Bitcoin Depot CEO, said the percentage of a transaction the Atlanta-based company retains as its fees is typically in the "low twenties," but would not provide a bottom or top boundary. "Nothing's definitive, it just depends on the market and what we need to do to cover our expenses," Mintz said. The company also charges a flat \$3 fee on every transaction, and became the first in the industry to IPO when it merged last year with a special purpose acquisition company at a price of \$10 per share.

Mintz also said that operating expenses are a core contributor to the fee structure, and that the machines' physical presence is a selling point for customers. "There are many other places where people can buy Bitcoin with lower fees, many options," he said. "We are an option that is a lot more convenient."

CoinFlip and Bitstop, Bitcoin Depot's main rivals, charge transaction fees as high as 22%, depending on the location, according to company representatives and customer service agents. CoinFlip also charges a "network fee" of \$2.49 on every transaction.

The grocery store manager in New Jersey said his kiosk, which is operated by Bitcoin Depot, was installed last year by the store owner who is now deceased. Though there's "very little" foot traffic generated by the BTM, Jeff, who withheld his last name, doesn't see the efficacy in removing it – it doesn't take up much space, and Bitcoin Depot pays the store a monthly stipend for its presence.

The liquor store manager, meanwhile, said about four to five people use their machine each day. "There's a few people who shop and then use it afterwards, but a lot of people who know that we have it, they come in, and they see it, use it and leave," he said.

The company has a pending application to operate in New York, which they say they expect to have approved by the end of June this year. The market in New York could allow for an additional 2,500 to 3,000 BTMs. Hal Goetsch, a senior analyst at B Riley Securities Inc. who covers Bitcoin Depot, said the pending license application could lift the size of the company by 30%.

"It probably could be the best market they've got," Goetsch said, citing the state's density, immigrant population and number of residents who might send remittances to family members abroad.

The New York State Department of Financial Services, which oversees the application process, declined to comment.

Aaron Klein, a senior fellow at the Brookings Institution's Center on Regulation and Markets, said any expansion of Bitcoin tellers, regardless of the company, serves more as marketing than as proof of use. The majority of BTMs — 92% of machines in the US, as indexed by Coin ATM Radar — don't allow users to sell their crypto in exchange for cash.

"Bitcoin is an asset masquerading as a payment instrument," said Klein. "And it's dangerous if you can buy something but can't sell it."

Sign up for the Bloomberg Equality newsletter for weekly reporting from Claire Suddath on how gender, race and class are shaping capitalism in America and beyond.

--With assistance from Shelly Hagan and Nabila Ahmed.

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Securities Law

April 18, 2024, 7:04AM PDT

TD Investors Meet as Probe, CEO Succession Fuel Frustration (1)

By Christine Dobby and Hannah Levitt

- Lack of heir apparent is said to stoke managers' frustration
- Salom, Ahmed and Chun are seen as among potential contenders

Bloomberg Law News 2024-04-18T13:01:26341183673-04:00

TD Investors Meet as Probe, CEO Succession Fuel Frustration (1)

By Christine Dobby and Hannah Levitt2024-04-18T10:04:27583-04:00

- Lack of heir apparent is said to stoke managers' frustration
- Salom, Ahmed and Chun are seen as among potential contenders

Toronto-Dominion Bank is confronting shareholders at a moment when investors and executives alike are clamoring for clarity on potential penalties in a US probe and the future of the firm's leadership.

The bank's annual shareholders meeting on Thursday comes as the firm contends with an investigation into its anti-money-laundering controls that has derailed the lender's growth strategy, hurt its stock and hastened questions about who might eventually rise to succeed Chief Executive Officer Bharat Masrani, 67, once he ultimately retires.

Senior executives have grown unhappy with the lack of an heir apparent, according to people with knowledge of the situation. The uncertainty has exacerbated managers' frustrations over the business setbacks and their ability to plot their futures, the people said, asking not to be named discussing private conversations.

Much of the tension stems from the bank's attempt to buy Memphis-based First Horizon Corp., which was called off almost a year ago amid the US regulatory probe into how the Toronto-based lender handled suspicious customer transactions. The move left Toronto-Dominion with ample capital to deploy and **limited options**, with its US growth strategy in limbo. The stock has tumbled in recent months, falling almost 9% this year, compared with a 2.5% decline for the S&P/TSX Commercial Banks Index.



Bharat Masrani in a 2014 interview.

Photographer: Galit Rodan/Bloomberg

Masrani, who's been CEO for almost a decade, voluntarily took a C\$1 million (\$725,000) [pay cut](#) for the last fiscal year over the scuttled acquisition of First Horizon and regulatory probe. Now, with no clear successor lined up, a new [board chair](#) is under pressure to come up with a way forward to satisfy investors and employees.

"The uncertainty is the biggest source of consternation," said **Dan Rohinton**, portfolio manager at iA Global Asset Management. The firm's retail mutual funds have about 4 million Toronto-Dominion shares.

Investors in Canada's second-largest bank want more detail on the fines it's likely to pay, Rohinton said, as well as whether it could be restricted from mergers and acquisitions – or, in a worst-case scenario, face a cap on growing US assets organically.

Analysts have estimated the fine could top \$1 billion, and the bank is already spending hundreds of millions of dollars on upgrades to its risk and control systems in the US.

"Regretfully, our AML program was not where it needed to be, and we are addressing it," Masrani said at Thursday's meeting. "We know what we need to do, and we are working diligently to strengthen our program. We have onboarded globally recognized talent and leadership, and invested in technology, process design, training and other activities. I understand that you want to know more. However, given the confidential nature of regulatory discussions, I cannot provide additional detail or speculate on timing or announcements."

With the broader regulatory penalties still up in the air, investors don't yet seem convinced.

"That uncertainty is weighing on the stock," said **Nigel D'Souza**, an analyst with Veritas Investment Research Corp., said before the meeting. "And then you have questions about succession planning as well."



"Bharat is focused on strengthening the bank, serving our customers and creating value for shareholders," Toronto-Dominion spokesperson **Lisa Hodgins** said in an email. "He leads a deep and highly experienced bench of leaders with proven track records driving growth across large complex businesses. As you would expect, we have a very detailed and robust succession plan, overseen by the board, which continues to serve us well."

Still, to outsiders, questions about his replacement have grown murkier this year. **Michael Rhodes**, who was leading the company's Canadian retail bank, [departed](#) in December to become CEO of Discover Financial Services, a role he has since left. His exit from Toronto-Dominion came as a shock to many executives, one of the people with knowledge of the conversations said.

Read More: [Discover CEO Michael Rhodes Resigns to Become Ally's Head](#)

Leo Salom, who heads up Toronto-Dominion's US operations, has long been seen as a potential CEO candidate, but it's unclear how the anti-money-laundering mess in the country might impact his path to the top.

The firm has a "strong and growing franchise in the US," Hodgins noted in the emailed statement, pointing to more than 10 million customers in "major markets and communities from Maine to Florida."

Another contender has been **Riaz Ahmed**, the former chief financial officer who was tapped to lead the capital-markets unit in 2021. Some within the company have speculated he could be named CEO but take on the role for a shorter-than-normal period – five years or less. Still, Ahmed's age – he's in his early 60s – could be a knock against him. Also, he's been with the bank since the 1990s and on its senior executive team since 2009, a lengthy tenure when a more-dramatic change may be preferred.

One new name in the mix is **Ray Chun**, the former head of wealth management who was named to run the Canadian personal-banking business after Rhodes departed. The new post is an important role, often viewed as part of the CEO pipeline.

The succession question – intertwined as it is with the US issues – will be top of mind for the board's new chair, **Alan MacGibbon**. The long-time director took over from Brian Levitt on Feb. 1 and led the bank's annual shareholder meeting in Toronto.

Despite the lingering questions, at least one influential market watcher sees upside in Toronto-Dominion's shares. **Meny Grauman**, a managing director in Bank of Nova Scotia's Global Equity Research unit, upgraded the stock to outperform on Wednesday.

"We believe that fear has overtaken rationality on this name," Grauman said in a report to clients co-written by associate **Felix Fang**.

The stock is trading at about 10 times earnings, compared with about 12 times earnings for rival Royal Bank of Canada and about 13 times earnings at Bank of Montreal, according to data compiled by Bloomberg.

"Concerns about the bank's US regulatory problems and worries about succession at the bank are all valid," Grauman and Fang wrote. "But we now believe that the downside risk from both of those issues is more than fully priced into the shares right now."

(Updates with Masrani's comments on probe in ninth paragraph.)

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Judge Won't Toss Any Expert In Under Armour Securities Suit

By **Elaine Briseño**

Law360 (April 17, 2024, 8:46 PM EDT) -- The opposing parties in a suit related to Under Armour Inc.'s allegedly inflated stock prices can keep their expert witnesses, a Maryland federal judge ruled Tuesday, saying he was mostly unswayed by the arguments from both sides.

The Maryland federal **suit** involves investors who have accused Under Armour of using "unnatural" business practices to mislead them and make it appear there was more demand for their product than there actually was.

Both sides want to exclude or limit testimony of expert witnesses, including that of a retail and apparel industry expert, professors, an accounting expert and an expert on the market. Under Armour has been battling the massive class action since 2017. The 12-day trial is set to begin July 15.

The defense has said that industry expert Mark Cohen should be excluded because he "offers his own interpretation of selective facts, unsupported by any meaningful expert analysis." But the argument did not hit its mark, according to the Tuesday opinion by U.S. Senior District Judge Richard D. Bennett.

"This challenge, however, does not go to the reliability of Cohen's expert testimony," Judge Bennett said. "Cohen is offered as an experiential expert, who may testify on the basis of either experience alone or experience in conjunction with other knowledge, skill, training or education."

The defense can address the issues with his testimony on cross-examination, the judge said.

Under Armour has offered Laurie Wilson, a woman with three decades of strategy and planning at large retailers, as a counter to Cohen, but the plaintiffs want to limit her testimony, according to Tuesday's filing. They argue that her opinions on "pull-forwards" are irrelevant, but Judge Bennett said he was not convinced and denied the request. Pull-forwards are sales executed earlier than planned, allowing a company to generate greater revenue and reach sales goals.

Meanwhile, Under Armour also wants to exclude entirely the testimony of a University of Chicago Law School professor regarding CEO Kevin Plank's actions, specifically his opinion about Plank's intent, motives and state of mind, Tuesday's filing said. Tuesday's memo, however, said the concerns about the testimony were addressed by limiting what the professor could discuss.

"To be sure, [the professor] will not be permitted to offer his legal opinions or conclusions as part of his testimony, and defendants may object at trial if they believe [he] crosses the line into such opinions," the order said. "The same is true with respect to any potential testimony and opinions about Plank's intent, motives, and state of mind."

The defendants also raised concerns about D. Paul Regan, the CPA who submitted an expert report in April 2023 on behalf of the investor class. They said his opinions are inadmissible, including his opinions on pull-forwards and "tone at the top" of the company.

"This court is unpersuaded that [his] pull-forward quantifications are unreliable and invade the province of the jury..." the memo said. "Considering Regan's 'tone at the top' opinion, this court agrees that this opinion invades the authority of the trier of fact to determine for itself the plain

meanings of the evidence presented at trial. As such, Regan is precluded from testifying as to the 'tone at the top.'"

In September 2022, Bennett **certified** a nationwide class of potentially thousands of people and entities that purchased Under Armour stock between September 2015 and November 2019. In February, he denied Under Armour's request for summary judgment, saying serious questions remained about the company's public statements.

The parties did not immediately respond to requests for comment.

The investors are represented by Michael J. Dowd, Mark Solomon, X. Jay Alvarez, Robert R. Henssler Jr., Matthew I. Alpert, Christopher R. Kinnon, T. Alex B. Folkerth, Stephen R. Astley, Elizabeth A. Shonson and Andrew T. Rees of Robbins Geller Rudman & Dowd LLP, Joshua C. Littlejohn and Christopher F. Moriarty of Motley Rice LLC, Thomas Michaud of Vanoverbeke Michaud & Timmony PC and Andrew C. White, William N. Sinclair and Pierce C. Murphy of Silverman Thompson Slutkin & White LLC.

Under Armour and Plank are represented by G. Stewart Webb and William B. King of Venable LLP and James D. Wareham, Samuel P. Groner, Michael P. Sternheim and Anne S. Aufhauser of Fried Frank Harris Shriver & Jacobson LLP.

The case is In Re Under Armour Securities Litigation, case number 1:17-cv-00388, in the U.S. District Court for the District of Maryland.

--Additional reporting by Hailey Konnath and Alex Lawson. Editing by Peter Rozovsky.

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2nd Circ. Won't Revive Investor Fight Over Honeywell Spinoff

By **Dorothy Atkins**

Law360 (April 17, 2024, 9:27 PM EDT) -- The Second Circuit affirmed Wednesday the dismissal of a proposed securities class action accusing a bankrupt Honeywell transportation business spinoff of misleading investors about significant risks it faced under its asbestos-liability indemnity deal with Honeywell, finding that the spinoff was frank about the uncertainty of its financial future.

In an 8-page summary order, a unanimous three-judge panel said they agreed with U.S. District Judge Jennifer L. Rochon's "careful and well-reasoned" decision to toss the suit. The panel agreed with the lower court's finding that the investors had not sufficiently pleaded scienter as required to state a viable securities fraud claim.

The panel said the investors' theory that Garrett Motion Inc. and its top brass intentionally misled them about Garrett's financial prospects, while knowing that the company was doomed from the outset, is not plausible, particularly since the "onerous terms" of Garrett's indemnity agreement with Honeywell International Inc. were public information at the time.

"Moreover, Garrett acknowledged the risks posed by its capital structure many times during the class period," the order says. "... Even if Garrett had succeeded in deceiving the market, its deception would have, at most, provided 'a short respite from an inevitable day of reckoning' before the truth was discovered."

The ruling ends a lawsuit that investors filed in September 2020, alleging that from Feb. 27, 2020, to Sept. 18, 2020, Garrett and its executives made "aggressive" false or misleading public statements regarding its financial health in violation of the Securities Exchange Act and federal regulations.

The dispute stems from Honeywell's agreement to spin off Garrett in October 2018, but under the spin-off deal, Garrett agreed to indemnify Honeywell for up to \$5.2 billion in its asbestos liabilities.

At the time, the Charlotte, North Carolina-based multinational conglomerate faced massive asbestos-related liabilities from now-defunct refractory material maker North American Refractories Co., which Honeywell owned for several years in the 1980s.

In 2022, Honeywell agreed to make a one-time \$1.3 billion payment to the North American Refractories Asbestos Personal Injury Settlement Trust, to resolve asbestos-related litigation. But Garrett investors claim that following Garrett's spin off, its executives hid the financial risks the company faced and repeatedly assured investors that the business had long-term potential despite knowing that it was doomed to file Chapter 11 bankruptcy in September 2020.

After multiple rounds of pleadings, in March 2023, Judge Rochon threw out the case, finding that the investors failed to plead facts giving rise to a strong inference of scienter.

A group of investors who lost more than \$7 million appealed, arguing before the appellate court that they sufficiently alleged that Garrett and its decision-makers were reckless by reassuring investors that the company was positioned for long term success, even though the company and its executives knew by the start of the proposed class period that Garrett could not continue to operate as a standalone company.

The investors also argued that Garrett misled them by failing to disclose that it was actively pursuing

a bankruptcy strategy, and stating instead a month before it filed bankruptcy, in an August 2020 press statement, that Garrett "ha[d] not yet determined whether to pursue any balance sheet restructuring alternatives."

But on Wednesday, the panel disagreed with the investors, finding that their latest complaint does not adequately allege reckless behavior that could give rise to an inference of scienter.

The panel noted that the record shows that Garrett's liabilities and the terms of the Honeywell indemnity were public information during the class period, and Garrett executives spoke candidly during calls with investors about the risks the business faced on multiple occasions.

Although during a May 2020 earnings call, Garrett executives highlighted the company's positive business fundamentals and position for long-term success, that same day Garrett released its first quarter financial results, which warned that Garrett might default under a credit agreement, raising "substantial doubt as to [its] ability to continue as a going concern," the panel said.

During the earnings call, Garrett's CEO also stated that "it is clear that our capital structure was ill suited to cope with any meaningful operating challenges."

The panel additionally found that Garrett's August 2020 press release made clear that Garrett was in serious financial trouble and that its balance sheet would likely need to be restructured due to significant claims asserted by Honeywell against Garrett subsidiaries under their disputed asbestos indemnity and tax agreement.

The panel noted that the statement cautioned investors that "[t]here can be no assurance that recoveries in any restructuring will approximate current trading prices of Garrett's securities," and warned that Garrett's current capital structure was "inappropriate" and "ill-suited to cope with any meaningful challenges at the macroeconomic level."

"The August 2020 press release thus does not give rise to an inference of scienter because it in fact made clear to investors that restructuring was likely," the order says. "Moreover, Garrett was not obligated to disclose that it was considering bankruptcy as one of several possibilities."

The panel added that the investors can't rely on a declaration by Garrett's chief financial officer, Scott Deason, that was submitted in bankruptcy court after the class period ended, which stated that the company had considered Chapter 11 bankruptcy among its options. The panel said the investors' reliance on the declaration is "an impermissible attempt to 'plead fraud by hindsight.'"

Garrett's counsel, Sanford I. Weisburst of Quinn Emanuel Urquhart & Sullivan LLP, said Wednesday that he and his client are very pleased that the Second Circuit has affirmed the lower court's order dismissing the case.

Counsel for the investors declined to comment Wednesday.

The bankruptcy court judge confirmed Garrett's Chapter 11 plan in April 2021 under which qualifying claimants, including the lead plaintiffs in the instant litigation, would receive a pro rata share of the amount recoverable under Garrett's insurance policies in cash, or shares of the company's stock at a value of \$6.25 per share once it emerged from bankruptcy, according to court documents.

As of close of market Wednesday, the company's stock was trading at \$9.14 per share.

U.S. Circuit Judges John M. Walker Jr., William J. Nardini and Steven J. Menashi sat on the panel.

The investors are represented by Andrew J. Entwistle, Arthur V. Nealon and Joshua K. Porter of Entwistle & Cappucci LLP.

Garrett Motion is represented by Sanford I. Weisburst, Michael B. Carlinsky, Jacob J. Waldman and Jaclyn Palmerson of Quinn Emanuel Urquhart & Sullivan LLP.

The appeal is *The Gabelli Asset Fund et al. v. Garrett Motion Inc. et al.*, case number 23-668, in the U.S. Court of Appeals for the Second Circuit. The bankruptcy case is *In re Garrett Motion Inc.*, case

number 1:20-bk-12212, in the Bankruptcy Court for the Southern District of New York.

--Editing by Kelly Duncan.

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Walgreens Investors' \$36M Deal In Opioid Suit Gets First OK

By **Henrik Nilsson**

Law360 (April 17, 2024, 11:17 PM EDT) -- An Illinois federal judge on Wednesday granted his initial approval of a \$36 million settlement to end a stockholder's derivative suit accusing Walgreens and its leadership of failing to limit retail pharmacies from dispensing unreasonable amounts of opioids.

U.S. District Judge Matthew F. Kennelly gave his preliminary approval after Walgreens Boots Alliance Inc. and the plaintiff investors unveiled the settlement in a court filing last week. Under the settlement, the pharmacy giant will receive \$36 million from the leadership's directors and officers insurance carriers.

Walgreens has also agreed to implement corporate governance changes, including creating a new board committee and a management-level committee dedicated to oversight of compliance, safety and quality risks. The company will also appoint two new independent directors and tack on additional responsibilities to the chief controlled substance compliance officer, the settlement states.

The defendants have not admitted any wrongdoing but agreed to settle to avoid lengthy litigation and "finally put to rest and terminate all of the claims that have been, or could have been, asserted in the action," according to the agreement.

Plaintiff's counsel will also receive an \$8 million fee and expense award.

In exchange for payments and changes, the investor agrees to release the defendants from the claims in the suit with prejudice, according to the settlement.

Wednesday's order is the latest development in a **derivative suit** Walgreens stockholders filed last fall, alleging the company and nearly a dozen current or former officers and directors didn't do enough to ensure the company was fulfilling its duties under the law to verify the prescriptions they were filling were legitimate and to report suspicious activities to the authorities, costing it hundreds of millions of dollars to resolve opioid-related litigation in multiple states.

The stockholders said Walgreens had to pay \$80 million in 2013 to end a U.S. Drug Enforcement Administration probe into claims that several of its Florida pharmacy locations and distribution centers failed to control the sales of narcotic painkillers that illegally ended up on the black market.

Eight years later, shareholders voted to force the retail pharmacy chain to prepare a report explaining what steps the board of directors implemented since 2012 "to more effectively monitor and manage financial and reputational risks related to the opioid crisis in the U.S.," the complaint alleged.

That led to a report in 2019, hyping the implementation of a "good faith dispensing" policy that purportedly allowed pharmacists the right to refuse to fill controlled substance prescriptions if they couldn't be properly verified. However, the plaintiffs alleged the company didn't do anything to ensure enforcement of the policy.

According to the investors, the defendants were "actively sabotaging" efforts to give pharmacists that kind of autonomy, with managers regularly insisting pharmacists fill suspicious prescriptions or face termination.

Further, its corporate policies allegedly encouraged the over-distribution of opioids, with the investors

alleging Walgreens never required its employees to check states' prescription drug monitoring databases and rewarded those who filled as many prescriptions as possible through pharmacist bonus programs.

The parties **told the court** on Feb. 22 that they had reached a deal in principle.

Counsel and representatives for Walgreens and the investors did not immediately return a request for comment.

The plaintiff is represented by James M. Ficaro of Weiser Law Firm PC, and by Matthew T. Heffner and Matthew T. Hurst of Heffner Hurst.

The defendants are represented by John M. Skakun III, Kristen R. Seeger and Caroline A. Wong of Sidley Austin LLP.

The case is Vladimir Gusinsky Revocable Trust v. Stefano Pessina et al., case number 1:23-cv-15654, in the U.S. District Court for the Northern District of Illinois.

-- Additional reporting by Gina Kim and Celeste Bott. Editing by Emily Kokoll.

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Elliott Waives BioMarin Board Deal, Moots Del. Suit

By **Leslie A. Pappas**

Law360 (April 17, 2024, 2:39 PM EDT) -- Elliott Investment Management LP has waived an agreement with BioMarin Pharmaceutical Inc. that gave the activist investor three new seats on the biopharmaceutical company's board, mooting a Delaware Chancery Court lawsuit that a BioMarin shareholder filed earlier this month.

In a six-page order signed late Tuesday, Vice Chancellor J. Travis Laster granted the parties' stipulation to dismiss as moot the proposed class action that BioMarin stockholder Aaron Jones **filed on April 4**.

Jones filed the suit against BioMarin, three Elliott affiliates, and 15 BioMarin directors in Delaware's Court of Chancery after BioMarin's board entered into a cooperation agreement in December with interests of Elliott, allegedly to stave off a threatened proxy contest.

The cooperation agreement would have required BioMarin to expand its board by three seats and recommend the election of three Elliott-selected directors at the 2024 meeting. The agreement also would have capped the size of the board for a year. In exchange, Elliott agreed to a standstill, nondisparagement provisions, and promised to vote its shares in favor of the incumbent board, the complaint said.

Jones asserted that the agreement's provisions capping the size of the company's board and requiring BioMarin to recommend stockholders vote for the new Elliott-backed directors — Mark Enyedy, Athena Countouriotis and Barbara Bodem — were invalid and unenforceable.

Shortly after Jones filed the lawsuit, BioMarin's board filed additional proxy materials with the U.S. Securities and Exchange Commission that nominated 11 candidates for election at the 2024 annual meeting, including Bodem, Countouriotis and Enyedy.

On April 11, according to a letter attached to the vice chancellor's Tuesday order, Elliott informed BioMarin that it had irrevocably waived the agreement's board size requirement and the recommendation provision that Jones targeted in his suit.

BioMarin, founded in 1997 and headquartered in San Rafael, California, is a global biotechnology company with eight approved therapies for rare genetic disorders, according to its website.

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

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

BioMarin and the director defendants are represented by Blake Rohrbacher of Richards Layton & Finger PA and Marjorie P. Duffy of Jones Day.

Elliott and its affiliated defendants are represented by Andrew J. Rossman, Michael A. Barlow and Hayden J. Driscoll of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Aaron Jones v. BioMarin Pharmaceutical Inc. et al., case number 2024-0360, in the Court of Chancery of the State of Delaware.



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Karuna Investor Ends Suit After Bristol-Myers Seals \$14B Deal

By **Elaine Briseño**

Law360 (April 17, 2024, 9:22 PM EDT) -- A Karuna Therapeutics shareholder has dropped her proposed class action after Bristol-Myers Squibb Co. completed its \$14 billion purchase of the biotechnology company, a deal the suit alleged was brought about by misrepresentations to investors to gain their support.

The **deal was finalized** March 18, according to a statement from Bristol-Myers at the time.

Shannon Jenkins **lodged her lawsuit** Feb. 14 in Delaware federal court, naming the company, President and CEO Bill Meury and several company directors. She filed the voluntary dismissal Wednesday, but it did not shine any light on the reason behind her decision.

In a March 18 statement on X, formerly known as Twitter, Boston-based Karuna announced it had completed the transaction with Bristol-Myers and was looking forward to "continuing to transform the lives of patients with neurological and neuropsychiatric diseases."

The parties did not respond to a request for further information Wednesday.

The companies announced on Dec. 22 that Covington & Burling LLP-advised Bristol-Myers Squibb had agreed to buy Simpson Thacher & Bartlett LLP-guided Karuna Therapeutics Inc., along with its lead asset, KarXT, an antipsychotic drug that is under review by the U.S. Food and Drug Administration and could be used to treat schizophrenia and Alzheimer's disease, as well as a promising early-stage and preclinical pipeline.

Bristol-Myers agreed to pay \$330 per share in cash, and the deal was originally expected to close in the fall of this year. Bristol-Myers, which is based in New Jersey, released its own statement March 18 when the deal closed ahead of schedule.

"We are excited to expand our neuroscience portfolio as we welcome Karuna to Bristol-Myers Squibb," said Bristol-Myers CEO Chris Boerner. "Importantly, this transaction aligns with our commitment to strengthening BMS's growth profile in the latter half of the decade and beyond.

Jenkins had argued in her lawsuit that, before stockholders voted to approve the transaction, Karuna had to disclose all allegedly omitted information from the deal's proxy statement. The filing included misleading information about Karuna's financial forecasts, including non-risk adjusted forecasts and line items about the company's gross profit, net operating profit after taxes and unlevered free cash flow, Jenkins alleged.

She had asked the court to stop the defendants from taking any further steps to close the proposed deal until the alleged omitted information was disclosed.

Jenkins is represented by Brian D. Long of Long Law LLC.

Counsel information for the defendants was not immediately available.

The case is Jenkins v. Karuna Therapeutics Inc. et al., case number 1:24-cv-00197, in the U.S. District Court for the District of Delaware.



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RTX Investor Sues Brass In Del. For Better Antitrust Oversight

By **Leslie A. Pappas**

Law360 (April 17, 2024, 9:55 PM EDT) -- A shareholder of RTX has sued the aerospace and defense giant's current and former officers and directors in Delaware's Court of Chancery, accusing them of failing over a period of at least eight years to prevent antitrust violations in the company's hiring practices.

Gerald Joseph Lovoi's stockholder derivative complaint, made public Wednesday, named Gregory J. Hayes, RTX Corp.'s chair and outgoing CEO, Christopher T. Calio, the incoming CEO and current chief operating officer, and 18 other current and former officers and directors as defendants.

The investor alleged the RTX leaders breached their fiduciary duties to stockholders from at least 2011 through 2019 by allowing divisions of the company to violate antitrust laws through a series of "no-poach" agreements with its suppliers.

"Plaintiff seeks damages for the company for defendants' breaches of fiduciary duties in connection with failing to implement and enforce a reasonable, functioning oversight mechanism for compliance with antitrust laws," Lovoi said in his filing.

Formerly known as Raytheon Technologies Corp., Arlington, Virginia-based RTX is the product of a **merger** between Massachusetts-based Raytheon Co. and Connecticut-based United Technologies Corp. in **2020**.

Other defendants in Lovoi's complaint include directors and officers of RTX, Raytheon, UTC, and former UTC subsidiaries Collins Aerospace and Pratt & Whitney. The shareholder said the antitrust violations he asserted occurred at the UTC units, which are now part of RTX.

The U.S. Department of Justice **indicted** a former executive of Pratt & Whitney in 2021, alleging he had participated in a conspiracy with executives of the company's suppliers to restrict the hiring of engineers and other skilled laborers.

The government **accused Mahesh Patel**, a former director of global engineering sourcing at Pratt & Whitney, of leading a conspiracy to ensure aerospace companies would not hire each other's employees. Federal prosecutors said the scheme robbed workers of career advancement and the ability to earn higher wages in a competitive job market.

Lovoi's lawsuit says Patel not only conspired with executives at Pratt & Whitney suppliers, but also with the division's human resource department.

Company executives and directors at UTC were aware as early as 2019 that the DOJ was investigating the alleged use of no-poach agreements and potential antitrust violations, but did nothing in response, the RTX investor said.

Leaders of Raytheon failed to fully investigate the problems before it merged with UTC, partly because Raytheon leaders did not establish adequate oversight of antitrust issues, according to the Delaware complaint.

"Had a functioning oversight function been in place, knowledge of that scheme would have been escalated to the board, or at least been detected in the due diligence conducted by Raytheon Co.

prior to closing of the merger," Lovoi wrote.

A Connecticut federal judge **threw out the government's criminal case** against Patel and the five others last year, finding that no reasonable juror could convict them based on the evidence prosecutors presented.

Nevertheless, Lovoi noted, since the unsealing of the criminal complaint against Patel, more than 20 class actions have been filed against RTX alleging antitrust violations at Pratt & Whitney and Collins Aerospace.

Those cases have been consolidated in Connecticut federal court as **Borozny et al. v. Raytheon Technologies Corp.** , and a judge **recently denied the company's motion** to dismiss the suit.

Four of the six defendants in the Borozny case have already settled, Lovoi said. If the federal court suit goes to trial, RTX "faces millions to hundreds of millions of dollars in damages," according to Lovoi's complaint.

Lovoi is seeking damages and calling for corporate governance reforms, including the creation of a board-level committee focused on compliance. He also asked the Chancery Court to order RTX to implement better employee training and create a chief compliance officer role overseeing its compliance framework.

None of the parties responded Wednesday to Law360's requests for comment.

Lovoi is represented by Shane T. Rowley and Danielle Rowland Lindahl of Rowley Law PLLC and Brian D. Long of Long Law LLC.

Counsel information for RTX and the individual defendants was not immediately available.

The Delaware case is Lovoi v. Hayes et al., case number 2024-0383, in the Court of Chancery of the State of Delaware.

The federal case is Borozny et al. v. Raytheon Technologies Corp., Pratt & Whitney Division, et al., case number 3:21-cv-01657, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Lauren Berg, Bryan Koenig, Nadia Dreid and Brian Steele. Editing by Covey Son.

Correction: An earlier version of this story misstated Patel's role at Pratt & Whitney.



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Ex-JPMorgan Analyst Liked 'Winding Up' Autonomy CEO, Jury Told

By **Bonnie Eslinger**

Law360 (April 17, 2024, 11:33 PM EDT) -- A former JPMorgan stock analyst testifying Wednesday in the criminal fraud trial of former Autonomy CEO Michael Lynch said that he "took pleasure in winding up Lynch" and once even used a Hitler analogy to describe his performance, but said his critical coverage was never personal.

Lynch is on trial, alongside Autonomy's former Vice President of Finance Stephen Chamberlain, on conspiracy and fraud charges that could put them behind bars for more than 20 years. Lynch, who reaped about \$804 million from the sale of U.K.-based Autonomy to HP Inc., is also charged with securities fraud. The trial **began March 18** and is slated to run into June.

On Wednesday, ex-JPMorgan Chase & Co. analyst Daud Khan took the stand for a second day. On Tuesday, Khan said he covered Autonomy from around 2002 until 2011 and Lynch **responded with hostility** when Khan's research reports questioned the company's growth.

During Khan's cross-examination on Wednesday a lawyer for Lynch, Daniel Silver of Clifford Chance LLP, asked if he had a "contentious" relationship with Lynch.

Khan said he had since 2008 when he began to put out research reports arguing that Autonomy was overvalued.

"And dozens of reports in which you predicted that its share price would go down, correct?" Silver asked. Khan agreed.

Silver also noted that at that time most other analysts disagreed with Khan's assessment of Autonomy, and Khan agreed.

Later Silver asked Khan if he had "animosity" toward his client, and Khan said no.

"I may have said things to people that might show that I was angry at him, but I wasn't angry at him," Khan said.

Silver put up on the court screen an April 2009 message chat Khan had with a friend after getting a bad review at JPMorgan. Khan said the review was based on the fact that his predictions that Autonomy's stock would go down had so far been wrong.

In the exchange, Khan said the review "really annoyed me," adding, "So now I take pleasure in winding up Lynch," which he followed with, "thorn in his side," "then a dagger," and "then an AK47."

Khan said he was just blowing off steam with a friend.

"You didn't mean that you actually were going to take an AK-47 and try to shoot Dr. Lynch, correct?" Silver asked.

Khan agreed.

Silver also put a chat exchange before jurors from October 2010, between Khan and another friend, Bram Cornelisse, managing partner at Farrington Capital Management.

In it, the men note that Autonomy's share price had recently dropped.

Khan wrote, "maybe being too hopeful, but I can see an image of a Hitler moment for Mike, where his generals tell him the war is lost, and then he has to step down."

Silver said that Khan is comparing Lynch to Adolf Hitler, and Khan said it was just a war analogy.

"There was one guy that controlled everything, and that's Dr. Lynch ... what happened with Hitler was that his generals basically said 'look it's time to step back ... it's done.'"

Silver asked Khan if it was still his testimony that he had no personal animosity or antagonism towards Lynch at that time. Khan said it was.

"On a professional basis, I thought he was lying to the market and was lying to me," Khan said. "There's no personal animosity."

Silver also suggested that Khan's negative reports on Autonomy were trying to help short sellers — investors who speculate on a stock's decline — including friends and JPMorgan's clients.

He put up a January 2010 email that Khan sent to Cornelisse with the subject line "Autonomy Ahhhg-why does it keep going up?"

Silver said both Khan and Cornelisse want the stock price to go down.

"You wanted that stock to drop. So Mr. Cornelisse could make money on his short position, correct?" Silver asked.

Khan said he didn't know what his friend's trading position was at the time.

During his direct examination on Tuesday, Khan said Lynch offered JPMorgan millions in business if he were taken off the Autonomy beat. On Wednesday, Silver underscored that it was JPMorgan's investment banking team who set up the March 2010 meeting where Autonomy made that offer but confirmed that the company had used it to discuss concerns about Khan's reports.

"I think you testified yesterday ... JPMorgan declined the opportunity to work with Autonomy on future deals because they would not agree to remove you from coverage, correct?" Silver asked. "But in fact, JPMorgan did go on to work with Autonomy on future deals, did you know that?"

Silver pointed out that JPMorgan was part of Autonomy's deal team related to its 2011 acquisition by HP.

"If we shortcut this: I wasn't working for JPMorgan at the time," Khan replied.

The trial continues Thursday.

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 accounting tricks to make Autonomy's revenue growth look better than it was.

The government also brought charges against Sushovan Hussain, former chief financial officer at Autonomy, who was **convicted on related charges** in 2018 and 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. A London judge ruled in 2022 that Lynch and Hussain had used dishonest accounting techniques to "induce" HP to buy the company. 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 its true price.

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 Brian Baresch.

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Trial-Ready Paraquat MDL Cases Tossed After Testimony Axed

By **Hailey Konnath**

Law360 (April 18, 2024, 12:40 AM EDT) -- An Illinois federal judge on Wednesday threw out the first group of trial-ready cases over the herbicide paraquat, agreeing with Syngenta and Chevron that the plaintiffs' expert testimony must be excluded and finding that the cases fail without that testimony.

U.S. District Judge Nancy J. Rosenstengel, who's overseeing the sprawling multidistrict litigation involving, issued two key orders Wednesday. In one, she granted the companies' joint motion for summary judgment, dismissing, for good, four bellwether cases alleging paraquat can cause Parkinson's disease.

Those cases had completed fact and expert discovery and were gearing up for trial. However, in her other order, Judge Rosenstengel found that the testimony of Cornell University professor Martin Wells — the sole expert witness backing the plaintiffs' theory as to why paraquat exposure poses risks — must be excluded. Notably, the judge slammed his analysis as "a textbook example of the type of standardless presentation of evidence that courts have cautioned against."

"The most obvious methodological defect is the absence of any discernible weighting methodology," the judge said.

She also said a "recent review of reviews" found that "a consensus exists in the scientific community that the available evidence does not warrant a claim that paraquat causes Parkinson's disease."

"Dr. Wells' opinion that 'drawing general causal inferences related to occupational paraquat exposure and [Parkinson's disease] is merited,' places him in direct conflict with this observed 'consensus,'" the judge said.

That testimony was vital to claims brought by Keith Fuller, Frederick Richter, Todd Burgener and Matthew Coward, whose cases were selected to be the first to head to trial in the MDL.

The companies had made a handful of arguments in the summary judgment motion as to why the plaintiffs' claims couldn't proceed. But Judge Rosenstengel said it wasn't necessary to get into the merits of those arguments. Ultimately, the claims fail for a "more fundamental reason: the inability to establish a causal link between occupational paraquat exposure and Parkinson's disease without Dr. Wells' testimony," the judge said.

In the **prominent litigation**, thousands of individuals claim they developed Parkinson's disease after being exposed to paraquat dichloride. Indeed, paraquat is banned in many European countries and restricted in the U.S. due to its high toxicity. Still, it remains one of the most widely used herbicides in the nation. It's sold by Syngenta as Gramoxone.

Chevron, which no longer sells paraquat, is named as a defendant because it sold it until the 1980s.

Both Syngenta and Chevron maintain that no peer-reviewed research supports the plaintiffs' contention.

Chevron said in a statement Wednesday that Judge Rosenstengel's ruling "affirms what Chevron has long asserted — that despite hundreds of studies conducted over the past 60 years, the scientific consensus is that paraquat has not been shown to be a cause of Parkinson's disease."

In January, the U.S. Environmental Protection Agency determined that Parkinson's "is not an expected health outcome" of using paraquat as a pesticide, per the statement.

Chevron added that it never manufactured paraquat — it only sold it, and it hasn't even done that since 1986. Chevron "has long maintained that it should not be liable in any paraquat litigation," it said.

Meanwhile, the plaintiffs' lead attorneys at Levin Papantonio Rafferty Proctor Buchanan O'Brien Barr & Mougey PA, Walkup Melodia Kelly & Schoenberger and Meyers & Flowers LLC issued a joint statement on Wednesday saying they planned to appeal. They also noted that the decision only applies to four of the more than 5,000 cases pending in the MDL as well as in state courts across the country.

"Per the court's direction, we will select new trial cases, and look forward to trying them promptly against Chevron and Syngenta," the attorneys said.

They said that the "overwhelming body of research" supports their position that paraquat "enters the brain and causes Parkinson's disease." The herbicide is already banned in more than 70 countries thanks to its risks, according to the statement.

"Knowing about the risks associated with paraquat decades ago, Syngenta spared no expense funding journal articles by employees and consultants to manufacture doubt and continue profiting from paraquat in the United States," the attorneys said. "Even the court acknowledged in its opinion that it was not concerned with 'the correctness of the data [plaintiffs' expert] analyzed or the conclusions he drew.'"

They added, "We will continue to prosecute these cases on behalf of the thousands of American farmworkers diagnosed with an incurable and debilitating disease because of their exposure to paraquat."

Syngenta didn't immediately respond to a request for comment late Wednesday.

The parties have been arguing over witness expert witness testimony in the four cases **for months**. At a hearing last year, Chevron argued that the dispute is all about epidemiology, yet plaintiffs haven't hired an epidemiologist. Wells was their epidemiology expert, and he's a statistician, Jones Day's Lee DeJulius Jr. argued at the time.

"Dr. Wells has not studied paraquat, not studied Parkinson's disease. He's disclaimed in the past the ability to opine on causation," DeJulius said.

Chevron's lawyer also took issue with the studies that Wells chose to include in his meta-analysis. On top of that, Wells has a terrible record of court approval as an expert witness, DeJulius argued. Courts in California, South Carolina and elsewhere have excluded Wells for a "ramshackle methodology," DeJulius said.

In a 97-page order Wednesday, Judge Rosenstengel identified several issues with Wells' testimony. That analysis was focused on "methodological soundness, not scientific accuracy," she said.

In particular, Wells left it to the court — and thus, the jury — to identify evidence in his reports that support his conclusions, according to the order.

Wells has disregarded the "basic methodological requirements of a weight of the evidence review," and that led to "unreliable" analyses, Judge Rosenstengel said.

She also pointed to Wells' "isolation from the scientific community."

"When an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied," Judge Rosenstengel said.

In her other order, Judge Rosenstengel noted that the plaintiffs didn't dispute that excluding Wells' testimony was fatal to their claims. Each of the four plaintiffs brought claims of "strict liability" — "design defect and failure to warn, negligence, breach of the warranty of merchantability [and] violation of the Illinois Consumer Fraud and Deceptive Business Practices Act," according to the decision.

Given the order excluding Wells' testimony, "the trial selection cases necessarily fail on an essential element of each of their claims," she said.

Judge Rosenstengel also said she intended to identify a new group of cases to head to trial, directing the parties to identify 16 member cases for limited fact discovery.

"Plaintiffs shall select eight cases from the global plaintiff pool, Chevron shall select four cases, and Syngenta shall select four cases," she said.

The plaintiffs are represented by Sarah Shoemake Doles of Levin Papantonio Rafferty Proctor Buchanan O'Brien Barr & Mougey PA, Khaldoun A. Baghdadi of Walkup Melodia Kelly & Schoenberger and Peter J. Flowers of Meyers & Flowers LLC.

Chevron is represented by Lee DeJulius Jr. and Sharyl Reisman of Jones Day.

Syngenta is represented by Ragan Naresh, Bradley Weidenhammer, Britt Cramer and Zach Holmstead of Kirkland & Ellis LLP.

The case is In re: Paraquat Products Liability Litigation, case number 3:21-md-03004, in the U.S. District Court for the Southern District of Illinois.

--Additional reporting by Cara Salvatore. Editing by Jay Jackson Jr.

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Kraft Sued Over Lead Contamination In Lunchables

By **Jonathan Capriel**

Law360 (April 17, 2024, 9:57 PM EDT) -- Kraft has been slapped with a proposed class action over its popular Lunchables snack kits after independent testing of the kits allegedly found that they contained high, though legally allowable, levels of lead and other harmful substances.

Laura LaSpisa filed the suit Monday in New York federal court on behalf of herself and anyone else who had bought one of three Lunchables products in the state within the statute of limitations, saying the products are "contaminated with levels of heavy metals that no reasonable parent would want their children to eat in a single meal."

LaSpisa and "thousands of other consumers in New York" will have to toss out the Lunchables they have already bought because they are not safe to eat, she said. Kraft also "deceptively and misleadingly labeled and marketed" the products as safe to use, citing the snack kit's slogan "Food kids love and parents trust."

"This omission leads reasonable consumers to believe they are purchasing a product that is safe and nutritious for their children to consume when in fact it is not," she said in the suit.

The lawsuit was sparked by a Consumer Reports finding that Lunchables tested contained worrying levels of lead, cadmium and phthalates, which are a class of chemicals used to make plastics stronger. Though the levels that Consumer Reports found were below the legally allowable limits set by the state of California, the publication still found the rates troublingly high because "even one meal kit would put a child near their daily limit for lead exposure," LaSpisa said.

"Despite the Consumer Reports' findings, Kraft Heinz is standing behind Lunchables and has not recalled any of its Lunchables products or offered refunds to consumers," the suit said.

A Kraft Heinz spokesperson told Law360 on Wednesday that company officials are "aware of the complaint and strongly disagree with the allegations."

"Certain substances like lead occur in the environment and can be found at low levels in agricultural products — whether on grocery store shelves, in the produce section, or grown in your backyard. Our products are safe for consumers, and we will vigorously defend our brand," the spokesperson said.

According to the tests run by Consumer Reports, a Kraft's 3.2 ounce turkey and cheddar cracker Lunchables kit contained 74% of the maximum allowable dose level for lead under California law. There are no federal limits on heavy metals for most food products.

LaSpisa said her family had been a big fan of Lunchables before she found out about the lead levels. Her two sons enjoyed the pizza Lunchables in particular, she said, especially the "feeling of independence they get from assembling their own meals." She would buy them in bulk once a month and freeze them until her sons were ready to eat them, according to the suit.

"Unless a class is certified, defendant will be allowed to profit from its deceptive practices, while plaintiff and the members of the class will have suffered damages," she said.

The proposed class is represented by Jeffrey I. Carton and Catherine H. Friesen of Denlea & Carton LLP.

Counsel information for Kraft was not immediately available.

The case is LaSpisa v. Kraft Heinz Foods Co., case number 7:24-cv-02822 in the U.S. District Court for the Northern District of New York.

--Editing by Rich Mills.

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No Sanctions For Wordy Footnotes In Google Maps Case

By **Lauren Berg**

Law360 (April 17, 2024, 11:34 PM EDT) -- A California federal judge will not sanction attorneys representing Google Maps customers in an antitrust action for their "numerous and excessively long footnotes" after the lawyers on Wednesday explained it wasn't a tactic for avoiding page limits and promised not to do it again.

U.S. District Judge Richard Seeborg, in a one-page **order** late Wednesday, terminated his **show cause order** from last week, the same day that attorneys for plaintiffs Dream Big Media Inc., Getify Solutions Inc. and Sprinter Supplier LLC apologized that their use of footnotes and string cites might have looked like an attempt to evade the court's page limits. The attorneys explained in their **response** that they wanted to provide the fruits of their legal research.

They said the majority of the string cites with descriptive parentheticals were to distinguish the authority that Google and its parent, Alphabet Inc., relied on while other caselaw citations in the footnotes provided additional supportive authority.

"We endeavored to let the caselaw and parenthetical summaries make the legal points, as opposed to focusing on our own commentary, because we believed that our approach would alleviate the burden on the court and better explain within the four corners of the brief why we were citing particular authority," the response stated.

The attorneys also stressed that "no artificial intelligence tools were used by us to identify cases, cite them, or draft parentheticals. All of the cases were read by us."

"Still, we apologize for the length of the footnotes and have understood your Honor's order," the attorneys continued. "Going forward, we will endeavor to shorten string cites and parentheticals, in part by providing more descriptive sentences that introduce the string cites — and thus obviating the need for more-detailed parentheticals — and by providing fewer cases in string cites."

The plaintiffs' attorneys also provided a table explaining their reasoning behind each footnote at issue, according to the response.

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

Judge Seeborg's April 12 show cause order came in response to the plaintiffs' **brief in opposition** to Google and Alphabet's February **motion to dismiss** that urged the judge to toss the proposed antitrust class action accusing the search giant of coercing users of its Maps product from using competing mapping services.

The defendants argued that the plaintiffs' third attempt at the action is "brimming with irrelevant information" and "antitrust jargon" but still fails to state a viable tying claim.

In a second amended complaint filed in January, Dream Big Media, Getify Solutions and Sprinter Supplier said Google unlawfully ties its Maps application programming interface with its Routes and Places API, forcing developers and businesses to pay inflated prices for mapping products.

The plaintiffs **first sued** Google and Alphabet in April 2022, alleging in their initial complaint that they were required to sign on to additional products and that once they were "locked in, Google

ratchets up the cost on its Maps products."

Although Google's Maps, Places and Routes are different products with different prices, the tech giant used its market dominance to tie the products together, they claimed. Due to Google's monopoly power in the market, there are few alternatives for companies that wish to take their digital business elsewhere, they said.

Google and Alphabet moved to dismiss the suit in July 2022, and U.S. District Judge Jeffrey S. White granted the dismissal in November of that year, finding that the plaintiffs had not alleged a valid tying claim. But in his order, he allowed the companies to amend their complaint.

In November 2023, Judge Seeborg tossed the amended complaint, **taking issue** with the plaintiffs' attempt to allege that, depending on the specific transaction between the company and its customers, any of the three application programming interfaces — Maps, Routes or Places — could be the tying service, with the remaining two being the products that are tied. But the judge also allowed the plaintiffs to file an amended complaint.

In their opposition to Google's motion, the plaintiffs said they have shown that "Google Maps has monopoly power in the Digital Maps API Market, with above 90% market share" and have sufficiently pled "allegations of circumstantial market power, direct demonstrations of monopoly power, and barriers to entry and expansion."

"Google's anticompetitive conduct has foreclosed plaintiffs from selecting Google Maps' competitors based on merit," they argued.

The Google Maps customers are represented by Justin S. Nematzadeh of Nematzadeh PLLC, John G. Balestriere of Balestriere Fariello, Matthew W. Schmidt of Schmidt Law Corp. and Mario Simonyan of ESQGo PC.

Google and Alphabet are represented by David C. Kiernan, Craig E. Stewart, Lin W. Kahn and Catherine T. Zeng of Jones Day.

The case is Dream Big Media Inc. et al. v. Alphabet Inc. et al., case number 3:22-cv-02314, in the U.S. District Court for the Northern District of California.

--Additional reporting by Rose Krebs, Henrik Nilsson and Bonnie Eslinger. Editing by Kristen Becker.



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SEC Urged To Rethink Whistleblower Awards To Short-Sellers

By **Jessica Corso**

Law360 (April 17, 2024, 10:41 PM EDT) -- A University of Kansas law professor has released research showing that a growing number of corporate outsiders, including short-sellers, are receiving whistleblower rewards from the U.S. Securities and Exchange Commission, and he told Law360 on Wednesday the agency should reconsider giving money to those who also seek to profit from trading on the tips they call in.

Alexander Platt, who teaches securities regulation at the University of Kansas School of Law, will publish the research in the Washington Law Review highlighting the SEC's reliance on short-sellers as whistleblowers.

The agency's whistleblower program, which began in 2011, has been **massively successful** at alerting enforcement staff to potential wrongdoing in the marketplace, and the SEC has rewarded those who have brought forth useful tips with nearly \$2 billion to date.

But Platt said an increasing percentage of that money is being given to individuals who work outside the penalized companies, as opposed to insiders seeking to sound an alarm about wrongdoing within their company. According to data he obtained partially through Freedom of Information Act requests, Platt found 38% of the monetary value of the awards granted in fiscal year 2022 went toward company outsiders compared to 22% in 2021, 18% in 2020 and 8% in 2019.

That amounts to around \$271 million in program reward money given to corporate outsiders from the program's beginning through fiscal year 2022, according to the paper.

The SEC declined to comment on the paper Wednesday.

It's hard to know how many of those compensated outsiders may be analysts or corporate competitors as opposed to short-sellers, as the identity of whistleblowers is protected under the Dodd-Frank Act, which mandated the creation of the SEC whistleblower program.

But in his paper, Platt provides a list of well-known activist short-sellers, like Carson Block of Muddy Waters Research, who have **reportedly received** SEC whistleblower awards worth millions of dollars.

In issuing those rewards, the SEC may be spending money on information it could have obtained by other means, because short-sellers make money publishing the research that has been the basis of the tip, Platt said. And he says his research shows they often do publish the information provided to the SEC after they first tip off the agency.

"It does seem like it's a windfall to the market participants here that is not creating any additional incentive to sniff out fraud," he told Law360. "[Short-sellers] have a powerful incentive, but it's coming from the market. It's not coming from the SEC. So when the SEC pays them, it's just kind of a waste of money."

That money could be better spent bulking up SEC enforcement staff, which is tasked with performing the very same research it often receives from corporate outsiders as tips, Platt said.

He acknowledged that the agency can't hire more staffers absent a budget appropriation from

Congress, but he said it can decide who receives whistleblower funds. The agency should consider rewriting the program's rules so that one of the factors for deciding who gets money is whether an individual tipster profited off the tip they provided, he said.

"I'm not saying exclude all activist short-sellers. I'm not saying exclude anyone who has privately profited," Platt said. "I'm just saying, put that information into the calculation when the SEC is issuing awards."

--Editing by Lakshna Mehta.

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Tesla To Vote On Reviving Musk's \$55B Pay, Moving To Texas

By **Jeff Montgomery**

Law360 (April 17, 2024, 3:05 PM EDT) -- Attorneys for Tesla Inc. notified Delaware's chancellor Wednesday that the company will seek stockholder approval June 13 for the same \$55.8 billion Elon Musk compensation plan voided by Chancery Court on Jan. 30, along with reincorporation of Tesla as a Texas company.

The company's notice also asserted that Tesla believes another ratification of the CEO performance award — originally approved in 2018 — "would materially impact" still-pending Chancery consideration of a proposed \$5 billion stock-based fee sought by class attorneys for their multiyear court challenge of the pay plan.

In a letter to stockholders from Tesla Chairperson Robyn Denholm included in the company's proxy statement, Denholm stressed that Chancery Court voided a pay plan already ratified once in 2018 by 73% of votes cast by disinterested stockholders.

"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 told stockholders in the proxy. "So we are coming to you now so you can help fix this issue — which is a matter of fundamental fairness and respect to our CEO."

Chancellor Kathaleen St. J. McCormick found in a **200-page ruling** in January that "Musk dictated the timing" of the compensation-setting process, "making last-minute changes to the timeline or altering substantive terms immediately prior to six out of the ten board or compensation committee meetings during which the plan was discussed."

The decision followed court findings that Tesla's directors approved the compensation plan by way of a flawed process, with approval coming from a board controlled by Musk, among other flaws.

Although Tesla and its directors argued that Musk was "uniquely motivated by ambitious goals," with Tesla desperately needing him to succeed, the opinion observed that "these facts do not justify the largest compensation plan in the history of public markets."

Hours after the chancellor released the court's decision, **Musk declared** on his X social media site: "Never incorporate your company in the state of Delaware."

Denholm told stockholders in the proxy, "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."

The January ruling "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," Denholm wrote.

Counsel for the stockholders who pursued the case since 2019 and proposed **taking their fee** in the form of Tesla stock did not immediately respond to a request for comment.

In seeking approval to reincorporate Tesla in Texas, Denholm said that "Texas is already our business home, and we are committed to it," noting that the company's Texas "gigafactory" is one of the

largest factories in the United States.

Gigafactory is a term once reserved for the company's battery production facilities. It has morphed over time to refer to the massive plants that now manufacture energy storage devices, electric motors, solar components and other aspects of the company's clean energy product line.

"We have a significant number of manufacturing, operations and engineering employees in Texas, and our executives are based there," Denholm wrote. "Texas is where we should continue working towards our mission of accelerating the world's transition to sustainable energy, as we lay the foundation for our growth."

That growth, Denholm indicated, should no longer take place by way of Delaware's corporation laws.

Lawrence Hamermesh, former director of the University of Pennsylvania Carey Law School's Institute for Law and Economics and professor emeritus of Widener University Delaware Law School, said he was unsurprised at the Tesla moves, although he didn't expect them so soon.

"I think the real question, putting aside the technicalities, is if the stockholders of Tesla, on full information, are going to say: 'Hey. No problem. He [Musk] deserves this. Give it to him,'" Hamermesh said. "It's pretty hard to say they can't do that."

Hamermesh added that Tesla's move was a bold one, and raises interesting questions

"Right now the plaintiffs' lawyers are saying, 'We just saved the company \$50 billion, and we'll take our share of that in stock,'" he said. "But if the stockholders approve this, then what has been gained in the litigation?"

Ann M. Lipton, Tulane University Law School's Michael M. Fleishman associate professor in business law and entrepreneurship and associate dean for faculty research, said Wednesday the legal effect of the shareholder vote on the pay package, "even if shareholders ratify, is not entirely certain and I think will likely be subject to (new) litigation."

Lipton added: "Even if it's binding, that doesn't mean the original case achieved nothing for shareholders — introducing new protections and disclosures for shareholders is a benefit. So while I can imagine that the vote might have some effect on the fee petition, it's really hard to say what effect it would/should have."

Musk's 10-year pay plan went to a **weeklong trial** in November 2022 after it was challenged by stockholders opposing it. The plan included 12 tranches or performance milestones that Musk had to meet before qualifying for a portion of the total, once estimated at as much as \$56 billion.

In the Chancery Court case, plaintiff Richard J. Tornetta is represented by Jeroen van Kwawegen, Gregory V. Varallo and Glenn R. McGillivray of Bernstein Litowitz Berger & Grossmann LLP, Jeremy S. Friedman, Spencer M. Oster and David F.E. Tejtrel of Friedman Oster & Tejtrel PLLC, and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC.

Defendants Elon Musk, Robyn M. Denholm, Antonio J. Gracias, James Murdoch, Linda Johnson Rice, Brad W. Buss and Ira Ehrenpreis are represented by Evan Chesler, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP, and David E. Ross and Garrett B. Moritz of Ross Aronstam & Moritz LLP.

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

--Editing by Robert Rudinger.