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Bloomberg Law
April 24, 2024, 9:41AM PDT
Pegasystems Investors Make \$35 Million Deal Over Misstatements
By Ufonobong Umanah
Documents

- Motion for Preliminary Approval
- Docket

- Investors: Company wasn't truthful about trade secret theft scheme
- \$2 billion IP judgment affected ability to pay investors

Bloomberg Law News 2024-04-24T12:46:55832320339-04:00
Pegasystems Investors Make \$35 Million Deal Over Misstatements

By Ufonobong Umanah 2024-04-24T12:41:24000-04:00

- Investors: Company wasn't truthful about trade secret theft scheme
- \$2 billion IP judgment affected ability to pay investors

Pegasystems Inc. agreed to pay \$35 million to resolve a securities class action where investors accused the software company of misleading them about its involvement in a scheme to steal a rival's trade secrets.

Pega is currently appealing a \$2 billion judgment from a Virginia state court for hiring corporate spies to steal trade secrets from Appian Corp. "Should Pega ultimately fail to significantly reduce or nullify the Virginia judgment, Pega's ability to fund a judgment following a trial in this case would be severely jeopardized," the unopposed motion for preliminary approval, filed in the US District Court for the District of Massachusetts, says.

A class of those who purchased Pega common stock between June 16, 2020 and May 9, 2022 and experienced loss should be conditionally certified, and the agreement should be ruled fair and reasonable, the motion also says.

The lawsuit, led by "institutional investors" Central Pennsylvania Teamsters Pension Fund and Construction Industry Laborers Pension Fund, said that during two time periods, starting from 2012 and 2019, "Pega's senior executives and employees participated in a conspiracy to misappropriate Appian trade secrets," according to Judge William G. Young's order denying in part Pega's motion to dismiss in 2023.

When two former Pega employees disclosed evidence of this to Appian, it proceeded to sue and convince a jury Pega "had willfully and maliciously misappropriated Appian's trade secrets in violation of" Virginia law.

The investors said that during the pendency of the Virginia case, Pega made no express mention of the litigation risk in several 10-Q and 10-K forms. Pega later said in a 10-K that "Appian's claims 'are without merit,' Pega has 'strong defenses to these claims,' and that 'any alleged damages claimed by Appian are not supported by the necessary legal standard,'" Young previously explained.

"As the truth finally emerged carrying with it a multi-billion-dollar judgment, Pega's stock fell dramatically," Young wrote in 2023. Pega's stock dropped at least 27% after the verdict, Bloomberg Law reported.

However, after reviewing "hundreds of thousands of documents in discovery," the plaintiffs would still need "to prove each element of their §10(b) claims to prevail at trial" the motion for preliminary approval says, while Pega "would need to defeat just one element to succeed."

And no matter who would prevail if litigation continues, the settlement means both sides avoid "tremendous costs" and an expensive trial.

The motion asks that lead counsel **Robbins Geller** Rudman & Dowd LLP be appointed counsel for the settlement class and says the law firm plans to seek "an award of attorneys' fees not to exceed 33% of the Settlement Amount," and no more than \$450,000 in costs and expenses, as well as interest. The two pension funds also ask that they be appointed representatives for the class and say that, if the motion is approved, they will seek "an amount not to exceed \$20,000 in the aggregate" for their costs and expenses incurred in representing the class.

Judge William G. Young is assigned the case.

Robbins Geller Rudman & Dowd LLP is lead counsel for the investors. Wilmer Cutler Pickering Hale & Dorr LLP represents Pegasystems and CEO Alan Treffer.

The case is City of Fort Lauderdale Police and Firefighters' Ret. Sys. v. Pegasystems Inc. , D. Mass., No. 1:22-cv-11220, motion for preliminary approval 4/23/24 .

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Labaton, Robbins Geller decide to work together on Boeing class action

 legalnewsline.com/stories/657964984-labaton-robbins-geller-decide-to-work-together-on-boeing-class-action

April 24, 2024

Attorneys & Judges

Eric Belfi of Labaton Keller Sucharow | <https://www.labaton.com/>

ALEXANDRIA, Va. (Legal Newsline) - Securities class action lawyers have reached an agreement on who will lead litigation against Boeing over financial problems caused by recent failures of its 737 Max planes.

Competing motions for appointment of lead plaintiff and lead counsel were filed by heavyweights Labaton Keller Sucharow and Robbins Geller. Their April 15 notice to a Virginia federal judge says they will lead the case together.

Their clients feel it is "in the best interests of the Class to jointly prosecute this Action."

Labaton and Cohen Milstein, which would be liaison counsel for the class, filed their case on behalf of the State of Rhode Island. Robbins Geller represents the Local #817 IBT Pension Fund.

Boeing and executives are the defendants in the case. It alleges violations of federal securities laws and is brought on behalf of all entities that purchased or acquired Boeing common stock between October 23, 2019 and January 24, 2024.

The plaintiffs accuse Boeing of outsourcing the production and assembly of its airplane components to third-party suppliers to cut costs and production time, thereby compromising safety standards. This practice allegedly led to two fatal crashes involving Boeing's 737 MAX 8 planes due to design flaws in the flight control software.

The case also alleges that despite promising enhanced focus on safety following these disasters, Boeing failed to uphold adequate quality control standards. The company had previously entered into a deferred prosecution agreement with the U.S Department of Justice in January 2021 related to these incidents.

ORGANIZATIONS IN THIS STORY

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<https://www.law.com/newyorklawjournal/2024/04/24/supreme-court-confirms-pure-omissions-cannot-support-securities-fraud-liability/>

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ANALYSIS

Supreme Court Confirms 'Pure Omissions' Cannot Support Securities Fraud Liability

In a significant decision regarding the scope of the federal securities laws' anti-fraud provisions, the U.S. Supreme Court held that "pure omissions" are inactionable under Section 10(b) of the Securities Exchange Act and its enabling rule, SEC Rule 10b-5.

April 24, 2024 at 10:00 AM

By James J. Beha II and Brendan F. Quigley | April 24, 2024 at 10:00 AM



In a significant decision regarding the scope of the federal securities laws' anti-fraud provisions, the U.S. Supreme Court in *Macquarie Infrastructure v. Moab Partners* held that "pure omissions" are inactionable under Section 10(b) of the Securities Exchange Act and its enabling rule, SEC Rule 10b-5. *Macquarie Infrastructure v. Moab Partners*, No. 22-1165, 601 U. S. ____ (2024).

The decision vacated the judgment of the U.S. Court of Appeals for the Second Circuit, which had reinstated securities fraud claims based on the defendant's omission of information allegedly subject to disclosure under Item 303 of Regulation S-K, an SEC rule governing the contents of public companies' periodic SEC filings.

The court's decision in *Macquarie Infrastructure* corrects a line of precedent that had opened the door to "pure omission" securities fraud claims in the Second Circuit—the busiest circuit for securities class action litigation. It is an important confirmation that an omission—the decision *not* to speak—cannot support a Section 10(b) claim if it "does not render any 'statements made' misleading." In other words, silence is not fraud.

Background

Section 10(b) prohibits the use of "any manipulative or deceptive device or contrivance [in connection with a securities transaction] in contravention of such rules and regulations as the [SEC] may prescribe." 48 Stat. 891, 15 U. S. C. §78j(b). Rule 10b-5 makes it unlawful, in connection with a securities transaction, to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 CFR §240.10b-5(b) (2022).

Thus, Rule 10b-5 prohibits falsehoods ("untrue statements of material fact") and half-truths (omissions of material facts necessary to make "statements made" not misleading). But Rule 10b-5 does not "create an affirmative duty to disclose any and all material information." *Matrixx Initiatives v. Siracusano*, 563 U.S. 27, 44 (2011). "Even with respect to information that a reasonable investor might consider material, companies can control what they have to disclose under [Section 10(b) and Rule 10b-5] by controlling what they say to the market."

The Supreme Court has long recognized an implied right of action under Section 10(b) of the Exchange Act and its enabling rule SEC Rule 10b-5.

By contrast, other SEC rules—including Regulation S-K—impose affirmative disclosure obligations, but do not have a private right of action. Regulation S-K governs the contents of “qualitative” or “nonfinancial statements” portions of periodic SEC filings. Item 303 of Regulation S-K requires periodic filings to include, along with the issuer’s financial statements, “management’s discussion and analysis of” the financial statements—the so-called MD&A section. 17 C.F.R. §229.303.

Among other things, Item 303 requires disclosure in the MD&A of “known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact” on the company’s financial performance. In recent years, shareholder plaintiffs have attempted to import Item 303’s affirmative disclosure obligations into Rule 10b-5, arguing that omission of information required to be disclosed under Item 303 is misleading in violation of Rule 10b-5 even in the absence of any affirmative statement. Under this theory, a “pure omission” can give rise to Rule 10b-5 liability if Item 303 required disclosure of the omitted information.

Given Item 303’s broad and highly subjective disclosure standard, permitting private securities fraud claims based on alleged Item 303 violations risked broad expansion of potential liability for pure omissions. After virtually any business setback or negative development causing a company’s stock price to fall, an investor plaintiff with the benefit of hindsight could then argue that some “uncertainty” should have been disclosed earlier.

For example, if the FDA denies a pharmaceutical company’s new drug application or a promising new product launch turns out to be a commercial flop or a defective product must be recalled or a senior executive engages in personal misconduct, plaintiffs may argue that the company should have disclosed (or said more about) the risk that the negative event might happen.

Courts disagreed on the validity of this theory. The U.S. Court of Appeals Third and Ninth Circuits concluded that “Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b-5.” *In re Nvidia Securities Litigation*, 768 F. 3d 1046, 1056 (9th Cir. 2014); *Oran v. Stafford*, 226 F. 3d 275, 288 (3d Cir. 2000).

In *Stratte-McClure v. Morgan Stanley*, the Second Circuit took the opposite approach, holding that “Item 303 imposes the type of duty to speak that can, in appropriate cases, give rise to liability under Section 10(b).” In 2017, the Supreme Court granted review of the Second Circuit’s decision in *Indiana Public Retirement System v. SAIC*, to resolve this split, but the case settled before argument before the Supreme Court. *Indiana Public Retirement System v. SAIC*, 818 F.3d 85, 94 (2d Cir. 2015), cert. granted sub nom. *Leidos v. Indiana Public Retirement System*, 137 S. Ct. 1395, 1396 (2017).

In the years since, the Eleventh Circuit adopted the logic of the Third and Ninth Circuits. *Carvelli v. Ocwen Financial*, 934 F.3d 1307 (11th Cir. 2019). The Second Circuit remained the only federal appellate court to recognize Section 10(b) claims based on alleged Item 303 violations.

Perhaps not surprisingly, Section 10(b) claims based on alleged Item 303 violations became increasingly common in the Second Circuit, the busiest circuit for securities litigation. Based on statistics Macquarie Infrastructure compiled in support of its petition for Supreme Court review, roughly 20% of Section 10(b) class actions complaints filed in the Second Circuit between 2014 and 2022 (totaling more than 100 complaints) included Item 303 omission claims.

With its decision in *Macquarie Infrastructure*, the Supreme Court has now confirmed that “[t]he failure to disclose information required by Item 303 can support a Rule 10b–5(b) claim *only if the omission renders affirmative statements made misleading.*”

Discussion

The Second Circuit decision in *Macquarie Infrastructure*—which the Supreme Court has now vacated—illustrates how Item 303 claims expanded the scope of potential liability for pure omissions.

Macquarie Infrastructure owned infrastructure-related businesses, including a subsidiary that operates large “bulk liquid storage terminals,” used to store liquid commodities, including No.6 fuel oil, a high-sulfur fuel oil that is a byproduct of the refining process and typically has a sulfur content around 3%. In 2016, the United Nations’ International Maritime Organization adopted IMO 2020, a regulation that would cap sulfur content of fuel oil used in international shipping at 0.5% by the beginning of 2020.

Macquarie Infrastructure said nothing about IMO 2020 in its SEC filings. But, in 2018, it announced disappointing financial results because of falling demand for storage in its subsidiary’ bulk liquid storage terminals due to the structural decline in the No. 6 fuel oil market.

Moab Partners, a Macquarie Infrastructure investor, sued, arguing that the company’s failure to “disclose the extent to which [its subsidiary’s] storage capacity was devoted to No. 6 fuel oil...violated disclosure obligations under Item 303” and, therefore, violated Section 10(b) and Rule 10b–5.

The district court dismissed, but the Second Circuit reversed. While the court recognized that Moab had not identified any false statements or half-truths that Macquarie Infrastructure had made on the topics of IMO 2020 or the No. 6 fuel oil market, the court applied its binding precedent under *Stratte-McClure*, holding that a pure omission may violate Section 10(b) and Rule 10b-5 when there is “‘a statute or regulation requiring disclosure,’ ...such as Ite[m] 303.” And, “[c]rediting [Moab’s] allegations as true,” the court found that “IMO 2020’s significant restriction of No. 6 fuel oil use was known to [Macquarie] and reasonably likely to have material effects on [Macquarie’s] financial condition or results of operation.”

As a result, the court found that Moab had “adequately alleged a ‘known trend[] or uncertaint[y]’ that gave rise to a duty to disclose under Item 303” and, thus, had adequately alleged a violation of Section 10(b) and Rule 10b-5.

The Supreme Court reversed. In a unanimous opinion delivered by Justice Sonia Sotomayor, the court drew a distinction between “half-truths”—“representations that state the truth only so far as it goes, while omitting critical qualifying information”—and “pure omissions”—“when a speaker says nothing, in circumstances that do not give any particular meaning to that silence.” The court framed the question before it as whether Rule 10b-5(b)’s prohibition of “omitting a material fact necessary ‘to make the statements made... not misleading’ ...bars only half-truths or instead extends to pure omissions.”

The court noted that “Rule 10b–5(b) requires disclosure of information necessary to ensure that statements already made are clear and complete.” Thus, “[l]ogically and by its plain text, Rule 10b–5(b) ... covers half-truths, not pure omissions, because it requires identifying affirmative assertions (i.e., ‘statements made’) before determining if other facts are needed to make those statements ‘not misleading.’”

In its analysis, the court also considered the statutory context, distinguishing Rule 10b-5’s reference to “statements made” with Section 11 of the Securities Act, which prohibits any registration statement that “omit[s] to state a material fact required to be stated therein.” 15 U. S. C. §77k(a). Thus, the court explained, Section 11 expressly “creates liability for failure to speak.”

The court found the absence of similar language in either Section 10(b) or Rule 10b–5(b) “telling.”

Conclusion

When public companies—and other participants in the capital markets—choose to speak, they must take care to do so accurately. But they should not face potential liability for fraud-by-hindsight claims when they have chosen *not* to speak about a topic.

The Supreme Court’s decision in *Macquarie Infrastructure* is an important confirmation of the principle that “silence...is

not misleading.” *Basic Inc. v. Levinson*, 485 U. S. 224, 239, n. 17 (1988).

James J. Beha II and **Brendan F. Quigley** are litigation partners in the New York office of Baker Botts. Beha focuses on securities litigation and shareholder derivative actions. Quigley focuses on white-collar criminal defense.

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Appvion Stock Plan Revives Some Claims of Flawed Transfer (1)

By Jacklyn Wille

- Dispute stems from 2001 move to employee stock ownership plan
- Multiple advisers, corporate directors named as defendants

Bloomberg Law News 2024-04-24T10:25:03951269475-04:00

Appvion Stock Plan Revives Suit Over Allegedly Flawed Transfer

By Jacklyn Wille 2024-04-23T18:01:58000-04:00

- Dispute stems from 2001 move to employee stock ownership plan
- Multiple advisers, corporate directors named as defendants

The employee stock ownership plan of bankrupt paper company Appvion Inc. on Tuesday had part of its case revived against former corporate directors and financial advisers it says mishandled a decades-old transaction that swapped workers' 401(k) assets for stock in the company.

The plan's claims under the Employee Retirement Income Security Act that arose after 2012 are plausible, the US Court of Appeals for the Seventh Circuit held.

The lawsuit stems from a 2001 transaction in which Appvion employees paid \$810 million to become owners of the company. Employees say they were "fraudulently persuaded" to transfer more than \$106 million out of their 401(k) accounts into an employee stock ownership plan holding stock in Appvion's parent company. A slew of advisers and executives played up the benefits of the ESOP while downplaying its risks, overvaluing the company's stock, and concealing their conflicts of interest, according to the lawsuit.

A federal district court in Wisconsin dismissed claims against more than a dozen former Appvion directors and officers, along with several companies that played a role in the transaction or were otherwise connected to the plan, including Houlihan Lokey Capital Inc., State Street Bank & Trust Co., Reliance Trust Co., and Stout Risius Ross Inc. The court allowed some claims to advance against Argent Trust Co.—the stock plan's trustee from 2014 until Appvion's bankruptcy in 2017—and put those claims on hold while the appeal against other defendants moved forward.

The decision was written by Judge Diane P. Wood and joined by Judges Amy J. St. Eve and John Lee.

The stock plan is represented by Beus Gilbert McGroder PLLC. The directors are represented by Willkie Farr & Gallagher LLP. Houlihan Lokey is represented by McDermott Will & Emery LLP. Stout Risius is represented by Groom Law Group. State Street is represented by Goodwin Procter LLP. Reliance Trust is represented by Bryan Cave Leighton Paisner LLP.

The case is Appvion, Inc. Ret. Savings & Emp. Stock Ownership Plan v. Buth , 7th Cir., No. 23-1073, 4/23/24

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Appaloosa Sues Credit Suisse Over \$17 Billion AT1 Bond Wipeout

By Rachel Graf

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Appaloosa Sues Credit Suisse Over \$17 Billion AT1 Bond Wipeout

By Rachel Graf2024-04-23T20:00:33216-04:00

Hedge fund Appaloosa LP became the latest to sue over the \$17 billion wipeout of high-risk bonds last year that was part of the deal to save Credit Suisse Group AG from a full-scale collapse.

Appaloosa served as investment adviser to Palomino Master Ltd. and Azteca Partners LLC, who are also plaintiffs in the lawsuit, for their purchases of Credit Suisse debt known as Additional Tier 1 bonds, or AT1s. The funds suffered “significant investment losses” when UBS Group AG bought Credit Suisse and the bonds were written to zero just days after Palomino and Azteca had purchased them in March 2023, according to the complaint filed Tuesday in federal court in Newark, New Jersey.

The investors claim Credit Suisse misled them about its well-being when they bought the notes.

Credit Suisse’s liquidity position was misrepresented “as very strong and ‘getting stronger’ at a time when there was a run on the bank and Credit Suisse was losing billions of dollars in withdrawals on a daily basis,” according to the complaint.

Credit Suisse Is No More. What Went Wrong?: QuickTake

A UBS representative didn’t immediately respond to a request for comment. Lawyers for Appaloosa declined to comment.

The complaint is one of many filed over the AT1 bond wipeout.

The plaintiffs allege violations of securities laws and the New Jersey Racketeer Influenced and Corrupt Organizations Act. They are seeking unspecified damages.

The case is Palomino Master Ltd. v. Credit Suisse Group AG, 24-cv-05539, US District Court, District of New Jersey (Newark).

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NEWS

Civil RICO Suit Accuses Big Pharma and Benefit Managers of Insulin Price-Fixing

"Rather than working to lower insulin and other Type 2 diabetes medication prices, major [pharmacy benefit managers] and manufacturers use their dominant market positions to drastically increase the price of these necessary, life-saving medications, generating billions of dollars in illicit profits," co-lead counsel for the plaintiff claimed in a joint statement.

April 23, 2024 at 03:31 PM



Emily Cousins
Litigation Reporter



The original version of this story was published on [Connecticut Law Tribune](#)

Multiple drug manufacturers and pharmacy benefit managers, CVS Health, Eli Lilly, Novo Nordisk and others face civil RICO claims from the International Union of Operating Engineers Local No. 478 Health Fund.

The plaintiff is a Taft Hartley fund, which provides union members with health benefits.

It filed the suit Monday in Connecticut federal court against Eli Lilly and Co., Novo Nordisk Inc., Sanofi-Aventis U.S. LLC, Evernorth Health Inc., Express Scripts Inc., Express Scripts administrators, Medco Health Solutions Inc., ESI Mail Pharmacy Service Inc., Express Scripts Pharmacy Inc., CVS Health Corp., CVS Pharmacy Inc., Caremark Rx LLC, Caremark PCS Health LLC, UnitedHealth Group Inc., Optum Inc., OptumRx Inc. and OptumInsight Inc.

This complaint was surfaced on [Law.com Radar](#).

According to the lawsuit, the cost of diabetes medication has “skyrocketed” over the past 20 years, not because of “rising cost of goods, production costs, investment in research and development, or competitive market forces,” but because the defendants have worked together to increase the price for a higher profit, the complaint alleged.

“Given the [pharmacy benefit managers'] purchasing power and their control over formularies that govern the availability of drugs, their involvement should theoretically drive down list prices because drug manufacturers normally compete for inclusion on the standard national formularies,” the complaint claimed. “For insulin, however, to gain access to the [pharmacy benefit managers'] formularies, the manufacturers artificially inflate their list prices and then pay a significant, yet undisclosed, portion of that inflated price back to the [pharmacy benefit managers].”

The plaintiff claimed the defendants violated the Racketeer Influenced and Corrupt Organizations Act and the Connecticut Unfair Trade Practices Act, and committed civil conspiracy while benefiting from unjust enrichment, the complaint said.

Counsel for the defendants has not appeared yet. Spokespersons for Novo Nordisk, CVS and Optum said the lawsuit is meritless and they intend to vigorously defend against the allegations.

A spokesperson for Sanofi said it has avenues to help reduce the cost of the medicine, and the company “believes that no one should struggle to pay for their insulin.”

Optum and Novo Nordisk spokespersons similarly said they are focused on lowering the price of insulin.

“While we will not comment on the specifics of the allegations, Sanofi’s pricing practices have always complied with the law and the company is committed to helping patients access the medicine they need at the lowest possible price,” Sanofi said in a statement.

However, the complaint claimed that the manufacturer defendants “have in tandem increased the prices of their insulins up to 1000%, taking the same increase down to the decimal point within a few days of one another and, according to a U.S. Senate Finance Committee investigation, ‘sometimes mirroring’ one another in ‘days or even hours.’”

Plaintiff co-lead counsel are Mark Pifko of Baron & Budd; Brandon Bogle of Levin Papantonio Rafferty Proctor Buchana O’Brien Barr Mougey; David Buchanan of Seeger Weiss; and Ben Widlanski of Kozyak Tropin & Throckmorton.

“Rather than working to lower insulin and other Type 2 diabetes medication prices, major [pharmacy benefit managers] and manufacturers use their dominant market positions to drastically increase the price of these necessary, life-saving medications, generating billions of dollars in illicit profits,” co-lead counsel claimed in a joint statement. “Through this litigation, we are seeking reforms to stop predatory pricing and to hold entities in the healthcare supply chain accountable for unjustly and unlawfully profiting at the expense of unions like IUOE Local 478 and other self-funded payers.”

This is not the first lawsuit challenging similar defendants’ insulin pricing practices. A class action was filed in U.S. District Court for the District of New Jersey on behalf of insulin consumers against drug manufacturers also claiming prices were artificially inflated.

However, that class certification was denied on Feb. 5.

Judge Brian R. Martinotti wrote in his opinion, “Drug manufacturers may offer rebates to an insurer’s pharmacy benefit manager to gain formulary access for their prescription drugs.”

Chief Judge Elizabeth Wolford of U.S. District Court for the Western District in Rochester also dismissed an antitrust class action against four drug manufacturers for allegedly manipulating insulin prices.

Wolford wrote, “The court ... finds that plaintiffs have not pleaded facts from which a factfinder could plausibly infer a conspiracy.”

This suit was surfaced by Law.com Radar, ALM’s source for immediate alerting on just-filed cases in state and federal courts. Law.com Radar now offers state court coverage nationwide. Sign up today and be among the first to know about new suits in your region, practice area or client sector.

Read the complaint:



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Lawyers in PFAS water pollution settlements win \$956 mln fee award

 [reuters.com/legal/litigation/lawyers-pfas-water-pollution-settlements-win-956-mln-fee-award-2024-04-23](https://www.reuters.com/legal/litigation/lawyers-pfas-water-pollution-settlements-win-956-mln-fee-award-2024-04-23)

Clark Mindock

REUTERS/Yuriko Nakao Purchase Licensing Rights , opens new tab

April 23 (Reuters) - A U.S. judge on Tuesday awarded over \$956 million in legal fees to plaintiffs' lawyers who secured two settlements worth more than \$11 billion with major manufacturers of toxic "forever chemicals" on behalf of public water systems.

U.S. District Judge Richard Gergel in Charleston, South Carolina, granted unopposed fee requests after 3M (MMM.N) , opens new tab, DuPont de Nemours Inc (DD.N) , opens new tab, Chemours (CC.N) , opens new tab and Corteva (CTVA.N) , opens new tab last year agreed to resolve claims that their products polluted drinking water in the United States with per- and polyfluoroalkyl substances, or PFAS.

PFAS are a class of thousands of chemicals used in firefighting foams, nonstick pans and stain resistant fabrics. They have been linked to cancer and other diseases and are often called forever chemicals because they do not easily break down in nature or the human body.

Last year, 3M agreed to a PFAS-related settlement with public water systems worth \$10.3 billion, while the other companies agreed to a settlement worth \$1.19 billion. The companies did not admit to wrongdoing as part of the deals.

The attorneys' award represents 8% of the two settlements plus roughly \$21 million in out-of-pocket expenses. The litigation has been led by the law firms Napoli Shkolnik, Douglas & London, Baron & Budd, Motley Rice and FeganScott.

"This has indeed been a long-fought case, and it's been years of dedicated work without compensation for many involved," Paul Napoli of Napoli Shkolnik said in an email.

The award will be dispersed in stages as the settlements are paid out, and a special master will determine how the funds are distributed between firms.

Roughly 26,000 water systems across the country will use the rest of the settlement money to test for and treat PFAS contamination, which is now mandated , opens new tab under a new U.S. Environmental Protection Agency rule issued this month.

The law firms represent water systems in several other active cases against different chemical companies in Gergel's court, one of which is due to go to trial in October.

Companies also face thousands of personal injury lawsuits and cases filed by states and property owners.

The case is In Re Aqueous Film-Forming Foams Products Liability Litigation, U.S. District Court for the District of South Carolina, case No. 2:18-mn-02873.

For the plaintiffs: Paul Napoli of Napoli Shkolnik; Michael London of Douglas & London; Scott Summy of Baron & Budd; and Elizabeth Fegan of Fegan Scott.

For 3M: Richard Bulger, Daniel Ring and Michael Olsen of Mayer Brown

For DuPont: Molly Craig of the Hood Law Firm and David Erickson of Shook Hardy and Bacon

Read More:

'Forever chemicals' were everywhere in 2023. Expect more litigation in 2024

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

Reporting by Clark Mindock

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April 24, 2024, 6:51AM PDT

Ornua Must Face Claims Over PFAS in Kerrygold Butter PackagingBy [Bernie Pazanowski](#)**Documents** [Opinion](#) [Docket](#)

- Product labels state that contents are 'Pure Irish Butter'
- PFAS from the packaging allegedly migrated into the butter

Bloomberg Law News 2024-04-24T12:43:27635448938-04:00

Ornua Must Face Claims Over PFAS in Kerrygold Butter Packaging

By Bernie Pazanowski 2024-04-24T09:51:34000-04:00

- Product labels state that contents are 'Pure Irish Butter'
- PFAS from the packaging allegedly migrated into the butter

Ornua Foods North America Inc. failed to convince a federal court that a class action alleging that its Kerrygold Butter products contain PFAS should be dismissed on the pleadings.

Plaintiff Carolyn Winans sufficiently alleged that PFAS—an artificial chemical linked to cancer—migrated from the packaging to the butter, as she cited several studies establishing that possibility, Judge Frederick Block of the US District Court for the Eastern District of New York said Tuesday. Winans' theory "strikes the Court as plausible," Block said.

PFAS is found in thousands of goods. They're called forever chemicals because they persist in people, and have generated billions of dollars worth of liabilities for companies that use them. The US Environmental Protection Agency says no level of exposure to them is safe and recently ordered water utilities to remove nearly all of them from tap water.

Kerrygold Butter's packaging says that it's "PURE IRISH BUTTER." In 2023, after New York banned per-and polyfluoralkyl substances in food packaging, Ornua recalled all of its butter products.

Winans sued Ornua under New York law, claiming deceptive business practices, false advertising, the sale of adulterated or misbranded products, negligence per se, and unjust enrichment. She sought money damages and injunctive relief.

Ornua said that Winans didn't have standing because she didn't allege an injury in fact or that any of the Kerrygold products contained PFAS.

Block rejected Ornua's argument that Winans had to provide lab tests showing that its butter contained PFAS. A testing requirement might be sensible in other cases, but Ornua removed its products from stores because the packaging contained PFAS, the judge said. Winans' allegations suffice, he said.

Ornua also said that Winans failed to plead an actionable misrepresentation. It said that “pure Irish butter” on its packages actually means “butter purely from Ireland,” rather than “pure butter from Ireland,” Block said. But he said that a reasonable consumer could “conclude that the adjective ‘pure’ modifies the noun, ‘butter.’”

Block noted that Winans alleged that Ornua had exclusive control over the Kerrygold packaging and recalled its products once New York’s PFAS ban took effect, so he rejected Ornua’s argument that Winans didn’t sufficiently alleged that Ornua knew about PFAS.

Block also rejected Ornua’s argument that Winans’ claims were preempted by federal law, and said that New York’s adulterated or misbranded law does create a private right of action. New York recognizes negligence per se claims based on the Food, Drug, and Cosmetic Act, and Winans’ unjust enrichment claim is permissible under state law, the judge said.

But Winans isn’t entitled to medical monitoring, Block said. She lacked standing to pursue that relief because she didn’t allege that she was likely to be harmed again in the future, he said.

Sullivan Law Group PC represented Winans. Bryan Cave Leighton Paisner BCLP represented Ornua.

The case is *Winans v. Ornua Foods N. Am. Inc.*, 2024 BL 138620, E.D.N.Y., No. 2:23-cv-01198-FB-RML, 4/23/24.

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GSK PLC

GSK readies for pivotal ruling in Zantac cases

Judge to decide on admission of evidence as part of litigation that has knocked billions off pharma group's value



Zantac was a best-seller for GSK after its US approval in 1983, the first drug to achieve 'blockbuster' status by generating more than \$1bn in revenue © Drew Angerer/Getty Images

Ian Johnston in London 5 HOURS AGO



Since his diagnosis for bladder cancer in 2019, Michael Caratti says he has undergone “a 180 degree change in my life”.

The 69-year-old former IT technician, who has had his bladder removed and now uses a urostomy bag, believes his “traumatic” experience was caused by a daily prescription of the heartburn medication Zantac from 2005 to 2018.

He now hopes to bring a case to trial alleging that the product — sold by [GSK](#), Sanofi, Pfizer and Boehringer Ingelheim over many years, caused his disease. It is one of about 80,000 remaining cases relating to Zantac that have prompted a combined hit of tens of billions of dollars to the values of the companies involved, with the drug's developer GSK the most exposed to the litigation.

The immediate fate of 72,000 of them lies with a judge in Delaware who, after a hearing in January, is expected to announce within weeks whether to admit plaintiffs' scientific evidence alleging that the drug breaks down into a carcinogen.

If Judge Vivian Medinilla decides in her so-called Daubert ruling to reject the evidence as unreliable, as analysts expect and a federal judge did in Florida last year, "the case in Delaware is dead", said Brent Wisner, the lawyer bringing the lawsuit. But he warned that GSK could face much higher liabilities if his evidence is allowed in trials.

"They are playing a very, very dangerous game because right now before the Daubert ruling there's an opportunity for them to reach a resolution," he said. "After Daubert, if we win it's a different world."

GSK said that after "16 peer-reviewed epidemiological studies . . . the resulting scientific consensus is that there is no consistent or reliable evidence that ranitidine [the active ingredient in Zantac] increases the risk of any type of cancer". It added that the Delaware ruling would only determine whether plaintiffs' evidence could be presented at trial, and would "neither provide a view on the merits of forthcoming cases, nor determine liability".

Zantac was a best-seller for GSK after its US approval in 1983, the first drug to achieve "blockbuster" status by generating more than \$1bn in revenue, and was later sold by the other pharma groups.

But in 2019 a small laboratory in Connecticut reported that it had discovered "extremely high levels" of NDMA when it heated ranitidine. NDMA is a substance also found in cigarettes and processed foods that is classed as a probable human carcinogen.

The US Food and Drug Administration and the European Medicines Agency recommended suspension of ranitidine products and the FDA asked all manufacturers to withdraw their products based on the drug.

The event passed largely unnoticed by investors until 2022, when an analyst note published by Morgan Stanley estimated the potential liability at up to \$45bn. Companies linked to the drug lost a combined \$40bn in value in days.

Pharma groups contest the lab's results and practices. GSK points to subsequent research by the FDA, EMA and other scientists that have failed to establish a causal association between their drug and cancer. The federal court in Florida found that plaintiffs' scientists' findings were based on "unreliable methodologies", in effect dismissing almost 2,500 cases in 2022, a decision that GSK said "ensured that . . . litigation-driven science does not enter the courtroom".

But cases continue in state courts. The continued threat of legal action has "clearly impacted GSK's share price performance" over the past 18 months, the company said in its annual report in February, and its stock remains 5 per cent below the 2022 sell-off.

Investors who spoke to the Financial Times said they were hoping for a swift resolution to the legal overhang, with one top-30 active shareholder describing the prospect of going to trial as "scary, unpredictable and appealing to a jury that understands no science".

A ruling in California to permit expert testimony has already been followed by a string of settlements. Last month, French group [Sanofi](#) decided to settle 4,000 claims in cases outside Delaware.

"Sanofi is settling these cases, not because we believe the claims have any merit, but rather to avoid the expense and ongoing distraction of the litigation. No concessions of liability have been made," the company said.

Dani Saurymper, an asset manager for Pacific Asset Management and small GSK shareholder, said Sanofi's decision and recent settlements by GSK showed that companies would "rather settle any liability than run the risk of going into any court and having a Monsanto-Bayer-type award".

Bayer has had to pay out billions of dollars after juries in litigation that was also led by Wisner found a link between a weedkiller developed by Monsanto, the US company the German group acquired in 2018, and cancer.

Despite the Florida ruling, Wisner said GSK's decision to settle several cases before going to trial showed the strength of his case. In upcoming cases in California, he said he would refer to a study by former GSK scientist Richard Tanner, who in 1981 found NDMA when ranitidine was combined in lab studies with high levels of nitrite, which occurs at lower levels in the human stomach. The study was not shared with the FDA until 2019.

GSK has said naturally occurring levels of nitrite in the stomach do not produce the same results, noting that the FDA was unable to replicate the study.

Since the initial 2022 sell-off and the Florida ruling, analysts have pared back their estimates for total litigation exposure. Litigation analysts at Bloomberg Intelligence have suggested that total value for these cases is \$2.5bn-\$4bn, with GSK responsible for 30 per cent. This is a far cry from the value hit being traded into the company's shares, according to Shore Capital analyst Sean Conroy, who believes a worst-case scenario of up to \$30bn has continued to be priced into the stock.

A definitive Daubert ruling in GSK's favour would lead investors back to GSK, according to several analysts and investors, and would cap what Barclays analysts have described as an "unexpectedly strong start to the year" for the company, which has been the best-performing large pharma stock in Europe behind Novo Nordisk, maker of hit diabetes treatment Ozempic and weight-loss drug Wegovy.

This follows GSK's spin-off of its consumer health division Haleon, and the strong performance of its vaccines unit, including Arexvy, a new vaccine for respiratory syncytial virus that reached blockbuster status within nine months of launch.

Caratti hopes his Californian case will go to trial in July. "I just want to get justice for me and thousands of other people that took their drug and got cancer," he said.

For investors who believe the claims are without merit, there is a desire to refocus on GSK's business.

"We don't think it's going to be enormously damaging," said Alessandro Valentini, a director of top-15 active GSK investor Causeway Capital Management. "We just want it to be done. We want it to be over."

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Uber defends Nevada ballot petition to cap all contingency fees at 20%

 [reuters.com/legal/legalindustry/uber-defends-nevada-ballot-petition-cap-all-contingency-fees-20-2024-04-23](https://www.reuters.com/legal/legalindustry/uber-defends-nevada-ballot-petition-cap-all-contingency-fees-20-2024-04-23)

Alison Frankel

The Uber logo is shown on the building in Los Angeles, California, U.S., February 14, 2024. REUTERS/Mike Blake/File Photo Purchase Licensing Rights , opens new tab

April 23 (Reuters) - In a new brief , opens new tab defending a ballot initiative to cap contingency fees in all civil litigation in Nevada at 20%, ridesharing company Uber argued that the petition meets all of Nevada's statutory requirements for court approval. Uber, which is the lead sponsor of the Nevada initiative, said its ballot petition , opens new tab addresses only one issue – the 20% contingency fee cap – and includes a clear, succinct description of the direct effect of the proposal, which is to change Nevada law to limit the fees that lawyers can collect in civil litigation.

Nevada voters, argued Uber counsel from Bravo Schrager, will not be confused or misled about the purpose or effects of the contingency fee cap when its proponents ask for their signatures to place the proposal on statewide ballots. And under Nevada precedent , opens new tab, most notably in the Nevada Supreme Court's 2022 ruling in Helton v. Nevada Voters First PAC, that's essentially all that is required, Uber said. (Uber counsel Bradley Schrager, whose website bio cites his expertise in Nevada election and ballot initiative law, knows the 2022 state supreme court case all too well: He was on the losing side.)

Uber's April 19 brief is a mere 11 pages – and is notably devoid of policy arguments about why Uber and the initiative's other backers believe the fee cap is a boon for Nevadans.

That's a sharp strategic contrast with the approach taken by the fee cap's opponents.

As I told you earlier this month, critics of the “draconian” fee limit, led by the group Uber Sexual Assault Survivors for Legal Accountability, filed a 43-page complaint , opens new tab asserting that Uber's true motive in pushing for a fee cap is to scare plaintiffs' lawyers away from suing the company.

Opponents' lawyers from Gupta Wessler also filed dozens of declarations, including sworn statements from more than 30 Nevada lawyers across a range of practice areas, to back their argument that the proposed fee cap – which would be the most restrictive fee limit in the U.S. – is bad public policy that will restrict access to courts for all kinds of would-be plaintiffs, from patent holders and defrauded shareholders to law enforcement officers injured on the job.

The challengers' complaint alleged that the Uber-backed petition fails to meet Nevada requirements for ballot initiatives because, among other alleged problems, it does not warn voters of the secondary effects of discouraging lawyers from taking all kinds of cases. Among them, according to the complaint: Nevadans will be on the hook for millions of dollars in Medicaid costs that might otherwise have been reimbursed by plaintiffs who won payouts from the defendants responsible for their injuries.

In response, Uber's brief said that it would be impossible to address every potential downstream effect of a ballot initiative in the space of 200 words, which is the statutory word limit for petitions. The point of the description is to give potential petition signers a concise explanation of the intent of the proposal, Uber said, not to confuse them with all kinds of hypotheticals.

If anything, Uber said, challengers' use of "hyperbole and inflammatory rhetoric" shows why the petition's straightforward explanation of the proposal's impact is "a model of objective language."

Challengers' arguments to the contrary, wrote Uber counsel from Bravo Schragar, "are policy disputes, not grounds for finding any legal insufficiency in the petition."

Deepak Gupta of Gupta Wessler told me on Tuesday that Uber's failure to address the factual assertions from his side is notable.

"Their brief is mostly just a boilerplate recitation of legal standards," Gupta said. "They are studiously not engaging with our evidence."

Uber did not respond to my email query. But its brief said fee cap opponents will have plenty of opportunity to pitch their policy arguments to voters if the fee cap initiative reaches the ballot.

Gupta Wessler's clients said in their complaint that the Nevada fee cap is by far the most sweeping and draconian in the U.S. Only two other states, Oklahoma and Michigan, impose across-the-board caps, but their respective 50% and 33% limits are not nearly as severe as Nevada's proposed 20% cap. Several states limit fees in medical malpractice cases, but, again, none sets as stringent a limit as 20%.

Uber's new brief in the Nevada case noted that Colorado is weighing a ballot initiative [here](#), opens new tab to impose a 25% cap in personal injury and wrongful death cases. The initiative has survived a preliminary review by Colorado officials but, as Gupta noted in our interview, has not yet been subjected to a challenge by trial lawyers or plaintiffs' groups. Uber's ballot initiative in Nevada is far more ambitious than even the Colorado proposal, of course, which is why Gupta Wessler's clients are so determined to squelch the initiative before its backers even begin to collect the 100,000 signatures they need to get it on the

state ballot.

Their response to Uber's brief is due on Thursday. I'm expecting an argument along these lines: Their copious evidence of fallout from the proposed fee cap proves that even the question of Uber's compliance with Nevada's statutory requirements is not nearly as simple as the company's lawyers have argued.

Read more:

Uber sex assault group sues to block Nevada bid to cap all contingency fees at 20%
Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

Documents

- Complaint
- Docket

- **COURT:** D. Conn.
- **TRACK DOCKET:** [No. 3:24-cv-00743](#)

Union Health Fund Sues Insulin Makers, PBMs on Price Conspiracy

By Ganny Belloni 2024-04-23T16:35:02000-04:00

- **COURT:** D. Conn.
- **TRACK DOCKET:** No. 3:24-cv-00743

A Connecticut health benefits fund accused major insulin manufacturers and pharmacy benefit managers of engaging in a widespread deceptive pricing scheme that caused the fund to overpay for diabetes medications.

The International Union of Operating Engineers Local No. 478 Health Benefits Fund filed the complaint Monday in the US District Court for the District of Connecticut. The group alleges insulin makers Eli Lilly and Co., Novo Nordisk Inc., and Sanofi-Aventis U.S. LLC worked together with PBMs like CVS Caremark, Express Scripts, and OptumRx to artificially inflate insulin list prices.

"Although the PBM Defendants represent both publicly and directly to their client payors that they use their market power to drive down prices for diabetes medications, these representations are false and deceptive," the lawsuit claimed.

According to the complaint, "the PBMs intentionally incentivize the Manufacturers to inflate their list prices."

Once the price was raised, the manufacturers would then pay back a portion of those inflated prices to the PBMs through rebates and other fees in exchange for favorable placement on the PBMs' drug formularies, the suit alleges.

The lawsuit also alleges that manufacturers closely monitored one another's pricing moves and matched competitors' price hikes to preserve their placement on PBM formularies.

For example, the plaintiffs said leaders from Sanofi, makers of insulin drug Lantus, welcomed price increases on competitors' products because they allowed the company to claim it was maintaining pricing "parity" with competitors.

Internal charts from Sanofi obtained by the plaintiffs showed that between April 2013 and November 2014, the company had carefully tracked that each time it raised the price of Lantus, Novo Nordisk quickly followed suit to match its price increases for Levemir, the complaint said.

The plaintiffs also reference an email exchange where Novo Nordisk CEO Lars Jorgenson had asked a Novo executive “[w]hat is our price increase strategy?” after he had learned that Eli Lilly had raised its US list price by 8% across their portfolio of injectable insulin medications.

The fund alleges this “insulin pricing scheme” has caused it to overpay substantial amounts for diabetes drugs like Humalog, Lantus, Levemir, and others. The plaintiffs allege the defendants violated Connecticut’s unfair trade practices law, federal racketeering laws, were unjustly enriched, and engaged in a civil conspiracy.

The lawsuit follows similar complaints filed by state and local governments against the companies over the price of insulin.

The fund seeks damages in excess of jurisdictional limits, injunctive relief, disgorgement, civil penalties, attorneys’ fees, and other legal and equitable relief.

The case is Int’l Union of Operating Engineers v. Eli Lilly & Co. , D. Conn., No. 3:24-cv-00743, 4/22/24 .

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Boies Schiller Attys For Epstein Victims Beat Sanctions Bid

By **Andrea Keckley**

Law360 (April 23, 2024, 3:57 PM EDT) -- A New York federal judge on Tuesday evening rejected a request by associates of Jeffrey Epstein to sanction Boies Schiller Flexner LLP's chair and a co-managing partner, while also denying the Boies Schiller attorneys' subsequent motion to sanction the Epstein associates' counsel.

In a **brief order** absent explanation, U.S. District Judge Arun Subramanian denied a motion for sanctions brought by Darren K. Indyke and Richard D. Kahn, the co-executors of Epstein's estate, and a separate sanctions bid that name partner David Boies and managing partner Sigrid McCawley brought in response to the defendants' motion.

The judge's order comes a day after Boies and McCawley **responded** to the defendants' motion, characterizing it as an attempt at "threatening, harassing, and intimidating" the attorneys and their clients. They are representing Danielle Bensky and a woman referenced in case filings as Jane Doe 3.

In a separate motion submitted last week, Boies and McCawley **argued for sanctions** against defense counsel for bringing the original sanctions bid.

Daniel Haym Weiner of Hughes Hubbard & Reed LLP, who represents Indyke and Kahn, told Law360 in an email Tuesday the plaintiffs no longer hold valid claims against his clients and that the case is "frivolous."

"The filings last Friday and yesterday by lawyers David Boies and Sigrid McCawley are transparent attempts to draw a false equivalency between their filing of a frivolous lawsuit on behalf of a client who in writing 'released and forever discharged' her claims, and defendants' legitimate effort to hold those two Boies Schiller attorneys accountable for their improper and sanctionable conduct," Weiner said.

The attorney declined to comment on Judge Subramanian's order late Tuesday.

In an interview with Law360 Tuesday, Boies called the sanctions bid "an absolutely frivolous motion."

"It had no basis whatsoever," he said. "They knew it at the time."

Boies did not immediately respond to a request for comment on the order denying sanctions late Tuesday.

The defense **asked the court earlier this month** to sanction the Boies Schiller attorneys for the complaint they **filed in February** as part of a proposed class action. The suit accused Indyke, Epstein's lawyer, and Kahn, Epstein's accountant, of helping to facilitate the financier's vast sex trafficking enterprise since 1995.

"Mr. Boies and Ms. McCawley filed the Bensky lawsuit without a good-faith basis, knowing that the lead plaintiff and 187 other women had expressly released all of the claims brought — collectively receiving \$163 million in compensation from the Epstein estate for doing so — and those lawyers should therefore be sanctioned," Weiner said Tuesday. "Boies Schiller's Rule 11 motion is a weak, tit-for-tat response to the co-executors' previously filed motion for sanctions; that filing and yesterday's opposition brief are just as meritless as the complaint."

In the original sanctions bid, the defense accused the Boies Schiller lawyers of ignoring the liability release Bensky signed to access funds from the Epstein Victims' Compensation Program, which was created in the aftermath of Epstein's August 2019 death in custody as he faced federal sex-trafficking charges.

However, the Boies Schiller attorneys said it's inappropriate to challenge the merits of the pleadings in a sanctions motion.

"Here, there can be no question that defendants' motion is nothing more than a self-granted page extension of their pending motion to dismiss, labeled as a sanctions motion," their response read.

The court, the survivors' counsel said, should at least wait until it has ruled on the defense's dismissal motion, which also cited the release of claims they insist the lead plaintiff signed. The attorneys took issue with characterizing the document in question as a release, however, contending that it contains both releases and covenants not to sue.

"Plaintiffs are fully prepared to prove the full factual basis of their argument that the release signed by plaintiffs was procured by fraud and will do so at the proper procedural posture," according to their filing.

"The days when they can intimidate people by threats are over," Boies told Law360.

Bensky and Jane Doe 3 are represented by David Boies and Sigrid McCawley of Boies Schiller Flexner LLP.

Indyke and Kahn are represented by Daniel Haym Weiner of Hughes Hubbard & Reed LLP and Daniel Seth Ruzumna of Patterson Belknap Webb & Tyler LLP.

The case is Bensky et al. v. Indyke et al., case number 1:24-cv-01204, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Hannah Albarazi, Madison Arnold and Lauren Berg. Editing by Covey Son.

Update: This story has been updated to reflect that Judge Subramanian denied the sanctions motions, and to add comments from David Boies.

Boeing Leaders' Windfall Predates New Safety Goals Tied to Pay

By David Hood

Documents

 [Boeing 2024 proxy](#)

 [Boeing clawback policy](#)

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- Retiring executives owed tens of millions despite safety issues
 - Investors mull linking future pay to 737 Max improvements

Bloomberg Law News 2024-04-24T10:22:14159423048-04:00

Boeing Leaders' Windfall Predates New Safety Goals Tied to Pay

By David Hood 2024-04-24T05:00:07000-04:00

- Retiring executives owed tens of millions despite safety issues
- Investors mull linking future pay to 737 Max improvements

A pair of top Boeing Co. bosses who announced their departures as the company faced scrutiny over near-catastrophic manufacturing flaws in its 737 series jets are still poised to collect a combined \$45 million in compensation based on the most recent company disclosures.

CEO Dave Calhoun and former Executive Vice President Stan Deal aren't likely to face an internal clawback policy in part because they were not fired in connection with quality management issues in the 737 program. By cashing out their large stock options now, they also are avoiding criteria which shareholders are poised to approve connecting compensation to performance for executives involved in production of two of the company's most embattled jets.

If production problems persist, their successors might not be so lucky. Investors are expected to approve a board-endorsed proposal at Boeing's annual meeting May 16 that would tie the compensation of the company's incoming executives directly to safety improvements.

The proposal was sparked by a January incident in which a door panel missing four bolts blew off of a Boeing 737 Max 9 jet during an Alaska Airlines flight. The company's share prices have fallen nearly 32% since the incident, and the company faces intense scrutiny from investors, the public, lawmakers, and regulators to focus on quality and safety.

Boeing announced a leadership shakeup two months after the January incident. Deal, who led the Boeing Commercial Airplanes division for five years, announced his retirement while Calhoun agreed to retire by the end of the year.

The retirements allow Deal and Calhoun to bypass the company's executive compensation clawback policy, which states the board may recoup past incentive pay in the event of "misconduct or certain types of negligent conduct, in addition to and even absent a restatement of financial results, including where such conduct has compromised the safety of our products or services."

If they were fired or laid off, their pay would be subject to being recouped, Temple University accounting professor Steven Balsam said. The retirement arrangement resembles a "golden parachute," where executives are well taken care of during major changes like mergers or acquisitions, he said.

"By any other name—it is," Balsam said.

The Boeing executives are not the first to escape clawback rules through retirement. Former consumer-credit reporting agency Equifax CEO Richard Smith, for example, left the company with \$165 million after he retired following a massive privacy breach in 2017. Investors angry with the payout pushed the company's board to adopt a stricter clawback policy after he left, affecting his successor.

Golden Landing

Calhoun was paid \$2.5 million in 2023 in salary and other compensation, while Deal netted \$2.4 million in salary, bonus and other compensation for 2023. Calhoun declined an estimated \$2.8 million bonus payout in 2023 in a short-term incentive, but he reaped more than \$30 million worth of stock awards, bringing his total compensation for the year to almost \$33 million. Deal was awarded nearly \$10 million in stocks, based on the share price of \$260 at year's end, bringing his total potential payout for 2023 to more than \$12.5 million, including a \$756,000 bonus. The actual amount both receive will vary based on the stock price at the time the shares vest.

Bosses Poised For Millions in Retirement

Calhoun, Deal were highest-paid Boeing executives in 2023

Name	Position	Total Compensation (\$)
David Calhoun	Chief Executive Officer	32.8M
Brian West	Chief Financial Officer	11.9M
Stephanie Pope	COO and CEO, Commercial Airplanes	9.7M
Stanley Deal	CEO, Commercial Airplanes (former)	12.5M
Theodore Colbert	CEO, Defense, Space and Security	9.0M

Source: Boeing 2024 proxy

Note: Total compensation includes salary, stock awards, bonus, non-equity compensation and other compensation in 2023; highlighted denotes retired or retiring executive

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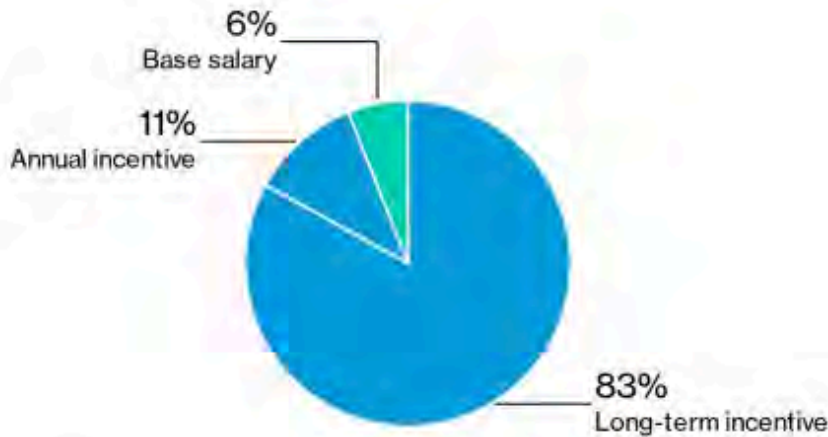
Still—Calhoun's total compensation is poised to increase 45% percent since 2022, when he received \$22.6 million in total compensation including stock awards. Deal's total year-over-year compensation increased 42% from \$8.8 million to \$12.5 million, records show.

According to Boeing's clawback policy, the board may recoup "incentive-based compensation paid to any executive of the company in the event of certain types of misconduct or negligent conduct, including where such behavior has compromised the safety of any of the company's products or services." That means 94% CEO compensation is subject to the clawback policy, and 89% for other named executive officers, Boeing's 2024 proxy statement shows. For Calhoun and Deal, that means the board could attempt to recover all but their salary.

Boeing spokespeople declined to comment if the company is considering clawing back any pay.

CEO Target Compensation

Board could claw back 94% of CEO pay



Source: Boeing 2024 proxy

Note: Base salary and annual incentive in cash, long-term incentive in stock

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The payouts also come as problems continue to emerge with Boeing manufacturing. The compensation agreements, disclosed in Boeing's 2024 proxy statement released April 5, show the massive payouts promised top executives as aircraft failure after aircraft failure kept occurring.

The bar to trigger a clawback review is rather high, said Jun Yang, director of Indiana University's Institute for Corporate Governance. Executives would have to do something egregious to trigger the clawback policy, she said, and their retirements—as opposed to being fired—signal their actions did not rise to that level.

The criteria for clawing back executive pay was established by the 2002 Sarbanes-Oxley Act following the Enron scandal and further enhanced by the Dodd-Frank Act in 2010 after the financial crisis. An SEC rule finalized in 2022 forces companies to undergo a review of executives' involvement in financial-statement mishaps. If companies have to revise their financial statements—in small or large ways—companies have to analyze executive liability.

Boeing did not restate its financial statements or disclose if it would initiate a clawback review.

Financial restatements can trigger clawbacks when it indicates executives hid—or tried to hide—mismanagement. Even then, just because a company makes a restatement doesn't mean it has to recoup executive pay. Though Archer-Daniels-Midland Co. corrected years of inaccurate statements in March and suspended its CFO, top bosses at the grain and agriculture-product giant asserted those revisions didn't warrant a review.

"Usually, there's strong reasons," Yang said. "Rarely are the executives fired for being incompetent—or for bad luck."

Time for Change

Boeing's 2024 proxy statement for its May 16 annual meeting includes a provision to overhaul the Commercial Airplanes division's compensation structure weighting 60% toward operational performance and 40% toward financial performance. In 2023, the division weighted 25% toward operational performance and 75% toward financial performance. The proxy also says operational performance metrics will be "focused entirely on quality and safety goals."

Further, "completion of 787 join verification rework, delivery of 737 Max inventory built prior to 2023" also falls on the Commercial Airplanes division, now headed by Chief Operating Officer and CEO of the unit, Stephanie Pope, who took over from Deal in late March.

Pope is the best leader to lead the type of turnaround the board is seeking, Jefferies Managing Director and equity analyst Sheila Kahyaoglu said. Her performance as head of Boeing's general services division delivered strong results in 2023, and she has "an amazing track record" during her nearly 30-year career at the aircraft maker, Kahyaoglu said.

Still, it won't be easy: "Wherever you are at Boeing, it's definitely a difficult position," she said. "You have to put in a major turnaround to make the organization look good."

Investors are poised to vote on new compensation criteria for named executive officers, which the company has gone to lengths to retool to prove to shareholders its serious about making changes. For example, the company changed the upper range of its annual incentive target to 120% from 200%. Those and the recent leadership changes are likely to placate investors and pass without a hitch, Kahyaoglu said.

Voting down executive pay packages rarely happens. Data from 2023's proxy season showed 58 companies failed to receive majority support for their proposals in the Russell 3000, according to corporate governance consulting firm Georgeson.

What the company needs is time for the proposed changes to take effect, and to support Pope in delivering results that please customers, regulators, employees and shareholders, Boston College law professor Mary Ellen Carter said. But that change isn't going to happen overnight.

"You have to give the leadership a chance to make the changes that need to be made—they have put some things in place," Carter said. "It would be unfair to only give them a couple of months and expect miracles."

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Boeing Co

Boeing burns through \$4bn in first quarter after door plug blowout

Results reflect slowdown of 737 Max production and compensation to customers



Boeing is reducing deliveries to improve the quality of its manufacturing following the mid-air blowout of a door panel on an Alaska Airlines flight © NTSB/Getty Images

Claire Bushey in Chicago 24 MINUTES AGO



Boeing burnt through almost \$4bn of cash in the first quarter after it slowed down production lines and paid \$443mn in compensation to aircraft customers in the aftermath of a mid-air accident on one of its planes.

The US plane maker has been in crisis since a door panel blew out of a [Boeing](#) 737 Max aircraft operated by Alaska Airlines in January, putting it in the crosshairs of government investigators and forcing it to reduce deliveries as it works to improve the quality of its manufacturing. Chief executive Dave Calhoun announced he would [step down](#) at the end of the year.

The company on Wednesday reported a \$355mn net loss in the first quarter. Its \$3.9bn of free cash outflow was almost five times outflows of \$786mn for the same period last year, though slightly lower than the \$4bn-\$4.5bn the company had warned of in March.

The results “reflect the immediate actions we’ve taken to slow down 737 production to drive improvements in quality”, Calhoun said.

“Near term, yes, we are in a tough moment,” he said in a letter to staff on Wednesday. “Lower deliveries can be difficult for our customers and our financials. But safety and quality must and will come above all else.”

As in January, the company did not lay out financial guidance for the year, but chief financial officer Brian West said the second quarter will still bring “another sizeable use of cash”.

However, the plane maker reiterated its target of generating \$10bn in free cash flow by 2025 or 2026, which it set in November 2022.

“This will cost us six months,” Calhoun said in an interview with CNBC, noting that while the company would still meet the cash flow target, the timing would be pushed back.

The plane maker is building fewer than 38 Maxes per month, fewer than before the [accident](#), meaning less cash flowing in to the company.

The company said it was working to improve processes including training, inspection and how “travelled work”, where jets that move through the production line with problems addressed later in the assembly process, is handled in the 737 factory in Renton, Washington.

Boeing also is attempting to stabilise its supply chain. In March, the company stopped accepting fuselages from Wichita, Kansas-based supplier Spirit AeroSystems that failed to meet design and manufacturing standards.

Boeing said in March that it was considering buying Spirit, which it had spun off two decades ago, but West said on Wednesday that it was working out details of pricing, financing and divesting work that Spirit does for others.

“We believe in the strategic logic of a deal, but we will take the time to get this right,” he said.

Boeing reports free cash outflow of \$3.9bn

Free cashflow* (\$bn)

4 _____

2 _____

FINANCIAL TIMES

Source: FactSet, company • *Operating cashflow after property, plant a

Boeing faces investigations by aviation regulators and the US Department of Justice. Though no one was killed in the January accident, the explosive loss of cabin pressure injured some on board and recalled two earlier fatal crashes that led to the worldwide grounding of the 737 Max for nearly two years.

The Alaska Airlines accident led to the temporary grounding of the 737 Max 9 aircraft, forcing Boeing to make payments to customers United Airlines and Alaska Airlines for disrupting their operations.

A US Federal Aviation Administration audit of Boeing has found “multiple instances” where it allegedly failed to meet manufacturing and quality control requirements. Regulators have given the company until the end of May to submit a plan to improve. A preliminary report by the National Transportation Safety Board found that the 737 Max 9 involved in the Alaska Airlines accident was missing [four bolts](#) meant to fasten the door panel to the fuselage.

Boeing said on Wednesday it was “implementing a comprehensive action plan” to address the audit’s findings. Calhoun’s letter to employees noted a 500 per cent increase in reports to [Boeing](#)’s internal safety hotline compared with last year.

But whistleblowers, aviation safety experts and now the union representing Boeing engineers have accused the company of retaliating against employees who have raised safety concerns.

The Society of Professional Engineering Employees in Aerospace said on Tuesday that it had filed a complaint with the National Labor Relations Board after two engineers received negative performance reviews after insisting over managers’ objections that Boeing review earlier work.

“Boeing can tell Congress and the media all it wants about how ‘retaliation is strictly prohibited’,” said SPEEA director of strategic development Rich Plunkett. “But our union is fighting retaliation cases on a regular basis.”

Boeing shares were 1.4 per cent lower in midday trading at \$166.81.

Baird analyst Peter Arment said the stock represented “a buying opportunity”. “The kitchen sink quarter was not bad as feared, with progress expected on production, deliveries and [free cash flow] in the coming quarters coupled with a management change.”

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<https://www.wsj.com/business/airlines/boeing-ba-q1-earnings-report-2024-a676882f>

BUSINESS | AIRLINES

Boeing Burns Through \$4 Billion of Cash and Scales Back 737 MAX Production

Aircraft maker has slowed factory to fix quality problems after door-panel blowout

By [Sharon Terlep](#) [Follow](#)

Updated April 24, 2024 12:13 pm ET



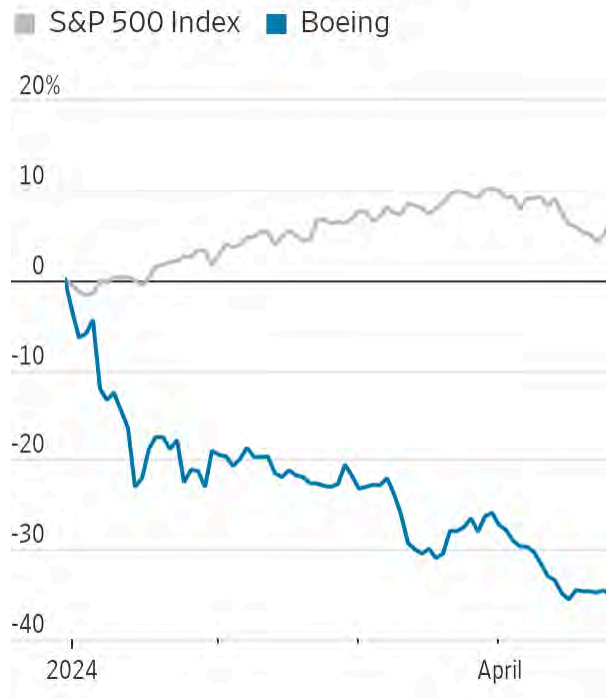
Boeing delivered 36% fewer commercial airplanes in the March quarter than a year ago. PHOTO: STEPHEN BRASHEAR/GETTY IMAGES

Boeing BA **-1.31%** ▼ burned through nearly \$4 billion in the most recent quarter as fallout from the Alaska Airlines midair accident exacted a financial toll.

The jet maker reported a \$355 million loss as revenue fell 8% from a year ago in quarterly results that were slightly better than expected. Under pressure from airlines and regulators to clean up its operations, Boeing has slowed its factories and has stopped providing most financial targets.

“Near term, yes, we are in a tough moment,” outgoing Chief Executive Dave Calhoun said in a message to employees. “Lower deliveries can be difficult for our customers and for our financials. But safety and quality must and will come above all else.”

Daily performance, year to date



Source: FactSet

Boeing is building fewer of its 737 MAX jets as the company weeds out quality problems at the Renton, Wash., factory that makes the planes. The company faces added inspections and heightened regulatory scrutiny following the Jan. 5 near tragedy. It delivered 83 commercial airplanes in the March quarter, a 36% drop from a year ago.

The production slowdown of the bestselling planes means the company's operations are burning cash. Boeing warned investors last month that it would take a hit of

between \$4 billion and \$4.5 billion for the year's first quarter, larger than it previously forecast. The company ended March with \$7.5 billion of cash and investments, less than half what it had at the start of the year.

Meantime, Boeing faces a separate problem with its 787 Dreamliner. A shortage of some key parts means the company can't increase production of the wide-body jets as quickly as it had hoped.

For the March quarter, the company reported an adjusted loss of \$1.13 per share on revenue of \$16.6 billion. On that basis, analysts had predicted an adjusted loss of \$1.63 per share on revenue of \$16.2 billion.

Shares of Boeing were hovering around \$168 in Wednesday afternoon trading, little changed following the release of the quarterly results. The shares have slumped more than 30% so far this year.

Calhoun said he is confident the company can ramp up 737 production to levels that will enable the company to hit its annual free-cash-flow target of \$10 billion by 2026. That would require churning out 50 737 jets a month, more than double the company's current delivery level. "That's the bet we're making and I'm confident we can get there," he said in a Wednesday call with analysts.

The results come a month after Boeing announced Calhoun will exit at the end of the year as part of an executive shake-up. The head of Boeing's commercial-aircraft business, Stanley Deal, stepped down and its board chair, Larry Kellner, won't stand for re-election.

Calhoun said Boeing is seeing results from efforts to improve quality. The biggest improvement came from Boeing's move to require defect-free fuselages, he said. The company has said faulty parts from jet-fuselage supplier Spirit AeroSystems are a major factor in its own quality issues. "When we get a clean one, it whistles through the factory," he said.

On Tuesday, Spirit said Boeing would make \$425 million in advance payments to cover costs tied to Boeing's quality-improvement efforts.

Spirit's factory in Wichita, Kan., made the fuselage involved in the Alaska Airlines door-plug blowout in January.

Spirit now must make its own quality improvements, while dealing with inventory buildup as well as a new mandate from Boeing that fuselages must be defect-free before being shipped to Renton.

Boeing is in the midst of negotiations with Spirit about acquiring the company. The talks have dragged out amid negotiations with rival Airbus about control of Spirit factories that produce parts for Airbus jets, according to people familiar with the matter.

Major aspects of the deal still need to be hammered out, Boeing finance chief Brian West said Wednesday. The companies remain in talks over price, terms and offloading factories. "We believe in the strategic logic of the deal, but we will take the time to get this right," he said in a call with analysts.

Write to Sharon Terlep at sharon.terlep@wsj.com

Videos

Victims' families to urge US prosecute Boeing over fatal crashes

 [reuters.com/world/us/victims-families-urge-us-prosecute-boeing-over-fatal-crashes-2024-04-24](https://www.reuters.com/world/us/victims-families-urge-us-prosecute-boeing-over-fatal-crashes-2024-04-24)

Mike Spector, David Shepardson

Item 1 of 3 Family members hold photographs of Boeing 737 MAX crash victims lost in two deadly 737 MAX crashes that killed 346 people as they wait for Boeing CEO Dennis Muilenburg to testify before a Senate Commerce, Science and Transportation Committee hearing on ?aviation safety? and the then-grounded 737 MAX on Capitol Hill in Washington, U.S., October 29, 2019. REUTERS/Sarah Silbiger/File Photo

[1/3]Family members hold photographs of Boeing 737 MAX crash victims lost in two deadly 737 MAX crashes that killed 346 people as they wait for Boeing CEO Dennis Muilenburg to testify before a Senate Commerce, Science and Transportation Committee hearing on ? aviation safety? and the then-grounded 737... [Purchase Licensing Rights](#)  , opens new tab
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NEW YORK/WASHINGTON April 24 (Reuters) - Families of the victims of two fatal Boeing 737 MAX crashes in 2018 and 2019 will press U.S. Justice Department officials Wednesday to criminally prosecute the planemaker after a January in-flight blowout exposed continuing safety and quality issues.

Relatives and their lawyers are expected to argue that Boeing (BA.N)  , opens new tab violated a 2021 deal with prosecutors to overhaul its compliance program following the crashes, which killed 346 people. Federal prosecutors agreed to ask a judge to dismiss a criminal charge against Boeing so long as it complied with the deal's terms over a three-year period.

But a panel blew off a new Boeing 737 MAX 9 jet during a Jan. 5 Alaska Airlines (ALK.N)  , opens new tab flight, just two days before the 2021 agreement expired. Justice Department officials are now weighing that incident as part of a broader probe into whether Boeing violated the deal, known as a deferred prosecution agreement, or DPA, two people familiar with the matter told Reuters.

"What we're saying to DOJ is, throw out the DPA," said Nadia Milleron, whose daughter, Samya Stumo, died while traveling aboard the Ethiopian Airlines Boeing 737 MAX 8 that crashed in March 2019. "We want them to think to themselves: This is too much. There has to be accountability."

Family members argue an independent monitor is needed to ensure Boeing's compliance with the agreement. Boeing's deal had no such requirement, unlike some past agreements with other companies.

"If there was an outside monitor, the Alaska situation would not have happened," Milleron said.

Boeing and the Justice Department declined to comment.

In January 2021, Boeing agreed to pay \$2.5 billion to resolve a criminal investigation into the company's conduct surrounding the crashes. The U.S. planemaker agreed to compensate victims' relatives and overhaul its compliance practices as part of the deal with prosecutors.

In an earlier April meeting with family members' lawyers, Justice Department officials said they were looking at circumstances outlined in the 2021 deal that could put Boeing in breach of the agreement, such as the company committing a felony or misleading U.S. officials, one of the people familiar with the matter said.

The agreement gives U.S. officials six months from the deal's Jan. 7 expiration to decide whether to prosecute Boeing on a charge that the company conspired to defraud the Federal Aviation Administration or pursue other alternatives to dismissing the case.

Officials plan to do so within that time frame while investigations into the Jan. 5 in-flight blowout continue, which could inform their decision, one of the people said. The people spoke on condition of anonymity.

Prosecutors are expected to lean heavily on findings from the FAA's investigations, one of the people previously told Reuters.

The FAA, for instance, is investigating a Boeing engineer's claims that the company dismissed safety and quality concerns in the production of the planemaker's 787 and 777 jets. In a congressional hearing last week, the engineer testified that Boeing sidelined him when he raised concerns. Reuters has not independently verified his claims, which Boeing has disputed.

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Reporting by Mike Spector in New York and David Shepardson in Washington; Additional reporting by Allison Lampert in Montreal and Chris Prentice in New York; Editing by Jonathan Oatis

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Mike Spector
Thomson Reuters

Mike Spector is a correspondent at Reuters covering corporate crises that span bankruptcy, mass tort litigation and government investigations. He was the first to expose Johnson and Johnson's plan to offload into bankruptcy lawsuits alleging its iconic Baby Powder caused cancer. He later revealed in an investigative series how J&J and other businesses and nonprofits use the bankruptcy system to escape liability for lawsuits over deadly products and sexual abuse while avoiding filing for Chapter 11 themselves. Mike has also contributed to an award-winning Reuters series on pervasive secrecy in American courts that covers up evidence of deadly products. Mike previously worked at The Wall Street Journal, where he covered bankruptcy and private equity on the paper's mergers and acquisitions team, and also the automotive industry. He has been part of award-winning teams that covered the government-brokered rescue and bankruptcy of General Motors; insider trading and related bankruptcy debt-trading issues; and emerging concerns with Tesla's self-driving car technology. He has a master's degree from Columbia University's journalism school and an undergraduate degree from Johns Hopkins University.

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April 24, 2024, 9:24AM PDT

Tesla Investor Asks Judge to Keep Musk Pay Fight in Delaware (1)

By Jef Feeley

Bloomberg Law News 2024-04-24T12:48:55529593195-04:00
Tesla Investor Asks Judge to Keep Musk Pay Fight in Delaware (1)

By Jef Feeley2024-04-24T12:24:53660-04:00

The Tesla Inc. shareholder who successfully challenged co-founder Elon Musk’s \$56 billion pay package is asking the Delaware court for an order barring Musk from trying to move the dispute to Texas.

Musk has been threatening to move Tesla’s corporate home to Texas after Delaware Chancery Judge **Kathaleen St. J. McCormick** ruled his pay package was flawed because of director conflicts and Tesla officials’ failure to properly disclose the compensation plan’s details. Tesla has filed a proxy request that shareholders approve the reincorporation move and reinstate Musk’s pay package.

Musk and Tesla’s directors “should not be permitted to evade this court’s post-trial opinion, which applies the law of the jurisdiction in which Tesla has been incorporated” for about 21 years, lawyers for Tesla shareholder Richard Tornetta said in a Delaware Chancery Court filing made public Wednesday.

It’s unclear what impact a McCormick order keeping the case in Delaware would have. If Tesla reincorporates in Texas and its board approves Musk’s pay there, that would presumably have to be challenged in a new lawsuit under Texas law.

Musk lawyer Evan Chesler didn’t immediately respond to an email seeking comment.

Yale Law School Professor **Jonathan Macey** said Tornetta’s filing seems “very premature” because Tesla hasn’t filed any action in Texas. He said it was likely motivated by the lawyers’ concern that shareholders will ratify Musk’s pay package, which would pose an “existential threat” to their request for billions of dollars in attorneys’ fees.

McCormick has set a July 8 hearing to review the fee request by Tornetta’s lawyers and issue a final order in the case. The lawyers on Tuesday asked the judge to rule on their request to keep the case in Delaware before Tesla’s June 13 annual meeting, when the proxy vote is due to take place.

A Texas move may allow Musk and his fellow directors to “evade, block, or otherwise interfere” with the judge’s ruling on the billionaire’s pay. They also asked the judge to place some 29 million Tesla shares in escrow, expressing concern about potentially having to also seek fee approval from a judge in Texas.

After McCormick issues a final ruling, Musk will have 30 days to appeal the case to the Delaware Supreme Court . It’s possible he will eschew the lengthy appeal process in favor of having his pay package approved again once Tesla’s reincorporated in Texas

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Robyn Denholm, the chair of Tesla's board, criticized McCormick's January decision in the proxy, noting it effectively second-guessed shareholders who approved Musk's performance-based award in 2018. Tesla directors also deny the Texas move is motivated by a desire to reinstate Musk's original compensation award. The company moved its headquarters to Texas in 2021.

Musk has also moved to reincorporate several of his other companies. SpaceX filed to move to Texas from Delaware in February, shortly after Neuralink Corp. reincorporated in Nevada.

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

(Updates with details from filing.)

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Tesla shareholder seeks to block Musk from litigating pay outside of Delaware

 [reuters.com/business/autos-transportation/tesla-shareholder-seeks-block-musk-litigating-pay-outside-delaware-2024-04-24](https://www.reuters.com/business/autos-transportation/tesla-shareholder-seeks-block-musk-litigating-pay-outside-delaware-2024-04-24)

Reuters

Tesla, X (formerly known as Twitter) and SpaceX's CEO Elon Musk speaks with members of the media during 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

WILMINGTON, Delaware, April 24 (Reuters) - A Tesla investor who successfully sued to void Musk's \$56 billion pay package has asked a Delaware judge to keep the lawsuit in the state, after the company asked shareholders to approve moving the electric vehicle maker's legal home to Texas.

Richard Tornetta's legal team on Wednesday asked the Delaware judge who voided Musk's pay to rule on his request before the June 13 shareholder meeting.

Tesla investors at the meeting will vote on moving the company's legal home out of Delaware and on approving Musk's 2018 pay package.

In January, a Delaware Court of Chancery judge voided the pay package, which Tesla estimated is worth up to \$56 billion, calling it "unfathomable."

Musk has criticized Delaware and its courts following the ruling and has said the state, which is home to a majority of large publicly traded corporations, is trying to prevent companies from leaving.

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Reporting by Tom Hals in Wilmington, Delaware

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...

So I'm finally reading the Tesla proxy provisions on reincorporation to Texas. Texas is an MBCA state which actually means in some ways it grants SHs more rights than Delaware law does. Tesla's doing what it can to neuter most of them.

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

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To be clear, I'm not saying they're taking rights away SHs have now. They aren't. They're trying to limit the expanded rights available under Texas law.



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For example, Texas requires giving SHs the power to call special meetings, by as little as 10% of the shares or up to 50%. Tesla's setting it at 50, and then there's this:

Cancellation of Special Shareholder Meetings		Right in the proposed Texas Charter
	The current Delaware Charter provides that the Board may cancel, postpone, or reschedule a special stockholder meeting.	Because the TBOC requires that shareholders holding 50% of the shares entitled to vote thereat to be able to call a special meeting of shareholders, the proposed Texas Charter does not provide that the Board of Directors has the right to cancel a special shareholder meeting, although the Board of Directors retains the right to postpone and reschedule shareholder meetings. The proposed Texas Bylaws, however, permit the Board to cancel a special shareholder meeting not called by shareholders.



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That would be a neat fight, if SH's called a meeting over board objections, and the board rescheduled it.
But w/ the threshold at 50%, it's unlikely to be an issue.



Tesla Inc

Tesla shares rise on plans to accelerate launch of 'more affordable' models

Elon Musk-led electric vehicle maker's stock jumps despite reporting a fall in quarterly revenue



Tesla's first-quarter revenue fell to \$21.3bn from \$23.3bn in the same period last year © Getty Images

Stephen Morris in San Francisco 3 HOURS AGO



Tesla has pledged to bring forward the launch of “more affordable” models of its electric vehicles, helping its stock recover some of its recent losses despite reporting a 9 per cent decline in first-quarter revenue amid a sharp fall in sales.

In a filing on Tuesday evening, the [electric-car](#) maker said it had “updated our future vehicle line-up to accelerate the launch of new models ahead of our previously communicated start of production in the second half of 2025”.

It added that these would include “more affordable” vehicles that could be produced on its existing manufacturing lines. [Tesla](#) shares were up more than 9 per cent by mid-day on Wednesday.

Chief executive Elon Musk said in January that Tesla was preparing to start production of a new lower-cost car next year, priced at \$25,000 and dubbed Model 2. The stock had fallen on a Reuters report earlier this month that the project had been shelved, which Musk denied.

On a conference call, Musk refused to be drawn on specific plans for an affordable “next generation vehicle” or how it would be produced using Tesla’s current infrastructure. He had previously said the Model 2 would require a new “revolutionary manufacturing system” at factories in Austin, Texas, as well as in Mexico.

Instead, Musk said more information would be given alongside an August announcement about “robotaxis” and sketched an ambitious vision for Tesla as an “AI and robotics company” based around its autonomous driving system and humanoid robots.

“If you value Tesla just as an auto company you fundamentally have the wrong framework. If you ask the wrong question, the right answer is impossible,” he said. “If somebody doesn’t believe Tesla is going to solve autonomy they should not be an investor in the company. And we will and we are.”

The results come at a turbulent time for Musk and the electric vehicle sector. Before Tuesday’s after-hours share price rise, Tesla stock had plunged more than 40 per cent since the start of the year after warning of slowing vehicle deliveries, eroding profit margins, a potential move of its incorporation to Texas from Delaware and revealing [plans to cut](#) more than 10 per cent of its workforce — at least 14,000 jobs.

Most big US carmakers have reported a drop in electric vehicle sales due to softening consumer demand, a shift in preference to hybrids and increased competition from low-cost options from Chinese brands.

“While Tesla has real issues to contend with, we believe the company’s long-term upward trajectory remains intact,” said Christopher Tsai of Tsai Capital, which holds Tesla stock. “The potential for high-margin autonomy revenue should not go unheeded.”

Absent the enthusiasm about a new vehicle line-up, the underlying financial performance remained disappointing. First-quarter revenue fell to \$21.3bn from \$23.3bn in the same period last year, missing analysts’ expectations for \$22.3bn. That marks Tesla’s first year-on-year quarterly drop since the start of 2020.

Adjusted earnings per share almost halved from a year ago to 45 cents, versus estimates for 52 cents, and the carmaker reported a sixth consecutive quarter of declining gross margins. The closely watched financial metric fell to 17.4 per cent, down from a peak of 29.1 per cent in the first quarter of 2022.

“We experienced numerous challenges, from the Red Sea conflict and the arson attack at Gigafactory Berlin, to the gradual [increase in production] of the updated Model 3 in Fremont,” Tesla said of the start to the year. “Global EV sales continue to be under pressure as many carmakers prioritise hybrid over EVs.”

Earlier this month, Tesla said it had delivered 386,810 electric cars between January and March, a fifth lower than the previous quarter, and 8 per cent below the same period in 2023. It has continued to cut prices for its most popular models as unsold-vehicle inventory piles up: that measure rose to 28 days of supply from 15 days a year ago.

Tesla still makes more than 80 per cent of its revenue from selling cars. Excluding the effects of regulatory credits, the gross margin from its automotive unit — a closely watched measure of its core operations — fell to 16.4 per cent for the quarter, down from 19 per cent a year ago.

Musk’s commitment to artificial intelligence was evident in a big jump in “AI infrastructure capex” to \$1bn, resulting in cash flow of negative \$2.5bn in the period.

He said that Tesla had installed 35,000 H100 Nvidia AI model training graphics processing units and that this number would rise to 85,000 by year end. He added that its humanoid robot, dubbed Optimus, would be “more valuable than everything else combined”.

Musk is also seeking to change the company’s state of incorporation to Texas, partly in protest at a Delaware court decision to void a \$56bn pay package he was awarded in 2018. Shareholders [will vote](#) on the move and whether to reaffirm his share award at its annual meeting in June.

Additional reporting by Richard Waters

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Elon Musk Needs Cheaper Teslas to Pay for Everything Else He Wants

Tesla's plan for a more affordable model that might revive growth and cash flows has been accelerated at the expense of ambition

By *Stephen Wilmot*

Updated April 24, 2024 9:43 am ET



Elon Musk still seems much more interested in cracking self-driving vehicles than making a cheaper electric car. PHOTO: LI JIANGUO/ZUMA PRESS

Tesla TSLA **9.98%** ▲ on Tuesday announced something totally unexpected from a company run by Elon Musk: a compromise.

The surprise passage of its highly anticipated first-quarter results came in the outlook statement.

“We have updated our future vehicle line-up to accelerate the launch of new models ahead of our previously communicated start of production in the second half of 2025.”

This is exactly what investors wanted to hear after a wave of doubt about the company's commitment to producing a new mass-market car. The shares rose about 10% in Wednesday trading.

But there was a twist: The company went on to explain that these new models will combine elements of both its current production platform and its "next generation" one under development. That means cost savings will be lower than previously expected, but so will capital spending as existing production capacity can be adapted to the new products. Tesla won't be opening new factories dedicated to a cut-price vehicle any time soon.

In other words, Tesla is trading radicalism for speed of delivery and capital efficiency, at least in the medium term. It is a sensible decision from a company that has historically preferred to take the heroic road. Institutional investors will likely love it; the Tesla fan base perhaps less so.

Terrible first-quarter results explain why Tesla is reaching for a new approach. With electric-vehicle sales under pressure, the company burned through \$2.5 billion of cash—far more than analysts had expected—by combining the lowest quarterly operating cash flow since early 2020 with record capital spending. Carmakers unravel very quickly and expensively when sales fall, and Tesla is no different.

The company is expecting a better second quarter as production and logistics problems that previously held back deliveries, such as an arson attack on its Berlin factory, unwind. But flagging demand for electric vehicles is also part of the mix, and the reported numbers don't distinguish between temporary and more lasting effects. As revenues fell 13% year over year in the first quarter, inventories rose 10% to around \$16 billion. These may be parts and unsold Teslas stuck in transit—the scenario emphasized by management on a call with investors—or they may be cars sitting on lots waiting for buyers.

The new plan has a shot at reviving sales growth next year: Musk said that the new models would come "early 2025 if not late this year." Beyond that, though, he gave few details, pointedly declining to answer analysts' questions on the topic during the call. That leaves the door open for speculation on all sides, with

bulls claiming that the affordable Tesla project is being brought forward and bears emphasizing the compromises.

The other wrinkle in the new plan is that Musk still seems much more interested in cracking the code to self-driving vehicles than in making a cheaper electric car. “If somebody doesn’t believe Tesla is going to solve autonomy, I think they should not be an investor in the company,” Musk said when asked by Morgan Stanley analyst Adam Jonas about Chinese competition to produce a low-cost EV.

Musk is right that Tesla’s valuation doesn’t add up without driverless cars, regardless of its growth in deliveries. So it was disappointing that the company gave investors no new ways to track its progress or gain confidence in its technology beyond well-worn assertions that it has the right approach. Tesla is taking a riskier road to autonomy than the likes of Mercedes-Benz and Alphabet, rejecting expensive lidar sensors and leaning into artificial intelligence. The approach should win on unit cost, but only if it actually delivers technologically. Meanwhile, Tesla’s spending on Nvidia’s AI-training chips and data centers is exacerbating its financial strain.

The company is holding an event to unveil a “robotaxi” on Aug. 8, but its self-driving technology requires constant supervision, suggesting delivery of truly driverless Teslas is still years away. Concrete details of its approach and performance benchmarks could help build investor confidence in what is usually seen as a moonshot, though.

Musk only has eyes for robots and AI, but selling cars is the cash machine capable of funding higher-tech dreams. His first priority must be to fix it.

Write to Stephen Wilmot at stephen.wilmot@wsj.com

Videos

FT Alphaville Trump Media & Technology Group

Trump Media's auditor is really bad at spelling his own name

Meet Ben F orgers (we wish we were making this up)



Ben F Borgers, a man of many names

George Steer in New York 4 HOURS AGO

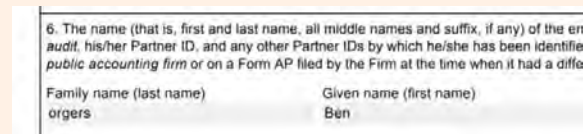


The founder of the accounting firm hired by Donald Trump's social media group has used 14 variations of his name in filings with the industry regulator, far more than any other US auditor, according to a review of public documents.

Ben F Borgers, whose accountancy firm BF Borgers inspects the finances of Trump Media & Technology Group, has filed [Form APs](#) to the US Public Company Accounting Oversight Board using the names Ben F Brogers, Blake F Borgers, Ben F Vonesh and Ben F orgers, among 10 others — some of which look like simple spelling mistakes — according to Public Company Accounting Oversight Board data.



An example of a Borgers blunder



© PCAOB

Orthographically-challenged auditors are relatively rare. One other US auditor has used nine variations of their name and another two have used eight different spellings. The vast majority spell their names consistently.

Ben F Borgers: a name of many, many spellings

Number of auditors with various reported names



Sources: FT research, PCAOB data gathered by Stephen Walker

© FT

BF Borgers is consistent in its own way, with the regulator having used its most recent report to flag the firm's "continued high level of instances of non-compliance with PCAOB standards or rules and quality control defects noted in both the 2021 and 2019 inspections".

MainFT has previously reported [the company's history of run-ins with regulators](#). PCAOB inspectors found Bogrers' auditors failed to properly check clients' revenues, accounts receivable, debt levels, fair value assumptions and numerous other key financial metrics.

Brgres' spelling irregularities only raise further questions about his firm's standards, according to Agnes Cheng, professor of accounting at the John T Steed School of Accounting at the University of Oklahoma.

“If multiple names are due to careless mistakes and lack of attention, then how can we trust him concerning his attention to the audits that he has to supervise,” she told FT Alphaville.

[Stephen Walker](#), a PhD accounting researcher from UC Berkeley, said the Form AP data he gathered showed one thing: “Borgers is in a league of his own.”

The PCAOB, which was gutted under Trump, provides daily-updated files on the accounting firms and Form APs required for each audit report issued. In each of them . . .

“

. . . the engagement partner’s name is required to be reported consistently on all Form APs with the PCAOB, unless the individual has changed his or her name. All Form APs filed subsequent to a name change are required to consistently use the new name.

‘Orgers was away when we tried his Colorado office and did not respond to emailed questions about why he had used so many subtly different names. This leaves open the possibility that he’s just fat-fingered, something to which the odd journalist, trader and British monarch can all relate.

Or maybe the man is simply overworked. Since 2017, Boogers has signed over 700 public company audit opinions, another record — and all while making time to jeep, backpack, fish, camp, hunt, sail, hike and hang out with his family. The second-most prolific auditor has signed about 500 over the same period, and many of those were for Spacs.

Higher-ups at TMTG seem unfazed by all of this, of course, and offered a full-throated defence of BF Borgers when the FT earlier this month [preemptively attacked](#) went for comment on its unusual track record.

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<https://www.law.com/delbizcourt/2024/04/23/trump-truth-social-attorneys-expect-solid-chance-at-shareholder-case-dismissal/>



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NEWS

Trump, Truth Social Attorneys Expect 'Solid' Chance at Shareholder Case Dismissal

Vice Chancellor Morgan Zurn said she'll hear argument April 30 on whether to continue handling the case on an expedited basis.

April 23, 2024 at 05:14 PM

Securities Litigation



Ellen Bardash



Defense motions that could have a domino effect on Delaware litigation over the pre-IPO Truth Social merger will be addressed in the next few weeks, Vice Chancellor Morgan Zurn decided at a recent hearing in which attorneys sparred over whether the court should first address a preliminary injunction or a motion to dismiss.

During the April 23 hearing, Berger McDermott partner Richard Jones, appearing for the plaintiff, asked that any motions to dismiss be briefed alongside those involving the preliminary injunction. But defense attorneys at the hearing said they're in favor of addressing the motion to dismiss before the preliminary injunction, which they said was unwarranted.

Ted Kittila of Halloran Farkas Kittila, representing Trump Media & Technology Group, said the motion to dismiss is "not some mild placeholder."

"Right now, from where we're standing, we do see a solid motion to dismiss to be briefed before your honor and allowing us not to waste the court's time with what I believe to be a meritless PI," Kittila said.

However, during the hearing, Zurn said she'll hear argument April 30 on whether to continue handling the case on an expedited basis, as ordered by Vice Chancellor Sam Glasscock, who was initially assigned to the case. The following week, briefing is due for the defendants' motions to dismiss.

"I think the extent to which we engage in discovery in aid of a preliminary injunction at the same time that we're briefing a motion to dismiss really comes down to whether this matter should be expedited," Zurn said.

The case was the first of four actions that were filed in the Delaware court since the end of February that take issue with the transaction that preceded Trump's social media platform, Truth Social, going public.

Among the key players in the various cases are Digital World Acquisition Corp., the SPAC that merged with Truth Social; DWAC's sponsor, ARC Global Investments II; ARC's managing member, Patrick Orlando; and Trump Media & Technology Group Corp., the post-transaction entity that's owner of Truth Social and controlled by Trump.

In the case in which Zurn held a hearing, United Atlantic Ventures, an entity formed by Truth Social’s co-founders, claims Trump Media & Technology Group Corp. lashed out by locking up stock owned by UAV. UAV is seeking a preliminary injunction releasing those shares.

The other three cases are assigned to Vice Chancellor Lori Will. In one, Orlando is suing DWAC, and in another, ARC is. In the most recently filed, ARC members who hold shares of DWAC stock are suing Orlando and ARC.

During the hearing, John Reed of DLA Piper, who represents the post-merger Trump Media, said because there’s a likelihood that some or all of the defendants will be dismissed, a stay of discovery is warranted.

“This is ultimately a case that can be remedied with money damages, and so there is really no need to move this at any breakneck pace,” he said.

Zurn said the motion to stay discovery related to the preliminary injunction will be addressed at a later date, after the first motion to dismiss briefs are filed. Kittila and Reed previewed the points they’re planning to make in those briefs during the hearing, stating Trump hasn’t fully waived jurisdiction in a Florida court and that there’s no basis for breach of fiduciary duty claims to proceed based on a lockup that was approved by more than 99% of shareholders.

“There are really no details at all about what this supposed breach of fiduciary duty was,” Reed said.

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April 24, 2024, 7:07 AM PDT

B. Riley Jumps as Auditor Signs Off, Cites Material Issues (1)

By Todd Gillespie

Bloomberg Law News 2024-04-24T12:59:17213423059-04:00

B. Riley Jumps as Auditor Signs Off, Cites Material Issues (1)

By Todd Gillespie2024-04-24T10:07:11482-04:00

B. Riley Financial Inc.soared as much as 61% after its auditors signed off on its annual report, while flagging concerns about weak internal controls.

The Los Angeles-based boutique investment bank’s audit cited multiple material weaknesses in the company’s reporting, and some of the previously reported data was revised, according to regulatory [filings](#) . Marcum LLP, which handled the audit, said the weaknesses in internal controls over financial reporting merited an “adverse opinion.”

The bank also expanded its list of risk factors and noted concerns about its involvement with Brian Kahn, a former key client who has come under scrutiny by US regulators. The firm said it redid an internal investigation with the help of a new law firm, Winston & Strawn , which reaffirmed that the bank has no ties to any alleged role of Kahn in the collapse of a hedge fund, which triggered a fraud investigation. Still, B. Riley said the matter may trigger further “adverse effects on our business.”

“The results of the independent investigation confirmed that the company and its executives had no involvement with, or knowledge of, any of the alleged misconduct concerning Mr. Kahn or any of his affiliates,” B. Riley said in a statement. The stock was up 37% to \$29.67 at 10 a.m. in New York and traded as high as \$35.

Kahn has repeatedly denied wrongdoing and hasn’t been charged with anything by US authorities.

The filing eases some pressure on B. Riley, whose stock had plunged after short sellers aired concerns about its relationship with Kahn. At the same time, it provided some support to investors who’ve criticized the firm’s ability to monitor its own finances. B. Riley had failed to file its audited results on time in March and needed an extension from its lenders to finish the job.

Read More: [B. Riley Fails to File Audited Results as Grace Period Ends](#)

The report didn’t satisfy some of the short sellers who’ve been betting against the stock.

“Marcum decided to enclose new risk factors and call Kahn a related party, which is everything the skeptics have been saying,” Marc Cohodes said by email. The firm still has “mismarked assets and related-party dealings that don’t pass the sniff test,” he said.

(Updates with opening share price, comments from short sellers, starting in the first paragraph.)

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Hedge Funds Are Succumbing to Mind-Boggling Returns of Memecoins

By Olga Kharif

- Seen as the first cycle where funds are jumping into memes
- Dogwifhat's rally attracts the attention of crypto hedge funds

Bloomberg Law News 2024-04-24T10:26:1703990567-04:00

Hedge Funds Are Succumbing to Mind-Boggling Returns of Memecoins

By Olga Kharif2024-04-23T11:28:34683-04:00

- Seen as the first cycle where funds are jumping into memes
- Dogwifhat's rally attracts the attention of crypto hedge funds

The hedge fund world appears to be finding the siren song of memecoins irresistible.

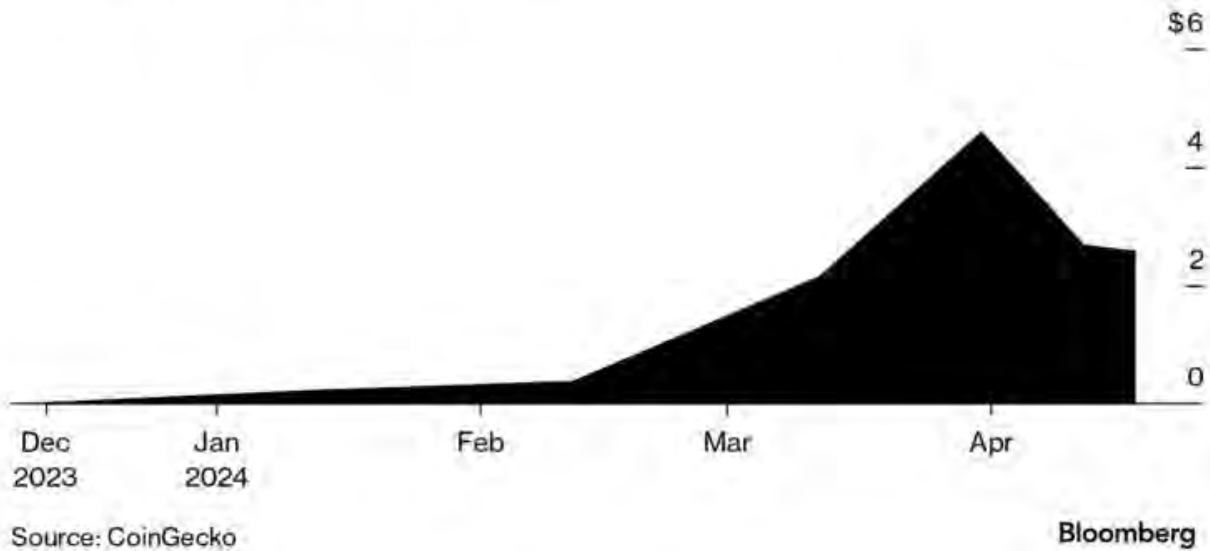
When Dogwifhat became the hottest token in crypto back in December, Newport Beach, California-based Stratos launched a liquid fund that held the token, whose mascot is, of course, a dog wearing a beanie. At one point, the token's price appreciated by more than 300 times, helping the fund post a 137% return in the first quarter, or more than double the gains seen overall in the crypto market. Dogwifhat is down more than 40% from its record high reached last month.

Stratos, which said its limited partners include venture capitalists Marc Andreessen and **Chris Dixon**, isn't the only hedge fund to dive into memecoins. Macro heavyweight Brevan Howard has made a "tiny" investment in the sector, according to a person familiar with the matter who wasn't authorized to speak on the record. Crypto fund Pantera Capital recently wrote that "memecoins are here to stay," and that "memecoin trading creates gigantic" opportunities. Indeed, memecoins are registering the highest trading volume on so-called decentralized exchanges as of late, according to Dex Screener. The overall market value of memes has swelled to around \$54.7 billion, according to data tracker CoinMarketCap.

"The unspoken truth is that if the fund isn't doing it, the people working at the fund are doing it," Rennick Palley, founding partner of Stratos, said in an interview.

Dogwifhat's Rollercoaster Ride

The meme's price in US dollars



CoinGecko

Hedge funds have long been active in crypto, attracted by strategies such as the arbitrage trade involving the Grayscale Bitcoin Trust that allowed them to profit from the disparity between the price of Bitcoin and the shares in the trust until that turned negative during the most recent "crypto winter."

Even so, many crypto participants remain skeptical of memecoins. Unlike more conventional cryptocurrencies, memes aren't typically tied to specific projects. Most were originally inspired by internet memes, characters, or trends, intended to be light-hearted and fun. That vibe has morphed into a speculative trading strategy led by groups that seek to realize a quick profit after heavily promoting the tokens over social media.

"It's just a retail frenzy, it's just what you've seen in GameStop and meme stocks in the traditional markets," said Quinn Thompson, who founded the hedge fund Lekker Capital, and has experimented with trading meme coins in his own account. "It's the tip of the spear for speculation. It's gambling."

The first meme coin was launched in 2014, and tens of thousands have been created since, with Dogecoin — with a picture of a Shiba Inu — currently the eighth-biggest cryptocurrency, with a roughly \$22 billion market value, according to CoinMarketCap. While many retail investors have lost their shirts — and a few made their fortunes — on memecoins, professional investors have mostly stayed away — until the latest crypto boom.

"Meme coins initially started as clearly a joke," said Cosmo Jiang, a portfolio manager at Pantera. "But over time they've evolved as much more than that. People have started to call some memecoins as culture coins, they are a membership into a culture or a group of people with a shared believe system."

Memes have also become much easier to create and launch, with apps such as Pump.fun allowing users to mint coins in minutes. Blockchains like Solana and Base that offer low trading fees have been overrun with the tokens. Telegram bots, such as Bonkbot, made trading in memes easier. Perhaps most important of all, some memes are now being listed on mainstream exchanges like the Winklevoss twins' Gemini.

"Since the last cycle, the infrastructure surrounding memecoins has become more robust, with significant improvements in liquidity for several tokens," said Josh de Vos, research lead at researcher CCData. "Centralized exchanges have developed sophisticated futures markets for leading memecoins, enabling hedge funds to capitalize on their volatile movements and effectively hedge their exposure."

That has hedge funds feeling more comfortable about following the lead of retail investors and promoters, who have long seen the microscopic prices of most memecoins as an opportunity to quickly post huge returns despite the lack of traditional fundamentals.

Dogwifhat was "almost a rounding error in terms of its initial cost base. That's how we typically think about memes," Palley of Stratos said.

As more hedge funds start taking memecoins more seriously, Palley expects the focus of on the highly speculative tokens will only increase.

"People will become more comfortable with the concept over time, not dissimilar to how people became comfortable with crypto overall," he said. "I wouldn't be surprised with firms creating meme-only funds, just as they created NFT-only funds."

That said, NFTs have proven to be unreliable investments, with the market crashing last year. With memes, at least no one claims they are more than a lottery ticket.

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Pool Supply Co. Seeks Exit From Investors' Inflated Sales Suit

By **Sydney Price**

Law360 (April 23, 2024, 8:58 PM EDT) -- Pool supply company Leslie's Inc. is urging the Arizona federal court to drop a suit accusing it of concealing that booming sales during the COVID-19 pandemic were due to an inventory glut, not the company's growth strategies, arguing that its statements were based on information it believed to be true about consumer purchasing behavior.

In a suit most recently amended in February, investors alleged that Leslie's inventory of chlorine-based products exceeded the amount needed by customers, and that it had no choice but to store excess product in parking lots and closets. The company attempted to offload its excess inventory onto customers, the suit claims.

But Leslie's argued in its motion to dismiss filed on Monday that the fact the company encouraged its customers to stock up on products does not demonstrate that any challenged statement was false when made, and the messaging was consistent with its "repeated refrain about supply uncertainties."

"The Complaint lacks factual allegations demonstrating that Defendants encouraged customers to stock up on product due to excess inventory, or allegations that Defendants knew increasing inventory would decrease gross margins in the future," Leslie's said.

According to the complaint, a form of stabilized chlorine called trichlor was becoming scarce due to supply chain disruptions from the pandemic, as well as a 2021 fire at one of the main chlorine production factories in the U.S. In response, the complaint says, Leslie's began increasing its product inventory and found itself with excess supply of the product.

The suit alleges Leslie's, along with its CEO Michael R. Egeck and its former chief financial officer Steven M. Weddell, attempted to capitalize on chlorine shortages by sending letters to customers saying the company could not "guarantee product availability" and urging them to buy supplies while they were available.

But Leslie's said it specifically disclosed to investors that it was building up inventory and sending it to its stores.

"In fact, Leslie's disclosures make clear that slowing consumer demand, which was first alleged to be revealed through consumer surveys performed at the end of Leslie's third quarter of fiscal 2023, was a surprise to Defendants," the motion states.

Leslie's says that the consumer surveys revealed that pool owners had stockpiled products in 2022, explaining lower-than-expected consumer demand in fiscal year 2023, and show that the defendants learned this information about consumer buying patterns after the statements in question were made.

"Plaintiffs' own allegations indicate that 'customer surveys conducted towards the end of the [third] quarter' revealed the customer stockpiling issues," Leslie's said. "Thus, by their own account, the newly discovered information from consumer surveys cannot show that statements made during the alleged class period were false or misleading when made."

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

The investors are represented by Darren J. Robbins, Tor Gronborg, Laurie L. Largent and Sarah A. Fallon of Robbins Geller Rudman & Dowd LLP, Thomas C. Michaud of Vanoverbeke Michaud & Timmony PC and Hart L. Robinovitch of Zimmerman Reed LLP.

Leslie's and the individual defendants are represented by Patricia Lee Refo and Megan Carrasco of Snell & Wilmer LLP and Monica K. Loseman and Allison K. Kostecka of Gibson Dunn & Crutcher LLP.

The case is Treasurer of the State of North Carolina et al. v. Leslie's Incorporated et al., case number 2:23-cv-01887, in the U.S. District Court for the District of Arizona.

--Editing by Vaqas Asghar.

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GoodRx Hid Revenue Reliance On Kroger, Suit Claims

By **Sydney Price**

Law360 (April 23, 2024, 6:43 PM EDT) -- GoodRx Holdings Inc. has been hit with a proposed class action alleging it concealed from investors the indispensability of its relationship with Kroger, leading to share declines when GoodRx announced revenue would be severely impacted because the grocery chain would no longer be accepting its discount codes.

According to the suit filed by shareholder Lisa Marie Barsuli in California federal court on Monday, GoodRx generates most of its revenue from contracts with pharmacy benefit managers that pay the company a commission on drug purchases made by consumers who use its discounts. GoodRx, however, never disclosed the risk that Kroger, which accounted for nearly 25% of its prescription transactions revenue, could unilaterally refuse to accept GoodRx's discounts, the complaint states.

Barsuli seeks to represent a class of those who purchased or otherwise acquired GoodRx stock between Sept. 23, 2020, and Nov. 8, 2022. In addition to GoodRx, the suit names its CEO Trevor Bezdek, Chief Financial Officer Karsten Voermann and former co-CEO Douglas Hirsch as defendants.

In September 2020, GoodRx touted its strong relationship with Kroger in its prospectus for its initial public offering, but failed to disclose that while Kroger accounted for less than 5% of the pharmacies accepting GoodRx discounts, it was responsible for nearly a fourth of GoodRx's total prescription transactions revenue. The defendants continued to conceal this information throughout the remainder of the class period, the suit alleges.

GoodRx investors became aware of the risk attached to the company's Kroger partnership in May 2022, when GoodRx revealed that a disruption with one of its grocery store partners "could have an estimated revenue impact of roughly \$30 million" in the second quarter of 2022, which resulted in GoodRx announcing lower-than-expected revenue guidance, according to the suit.

"While defendants refused to identify the grocer by name, analysts and media outlets quickly recognized that the unnamed grocery chain was Kroger," the complaint states.

The news resulted in GoodRx's stock price declining \$2.78, or about 26%, to close at \$7.97 per share on May 10, 2022, according to the complaint.

Several months later, on Nov. 8, 2022, GoodRx provided another update on its relationship with the grocer, the complaint says. It said the issues caused a \$40 million impact on prescription transactions revenue, and that it expected "a combined \$45 million to \$50 million estimated impact to prescription transactions revenue" for fourth-quarter 2022.

On the news, GoodRx's stock price declined \$1.18, or about 22%, to close at \$4.06 per share on Nov. 9, 2022.

Barsuli claims GoodRx and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act. She claims the defendants' statements aren't covered by the safe harbor provisions of securities laws and seeks damages on behalf of the proposed class.

Counsel for Barsuli and a representative of GoodRx did not immediately respond to requests for comment on Tuesday.

Barsuli is represented by Stacey M. Kaplan of Kessler Topaz Meltzer & Check LLP.

Counsel information for GoodRx and the individual defendants was not immediately available on Tuesday.

The case is Barsuli v. GoodRx Holdings Inc. et al., case number 2:24-cv-03282, in the U.S. District Court for the Central District of California.

--Editing by Marygrace Anderson.

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Bike Parts Co. Investor Wants Scott + Scott For Class Counsel

By **Peter McGuire**

Law360 (April 23, 2024, 3:51 PM EDT) -- An investor suing a Georgia bicycle parts maker has asked a federal district court to appoint Scott + Scott Attorneys At Law LLP and the Schall Law Firm lead counsel in litigation alleging the company hid from shareholders slumping sales and demand.

Investor Ryan Marselis, who filed a proposed class action against Fox Factory Holding Corp. and some of its executives this year, has urged a Georgia federal court to appoint the law firms and make himself lead plaintiff in the suit, according to a **memorandum** filed Monday.

Marselis told the court he should lead the proposed class since his financial losses from the company's misrepresentations surpassed anyone else's. He lost more than \$28,700 after Fox Family stock tanked last year when the company significantly downgraded sales projections after **allegedly misleading shareholders** about product demand, according to the filing.

"Marselis thus has a significant financial interest in this case," he told the court. "Moreover, Marselis is unaware of any other movant that has sustained greater financial losses in connection with their Fox Factory transactions during the class period."

Like others, Marselis bought Fox Factory stock during a period it was allegedly artificially inflated by the company's false and misleading statements, according to the filing.

Marselis' "personal financial loss ensures that he has sufficient incentive and willingness to ensure the vigorous advocacy of this action," he told the court.

Scott + Scott and Schall Law are similarly well suited to represent investors in their suit, Marselis said, adding that the firms "have substantial experience in the prosecution of securities class actions and possess the necessary resources to efficiently conduct this action."

Scott + Scott attorneys have recovered tens of millions of dollars for their clients. Among other clients, Scott + Scott is presently representing plaintiffs in a suit against Cognyte Software Ltd. for losses sustained after Cognyte was outed as a **"surveillance for hire" outfit**, Marselis said.

Schall Law, meanwhile, helped bargain a **\$90 million settlement** for a class that accused tobacco company Altria Group Inc. of misleading investors regarding its purchase of Juul vaping products, among other wins, according to the filing.

Marselis sued Fox Factory in February, accusing the company of violating the Exchange Act and a U.S. Securities and Exchange Commission rule by falsely touting rosy growth and strong product demand until it suddenly cut sales projections by nearly 20% last year. The news triggered a collapse in the company's stock price, dearly costing investors who had relied on its misrepresentations, according to the suit.

Marselis claimed demand growth for Fox Factory's high-end mountain bike components eroded during the class period, even as executives reaffirmed sales expectations and suggested the company could seize a bigger share of the market.

The proposed class would cover anyone who bought or obtained Fox Factory stock between May 2021 and November 2023, according to the suit.

Representatives for Marselis and Fox Factory did not immediately respond to requests for comment Tuesday.

The investors are represented by James M. Evangelista of Evangelista Worley LLC, Thomas L. Laughlin IV, Jonathan Zimmerman and Nicholas S. Bruno of Scott + Scott Attorneys At Law LLP, and Brian J. Schall and Brian R. England of Schall Law Firm.

Counsel information for Fox Factory was not available Tuesday.

The case is Ryan Marselis v. Fox Factory Holding Corp. et al., case number 1:24-cv-00747, in the U.S. District Court for the Northern District of Georgia.

--Additional reporting by Jonathan Capriel and Emily Ruscoe. Editing by Lakshna Mehta.

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Levi & Korsinsky To Head Combined Paycom Investor Actions

By **Katryna Perera**

Law360 (April 23, 2024, 7:00 PM EDT) -- An Oklahoma federal judge selected Levi & Korsinsky LLP to lead a consolidated proposed investor class action against human resources technology company Paycom Software Inc. over the company's alleged failure to disclose that the success of its self-service payroll software was hindering the growth of the company's other services and revenue.

U.S. District Judge Stephen P. Friot issued **an order Tuesday** consolidating three parallel proposed class action suits against Paycom and naming Calvin Mein as the lead plaintiff after finding his loss to be the greatest among the competing movants.

Levi & Korsinsky beat out four other firms that submitted bids **in January** to lead the suit. In his motion to be named lead plaintiff, Mein claimed to have lost roughly \$1.6 million due to the defendants' wrongful conduct.

According to Tuesday's order, there were four pending class actions against Paycom in the Western District of Oklahoma, but Judge Friot dismissed one of them without prejudice after the plaintiff's counsel from Caruso & Smith PLLC failed to file his entry of appearance in the action within three business days.

The remaining three suits were consolidated, with Judge Friot finding that the actions involve similar factual allegations, assert the same legal claims and name the same defendants. According to the order, there was a difference in the class period length in one of the suits, but Judge Friot said that does not render consolidation inappropriate.

According to the order, movant Joseph Minarik said Mein improperly inflated his alleged losses by including losses he suffered on shares that he sold before the suit's alleged corrective disclosures. Minarik claims Mein's losses are actually \$1.3 million instead of \$1.6 million.

But Judge Friot noted Tuesday that even so, Mein's losses are still greater than Minarik's reported \$1.2 million in losses.

"Although Mr. Minarik maintains there is only a 'marginal difference' between his [and Mein's] losses — slightly over \$70,000.00 — Mr. Minarik has not cited any authority permitting the court to ignore the statutory presumption given to the person with the 'largest financial interest' in the relief sought by the class," the order says.

In naming Mein as lead plaintiff, Judge Friot said he satisfies the typicality and adequacy requirements and his retained counsel from Levi & Korsinsky "appears to be qualified, experienced, and able to conduct the litigation."

In a statement to Law360 on Tuesday, Adam Apton of Levi & Korsinsky, counsel for Mein, said, "Our team looks forward to pursuing the claims against Paycom and holding those accountable who deserve it. Our client along with many other investors lost significant sums of money through no fault of their own. That's not fair."

Counsel for Paycom did not immediately respond to requests for comment Tuesday.

Investor Angelo Ventrillo Jr. filed the first suit against Paycom **in November** over the company's

employee-driven payroll software, Beti, rolled out in 2021. He alleged that as more customers adopted Beti, Paycom was losing out on other forms of revenue, which led to slower than projected growth for the 2023 fiscal year.

According to investors, Paycom continually touted Beti's success while omitting that the software's prosperity would damage Paycom's overall services and revenue.

Paycom allegedly "shocked the market" on Oct. 31, 2023, by admitting the effect Beti was actually having on the company financially, according to the complaint. The same day, it held its third-quarter 2023 earnings call and announced lower than expected revenues for the quarter and lowered guidance.

On that news, the price of Paycom shares fell by \$94.28 per share, or 39%, to close at \$150.69 per share on Nov. 1, according to the complaint.

Mein and the proposed class are represented by Adam M. Apton of Levi & Korsinsky LLP.

Paycom and the individual defendants are represented by Craig Zieminski, K. Virginia Burke DeBeer and Robert Ritchie of Vinson & Elkins LLP and Michael F. Lauderdale and Spencer F. Smith of McAfee & Taft.

The case is Ventrillo et al. v. Paycom Software Inc et al., case number 5:23-cv-01019, in the U.S. District Court for the Western District of Oklahoma.

--Editing by Stephen Berg.

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EV Co.'s SPAC Suit Gets Final OK For \$1.9M Settlement

By **Emilie Ruscoe**

Law360 (April 23, 2024, 7:40 PM EDT) -- Lightning eMotors Inc., which made electric commercial vehicles and has announced liquidation of its assets, has received final approval for a \$1.85 million settlement of shareholder derivative claims against its brass alleging they hid supply chain issues that would keep it from scaling after going public via merger with a special purpose acquisition company.

In a Monday order in Denver federal court, U.S. District Judge Nina Y. Wang granted final approval to the deal, which resolves breach of fiduciary duty claims against seven individuals associated with nominal defendant Lightning eMotors Inc. and seven individuals associated with GigCapital3 Inc., the SPAC with which the commercial fleet company merged in 2021.

The settlement deal, which Lightning investor Kelly Lanham sought final approval for in February, will see the Gig3 defendants pay, or cause their insurers to pay, \$1.85 million into an escrow account for Lightning to be used "only for the defense or settlement of [a] securities class action" over the company's alleged misrepresentations to investors that was dismissed with prejudice at the end of March.

Lightning announced in January that it had reached a deal to sell substantially all of its assets for \$12.6 million in cash. At the time, it noted that the funds would be distributed to the company's creditors by a court-appointed receiver and that its "shareholders will not receive any distributions in the receivership or as a result of the transaction."

The Monday order ends Lanham's claims that the individual Gig3 and Lightning defendants knew, or should have known, that certain claims about the company's ability to increase capacity quickly following the SPAC merger were misleading.

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

Lanham is represented by Timothy J. MacFall of Rigrodsky Law PA.

The GigCapital3 defendants are represented by David Ian Freeburg and Melanie E. Walker of DLA Piper LLP.

Nominal defendant Lightning eMotors and the associated individual defendants are represented by Boris Feldman and Doru Gavril of Freshfields Bruckhaus Deringer US LLP.

The case is Lanham v. Fenwick-Smith et al., case number 1:23-cv-00507, in the U.S. District Court for the District of Colorado.

--Additional reporting by Daniel Ducassi. Editing by Vaqas Asghar.

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Pre-Merger Deal Prompts Pharma Co. Derivative Suit In Del.

By **Jeff Montgomery**

Law360 (April 23, 2024, 4:55 PM EDT) -- An Ayala Pharmaceuticals stockholder has launched a derivative suit against the company's board and controlling investors in Delaware's Court of Chancery, accusing directors of issuing new shares to the controllers at far below market value, timed to take advantage of an asset sale worth up to \$85 million.

Marstrand Partners LP said in its complaint late Monday that nine mostly conflicted Ayala directors conspired with controlling funds of Israel Biotech and Arkin Bio Ventures to lock up most of the clinical-stage oncology drug company's equity while diluting existing stockholders before closing a deal for two cancer-drug candidates with Immunome Inc.

Marstrand — which is seeking a court order voiding the alleged insider deals — accused Ayala's board of approving "related sweetheart, insider convertible 'loan' transactions" in November 2023 that enabled acquisition of Ayala stock at significantly below fair value, "without due consideration, any form of effective market check, fair process or diligence."

At the time of the alleged insider deals, Ayala was in talks with various parties on strategic transactions. One month later, the company closed a deal with Immunome worth up to \$85 million, with \$50 million guaranteed.

In connection with the Immunome deal, the complaint said, directors also approved personal bonuses for themselves ranging from \$50,000 to \$1.6 million.

Ayala, the suit said, disregarded a range of fiduciary duties, including procedural protections. The process went forward without an independent committee evaluation of the transactions, described as "architected and engineered by the controlling stockholders for their own benefit."

Minority stockholders were denied an opportunity to vote on or object to the deal, which went forward without approval of a majority of the minority.

An information statement filed with the Securities and Exchange Commission on the deal acknowledged potential flaws, including terms that bar consideration of an alternative transaction or terminate the deal in favor of a superior offer. In addition, the disclosure acknowledged, "certain of our officers and directors may have interests with respect to the asset sale in addition to their interests as stockholders generally."

Ayala chairman Dr. David Sidransky, the complaint noted, is a co-founder and managing partner of controller IBF. Three others with direct IBF ties, including another co-founder and managing partner, also serve on Ayala's nine-member board, along with ABV's Pharma Division head.

The controlling investors gained their 5-4 majority during an October 2023 merger of Ayala and Biosight Ltd., which brought ABV.

Soon after the Biosight deal, Marstrand alleged, Ayala's board abandoned another effort to bring independent investment into the company and began pursuing "self-interested, dilutive financing." Measures approved included a \$4 million convertible loan and the issuance of warrants allowing purchase of up to 22.5 million shares of Ayala stock at 50% of its price on the date of issue or exercise.

"There is no indication that, at the time the board considered and approved the self-interested dilutive financing, the defendant directors made any effort to obtain equivalent bridge financing in an arms' length, fair transaction that would protect the interests of Ayala and its minority stockholders," Marstrand said in the complaint.

Ayala did not immediately respond to a request for comment.

Marstrand Partners LP is represented by Richard I.G. Jones and Zachary J. Schnapp of Berger McDermott LLP and Lloyd Winawer, John D. Pernick and Susan Bower of Bergeson LLP.

Counsel information for those named in the suit was not immediately available.

The case is Marstrand Partners LP, derivatively on behalf of Ayala Pharmaceuticals Inc. v. Israel Biotech Fund I LP et al., case number 2024-0421, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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Hot Spot Co. Investors' Revised \$2.4M Deal Gets Initial OK

By **Emilie Ruscoe**

Law360 (April 23, 2024, 7:13 PM EDT) -- Investors in mobile hotspot-maker Franklin Wireless Corp. have received an initial green light for their \$2.4 million deal to end claims the company knowingly sold devices with defective batteries that could burst into flames after a federal judge rejected an earlier iteration of the proposal.

In a Monday order, U.S. District Judge Anthony J. Battaglia granted preliminary approval to Franklin Wireless investor Gergely Csaba and the certified investor class.

The order also said the proposed method for calculating relief for each class member "appears reasonable, fair, and effective," and resolves issues that in January prompted Judge Battaglia to deny an earlier request for preliminary settlement approval.

In January, the judge said that the earlier settlement proposal "appears to treat class members unequally," pointing out that would-be claimants whose prospective settlement sums would be less than \$10 ultimately wouldn't receive anything.

The judge's January order also took issue with the investor counsel's estimated litigation and administration costs, describing those sums as "excessive" by comparison to similar settlement deals and noting that after those proposed costs were paid out, the settlement fund would end up being just over \$1 million before taxes.

Judge Battaglia also criticized the earlier version of the settlement agreement for not estimating the number of class members, or how much they might get, telling Csaba that "without more [information], the court cannot ascertain whether 'the relief provided for the class is adequate.'"

In February, Csaba revised the settlement approval bid, telling the court that the investors could expect a \$1.4 million settlement fund and would provide recovery of just under 13% of the investors' estimated damages.

The revised settlement approval motion details significantly lowered litigation costs of about \$100,000, compared to estimated litigation costs of \$200,000 in the earlier settlement approval filing, and expected administration costs of about \$100,000, down from a January estimate of \$250,000. Together, those sums added about \$350,000 to the net settlement fund, the investor said in February.

In both versions of the settlement approval bid, Csaba's legal team would receive attorney fees of about a third of the settlement fund, or approximately \$800,000.

And in the February approval bid, Csaba explained that excluding would-be claimants whose disbursements would be under \$10 isn't unfair because "such small checks are frequently discarded by recipients, serving only to add to the settlement's costs."

On Monday, Judge Battaglia said the new settlement agreement passed muster, adding that he was satisfied by the explanation about the \$10 million threshold for plaintiffs and noting that precedent exists for the provision.

He also found it fair that claimants would receive disbursements on a pro rata basis based on the size

of their claims, their number of shares and the timing of their share purchases.

On Tuesday, Austin Van, an attorney for Csaba, told Law360 via email, "We are pleased that the court has granted preliminary approval of the settlement and believe it represents an excellent recovery for the class."

Representatives for the defendants did not immediately respond to requests for comment.

Csaba and the proposed class are represented by Jennifer Pafiti, Jeremy A. Lieberman and Austin P. Van of Pomerantz LLP, and Lesley F. Portnoy of the Portnoy Law Firm.

Franklin Wireless, Kim and Brown are represented by Stephen M. Lobbin and Christopher M. Ferri of SML Avvocati PC.

The case is Ali et al. v. Franklin Wireless Corp. et al., case number 3:21-cv-00687, in the U.S. District Court for the Southern District of California.

--Additional reporting by Sydney Price. Editing by Kristen Becker.

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Goosehead Insurance Investor Looks To Pause Chancery Deal

By **Leslie A. Pappas**

Law360 (April 23, 2024, 7:19 PM EDT) -- A stockholder of Goosehead Insurance Inc. who struck a settlement last year with the Texas-based company to end his proposed class action over disproportionate insider control asked Delaware's Court of Chancery on Tuesday to put the deal on hold until another case involving investment bank Moelis & Co. plays out.

In a letter to Vice Chancellor J. Travis Laster, Goosehead shareholder Mickey Dollens said the parties had agreed to defer further settlement proceedings pending the potential appeal of rulings in [West Palm Beach Firefighters' Pension Fund v. Moelis & Co.](#) to Delaware's Supreme Court. The letter marks the second time the Moelis case has put a damper on Goosehead settlement talks.

At a **settlement hearing in February**, the vice chancellor questioned whether the ongoing litigation in the Moelis case — which challenged the board-trumping power that a stockholder agreement gave to the global investment bank's founder Kenneth Moelis — might jeopardize provisions of the Goosehead settlement agreement.

Dollens **sued** Goosehead in November, alleging the company was being controlled by pre-IPO family members rather than its board of directors, even though the insiders held a minority share of the company's voting power.

The proposed class action challenged a stockholder agreement, implemented in connection with Goosehead's IPO, that gave pre-IPO members of the company the power to veto most board decisions.

The **settlement** that Dollen and Goosehead reached in August would have transferred control of the \$2.8 billion company from the minority pre-IPO insiders to the corporation's public stockholders, but it didn't eliminate all the provisions in the stockholder agreement that Dollen had challenged as invalid under Delaware law.

"Can I then approve this?" the vice chancellor asked at the settlement hearing in February, according to a court transcript. "Because what that would mean is I would be approving a settlement that would ostensibly insulate a statutorily noncompliant agreement, which, again, if you are right, is void by statute. So how does that work?"

The vice chancellor deferred ruling on the Goosehead settlement agreement and asked the parties to submit further briefing on the matter.

The next day, Vice Chancellor Laster **issued** a 133-page opinion in the Moelis case that found all but three provisions of that stockholder agreement facially invalid.

Some attorneys **have said** the Moelis decision "upends" standard practice for Delaware corporations, which often enter into stockholder agreement with founders and pre-IPO investors.

The Moelis decision has not yet been appealed to the Delaware Supreme Court, according to the court docket.

Additional briefings in the Goosehead case were due April 24. The letter the parties filed on Tuesday asked the court to "hold in abeyance" their motion for approval of the proposed settlement as well as

the supplemental briefing.

A proposed stipulation submitted along with the letter suggested the parties would provide the court with a status report on the Goosehead settlement within 21 days of the resolution of any Moelis appeal.

None of the parties immediately responded on Tuesday to Law360's requests for comment.

Dollens and the proposed class are represented by Thomas Curry, David Wales and Adam Warden of Saxena White PA and Francis A. Bottini Jr. of Bottini & Bottini Inc.

Goosehead Insurance Inc. is represented by Blake Rohrbacher and Morgan R. Harrison of Richards Layton & Finger PA and Gary A. Bornstein and Justin C. Clarke of Cravath Swaine & Moore LLP.

The case is Mickey Dollens v. Goosehead Insurance Inc., case number 2022-1018-JTL, in the Court of Chancery of the State of Delaware.

--Additional reporting by Katryna Perera. Editing by Philip Shea.

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Del. Chancery To Rethink Fast-Track Of Truth Social Suit

By **Leslie A. Pappas**

Law360 (April 23, 2024, 2:25 PM EDT) -- The judge taking over a Delaware Chancery Court lawsuit that two former "Apprentice" contestants brought against former President Donald Trump's social media company before the Truth Social platform went public will decide at the end of the month whether the suit still needs to be fast-tracked.

In a telephonic status conference Tuesday, Vice Chancellor Morgan T. Zurn, who took over the case from Vice Chancellor Sam Glasscock III because he is about to retire, said she would consider a motion to vacate expedition April 30.

Briefs on the motions to dismiss the case will be due the week of May 6, she added.

Former reality show contestants Andrew Litinsky and Wes Moss, via their company United Atlantic Ventures LLC, **sued** Trump Media & Technology Group Corp. in March, seeking a court declaration that they had an ownership right to 8.6% of the social media company.

The suit alleges TMTG Corp., which was 90% owned by Trump, was on the verge of issuing millions of new shares to Trump and his family before it merged with special-purpose acquisition company Digital World Acquisition Corp. and took Truth Social public.

Vice Chancellor Glasscock **expedited the case** shortly before Digital World shareholders voted on the merger, saying the parties could reconvene after the vote to determine the best path forward.

Truth Social **went public March 22**. Digital World was renamed Trump Media & Technology Group Corp., and the old TMTG Corp. changed its name to TMTG Sub Inc.

Two days after Digital World shareholders approved the merger, the new Trump Media & Technology Group Corp. filed a **complaint** against UAV, Moss and Litinsky in Florida, accusing them of multiple breaches of fiduciary duty leading up to the deal and seeking to claw back the value of their TMTG shares.

Vice Chancellor Glasscock gave UAV **the go-ahead** to revise its Delaware complaint earlier this month, shortly before he handed the case over to Vice Chancellor Zurn.

Defendants in the amended complaint include the old and new TMTG Corps., Donald J. Trump, former TMTG Director Daniel Scavino Jr., and the entire board of the new social media company: Devin G. Nunes, Donald J. Trump Jr., Kashyap "Kash" Patel Jr., Eric Swider, W. Kyle Green, Linda McMahon and Robert Lighthizer.

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

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

TMTG Sub Inc. (formerly known as Trump Media & Technology Group Corp.), Trump and Scavino are represented by Theodore A. Kittila and William E. Green Jr. of Halloran Farkas + Kittila LLP.

Trump Media & Technology Group Corp. (formerly known as Digital World Acquisition Corp.), Nunes,

Trump Jr., Patel, Swider, Green, McMahon and Lighthizer are represented by John L. Reed and Ronald N. Brown III of DLA Piper LLP.

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

--Editing by Janice Carter Brown.

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Trump's Stake In Truth Social Swells An Additional \$1.2B

By Tom Zanki

Law360 (April 23, 2024, 7:08 PM EDT) -- The value of Donald Trump's stake in his newly public social media company soared by nearly \$1.2 billion on Tuesday as the former president became eligible to receive bonus shares that were conditioned on the company's stock performance.

Under a **previously disclosed agreement** involving Trump Media & Technology Group Corp. and its investors, Trump, who already owns a majority stake in the company, has obtained the right to receive an additional 36 million in so-called earnout shares. The additional shares are worth \$1.17 billion based on Tuesday's closing price of \$32.52.

The agreement was contingent upon shares hitting certain performance targets, including maintaining an average price of \$17.50 for at least 20 of 30 trading days up to the first three years of trading. Those requirements were satisfied on Tuesday, which marked 20 trading days since Trump Media listed on the Nasdaq exchange. Shares of Trump Media, while fluctuating wildly on certain days, have traded well above \$17.50 since the March 26 listing.

Trump now owns 114.75 million shares of his namesake company Trump Media, the owner of the Truth Social platform on which the former president frequently posts, for a total stake worth about \$3.7 billion on paper. Trump had already owned 78.75 million shares before the earnout.

Trump, who is facing mounting legal bills from multiple lawsuits, is barred from selling his stock under a lockup provision that is in effect for up to six months after the March 25 closing of Trump Media's **go-public merger** with a special purpose acquisition company — that is, sometime in September.

Trump could sell shares sooner if the board of directors waives lockup restrictions. However, observers note that an early lockup waiver could trigger shareholder litigation if Trump Media's stock price were to fall upon expectations that new shares are flooding the market, or that Trump is partly or completely liquidating his stake.

"It is conceivable that the board could grant a waiver, and there's been widespread speculation that they will do so," said Usha Rodrigues, who teaches corporate and securities law at the University of Georgia School of Law. "That would likely lead to a shareholder lawsuit, however."

Representatives of Trump Media did not immediately return a request for comment.

Lockup provisions, which are intended to foster stability in a company's stock price in its early days of trading, are common in initial public offerings and merger agreements with special purpose acquisition companies. Trump Media went public last month after merging with Digital World Acquisition Corp., a SPAC, rather than through a traditional IPO.

SPACs, also called blank-check companies, are shell companies that raise money through a public offering and then use the funds to take a private company public. Earnout agreements, which provide an incentive of sorts enabling insiders to gain additional shares as equity compensation if certain milestones are met, are also a common component in SPAC mergers. However, many companies have traded poorly after combining with a SPAC in recent years, a factor that can prevent earnout agreements from ever materializing.

Trump Media investors are eligible to receive up to 40 million earnout shares in total, with most of that sum going to Trump. The stock award also comes as Trump, the presumptive Republican presidential nominee, is **on trial** in New York City for allegedly falsifying business records related to hush money payments ahead of the 2016 election.

Shares of Trump Media fell \$2.94, or 8.3%, to close at \$32.56 in Nasdaq trading on Tuesday, continuing a roller coaster for the stock since it **began trading**. Trump Media shares soared shortly after the company's merger with Digital World, closing at \$68.50 on March 27. They have since fallen far from their peak, while still remaining well above levels needed to satisfy the earnout requirement.

Sarasota, Florida-based Trump Media is unprofitable and has warned in previous filings that it may never generate sufficient operating revenue to turn consistent profits. Truth Social is the lone product of Trump Media, which touts itself as on "a mission to create a free-speech beachhead against Big Tech censorship."

--Editing by Alanna Weissman.

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Tesla's Risky Ride To Revive Musk's Multibillion-Dollar Pay

By **Jeff Montgomery**

Law360 (April 23, 2024, 6:17 PM EDT) -- Tesla Inc. and its mercurial CEO Elon Musk are banking on a bold strategy to salvage his multibillion-dollar compensation plan, invoking a recently enacted corporate power to first patch Tesla's charter and then reincorporate in Texas, potentially triggering stockholder claims of fiduciary breaches and waste.

The strategy could restore what was once a nearly \$56 billion compensation plan for Musk recently scuttled by Delaware's chancellor, while putting the company beyond the same court's reach with the very next annual meeting vote on June 13.

But the plan is expected to focus attention on Musk himself amid concerns that Tesla will continue to face stockholder litigation in Delaware even if the pay plan and reincorporation pass. Debate was expected to step up when Tesla issues its first-quarter 2024 and full-year 2023 results late Tuesday.

"What on Earth is Tesla doing and how come there's nobody, no responsible adult on the board of directors who is taking care of this man?" asked Anat Alon-Beck, associate professor of law at Case Western Reserve University School of Law.

"They're not doing this to benefit the company. They're doing it for their own political reasons," and pushing the company to a state where newly authorized business courts have yet to be fully organized, Alon-Beck said. "He's going to face more litigation, and it's going to be in Delaware."

Tesla directors called for a new stockholder ratification of Musk's compensation plan last week after Chancellor Kathaleen St. J. McCormick deemed the original an invalid, "defective" corporate act in a post-trial decision on Jan. 30.

Soon afterward, Tesla began working to save the plan by way of a Delaware general corporation law amendment signed into law in August 2023 that simplified and streamlined actions required for companies seeking to fix and ratify defective corporate acts. The effort would be shored up, Tesla announced last week, by additional disclosures and a nod from a one-member board independent committee.

"I think it was a bold move on their part, because they've got nothing else to lose at this point," said Brian Dunn, director of professional programs at the institute for compensation studies at Cornell University School of Industrial and Labor Relations. "I don't think that there's a high likelihood of a win on appeal" in Delaware, he said, "so they're trying to figure out a way to make sure he gets paid."

Dunn, who testified for the stockholders during Tesla's five-day trial in November 2022, drew a distinction between awarding Musk a CEO-level salary and handing him 12% of the company at a time when it reduced its workforce by 10%, recalled thousands of Cybertrucks and is losing market share. From the stand during the 2022 trial, Dunn described Musk's compensation plan as "on roller skates" headed downhill.

Tesla leaders say Musk already had met all of the all-stock plan's revenue, earnings and market capitalization milestones, although eroding share prices have trimmed the plan's current value to around \$44 billion.

But Tesla's overall value, meanwhile, has fallen from a market capitalization of \$1.4 trillion at the start of 2022 to about \$445 billion at day's end Monday, with its share price down from nearly \$410 in November 2021 to just over \$142 pre-market opening on Tuesday.

The concerns bubbled up recently on a public Q&A site for Tesla investors ahead of Tuesday's 2024 first-quarter and 2023 full-year earnings report.

The site, operated by Say Technologies LLC, included one investor's query: "Is there any discussion about oversight of Elon's erratic behavior on X that is damaging the Tesla brand?" and another asking, "If we vote for your comp package will you please at least appear to make Tesla your top priority? (Not saying crazy things on Twitter would be nice too)."

Summing up the picture, Boston College Law School professor Brian Quinn said "There are a lot of issues. It's going to end up going one last time through Delaware courts before they wander off to Texas."

Among the points of friction: Tesla's effort to secure ratification of performance targets already met, years ago, in some cases.

"In contract law, you can't make a contract to pay someone for work already completed," Quinn said. "What we're looking at here is ratifying past performance. That sets up a waste claim for pay between 2018 and 2024" and allegations that the company approved expenses for which it could claim no benefit.

Waste, several of those interviewed pointed out, can only be ratified by a unanimous shareholder vote — unlikely with Tesla facing so much criticism.

Quinn cautioned that attorneys who wake up to find themselves in charge of waste claims find they "made a career error" because of the difficulty in proving them. But "where they do have a little bit of life is executive compensation claims."

Jill E. Fisch, Saul A. Fox distinguished professor of business law at the University of Pennsylvania Carey Law School, viewed Tesla's recent actions as signs that the company is trying to comply with court rulings that point the way to business judgment deference, rooted in the Delaware Supreme Court's landmark **Kahn v. M&F Worldwide** decision in 2014.

Kahn established an alternative standard for judging controlling stockholder transactions — ordinarily subject to plaintiff-friendly "entire fairness" review — with deference to business judgment considered only if a deal is conditioned from the start on approval by an independent, fully functioning special committee and a majority of disinterested directors.

"Incorporation in Texas, I'm not sure how much that is a calculated business decision that this is really better for Musk and Tesla and how much of it is a fit of pique — 'I'm taking my marbles and going home,'" Fisch said.

One possible point of contention, he said, is Tesla's decision to set up its stockholder vote do-over with a one-member special committee, in the form of director Kathleen Wilson-Thompson, to assess the original plan and its fairness.

"It's possible to have a one-person special committee, but it wouldn't necessarily be the norm. So that could raise questions about, 'Well, is this really good enough, or is this nominal independence?'" Fisch said. "There will definitely be more law made. In a way, I think, that's a good thing."

Tesla acknowledged in its proxy that Wilson-Thompson did not reassess the amount or terms of Musk's compensation, "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." It also considered what it described as support from institutional investors, including four of the Top 10 who sought a meeting with Tesla's chair to support the plan.

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 in an interview that Tesla's

attempt to avoid reassessing the old plan — already judged a breach — or consider it anew despite indefensible retroactive terms will likely bring new litigation.

In a separate public blog post, Lipton pointed out as "obvious issues" the question of Wilson-Thompson's independence, the completeness and accuracy of the company's proxy statement, and "the suggestion that only a captured board would even make these proposals."

Even the charter change purportedly seeking to ratify the defective compensation approval, she said, addresses the company's statutory charter duty without dealing with fiduciary obligations.

Charles Elson, retired professor of governance at the University of Delaware and founding director of its Weinberg Center for Corporate Governance, said Tesla's apparent intent to reward Musk for his past performance would raise waste claims in Chancery regardless of a Texas move.

"Shareholders can give away corporate assets with no purpose, but it has to be unanimous," Elson said. "Delaware law protects all shareholders, not just the minority. That's the whole point of our law. What you're seeing is a move that seeks to avoid a Delaware judgment."

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, described Tesla's plan as "a bold move."

Nevertheless, he said, the company's plan also sets up possible thorny questions, including whether the company will need a unanimous vote to approve the purportedly unfair deal, and how a reincorporation in Texas would affect claims in Delaware.

"Right now the plaintiff's lawyers are saying, 'We just saved the company \$50 billion, and we'll take our shares of this in stock.' But if the stockholders approve this, what has been gained?"

In the background, too, is concern over the approval in Texas of a new business court system, to be in operation by September. That court and its appellate court could address the same sorts of corporate and commercial law issues handled by Delaware, albeit without the same, vast body of law and precedent and perhaps with a different perspective.

As has been the case after other states, including Nevada, sought to topple Delaware as a corporate charter and business court magnet, those close to Delaware's system point to the Chancery Court's long body of law and record of fairness as tamping down worry that Tesla will trigger an exodus.

"Tesla's one public company. It's significant, but it's among thousands," Hamermesh said. "Unless it triggers an exodus of some sort, and I don't think it will, people might just say, 'Goodbye Elon. It's been nice knowing you.'"

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.

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 Tornetta et al. v. Musk et al., case number 2018-0408, in the Court of Chancery of the State of Delaware.

--Editing by Adam LoBelia.



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Ex-Autonomy Tech Exec Doubted 'Bizarre' \$6M Deal, Jury Told

By **Dorothy Atkins**

Law360 (April 23, 2024, 10:19 PM EDT) -- Autonomy's ex-chief technology officer testified Tuesday in the California federal fraud trial of former CEO Michael Lynch that he had concerns about Autonomy's "bizarre" 2010 deal to sell \$6 million in repackaged hardware, which prosecutors allege was never delivered and was only used to artificially inflate Autonomy's revenues.

Christopher Goodfellow's comments came during his brief redirect examination in which a federal prosecutor asked Goodfellow to describe in one word Autonomy's \$6 million deal in December 2010 to supply refurbished hardware to Video Monitoring Services, which was pushed into bankruptcy shortly after.

"Bizarre," Goodfellow replied.

"Why bizarre?" the prosecutor asked.

"It didn't make sense," Goodfellow said.

Goodfellow explained that the transaction, which was reported in Autonomy's 2010 fourth-quarter revenues even though the hardware hadn't been delivered, claimed to have sold repurposed hardware to VMS. But Goodfellow didn't believe it was technically possible to repurpose the hardware Autonomy owned for VMS' use, and the purchase orders and inventory schedules didn't match.

"It just seemed extremely strange," he said.

The prosecutor asked if it was obvious to him that the deal was strange, and Goodfellow replied, "yes." When asked why he didn't raise his concern at the time, Goodfellow expressed his regret.

"To be honest, I wish that I had," he said.

Goodfellow is one of the latest witnesses to take the stand in a monthslong conspiracy and fraud trial that began **March 18** against Lynch and Autonomy's former Vice President of Finance Stephen Chamberlain over HP Inc.'s \$11.7 billion October 2011 acquisition of the U.K.-based technology company.

Goodfellow first took the stand Monday to offer testimony supporting the government's charges that Lynch and Chamberlain artificially inflated Autonomy's revenues in the months leading up to the HP acquisition by cutting a series of allegedly worthless transactions, while falsely depicting the deals to HP as significant longterm revenue boosters.

Lynch, 58, who reaped roughly \$804 million from the sale, is also charged with securities fraud.

The allegedly worthless deals include a transaction in which Autonomy acquired FileTek StorHouse software for tens of millions of dollars, Autonomy's 2010 deal to sell \$6 million in refurbished hardware to VMS and a transaction purportedly attempting to hide Autonomy's failed efforts to cut a €70 million deal to sell software to the Vatican.

During Goodfellow's cross-examination, Chamberlain's counsel, Michael C. Landman of Bird Marella Rhow Lincenberg Dooks & Nessim LLP, tried to get the witness to concede that he never told

Chamberlain or other Autonomy executives that it was unusual or impractical to repurpose hardware that VMS needed.

"The concept of repurposing hardware wasn't unusual — you had done it before," Landman asked.

Goodfellow agreed that he had repurposed hardware, but he said he had only done it "on a small scale," and he noted that typically hardware that other companies used, such as the hardware Autonomy owned, isn't repackaged and sold to other companies because it can pose "legal, practical and technical" concerns.

During his re-cross-examination, Landman also got Goodfellow to acknowledge that he didn't know whether Chamberlain compared VMS purchase orders and Autonomy's hardware inventory schedules.

"I don't know what Steve did with those particular emails," Goodfellow said.

Goodfellow also testified Tuesday that he had been surprised to learn in late 2009 that Autonomy had purchased FileTek software for roughly \$8 million without informing him, even though he was the company's technology chief at the time.

He said he believed the software needed to be tested before agreeing to buy it, and "I would want more due diligence, personally."

But during his cross-examination by Lynch's defense attorney, Celeste Koeleveld of Clifford Chance LLP questioned Goodfellow on dozens of emails he sent and received between 2009 and 2011. She tried to get Goodfellow to concede that FileTek's software provided Autonomy's clients with multi-year licenses that offered valuable, long-term data processing capabilities with cutting-edge, "structured probabilistic engine" search technology, or SPE, that could have proven to be the "holy grail" of data processing over time.

Goodfellow acknowledged that if the software had been able to process older databases using SPE technology, it could have given Autonomy an advantage in the market. But he repeatedly doubted SPE's capabilities and its compatibility with Autonomy's intelligent data operating layer, or IDOL, server.

"Just because IDOL is installed, doesn't mean that the SPE functionality is available for use by the customer," he explained.

Koeleveld also tried to get Goodfellow to acknowledge that although the Vatican had decided to purchase software from another company in an \$11.5 million deal, there was "still room" for Autonomy to try to cut a deal with the Vatican for other services. Goodfellow agreed.

"Yes," he said. "I think we're talking in theoreticals, but yes."

Landman additionally got Goodfellow to concede that prior to the HP merger, he had "checked and tweaked" certain Autonomy cost models provided to a financial analyst, and that Goodfellow didn't raise concerns when Chamberlain wrote in a December 2010 email that the "specificity" of the type of refurbished hardware provided in the VMS deal was up to Goodfellow and the customer and not Chamberlain.

"He's saying, 'You figure it out?'" the attorney asked.

"Correct," Goodfellow replied.

Trial will continue Wednesday with the parties calling **back to the stand** Joel Scott, who served as general counsel for Autonomy in the U.S. from 2009 to 2012.

The executives' trial follows ex-Autonomy Chief Financial Officer Sushovan Hussain's **April 2018 jury trial conviction** on **related** charges. He has since been **sentenced** to five years in prison and ordered to pay \$4 million in fines, and in 2020 the Ninth Circuit rejected his **appeal**.

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 Bonnie Eslinger, Richard Crump and Christopher Crosby. Editing by Michael Watanabe.

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Judge Allows \$956M Atty Fees In 3M, DuPont PFAS Settlements

By **Emily Field**

Law360 (April 23, 2024, 8:23 PM EDT) -- A South Carolina federal judge on Tuesday signed off on attorney fees totaling more than \$956 million in settlements with 3M and DuPont over so-called forever chemicals in firefighting foam that contaminated drinking water, saying that another group of lawyers may not have been able to reach the same outcome.

U.S. District Judge Richard Gergel approved \$94.8 million in fees and \$2.14 million in costs for counsel representing public water systems in the DuPont deal. In the same **motion**, he also approved \$840 million in fees and \$19.25 million in costs in the 3M deal.

The \$12.5 billion deal with 3M and the \$1.18 billion with DuPont de Nemours Inc., Chemours and Corteva over PFAS contamination have both received final approval by the judge.

The litigation over the claims that the companies leached perfluoroalkyl and polyfluoroalkyl substances, or PFAS, into local drinking and bathing water involved understanding the scientific and legal issues, as well as how public water systems work and how they should be compensated, the judge said.

"Class counsel and the [plaintiffs executive committee] possess such attributes and are some of the most qualified mass tort litigators in America," the judge said. "A different group of lawyers may not have been able to achieve the same result."

More than 300 lawsuits have been filed over PFAS contamination since 2018, with many being consolidated in the South Carolina-based MDL focused on pollution involving the chemicals in aqueous film-forming foam used in firefighting applications.

PFAS chemicals, which have been used by companies such as DuPont and 3M to manufacture products like Teflon, firefighting foam and water-resistant fabrics, have been shown to be deleterious to health, including birth defects, increased rates of cancer, and elevated cholesterol and obesity rates.

In early April, Judge Gergel signed off on the **deal** between 3M and about 12,000 public water, saying that otherwise, it would take years to try the cases.

Without the settlement, it could take up to a decade to litigate the cases, even though the U.S. Environmental Protection Agency is expected shortly to issue a rule limiting PFAS levels, the judge said. Preparing cases for trial would also cost hundreds of thousands of dollars, and verdicts in favor of the water systems would also go through protracted appeals, he said.

The 3M deal was announced in June and was later revised after opposition by the attorneys general of 20 states, the District of Columbia, and the commonwealths of the Northern Mariana Islands and Puerto Rico to an indemnification clause that could have shifted future liability to local ratepayers, which 3M dropped.

Judge Gergel **approved** the DuPont deal in February, after rejecting objections from the Washington cities of Vancouver, DuPont and Tacoma, as well as by the North Texas Municipal Water District, among others, which claimed the deal does not compare the value of the settlement to the damages that could have been obtained at trial.

The class certified under the agreement consists of all public water systems in the country that draw or otherwise collect water from any water source that was tested or analyzed for PFAS and found to contain them at any level, on or before the settlement was reached. The class also includes all public water systems in the U.S. subject to monitoring rules or required under state or federal law to test any of their water sources for PFAS.

Representatives for DuPont and 3M declined to comment Tuesday. Representatives for the other parties didn't immediately respond to requests for comment.

3M is represented by Daniel L. Ring, Michael A. Olsen and Richard F. Bulger of Mayer Brown LLP and Brian Duffy of Duffy & Young LLC.

The interim co-lead class counsel for the MDL are Michael A. London of Douglas & London PC, Scott Summy of Baron & Budd PC, Paul J. Napoli of Napoli Shkolnik PLLC, Joe Rice of Motley Rice LLC and Elizabeth Fegan of FeganScott.

Dupont, Chemours and Corteva are represented by Shook Hardy & Bacon LLP, Norris McLaughlin & Marcus PA, Hood Law Firm LLC, Wyche PA and Bartlit Beck LLP.

The cases are City of Camden et al. v. 3M Co., case number 2:23-cv-03147, and City of Camden v. E.I. du Pont de Nemours & Co. et al., case number 2:23-cv-03230, in the U.S. District Court for the District of South Carolina.

--Additional reporting by Madeline Lyskawa. Editing by Adam LoBelia.

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Monsanto Judge Slashes \$857M PCB Jury Verdict

By **Rachel Riley**

Law360 (April 23, 2024, 11:13 PM EDT) -- A Washington state judge slashed a nearly \$860 million PCB poisoning verdict against Monsanto by roughly half on Tuesday, while the company sought to avoid future losses by moving to sever an upcoming 14-plaintiff trial in another toxic tort stemming from the same Evergreen State school site.



A PCB poisoning verdict against Monsanto has been slashed to \$438 million by a Washington state judge overseeing claims that polychlorinated biphenyls emitted by light fixtures and other building materials at the Sky Valley Education Center sickened Angela "Michelle" Bard, her two daughters and four other women. (AP Photo/Seth Perlman, File)

In a **written order**, King County Superior Court Judge Jim Rogers reduced a principal judgment to \$438 million, down from the **\$857 million** jurors previously awarded to Angela "Michelle" Bard, her two daughters and four other women following a trial last fall on claims they were sickened by polychlorinated biphenyls emitted by light fixtures and other building materials at the Sky Valley Education Center. The judgment debtor is listed as Pharmacia LLC, a corporate spinoff that Monsanto has agreed to defend in litigation stemming from its manufacture of PCBs from the 1930s to 1977.

Jurors determined at the conclusion of a nearly two-month trial in December that the Monsanto spinoff was liable for selling unsafe PCBs without providing adequate warnings to commercial and industrial purchasers who for decades used the product in light fixtures and other consumer goods, allocating the plaintiffs \$784 million in punitive damages on top of \$73 million in compensatory damages. The verdict marked another loss for the chemical giant in the **series of cases** brought by former students, their

parents and school staff members at Sky Valley, a home-school education center about 35 miles northeast of Seattle that was previously Monroe Middle School.

Following the entry of the initial judgment on Jan. 5, Pharmacia argued in a **Jan. 12 motion** that the jury's decision to award a "shocking" \$112 million in punitive damages to each of the seven plaintiffs in the Bard case was "arbitrary and excessive." The company argued that the penalties exceed constitutional limits, asking the court to reduce each plaintiff's punitive damage award to an amount no greater than a 1:1 ratio to compensatory damages. Pharmacia also sought to have the punitive awards further reduced to zero, under the law of Monsanto's home state in Missouri, because it already faces more than \$647 million in judgments for punitive damages for Sky Valley plaintiffs in previous trials.

Monsanto and its affiliates **have appealed** losses in the Sky Valley cases, nine of which have gone to trial.

The families bringing the Bard case **countered** Monsanto's motion, saying they presented evidence at trial of Monsanto's "reprehensible" conduct, including its "failure to provide outsiders the same warnings it provided its employees and deliberate ignorance regarding the full extent of the dangers its PCBs posed to those likely to be exposed to them."

The families also contended Monsanto was not entitled to an offset for punitive damages awarded in other Sky Valley cases because those judgments have yet to be paid, and each of the awards is plaintiff-specific. The plaintiffs added that Monsanto "unreasonably continued its manufacture and unrestrained sale of PCBs after acquiring actual knowledge of the dangerous nature of its product, negating any right to offset that might otherwise exist under Missouri law."

In the order issued Tuesday, Judge Rogers stopped short of nixing the punitive award altogether in the Bard case but decided to reduce the jury's punitive damage findings "to a five-to-one ratio between punitive and compensatory damages on an individual plaintiff basis." The judge also granted Pharmacia's request to offset the new principal judgment of \$438 million by about \$1.5 million based on awards each plaintiff had already received in a settlement with the local school district.

In a **separate order**, Judge Rogers rejected Pharmacia's renewed bid for a judgment as a matter of law or, alternatively, a new trial. The judge issued a **third order** on Tuesday declining to issue a directed verdict regarding Pharmacia's affirmative defense regarding the statute of repose.

Monsanto Co. filed **a motion** in another case in the same state superior court on Monday, seeking to sever the claims of former student Ethan Burke and more than a dozen other Sky Valley plaintiffs expected to take their PCB poisoning allegations to a single jury in an upcoming trial. Monsanto, along with Pharmacia and another corporate affiliate, said the 14 children and parents would be the largest group yet to argue their claims in one trial. The companies say trying them all together would make it impossible for jurors to determine whether the type of PCB exposure alleged by each person is responsible for their various injuries.

"Plaintiffs' counsel have expressly invited that sort of improper, broad-brush decision-making by urging the juries to gloss over deficiencies in their individual causation claims and instead consider PCBs as the 'common denominator' among 'unrelated adults,' the company said. "But due process requires the jury to sift through the evidence and make individualized causation decisions for each Plaintiff."

A Monsanto spokesperson said Tuesday that the company was pleased by Judge Rogers' decision to reduce the verdict in the Bard case but still believed the damages amount was excessive, given that testing "demonstrates that plaintiffs were not exposed to unsafe levels of PCBs."

"Significantly, none of the [Sky Valley Education Center] trials to date have been subject to appellate review, which is important given that Bard and other cases have been tried under mostly similar rulings, and any errors at trial could affect multiple cases," the spokesperson said.

Henry G. Jones of Friedman Rubin PLLP, representing the Sky Valley plaintiffs, told Law360 that Monsanto's motion for separate trials in the Burke case is part of its ongoing strategy to stall cases connected to the school.

"Monsanto's only real defense to these cases is to try to create confusion and delay," Jones said in an email. "This is another effort to advance that strategy."

The Sky Valley plaintiffs are represented by Friedman Rubin PLLP and Pfau Cochran Vertetis Amala PLLC. PWRFL and TL4J are also representing the plaintiffs in the Bard case.

Monsanto and Pharmacia are represented by Bryan Cave Leighton Paisner LLP and Shook Hardy & Bacon LLP. Corr Cronin LLP and Irwin Fritchie Urquhart Moore & Daniels LLC are also representing the companies in the Burke case.

The cases are Angela M. Bard et al. v. Pharmacia LLC, case number 21-2-14305-5, and Leah Burke et al. v. Monsanto Co. et al., case number 18-2-58379-9, in King County Superior Court, Washington.

--Additional reporting by Greg Lamm. Editing by Peter Rozovsky.

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9th Circ. Backs Class Cert. In Pet Supplement False Ad Suit

By **Lauren Berg**

Law360 (April 22, 2024, 9:23 PM EDT) -- The Ninth Circuit on Monday upheld certification of a consumer class accusing health supplement company Nutramax of falsely marketing Cosequin as promoting healthy joints in dogs, saying an economics expert could use a generic and "otherwise reliable" damages model without applying it specifically to the class at this stage.

In a published **opinion**, a three-judge panel affirmed a California federal judge's certification of a class of consumers — led by dog owners Justin Lytle and Christine Musthaler — who claim Nutramax Laboratories and Nutramax Laboratories Veterinary Sciences violated the California Consumers Legal Remedies Act by marketing Cosequin as a health supplement that would benefit their pets' joints and mobility when there is no evidence the product provides those benefits.

"We conclude that, contrary to Nutramax's contention, there is no general requirement that an expert actually apply to the proposed class an otherwise reliable damages model in order to demonstrate that damages are susceptible to common proof at the class certification stage," according to the opinion written by U.S. District Judge Jed S. Rakoff.

"Rather, we hold that class action plaintiffs may rely on a reliable though not-yet-executed damages model to demonstrate that damages are susceptible to common proof so long as the district court finds that the model is reliable and, if applied to the proposed class, will be able to calculate damages in a manner common to the class at trial," it states.

The consumers, who launched their suit in May 2019, take issue with four statements that appear on Cosequin product labels: "Joint Health Supplement"; "Use Cosequin to help your pet Climb stairs, Rise and Jump!"; "Supports Mobility for a Healthy Lifestyle"; and "Mobility, Cartilage and Joint Health Support," according to the opinion.

Those statements are bunk, the consumers claim, arguing that "the only two peer-reviewed, double-blinded, randomized controlled trials that have been conducted on Cosequin's efficacy have concluded that Cosequin confers no more benefit to canine joint health than a placebo."

In May 2022, U.S. District Judge Fernando M. Olguin certified class of California residents who bought Cosequin DS Maximum Strength Chewable Tablets, Cosequin DS Maximum Strength Plus MSM Chewable Tablets and Cosequin DS Maximum Strength Plus MSM Soft Chews.

Nutramax was then granted permission to file the current interlocutory appeal, challenging the district court's findings that damages are susceptible of common proof and that causation and reliance are susceptible of common proof.

To establish damages on a classwide basis, the consumers put forward testimony by Dr. Jean-Pierre Dubé, a professor of marketing at the University of Chicago Booth School of Business, who proposed to conduct a "conjoint survey" that can test the economic value that a consumer places on a given product feature, such as a particular package statement, according to the opinion.

To conduct the survey, a researcher shows the product to participants with and without certain features, and then uses the responses to calculate the economic value consumers place on that feature, according to the opinion.

At that stage of the case, Dubé had not applied a conjoint analysis to a representative sample in the Cosequin case, but instead looked at market data and documents obtained during discovery to determine that a conjoint survey would "successfully isolate the economic damages associated with the challenged [product] claims," the opinion says.

Nutramax criticized Dubé for not conducting a survey and completing his analysis, but the district court found that such conjoint surveys are "a well-established method for measuring class-wide damages in CLRA mislabeling cases," according to the opinion. The judge also pointed out that a plaintiff does not have to execute a proposed conjoint analysis to show that damages are applicable on a classwide basis.

The appellate panel agreed, writing in its opinion Monday that class action plaintiffs need not prove their case through common proof at the class certification stage. Instead, they must show they will be able to prove their claims through common proof at trial, according to the opinion.

"We thus hold that class action plaintiffs may rely on an unexecuted damages model to demonstrate that damages are susceptible to common proof so long as the district court finds, by a preponderance of the evidence, that the model will be able to reliably calculate damages in a manner common to the class at trial," the panel said.

The panel rejected Nutramax's argument that the theoretical possibility that Dubé's model, when executed, will reveal no damages undermines predominance, saying that result would still be common to the class, according to the opinion.

Consumer attorney Mark Sigmon of Milberg Coleman Bryson Phillips Grossman PLLC told Law360 in a statement Monday that the panel's decision "correctly recognizes that class actions can and should be certified if there are common issues, that you don't have to prove all of your damages at the class certification stage, and that California law in particular allows mislabeling class actions if a reasonable person would be misled by the label."

"Those are important principles not just in this case, but in many others," Sigmon added.

Counsel for Nutramax did not immediately respond to a request for comment.

U.S. Circuit Judges A. Wallace Tashima and Holly A. Thomas and U.S. District Judge Jed S. Rakoff, sitting by designation, sat on the panel that reached Monday's decision.

The consumers are represented by Mark Sigmon, Greg Coleman and Adam A. Edwards of Milberg Coleman Bryson Phillips Grossman PLLC, Michael H. Pearson and Daniel L. Warshaw of Pearson Simon & Warshaw LLP, and Matt Schultz of Levin Papantonio Rafferty Proctor Buchanan O'Brien Barr & Mougey PA.

Nutramax is represented by David R. Carpenter, Sean A. Commons, Nicole M. Baade, and Amy P. Lally of Sidley Austin LLP and Joshua A. Glikin of Bowie & Jensen LLC.

The case is Justin Lytle et al. v. Nutramax Laboratories Inc. et al., case number 22-55744, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Peter Rozovsky.