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April 25, 2024, 1:02 PM PDT
Anadarko Gets New Chance to Fight Investors' Class Status Proof
By Martina Barash
Documents

- 5th Cir. Docket
- Court Opinion

- Parties point to different after-market announcements
- Stock market's reaction to news events at center of appeal

Bloomberg Law News 2024-04-25T18:24:29063097797-04:00
Anadarko Gets New Chance to Fight Investors' Class Status Proof

By Martina Barash 2024-04-25T16:02:44000-04:00

- Parties point to different after-market announcements
- Stock market's reaction to news events at center of appeal

Anadarko Petroleum Corp. will get a chance to submit evidence about what caused a 2017 stock drop at the center of a securities fraud case after the Fifth Circuit said Thursday that investors can't proceed as a class for now.

Shareholders say the company misled them about a new oil field it was developing until it announced a roughly \$900 million write-off for the project. Anadarko says a different piece of adverse news—its role in a Colorado home explosion—caused the stock price decline.

"Our adversarial system of justice requires that we give both sides full and fair opportunity to present their strongest possible arguments to the court," Judge James C. Ho said for the US Court of Appeals for the Fifth Circuit.

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

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

The company disclosed after trading on May 2, 2017, that it was suspending its appraisals of the field, "resulting in \$435 million in expensed suspended exploratory well costs and a \$467 million impairment," according to a September 2022 order in which Judge Charles Eskridge of the US District Court for the Southern District of Texas certified the class.

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

Anadarko's common stock price fell approximately 8% on the following day, May 3, 2017.

Effect on Market

Class certification hinges on the issue of what affected the stock price because the investors would need to show they relied on the alleged misrepresentation on a classwide, rather than an individual, basis. Evidence that the market reacted to the news of Anadarko's oil field write-off allows the investors' reliance to be presumed classwide, according to Eskridge.

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

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

Anadarko argued that Eskridge abused his discretion in relying on the investors' evidence while refusing its own.

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

Ho expressed concern during oral argument about whether the adversarial process was complete without the sur-reply, but also wondered whether the outcome would have changed had the company been able to file the brief.

"Ordinarily, sur-replies are disfavored, Ho said in the unanimous opinion. "But when a party raises new arguments or evidence for the first time in a reply, the district court must either give the other party an opportunity to respond or decline to rely on the new arguments and evidence," he said. Here, the investors' brief presented new evidence, and the district court considered it in its class certification decision.

The lower court also should have conducted a rigorous *Daubert* analysis of the investors' expert evidence, he said.

The case will go back to the lower court, where Anadarko will be allowed to file a sur-reply and the judge must consider the company's *Daubert* challenge.

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

Robbins Geller Rudman & Dowd LLP, Kendall Law Group LLC, and Ajamie LLP represented the investors. Cravath, Swaine & Moore LLP represented Anadarko.

The case is Georgia Firefighters' Pension Fund v. Anadarko Petroleum Corp. , 5th Cir., No. 23-20424, 4/25/24 .

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News from Bloomberg Terminal

April 25, 2024, 10:19 AM PDT

Pegasystems Makes \$35M Deal Over Alleged Misstatements (Correct)

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

By Ufonobong Umanah

(Bloomberg Law) --

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 what the district court in the securities case has described as "'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 Treffler.

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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(Updates headline of April 24 story to clarify that Pega faced allegations of misstatements at time of settlement. Updates paragraph 2 to add attribution to district court.)

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McDermott Merger Subclass Can Be Approved Now, Magistrate Says

By Martina Barash

- Merged companies' shareholders can't be in single class
- Magistrate clarifies that one subclass meets requirements

Bloomberg Law News 2024-04-26T09:43:36471533677-04:00

McDermott Merger Subclass Can Be Approved Now, Magistrate Says

By Martina Barash 2024-04-25T14:40:30000-04:00

- Merged companies' shareholders can't be in single class
- Magistrate clarifies that one subclass meets requirements

A securities suit over McDermott International Inc.'s 2018 merger with Chicago Bridge & Iron Co. is ready for former CB&I shareholders to get class status, a federal magistrate judge said.

Magistrate Judge Andrew M. Edison recommended separate proposed subclasses for investors who purchased McDermott stock directly, and those who converted CB&I stock to McDermott stock through the merger. His report Wednesday to the US District Court for the Southern District of Texas amended a recommendation he made in February, clarifying that the lead plaintiff, a pension fund that held CB&I shares, satisfies the requirements for class certification.

The court should grant certification for that subclass, he said.

McDermott and CB&I announced in 2017 that they would merge in a \$6 billion all-stock deal combining two major engineering and construction companies with a focus on the energy industry. Lead investor Nova Scotia Health Employees' Pension Plan alleges that McDermott misled investors about its operations and prospects and failed to disclose problems with the integration of CB&I's business, as well as headwinds that would negatively impact its revenue and earnings.

Investors were also allegedly denied an opportunity to make informed decisions when voting on the merger due to the misstatements, the complaint said.

Two months after the merger with CB&I closed, McDermott reported a \$221 million change in cost estimates for four large construction projects in CB&I's contractual backlog. Negative disclosures continued in the next quarter, prompting McDermott's share price to fall by nearly 40% in October 2018.

Class Conflicts

Edison recommended in February that Judge George C. Hanks Jr. deny class certification with permission to request it again. Certification is inappropriate because former shareholders of CB&I, including the Nova Scotia pension plan, have a fundamental conflict with the rest of the proposed class, Edison said.

"Unlike the inflation in McDermott's stock, which unquestionably harmed all class members, the inflation in CB&I's stock prior to the Merger was a *benefit* to CB&I shareholders," he said.

In his recommendation Wednesday, Edison said that it's "too early to say whether former CB&I shareholders derived a *net* economic benefit from the alleged fraud." That factual issue will be determined later, he said. But there is a fundamental conflict, he reiterated.

Edison said his earlier recommendation "could have been clearer about the next procedural steps." There's "no need to delay certifying a class of CB&I shareholders when Nova Scotia and its counsel satisfy all the Rule 23 requirements for such a class," he said.

Pomerantz LLP, Briscoe Law Firm PLLC represent Nova Scotia Health. Reynolds Frizzell LLP, Kendall Law Group PLLC, Wolf Popper LLP, Bernstein Litowitz Berger & Grossmann LLP, and Chambers Law Group LLC represent other plaintiffs. Baker Botts LLP represents McDermott.

The case is *Edwards v. McDermott Int'l, Inc.*, 2024 BL 140336, S.D. Tex., No. 4:18-cv-04330, 4/24/24.

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April 26, 2024, 9:09 AM PDT

QuidelOrtho Leaders Allegedly Misled on Test Revenue, OutlookBy [Martina Barash](#)**Documents**📄 [Docket](#)📄 [Complaint](#)📄 [Company Info: QuidelOrtho Corp.](#)

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-03176](#)

Bloomberg Law News 2024-04-26T13:02:48426931042-04:00

QuidelOrtho Leaders Allegedly Misled on Test Revenue, Outlook

By Martina Barash 2024-04-26T12:09:31000-04:00

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-03176](#)

QuidelOrtho Corp.'s former CEO and other members of leadership breached their duties to the company when they concealed diminishing Covid-19 test revenue and setbacks for a viral test under development, an investor alleges.

The inflated stock price caused QuidelOrtho to overpay for stock repurchases, and stock drops after the company's eventual disclosures opened it to a class action, shareholder Matthew Whitfield says. He filed his derivative suit on behalf of the company Thursday in the US District Court for the Southern District of New York.

Board members and executives "assured the public that QuidelOrtho was well positioned to maintain a stable, high margin revenue stream from its respiratory business," including Covid-19 tests, despite the disease "transitioning into an endemic," Whitfield says. Its strategies included launching launch a new test, the Savanna Respiratory Viral Panel-4, he says.



The company must defend itself in a proposed class action filed April 12, Whitfield says. In that suit, investors brought securities fraud claims over a 32% stock drop Feb. 14 following a disappointing earnings report and a 10% stock drop April 2 after QuidelOrtho said it was withdrawing its viral panel test from Food and Drug Administration consideration.

Whitfield brings claims for violation of proxy statement requirements under Section 14(a) of the Securities Exchange Act; breach of fiduciary duty; unjust enrichment; abuse of control; gross mismanagement; and waste of corporate assets. He seeks compensatory and punitive damages, along with a constructive trust for the defendants' alleged unjust enrichment, including salaries, bonuses, and stock awards.

QuidelOrtho doesn't comment on pending litigation, it said in an email Friday.

Rigrodsky Law PA and the Grabar Law Office represents Whitfield.

The case is Whitfield v. Beuchler, S.D.N.Y., No. 1:24-cv-03176, complaint 4/25/24.

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April 25, 2024, 3:15 PM PDT

Tesla Pushes Back on Investor's Latest Move in Musk Pay Row (1)

By Jef Feeley

Bloomberg Law News 2024-04-26T09:42:21517734372-04:00

Tesla Pushes Back on Investor's Latest Move in Musk Pay Row (1)

By Jef Feeley2024-04-25T18:15:51356-04:00

Tesla Inc. says the shareholder who won a court order in Delaware killing co-founder Elon Musk's \$56 billion pay package is jumping the gun in asking the judge to bar the billionaire from moving the executive-compensation dispute to Texas.

Tesla investor Richard Tornetta is raising false alarms about the company's proxy asking shareholders to support reincorporating the manufacturer in Texas and reinstate Musk's voided pay, John Reed, one of Tesla's attorneys, said in a Delaware Chancery Court filing Thursday.

Musk has been threatening to move Tesla's corporate home from Delaware to Texas after Judge **Kathleen St. J. McCormick** in January rescinded his record-setting pay package over director conflicts and Tesla's failure to properly disclose the plan's details. Tornetta wants McCormick to issue an order barring Musk from litigating the pay issue anywhere other than Delaware.

Read More: Tesla Investor Asks Judge to Keep Musk Pay Fight in Delaware

"There are no pending or threatened actions in Texas or anywhere else" aimed at re-litigating the pay suit and Musk has done nothing that would interfere with McCormick issuing a final judgment in the case, Reed said in a letter to the judge.

Greg Varallo, one of Tornetta's lawyers, didn't immediately respond to an email seeking comment on Tesla's latest filing.

It's unclear what impact an order from McCormick retaining the dispute in Delaware would have on the case. 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.

McCormick has set a July 8 hearing to review a request by Tornetta's lawyers for attorney fees and issue a final order in the case. The investor's lawyers want the judge to rule on their injunction request before Tesla's June 13 annual meeting, when the proxy vote is due to take place.

In his letter, Reed said Tornetta's lawyers may be seeking to influence Tesla shareholders' decision on whether to support moving incorporation to Texas and reinstating for Musk the largest executive compensation package in US history.

Reed urged McCormick not to publicly respond to Tornetta's demand for an injunction against moving the case to Texas because it "might unfairly impact the stockholder votes at the company's annual meeting."

Tornetta's lawyers says a Texas move could allow Musk and his fellow directors to "evade, block, or otherwise interfere" with the judge's ruling on the billionaire's pay.

They also want McCormick to order the creation of an escrow account for 29 Tesla million shares, currently worth about \$5 billion — in keeping with their unusual request to be paid for their work in stock. The lawyers expressed concern about potentially having to also seek fee approval from a judge in Texas.

Reed argued that sequestering the shares would amount to "an impermissible pre-judgment attachment" of Tesla assets and criticized the Tornetta side's understanding of "the facts and mechanics" of how the company's stock is authorized.

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

(Updates with details from filing starting in eighth paragraph)

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Aerotech Sued Over Low-Yield Investments in Employee Stock Plan

By Jacklyn Wille

- **COURT:** W.D. Pa.
- **TRACK DOCKET:** [No. 2:24-cv-00618](#)

Bloomberg Law News 2024-04-26T09:44:0391819692-04:00

Aerotech Sued Over Low-Yield Investments in Employee Stock Plan

By Jacklyn Wille 2024-04-25T12:13:43000-04:00

- **COURT:** W.D. Pa.
- **TRACK DOCKET:** [No. 2:24-cv-00618](#)

Three former Aerotech Inc. workers filed a proposed class action saying their employee stock ownership plan was mismanaged because it parked too much money in cash-like investments that paid paltry returns.

The lawsuit, filed Wednesday in the US District Court for the Western District of Pennsylvania, challenges how Aerotech invests the portion of the plan that's not dedicated to holding stock in the company.

According to the workers, the company put more than \$10 million of the plan's assets in "cash equivalents" that returned less than 1.5% between 2018 and 2023. This "unusual and imprudent" strategy wasn't a suitable way to manage long-term retirement investments, the workers said.

Money market-style funds—those that prioritize liquidity and attempt to minimize risk—averaged returns of more than 3% over a recent 30-year period, while large company domestic stocks returned more than 10%, according to the lawsuit.

"Cash equivalents are appropriate only if the investor has a short-term investment objective, needs to preserve their principal balance, and cannot tolerate market risk," the workers said. "These investments are not designed or expected to provide competitive long-term growth needed by retirement plan participants such as Plaintiffs and the Class."

The lawsuit brings claims under the Employee Retirement Income Security Act on behalf of a proposed class of about 400 participants in the Aerotech stock plan.

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

Engstrom Lee LLC represents the workers.

The case is Schultz v. Aerotech, Inc. , W.D. Pa., No. 2:24-cv-00618, complaint 4/24/24 .

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NEWS

As Eli Lilly's Insulin Pricing Settlement Unravels, Lawyers Vow to Push Ahead

Lawyers touting a \$500 million settlement over insulin pricing are back at the drawing board after a judge refused to certify their class.

April 25, 2024 at 03:52 PM

Litigation



Amanda Bronstad
staff reporter



What You Need to Know

- In an April 12 letter, lawyers told U.S. District Judge Brian Martinotti that they would not be seeking approval of the Eli Lilly settlement.
- Eli Lilly had agreed to cap the price of insulin at \$35 per month for four years and provide a \$13.5 million cash fund for certain consumers.
- A dozen state attorneys general, some with their own insulin cases in multidistrict litigation, had objected to the Eli Lilly settlement.

Lawyers touting a \$500 million settlement over insulin pricing are back at the drawing board after a judge refused to certify their class.

Insulin prices have drawn the interest of federal and state regulators, many of which, including California, have sued manufacturers Eli Lilly and Co., Novo Nordisk Inc. and Sanofi-Aventis U.S. LLC and, in some cases, numerous pharmacy benefit managers.

Meanwhile, a consumer class action humming along for six years in U.S. District Court in the District of New Jersey reached the first substantive settlement, in which Eli Lilly agreed to cap the price of insulin at \$35 per month for four years and provide a \$13.5 million cash fund for certain consumers.

Then, last week, lawyers told U.S. District Judge Brian Martinotti that the deal was off.

“We write on behalf of the class plaintiffs and Eli Lilly and Company to inform the court that they will not be moving forward with preliminary approval and are terminating the settlement agreement,” lead plaintiffs lawyers Steve Berman, of Seattle’s Hagens Berman Sobol Shapiro, and James Cecchi, of Carella, Byrne, Cecchi, Brody & Agnello in Roseland,

New Jersey, wrote.

Their April 12 letter comes two months after Martinotti refused to certify a nationwide class of insulin consumers in the remaining litigation against the two other defendants, Novo Nordisk and Sanofi-Aventis. In a stipulation filed on Monday, both sides acknowledged the class certification order also pertained to Eli Lilly.

Plaintiffs lawyers are far from giving up, however. Hagens Berman partner Mark Vazquez, in Chicago, said plaintiffs plan to amend their complaint “in light of the changed circumstances following the court’s denial of class certification.”

“We are amending the complaint to address the court’s concerns,” he said.

“While Lilly will continue to defend itself from these allegations, Lilly’s commitment to patients remains the same,” Eli Lilly spokesperson Antoinette Forbes said in a statement. “Lilly was the first and still only company to cap what people pay at \$35 per month for all of our insulins, and the average monthly out-of-pocket cost for Lilly insulin is even lower, \$17.16. We also cut insulin prices by 70% and automatically capped monthly out-of-pocket costs at \$35 or less wherever possible, which should drive that average even lower.”

Novo Nordisk, in its own statement, clarified that it also had a \$35 insulin option and, as of Jan. 1, lowered its list prices on several products by up to 75%.

“Novo Nordisk believes that the allegations in the lawsuit are without merit, and we intend to vigorously defend against these claims,” spokesperson Jamie Bennett said.

A Sanofi-Aventis spokesperson did not respond to a request for comment.

‘Evidence Individual to Each Putative Class Member’

The lawsuits allege that drug manufacturers have intentionally allowed insulin prices to skyrocket. Initially, the consumer class action alleged federal racketeering claims, Vazquez said, plus state law consumer protection claims.

“The racketeering, the RICO claims, were knocked out on what was effectively a legal technicality called the ‘direct purchaser rule,’” he said. “That left us with the fraud and unfair practices claims.”

Vazquez said the complaint sought class certification based on the unfair practices claims.

In a Feb. 5 redacted version of his order, Martinotti found that the class could not be certified because plaintiffs failed to establish an “ascertainable loss” without “delving into evidence individual to each putative class member and their respective factual circumstances,” such as whether each class member got a rebate and their various health plans and insurers.

Vazquez said plaintiffs plan to move ahead with an amended complaint alleging that the list price of insulin is deceptive to consumers. That’s because manufacturers are raising prices on consumers in order to compete through “kickbacks to middlemen,” he said.

‘Phantom Consideration’

Last year, Arkansas, Illinois, Kansas, Mississippi and Montana sought to coordinate their attorneys general actions over insulin prices in Mississippi’s Southern District.

They asked to exclude the consumer class action, citing “material differences” in the claims, which don’t name pharmacy benefit managers. Lawyers in the consumer class action also referenced the pending Eli Lilly settlement. On Aug. 3, the U.S. Judicial Panel on Multidistrict Litigation sent the cases to Martinotti.

As the multidistrict litigation started up, about a dozen states, including Arkansas and Mississippi, intervened to object to the Eli Lilly settlement. They raised two concerns: the potential releases of the states' claims, and the settlement's "phantom consideration," particularly given that Eli Lilly, on its own, had already agreed to cap insulin prices at \$35 per month.

Plaintiffs lawyers, however, insisted that Eli Lilly's \$35 price for four years had an estimated \$500 million value.

In support of the settlement, Eli Lilly noted in court papers that it had no legal obligation to keep offering the \$35 price.

"But, through this settlement, plaintiffs have secured a guarantee that this offering will remain in place, regardless of changed market conditions, Lilly's competitors' actions, or any other business factors," wrote Eli Lilly attorney Melissa Geist of Reed Smith in Princeton, New Jersey.

Geist added: "A legally binding obligation to continue an affordability solution that is currently saving patients \$20 million per month is not 'phantom' consideration, especially considering that plaintiffs' case rests on novel legal theories no court has ever endorsed and fully explored through six years of litigation and discovery."

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April 25, 2024, 9:14 AM PDT
Ozempic Plaintiffs Committee Includes Motley Rice, Seven Others
By Shweta Watwe
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Bloomberg Law News 2024-04-26T12:56:09972630623-04:00
Ozempic Plaintiffs Committee Includes Motley Rice, Seven Others

By Shweta Watwe 2024-04-25T12:14:30000-04:00

A federal judge overseeing litigation over allegedly inadequate side effect warnings on Ozempic and similar drugs appointed eight firms to leadership roles on the plaintiffs’ committee.

Dozens of lawsuits have accused Ozempic and Wegovy maker Novo Nordisk AS, and other pharmaceutical companies making similar drugs, of downplaying severe gastrointestinal side effects associated with the drugs. Ozempic was originally formulated to be a diabetes drug that regulated blood sugar levels by slowing down the digestive system, but demand for it and similar drugs skyrocketed after they became known for also causing weight loss.

Judge Gene E.K. Pratter of the US District Court for the Eastern District of Pennsylvania on April 23 appointed attorneys from Morgan & Morgan PA, Susen Law Group, Motley Rice LLC, Levin Papantonio Rafferty Proctor Buchanan O’Brien Barr & Mougey PA, Pogust Goodhead, Johnson Becker PLLC, Alex Walsh Law, and DiCello Levitt to the plaintiffs committee

Attorneys from Fine Kaplan & Black RPC and Dilworth Paxson LLP were appointed liaison counsel for the plaintiffs

Plaintiffs say the pharmaceutical companies failed to warn doctors and patients that prescribed use could cause gastroparesis, a condition that affects digestive muscles and can cause painful side effects

The case is In re Glucagon-Like Peptide-1 Receptor Agonists (GLP-1 RAS) Prods. Liab. Litig. , E.D. Pa., No. 2:24-md-03094, 4/23/24 .

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US Supreme Court urged to strike lawyers' \$667 mln fee in Blue Cross case

 [reuters.com/legal/government/us-supreme-court-urged-strike-lawyers-667-mln-fee-blue-cross-case-2024-04-25](https://www.reuters.com/legal/government/us-supreme-court-urged-strike-lawyers-667-mln-fee-blue-cross-case-2024-04-25)

Mike Scarcella

The U.S. Supreme Court in Washington, U.S., April 23, 2024. REUTERS/Julia Nikhinson
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April 25 (Reuters) - The U.S. Supreme Court was asked on Thursday to strike down \$667 million in legal fees and costs won by the plaintiffs' lawyers in a \$2.7 billion class-action settlement with Blue Cross Blue Shield accusing it of nationwide insurance overcharges.

The petition , opens new tab at the Supreme Court was filed by a member of the class who had argued in the lower court that the fee amount was too high.

A U.S. appeals court last year upheld the settlement, rejecting challenges over legal fees and other provisions that were part of the insurer's landmark 2020 accord.

Health subscribers in the long-running litigation in Alabama federal court accused Blue Cross Blue Shield Association and related entities of unlawfully agreeing with each other not to compete, in violation of U.S. antitrust law.

Millions of class members allegedly paid higher insurance costs as part of the alleged conspiracy.

Attorneys for the subscriber plaintiffs did not immediately respond to a request for comment. Blue Cross denied the claims in agreeing to settle.

Blue Cross Blue Shield Association and a lawyer for objector David Behenna, who filed the Supreme Court challenge, declined to comment.

Behenna's petition argued that the fee should be no more than \$194 million, which was the "lodestar" amount, or the number of hours the lawyers said they worked multiplied by a prevailing hourly rate.

The award instead was based on a "percentage of the fund" calculation. The fee was 23.47% of the settlement fund, and it fell within a "range of reasonableness" of 20% to 25%, the 11th U.S. Circuit Court of Appeals found.

The petition said U.S. appeals courts are divided over whether trial judges are allowed to use the lodestar approach to determine fees in cases where lawyer or litigant secures a "common fund" to be shared.

"Federal courts are entirely failing to seriously scrutinize fee applications in common-fund cases," Behenna's petition said.

Behenna's challenge to the fee award is related to another pending case at the Supreme Court over the terms of the Blue Cross settlement.

In March, Home Depot filed [a challenge](#), opens new tab a challenge to the deal, telling the justices that the terms are too sweeping and will harm the ability of future private parties to sue Blue Cross Blue Shield over alleged violations of competition law.

The plaintiffs' lawyers and Blue Cross have not yet responded to Home Depot's petition.

The case is David G. Behenna v. Blue Cross Blue Shield Association et al, U.S. Supreme Court, unassigned.

For petitioner: Daniel Woofert of Goldstein, Russell & Woofert

For respondents: No appearance yet

Read more:

[Lawyers in Google browsing data case ask for \\$218 million fee award](#)

[Blue Cross Blue Shield must face Ford Motor antitrust claims, US judge rules](#)

[\\$2.7 bln Blue Cross antitrust settlement upheld by US appeals court](#)

[Class lawyers defend \\$667 mln fee award in insurance antitrust case](#)

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Reporting by Mike Scarcella

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<https://www.wsj.com/real-estate/warren-buffetts-real-estate-firm-settles-antitrust-matter-for-250-million-e77e87d8>

REAL ESTATE

Warren Buffett's Real-Estate Firm Settles Antitrust Matter for \$250 Million

Real-estate industry has now agreed to pay nearly \$1 billion to settle anticompetitive allegations

By [Laura Kusisto](#) [Follow](#) and [Nicole Friedman](#) [Follow](#)

Updated April 26, 2024 11:05 am ET



Berkshire Hathaway's HomeServices of America was the last remaining defendant in the antitrust case against NAR and four major brokerage firms. PHOTO: RICHARD DREW/ASSOCIATED PRESS

A real-estate brokerage firm that is part of Warren Buffett's conglomerate has reached a settlement in the landmark antitrust case against the industry, though the amount was a fraction of what the plaintiffs have aimed to recover.

HomeServices of America reached a nationwide \$250 million settlement, the company said Friday. That figure is higher than what any other individual brokerage has agreed to pay to settle claims that the real-estate industry used a commission structure that kept fees for agents artificially high.

Since the residential broker is a subsidiary of Buffett's Berkshire Hathaway BRK.A **-0.70%** ▼ , the plaintiffs hoped to collect a payout many times that amount. They had tried in court filings to tie the brokerage to its parent company, Berkshire Hathaway Energy.

Christopher Dusseault, an outside counsel for HomeServices, said the company told plaintiffs that Berkshire wasn't going to write a large check to settle the matter.

Benjamin Brown, a plaintiff attorney at Cohen Milstein, said plaintiffs can continue to pursue claims against Berkshire Hathaway Energy. "We don't accept that none of the Berkshire Hathaway entities have liability here," Brown said.

HomeServices was the last remaining defendant in the antitrust case against the National Association of Realtors trade organization and four major brokerage firms. With this latest settlement, real-estate firms and NAR have agreed to pay more than \$940 million to resolve the antitrust claims.

In October, plaintiffs won a \$1.8 billion verdict in Missouri after alleging that NAR and residential brokerages used a commission structure that kept fees for Missouri agents artificially high. A judge could have tripled that amount to more than \$5 billion.

Though additional brokerages are expected to reach settlements in similar lawsuits, it is clear that the plaintiffs are unlikely to collect on anything close to the amount that has been pledged so far.

Still, NAR has agreed to change the way the real-estate industry does business, namely through a settlement in March in which the powerful trade group agreed to rewrite the rules for how agents are compensated that could ultimately reduce the cost of buying and selling a home.

After legal expenses, the remaining settlement payments will eventually be distributed to recent home sellers around the U.S., a class of some 50 million people. Individual sellers are likely to receive nominal payouts.

The relatively modest financial settlements reflect what these companies and NAR could afford to pay without being pushed into bankruptcy, plaintiff lawyers have said.

Dusseault said HomeServices faced potential bankruptcy if it didn't settle. To even appeal the verdict it likely would have needed to post a bond, which a judge could have set in the billions of dollars.

If Berkshire had instead stepped in to bail out its subsidiary, it would have set a precedent that could make other companies under its umbrella an appealing target for litigation.

Write to Laura Kusisto at Laura.Kusisto@wsj.com and Nicole Friedman at nicole.friedman@wsj.com

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NOT FOR REPRINT

Federal Judge Grants Final Approval to Philips CPAP Settlement

Senior U.S. District Judge Joy Flowers Conti of the Western District of Pennsylvania granted final approval to a class action settlement over recalled Philips breathing devices, plus nearly \$100 million in attorney fees.

April 25, 2024 at 07:07 PM

Class Actions

By Amanda Bronstad | April 25, 2024 at 07:07 PM

The original version of this story was published on [The Legal Intelligencer](#)

Attorneys scored nearly \$100 million in attorney fees after a federal district court judge in Pennsylvania on Thursday granted final approval to a class action settlement over recalled Philips continuous positive airway pressure breathing devices.

Senior U.S. District Judge Joy Flowers Conti, who sits in the Western District of Pennsylvania, signed off on [the settlement](#), valued from \$479 million to more than \$600 million. The settlement resolves the economic damages of consumers who purchased CPAP and other devices that Philips recalled in 2021. The judge, who heard arguments earlier this month, rejected 78 objections to the settlement and awarded \$94.4 million in fees to the lawyers.

“The high participation rate was very compelling, the compensation was extremely fair, and the claims process was streamlined and easy,” said Chris Seeger of Seeger Weiss, co-lead plaintiffs’ counsel in the multidistrict litigation over the Philips recalled breathing machines. “This settlement is state of the art, and all those factors led to the approval of the court.”

Seeger also noted that, under the settlement’s provisions, class members could receive payments on time even if someone appeals the deal.

Seeger is co-lead counsel with Sandra Duggan, of Levin Sedran & Berman; Kelly Iverson of Lynch Carpenter; and Steven Schwartz of Chimicles Schwartz Kriner & Donaldson-Smith.

The claims period ends Aug. 9.

“We welcome the court’s final approval of the economic loss settlement in the U.S., which Philips announced in September last year,” Philips spokesman Steve Klink said in a statement.

1.6 Million Returned Their Devices

The settlement resolved claims by consumers of 10.8 million breathing devices recalled due to health risks associated with its sound-reducing foam. The settlement reimburses consumers for their purchases or rentals of the devices, which each cost between \$55.63 and \$1,552.25, and any other out-of-pocket costs. Users also will get \$100 for returning the devices.

Seeger said about 3 million class members have registered for benefits, and 1.6 million have returned their devices for payment.

The deal excludes more than 50,000 claims in the MDL involving personal injuries or medical monitoring.

On Oct. 10, Conti granted preliminary approval of the economic damages settlement after raising some concerns about the notice to class members.

In her final approval order, Conti found the settlement’s objections, most of which were filed by pro se class members, centered on two main issues: the deal did not provide them enough money, or class members had a misunderstanding that they were releasing their rights to personal injury claims.

She rejected all of them.

As to the fees, which lawyers sought months after her preliminary approval order, Conti found they were reasonable, particularly since the lodestar amount, which is the total hours billed multiplied by the blended hourly rate, was more than \$65.8 million.

In 2022, Conti [appointed more than 30 lawyers](#), including 18 women and eight attorneys of color, to lead the multidistrict litigation against Philips. She also named 10 attorneys on a leadership development committee, which is aimed at promoting lawyers who are younger or less experienced.

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SURVEYS & RANKINGS

California AG announces multimillion-dollar settlement with University of Phoenix over aggressive recruitment tactics

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Sam Ribakoff, Sergio Frez

Under the terms of the settlement, the for-profit University of Phoenix and its parent company would pay \$4.5 million and take responsibility for unlawfully soliciting service members on military sites.

(CN) — Under a proposed settlement agreement announced Thursday, the University of Phoenix and its parent company Apollo Education Group would pay \$4.5 million after authorities said they used illegal tactics to aggressively recruit members of the military to enroll as students.

The company has agreed to the deal — though at press time, a judge still needs to sign off.

In a complaint filed in state court in San Diego, the California attorney general's office claimed that starting in 2012 and ending in 2015, the company created a team of ex-military employees — dubbed National Defense Liaisons — whose main purpose was to enroll new students from communities of armed service members.

Some liaisons would use their personal military retiree identification cards to get into military installations, National Guard armories and reserve centers to solicit students collect information for future recruitment efforts. All this was done without approval by Department of Defense officials — and in places where commercial solicitation is prohibited.

The company also created custom-made coins with its logo on one side and the U.S. Department of Defense or military seals on the other.

According to the attorney general's office, these coins gave the false impression that the military endorsed the University of Phoenix, allowing the company “to trade upon the loyalty, trust, and affection that military personnel have for their country, their military service, and their fellow servicemembers.” In its complaint, the AG accused the company of violating California law on unfair competition and false advertising.

The proposed settlement would require the company to pay \$4.5 million in penalties. That money would go towards funding military-service relief organizations like the Navy-Marine Corps Relief Society, Army Emergency Relief, the Air Force Aid Society and Coast Guard Mutual Assistance.

The company would also have to comply with “strong injunctive terms that aim to substantially address and curb its improper military-recruitment tactics,” California AG Rob Bonta stated in a press release.

“Today’s settlement sends a strong message that schools who use predatory practices to recruit servicemembers and veterans will be held to account,” Bonta added. “California takes consumer protection seriously; we will vigorously protect those who have sacrificed so much to protect us.”

In his news release, Bonta linked efforts to recruit servicemembers to the “90/10 rule,” a provision in the Higher Education Act of 1965 which requires for-profit colleges to get at least 10% of their funding from sources besides federal student-aid programs.

For-profit colleges went after military students because — until recently — they received educational benefits from the Department of Defense, GI Bill funds, and the Coast Guard’s tuition assistance programs rather than standard federal student-aid programs. In 2014, the Department of Defense started limiting schools’ access to military installations.

In 2021, President Biden and Congress amended the Higher Education Act to close the loophole that allowed for-profit colleges to exploit the “90/10 rule.” The University of Phoenix had been the top recipient of GI Bill and other military education benefits funding for the past decade, Bonta added in the complaint.

Despite agreeing to the settlement, the University of Phoenix stressed in a statement of its own that it believed it hadn’t broken the law.

“As this settlement clearly indicates, the University denies any wrongdoing in this decade-old matter,” a spokesperson told Courthouse News.

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April 25, 2024, 1:20 PM PDT

FirstEnergy 1Q Adjusted Operating EPS Beats Estimates

By Bloomberg Automation

(Bloomberg) --

FirstEnergy reported adjusted operating earnings per share for the first quarter that beat the average analyst estimate.

FIRST QUARTER RESULTS

- Adjusted operating EPS 55c vs. 60c y/y, estimate 54c (Bloomberg Consensus)
- EPS 44c vs. 51c y/y, estimate 54c
- Revenue \$3.3 billion, +3.1% y/y, estimate \$3.18 billion

COMMENTARY AND CONTEXT

- "Despite a mild winter, we're off to a solid start in 2024."
- "Our first quarter financial results are above the midpoint of our guidance, reflecting strong execution across each of our businesses," said Brian X. Tierney, President and Chief Executive Officer.

NOTE

- For Bloomberg Consensus estimates used in this story see: FE Equity MODL
- 9 buys, 8 holds, 1 sell
- Conference call website

Statement: "FirstEnergy Announces First Quarter 2024 Financial Results"

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Tesla's Most Crucial Metric Drops to the Lowest in Three Years

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April 26, 2024, 10:07 AM PDT

Craig Trudell

Bloomberg Editorial

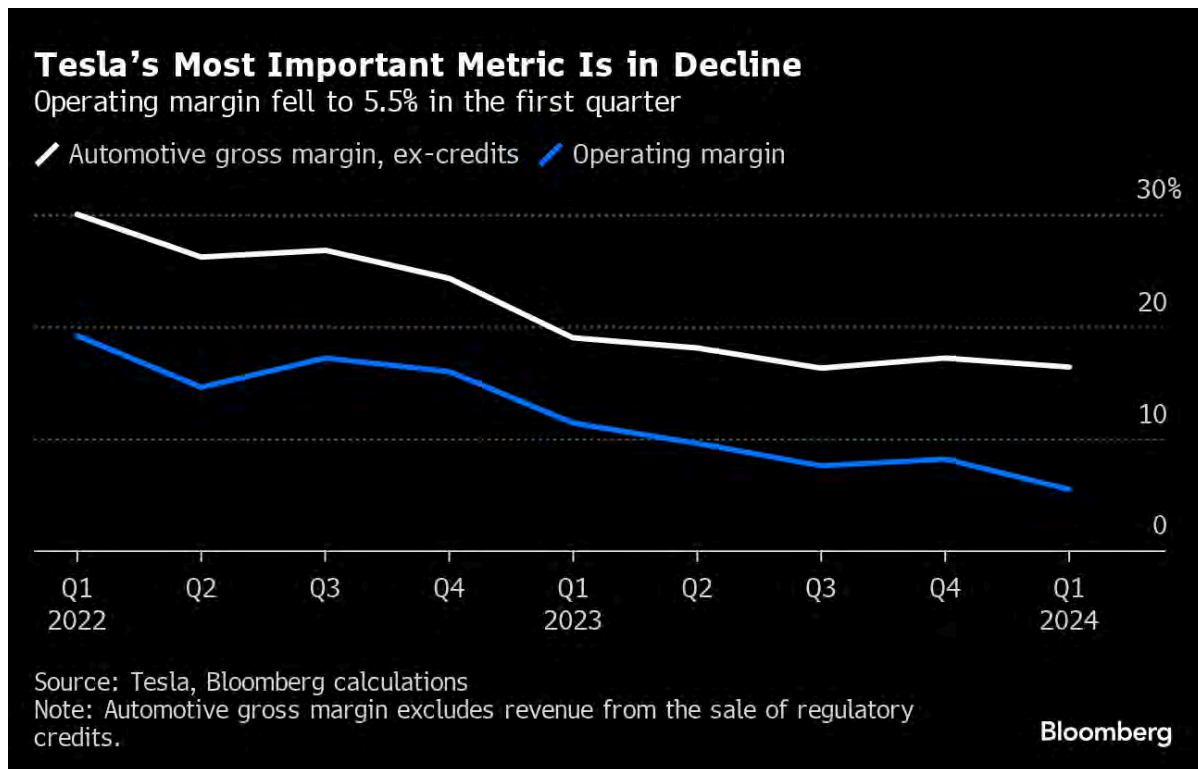
By Craig Trudell

(Bloomberg) --

The metric Tesla Inc. told investors early last year was most important to its executives is in steady decline.

The carmaker reported this week that its operating margin shrank to 5.5% in the first quarter, the lowest since the last three months of 2020. The measure of profitability was at 16% when Zachary Kirkhorn, Tesla's then-chief financial officer, said during an earnings call that it was key to the company.

"As a management team here, we're most focused on what our operating margin is," he said in January 2023, in response to an investor question on a different earnings metric. "That is what we're primarily managing to now."



Tesla shares have nevertheless soared since the company reported its latest results, after Chief Executive Officer Elon Musk teased plans to put less-expensive vehicles into production as soon as late this year. The stock jumped 18% in the two sessions following the carmaker's earnings release and rose as much 1.1% as of 1 p.m. Friday in New York trading.

Kirkhorn resigned as CFO in August of last year.

To contact the reporter on this story:

To contact the editors responsible for this story:

Tonya Garcia

Citi Spinoff Mints \$4 Billion Fortune for CVC Buyout Barons (1)

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US probes Tesla recall of 2 million vehicles over Autopilot

 [reuters.com/business/autos-transportation/us-probes-tesla-recall-2-million-vehicles-over-autopilot-citing-concerns-2024-04-26](https://www.reuters.com/business/autos-transportation/us-probes-tesla-recall-2-million-vehicles-over-autopilot-citing-concerns-2024-04-26)

David Shepardson

Item 1 of 2 Auto pilot is shown on a 2018 Tesla Model 3 electric vehicle in this photo illustration taken in Solana Beach, California, U.S., June 1, 2018. Picture taken June 1, 2018. REUTERS/Mike Blake/File Photo

[1/2]Auto pilot is shown on a 2018 Tesla Model 3 electric vehicle in this photo illustration taken in Solana Beach, California, U.S., June 1, 2018. Picture taken June 1, 2018. REUTERS/Mike Blake/File Photo Purchase Licensing 

WASHINGTON, April 26 (Reuters) - U.S. auto safety regulators said Friday they have opened an investigation into whether Tesla's recall of more than 2 million vehicles announced in December to install new Autopilot safeguards is adequate.

The National Highway Traffic Safety Administration (NHTSA) said it was opening an investigation after the agency identified concerns due to crash events after vehicles had the recall software update installed "and results from preliminary NHTSA tests of remedied vehicles."

The agency's new probe comes after it closed its nearly three-year investigation into Autopilot, saying it found evidence that "Tesla's weak driver engagement system was not appropriate for Autopilot's permissive operating capabilities" that result in a "critical safety gap."

NHTSA also cited Tesla's statement "that a portion of the remedy both requires the owner to opt in and allows a driver to readily reverse it."

The agency said Tesla has issued software updates to address issues that appear related to its concerns but has not made them "a part of the recall or otherwise determined to remedy a defect that poses an unreasonable safety risk."

Tesla said in December's its largest-ever recall covering 2.03 million U.S. vehicles - or nearly all of its vehicles on U.S. roads - was to better ensure drivers pay attention when using its advanced driver assistance system.

The new recall investigation covers Model Y, X, S, 3 and Cybertruck vehicles in the U.S. equipped with Autopilot produced between the 2012 and 2024 model years, NHTSA said.

Tesla said in December Autopilot's software system controls "may not be sufficient to prevent driver misuse" and could increase the risk of a crash.

The auto safety agency disclosed Friday that during its Autopilot safety probe it first launched in August 2021 it identified at least 13 Tesla crashes involving one or more death and many more involving serious injuries in which "foreseeable driver misuse of the system played an apparent role."

NHTSA also on Friday raised concerns about Tesla's Autopilot name "may lead drivers to believe that the automation has

greater capabilities than it does and invite drivers to overly trust the automation."

Tesla did not immediately respond to a request for comment.

In February, Consumer Reports, a nonprofit organization that evaluates products and services, said its testing of Tesla's Autopilot recall update found changes did not adequately address many safety concerns raised by NHTSA and urged the agency to require the automaker to take "stronger steps," saying Tesla's recall "addresses minor inconveniences rather than fixing the real problems."

Tesla's Autopilot is intended to enable cars to steer, accelerate and brake automatically within their lane, while enhanced Autopilot can assist in changing lanes on highways but does not make vehicles autonomous.

One component of Autopilot is Autosteer, which maintains a set speed or following distance and works to keep a vehicle in its driving lane.

Tesla said in December it did not agree with NHTSA's analysis but would deploy an over-the-air software update that will "incorporate additional controls and alerts to those already existing on affected vehicles to further encourage the driver to adhere to their continuous driving responsibility whenever Autosteer is engaged."

NHTSA's then top official, Ann Carlson, said in December the agency probe determined that more needed to be done to ensure drivers are engaged when Autopilot is in use. "One of the things we determined is that drivers are not always paying attention when that system is on," Carlson said.

NHTSA opened its August 2021 probe of Autopilot after identifying more than a dozen crashes in which Tesla vehicles hit stationary emergency vehicles.

NHTSA said in December it found Autopilot "can provide inadequate driver engagement and usage controls that can lead to foreseeable misuse."

Separately, since 2016, NHTSA has opened more than 40 Tesla special crash investigations in cases where driver systems such as Autopilot were suspected of being used, with 23 crash deaths reported to date.

Tesla's recall includes increasing prominence of visual alerts and disengaging of Autosteer if drivers do not respond to inattentiveness warnings and additional checks upon engaging Autosteer. Tesla said it will restrict Autopilot use for one week if significant improper usage is detected.

Tesla disclosed in October the U.S. Justice Department issued subpoenas related to its Full Self-Driving (FSD) and Autopilot. Reuters reported in October 2022 that Tesla was under criminal investigation.

Tesla in February 2023 recalled 362,000 U.S. vehicles to update its FSD Beta software after NHTSA said the vehicles did not adequately adhere to traffic safety laws and could cause crashes.

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

Reporting by David Shepardson; editing by Jason Neely and Louise Heavens

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<https://www.wsj.com/business/autos/regulators-probing-tesla-recall-tied-to-autopilot-a1af6d67>

BUSINESS | AUTOS

U.S. Regulators Tie Tesla's Autopilot to More than a Dozen Fatalities, Hundreds of Crashes

NHTSA launches new probe into adequacy of 2-million vehicle recall in December, after discovering more crashes linked to the controversial technology

By [Ryan Felton](#) [Follow](#) and [Dean Seal](#) [Follow](#)

Updated April 26, 2024 12:56 pm ET



Tesla has been beset with safety concerns lately. PHOTO: JUSTIN SULLIVAN/GETTY IMAGES

Federal auto-safety regulators have opened an investigation into the adequacy of Tesla's TSLA **0.88%** ▲ December recall of 2 million vehicles equipped with Autopilot software, tying the technology to at least 14 fatalities, several dozen injuries and hundreds of crashes.

The National Highway Traffic Safety Administration said in a report published Friday that its examination of Tesla's Autopilot, a driver-assist system that automates some driving tasks, uncovered a trend of “avoidable crashes involving hazards that would have been visible to an attentive driver.”

NHTSA, the auto industry's top regulator, shed more light on the safety concerns that have long been swirling around Autopilot, providing new information on fatalities and injuries linked to drivers' use of the controversial feature, which is widely available on Tesla models.

The new probe also marks an escalation of NHTSA's long-running scrutiny of the technology, which it had been investigating for nearly three years after numerous high-profile crashes, including ones that killed drivers.

On Friday, the regulator said it was closing its earlier probe and opening the new one into the adequacy of the recall remedy. The recall in December was among Tesla's largest to date and involved nearly all the vehicles it had sold in the U.S.

In all, NHTSA said it had identified 467 crashes involving Autopilot.

The regulator said its Office of Defects Investigation had discovered crashes that occurred after the recall and results from preliminary tests the agency performed on remedied vehicles.

Tesla issued the recall to address a previous NHTSA investigation into whether the Autopilot program contained a defect that created an unreasonable risk to vehicle safety. The agency said it identified at least 13 fatal crashes and more involving serious injuries in which Autopilot played an apparent role.

The resulting recall affected more than 2 million Model Y, X, S, 3 and Cybertruck vehicles made since 2012 that were equipped with Autopilot. In the December recall, Tesla set out to update the Autopilot software and install new safeguards to prevent driver misuse.

In its latest report, NHTSA took issue with Tesla's statements that a portion of the recall remedy required opt-in from the owner and could be reversed at the driver's discretion. It also said some Tesla updates appeared to address Autopilot issues that the NHTSA raised without identifying them as remedies.

"This investigation will consider why these updates were not a part of the recall or otherwise determined to remedy a defect that poses an unreasonable safety risk," the agency said.

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

Since the Autopilot update was rolled out, regulators have received an unusually high number of complaints about changes made to the controls. Some drivers say warnings have become excessive and are triggered when performing routine tasks.

Tesla has been beset with safety setbacks recently. Earlier this year, Tesla issued a recall for nearly all of its electric vehicles sold in the U.S. due to the font for some visual warning lights being too small.

Write to Ryan Felton at ryan.felton@wsj.com and Dean Seal at dean.seal@wsj.com

Videos

FT Alphaville Tesla Inc

Tesla's biggest problem: cars

Driven to distraction



Drew Dickson 4 HOURS AGO



Drew Dickson is the founder and chief investment officer of Albert Bridge Capital. He is short Tesla in his personal account. Albert Bridge Capital holds shares in Porsche SE, which is part owned by Volkswagen.

Tesla's [first-quarter earnings](#) could have been an extreme disappointment to the bulls who just last week, let alone last year, were expecting a much better outcome. True to form, however, CEO Elon Musk used the conference call to talk about anything except their automotive business.

“

I think Cathie Wood said it best. Like really, we should be thought of as an AI or robotics company. If you value Tesla as just like an auto company [then] fundamentally, it's just the wrong framework and if you ask the wrong question, then the right answer is impossible.

And:

“

The way to think of Tesla is almost entirely in terms of solving autonomy and being able to turn on that autonomy for a gigantic fleet. And I think it might be the biggest asset value appreciation in history when that day happens, when you can do unsupervised full self-driving.

Who wants to miss out on the biggest asset value appreciation in history? Not the Tesla Illuminati, who responded jubilantly. At one point on Wednesday morning the stock was up 16 per cent, or more than \$80bn in market cap. That's more than a whole Diageo, or Richemont, or Glencore. It's also more than an entire Volkswagen, or Stellantis, or Ferrari.

Big intraday moves make it easier to overlook that Tesla's still down nearly 50 per cent from where it was traded last summer, and that it's (by far) the worst performing by far of the so-called “Magnificent Seven” year to date.

Instead of addressing the quarter's decreased unit sales, lower revenues, plummeting earnings, or suffering share price, Musk waxed on about “distributed inference compute”. Regulatory approval for full-self-driving will reveal the similarities between Tesla and AWS, Amazon's cloud-computing cash cow, he said, later adding that we should “think of [Tesla's fleet] as a combination of Airbnb and Uber.”

Lie back and think of anything other than Tesla.

Optimus also featured, of course, with Musk described how Tesla should have humanoid robots taking over chores in their factories by the end of the year, and perhaps could be selling them to the general public last next year.

When brought back to the subject of automobiles, Musk wouldn't be drawn on Tesla's plans for new models or what specifically was meant by the reference in the results statement to a “more affordable” vehicle.

A cut-price Model 2 was first teased at the 2023 Tesla AGM, with Musk saying in January that it would be in production towards the end of next year, but the expected spring product announcement never came.

Tesla now states it is “accelerating” plans, though as with the Cybertruck it’s easy to mistake the accelerator for the brakes. The notion that a Model 2 might be built in new factories in Mexico or elsewhere have been replaced with vague commitments to retool existing infrastructure and production lines.

Naturally, there was no discussion about where the displaced higher-end cars would be built. And there were no questions from the sellside analysts about reduced potential cost savings, nor what would need to be sacrificed to create the new capacity. When one dared to ask for a detailed product roadmap he was met with silence.

More important were Musk’s Shower Thoughts:

“

This will be much like elevators. Elevators used to be operated by a guy with relay switch. But sometimes, the guy would get tired or drunk or just make a mistake and send somebody in half between floors. So, we just get an elevator and press button, we don’t think about it. In fact, it’s kind of weird if somebody is standing there with a relay switch. And that will be how cars work. You just summon the car using your phone. You get in. It takes you to a destination. You get out.

In Elon’s mind, the decision about what a car looks like, how much it costs, and what utility it provides doesn’t really matter to people. That kind of thinking might explain the Cybertruck, though even it barely merited a mention beyond a guide that production’s running at 1,000 per week. Observers who were hoping to see at least 250,000 Cybertrucks sold by the end of next year should by now have realised that it’s very unlikely to happen.

But just for giggles, let’s look at how the company actually did this past quarter.

Of Tesla’s total quarterly sales of \$21.3bn, 82 per cent were indeed “automotive revenues” while the rest were energy and services. In spite of these numbers Tesla is conceptualised as AI and/or robotics company by some, and thus we might be using the wrong valuation framework, so apologies to the “it’s not a car company” crowd in advance, but:

- Sequential growth in units sold was down 13 per cent sequentially.

- Tesla's price per vehicle, excluding regulatory credits and leasing or finance income, was \$38,924.
- This was down 13 per cent from \$44,642 last year, which itself was down 11 per cent from \$50,037 the previous year.

Extreme pricing pressure is forcing affordable vehicles on Tesla, irrespective of whether it chooses to launch one. Amid a lack of demand for EVs in general, and Teslas in particular, its quarterly automotive revenues were down nearly 13 per cent over the past year and by over 19 per cent sequentially.

“Clean” automotive margins (which exclude regulatory credits and leasing income) were down from 29.7 per cent in the first quarter of 2022, to 18.3 per cent in the first quarter of 2023, and again to 15.6 per cent in the first quarter of 2024. If you back out the new IRA US tax credits (which Tesla doesn't seem to disclose) then automotive gross margin looks to have fallen even further, to around 14.1 per cent.

The capex and investment required to keep the machine in first gear meant Tesla burned through \$2.5bn of cash in the quarter. Inventories grew by over 10 per cent to \$16bn. Consequently, GAAP EPS was down 53 per cent year-on-year, accelerating from the 23 per cent drop in the first quarter of 2023. Even using non-GAAP EPS it's a 47 per cent decrease over the past year.

In the summer of 2022, when the stock was above \$300 share, analysts were expecting Q1'24 EPS of \$1.80. Instead, they got \$0.45. That is a 75 per cent downgrade to expectations. But with no commensurate downgrade to Elon's narrative machine, the stock sure isn't down 75 per cent. Not yet, anyway.

Worth highlighting also is that the recognition of deferred FSD revenues may have helped the EPS number, and unsustainably so. Consequently, we won't be surprised to see \$1.85 of non-GAAP EPS for the full year of 2024, which means Tesla is trading on a forward PE of about 86x. Volkswagen is on a forward PE of less than 5x.

In one way, Musk's wish has already come true. Tesla is valued like a pure AI and robotics company, even though it isn't one yet. He may achieve everything that he wants to, but the share price and resulting market cap already assume that this will happen. That's the danger for those that own the stock.

If the auto business is worth 3 or 4 times the multiple of a Stellantis or Volkswagen, then it would get a forward PE of, say, 20x. That's more than generous for a business the CEO talks about as a legacy sideline.

Street numbers for Tesla are consistently far too high but even using the 2024 consensus EPS of \$2.64, Tesla would be worth just over \$50 per share. Using today's diluted shares (and assuming that they don't issue more, which they will) that works out to a market cap of \$181bn.

Tesla's fully diluted market cap at pixel time is still \$580bn. Simplistically, that means shareholders are already paying around \$400bn for corporate experiments in "robotics and AI", along with anything else Musk has or tries to conjure up.

In order to make money in the stock market, you have to anticipate fundamental developments that exceed those already implicitly baked into the share price. Despite the stock's fall from grace, I'm afraid that many Tesla shareholders still don't understand that. In our view, it is going to take a miracle for Tesla shareholders to avoid more pain.

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April 25, 2024, 4:59 PM PDT

Chemours CFO Resigns in Latest Fallout from Accounting Probe

By Nicola M. White

Bloomberg Law News 2024-04-26T09:41:40207048953-04:00

Chemours CFO Resigns in Latest Fallout from Accounting Probe

By Nicola M. White 2024-04-25T19:59:43000-04:00

Chemours Co.'s chief financial officer has resigned two months after the chemical maker announced an internal investigation into its accounting practices that put him and two other executives on leave.

Jonathan Lock resigned April 23, Chemours said in a securities filing Thursday. Lock is not entitled to any severance pay but he can elect to receive three months of healthcare premium payments.

The Delaware-based company shocked the market in late February when it suspended its CEO, chief financial officer, and controller while announcing an internal investigation into its accounting. The investigation has included a review of how its accounting impacted executive paychecks. The US Securities and Exchange Commission and the Department of Justice also are probing the Teflon-maker's accounting practices, according to an earlier filing from the company.

Now-former Chemours CEO Mark Newman resigned on March 22.

At the end of 2023, top Chemours executives delayed payments of up to \$100 million to vendors and sped up bill collections of approximately \$260 million to manipulate the company's free cash flow targets, according to details the company revealed in March. The accounting moves pumped up metrics the company used to set cash and stock bonus payouts, Chemours said at the time.

The Chemours investigation also determined that similar actions, though "to a lesser extent," were taken in the fourth quarter of 2022, according to the company's annual 10-K financial report.

Lock couldn't be immediately reached for comment.

To contact the reporter on this story: Nicola M. White in Washington at nwhite@bloombergtax.com

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April 26, 2024, 4:07 AM PDT

Four Plead Not Guilty to Patisserie Valerie Accounting Fraud

By Katharine Gemmell

- SFO accuses chief financial officer of inflating balance sheet
- London trial date for fraud charges set for March 2026

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Four Plead Not Guilty to Patisserie Valerie Accounting Fraud

By Katharine Gemmell 2024-04-26T07:07:13848-04:00

- SFO accuses chief financial officer of inflating balance sheet
- London trial date for fraud charges set for March 2026

Four people charged with fraud over the Patisserie Valerie accounting scandal that brought down the 90-year-old high-street bakery chain pleaded not guilty.

The Serious Fraud Office charged former chief financial officer of Patisserie Holdings Christopher Marsh, his wife Louise, financial controller Pritesh Mistry and consultant Nileshkumar Lad with inflating the cash in the firm's balance sheets between 2015 and 2018.

Christopher Marsh was charged with eight counts, while Lad and Mistry were charged with seven counts of accounting fraud. Louise Marsh was charged with one count of conspiracy to defraud. All four defendants entered not guilty pleas to all charges at Southwark Crown Court on Friday with a trial scheduled for March 2026.

Read More: [UK Charges Four Over Patisserie Valerie Accounting Fraud](#)

The group collapsed into insolvency in 2019 after a forensic investigation revealed thousands of false entries in its accounts, which resulted in hundreds of employees losing their jobs. Once listed Patisserie Holdings, previously owned in part by British restaurant entrepreneur Luke Johnson, had a market value of £446 million (\$558 million) before it was suspended.

All defendants were charged with conspiring to defraud the shareholders and creditors including banks by dishonestly agreeing to misstate and inflate the figures for cash on the balance sheets, according to the indictment. The three men are also charged with giving false representations to auditors Grant Thornton LLP, Barclays Plc., and HSBC Holdings Plc.

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PwC Quits Audits of Troubled 'Smart Window' Maker View Inc.

By Nicola M. White

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PwC Quits Audits of Troubled 'Smart Window' Maker View Inc.

By Nicola M. White 2024-04-25T18:37:00000-04:00

PricewaterhouseCoopers LLP stepped down as auditor for View Inc. less than three weeks after the window manufacturer filed for bankruptcy protection, View disclosed Thursday.

PwC, which had vetted View's books since 2013, quit before the company could publish its annual 10-K financial report, which requires auditor approval. View disclosed earlier in April that it would miss the 10-K filing deadline. On Thursday, View further acknowledged the company didn't have enough internal controls in place to meet accounting and reporting requirements and "did not demonstrate a commitment to integrity and ethical values," its securities filing said.

The Milpitas, Calif.-based company makes "smart" windows that adjust to the sun's rays. It went public via merger with a special purpose acquisition company, or SPAC, in March 2021. Less than a year later, the Securities and Exchange Commission was investigating the company's accounting practices, the company revealed in July 2022.

- The regulator settled charges against View in the summer of 2023, saying the company failed to disclose millions of dollars in projected liabilities on product warranties. The company avoided civil penalties because it self-reported the misconduct to the SEC, undertook remedial measures, and cooperated with the regulator's investigation, the agency said at the time.
- View's former CFO, however, still faces separate SEC allegations that he failed to disclose liabilities from product defects with its windows.
- View filed for bankruptcy on April 2.

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Hedge Funds Under SEC Spotlight in Expanding WhatsApp Crackdown

By Matthew Bultman

Deep Dive

- SEC action is first against standalone investment adviser
- Investigations continue into other advisers, with more likely

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Hedge Funds Under SEC Spotlight in Expanding WhatsApp Crackdown

By Matthew Bultman 2024-04-26T05:10:57000-04:00

- SEC action is first against standalone investment adviser
- Investigations continue into other advisers, with more likely

The Securities and Exchange Commission is expanding its crackdown on finance firms' use of private messaging apps like Meta Platforms Inc.'s WhatsApp, underscoring questions about what records hedge funds are required to keep.

The SEC earlier this month fined Senvest Management LLC, a New York hedge fund, \$6.5 million. It was the first time the agency has brought a case as part of its messaging app enforcement against a standalone investment adviser.

The move comes amid similar crackdowns against banks — and even the SEC's own employees last week, after the agency banned third-party messaging apps from work mobile phones.

It's a harbinger of increased scrutiny around the records of private equity and hedge funds, which usually register with the SEC as investment advisers, attorneys say.

"This is not going to go away," K&L Gates LLP partner Lance Dial said. "This is going to be a perennial priority for enforcement."

Industry groups have told the SEC they're uneasy about how the agency appears to view their obligations. They argue private funds shouldn't be subject to the same requirements as banks.

Bloomberg News has reported the hedge fund Citadel is considering a legal challenge, if necessary, over the scope of record-keeping obligations.

"It's an issue that has been raised to the staff in the context of investment advisers, and I think has been teed up to ask whether the obligations should be the same for both kinds of firms," said Amy Jane Longo, a Ropes & Gray LLP partner and former SEC attorney.

Different Obligations

Senvest's settlement resolved SEC charges that employees discussed company business over text messages and other unmonitored communication channels. The SEC alleged Senvest failed to maintain those communications.

The enforcement action is part of regulators' multiyear crackdown on the financial industry's use of messaging apps, collecting over \$2.5 billion in fines from Wall Street banks.

The SEC, the Commodity Futures Trading Commission, and the Financial Industry Regulatory Authority have fined dozens of firms for use of private apps, which regulators say interferes with their ability to investigate misconduct and violates rules requiring broker-dealers "retain all communications" relating to their business.

But much of the enforcement actions have focused on banks, not investment advisers, which are subject to a different set of rules. The Advisers Act limits record-keeping requirements to certain categories of communications.

Last year, several trade groups for private equity and hedge funds including MFA, formerly known as the Managed Funds Association, and the Securities Industry and Financial Markets Association said they'd gotten wind that the SEC was seeking evidence of any off-channel business communications from various investment advisers.

"The SEC should not hold investment advisers to the broad recordkeeping requirements applicable to broker-dealers because the regulations, as written, do not require investment advisers to preserve all business communications," the groups wrote to SEC Chair Gary Gensler. MFA and SIFMA declined further comment beyond the letter.

Perhaps cognizant of those concerns, the SEC in its recent case against Senvest referred to the Advisers Act requirements and said that a number of the problematic messages "related to matters within the scope of the Advisers Act."

Unintended Consequences?

But the SEC also faulted Senvest for failing to implement procedures to monitor whether its employees were following the firm's policies concerning work-related communications.

"While the settlement is styled as a record-keeping case in the SEC's press release, the actual settlement order is ultimately principally about compliance violations and supervision breakdowns," Peter Altman, an Akin Gump Strauss Hauer & Feld LLP partner and former SEC attorney, said.

That perhaps plays into a different critique industry groups have voiced.

The groups argue that many firms have policies that are broader than the legal requirements, and the SEC shouldn't turn employees' non-compliance into legal violations. They warn there could be unintended consequences.

"It will penalize advisers' good faith efforts to promote compliance by adopting a broader internal requirement, and will incentivize firms to adopt policies that narrowly circumscribe recordkeeping obligations consistent with the statutory requirements, which will introduce subjectivity in interpreting enumerated categories under the rule," the groups said in their letter.

No Legal Test

Meanwhile, the enforcement action doesn't definitively answer questions about whether the SEC views broker-dealers and investment advisers as having the same record-keeping obligations, even though the laws governing them are different.

"The fact that none of these cases have litigated in the SEC context has limited our ability to really test what that difference ought to mean," said Ropes & Gray's Longo.

Such a test could be coming.

Bloomberg News has reported that Citadel is willing to take the agency to court if the regulator moves against the Miami-based hedge fund over allegations of untracked communications.

Other funds, including KKR & Co. and Blackstone Inc., are reportedly discussing legal approaches and what a settlement could look like.

In the meantime, observers expect investment advisers to be under the SEC's microscope, and say that companies should develop clear policies for how people can communicate about work on personal devices.

"It's clear from the settlement that the SEC isn't going to let the more narrow scope of the Advisers Act record-keeping rule limit their inquiries into whether or not advisers are using off-channel communications and creating records that should be maintained under the Advisers Act record-keeping requirements," K&L Gates' Dial said.

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WWE Shareholders Combine Chancery TKO Merger Suits

By **Leslie A. Pappas**

Law360 (April 25, 2024, 4:06 PM EDT) -- Delaware's Court of Chancery will decide this summer whether teams led by Block & Leviton, Bernstein Litowitz or Robbins Geller will represent World Wrestling Entertainment Inc. stockholders in a consolidated class suit against founder Vincent McMahon and others over the company's \$21 billion merger with the Endeavor Group.

In a stipulation and proposed order filed Thursday, the parties in two of three proposed class actions sought court approval to consolidate their cases and begin briefing in May on who will lead the consolidated suit.

In all, three sets of shareholder plaintiffs sued in Delaware in connection with the wrestling promoter's merger with the fighting franchise Ultimate Fighting Championship, a subsidiary of Endeavor Group Holdings Inc., that created TKO Group Holdings Inc. in September.

Announced in April last year, the deal combined two of the world's largest professional fighting sports and entertainment organizations, giving Endeavor a majority 51% stake and WWE shareholders 49%.

Laborers' District Council and Contractors' Pension Fund of Ohio, represented by Block & Leviton LLP, **filed a complaint on Nov. 17** alleging breaches of fiduciary duty in connection with the merger.

Shareholder Dennis Palkon, who accused McMahon last year of "rampant" sexual misconduct in **a separate Chancery suit** that was **quickly mooted**, filed his class action about the merger three days after the Ohio pension fund filed its suit. Palkon is represented by Bernstein Litowitz Berger & Grossmann LLP, Robbins LLP and RM Law PC.

A third shareholder plaintiff, pension fund City of Pontiac Reestablished General Employees' Retirement System, **sued** World Wrestling Entertainment Inc. for books and records in connection with the merger in January. That case was dismissed without prejudice in April.

Pontiac also intends to file a plenary complaint alleging breach of fiduciary duty in connection with the TKO merger, and at that point will seek to consolidate its suit with the other cases, the stipulation filed Thursday said.

Pontiac is represented by Robbins Geller Rudman & Down LLP and Prickett Jones & Elliott PA.

None of the defendants in the cases opposed the consolidation, the stipulation said.

Opening briefs in support of leadership applications would be filed by May 15 and answering briefs would be due on May 29, according to the proposed schedule in the stipulation filed Thursday.

The stipulation and proposed order still requires court approval.

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

Laborers' District Council and Contractors' Pension Fund of Ohio is represented by Jason M. Leviton, Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax and Robert Erikson of Block & Leviton LLP.

Dennis Palkon is represented by Jeroen van Kwawegen, Edward G. Timlin, Shiva Mohan, Gregory V. Varallo, Daniel E. Meyer, and Andrew E. Blumberg of Bernstein Litowitz Berger & Grossmann LLP, Brian J. Robbins, Stephen J. Oddo and Richard N. Lozano of Robbins LLP, and Richard A. Maniskas of RM Law PC.

City of Pontiac Reestablished General Employees' Retirement System is represented by Randall J. Baron, David Knotts, Lion Wintemute, Christopher H. Lyons and Tayler D. Bolton of Robbins Geller Rudman & Down LLP, and Kevin H. Davenport, John G. Day and Seth T. Ford of Prickett Jones & Elliott PA.

Vincent K. McMahon is represented by Sandra C. Goldstein, Stefan Atkinson and Haley S. Stern of Kirkland & Ellis LLP and Michael A. Pittenger, T. Brad Davey, Nicholas D. Mozal, Caneel Radinson-Blasucci and Eric J. Nascone of Potter Anderson & Corroon LLP.

World Wrestling Entertainment Inc. and the other individual defendants in the case are represented by Kristin N. Murphy of Latham & Watkins LLP and William M. Lafferty, Ryan D. Stottmann and Kirk Andersen of Morris Nichols Arsht & Tunnell LLP.

The case is In re World Wrestling Entertainment Inc. Merger Litigation, Consolidated, case number 2023-1166, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery and Katryna Perera. Editing by Linda Voorhis.

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5th Circ. Axes Class Claims Over Anadarko's \$900M Write-Off

By **Jessica Corso**

Law360 (April 25, 2024, 10:52 PM EDT) -- The Fifth Circuit on Thursday decertified a class of Anadarko Petroleum Corp. shareholders who claim they lost money on the company's bad oilfield bet, ruling a lower court judge didn't allow the company to respond to an expert report that tied a stock price drop to a \$900 million write-off disclosure.

A three-judge panel reversed a ruling by U.S. District Judge Charles Eskridge certifying a class of shareholders who held Anadarko stock between February 2015 and May 2017, which is when investors say they learned a promising project in the Gulf of Mexico had gone bust.

The Fifth Circuit said the class was certified over objections by Anadarko, which said it was not allowed to respond to a shareholder expert report presented for the first time in a reply brief urging Judge Eskridge to certify the class.

The judge should have permitted Anadarko to file a sur-reply allowing it to address the claims in the report, U.S. Circuit Judge James Ho said on behalf of the unanimous panel.

"Our adversarial system of justice requires that we give both sides full and fair opportunity to present their strongest possible arguments to the court," the opinion said.

"That clash of ideas was missing here," the opinion said.

The appellate panel also ordered the court to reconsider Anadarko's arguments that the shareholder's expert report was inadmissible on several technical grounds.

The expert report sought to tie a May 2017 stock price drop to an announcement from the company that it was taking a \$902 million write-off for the oil field project, known as the Shenandoah project, after some exploratory wells came up dry.

The shareholders claimed they were misled about the viability of the project.

However, the company argued the price decline could be tied to a separate incident, a news report that linked Anadarko to a fatal Colorado home explosion that ended up costing the company \$140 million in regulatory fines.

The case has been sent back to the district court to reconsider the class certification motion.

Counsel for the parties didn't respond to requests for comment Thursday.

Occidental Petroleum Corp. **purchased** Anadarko for \$55 billion in 2019.

U.S. Circuit Judges James Ho, Carolyn Dineen King and Kurt Engelhardt sat on the panel for the Fifth Circuit.

The shareholders are represented by Joseph Daley, Daniel Drosman and Rachel Jensen of Robbins Geller Rudman & Dowd LLP and Joe Kendall of Kendall Law Group PLLC.

Anadarko is represented by Kevin Orsini and Lauren Rosenberg of Cravath Swaine & Moore LLP and

George Shipley of Shipley Snell Montgomery LLP.

The case is Georgia Firefighters' Pension Fund v. Anadarko Petroleum Corp., case number 23-20424, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by Drashti Mehta.

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McDermott Judge U-Turns, Says Some Investors Deserve Cert.

By **Bonnie Eslinger**

Law360 (April 25, 2024, 10:41 PM EDT) -- A Texas federal magistrate judge reversed his recommendation that investors be denied class certification in litigation over McDermott International's \$6 billion merger with Chicago Bridge & Iron, saying a former CB&I shareholder class "should be certified now" and a putative McDermott stock purchaser class be created for subsequent consideration.

U.S. Magistrate Judge Andrew M. Edison said in his Wednesday **recommendation** that status conferences with the parties after his initial decision made it clear that "there is no need to delay certifying a class of CB&I shareholders," since lead plaintiff Nova Scotia Health Employees' Pension Plan and its counsel satisfy the requirements.

As a result, the magistrate judge said he was withdrawing his February **recommendation** and now suggesting the motion for class certification be granted in part, with the court requiring two separate classes. One would be the former CB&I shareholders he said could be certified now. The second would be purchasers of McDermott stock, a group that now needed a lead plaintiff before they could pursue class certification, the judge said.

"I further recommend the court permit lead plaintiff applications for the putative class of purchasers of McDermott stock," Judge Edison stated.

After the outset of the litigation, five other parties filed motions in early 2019 seeking appointment as the lead plaintiff: the University of Puerto Rico Retirement System, Wah Kee Ho, Donald Piliero, Alfred Rodrigues, and the City of Pontiac General Employees' Retirement System. The court selected Nova Scotia to be lead plaintiff and Pomerantz LLP to be **lead counsel**.

In his memorandum, Judge Edison recommended that the trial court judge once again have the five plaintiffs vie for the lead plaintiff job, this time for a class of purchasers of McDermott stock.

"Whichever plaintiff is appointed can then move for certification of a class of purchasers of McDermott stock," he stated.

The judge also reiterated his initial conclusion from March that the Nova Scotia pension fund, which was previously a shareholder in CB&I, had "a fundamental conflict" with purchasers and acquirers of McDermott stock who never held CB&I shares during the proposed class period spanning December 2017 to November 2019.

When Nova Scotia filed the complaint, it alleged that it "purchased McDermott's common stock at artificially inflated prices during the ... class period and was damaged upon the revelation of defendants' fraud." During discovery, it was made clear that Nova Scotia acquired its McDermott stock when its CB&I shares were converted at the time of the merger.

It is too early to say whether former CB&I shareholders were damaged by the alleged fraud, and "now is not the time to litigate these issues," the magistrate judge said.

However, he said, the potential inflationary effect of the alleged fraud on CB&I's stock does not concern purchasers of McDermott stock.

"It is fundamentally unfair for absent class members who actually purchased McDermott stock to be represented by Nova Scotia and its counsel, who may yet expend considerable time — as they did during the class certification hearing — on this issue," Judge Edison wrote.

If in the end both classes are certified, class members who converted CB&I stock into McDermott stock and also separately purchased McDermott stock would hold claims in both classes, the judge said.

"But Nova Scotia cannot represent a class of purchasers of McDermott stock," he added.

"Accordingly, the court should appoint a lead plaintiff for a putative class of purchasers of McDermott stock."

In opposing the class certification motion, McDermott argued that Nova Scotia lacked standing, saying that while the alleged inflation in its stock would have damaged those shareholders, the inflation in CB&I's stock before the merger was a benefit to CB&I shareholders. That benefit made Nova Scotia an unsuitable class representative for anyone other than CB&I shareholders.

Judge Edison however said there was a chance that CB&I's stock was "less inflated" than McDermott's, which would allow the former CB&I shareholders to possibly prove an economic injury.

"This possibility is why Nova Scotia has standing," the judge said.

Other arguments made by McDermott pertain only to actual purchasers of its stock, he noted.

Judge Edison recommended that the trial court judge "defer consideration of these arguments until a lead plaintiff for a putative class of purchasers of McDermott stock is appointed and moves for class certification."

The investors said in their 2018 suit that McDermott made material misrepresentations both before and after its acquisition of CB&I, which was announced in December 2017 and closed in May 2018.

The pension fund accused McDermott of concealing that four "challenging" CB&I projects would ultimately cost well over \$1 billion, and that price would pose risks to the "strength and viability of McDermott's postmerger capital structure, balance sheet, liquidity, and financial health."

The suit survived a dismissal bid in April 2021, when U.S. District Judge George C. Hanks Jr. found that **certain statements** by the company were made "with actual knowledge that they were misleading."

In March, Judge Hanks adopted the magistrate judge's recommendation that the class certification bid be **denied** without prejudice so the investors could refile a motion to certify the two subclasses of McDermott stockholders. On Wednesday, Judge Hanks withdrew that order to allow the motion for class certification to be reconsidered, Judge Edison said.

Representatives for the investors did not respond Thursday afternoon to requests for comment. A spokesperson for McDermott said the company would not be able to immediately remark on the magistrate judge's latest recommendation.

Nova Scotia is represented by Matthew L. Tuccillo, Jeremy A. Lieberman, Jennifer Banner Sobers and Zachary Denver of Pomerantz LLP, and Willie C. Briscoe of the Briscoe Law Firm PLLC.

McDermott is represented by David D. Sterling, Amy Pharr Hefley, J. Mark Little, Anthony J. Lucisano and Elizabeth Furlow Malpass of Baker Botts LLP.

The case is *Edwards v. McDermott International Inc. et al.*, case number 4:18-cv-04330, in the U.S. District Court for the Southern District of Texas.

--Additional reporting by Craig Clough and Emilie Ruscoe. Editing by Adam LoBelia.



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Zendesk Beats Shareholders' Suit Over \$10B PE Takeover

By **Isaac Monterose**

Law360 (April 25, 2024, 9:22 PM EDT) -- Zendesk Inc. has defeated a securities class action in California federal court accusing the customer service software company of undervaluing itself to get a \$10.2 billion go-private merger with private equity firms approved by Zendesk shareholders.

In his **Wednesday order**, U.S. District Judge P. Casey Pitts dismissed without prejudice the suit brought by lead plaintiffs Brian Bailey and Scott Franklin, ruling their claims don't hold up because the class didn't adequately allege they were misled by Zendesk about the company's value.

"Plaintiffs have not presented sufficient factual evidence to allege with particularity that defendants' communications in the August 2022 proxy statement were objectively false or misleading in violation of [the Securities Exchange Act]," Judge Pitts said. "As defendants rightly note, citing potentially outdated metrics from October 2021 and March 2022 does not show that the updated June 2022 projections relied upon in the proxy statement were false."

According to the class action, Zendesk filed a misleading August 2022 proxy statement with the U.S. Securities and Exchange Commission that included "drastically reduced" financial projections as well as favorable fairness opinions issued by the company board's financial advisers, Qatalyst Partners LP and Goldman Sachs & Co. LLC.

Zendesk had announced in June 2022 it **planned to be bought** by a group of investors, led by private equity firms Permira Advisers LLC and Hellman & Friedman LLC, in a go-private deal that valued the software company at about \$10.2 billion, or \$77.50 per share.

The Zendesk shareholders relied on the proxy statement to approve the merger in September 2022, the class claimed.

The lead plaintiffs filed suit in March 2023, alleging Zendesk was "significantly undervalued" in its sale, relying on the August 2022 proxy statement and revenue projections from June 2022.

According to the Thursday order, the plaintiffs alleged Zendesk's major shareholder Jana Partners LLC had forced the company to reduce its financial projections to force a sale of Zendesk.

But the judge rejected that argument, saying higher revenue projections from March 2022 "predated Zendesk's declining bookings metrics in April and May of 2022, which defendants argue contributed to Zendesk's rapidly declining stock price."

According to the judge, JANA Partners tried to force Zendesk to sell itself or have a proxy fight on its hands, but he ruled there's no proof of the pressure caused Zendesk to release reduced financial projections.

The class also failed to adequately allege that Zendesk's August 2022 proxy statement was subjectively false, according to Judge Pitts.

"Plaintiffs allege that Zendesk's board members knew that the June 2022 revenue projections were inaccurately low but nonetheless approved them in the proxy statement because of Jana's threat of a proxy contest," the judge said. "But plaintiffs do not provide any evidence that Jana's purported threat actually caused Zendesk's board of directors to approve management's revised downwards

valuation in order to expedite a sale."

Additionally, Judge Pitts wasn't convinced by the class' use of the Northern District of California's October 2020 decision in **Karri v. Oclaro Inc** . The Karri case was a securities class action accusing the board of optical components company Oclaro of filing a misleading proxy statement to get shareholder approval for the company's acquisition by Lumentum Holdings Inc, which manufactures optical technology.

"In that case, the company lowered its financial projections in February prior to a sale even though the CEO contemporaneously noted that the company had positive prospects and financial analysts had noted that the company's stock price was undervalued," Judge Pitts said. "In contrast, defendants here only changed their position and lowered Zendesk's projections after Qatalyst released a June 15, 2022 report indicating that the company's year-over-year bookings metrics had declined in May 2022."

"Further, unlike in Karri, Zendesk's stock price continued to decline in the intervening period," the judge added.

According to the order, by June 13, 2022, Zendesk's market stock price had dipped to \$60 per share from more than \$120 per share in April 2022.

Judge Pitts reached a conclusion similar to the Karri one when he ruled that the class didn't sufficiently allege that Zendesk made its decisions in a proper state of mind.

The judge also said the class wasn't financially injured by Zendesk's merger.

The class had claimed minority shareholder Light Street Capital Management LLC wanted to buy half the company's shares for \$82.50 per share, while the private equity firms bought Zendesk for \$75.50 per share, the judge said.

But Light Street Capital Management only wanted to buy half of the company shares, and the class failed to show that the minority shareholder had the capital needed to actually buy half of the shares, according to the judge.

The class led by Bailey and Franklin weren't the only Zendesk shareholders who sued over the merger. In September 2022, a Detroit municipal pension fund **sued** Zendesk in Delaware state court to get the company's records after the merger was announced in June 2022.

Counsel for the class and Zendesk didn't respond to requests for comment Thursday.

The class is represented by Juan E. Monteverde and David E. Bower of Monteverde & Associates PC.

Zendesk is represented by Anna Terteryan, Matthew Solum, Haley S. Stern and Michael Rusie of Kirkland & Ellis LLP.

The case is Bailey et al. v. Zendesk Inc. et al., case number 5:23-cv-01243, in the U.S. District Court for the Northern District of California.

--Editing by Lakshna Mehta.



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Autodesk Faces Investor Suit Over Internal Controls

By **Sydney Price**

Law360 (April 25, 2024, 7:15 PM EDT) -- Software company Autodesk has been hit with a proposed class action alleging the company's stock price dropped after investors learned it lacked proper internal controls due to issues with its free cash flow and operating margin practices.

According to the suit filed by shareholder Michael Barkasi in California federal court Wednesday, Autodesk is self-described as an engineering and construction technology solutions company that sells its products through a combination of indirect and direct channels.

Throughout the class period, Autodesk failed to inform investors that the company lacked effective internal controls, causing share declines and delaying the filing of its annual report for its 2024 fiscal year, the suit says.

In addition to Autodesk, the suit names CEO Andrew Anagnost and Chief Financial Officer Deborah L. Clifford as individual defendants.

The suit's class period begins June 1, which is the day Autodesk submitted a quarterly filing to the U.S. Securities and Exchange Commission. The report, and others throughout the remainder of the class period, affirmed Autodesk was maintaining effective disclosure controls and procedures, which was false and misleading, the suit claims.

The truth about Autodesk's internal controls began to emerge on April 1, when Autodesk told the SEC it would need 15 additional days to file its annual report due to the Autodesk's audit committee's internal investigation of its free cash flow and non-generally accepted accounting principle operating margin practices.

According to the suit, Issues with the practices were revealed to Autodesk after the company's earnings release in February.

Autodesk's stock price declined \$10.73, or about 4%, closing at \$248.71 per share on April 2, the suit says.

Fifteen days later, Autodesk said it would need even longer to file its annual report because of the ongoing investigation. Additionally, the company said it expected to submit a plan to Nasdaq to address how the company intends to remain compliant with Nasdaq's listing rules, according to the suit.

Autodesk's stock price fell \$13.32, or about 6%, closing at \$214.92 per share on April 17, the suit says. The next day, it fell an additional \$4.29, or about 2%, closing at \$210.63 on April 18, the suit states.

Barkasi claims Autodesk and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act. He seeks damages on behalf of the proposed class.

Counsel for Barkasi and a representative of Autodesk did not immediately respond to requests for comment Thursday.

Barkasi is represented by Laurence M. Rosen of The Rosen Law Firm PA.

Counsel information for Autodesk and the individual defendants was not immediately available.

The case is *Barkasi v. Autodesk Inc. et al.*, case number 3:24-cv-02431, in the U.S. District Court for the Northern District of California.

--Editing by Drashti Mehta.

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PHX Minerals Stockholders Sue In Del. To Change Bylaws

By **Isaac Monterose**

Law360 (April 25, 2024, 8:45 PM EDT) -- A proposed class of PHX Minerals Inc. stockholders has sued the natural gas and oil mineral company and its board in Delaware state court, arguing that the company's bylaws must be changed to bring them into compliance with the Delaware General Corporation Law.

In his suit, filed April 24, named plaintiff William Schilling said the company's board rejected his March request to change the bylaws "for logically unsound reasons."

According to the proposed class, the bylaws don't allow stockholders to vote to act without meetings even if the stockholders have enough votes to make a decision. The company's bylaws require 75% of stockholders to give consent to take action, the proposed class claimed.

Schilling says PHX Minerals rejected his request, saying its bylaws don't violate the DGCL because of the company's charter referring to the bylaws and a DGCL provision that allows companies to have higher voting standards.

"The board's first ground for rejection is specious, as it would allow corporations to bootstrap provisions into charters through banal references to external documents without following statutorily prescribed processes for amending charters," the proposed class alleged.

"The board's second ground for rejection ignores that [DGCL Section 216] only allows corporations to specify different voting standards '[s]ubject to [the DGCL] in respect of the vote that shall be required for a specified action,'" the proposed class further claimed.

According to the proposed class, PHX Minerals changed its state of incorporation from Oklahoma to Delaware in April 2022 when it merged with a subsidiary, and the company's charter was not amended afterward.

"Its bylaws were amended, effective December 9, 2022, to reflect a change in the company's fiscal year and confer on the board the authority to change the fiscal year without further amendment of the bylaws," the proposed class alleged. "Other than this amendment, the bylaws have likewise remained the same since the reincorporation."

Class counsel declined to comment on April 25. PHX Minerals did not respond to a request for comment, and the company's counsel information was not immediately available.

The proposed class is represented by William J. Fields, Christopher J. Kupka, and Samir Shukurov of Fields Kupka & Shukurov LLP, D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC, and F. Troupe Mickler IV of Ashby & Geddes PA.

The case is Schilling v. Stephens, case number 2024-0433, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.



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QuidelOrtho Execs Lied About COVID Test Revenue, Suit Says

By **Henrik Nilsson**

Law360 (April 25, 2024, 11:18 PM EDT) -- A QuidelOrtho Corp. investor on Thursday filed a derivative shareholder suit in New York federal court against board members and executives of the diagnostic healthcare company, alleging they made misleading statements about the company's ability to maintain a high margin revenue after sales of its COVID-19 detection tests plunged.

Matthew Whitfield alleges in his complaint that the company is facing serious liabilities, including a separate securities class action, because former and current board members and executives falsely told the public that the company's revenue from COVID-19 tests would not be significantly impacted despite the pandemic slowing down by spring 2022.

Additionally, the defendants lied about the company's ability to launch a new respiratory test called the Savanna RVP4 test, according to the complaint.

"Defendants had numerous opportunities to address the company's noncompliance and lack of adequate reporting protocols and information controls," Whitfield alleges. "By failing to implement and monitor an adequate oversight system, and by consciously disregarding their duty to inform themselves of, and investigate, red flags, defendants failed to exercise due care and failed to satisfy their duty of loyalty to the company and its stockholders."

Whitfield asserts violations of the Securities Exchange Act, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, abuse of control, gross mismanagement and waste of corporate assets. He seeks an award of damages against all defendants.

San Diego-based QuidelOrtho manufactures and sells diagnostic healthcare products, and its main diagnostic products in the respiratory space have traditionally been seasonal flu tests. But when the COVID-19 pandemic started to hit in 2020, the company generated "substantial revenue" from its COVID-19 tests, which it sells under various brands, according to the suit.

The company finalized a \$6 billion merger with Ortho Clinical Diagnostics PLC in May 2022, during which time the defendants assured investors that the company was well positioned to maintain a high-margin revenue stream from its respiratory business despite the number of COVID-19 infections dropping, Whitfield claims.

The suit states that the defendants cited the Savanna RVP4 test as a key strategy for their respiratory business.

However, in earnings calls and various public statements, the company's leadership failed to disclose to investors that QuidelOrtho sold more COVID-19 tests to distributors and pharmacy chain customers than they could resell to healthcare providers and end customers, Whitfield alleges. Additionally, excess inventory of the tests existed throughout the supply chain, and distributors and pharmacies were planning to significantly reduce their COVID-19 test orders, according to the suit.

The defendants also hid from investors that the company was running into undisclosed problems related to the commercial launch of the Savanna test in the United States. Instead, the defendants continued to tout the test and falsely told investors it was on track for U.S. marketing approval, according to the suit.

The truth emerged on Feb. 13, when the company "reported underwhelming results" for its fourth quarter in 2023. For example, QuidelOrtho's adjusted earnings per share was 46% below the midpoint of analysts' expectations, largely attributed to distributors' destocking on COVID-19 tests, according to the suit.

Whitfield says the company also lowered its COVID-19 revenue forecast from a range of between \$200 million and \$400 million to \$200 million.

During the earnings call, the company's then-CEO, Douglas Bryant, allegedly continued to mislead about the Savanna test prospects. He was fired shortly after and QuidelOrtho announced April 2 that it had withdrawn its submission to sell the test in the U.S. "after recent data did not meet expectations," according to the suit.

"On this news, the price of QuidelOrtho stock dropped \$4.85, or more than 10 percent, to close at \$42.15 on April 2, 2024," Whitfield claims.

As a result, a securities class action was filed against the company in New York federal court, which "has exposed the company to massive liability, as well as significant costs and expenses to defend itself in that action," Whitfield alleges.

Counsel and representatives for the parties did not immediately return a request for comment.

Whitfield is represented by Seth D. Rigrodsky, Timothy J. MacFall and Vincent A. Licata of Rigrodsky Law PA and Joshua H. Grabar of Grabar Law Office.

Counsel information for the defendants was not immediately available.

The case is Matthew Whitfield, derivatively on behalf of nominal defendant QuidelOrtho Corp. v. Kenneth F. Buechler et al., case number 1:24-cv-03176, in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.



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Tesla Says Investors May Want To Influence Shareholder Vote

By **Hailey Konnath**

Law360 (April 26, 2024, 12:07 AM EDT) -- Tesla on Thursday questioned the motives of investors who want billions of dollars in company stock put into a trust, saying that their push to hasten the court's decision in their suit over Elon Musk's compensation plan raises concerns that they want to "elicit commentary" ahead of a shareholder meeting.

One of Tesla's lawyers, John L. Reed of DLA Piper LLP, said in a letter that the investors have requested a hearing "far in advance" of the upcoming shareholder meeting, set for June 13. That "raises a concern" that the investors' request — and other motions filed earlier this week — "are designed for some other purpose, such as to improperly solicit proxies or to elicit commentary from the court on issues not presently before the court to influence the forthcoming stockholder vote."

"Tesla respectfully asks that the court avoid prejudging those non-extant issues and/or prematurely commenting on them in connection with the three motions in a manner that might unfairly impact the stockholder votes at the company's annual meeting," Reed said.

He added that once the court has a chance to review Tesla's opposition to the investors' bid to fast-track their motions, it "may want to revisit the issue of whether anything in the three motions needs to be heard and resolved prior to June 13."

The letter was filed **just days after** class attorneys for Tesla stockholders asked the court to seize or shelter in a trust tens of billions of dollars in company stock. That stock was sidelined in January, when the court struck down Musk's 10-year compensation plan.

The stockholders lodged several other motions Tuesday, including one seeking an injunction that would block Tesla from attempting to litigate the issue in other jurisdictions, like Tesla's new home state of Texas. They also want the court to quickly finalize the January ruling as well as multibillion-dollar attorney fee awards.

Notably, the investors cited Tesla's recent decision to hold the stockholder meeting in June to hold a second ratification vote on the pay plan — valued in January at around \$56 billion — as well as vote on reincorporating the electric-vehicle company in Texas, potentially shedding Delaware court jurisdiction over future issues.

"The risk arising from defendants' efforts to thwart the court's opinion via 'ratification' is compounded by defendants' efforts to remove Tesla from the court's jurisdiction through the Texas re-domestication," the class attorneys wrote at the time.

In Thursday's letter, Reed said it's not clear from the investors' motions "that there is really anything in dispute" and the merits don't justify fast-tracking the hearing. For one, the investors have acknowledged that there are no pending or threatened actions in Texas — or anywhere else — that warrant the investors' request for an injunction barring litigation of the issues elsewhere, he said.

And the request for a trust is "nothing more than an impermissible pre-judgment attachment, and seeks illogically to attach property of Tesla, the company plaintiff purports to represent. Plaintiff's fee petition has not been decided," Reed said.

He added, "The company will explain in its opposition papers, among other things, that plaintiff

simply has the facts and mechanics wrong when it comes to the authorization and issuance of 'shares.'"

In late January, Chancellor Kathaleen St. J. McCormick characterized the 10-year pay plan as "the largest compensation plan in the history of public markets." She found that Musk dictated the timing of the compensation review process, "making last-minute changes to the timeline or altering substantive terms immediately prior to six out of the 10 board or compensation committee meetings during which the plan was discussed."

There were also disclosure failures, murky terms, conflicted director architects and Musk's own conflicted influence involved in Tesla's creation of the fast-triggering stock options, the chancellor held.

Counsel for the parties didn't immediately respond to requests for comment late Thursday.

The investors are 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. Tejtzel of Friedman Oster & Tejtzel PLLC and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC.

Tesla is represented by John L. Reed of DLA Piper LLP.

Musk and the other directors are represented by Evan Chesler, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP and David E. Ross and Garrett B. Moritz of Ross Aronstam & Moritz LLP.

The case is Richard J. Tornetta et al. v. Elon Musk et al., case number 2018-0408, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Jay Jackson Jr.

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Real Estate Exec Can't Escape Shareholder's Self-Dealing Suit

By **Katryna Perera**

Law360 (April 25, 2024, 9:49 PM EDT) -- A California federal judge ruled that a derivative shareholder suit accusing the president of a real estate management and investment firm of misusing nearly \$35 million of company revenue now passes the so-called Zuckerberg test since the plaintiff sufficiently pled that demand on the company's board members would be futile.

U.S. District Judge Kenly Kiya Kato issued an in-chamber **order** on Tuesday partially denying a **dismissal motion** filed by John Morris.

The suit, filed by Molly Tracy, a minority owner of Tramor Properties Inc., claims that Morris misused company revenue to make "questionable loans," "pay exorbitant employee benefits," and hire property management company Tramor Management Services, which is owned by Morris and his alleged mistress, Monique F. Price.

As a result, Tracy claims, she and other minority shareholders have received significantly reduced distributions while "many millions of dollars in cash has been accumulating" at Tramor without a business purpose.

Tramor owns more than 2,600 apartments, mostly in the Austin, Texas, area, the company says on its website.

On Tuesday, Judge Kato said Tracy has sufficiently pleaded demand futility, which entails shareholders having the option to make litigation demands to the board before filing a derivative shareholder suit.

The court previously dismissed Tracy's suit for failing to pass the **so-called Zuckerberg test**, laid out in the Delaware Supreme Court's September 2021 decision in United Food & Commercial Workers Union & Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg.

But Tracy has now sufficiently pled that all three members of Tramor's board satisfy at least one of the Zuckerberg factors, the judge said.

According to the order, Tracy has sufficiently alleged that Morris received a personal benefit from diverting Tramor's corporate assets for his personal use, and as Tramor's president and controller of operations, Morris faces a "substantial likelihood of liability" from the suit's allegations.

The second member of Tramor's board, Marisa Prasifka, is conflicted because she lacks independence from Morris, according to the order.

"Plaintiff's allegations show Prasifka has material ties to defendant Morris that likely affect her ability to be an impartial director. For example, plaintiff alleges Prasifka is employed by defendant Morris as TPI's chief financial officer and reports directly to him," the order stated.

Tracy also claims Prasifka is benefiting from Morris' conduct and has been "complicit in numerous accounting irregularities, such as the mystery loans to entities and the wildly disproportionate ratio of benefits to salaries ... and the grossly excessive cash hoarding that puts such assets at risk and fails to properly use or distribute such assets."

Thomas Tracy, the third and final member of Tramor's board and the plaintiff's ex-husband, also lacks

independence from Morris, according to the order, since he has been Morris' "close personal friend" for over four decades and speaks to him weekly.

Additionally, Judge Kato said, based on the facts alleged in the suit, Thomas Tracy seems to have been "actively involved in both furthering and covering up" Morris' misconduct.

"For example, plaintiff alleges [Thomas] Tracy has been active in preventing plaintiff from obtaining records that would reveal defendant Morris' misconduct. Plaintiff further alleges Tracy has 'been aware of the misconduct of [defendant Morris] and [Prasifka] for years, ... but has declined to [take] any action,'" the order said.

Thomas Tracy and Prasifka aren't listed as defendants in Molly Tracy's suit, which she **filed** in September 2023.

Despite ruling that Tracy has sufficiently pled demand futility, Judge Kato tossed the suit's direct claim for breach of fiduciary duty, finding that it was insufficiently pled.

The judge said that although Tracy accuses Morris of using his power as president and controlling shareholder to direct Tramor to "hoard excessive amounts of cash," she does not allege that Tramor's majority shareholders received a benefit from Morris' alleged misconduct that minority shareholders did not. All shareholders, including Morris, received reduced contributions, Judge Kato noted.

"While there are allegations defendant Morris funneled TPI revenue to the company that he owned and that money was spent in an effort to preclude plaintiff from accessing financial documents, these are harms TPI also shares," the order said. "Thus, plaintiff's alleged harms are incidental to a direct injury to the corporation's assets."

In dismissing the direct claim, Judge Kato declined to grant Tracy the opportunity to replead, saying it would be futile.

In a statement to Law360 on Wednesday, Brendan Macaulay of Nossaman LLP, who represents Molly Tracy, said the court's ruling allows them to pursue claims on behalf of all shareholders against Morris and Tramor, and "ensure that any misused assets are returned."

"We are pleased the court agreed that, because of financial and personal relationships between defendant John Morris and the other directors of TPI, it would have been pointless for plaintiff Molly Tracy to ask Tramor Properties Inc. to sue Mr. Morris for the alleged self-dealing and improper use of corporate assets," he said.

Counsel for Morris did not immediately respond to requests for comment.

Tracy is represented by Brendan Macaulay and Kasia Penn of Nossaman LLP.

Morris is represented by Christopher Tayback, Joseph C. Sarles and John W. Baumann of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Molly Tracy et al. v. John H. Morris et al., case number 2:23-cv-08022, in the U.S. District Court for the Central District of California.

--Additional reporting by Isaac Monterose. Editing by Kristen Becker.



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Chancery's Carvana Suit Toss Shows Special Committee Value

By **Jody Barillare, Brian Morris and Brian Loughnane** (April 25, 2024, 4:57 PM EDT)

On March 27, in *In re: Carvana Co. Stockholders Litigation*, the Delaware Court of Chancery followed the special litigation committee's recommendation and **dismissed a stockholder complaint** alleging that the company's controlling stockholders enriched themselves through a direct offering by acquiring shares at a depressed price.

The court's decision illustrates how an SLC can contribute to litigation concerning an alleged breach of fiduciary duty.

In March 2020, online used car retailer Carvana made a direct public offering of \$600 million at a price of \$45 per share. Carvana's then-controlling stockholders agreed to contribute \$50 million.

The controlling stockholders were restricted from realizing profits from the shares they purchased through the direct offering for six months under the Securities Exchange Act. After the six-month restriction period expired, one of the two controlling stockholders sold shares in Carvana for more than \$1 billion.

Carvana stockholders sued, alleging that the controlling stockholders manufactured an unfair process related to the direct offering to obtain shares in Carvana at a deflated price. The stockholders sought to disgorge the profits realized by the controlling stockholder on an unjust enrichment theory. The Court of Chancery **denied** subsequent motions to dismiss.

Thereafter, Carvana's board of directors formed an SLC comprised of two directors, supported by financial and legal advisers. The SLC had the Carvana board's full, exclusive authority to investigate and assess the facts and circumstances surrounding the stockholders' complaint. The parties agreed to stay the litigation pending the SLC's investigation.

Seven months later, the SLC issued "a 170-page report, which concluded 'that the costs associated with continuing to pursue the [complaint] or any other claims in connection with the Direct Offering outweigh any benefits'" because the "alleged breaches of fiduciary duty lack merit," and the SLC "did not 'identify any other potential claims that would be likely to succeed.'"

The SLC concluded that there was no evidence that the controlling stockholders exploited opportunistic timing, nor did their "role in ... negotiations [lead] to the terms of the Direct Offering being any less favorable to Carvana."

The Delaware Court of Chancery then accepted the SLC's conclusions regarding the merits of the stockholders' complaint and dismissed the litigation.

Zapata's Two-Step Test

Delaware courts evaluate an SLC's recommendation to dismiss a stockholder derivative action under



Jody Barillare



Brian Morris



Brian Loughnane

the Delaware Supreme Court's seminal 1981 decision in *Zapata Corp. v. Maldonado*.^[1] Zapata calls for a two-step analysis.

The first step requires the court to review the independence of the SLC members and consider whether the SLC conducted a good faith investigation of reasonable scope that yielded reasonable bases supporting its conclusions.

Second, the court must apply its own business judgment to the facts to determine whether the corporation's best interests would be served by dismissing the suit.

Directors should not expect this to be the case in every investigation.

Independence of the Directors on the SLC

In *Carvana*, the plaintiffs presented four bases to challenge the independence of the SLC's two directors. The Court of Chancery rejected all four challenges and found that the SLC demonstrated its independence.

First, the plaintiffs argued "that the SLC was improperly influenced by outside counsel" because the SLC's legal advisers were recommended by Carvana's board.

The court swiftly rejected this challenge, commenting that "this is a bad argument [because adopting] a recommendation from management alone does not evidence a lack of independence."

Second, the plaintiffs argued that the SLC's directors were compromised because they were named defendants in two separate insider trading claims also asserted against Carvana's controlling stockholders.

The court commented that this argument "might gain traction in other circumstances," but found it unpersuasive in *Carvana* because the insider trading cases concerned events that occurred after the direct offering — they were not related to the direct offering itself.

Third, the plaintiffs argued that the SLC prejudged the investigation because (1) the directors on the SLC approved the direct offering, and (2) they were present on Carvana's board when Carvana initially sought to dismiss the plaintiffs' complaint.

The court rejected both arguments, finding that a director's approval of a transaction does not establish their inability to impartially take action with respect to the transaction at a later time.

Additionally, the court found that the mere fact that directors were on Carvana's board when Carvana filed its motion to dismiss did not establish a lack of independence because the SLC's "members did not participate in a substantive way in the decision to file the motion [to dismiss]."

Differentiating the facts here from prior cases, the court found that without allegations, the SLC members "attacked ... the merits of [the] plaintiffs' claims," as a decision to file a motion to dismiss does not demonstrate that the SLC members are not independent.

Fourth, the plaintiffs argued that one of the SLC's members lacked independence because one of the directors owned auto dealerships that participated in Carvana's pilot programs. The Court of Chancery found these allegations insignificant.

A Reasonable Investigation in Good Faith

Despite the plaintiffs offering several challenges to the thoroughness and reasonableness of the investigation, the court found that the SLC met its burden of proving it conducted a reasonable investigation in good faith. The court noted that the scope and efforts of the SLC's investigation compared favorably to other SLC investigations upheld by the court.

The plaintiffs first argued that the SLC's legal counsel played an outsized role in the investigation because the SLC's members delegated the investigative plan to its legal counsel.

But the Court of Chancery concluded that an SLC heavily relying on counsel and advisers is not unreasonable, and the "SLC's level of engagement was sufficient" because the SLC participated in decisions regarding the investigation and attended witness interviews performed by the SLC's legal counsel.

The plaintiffs also suggested that the SLC's investigation was unreasonable because the SLC's members could not remember details of the investigation when interviewed after the SLC published its report.

The Court of Chancery rejected this argument, finding that the SLC's lack of recall was not significant because human memory is fleeting, and the SLC's legal conclusions were well documented in its exhaustive report and supported by an extensive factual record.

The strongest basis the plaintiffs presented to challenge the reasonableness of the SLC's investigation arose from comments an SLC director made in an interview after the SLC published its report. The director commented that he "was concerned about how much time [the SLC process] would take," viewed his role on the SLC as a "part-time responsibility," and was concerned that his involvement would subject him to personal exposure.

The Court of Chancery reflected that "[c]omments of this nature are not helpful to an SLC's cause," but nonetheless concluded that they failed to demonstrate that the investigation was unreasonable because there was no evidence that the SLC member's lack of enthusiasm for his role "affected his diligence."

The plaintiffs also made a series of challenges to the scope of the SLC's investigation, suggesting that the SLC failed to consider a number of allegations set forth in the complaint. But in each instance, allegations that the plaintiffs argued that the SLC failed to consider had not actually been omitted from the SLC's investigation or report, according to the Court of Chancery.

Instead, the SLC "adequately considered the allegations contained in the Complaint and evaluated the facts and law relevant to those allegations."

Moreover, in evaluating the scope of the investigation, the court compared the investigation to prior SLC investigations that the court approved, noting that the SLC conducted a seven-month investigation, reviewed over 100,000 pages of documents from 18 different custodians, interviewed 16 witnesses and held nine SLC meetings before submitting a 170-page report of its findings.

Given these facts, the court found that these efforts compared favorably with previous SLC investigations upheld by the court.

The Court's Business Judgment

In closing, the Court of Chancery concluded that Zapata's second step was also satisfied. The court, applying its own business judgment, was called "to determine whether the SLC's recommended result falls within a range of reasonable outcomes that a disinterested and independent decision maker for the corporation, not acting under any compulsion and with the ... information then available, could reasonably accept."

In the court's view, this was easily satisfied because the court already probed the plaintiffs' challenges to the SLC's report and found that the conclusions set forth in the report were reasonable.

What Boards of Delaware Corporations Should Know

Forming an SLC is a powerful tool that boards can use when faced with shareholder litigation, allowing the board of directors to maintain or regain control of the derivative suit.

After determining that an SLC should be hired, Carvana emphasizes several key points that must be met in order for the investigation to withstand judicial review.

First, SLC members are entitled to good faith reliance on outside legal counsel and other experienced advisers to lead the investigation and delegate certain tasks. In most situations, the Court of

Chancery expects this to be the case.

This does not mean, however, that SLC members can be entirely passive. Taking initiatives to be engaged with the document collection process, identifying key custodians, coordinating communications with outside advisers, attending witness interviews, and reviewing witness interview summaries and reports from outside advisers are necessary steps to establish that the SLC's investigation was reasonable.

Otherwise, plaintiffs can allege that the directors did not engage with the investigation in good faith and were merely rubber-stamping the process.

Second, the court will consider statements made by SLC members concerning the investigation and the directors' role. Here, the court expressly noted that the director's comments were not necessary, and even though the court determined that the comments here did not demonstrate evidence that the comments "affected his diligence," other statements could be construed as indications that the investigation was unreasonable or evidence of bad faith.

Third, the SLC should carefully consider and document its investigation into all facts, specific acts of alleged misconduct and sources of information in a plaintiff's complaint, even for less serious allegations.

Even if the SLC determines that a full investigation into certain allegations is not warranted, the SLC's report should document that it considered those allegations and discuss the SLC's reasoning for not pursuing a summary investigation. A total failure to explore less serious allegations may cast doubt on an otherwise reasonable and good faith SLC investigation.

Fourth, as occurs in nearly all investigations, the court noted the expansive number of documents collected and reviewed during the investigation, and highlighted that the court expects that companies and directors retain and provide documents for outside counsel to review.

Of particular note, the Court of Chancery rejected the plaintiffs' claims that the SLC should have gathered text messages from numerous individuals, finding that the SLC's motion to dismiss "cannot stand or fall on a failure to gather text messages."

While this does provide support that text messages do not have to be collected — which can be intrusive to directors and add significant costs in terms of review — SLCs and their counsel should still consider whether it is necessary to collect text messages on a case-by-case basis.

Jody Barillare is a partner, and Brian Morris and Brian Loughnane are associates, at Morgan Lewis & Bockius LLP.

Morgan Lewis partner Mike Blanchard contributed to this article.

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[1] [Zapata Corporation v. Maldonado](#) , 430 A.2d 779 (Del. 1981).

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7th Circ. Mootness Fee Case May Curb Frivolous Merger Suits

By **Marcie Lape, Chuck Smith and Lauren Sexton** (April 24, 2024, 4:37 PM EDT)

On April 15, the U.S. Court of Appeals for the Seventh Circuit in *Jorge Alcaarez v. Akorn Inc.*^[1] **mapped out** one way a court may evaluate mootness fees paid to individual shareholders after the voluntary dismissal of an action challenging a public company merger.

Specifically, the Seventh Circuit held that although a district court does not have the inherent power to review a mootness fee paid to an individual shareholder following the voluntary dismissal of a suit under Rule 41(a) of the Federal Rules of Civil Procedure, it nonetheless may review the fee following intervention in the case by an absent shareholder, a Rule 60(b) motion for relief from judgment, and an evaluation of compliance by the plaintiff and their attorneys with Rule 11 of the Federal Rules of Civil Procedure.

As the Seventh Circuit explained, should the district court find a violation of Rule 11, Rule 11(c) then gives the district court discretion to order appropriate sanctions in the event it determines that a shareholder initiated a merger challenge not for good reason but only to extract a payment from the company for the benefit of plaintiffs lawyers. Thus, while not directly articulating a standard of review for mootness fees paid to an individual shareholder, the Seventh Circuit indicated that Rule 11 provides the proper framework to evaluate the propriety of the underlying disclosure lawsuit.

The ruling in this case could be persuasive to courts outside the Seventh Circuit, encourage objections to mootness fees and reduce the number of frivolous merger challenge cases filed.

Background to Merger Challenge Litigation

The announcement of a public company merger is almost guaranteed to attract one or more challenges by shareholder class action plaintiffs who claim that the deal disclosures are inadequate.

Plaintiffs typically assert that the target company's proxy statement contains materially false or misleading statements in violation of Section 14(a) of the Securities Exchange Act of 1934, or that the directors breached state law fiduciary duties in approving the merger and proxy statement. Often these suits are criticized as "strike suits" with little to no merit, whose primary purpose is to generate fees for plaintiffs counsel.

Only rarely is a disclosure case actually litigated. Instead, companies typically settle these suits by agreeing to additional "correcting" disclosures and paying plaintiffs counsel a modest fee. When a case is settled on behalf of a class and class members' claims are released, the settlement is subject to court approval.

Historically, federal courts approved disclosure-based settlements without much scrutiny. But in 2016, the Seventh Circuit followed the Delaware Court of Chancery's decision earlier that year in *In re: Trulia Inc. Shareholder Litigation*, and held in *In re: Walgreen Co. Stockholder Litigation* that



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classwide disclosure settlements are disfavored "unless the supplemental disclosures address a plainly material misrepresentation or omission" and the release is narrowly drafted to encompass "nothing more than disclosure claims and fiduciary duty claims concerning the sale process." [2]

A year later, in *Farber v. Crestwood Midstream Partners LP*, the U.S. Court of Appeals for the Fifth Circuit similarly criticized disclosure-based settlements because "[t]he class members get nothing. The attorneys get their fees." [3]

To avoid judicial scrutiny over disclosure-based settlements, parties now often settle federal merger challenge cases on an individual basis, whereby the company makes additional disclosures that moot the plaintiff's claims, the individual plaintiff voluntarily dismisses their claims prior to certification of a class, no releases are exchanged and the company agrees to pay a mootness fee to the plaintiff's counsel. Under these circumstances, federal courts do not have visibility that a fee is being paid to moot the case, nor do they have an opportunity to review and police the fee.

The District Court Proceedings

This case arises from Akorn's 2017 announcement that it had agreed to be acquired by Fresenius Kabi AG. Six Akorn shareholders filed lawsuits challenging the adequacy of disclosures in the preliminary proxy statement. After Akorn filed updated proxy statements containing additional disclosures, including disclosures sought by the plaintiffs, the **plaintiffs voluntarily dismissed** their complaints in 2019 pursuant to Rule 41(a) and Akorn agreed to pay the plaintiffs' counsel a \$322,500 "mootness fee."

Following the dismissal, Akorn shareholder Theodore H. Frank — an attorney who represented the shareholders who objected to the attorney fees in *Walgreen* and *Farber* — moved to intervene and force the plaintiffs' counsel to return the mootness fee.

Frank argued that the disclosure suits were meritless strike suits and a "misuse of the class action device for private gain." The district court denied his motion to intervene, but in a move that the plaintiffs called "unprecedented," the district court exercised its "inherent powers to police potential abuse of the judicial process — and abuse of the class mechanism in particular" — and required the plaintiffs to demonstrate that the disclosures they claimed credit for cured a "plainly material" false or misleading statement. The district court invited Frank to participate as an *amicus curiae*.

Following briefing, the court determined that the disclosures the plaintiffs sought were not "plainly material," and in fact were "worthless" to the proposed shareholder class. As a result, the court declared that the plaintiffs' cases should have been "dismissed out of hand." And because the court had earlier failed to take that action, it exercised its inherent authority to abrogate the settlement agreements and ordered the plaintiffs' counsel to return the mootness fees.

Arguments on Appeal

The District Court's Power to Review Mootness Fees After Dismissal

The plaintiffs argued the district court "overstepped the bounds of its inherent authority" and lacked jurisdiction to review the mootness fee after the plaintiffs dismissed their cases.

As *amicus curiae* in support of the district court's judgment, Frank argued that the court had the inherent authority to review mootness fees after dismissal and order the return of the fees in order to protect against abuses of the judicial process and the class action device. He also argued that the court should have allowed him to intervene in the case.

The Standard of Review for Supplemental Disclosures

The plaintiffs argued that, even if the district court had jurisdiction to review the mootness fee, the court applied the wrong standard. According to the plaintiffs, the *Walgreen* and *Trulia* "plainly material" standard only applies to class settlements, and a lower standard applies to the dismissal of individual claims.

The plaintiffs also argued that the district court erred by considering only the disclosures they sought

in their complaints and not the full set of additional disclosures for which they claimed responsibility.

Finally, the plaintiffs argued that the district court "misapprehended the significance" of Akorn's additional disclosures, while Frank argued that the additional disclosures were worthless by any standard.

The Seventh Circuit's Ruling

The Seventh Circuit panel, consisting of U.S. Circuit Judges Frank H. Easterbrook and Diane P. Wood, [4] held — four years after oral arguments in the case — that the district court did not have the inherent authority to reopen the merger challenge and review the mootness fee following the action's voluntary dismissal, finding that it could only reopen the case following a formal motion under Rule 60(b) of the Federal Rules of Civil Procedure, which had not occurred.

But as the Seventh Circuit pointed out, Frank had moved to intervene in the case, and, had his motion been granted, he could have filed a motion to reopen under Rule 60(b).

The Seventh Circuit then turned to whether the district court should have granted Frank's motion to intervene. After rejecting the plaintiffs' arguments that Frank lacked standing and was required to bring a derivative action, rather than personally intervene, the Seventh Circuit held that the district court erred when it addressed only Frank's proposal to intervene as of right and not his proposal to intervene permissively under Federal Rule of Civil Procedure 24(b).

The Seventh Circuit found that as an investor in Akorn whose shares' value was affected by the merger and mootness fee, as well as a member of the proposed class, Frank plainly had a claim in common with the main action. And reasoning that "class counsel and Akorn [we]re looking out for their own interests rather than those of the class," the Seventh Circuit held that "intervention [wa]s appropriate" and that Frank was "entitled to participate as a party."

The Seventh Circuit further commented that although Rule 23(e) does not require judicial approval to settle or dismiss cases brought as class actions, yet not so certified — an issue it invited the rules committee of the Judicial Conference to consider — through its mandate in Section 78u-4(c)(1), the Private Securities Litigation Reform Act supplies a mechanism for review of the underlying merit of a supplemental disclosure case and mootness fees.

That section obligates a district court upon final adjudication of any action brought under the Securities Exchange Act to make specific findings regarding compliance with Rule 11(b) of the Federal Rules of Civil Procedure by each party and each attorney representing a party as to any complaint, responsive pleading or dispositive motion. The dismissal of a suit, the Seventh Circuit reasoned, is a "judicial action" and therefore the "final adjudication of the action" irrespective of whether or not a settlement was the reason behind the dismissal.

The Seventh Circuit thus determined that, while the district court's reference to its "inherent authority" should have been to Section 78u-4(c)(1) and Rule 11, the court's reasoning holds. Frank alleged — and the district court had essentially already found — that plaintiffs' counsel had violated Rule 11 by bringing suits whose very purpose was to "needlessly increase the cost of litigation" so as to "induce Akorn to pay the lawyers to go away."

And the Seventh Circuit remarked that, under Rule 11(c)(4), the district court has "discretion over the choice of sanction" and "would be entitled to direct counsel who should not have sued at all to surrender the money they extracted from Akorn." Still, the Seventh Circuit acknowledged that, given the denial of the motion to intervene, the district court had not yet conducted the proper proceeding under Section 78u-4(c)(1) and Rule 11, including by providing notice and an opportunity to be heard, thus necessitating a remand.

In short, the Seventh Circuit outlined a path by which shareholders may challenge mootness fees by intervening in a merger challenge case and invoking Rule 11's ban on suits brought for an improper purpose, including the extraction of fees from defendants, or frivolous or unsupportable suits.

Importantly, the Seventh Circuit highlighted that judicial findings as to the propriety of these types of class actions are mandatory upon resolution, indicating that judicial scrutiny of the value of

supplemental disclosures and the corresponding validity of the lawsuits brought to force those disclosures is likely to increase. The prospect of such judicial scrutiny could reduce the number of meritless merger challenge cases filed.

Marcie Lape is a partner at Skadden Arps Slate Meagher & Flom LLP.

Chuck Smith is a partner at the firm and leads the litigation and regulatory enforcement practice for the firm's Chicago office.

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[1] Nos. 18-2220, 18-2221, 18-2225, 18-3307, 19-2401 and 19-2408.

[2] **In re: Walgreen Co. S'holder Litig.** , 832 F.3d 718, 725 (7th Cir. 2016) (quoting and adopting the standard set forth in *In re: Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 898-99 (Del. Ch. 2016)).

[3] **Farber v. Crestwood Midstream Partners L.P.** , 863 F.3d 410, 412 (5th Cir. 2017). The Fifth Circuit found here, however, that the objection to the settlement was untimely and declined to decide whether to adopt the Trulia standard.

[4] Judge Michael S. Kanne, the third member of the panel, died after the appeals were argued. The appeals were decided by a quorum. 28 U.S.C. § 46(d).

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Chancery Seeks More Info About Bond In Truth Social Case

By **Leslie A. Pappas**

Law360 (April 25, 2024, 7:59 PM EDT) -- A Delaware vice chancellor said Thursday she needs more information from the sponsor of the blank-check company that took Donald Trump's Truth Social public about a bond it requested during litigation with some of the company's stockholders.

ARC Global Investments II LLC, sponsor of the special-purpose acquisition company Digital World Acquisition Corp., asked for the bond to protect the company from losses in case a status quo order that was issued as part of an ongoing dispute turns out to have been "improvidently issued," Vice Chancellor Lori W. Will said in a letter to counsel Thursday.

Defendants in the case are seeking a bond corresponding to potential losses for the approximately 2.14 million shares of Trump Media & Technology Group Corp., the letter said.

"After reviewing the parties' submissions, I believe that a bond is likely appropriate and necessary," the vice chancellor wrote. "Additional information is needed, however, before I can ascertain whether a bond should issue and set the appropriate amount of that bond."

The court said it will discuss the matter at a hearing on April 29.

The Chancery Court lawsuit was filed in March, shortly ahead of a Digital World shareholder vote on the merger that would take Truth Social public.

About two dozen of the sponsor's members that held Digital World Class B stock **sued** ARC Global and its acting manager, Patrick Orlando, seeking a court declaration that they had validly removed him as the investment company's managing member, and he could no longer act on ARC Global's behalf.

The Delaware suit came a few days after Digital World sued ARC Global in New York to force a **shareholder vote** on the transaction, alleging that Orlando had been trying to frustrate the deal.

Digital World shareholders subsequently **approved the merger**, and Trump Media, the owner of Truth Social, **began trading** on the Nasdaq in late March.

In the Delaware case, Vice Chancellor Will issued an order on April 11 to **maintain the status quo** at ARC Global, declaring that Orlando would continue to act as its sole manager or managing member while the dispute was being litigated. The status quo order also laid out rules about the transfer of Trump Media securities issued to ARC.

A minute order appeared on the court docket shortly after the status quo order was issued, saying that the defendants had called for a bond to avoid risk of possible harm from the transfer restrictions.

"I too perceive a risk of financial harm to the defendants if they prevail in this action and were improvidently restricted from transferring, causing a loss," the vice chancellor wrote in the minute order April 11. She asked the parties to advise her by April 15 on the appropriate amount of a bond to be posted by the plaintiffs while the status quo order remains.

The letter Thursday follows up on those filings, with new questions.

Vice Chancellor Will said she needed to know how many Trump Media shares ARC has that are not subject to a contractual lockup now or anytime in the next three months. She asked how many shares might be sold in the next three months for purposes that weren't expressly permitted by the order. And she asked how the trading price of Trump Media shares could be estimated.

"I understand that certain of this information is not knowable and ask for your best approximations based on what is presently known," the letter said.

Trump Media's common stock, which trades on the Nasdaq under DJT, closed Thursday at \$38.49 per share.

Counsel for the parties did not immediately respond Thursday to a request for comment.

The plaintiffs are represented by Thomas A. Uebler, Brian V. DeMott and Adam J. Waskie of McCollom D'Emilio Smith Uebler LLC.

ARC Global and Orlando are represented by Matthew D. Perri, Daniel E. Kaprow, Elizabeth J. Freud and Rae Ra of Richards Layton & Finger PA.

The case is Leon et al. v. Orlando et al., case number 2024-0311, in the Court of Chancery of the State of Delaware.

--Additional reporting by Tom Zanki and Jeff Montgomery. Editing by Adam LoBelia.

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Class Counsel Seeks \$31M From \$93M Lipitor Settlement

By **Adrian Cruz**

Law360 (April 25, 2024, 4:04 PM EDT) -- Attorneys representing a class of buyers in antitrust litigation against Pfizer over the cholesterol medication Lipitor have asked a New Jersey federal judge to approve their request for \$31 million in fees after the two sides agreed to a \$93 million settlement in February.

The coalition of firms representing the direct purchasers — including Berger Montague, Garwin Gerstein & Fisher LLP and Hagens Berman Sobol Shapiro LLP — said in a filing Wednesday that because the dispute spanned 12 years and involved more than 42,000 hours of work on a contingent basis, \$31 million plus interest and expenses would be fair compensation.

"Investigating, bringing, litigating and mediating this lengthy and highly complex case involving the intersection of patent and antitrust law required class counsel to work and persevere for more than twelve years, knowing that they were litigating the case on a wholly contingent basis without any guarantee of success against formidable adversaries," the firms' memorandum in support of their request states. "From case investigation through the filing of their motion for preliminary approval of the proposed settlement between plaintiffs and Pfizer, class counsel expended more than 42,000 hours of uncompensated professional time."

The firms added that the rapid evolution of antitrust law regarding pharmaceuticals in the wake of 2013's landmark *FTC v. Actavis Inc.* — in which the U.S. Supreme Court determined that the U.S. Federal Trade Commission has the right to challenge a reverse payment patent settlement — added to the complexity of the issues they were litigating.

Citing similar Third Circuit settlements, such as last year's \$30M deal over claims that Indivior Inc. jacked up the price of opioid addiction treatment Suboxone, the firms said that asking for one-third of a settlement is reasonable according to circuit standard.

The settlement involves direct purchasers of Lipitor, such as pharmaceutical wholesalers and distributors, who accused Pfizer of conspiring with Ranbaxy Laboratories Ltd. to delay the release of a cheaper generic version of Lipitor and monopolize the market.

The settlement class includes all persons or entities in the United States and its territories who purchased Lipitor or generic products directly from Pfizer or its affiliates between June 2011 and May 2012.

Representatives for both sides didn't immediately respond to a request for comment late Wednesday.

The direct purchaser plaintiffs are represented by Cohn Lifland Pearlman Herrmann & Knopf LLP, Carella Byrne Cecchi Olstein Brody & Agnello PC, Berger Montague, Garwin Gerstein & Fisher LLP, Hagens Berman Sobol Shapiro LLP, Odom & Des Roches LLP, Smith Segura Raphael & Leger LLP, Faruqi & Faruqi LLP, and Heim Payne & Chorus.

Pfizer is represented by Liza M. Walsh and Jessica K. Formichella of Walsh Pizzi O'Reilly Falanga LLP, and Robert A. Milne, Raj Gandesha, Edward Thrasher, Sean Murray, Seok Ho Kang and Kathy Hong of White & Case LLP.

The case is *In re: Lipitor Antitrust Litigation*, case number 3:12-cv-02389, in the U.S. District Court

for the District of New Jersey.

–Additional reporting by Hailey Konnath. Editing by Amy French.

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Philips Gets \$506M Economic Loss Deal OK'd In CPAP MDL

By **Mike Curley**

Law360 (April 25, 2024, 6:21 PM EDT) -- A Pennsylvania federal judge on Thursday gave final approval to a \$506.3 million settlement to end economic loss claims in multidistrict litigation over Philips' recalled CPAP breathing machines, including \$94.4 million for the plaintiffs' attorneys.

In the **order**, U.S. District Judge Joy Flowers Conti said the deal was fair and came after more than a year of hard-fought negotiation, with only 78 objections from the more than 5 million class notices sent out, which she described as an "infinitesimally small number" of objectors.

The settlement includes \$467.5 million in a nonreversionary fund for device replacement and return awards, plus \$34 million for eligible payers who have reimbursed users of the devices, according to court documents. Philips has also agreed to pay the attorney fees and service awards of \$5,000 per class representative separately, according to the order.

The judge noted that the \$506.3 million is a floor, not a ceiling, and Philips will add to the fund should it deplete before all class claims are paid out. Class members will receive set payments of \$100 for each recalled device they return to Philips, plus \$55.63 to \$1,552.25 per recalled device, depending on the device.

The judge further found that the attorney fees and costs were well within the threshold considered fair in the Third Circuit, as the \$94.4 million is 18.65% of the nonreversionary \$506.3 million common fund, or 15.4% of the combined common fund and the separate fund for attorney fees and costs, which Judge Conti said comes to \$613.3 million.

The plaintiffs sued Philips after it recalled 10.8 million units of its CPAP, BiPAP devices over the breakdown of foam inside the machines, which users alleged caused them to inhale harmful chemicals and particles.

The cases were consolidated into a multidistrict litigation in the Western District of Pennsylvania, with separate master complaints being filed for economic loss due to buying new machines, for personal injury from using an affected machine, and for those seeking medical monitoring to make sure they didn't develop health issues later on as a result of their exposure.

The **settlement** covers **economic loss claims**, and will also provide extended warranties for replacement devices, cash bonuses if customers return the recalled devices to Philips and awards for some customers who purchased replacement devices after the recall.

Judge Conti granted preliminary approval in October, and the parties **sought final approval** in March, arguing the reaction to the deal has been overall positive, with only a few objections left at that time. And the objectors were largely concerned with personal injury or medical monitoring claims not covered by the deal.

In Thursday's order, Judge Conti said the court had overruled all those objections at the April 11 final fairness hearing, saying many of the objectors based their protests on a misunderstanding that the settlement would release their personal injury or medical monitoring claims.

Others, the judge said, objected that they would not receive enough money, but were overruled because a settlement is a compromise in exchange for certainty and resolution.

The plaintiffs' co-lead counsel said in a statement Friday that they're pleased with the final approval.

"This agreement provides expedient payments and extended warranties on remanufactured machines to class members and holds Philips accountable for selling defective and unsafe products," the attorneys said in the statement. "We will continue to pursue justice on behalf of those injured by Philips' defective products."

A spokesperson for Philips said in a statement Thursday, "We welcome the court's final approval of the economic loss settlement in the U.S., which Philips announced in September last year."

Philips is represented by Wendy West Feinstein, John P. Lavelle Jr. and Lisa C. Dykstra of Morgan Lewis & Bockius LLP, Erik T. Koons and Andrew T. George of Baker Botts LLP, and Michael H. Steinberg, Tracy Richelle High and William B. Monahan of Sullivan & Cromwell LLP.

The plaintiffs are represented by Sandra L. Duggan and Keith J. Verrier of Levin Sedran & Berman LLP, Christopher A. Seeger, Caleb Seeley and David R. Buchanan of Seeger Weiss LLP, Kelly K. Iverson of Lynch Carpenter LLP, Steven A. Schwartz of Chemicles Schwartz Kriner & Donaldson-Smith LLP, D. Aaron Rihn of Robert Peirce & Associates PC, Michael F. Ram of Morgan & Morgan PA, and Peter St. Tienne Wolff of Pietragallo Gordon Alfano Bosick & Raspanti LLP.

The case is In re: Philips Recalled CPAP, Bilevel PAP and Mechanical Ventilator Products Litigation, case number 2:21-mc-01230, in the U.S. District Court for the Western District of Pennsylvania.

--Additional reporting by P.J. D'Annunzio. Editing by Lakshna Mehta.

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Objector Takes \$125M PACER Overcharge Deal To Fed. Circ.

By Ali Sullivan

Law360 (April 25, 2024, 9:14 PM EDT) -- An objector to a \$125 million deal resolving class action claims that the federal judiciary overcharges users of its PACER court records system is taking his challenge to the settlement to the Federal Circuit.

The notice of appeal, posted Wednesday to the D.C. trial court docket, comes after U.S. District Judge Paul L. Friedman **gave final approval** to the settlement last month. Under the deal, the U.S. government agreed to pay \$125 million to conclude years of litigation brought by a group of nonprofits that contended the federal government charged excessive fees for using the courts' Public Access to Court Electronic Records, or PACER, system.

While Judge Friedman called the settlement "historic," objector and attorney Eric Alan Isaacson says the agreement is a mediocre deal that allocates far too much to institutional PACER users and law firms whose PACER expenses were already reimbursed by clients.

Isaacson's objection, filed ahead of final approval, also argues that the **\$23.9 million in attorney fees** awarded to class counsel with Gupta Wessler LLP and Motley Rice LLC is too high.

"It is, in the end, a run-of-the-mill settlement that does not justify the award of attorney's fees that Class Counsel seeks," Isaacson wrote in the objection.

Gupta Wessler and Motley Rice represented the three nonprofits — the National Veterans Legal Services Program, the National Consumer Law Center and the Alliance for Justice — in the class action litigation, which was first filed in D.C. federal court in 2016. They alleged the federal judiciary violated the E-Government Act by charging excessive PACER fees.

Isaacson was one of five class members — out of roughly 500,000 PACER account holders — to object to the settlement, according to Judge Friedman's March 20 opinion approving the deal. The judge said he considered all the objections but nevertheless concluded that the settlement was fair, reasonable and adequate.

Under **the terms of the deal**, each class member will receive up to \$350 for PACER fees they paid between April 21, 2010, and May 31, 2018, with those who paid more than \$350 receiving an additional pro rata share of the remaining settlement funds.

Isaacson, the U.S. Department of Justice and counsel to the plaintiffs did not immediately return a request for comment on Thursday.

The class is represented by Deepak Gupta and Jonathan E. Taylor of Gupta Wessler LLP, and William H. Narwold, Meghan S.B. Oliver and Charlotte E. Loper of Motley Rice LLC.

The government is represented by Brenda González Horowitz of the U.S. Department of Justice's Civil Division.

The trial court case is National Veterans Legal Services Program et al. v. U.S., case number 1:16-cv-00745, in the U.S. District Court for the District of Columbia.

--Additional reporting by Dave Simpson and Hailey Konnath. Editing by Alanna Weissman.



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Outlets Ask Fla. Court To Toss Trump's \$1.5B Truth Social Suit

By **David Minsky**

Law360 (April 25, 2024, 9:40 PM EDT) -- Several news outlets that were sued by Donald Trump's social media company over reports that it lost \$73 million following a merger have urged a Florida state court to dismiss the lawsuit, saying defamation wasn't sufficiently alleged and the articles were substantially true.

At least a dozen motions to dismiss were filed Monday in Florida's 12th Judicial Circuit Court, all seeking to toss the **\$1.5 billion lawsuit brought** by Trump Media & Technology Group Corp., which operates Truth Social, alleging defamation and injurious falsehood. The Miami Herald, which is among the news organizations being sued, said Trump Media is trying to profit from the reported losses.

"Since its inception and to this day, Truth Social has operated in the red, losing — as public filings document — millions upon millions of dollars while continually shedding market value since its stock went public on March 26, 2024," Miami Herald's **motion to dismiss** stated. "This lawsuit is, ironically, an attempt to quite handsomely profit from those reported losses because the nineteen (19) named media outlets reported on them in November of last year."

TMTG brought its suit in November, alleging that numerous outlets' reporting on the company's merger with Miami-based Digital World Acquisition Corp. was a coordinated effort to "torpedo" the transaction.

The Miami Herald said in its motion that reporting on the merger followed Digital World Acquisition's November public filing of an S-4 registration statement with the U.S. Securities and Exchange Commission, which "chronicled Truth Social's precarious financial state."

While the crux of TMTG's complaint is that media coverage of the merger "tarnished" the company's reputation and placed the merger in jeopardy, the Miami Herald noted that the transaction wasn't actually completed until the following March, and the initial public offering came soon after.

The newspaper said it was sued because it republished an alleged defamatory article originally published by "The Hill," but argues that, at the very least, the complaint must be dismissed because of the "wire service defense," in addition to the fact that the article is "substantially true and/or privileged."

"The Herald cannot face liability for simply republishing the reporting of other reputable news agencies," the motion stated. "The long-established privilege for republication, often referred to as the 'wire service defense,' was originally adopted by the Florida Supreme Court in 1933 and insulates news agencies from liability for republishing news reports from established news sources."

In addition, the Miami Herald said the article was substantially true because the SEC filing showed Truth Social had lost tens of millions of dollars over the previous two years and was "in significant financial distress."

The SEC filing showed TMTG "had a multimillion-dollar loss from operations in every period it reported" and "has a significant accumulated deficit" resulting in "negative cash flows from operations," according to the Miami Herald, which also said TMTG's public accounting firm raised substantial doubt that the company could continue operating in the future and that company management wouldn't have enough money to pay its debts.

"The only part of the republications that plaintiff disputes as 'false' is the exact magnitude of its financial losses," the Miami Herald said.

Representatives of both parties did not immediately respond to requests for comment Thursday.

The **motion to dismiss** from Rolling Stone, another of the outlets being sued, states that it updated its story to reflect a \$50.5 million profit in 2022, but that the company lost nearly \$31.6 million as of June 2023.

Nevertheless, according to Rolling Stone, the statement that TMTG lost \$73 million is "substantially true" because the difference between \$73 million and \$31.6 million "produces no different effect in the mind of the reader."

"TMTG's reported and actual losses are both tens of millions of dollars, each rendering the same mental impression on the reader," Rolling Stone said in its motion.

Trump Media & Technology Group Corp. is represented by Jared J. Roberts and Stephen French of Binnall Law Group PLLC.

Axios is represented by Charles D. Tobin, Chad R. Bowman and Maxwell S. Mishkin of Ballard Spahr LLP.

Forbes and Newsweek are represented by Sara C. Tesoriero and Cameron Stracher of Cameron Stracher PLLC.

Gizmodo, Guardian News, Daily News, Rolling Stone, The Daily Beast, Deadline Hollywood and The Hollywood Reporter are represented by Rachel E. Fugate, Deanna K. Shullman and Minch Minchin of Shullman Fugate PLLC.

Reuters, MSNBC, CNBC and the Associated Press are represented by Kelli L. Sager, Sam Cate-Gumpert and Eric J. Feder of Davis Wright Tremaine LLP and George S. LeMieux of Gunster.

Alex Mena and the Miami Herald are represented by Mark R. Caramanica, Elizabeth D. Ernest and Dana J. McElroy are represented by Thomas & Locicero PL.

Mediaite is represented by Mark R. Caramanica and Elizabeth D. Ernest of Thomas & Locicero PL and by Elizabeth Vulaj and Delia Thornton of Mediaite LLC.

Salon is represented by Armando Rosquete and Javier A. Reyes of Bell Rosquete Reyes Esteban PLLC and Justin L. Ormand and Bradley Pensyl of Allen & Overly LLP.

The case is Trump Media & Technology Group Corp. v. Guardian News and Media LLC et al., case number 2023 CA 008180, in the 12th Judicial Circuit Court of Florida.

--Editing by Linda Voorhis.