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'Perplexing': 6th Circuit Judge Criticizes High Bar for Securities Lawsuits

"Hopefully, a future panel of this Court, or the Supreme Court, can clarify the law along the lines described here, so that the majority's untenable views are not sustained," Judge Eric Clay wrote.

April 30, 2024 at 04:04 PM

Securities Litigation



Avalon Zoppo



The U.S. Court of Appeals for the Sixth Circuit on Monday upheld the dismissal of a lawsuit accusing tech company Root Inc. of violating federal securities laws, but a concurring judge called the pleading standard applied by his colleagues "particularly perplexing" and highlighted a circuit split on the legal issue.

"Hopefully, a future panel of this Court, or the Supreme Court, can clarify the law along the lines described here, so that the majority's untenable views are not sustained," Judge Eric Clay wrote.

The underlying complaint was brought by Plumbers Local 290 Pension Trust Fund, which invested in Root and alleged that the company made misstatements about its customer acquisition costs and in its registration statement filed with regulators. The complaint raised negligent misrepresentation claims under Sections 11 and 12 and fraud claims under Section 10(b) of the federal Securities Acts of 1933 and 1934.

Unlike negligence claims, Section 10 fraud claims are pleaded under Rule 9, which requires specifying the "time, place, and content of the alleged misrepresentation" and the "fraudulent scheme."

But there's a circuit split over what pleading standard to apply when a complaint raises both types of claims, Clay wrote.

In the majority opinion, Judge Alice Batchelder stated that Rule 9 applies to claims about securities violations that "sound in fraud." The majority said that is the case here because all of Plumber Local's claims rely on the same set of facts.

"[A] party's disclaimer that it is not pleading fraud will not defeat our application of Rule 9(b), particularly when a securities fraud claim and the Sections 11 and 12(a)(2) claims rely on the same set of facts, as is true here," wrote Batchelder, joined by Judge Stephanie Davis.

While Clay agreed that the lawsuit should be dismissed for failing to state a claim, he expressed concern that the majority applying the stricter Rule 9 standard in situations like this could dissuade litigants from bringing fraud and negligence allegations in tandem, as is common.

“[T]he majority’s newly fashioned rule will undoubtedly lead some plaintiffs to shed some potentially meritorious claims so as to avoid triggering the demanding Rule 9(b) standard,” Clay wrote.

“We need not apply Rule 9(b) so broadly as to foreclose vindication of the securities laws, which Congress enacted to better protect consumers and the integrity of the financial system as a whole,” he continued. “But courts that apply Rule 9(b) even to claims of negligence, just because they rely on the same set of facts as a 10(b) claim, frequently dismiss the negligence claims for failure to meet Rule 9(b)’s specificity requirements.”

Clay stated that the majority didn’t acknowledge that Plumbers Local distinguished its fraud claims from others in the complaint.

He cited other circuits, such as the Fifth, Eighth and Ninth, that have said negligence claims paired with fraud claims need not be dismissed for failing to satisfy Rule 9.

“If a plaintiff fails to allege fraud with sufficient particularity, courts have the power to strip the allegations of fraud from the claim and evaluate whether a claim has been stated,” Clay wrote.

Plumbers Local was represented by Robbins Geller Rudman & Dowd and Root was represented by Cravath, Swaine & Moore.

The Sixth Circuit rendered its decision in *Plumbers Local 290 Pension Trust Fund v. Root*, No. 23-3392.

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6th Cir. heightens pleading standard in Root Inc.'s win over IPO investors | Secondary Sources | National

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6th Cir. heightens pleading standard in Root Inc.'s win over IPO investors

2024 SECDBRF 0084

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By Conor O'Brien, Esq.

(May 01, 2024) - Shareholders of Root Inc. have failed to persuade a federal appeals court to reinstate their proposed class action alleging the online car insurance company misled them in the registration statement for its initial public offering.

Kolominsky et al. v. Root Inc. et al., No. 23-3392, 2024 WL 1854474 (6th Cir. Apr. 29, 2024). The lower court correctly applied the heightened pleading standard reserved for allegations "sounding in fraud" when it dismissed claims under Sections 11 and 12(a)(2) of the Securities Act of 1933, 15 U.S.C.A. §§ 77k and I, the 6th U.S. Circuit Court of Appeals ruled April 29.

'Competitive advantage'

According to the lawsuit, Root's IPO registration statement claimed that the company had a competitive advantage because its customer acquisition cost was significantly lower than that of traditional insurers.

The IPO occurred Oct. 20, 2020, raising over \$600 million. By that time, however, the company's campaign to expand into all 50 states had driven the customer acquisition cost at least as high as traditional insurers, the amended complaint said.

The registration statement did not disclose the cost increase, but Root confirmed it in a series of earnings reports issued in 2020 and 2021, according to the suit. By March 19, 2021, Root's share price had fallen more than 55% since the IPO, according to the complaint.

The suit alleged that three Root officers and four banks that acted as the IPO's underwriters were liable under Section 11 of the Securities Act for issuing a misleading registration statement.

They and nine Root directors who approved the registration statement were also liable under Section 12(a)(2) of the Securities Act, the suit said.

The suit also brought fraud claims under Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C.A. § 78j(b).

The defendants moved to dismiss, arguing in part that the plaintiff had failed to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires that plaintiffs plead fraud "with particularity."

Lead plaintiff Plumbers Local #290 Pension Trust Fund in a July 2022 memo opposing dismissal urged U.S. District Judge Michael H. Watson of the Southern District of Ohio to apply the heightened standard only to the 10(b) claim.

The complaint had mentioned fraud with respect to the Securities Act claims only "to expressly exclude any allegations which might sound in fraud," the memo said.

Judge Watson dismissed the complaint in March 2023, ruling that it failed meet the higher pleading standard. *Kolominsky v. Root Inc.*, 667 F. Supp. 3d 685 (S.D. Ohio 2023).

'Disclaimer' rejected

The pension fund appealed, arguing that because the complaint expressly stated that fraud is not an element of the Securities Act claims, Judge Watson wrongly subjected the claims to Rule 9(b).

The appellate panel disagreed. A majority said Judge Watson correctly applied Rule 9(b) because the Securities Act claims and the 10(b) fraud claim all arose from the same set of allegedly misleading statements.

The complaint's "disclaimer" that the Securities Act claims were not pleading fraud did not "defeat the assumption that the pleadings in this action sound in fraud," the majority said.

U.S. Circuit Judge Eric L. Clay concurred in the outcome of the ruling, saying he believed the complaint failed to state a claim under a non-heightened standard, but he dissented with the majority's application of Rule 9(b) to the Securities Act claims.

He said that legal precedent has never required plaintiffs pleading negligence claims under the Securities Act to face Rule 9(b), even when the claims rely on the same facts as a fraud claim pleaded in the same complaint.

"Meritorious negligence claims under Section 11 and 12 will be dismissed under a standard that they would never have to meet were they alleged on their own," Judge Clay wrote.

Steven F. Hubachek of Robbins, Geller, Rudman & Dowd LLP argued on behalf of Plumbers Local. Michael P. Addis of Cravath, Swaine & Moore LLP argued for the appellees. By Conor O'Brien, Esq.

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May 1, 2024, 7:31AM PDT
Inovalon Investors Get Another Chance at \$7 Billion Buyout Case
By [Mike Leonard](#) and [Jennifer Kay](#)
Documents

-  [Ruling](#)
-  [Docket](#)

- Pension funds said take-private deal was rife with conflicts
- Buyout’s architects made incomplete disclosures, court says

Bloomberg Law News 2024-05-01T13:09:28309845939-04:00
Inovalon Investors Get Another Chance at \$7 Billion Buyout Case

By Mike Leonard and Jennifer Kay 2024-05-01T10:31:48000-04:00

- Pension funds said take-private deal was rife with conflicts
- Buyout’s architects made incomplete disclosures, court says

Delaware’s top court revived shareholder litigation Wednesday over Inovalon Holdings Inc.’s \$7.3 billion sale to a private equity consortium led by Nordic Capital.

Although the transaction’s architects put it to a vote of Inovalon’s minority shareholders, they kept a lid on important information about the deal’s financial advisers, so the judge who presided over trial-level proceedings should have taken a harder look at insider conflicts of interest, Justice Karen L. Valihura wrote for a unanimous state supreme court.

“The alleged facts could make a difference to stockholders in analyzing and weighing the advice of the advisors,” Valihura said in a 57-page opinion.

The lawsuit, filed by pension funds in 2022, says CEO Keith Dunleavy and other Inovalon executives steered the health analytics company into the buyout for a lower price that favored company insiders.

At the same time, they hid potentially higher bids and downplayed conflicts of interest affecting two advisers, Evercore Inc. and JP Morgan Securities LLC, the suit says.

Dunleavy was allegedly driven by his own personal interests while negotiating the transaction, which gave him a job at the combined company, the chance to roll over his \$700 million stake, and other perks.

Chancellor Kathaleen St. J. McCormick, chief judge of Delaware’s Chancery Court, dismissed the case in June 2023. Inovalon investors had adequate notice about the conflicts of interest when they voted to approve the transaction anyway, McCormick said.

The Delaware Supreme Court reversed, applying a form of heightened legal scrutiny that covers deals conferring special benefits on corporate controlling stockholders.

Under that framework, company leaders must prove both the price and the process were adequate, but they can get the deal reviewed under a more insider-friendly standard if they adopt minority investor protections including shareholder approval. The investor vote doesn't count, however, unless it was fully informed.

Undisclosed information about Nordic's relationships with Evercore and JP Morgan, and certain details about their transaction-related advisory fees, was significant enough to nullify the shareholder vote, Valihura said Wednesday.

Chief Justice Collins J. Seitz Jr. and Justices Gary F. Traynor, Abigail M. LeGrow, and N. Christopher Griffiths joined the ruling.

The pension funds are represented by Kessler Topaz Meltzer & Check LLP, Friedman Oster & Tejtell PLLC and Labaton Keller Sucharow. Latham & Watkins LLP and Morris Nichols Arsht & Tunnell LLP are counsel for the board committee members that negotiated the deal. Richards Layton & Finger PA represents Inovalon. Abrams & Bayliss LLP represents Dunleavy.

The case is City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings Inc. , Del., No. 305,2023

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May 1, 2024, 9:51 AM PDT
Insulin Pump Maker Tandem Wins Dismissal of Shareholder Suit
By [Matthew Bultman](#)
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- Tandem’s statements not shown to be misleading, judge says
- Investors given a chance to amend their complaint

Bloomberg Law News 2024-05-01T13:32:06015524395-04:00
Insulin Pump Maker Tandem Wins Dismissal of Shareholder Suit

By Matthew Bultman 2024-05-01T12:51:33000-04:00

- Tandem’s statements not shown to be misleading, judge says
- Investors given a chance to amend their complaint

A federal judge dismissed a shareholder lawsuit accusing Tandem Diabetes Care Inc. of hiding information about staffing shortages at doctors’ offices related to Covid-19 and other headwinds the insulin pump maker faced.

Tandem repeatedly warned investors in calls and filings with the Securities and Exchange Commission about adverse market conditions, Judge Marilyn Huff in the US District Court for the Southern District of California said in an opinion filed Tuesday.

Those conditions included the physician staffing shortages, customers having less money to spend on insulin pumps because of high unemployment and inflation, and more insulin pumps entering the market from companies like Insulet Corp. and Medtronic Plc, court filings said.

“Given the Company’s repeated disclosures of the Three Headwinds before, during, and after the Class Period, it is not plausible that a ‘reasonable investor’ would conclude that the challenged statements were false or misleading,” Huff said.

The judge gave investors a chance to amend the complaint.

Investors filed the lawsuit in September, after San Diego-based Tandem missed its 2022 third-quarter sales targets and reduced its annual sales projections, leading to a drop in its stock price.

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The complaint relied on two former Tandem employees, including one who served as a territory manager in the northwest US. The manager claimed to have expressed concerns internally about how market conditions would affect pump sales, and alleged that higher-up managers ignored the warnings.

But the investors failed to establish that the manager, referred to in courts filings as "FE1," was reliable or had personal knowledge of the impact those conditions had at a company-wide level, Huff said.

"As a 'territory manager' responsible for only one region in the United States, it is not clear how FE1 would have personal knowledge regarding sales in other regions or the general market conditions across the United States," Huff said.

Levi & Korsinsky, LLP and Pomerantz LLP represent the investors. Cooley LLP represents Tandem.

The case is *Lowe v. Tandem Diabetes Care, Inc.*, S.D. Cal., No. 23-cv-01657, opinion filed 4/30/24 .

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April 30, 2024, 1:44 PM PDT

Paramount Investor Asks Judge for Access to Merger Documents (1)

By Jef Feeley

Bloomberg Law News 2024-05-01T14:55:51750685145-04:00

Paramount Investor Asks Judge for Access to Merger Documents (1)

By Jef Feeley2024-04-30T16:44:16364-04:00

A Paramount Global investor is going to court, concerned that a merger of the film and TV company may harm minority investors.

The Employees' Retirement System of Rhode Island asked a Delaware judge to order the company to turn over files related to its talks with **David Ellison's** Skydance Media, according to a filing Tuesday in the state Chancery Court.

Paramount's controlling shareholder Shari Redstone may be hampering the media giant's chances to cut a better deal than the terms offered by Ellison, the pension fund said. Its managers want to be confident that board members of Paramount, which owns CBS, MTV and other properties, get the best price for the company.

Ellison's Skydance Media is proposing to take a controlling stake in Paramount through a series of transactions, starting with a deal to buy National Amusements, the Redstone family company that holds a 77% voting stake in the company. Ellison is the son of Oracle Corp. co-founder and Chairman Larry Ellison.

Skydance is also proposing to buy \$3 billion of Paramount shares at a premium to their current price to shore up the film and TV company's finances, according to people familiar with the negotiations. The board and Skydance's representatives have been discussing how much of that money would go to share buybacks and how much for debt reduction.

The pension fund is "concerned the Paramount board has failed to prevent Shari Redstone from diverting corporate opportunities or interfering with Paramount's ability to seek the best deal for Paramount and its other stockholders," according to the filing.

The fund's lawyers want access to board materials about how Ellison's offer has been evaluated and other proposed offers for the struggling entertainment company, according to the filing.

Paramount didn't respond to a request for comment.

The merger talks have led to a shareholder revolt over possible harm to minority investors. Paramount's board has been hesitant to agree to a deal given the opposition from investors such as billionaire money manager Mario Gabelli and Barington Capital Group LP, which said the company should consider options that benefit all shareholders, not just the Redstones.

John Rogers, founder of Ariel Investments and a longtime stockholder, said Tuesday on Bloomberg TV that a sale of the company to Sony Group Corp. and Apollo Global Management Inc. would be better.

"That seems like a marriage made in heaven," Rogers said. "We wouldn't rush to the altar with a smaller company that's not as proven."

Read More: Listen to the John Rogers interview

Lawyers for the Rhode Island fund say they have a "credible basis" for fearing Redstone may violate legal duties she owes to minority investors under Delaware law. Paramount is incorporated in the state while the Redstone's company — National Amusements — is incorporated in Maryland.

To get to internal company files, shareholders must show they have a proper purpose for seeking the documents. Such actions, known as "books & records" cases, are heard on an expedited basis and shareholders often can get access to at least some records.

The case is State of Rhode Island Office of the Treasurer v Paramount Global, 2024-0457, Delaware Chancery Court (Wilmington).

(Updates with comments from filing in sixth paragraph.)

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Judge dismisses Meta shareholder lawsuit claiming that directors' obligations extend beyond company

 [courthousenews.com/judge-dismisses-meta-shareholder-lawsuit-claiming-that-directors-obligations-extend-beyond-company](https://www.courthousenews.com/judge-dismisses-meta-shareholder-lawsuit-claiming-that-directors-obligations-extend-beyond-company)

Associated Press

DOVER, Del. (AP) — A Delaware judge on Tuesday dismissed a shareholder lawsuit asserting novel claims about the roles of corporate leaders and arguing that the loyalties of Meta directors and company founder Mark Zuckerberg should not lie exclusively with the social media giant.

James McRitchie, who runs a website focused on corporate governance and shareholder activism, argued that Meta's directors have breached their duties to the company by putting profits over broader societal and economic interests, including Meta shareholders' diversified investments in other companies.

In a 101-page opinion citing court rulings dating back more than 200 years, decades of law review articles and legal treatises, and even a Sherlock Holmes short story, Vice Chancellor J. Travis Laster rejected McRitchie's claims.

Laster noted that, under the "standard Delaware formulation" of corporate law, directors of a corporation owe duties to the stockholders as investors in that corporation.

"The plaintiff has not made a persuasive case for change," Laster wrote. "At most, he has shown that some academics — primarily from the law and economics school — have assumed that a diversified-investor model is the norm. He has also shown that some investor advocacy organizations would prefer that model."

While Delaware law requires corporate directors to act in the best interests of their stockholders, including maximizing the value of their shares, attorneys for McRitchie argued that Delaware courts should recognize a "portfolio theory" of corporate governance that takes into account external factors.

They argued, for example, that Meta, which owns Facebook, Instagram, Messenger and WhatsApp, has prioritized profits while downplaying the detrimental effects of its products on society and the global economy. That, in turn, they said, can negatively affect the investment portfolios of Meta shareholders who also have invested in other companies.

Among the "negative externalities" the lawsuit blamed on Meta's social media platforms are mental health problems among young Instagram users, online human trafficking, "vaccine hesitancy," incitements to violence, and "election misinformation."

By RANDALL CHASE AP Business Writer

Categories / Business, Media, Securities, Technology

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April 30, 2024, 11:18 AM PDT

Meta Escapes Lawsuit Claiming It Profits at Society's Expense

By Jennifer Kay

- Meta's actions damage diverse portfolios, shareholder argued
- Judge was 'skeptical' of arguments to change corporate laws

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Meta Escapes Lawsuit Claiming It Profits at Society's Expense

By Jennifer Kay 2024-04-30T14:18:40000-04:00

- Meta's actions damage diverse portfolios, shareholder argued
- Judge was 'skeptical' of arguments to change corporate laws

Meta Platforms Inc. and Mark Zuckerberg have escaped investor litigation that claimed their pursuit of profits jeopardized public health, social well-being, and their stockholders' diversified portfolios.

A shareholder activist didn't make a persuasive case for changing Delaware and US corporate laws to operate on the assumption that a corporation's stockholders are diversified, said Vice Chancellor J. Travis Laster, in a 101-page opinion Tuesday for the Delaware Court of Chancery.

"There are reasons to be skeptical," he said, dismissing the case with prejudice. "The academic literature indicates that a diversified-investor model has drawbacks of its own, and the case for imposing a different fiduciary model is far from clear."

The parent company of Facebook and Instagram had argued the litigation aimed to disrupt the stability of Delaware corporate law. The leaders of Delaware corporations don't owe a duty to oversee, consider, or protect a stockholder's investments in other companies, they said.

Laster agreed.

"It is not reasonably conceivable that Delaware corporate law currently operates on a diversified-investor model," he said. "Nor does this court have the freedom to adopt it, even assuming the concept was sound."

In a Dec. 20 hearing in the case, Laster said he expected the question at the heart of the lawsuit—whether short-term gains for stockholders should prevail in consideration of any corporate action that “from a societal standpoint is a net-negative”—is one that will be a “recurring event” for corporate boards.

The shareholder activist, James McRitchie, initially sued Meta and its board in 2022, alleging the directors failed in their fiduciary duties by putting profit over public safety, broad economic welfare, and the interest of Meta’s diversified stockholders, who also invest in other companies. The lawsuit made similar claims against Zuckerberg and boardmember Sheryl Sandberg as officers of the company, and against Zuckerberg as a controlling stockholder.

McRitchie is represented by Heyman Enerio Gattuso & Hirzel LLP. Meta, Zuckerberg, and Meta’s other board members are represented by Ross Aronstam & Moritz and Orrick Herrington & Sutcliffe LLP.

The case is *McRitchie v. Zuckerberg*, Del. Ch., No. 2022-0890, opinion 4/30/24.

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Commerzbank Subprime-Era Trust Claims Get Revived on Appeal (1)

By Martina Barash

- Under deals' terms, trustee and others needed chance to sue
- Courts should mull conflicts of interest, Second Circuit says

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Commerzbank Subprime-Era Trust Claims Get Revived on Appeal (1)

By Martina Barash 2024-04-30T10:49:44000-04:00

- Under deals' terms, trustee and others needed chance to sue
- Courts should mull conflicts of interest, Second Circuit says

Commerzbank AG may pursue contractual claims over residential mortgage-backed securities despite clauses in those agreements requiring pre-suit demands on trustees, at least for now, the Second Circuit ruled Tuesday.

The suit stems from Commerzbank's purchase of RMBS certificates from U.S. Bank NA, the trustee that allegedly managed the securities, before the collapse of that sector of the market during the 2008 financial crisis.

Courts considering provisions barring lawsuits without pre-suit demands—or “no action clauses”—in similar contracts “should consider whether such requirements would entail potential conflicts of interest on the demanded party” to such an extent that the request would be futile, the US Court of Appeals for the Second Circuit said.

The holding extends the logic of a 1992 precedent of the Second Circuit, *Cruden v. Bank of New York*, to include “additional or substitute” parties designated to receive pre-suit notice as potentially conflicted enough to make a demand on them futile, according to the court.

“Our holding today, however, is not a blanket extension of *Cruden* to allow *any* suits against trustees by absolving plaintiffs of the obligations set forth in No Action Clauses,” Judge Myrna Pérez said. Instead, courts must look at the specifics of the alleged conflicts of interest, she said.

Conflicts Under Microscope

Commerzbank's suit was one of many "brought against the banks, trustees, and servicers who originated the subprime mortgage loans and repackaged them into RMBS financial instruments," she said.

In Commerzbank's case, the US District Court for the Southern District of New York should look at two surviving subsets of the challenged certificate agreements, Pérez said.

One subset consisted of agreements "where the trust administrator, Citibank, N.A., was affiliated with a breaching seller, Citigroup Global Markets Realty Corp.," she said.

The other potential conflict involved contracts "where securities administrators, Litton Loan Servicing LP and JPMorgan Chase Bank, were breaching servicers or The Bank of New York was both a securities administrator and trustee accused of similar wrongdoing in other cases," she said.

The Second Circuit didn't rule entirely for Commerzbank. It affirmed the lower court's orders rejecting some of Commerzbank's claims on two other issues besides the no-action clauses: whether claims over certificates the bank held through German entities were timely, and whether it could bring claims over certificates it had sold to third parties.

Judges Gerard E. Lynch and Joseph F. Bianco joined the opinion.

Wollmuth Maher & Deutsch LLP represented Commerzbank. Jones Day represented U.S. Bank.

The case is Commerzbank AG v. U.S. Bank, N.A. , 2d Cir., No. 22-854, 4/30/24 .

(Updated throughout with details and analysis from court opinion.)

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Critical Mass with Law.com's Amanda Bronstad: Roundup Trial Revs Up in Missouri, \$100M Fee Award in Philips CPAP Class Settlement

May 01, 2024 at 08:08 AM

Critical Mass



Amanda Bronstad
staff reporter



Welcome to Law.com Class Actions: Critical Mass, a weekly briefing for class action and mass tort attorneys.

This week: A trial involving three plaintiffs who sprayed **Monsanto's Roundup** began this week in **St. Louis, Missouri**. Lawyers who got a class action settlement over **Philips** recalled CPAP machines will receive \$94.4 million in fees. Find out who got appointed to a slimmed-down leadership team in the **Ozempic** multidistrict litigation.

I'm **Amanda Bronstad**. Feel free to reach out to me with your input. My email is abronstad@alm.com. Follow me on [LinkedIn](#) or X: [@abronstadlaw](#).

Roundup Plaintiffs Also Target PCBs

Another Roundup trial began this week in Missouri—and, this time, **Monsanto** faces three plaintiffs.

[Here's my story](#) on the trial, in **St. Louis City Circuit Court**, which pits plaintiffs' team [Al Stewart](#) (**Allen Stewart**), [Scott Frieling](#) (**Allen Stewart**), [Susannah Chester-Schindler](#) (**Waters Kraus**) and [Walt Cubberly](#) (**Williams Hart & Boundas**) against defense attorneys [Anthony Upshaw](#) (**McDermott Will & Emery**) and [Shayna Cook](#) (**Goldman Ismail**).

Juries since the COVID-19 pandemic have been split in Roundup trials across the country, including in Missouri, where **Monsanto**, now owned by **Bayer**, has [won five defense verdicts](#) but lost awards of [\\$1.25 million](#) in St. Louis and [\\$1.6 billion](#) in Jefferson City.

Who are the three plaintiffs? Two women from Ohio, and one from Oklahoma, who allege that spraying Roundup at their homes caused them to get non-Hodgkin lymphoma.

Bayer, in its statement, said the case also involves “unspecified claims regarding PCB exposure,” referring to polychlorinated biphenyls. The statement says, “The relevant science shows PCBs do not cause NHL, and Monsanto discontinued its production of PCBs nearly five decades ago, conducted hundreds of studies about their safety, and provided warnings to its customers based on the state-of-the-science at the time, including warnings to customers and

government regulators regarding the need to avoid the use of PCBs where they could come in contact with food.”

Monsanto has been hit with \$1.6 billion in multiple verdicts in **Seattle’s King County Superior Court**, where former students, teachers and parents at a school have sued over PCB exposure. In fact, jury selection is underway in another trial begins with opening statements on May 20. That trial involves nine plaintiffs from two families. Monsanto’s trial team is led by [Hildy Sastre](#) (Shook Hardy & Bacon) and [Susan Werstak](#) (Shook Hardy & Bacon) and [Erin Ehlert](#) (Bryan Cave).

Philips Settlements ‘Accomplish What We Sought to Achieve’

Attorneys announced two big settlements involving recalled Philips breathing machines. A class action settlement, valued at between \$479 million to more than \$600 million, resolved the economic damages of consumers who purchased the devices and, on Monday, Philips agreed to pay \$1.075 billion for personal injuries and \$25 million for medical monitoring as part of a separate settlement.

“Ultimately, these combined agreements accomplish what we sought to achieve when this litigation began—holding Philips accountable by obtaining care for those with physical injuries and compensation for those needing new respiratory devices,” co-lead counsel [Sandra Duggan](#) (Levin Sedran & Berman), [Kelly Iverson](#) (Lynch Carpenter), [Chris Seeger](#) (Seeger Weiss) and [Steven Schwartz](#) (Chimicles Schwartz) wrote.

It is not clear how much in fees will come from the personal injury agreement but, on April 25, U.S. District Senior Judge **Joy Flowers Conti** granted final approval of the class action settlement, awarding **\$94.4 million** to the lawyers.

Philips is not the only big settlement with the potential for some hefty fees: Tyco’s [\\$750 million deal](#) to resolve PFAS contamination for thousands of providers of drinking water, and the \$600 million agreement with **Norfolk Southern** over last year’s derailment in East Palestine, Ohio. Lawyers in both cases filed April 26 motions for preliminary approval.

The Tyco motion does not give an amount, but it could be **\$60 million** given that U.S. District Judge **Richard Gergel**, who is overseeing the case, approved 8% in fees in similar PFAS settlements with **3M** and **DuPont**. In the Norfolk Southern settlement, lawyers said they would seek no more than 27% of the agreement, which is **\$162 million**.

Who Got the Work?

A federal judge in Pennsylvania [ordered a pared-down leadership team](#) in the **Ozempic** multidistrict litigation. Lawyers had proposed a team of 32 lawyers, but, in an April 24 ruling, U.S. District Judge **Gene Pratter** named 10 to leadership posts: [Paul Pennock](#) (**Morgan & Morgan**), [Marcus Susen](#) (**Susen Law Group**), [Sara Couch](#) (**Motley Rice**), [Cameron Stephenson](#) (**Levin Papantonio**), [Mike Daly](#) (**Pogust Goodhead**), [Stacy Hauer](#) (**Johnson Becker**), Alex Walsh (**Alex Walsh Law**), and [Diandra “Fu” Debrosse](#) (**DiCello Levitt**).

Here’s what else is happening:

Class Disrupted: Edelson PC filed a class action against **Columbia University** on behalf of students who have had to switch to online learning as of April 24 due to campus protests and encampments over the **Israel and Palestinian** war in Gaza. The suit brings claims for breach of contract and an emergency injunction requiring Columbia trustees to enforce the university’s ethical codes of conduct. “Columbia has in no uncertain terms announced that the university is not safe for its Jewish students,” the students alleged in Monday’s lawsuit, which comes as many law schools have [had to change final exam locations](#) or adjust commencement ceremonies.

Insulin Reboot: Lawyers touting a **\$500 million settlement** over insulin prices are [starting over](#) after a federal judge refused to certify their class. Under the proposed deal, manufacturer **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. A dozen state attorneys general

objected to the deal, which lawyers called off after **U.S. District Judge Brian Martinotti** refused to certify their class action against manufacturers **Novo Nordisk** and **Sanofi-Aventis**. The plaintiffs’ lawyers plan to amend their complaint.

Breach Battle: Lawyers ramped up their fight over who should lead lawsuits over **23andMe’s** data breach, which compromised the personal data of seven million people, including genetic information, particularly those of Ashkenazi Jewish or Chinese ancestry. Lawyers pitched at least four different leadership teams to **U.S. District Judge Edward Chen**, who is overseeing the multidistrict litigation in California. The teams differed on whether and when to settle the cases. Chen has set a May 30 hearing to appoint lead counsel.

Thanks for reading Critical Mass! I’ll be back next week.

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J&J advances \$6.48 billion settlement of talc cancer lawsuits

 [reuters.com/legal/jj-advances-6475-billion-settlement-talc-cancer-lawsuits-2024-05-01](https://www.reuters.com/legal/jj-advances-6475-billion-settlement-talc-cancer-lawsuits-2024-05-01)

Dietrich Knauth

Bottles of Johnson's baby powder are displayed in a store in New York City, U.S., January 22, 2019. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, May 1(Reuters) - Johnson & Johnson (JNJ.N) , opens new tab said on Wednesday it is moving forward with a \$6.48 billion proposed settlement of tens of thousands of lawsuits alleging that its baby powder and other talc products contain asbestos and cause ovarian cancer.

The deal would allow it to resolve the lawsuits through a third bankruptcy filing of a subsidiary company.

It will begin a three month voting period in hopes of reaching consensus on a settlement of all current and future ovarian cancer claims. Those claims account for 99% of the talc-related lawsuits filed against J&J, including about 54,000 lawsuits that are centralized in a New Jersey federal court proceeding.

Courts have rebuffed J&J's two previous efforts to resolve the lawsuits through the bankruptcy of the subsidiary created to absorb the company's talc liability, LTL Management.

J&J, which says its products do not contain asbestos and do not cause cancer, said that its settlement is supported by attorneys representing the majority of plaintiffs who have filed cancer lawsuits against the company.

Erik Haas, J&J's worldwide vice president of litigation, said gathering votes before a bankruptcy filing would allow the new plan would succeed where J&J's past efforts faltered.

"The claimants get to vote, and that's the major difference here," Haas said in a Wednesday call with investors.

J&J said it is confident that the deal will reach a 75% support threshold needed for a bankruptcy settlement that would end the litigation entirely, shutting off future lawsuits and preventing people from opting out of the deal to pursue their separate claims.

Attorneys representing cancer victims seemed divided on the proposal on Wednesday.



"I believe J&J's proposed plan announced today will bring peace and closure to our clients and the thousands of women who have fought by our side in the quest for justice," said Jim Onder, who represents about 21,000 talc claimants and who supported J&J's previous bankruptcy proposal.

Other lawyers said J&J is trying to "stuff the ballot box" by getting votes from lawyers who have not sued J&J or whose clients have types of cancers that do not have a strong scientific link to talc.

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Mike Papantonio, an attorney opposed to the deal, said J&J has been "covertly soliciting law firms to accept their deal, promising a swift payday for some opportunistic lawyers."

The proposed deal would build on J&J's settlements with about 95% of people who have sued the company after developing mesothelioma, a rare form of cancer linked to asbestos exposure, as well as its settlements with U.S. states, which have alleged that the company failed to warn consumers about the dangers of its talc products.

\$11 BILLION IN RESERVES

J&J said it set aside a total reserve of \$11 billion to account for all of its talc settlements, including the proposed ovarian cancer settlement, mesothelioma claims, states' claims, and settlements with two bankrupt companies that supplied talc used in J&J's products. J&J recorded an incremental charge of \$2.7 billion in the first quarter of 2024, added to its previous reserve for talc litigation.

In its second bankruptcy filing, LTL put forward an \$8.9 billion deal that would have dealt with all talc-related claims at once.

After that deal was rejected, Haas said it was more practical to settle mesothelioma claims outside of bankruptcy before addressing much larger group of 85,000 to 100,000 ovarian cancer claims. Haas said J&J faced hundreds of mesothelioma lawsuits, and it has settled all but 153 lawsuits.

The previous bankruptcy filings put the talc litigation on hold from 2021 to 2023, but trials have resumed after a federal judge ruled the latest bankruptcy case should be dismissed in July 2023.

In March, J&J received a new chance to contest the scientific evidence linking talc to ovarian cancer in the centralized litigation in New Jersey federal court. The judge overseeing the cases said that recent changes in the law and new scientific evidence require a fresh review, and he asked J&J to present new arguments on the science by late July.

J&J said it will continue to defend itself against the lawsuits while trying to gather votes on the settlement. The company said it has prevailed in 95% of ovarian cases tried to date, including every ovarian case tried over the last six years.

The litigation has resulted in some large verdicts for plaintiffs, including a \$2.12 billion award in favor of 22 women who blamed their ovarian cancer on asbestos in J&J talc. In the past month, J&J was recently ordered to pay \$45 million [\[link\]](#), opens new tab in a mesothelioma case while winning an ovarian cancer case.

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Reporting by Dietrich Knauth; Editing by Alexia Garamfalvi, Christopher Cushing and Bill Berkrot

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Johnson & Johnson Co Inc

Johnson & Johnson proposes \$6.5bn deal to settle talc cancer lawsuits

Drugmaker could fast track subsidiary's bankruptcy process if 75% of claimants vote in favour of new plan



J&J's two previous Chapter 11 bankruptcy filings were rejected by the courts © Justin Sullivan/Getty Images

Oliver Barnes in New York 52 MINUTES AGO



Johnson & Johnson has offered an improved \$6.5bn settlement to tens of thousands of plaintiffs claiming that its talcum powder products caused ovarian cancer, in its latest attempt to [draw a line](#) under the long-running litigation.

In an update on Wednesday the world's largest drugmaker by revenues said it would put the plan, which would pay out about \$6.48bn over the next 25 years, to a vote by the more than 50,000 ovarian cancer claimants later this year. The deal would allow J&J to resolve all current and future claims relating to ovarian cancer through the bankruptcy filing of a subsidiary company, if 75 per cent of plaintiffs vote in favour.

The latest proposal would bring the total payout across all cases to \$11bn, an increase of \$2.1bn on a [previous offer](#), and marks the third attempt by J&J to resolve the ovarian cancer claims through bankruptcy proceedings.

The drugmaker's two previous Chapter 11 bankruptcy filings were rejected by the courts. In both cases J&J attempted to use a controversial manoeuvre known as the ["Texas two-step"](#), in which a subsidiary facing legal claims is spun out from the main company, and files for bankruptcy to facilitate the settlement.

On this occasion, [J&J](#) is seeking first to win approval from claimants before going to court, using a "pre-packaged" bankruptcy process, which allows for a speedier resolution if companies have won sufficient support from creditors. J&J will give claimants the opportunity to vote on the plan over a three-month period before putting its subsidiary LLT Management through the pre-packaged process.

J&J, which has repeatedly denied that its talc-based products cause cancer, said the new plan "differs significantly" from its previous attempts. Erik Haas, the company's worldwide vice-president of litigation, said it was "the culmination of our consensual resolution strategy that we announced last October".

"Unlike the prior cases, it is the vote of the claimants — and not the conflicting financial incentives of the small minority of plaintiff lawyers who stand to receive excessive legal fees outside of a reorganisation — that decides whether the plan may proceed," Haas said.

A judge [rejected J&J's second bankruptcy attempt](#) in July last year, after concluding that the subsidiary was not in sufficient "financial distress" to merit a Chapter 11 process. The first bankruptcy case was dismissed for a similar reason.

J&J announced plans for a third attempt at a bankruptcy process last October. On Wednesday J&J said it would pursue alternative ways to resolve the litigation while awaiting approval from claimants. Those included appealing against the dismissal of its previous bankruptcy plan, "aggressively litigating" against plaintiffs who refused to settle, and taking legal action against people who presented false and defamatory claims about its products and law firms that assisted them.

More than 99 per cent of the lawsuits facing J&J relate to ovarian cancer. However it is also facing a small number of personal injury lawsuits over claims that its products caused mesothelioma, a different form of cancer linked to asbestos exposure, which the company also denies.

J&J said it had already resolved 95 per cent of those cases, and had agreements in principle to resolve claims brought by US states and talc suppliers.

Shagun Singh, an analyst at RBC Capital Markets, said in a note that she was “encouraged” by J&J’s proposed plan “which removes one aspect of overhang on the stock”. Singh added that following conversations with industry experts “we believe that the plan should go through and be a catalyst for JNJ’s stock”.

In December last year, J&J moved the registered headquarters of the subsidiary from an address in North Carolina to one in Texas, changing the name of the subsidiary from LTL to LLT as part of the process.

J&J’s share price was up 3.6 per cent in Wednesday morning trading in New York.

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Opinion **Lex**

Johnson & Johnson talc settlement shows limits of bankruptcy tactics

Real progress comes when both sides accept the other has something valuable to exchange



J&J has agreed to payments worth \$13.7bn over 25 years © REUTERS

54 MINUTES AGO



The real fancy footwork was always going on behind the scenes.

Johnson & Johnson had received scorn for executing the so-called Texas Two-Step bankruptcy strategy. The healthcare titan was facing thousands of claims about allegedly carcinogenic talcum powder. Taking advantage of a quirk in Lone Star State law, it created a subsidiary called LTL to segregate those claims. It then had LTL file for bankruptcy so that the court system could manage a single settlement negotiation and bind all the claimants to that deal.

Federal appeals courts rejected this “Texas Two-Step” gambit not once but twice. Yet in the background, the company and plaintiffs’ lawyers were trying to cut a global deal, announced on Wednesday. Tactics aside, real progress comes when both sides accept that the other has something valuable to exchange: certainty on one and cash on the other.

J&J [has agreed to payments](#) worth \$13.7bn over 25 years, or \$6.5bn in present value terms. It said that lawyers representing 99.75 per cent of ovarian cancer claimants have agreed to the deal. The claimants will vote on the settlement and, if 75 per cent approve, LTL will file a consensual, pre-packaged bankruptcy in order to implement the terms.

Large companies facing so-called tort liability have awkwardly turned to the bankruptcy system, arguing that Chapter 11 is the only way to resolve claims efficiently and fairly. Critics say the manoeuvre is a ploy to shirk responsibility for misconduct.

The elegance of US bankruptcy is that it can impose a sweeping settlement across all creditors and claimants while terminating all outstanding litigation. That concept is controversial by itself as the Purdue Pharma opioid case, now in front of the Supreme Court, shows.

But J&J took it a step further, by filing not the whole \$350bn company but a contrived subsidiary. The company had said it would pay up to \$60bn of liability. Ironically, that pledge forced an appeals court judge to rule that the subsidiary did not demonstrate the financial distress required by bankruptcy law.

Note that this J&J deal is the second large mass tort case to be resolved outside of Chapter 11 after first trying bankruptcy courts. 3M put its military earplug division, Aearo, into bankruptcy only to run into roadblocks. It eventually got to a deal outside of bankruptcy that was in effect what the parties could have got from a court-imposed resolution.

Adversaries always seek negotiating leverage in order to win concessions. When the sides realise that both have something the other really wants, a deal can quickly come together.

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April 30, 2024, 10:32 AM PDT
Apple iPhone Consumer Attorneys Seek \$8.75 Million in Audio Suit
By [Shweta Watwe](#)
Documents

-  [Motion for Attorneys' Fees](#)
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- Attorneys say they spent thousands of hours on five-year suit
- \$35 million deal over audio defects previously got early nod

Bloomberg Law News 2024-05-01T13:23:16440761107-04:00
Apple iPhone Consumer Attorneys Seek \$8.75 Million in Audio Suit

By Shweta Watwe 2024-04-30T13:32:33000-04:00

- Attorneys say they spent thousands of hours on five-year suit
- \$35 million deal over audio defects previously got early nod

Attorneys for consumers who alleged that a defect in iPhone 7 and 7 Plus phones caused poor sound quality have asked for \$8.75 million in fees and costs after the parties’ settlement agreement won preliminary approval.

Class counsel said they’ve spent nearly 8,000 hours over five years on the “hotly contested” litigation over the alleged defect, according to their motion filed Monday in the US District Court for the Northern District of California. Litigation expenses amount to approximately \$175,000 and attorneys’ fees should be approximately \$8.57 million, the attorneys say. The attorneys are also asking the court to approve a \$3,000 class representative service award for six plaintiffs.

Consumers alleged an audio defect in the phones provided poor sound and interfered with their ability to make phone calls or use features like Siri.

The parties agreed to settle the claims for \$35 million, and Judge Jon S. Tigar granted preliminary approval of the deal in November 2023.

The deal will cover individuals who owned an iPhone 7 or 7 Plus between September 2016 and January 2023 who had contacted Apple Inc. to fix the issue. Class members who paid out-of-pocket expenses related to the alleged defect will be eligible to receive between \$50 and \$349. Class members who complained about the alleged defect but didn’t have out-of-pocket expenses are eligible for up to \$125.

Customers whose phones didn’t have an issue aren’t eligible for settlement relief.

https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X24TMEVS000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6L... 1/3

"Delivering this relief has been a labor intensive and risky undertaking," the plaintiffs' attorneys said. "Reviewing and analyzing *all* of Apple's produced records (which totaled over 230,000 pages), the majority of which were highly technical, was arduous and time intensive."

The attorneys are asking for the fees to be paid from the settlement fund and say the fees meet the Ninth Circuit's accepted 20-30% range. Additionally, only 22 class members have opted out of the settlement and no objections have been received, which the attorneys say shows that the fees request is reasonable.

The consumers are represented by Tycko & Zavareei LLP and Milberg Coleman Bryson Phillips Grossman PLLC. Apple is represented by Morrison & Foerster LLP.

The case is *Tabak v. Apple Inc.*, N.D. Cal., No. 4:19-cv-02455, 4/29/24 .

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NEWS

Artists Sue Google, Alleging It Used Copyrighted Work in AI Training Database

This is the 22nd of 23 such lawsuits filed against AI developers for copyright infringement.

April 30, 2024 at 06:26 PM

Intellectual Property



Alex Anteau



What You Need to Know

- Two more copyright infringement lawsuits were recently filed against Google, Microsoft and Open AI for using work they didn't have the rights to to train AI models.
- The plaintiffs suing Google contend the company is purposefully opaque about the dataset used to train its AI image editing software so it doesn't get sued.
- Two of the artists named in the complaint also have a similar case pending against Stability AI.

The wave of lawsuits pending against generative AI developers has reached another crest with new legal actions brought against [Google](#), [Microsoft](#) and [Open AI](#).

Alphabet, the parent company of Google, and Google were named in a copyright class action on April 26 in the U.S. District Court for the Northern District of California. The [Joseph Saveri Law Firm](#), [Butterick Law](#) and [Lockridge Grindal Nauen](#) filed the complaint on behalf of cartoonists Sarah Andersen, Hope Larson and Jessica Fink and photographer Jingna Zhang, who contend that Google used their registered copyrights to train Imagen, an AI photo editing assistant, without authorization.

This is the 22nd of 23 such lawsuits filed against AI developers for copyright infringement, the most recent of which where filed by the Chicago Tribune against Microsoft and Open AI on Tuesday. The Joseph Saveri firm is involved in seven of these cases and Zhang and Andersen are also plaintiffs in a [similar lawsuit](#) against Stability AI. The Stability case was the first to challenge the legality of training text-to-image diffusion models on copyrighted work without consent, credit, or compensation, according to Zhang and Andersen’s most recent allegations.

“Our complaint describes another instance of a multitrillion-dollar tech company choosing to train a commercial AI product on the copyrighted works of others without consent, credit, or compensation,” plaintiff counsel [Matthew Butterick](#) of Butterick Law said. “Google has admitted using the notorious LAION-400M dataset to train its Imagen model, and possibly others.”

The complaint was surfaced by ALM’s [Law.com Radar](#).

While counsel has not yet appeared for the tech giant, the company issued a statement that its “AI models are trained primarily on publicly available information on the internet.”

“American law has long supported using public information in new and beneficial ways, and we will refute these claims in court,” said Google spokesperson José Castañeda.

The most recent complaint against Google alleges that “Google’s introduction of Imagen 2 carefully omits a detailed description of its training dataset,” and “On information and belief, Google did not disclose details about the training dataset for Imagen 2 because it was aware of the *Andersen v. Stability AI* case and hoped to avoid being named as a defendant in a lawsuit over the legality of training on mass quantities of copyrighted works without consent, credit, or compensation.”

It goes on to argue that the proposed class of plaintiffs is entitled to statutory and actual damages and restitution of profits.

In July 3023, Google [was also sued](#) for scraping the internet for copyrighted works and personal information, including emails, to train Bard, the company’s large language model and competitor to ChatGPT.

The company, represented by [Eric Tuttle](#), [David Kramer](#) and [Maura Rees](#) of Wilson Sonsini Goodrich & Rosati in the July 2023 action, responded to the scraping claims contending, “Plaintiffs imagine they have a property or privacy right in information they shared publicly on the internet that entitles them to stop anyone from gathering and using such information in ways they don’t like, such as for generative AI. But outside copyright law (including its protection for fair use), there is no general right to control publicly-available information.” Most recently, Google filed a motion to dismiss the scraping complaint, which is also currently pending in the Northern District of California.

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COURTS

Attorney Suing Boeing Has A Wild Coincidence Wash Up On His Front Doorstep

The universe is a plaintiff's attorney.

By KATHRYN RUBINO on May 1, 2024 at 11:46 AM



Photographer: David Ryder/Bloomberg via Getty Images

Some god or all knowing universe or karmic cosmic power is definitely having a laugh at us. How else to explain the bizarre coincidence that New York attorney [Jake Bissell-Linsk](#) literally had wash up on his doorstep.

See, Bissell-Linsk's law firm is suing beleaguered aerospace company Boeing, *In re The Boeing Company Securities Litigation*. The class action complaint was filed on behalf of the Employees' Retirement System of the State of Rhode Island, as [described by the firm](#):



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The Business Case For AI At Your Law Firm

ChatGPT ushers in the age of generative AI – even for law firms.

From THOMSON REUTERS

In October 2018 and March 2019, two Boeing 737 MAX 8 planes were involved in fatal crashes caused by malfunctions due to design flaws in the 737 MAX's flight control software, resulting in the deaths of 346 people and leading to 737 MAX planes being grounded from March 2019 to December 2020.

On January 5, 2024, a “door plug” flew out of the side of a 737 MAX 9, leaving a gaping hole in the plane's main cabin. Investigations into the incident led to the discovery of problems with such door plugs on other 737 MAX planes, including loose bolts holding the door plugs in place, further revealing the Company's manufacturing and production missteps and leading to the grounding of many 737 MAX 9 planes.

Defendants are accused of failing to disclose that, throughout the Class Period, Boeing had been prioritizing its profits over safety, which led to poor quality control standards in the production of its commercial aircrafts such as the 737 MAX, resulting in a heightened risk of manufacturing flaws that could render the Company's new airplanes unsafe.

Pretty standard fare for a plaintiff's attorney. But the invisible string element happened when a Boeing passenger jet lost its emergency slide after take off from JFK airport. A few days later, it washed ashore — right in front of Bissell-Linsk's home in Belle Harbor, New York.

He spotted the yellow slide from the window of his oceanfront home, as he [detailed](#) to the New York Post:

Bissell-Linsk said he went outside and got up close to snap pictures of the deflated, yellow slide, noting that it appeared to be intact despite being tangled in the rocks and floating in the surf.



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"I didn't want to touch it but I got close enough to get a close look at it," Bissell-Linsk told The Post. "Our case is all about safety issues at Boeing, and this slide is literally right in front of my house."



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Generative AI In Legal Work – What's Fact And What's Fiction?

Zach Warren from the Thomson Reuters Institute discusses the potential and the pitfalls.

From THOMSON REUTERS



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Delta confirmed they retrieved the slide:

"My neighbor called the FAA hotline and they are closed on Sundays," Bissell-Linsk said. "So he just called Delta."

"I see this Delta truck pull up and watch them pull it out of the water," Bissell-Linsk said. "It took them about 10 minutes."

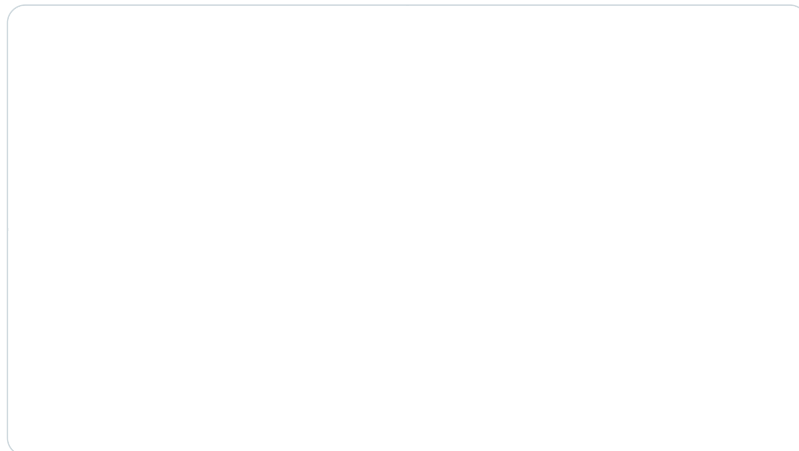
The Rockaway Times got some shots of the recovery effort.

Katie McFadden

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Chute retrieved from the jetty in Rockaway. @Delta must have been looking for this 😂



2:58 PM · Apr 28, 2024 from Queens, NY



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Bissell-Linsk said of the fortuitous discovery, “We haven’t decided if the slide is relevant to our case.” But you know it’ll somehow make its way into the case if the universe has anything to say about it.

In this CLE-eligible webinar, we’ll explore the most common accounting pitfalls and how to avoid them for your firm.

From PILOT AND ABOVE THE LAW



Kathryn Rubino is a Senior Editor at Above the Law, host of [The Jabot podcast](#), and co-host of [Thinking Like A Lawyer](#). AtL tipsters are the best, so please connect with her. Feel free to email [her](#) with any tips, questions, or comments and follow her on Twitter [@Kathryn1](#) or Mastodon [@Kathryn1@mastodon.social](#).

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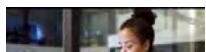


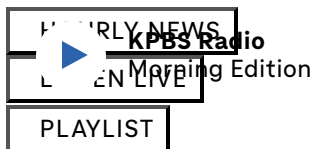
Jay Powell Is SO Fired



Morning Docket: 05.01.24

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INVESTIGATIONS

When judges get free trips to luxury resorts, disclosure is spotty

MAY 1, 2024 · 5:08 AM ET

HEARD ON MORNING EDITION

By Tom Dreisbach, Carrie Johnson

[7-Minute Listen](#)[PLAYLIST](#) [Download](#)

Many federal judges receive free rooms and subsidized travel to luxury resorts for legal conferences. NPR found that dozens of judges did not fully disclose the perks they got.

Chelsea Beck for NPR

Dozens of federal judges failed to fully disclose free luxury travel to judicial conferences around the world, as required by internal judiciary rules and federal ethics law, an NPR investigation has found. As a result, the public remained in the dark about potential conflicts of interest for some of the United States' top legal officials.

Federal judges — occasionally with family members or even their dog in tow — traveled to luxury resorts in locations as far-flung as London; Palm Beach, Fla.; Bar Harbor, Maine; and the outskirts of Yellowstone National Park for weeklong seminars. The judges received free rooms, free meals and free money toward travel expenses, together worth a few thousand dollars.

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**LAW****Victims of harassment by federal judges often find the judiciary is above the law**

At one event, a far-right German politician with a history of racially inflammatory and anti-immigrant statements made a presentation to dozens of judges. At others, judges heard from an advocacy group that uses lawsuits in federal court to change environmental policy, as well as from corporate CEOs in the oil and pharmaceutical industries.

For almost two decades, the federal judiciary has recognized that the combination of apparent luxury and ideological content can present the appearance of undue influence on the courts. In response, the judiciary has required more transparency in the form of public disclosure.

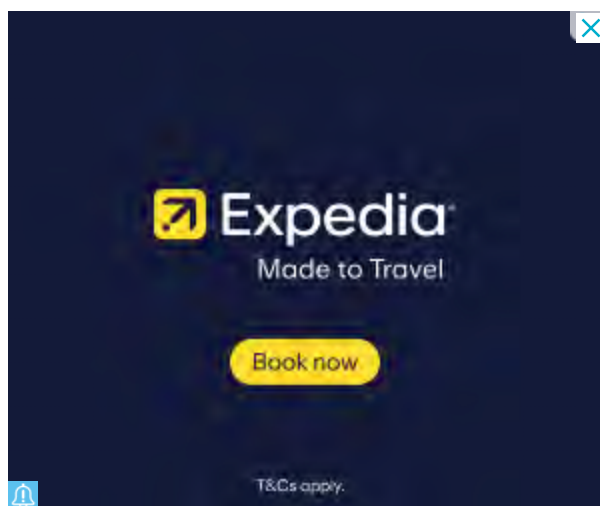
An NPR investigation found that the disclosure systems often fail to give the public timely information about the outside benefits that judges receive and from whom.

As a result, judicial ethics experts say, people with cases before these judges lack important information about a judge's potential biases. That information, if received in time, could be used to request that a judge recuse from a particular case.

"It also matters to the public, even if someone never shows up in a courtroom, to believe in the integrity of our judiciary and to trust in the decisions that are issued by judges," said Renee Knake Jefferson, a professor at the University of Houston Law Center. "Having disclosures of judicial financial interests goes

directly to the public having confidence in the outcomes of the decisions — that they are free of any bias or influence."

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Many judges defend these events as helpful forums to discuss important issues, and they reject criticism that a stay at a fancy hotel could influence their decisions. Critics call them "junkets" and glorified vacations that reward ideological allies.

Both sides agree that disclosure is needed.

There are two primary ways the public can view information about judicial education events and see which judges attended: One disclosure is filed soon after the event, and the other is submitted much later.

First, within 30 days of an event, judges are required to file a form that details the host of the event and the entities that provided funding, as well as the speakers and topics of discussion. This form, called a "Privately Funded Seminar Disclosure Report," is posted on every federal court's website.

Second, federal law requires that judges report the reimbursements they received for the events on an annual financial disclosure report. That report also includes information like alternate sources of income (such as a book deal or teaching job) and what stocks a judge might own. Those reports are eventually posted on a centralized online database maintained by the Administrative Office of the U.S. Courts.

By closely examining the portion of these events subject to public records laws, NPR identified problems with both systems.

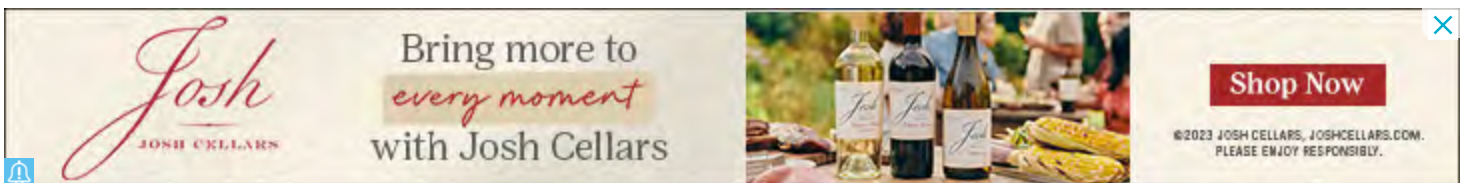
In nearly 40 instances, judges attended events at luxury resorts but failed to properly file a report within 30 days. In fact, the forms were uploaded months or even years late and only after NPR began asking questions.

In 13 cases, NPR found that judges failed to declare the benefits they received on their annual financial disclosure forms.

NPR contacted all those judges for comment.

And in another dozen cases, judges' financial disclosures for 2021 or 2022 were simply unavailable to the public. By all accounts, judges are filing those annual disclosure reports on time. The Administrative Office of the U.S. Courts bears responsibility for posting those reports online and has acknowledged delays in getting the system up to date.

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There is no indication that the judges intentionally withheld information in order to deceive the public. And the office that administers the annual financial disclosure website told NPR that it struggles to work through a backlog of reports, as well as requests for redactions to protect judges' safety, but is making progress.

Ethics experts said delays and omissions in these reports undermine the entire purpose of the transparency rules.

"That information loses most of its value if it's a year and a half later," said Kedric Payne, the senior director of ethics at the nonprofit watchdog Campaign Legal Center. "It's just too distant from the potential conflict of interest."

Regardless of intention, the result is that the public is kept in the dark. And NPR's findings likely represent an undercount of the larger problem.

Events with ideological presentations and a side of luxury

Nonprofits, legal organizations and private universities all host judicial education events around the world. But those groups are generally not subject to public records laws. As a result, their full attendee lists are shielded from public scrutiny.

When it comes to the hosts of these events, George Mason University in Fairfax, Va., is exceptional in two ways.



George Mason University's campus in Fairfax, Va., in 2018.

Education Images/Universal Images Group via Getty Images

For one, GMU — particularly the university's conservative-leaning Law & Economics Center — has long stood out as one of the most prolific hosts of

judicial education events. Collectively, hundreds of judges have attended the university's events at luxury resorts over the years. GMU is quick to point out that the events are paid for by private donors. The Law & Economics Center's website lists donors that include major corporations like Amazon, Pfizer, Google and Facebook, as well as the business lobby group the U.S. Chamber of Commerce. According to the *New York Times*, conservative activist Leonard Leo helped gather \$30 million in donations to rename the law school after late Supreme Court Justice Antonin Scalia.

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GMU is a public university in Virginia, which means it is subject to the state's Freedom of Information Act. NPR requested attendee lists for eight of its judicial education events from 2021 to 2023. By comparing attendee lists with the publicly available records, NPR was able to identify dozens of missing disclosures.

Luxury events for judges present disclosure problems

NPR identified gaps in the public disclosure reports for many judges who attended legal seminars hosted by George Mason University from 2021 to 2023. In some cases, judges failed to file disclosure reports on time or omitted reimbursements they received on an annual financial disclosure report. In others, a court’s administrative office had not made annual financial disclosures publicly available.

- The Naples Colloquium
- The Beaver Creek Colloquium
- The Sage Lodge Colloquium
- The Breakers Colloquium
- The Bar Harbor Colloquium
- Judicial Seminar on English Foundations of the Rule of Law and Liberty
- The Sage Lodge Colloquium - Special “YELLOWSTONE” Edition
- The Alyeska Colloquium

The Naples Colloquium

The Ritz-Carlton, Naples, Fla. (March 14 - March 20, 2021)

The privately funded seminar disclosure reports for the Naples Colloquium are no longer available because the federal courts remove such reports from the public-facing database after three years.

Agenda and speakers

Attendee	Privately funded seminar disclosure posted within 30 days?	Annual financial disclosure available?	Event disclosed on annual financial disclosure?
Judge Micaela Alvarez, Southern District of Texas	N/A	Yes	Yes
Judge Patrick Bumatay, 9th U.S. Circuit Court of Appeals	N/A	Yes	Yes
Judge John Bush, 6th U.S. Circuit Court of Appeals	N/A	Yes	Yes
Judge Douglas Cole, Southern District of Ohio	N/A	Yes	Yes
Judge D. Michael Fisher, 3rd U.S. Circuit Court of Appeals	N/A	Yes	Yes
Judge Nathaniel Gorton, District of Massachusetts	N/A	Yes	Yes
Judge Robert Luck, 11th U.S. Circuit Court of Appeals	N/A	Yes	Yes

Judge Stephen Murphy , Eastern District of Michigan Show response ▶	N/A	No	N/A
Judge George O'Toole , District of Massachusetts	N/A	Yes 	Yes
Judge William M. Ray , Northern District of Georgia	N/A	Yes 	Yes
Judge Rodolfo Ruiz , Southern District of Florida	N/A	Yes 	Yes
Judge Jerry Smith , 5th U.S. Circuit Court of Appeals	N/A	Yes 	Yes
Judge Brantley Starr , Northern District of Texas	N/A	Yes 	Yes

That missing information may be relevant to both the public at large and people with cases in front of these judges.

For example, dozens of judges took part in a 2022 event that featured a speaker from the far-right Alternative für Deutschland (Alternative for Germany) political party. Germany has been rocked by massive protests in recent months over revelations about AfD's ties to right-wing extremism. A regional AfD leader is facing charges in Germany for allegedly using Nazi slogans, which he denies.

Gunnar Beck, a member of the European Parliament and an AfD member, spoke to the group of American federal judges about "European Jurisprudence." Beck has a history of anti-immigrant and racially inflammatory statements.

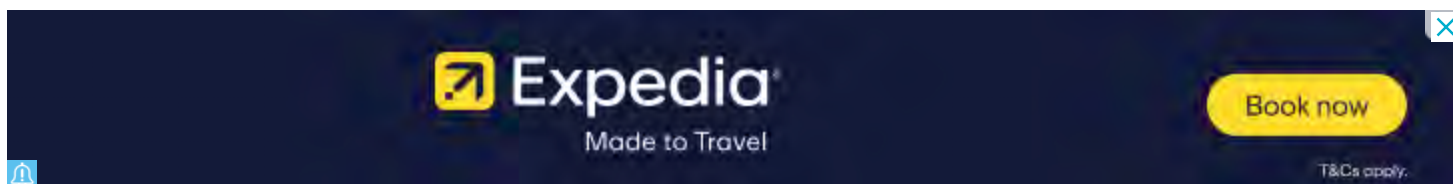
In 2021 — the year before his presentation to the judges — Beck took multiple photos of Black families, including young children in strollers, and posted them on social media. In one of the posts, he used the photo to criticize what he called the *Afrikanisierung* (Africanization) of Germany. (This post was deleted after NPR contacted Beck.) In another, Beck wrote that due to immigration, "Germany has no future as an industrial and cultural nation, but it does have a future as a welfare office."

Beck told NPR in an email that "each country and its people have a right to control their border with a view to safeguarding their maintenance of their

national culture and identity" and that "I do not think these views are either fascist or racist."

The GMU events have also featured presentations from a nonprofit that says it uses lawsuits to promote a pro-market, as opposed to pro-regulation, approach to environmental policy; the CEO of a U.K.-based pharmaceutical company; and the CEO of an energy company that is currently suing the federal government over financial regulations.

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One recent event included a reading assignment on the "worst decisions ever handed down by the Supreme Court" as defined by conservative and libertarian legal scholars. *Roe v. Wade*, which established a constitutional right to abortion, was No. 2. Landmark cases establishing rights to same-sex marriage and the use of birth control also appeared among the top 10 "worst" decisions.

Given the power of judges to affect Americans' lives on issues from guns to abortion, the environment and crime, transparency about these events is critical, said Gabe Roth of the nonprofit watchdog group Fix the Court.

"The public has a right to know whether or not its top legal officials have any potential conflicts going into hearing cases," said Roth. "Sometimes they're small bore, but a lot of the times they have major national impact."

The agendas for the GMU events showed that the event programming often ended around noon, followed by a five- or six-hour "study break." In some instances, the

agendas leave days completely free.

It's unclear exactly how judges spent that time. But attendees had the opportunity to enjoy the Ritz-Carlton's clay tennis courts, the Alyeska Resort's Nordic Spa or the short walk to Buckingham Palace from the May Fair Hotel in London. The agenda for GMU's 2022 Bar Harbor Colloquium in Maine reserved 90 minutes for a wine tasting.



The Alyeska Resort in Girdwood, Alaska, in 2009.

John Greim/LightRocket via Getty Images

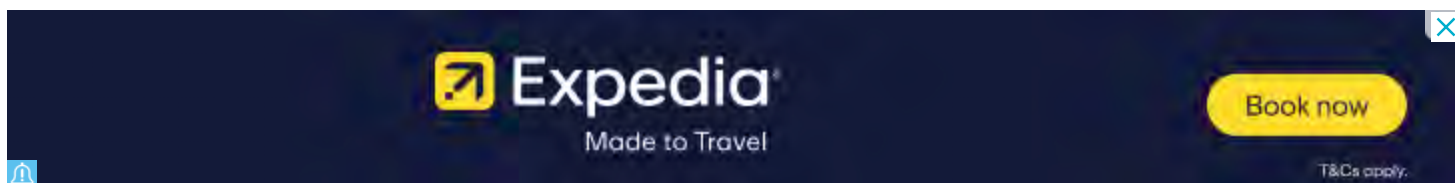
A spokesperson for GMU did not respond to NPR's specific questions for this story.

"Topics are selected based on foundational concepts in the economic analysis of law relevant to judges and other areas of interest to the judiciary," wrote Ken Turchi, associate dean of GMU's Antonin Scalia Law School, in an email. "Every judge who attends has the option to complete and submit a disclosure form detailing expenses incurred and reimbursed."

Which judges have disclosure problems?

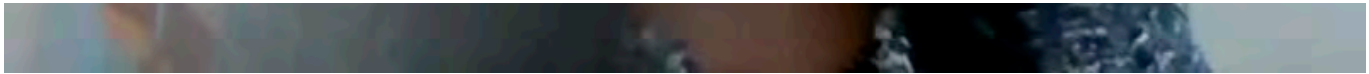
Problems plagued the paperwork for judges appointed by presidents of both major parties going back decades, including Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, Barack Obama and Donald Trump.

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And the judges who failed to fully comply with the disclosure requirements include some notable names.

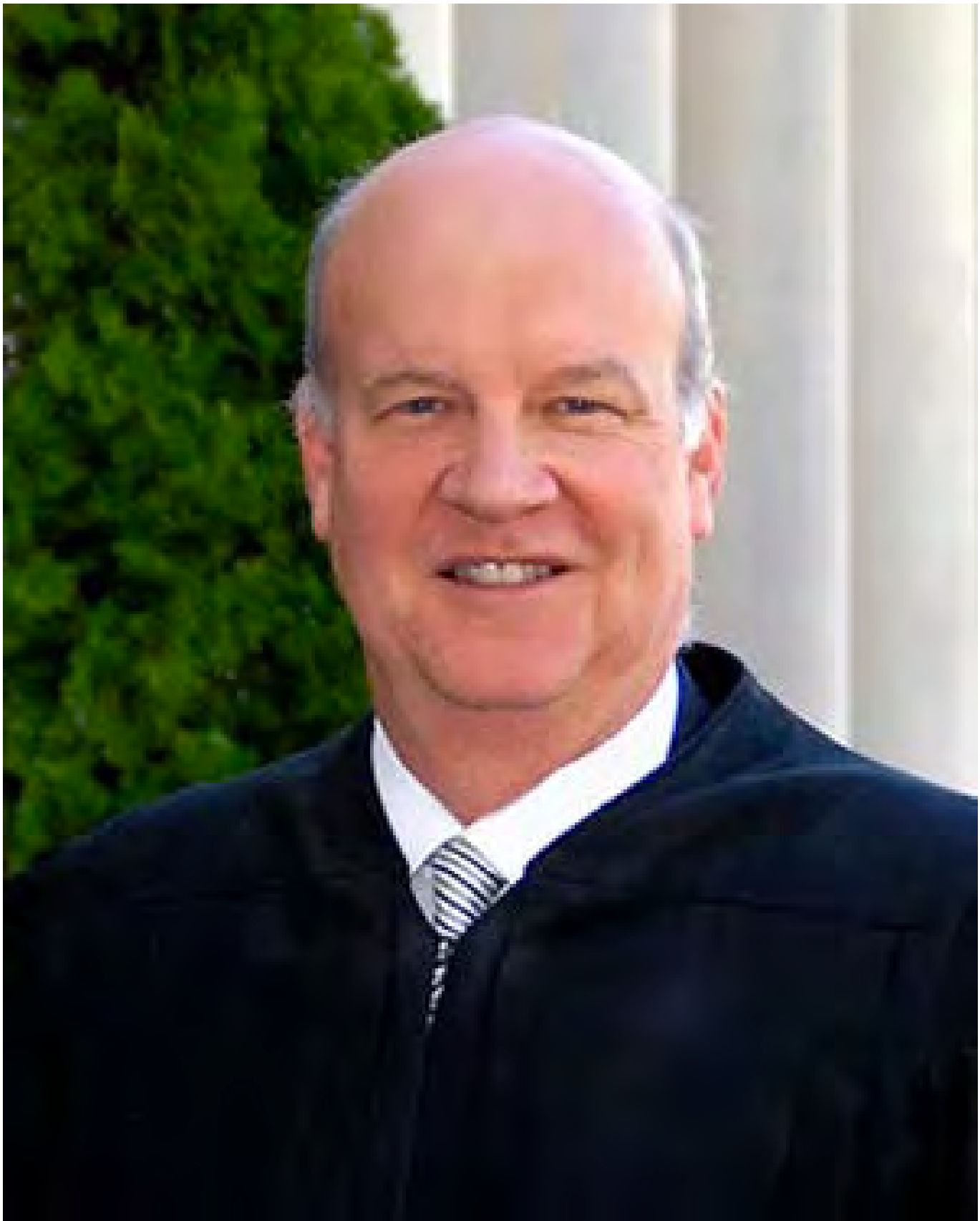




In this screenshot, Aileen Cannon speaks during a Senate Judiciary Committee nomination hearing to be a U.S. district judge for the Southern District of Florida on July 29, 2020. She was appointed to the position later that year.

U.S. Senate via AP

Judge Aileen Cannon of the Southern District of Florida is presiding over former President Donald Trump's criminal trial for allegedly mishandling classified documents. Cannon, herself a Trump appointee, attended two seminars at a luxury resort in Montana, but the privately funded seminar disclosures for both events were not posted online until NPR began making inquiries. Clerk of court Angela Noble told NPR in an email that the absence of the disclosures was due to technical issues and that "Any omissions to the website are completely inadvertent."



Judge Robert Conrad is the director of the Administrative Office of the U.S. Courts.

U.S. Courts

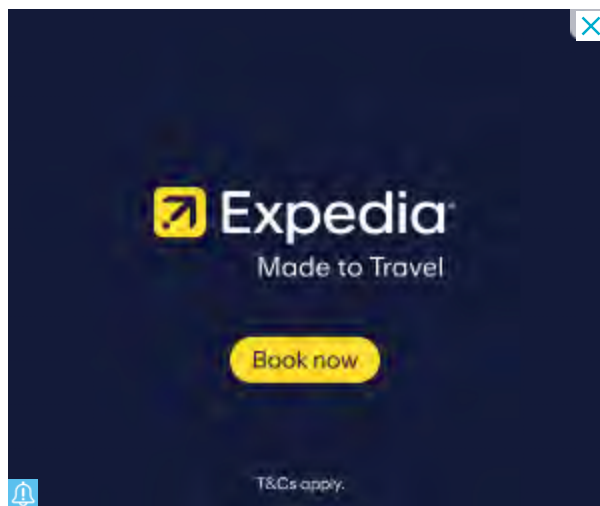
Judge Robert Conrad is the current director of the Administrative Office of the U.S. Courts, which implements the policies of the federal judiciary. Conrad, who was appointed by George W. Bush to the Western District of North Carolina, attended three privately funded seminars from 2021 to 2023. He later included the events on his annual financial disclosure but did not file a publicly available disclosure for any of those events within the required 30-day time limit. "He inadvertently did not make the additional disclosure in the separate system for private seminar attendance," said Peter Kaplan, a spokesperson for the Administrative Office. "Judge Conrad appreciates your bringing this oversight to his attention."

Judge Leslie Gardner of the Middle District of Georgia, who is the sister of prominent Georgia Democrat Stacey Abrams, also failed to file a privately funded seminar disclosure on time. Additionally, NPR found that Gardner omitted the reimbursements she received for lodging, meals and travel on her annual financial disclosure. In a phone call to NPR, clerk of court David Bunt said that Gardner, an Obama appointee, was updating her annual financial disclosure and privately funded seminar disclosure, which were incomplete due to an "oversight."

"I don't have really an excuse for it, and I'm going to correct it"

Judges contacted by NPR largely described the issues with their disclosures as the result of an "inadvertent oversight" or an "accident." In a handful of cases, court clerks blamed technical issues with the online system for uploading paperwork. One judge appeared to be unaware of the requirement to file a disclosure report within 30 days. Several judges thanked NPR for contacting them and prompting them to update their disclosure reports.

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"It looks like we blew it," said Judge Philip Gutierrez of the Central District of California in a phone call to NPR. Gutierrez failed to file a disclosure within 30 days of attending a judicial seminar at The Breakers, a resort in Palm Beach, Fla., in 2021. "I apologize. It's important. I'm embarrassed."

Gutierrez immediately uploaded the missing disclosure.

Judge Gary Fenner of the Western District of Missouri attended the same GMU 2021 seminar in Palm Beach but failed to file a privately funded seminar disclosure and omitted the event from his annual financial disclosure that year.

"I am really surprised that I did not report that," said Fenner, an appointee of Bill Clinton, in a phone message to NPR. "I'm going to rectify it. I'm embarrassed about the fact that somehow that was overlooked by me. But I don't have really an excuse for it, and I'm going to correct it."

Judge Keith Starrett of the Southern District of Mississippi, a George W. Bush appointee, said he had thought he marked his attendance at GMU's seminar at the Park Hyatt Beaver Creek Resort and Spa in Colorado in 2021 on his annual financial disclosure. He acknowledged that it was missing from the forms due to an "oversight."

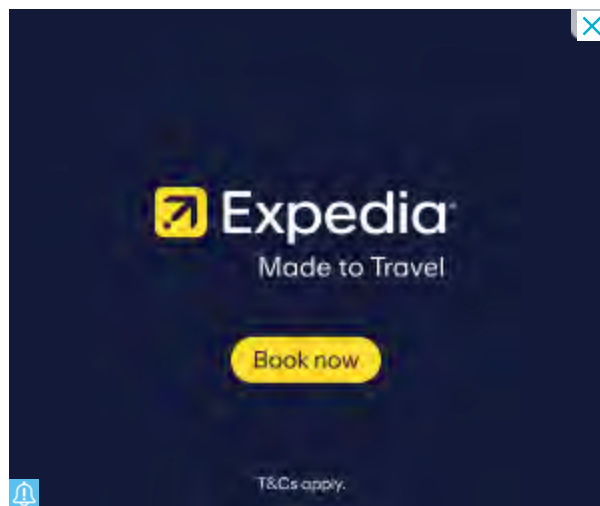
"I'm going to do whatever I need to do to get it right," he said by phone.

In the District Court for the Southern District of Texas, NPR found three judges — Jeffrey Brown, Andrew Edison and Charles Eskridge — who had not filed the required privately funded seminar disclosure forms. After NPR contacted the

court, the judges uploaded the forms, and clerk of court Nathan Ochsner said in an email, "At the direction of Chief Judge Randy Crane, my office will routinely remind all [Southern District of Texas] judges of this reporting requirement."

Meanwhile, the delays in getting access to annual financial disclosure reports appear to be the result of the time limits built into the transparency laws, as well as a combination of long processing times for redactions requested by judges and, in some cases, security concerns.

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The law requires that judges file their annual financial disclosure reports for the previous year on May 15. Many judges request and receive a 90-day extension, pushing that deadline to mid-August. Judges can then request that the judiciary redact "personal or sensitive information that could directly or indirectly endanger" the judge or the judge's family, but then a committee has to review the request.

"So if you're a judge that asked for a 90-day extension and then, on top of that, you're asking for redactions," said Roth, of Fix the Court, the public release of the annual disclosure is "already well into the following year."

Former federal Judge Jeremy Fogel, who is now the executive director of the Berkeley Judicial Institute, evaluated some of these redaction requests when he served on the judiciary's Committee on Financial Disclosure.

"I don't think that the problem you described is one where the judiciary doesn't want to share the information," said Fogel. "I think the problem is that they have not been able to put the resources in place to get the information online and available to the public in a timely manner."



The Thurgood Marshall Federal Judiciary Building in Washington, D.C., houses the Administrative Office of the U.S. Courts.

Andrew Harnik/AP

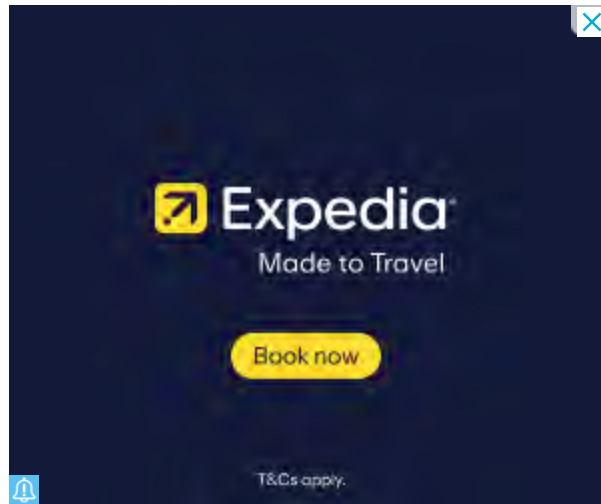
NPR sent a list of judges to the Administrative Office of the U.S. Courts and asked why their annual financial disclosures for 2021 or 2022 were still unavailable. Kaplan, the Administrative Office spokesperson, said he "could not comment on specific judges' filings." In general, Kaplan blamed missing disclosures on backlogs in the system and reviews of filings for possible security issues.

"Currently, nearly all filings from 2021 and more than 80% of the filings from 2022 are available on the database," said Kaplan. "We are continuing to cut into the backlog of reports."

An ongoing debate over judges and luxury trips

Even if judges universally filed their disclosure reports on time and if the federal judiciary sped up the release of information, it would likely not end the ongoing debate over judges getting thousands of dollars in free perks, especially at ideologically slanted conferences.

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Fogel said that in his time as a judge, he tended to avoid events that might be perceived as ideological.

"I wouldn't go so far as to say that it's unethical," said Fogel. "But I think it's better — it's a best practice — for judges to avoid programs that have a particular philosophical or ideological viewpoint."

Judge Starrett, of the Southern District of Mississippi, has attended five GMU legal events in the last three years and even brought his German shepherd to one of them.

He rejected the idea that his views could be swayed by a certain speaker's agenda or free perks.

"I've been called a liberal judge. I've been called a conservative judge. I've been called a son of a bitch. That comes with the territory," said Starrett. "I pay close attention to speakers that are politically biased one way or another. I listen to them, and I challenge some of them. I ask pointed questions."

Judge Gutierrez, of the Central District of California, has attended three GMU events in the last three years.

"Certainly, I think people have a slant. But for the most part, I found them to be interesting and educational," he said. He added that a group of federal judges will always tend to ask tough questions and get into spirited debates — whether in court or in a legal seminar.

"We want our judges out in the world learning and teaching. And we want our judges to have friendships. We want our judges to be able to travel," said Jefferson, the legal ethics expert at the University of Houston Law Center. "It's the disclosure that matters."

Nick McMillan and Hilary Fung contributed reporting and visuals, with graphic editing by Alyson Hurt. This story was edited by Barrie Hardymon with research by Barbara Van Woerkom. Photo editing by Emily Bogle.

leonard leo aileen cannon federal courts george mason university federal judges financial disclosure

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Class Action

May 1, 2024, 7:47 AM PDT

BofA Is Latest Bank Sued Over Adviser Commission Forfeitures

By Jacklyn Wille

Documents

-  Docket
-  Complaint
-  Company Info: Merrill Lynch Pierce
Fenner & Smith Inc.

- **COURT:** W.D.N.C.
- **TRACK DOCKET:** [No. 3:24-cv-00440](#)

Bloomberg Law News 2024-05-01T13:08:48656198552-04:00

BofA Is Latest Bank Sued Over Adviser Commission Forfeitures

By Jacklyn Wille 2024-05-01T10:47:08000-04:00

- **COURT:** W.D.N.C.
- **TRACK DOCKET:** No. 3:24-cv-00440

A former Bank of America Corp. unit financial adviser filed a proposed class action saying he was wrongly forced to forfeit more than \$500,000 in commissions under a deferred compensation plan that doesn't comply with federal benefits law.

The lawsuit, filed Tuesday in the US District Court for the Western District of North Carolina, centers on a deferred compensation program in which financial advisers are required to contribute a portion of their commissions and is similar to one driving a 2020 suit against Morgan Stanley. BofA's plan allegedly includes a "cancellation rule" in which advisers can forfeit any commissions earned less than eight years before their departure from the company.

Plaintiff Kelly Milligan, who brings claim against Merrill Lynch and parent BofA after two decades at the bank, says the cancellation rule violates the Employee Retirement Income Security Act's prohibitions on lengthy vesting schedules and forfeitures of accrued benefits. He seeks court orders invalidating the cancellation rule and declaring that the plan is governed by ERISA on behalf of a proposed class of thousands of financial advisers who experienced similar forfeitures since April 2018.

A BofA spokesman disputed the allegations. The bank is confident the plan is not covered under ERISA and that it complies with all relevant laws, he said in an email.

Milligan is represented by Izard, Kindall & Raabe LLP, Ajamie LLP, and Motley Rice LLC, which in 2020 filed a similar proposed class action on behalf of Morgan Stanley financial advisers. A Manhattan federal judge sent that dispute to arbitration in a 2023 opinion that also deemed the Morgan Stanley plan to be subject to ERISA. Morgan Stanley is seeking reconsideration of that issue, saying the judge wrongly decided a question that should be resolved in arbitration.

The case is *Milligan v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, W.D.N.C., No. 3:24-cv-00440, complaint 4/30/24 .

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Securities Law

May 1, 2024, 10:27 AM PDT

'Earnings Before Bad Stuff' Comes Under Renewed SEC Scrutiny

By Nicola M. White

- Agency zooms in on persistent non-GAAP measures questions
- Kohl's, Accenture, Hormel, 1-800-Flowers among those queried

Bloomberg Law News 2024-05-01T13:35:54927025589-04:00

'Earnings Before Bad Stuff' Comes Under Renewed SEC Scrutiny

By Nicola M. White 2024-05-01T13:27:16000-04:00

- Agency zooms in on persistent non-GAAP measures questions
- Kohl's, Accenture, Hormel, 1-800-Flowers among those queried

Retailer Kohl's Corp. picked an unlikely cost to downplay as it reported 2023 annual results to the market: its rent.

Wall Street's top regulator had some pointed questions. How, as a retailer, could store rent be considered an unusual or one-time expense?

The Securities and Exchange Commission's query to Kohl's was one of several the regulator sent to businesses in recent months as part of its perennial campaign to ensure companies don't hype rosy earnings measures or emphasize results that skeptics call "earnings before bad stuff."

The SEC permits companies to report supplemental earnings figures that fall outside the bounds of formal US accounting rules, but they can't stray too far. That's where the agency's reviewers come in, peppering companies with reminders that they can't let special measures overshadow official results—based on Generally Accepted Accounting Principles, or GAAP—or offer misleading information.

SEC staff reviewers in recent months zoomed in on companies as diverse as meat manufacturer Hormel Foods Corp., e-commerce gift company 1-800-Flowers.com Inc., and consulting firm Accenture plc about some of the so-called non-GAAP measures they used or the way they presented them in earnings reports, according to recently released correspondence.

Agency reviewers usually start with questions, then ask for changes in future regulatory filings—all a normal part of the SEC's oversight of public company financial reporting.

Results that don't comply with official accounting rules keep the regulator busy. It was the No. 1 topic SEC reviewers highlighted in letters to companies in 2023 as well as the year before, according to accounting firm PricewaterhouseCoopers LLP.

No matter how much guidance the agency issues or how many letters it writes, the questions will persist, said Jasmine Wang, accounting professor at the University of Virginia.

"The SEC and public companies have very different views on how non-GAAP should be reported—and they both believe they are right," Wang said. "That's why we see so much back and forth."

Familiar Ground

Sometimes official accounting results don't fully capture a company's performance, so businesses are allowed to supplement their numbers with non-GAAP measures as a way to tell their story. Earnings before interest, tax, depreciation and amortization, or EBITDA, is one of the most commonly used non-GAAP measures, but companies present many variations on it and must explain what they're backing out or adding in.

Kohl's didn't headline its 2023 results with an earnings measure that excluded rent, but used so-called EBITDAR, with the R representing rent, in a certain financial ratio elsewhere in its report. Once SEC reviewers asked the company questions, Kohl's made the case for keeping it in, explaining how rating agencies ask for the ratio.

It promised in future financial reports to use the rent-adjusted earnings figure only when reporting this ratio and also agreed to spell out that the adjusted earnings number was a liquidity measure, not a signal of financial performance. The SEC accepted the arguments. The company didn't respond to a request for comment for this article.

Most of the other SEC non-GAAP queries to companies cover familiar ground. They stand out not because they focus on new themes, but because they repeat so many warnings the SEC has issued in the past. Some involved practices the SEC has routinely flagged as questionable, such as putting non-GAAP earnings metrics in a more prominent spot in earnings reports compared with official, audited numbers.

1-800-Flowers, for example, discussed adjusted EBITDA in two places in its 10-K without presenting net income or loss at the same time, the SEC said. For the e-commerce gift company, its results using official accounting showed a loss but adjusted measures showed a profit. The SEC told the company it had to present the official numbers "with equal or greater prominence."

The company agreed with SEC reviewers and pledged to give GAAP numbers equal prominence in future filings.

Companies and auditors have heard the SEC repeatedly warn against overplaying unofficial results and minimizing GAAP results, including through staff guidance in 2022 that also told companies not to remove normal, recurring expenses from their supplemental measures. Companies "should know by now," said accounting analyst Olga Usvyatsky.

"It's not controversial. It's not difficult to rectify," Usvyatsky said. "It's just a plain vanilla rule to say, 'Do not present non-GAAP numbers ahead of the GAAP measures.' Those are fairly simple rules."

Whack-a-Mole

Most recent exchanges with the SEC wrapped up quickly, with companies agreeing to tweak how they described their measures or to give more prominence to official results.

In Hormel's case, the SEC told the company a table in its 2023 10-K that explained the breakdown of how it arrived at adjusted earnings gave the appearance of a full non-GAAP income statement—a no-no under guidance the SEC issued in 2022 that said such a reconciliation gives undue prominence to unofficial results.

Hormel beat the SEC to the punch; it already had removed the table in its first-quarter of 2024 filings, prior to receiving a letter from the agency, the company said.

Sometimes, the SEC wants companies to better highlight that numbers they report are non-GAAP measures. The agency told Accenture it needed to more clearly label its effective tax rate and diluted earnings per share as unofficial measures when the company excludes certain costs. Accenture agreed to be clearer in future filings, the letters show.

Since non-GAAP is, by its nature, unofficial, the SEC and companies are constantly navigating what's acceptable. This leads to persistent questions, said Nerissa Brown, accounting professor at the University of Illinois Gies College of Business.

"The guidance is clear but the guidance is also not clear," Brown said. "Even though it seems like whack-a-mole, it's not because companies are not playing within the rules or staying within the sandbox. They may not understand what the sandbox is."

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Matt Levine's Money Stuff: Banks Are Still Where the Money Isn't

By Matt Levine

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Narrower banking

Barclays Plc is a large global bank, and it issues credit cards. If you have a Barclays credit card, you can use it to buy stuff, in which case Barclays will lend you the money to buy the stuff. Some customers pay Barclays back every month; others take years to pay back the money they have borrowed from Barclays to buy stuff. In many ways, Barclays is well suited to lending them money: As a giant bank, it employs a lot of people who are good at marketing financial products, people who are good at making credit decisions, and people who are good at managing the payments infrastructure that makes credit cards work. It has branches where people can go to get credit cards, and checking accounts that they can link to automatically pay back their credit cards.

But Barclays' ability to issue credit cards is constrained by a simple problem: *Where would it get the money?* Bloomberg's Carmen Arroyo and Katanga Johnson report on Barclays' quest to find a source of money that it can lend to credit card users:

For years, Barclays Plc struggled with what to do about its US credit-card business. It was a cash generator, cranking out a steady stream of revenue, and yet it was costly to run because of the way regulators force banks to set aside capital as a buffer against losses.

The British lender came up with a solution in February, by selling \$1.1 billion of card assets to private equity firm Blackstone Inc. The transaction, part of an ongoing financing arrangement, allows Barclays to collect fees for servicing the loans, but not have to hold them on its books. In return, Blackstone gets to generate high yields for insurance clients.

In essence, Barclays is renting Blackstone's balance sheet. ...

The Barclays-Blackstone deal got little attention at the time but may have marked a new chapter in the evolution of the lending industry since the global financial crisis. As capital rules have gotten tougher, banks have had to exit certain businesses or else cede market share to non-bank rivals. Now, they are partnering with those rivals in ways that benefit both parties – even if it is unclear how regulators might react.

Soon after Barclays and Blackstone announced their tie-up, KeyCorp and Blackstone unveiled a similar partnership. In interviews, executives at several private-credit providers said they are holding conversations about more deals, including with some of the largest US banks.

I have adapted the first two paragraphs above from a column I wrote in November, about JPMorgan “looking for third-party capital” to make leveraged loans. I want to keep stressing the oddity of this: The world’s biggest banks, when they ponder how to do the *very most core business of banking*, things like making corporate loans and issuing credit cards, are increasingly constrained by the need to *find money*.

The traditional view of banks is that *they have lots of money*: They take deposits from their customers, giving them cheap funding that they then use to make corporate loans and mortgages and credit cards and everything else. But when the actual bankers at Barclays think about how to fund their credit cards, they come up with ideas like “ask Blackstone for the money.” Blackstone has lots of money too, but its money comes not from bank depositors – who can withdraw their money at any time – but, in this case, from insurance customers, who have longer-term and more predictable liabilities. This makes Blackstone’s funding safer: Its customers are not going to ask for their money back all at once, the way that Barclays’ customers theoretically might (and the way that some banks’ customers actually have). Everyone knows this, which is why Barclays is subject to strict banking capital requirements, making it expensive for it to do credit-card loans, while Blackstone is not, making it cheaper for it to provide the money for those loans.

I mean, “cheaper” in some sense; Arroyo and Johnson add that “because non-banks have higher costs of funding, consumers and businesses may see loan rates rise.” The traditional view is that non-banks have higher costs of funding than banks: Blackstone’s insurance customers want to earn a juicy return on their investment in risky credit-card assets, while Barclays’ depositors are happy to get a return of 0% on their checking-account balances. It’s just that those cheap deposits are not actually so cheap anymore, when you take into account their risk, and the regulation designed to confine that risk. Barclays is in the traditional business of lulling depositors into lending it money at 0% so it can turn around and lend money to credit-card customers at 20%, but that trick no longer works as well as it used to.

One thing I wonder about is: If you were designing a financial system from scratch, in 2024, would you come up with *banking*? That central traditional trick of banks – that they fund themselves with safe short-term demand deposits, and use depositors’ money to invest in risky longer-term loans, with all of the run risk and regulatory supervision and *It’s a Wonderful Life*-ness that that involves – would you recreate that if you were starting over?

Part of me feels like, if you started a new civilization and put smart but ahistorical tech people in charge of designing a financial system, it would never occur to them to recreate traditional banking. It is so messy and opaque and imprecise, using a shifting pile of demand deposits to fund long-term loans. Plenty of people – insurance companies, retirement savers – want to earn a return on their money and don’t need it anytime soon; *their* money can be locked up in long-term loans. The money that people keep in the bank just to pay rent and buy sandwiches doesn’t need to be pooled and invested in risky loans; it should just sit in the vault.

This idea – that bank deposits should just sit in the vault (or, realistically, in electronic money at the Federal Reserve), while risky loans should be funded by long-term investors who *intend* to take those risks – is sometimes called “narrow banking.” It has a long intellectual pedigree, it came back into vogue after the 2008 financial crisis, and it got attention again after last spring’s US regional banking crisis. All those crises! The traditional business of banking is *necessarily* crisis-prone; using risky long-term loans to back risk-free short-term demand deposits involves a fundamental mismatch, and every so often that flares up into a crisis.

And so, since 2008, but more visibly since last spring, banking really has become narrower. Private credit is the lending side of “narrow banking”: Private credit firms raise dedicated funds, with locked-up money, from investors who intend to invest in long-term loans to earn a return. And private credit is the hottest area of finance, making buyout loans and investment-grade corporate loans and funding consumer loans. And private credit is booming not *just* as a competitor to banks, but as a funding source for banks: Banks have the relationships and technology to make loans, *but not the money*, so they partner with private credit to fund the loans.

Meanwhile the deposit side of “narrow banking” is something like banks taking their customers’ money and parking it at the Federal Reserve. And in fact some money has shifted out of banks (which are not narrow) and into government money-market funds (which park the money in Fed repo or Treasury bills). Even within banks, there is less lending. Here’s “The Secular Decline of Bank Balance Sheet Lending,” by Greg Buchak, Gregor Matvos, Tomasz Piskorski and Amit Seru, from February:

The traditional model of bank-led financial intermediation, where banks issue demandable deposits to savers and make informationally sensitive loans to borrowers, has seen a dramatic decline since 1970s. Instead, private credit is increasingly intermediated through arms-length transactions, such as securitization. This paper documents these trends, explores their causes, and discusses their implications for the financial system and regulation. We document that the balance sheet share of overall private lending has declined from 60% in 1970 to 35% in 2023, while the deposit share of savings has declined from 22% to 13%. Additionally, the share of loans as a percentage of bank assets has fallen from 70% to 55%. We develop a structural model to explore whether technological improvements in securitization, shifts in saver preferences away from deposits, and changes in implicit subsidies and costs of bank activities can explain these shifts. Declines in securitization cost account for changes in aggregate lending quantities. Savers, rather than borrowers, are the main drivers of bank balance sheet size. Implicit banks' costs and subsidies explain shifting bank balance sheet composition. Together, these forces explain the fall in the overall share of informationally sensitive bank lending in credit intermediation.

And:

Shifting saver preferences are largely responsible for shrinking size of bank balance sheets and the reduction of deposits in the economy. Intuitively, bank balance sheets are large not because they have excellent lending opportunities, but rather because the saver sector demands a large quantity of deposits. Excess deposits are simply invested into securities rather than loans. In consequence, savers, rather than borrowers, are the main drivers of bank balance sheet size.

We are quite a long way from it, but you can see glimpses of a world in which:

1. Banks take deposits and park them at the Fed.
2. Banks also run the infrastructure to make loans: They have branches and loan officers and websites and credit-card processing.
3. All the *money* to make the loans comes from asset managers, who manage money for insurance companies, pensions, mutual funds, etc., and invest that money in loans that they buy from the banks.
4. The banks charge fees – to the customers, to the asset managers – for putting the loans together, but the risk of the loans is all borne by the investors, not the banks. Certainly not by the banks' *depositors*, whose money is all parked safely at the Fed.

That's narrow banking. I admit I have a certain emotional soft spot for traditional banking. There is something magical about how banking transmutes risky assets (loans) into risk-free liabilities (deposits). "A banking system is a superposition of fraud and genius that interposes itself between investors and entrepreneurs," wrote Steve Randy Waldman in 2011; it allows society to use the money of risk-averse depositors to fund risky investments in growth. But it is possible that this magic no longer works: In a world of financial transparency and fast communications technology and flighty deposits, you can't really expect to hide the risks of the banking system; you have to fund the loans with people who know they're funding the loans.

I will say, though, that I have also written a lot about crypto over the last few years. Crypto really created a new financial system from scratch, and it started with a very strong philosophical bias against traditional banking. And then it really did recreate traditional banking! And also traditional banking crises: In 2022, it turned out that one of the main uses of crypto was to turn customer demand deposits (of crypto) into extremely risky loans (of crypto), which ended as badly as you'd have expected. "One possibility," I wrote last year, "is that fractional reserve banking is deeply rooted in human nature." If you started the financial system over, maybe banking would develop again. Even if actual banking is getting narrower now.

Archegos

My main question has always been whether Bill Hwang buried any money in his backyard. Hwang ran Archegos Capital Management, his briefly enormous family office. He borrowed tons of money from banks to buy a few stocks, his buying pushed up the stocks dramatically, he used his paper profits to borrow more money, he used the money to buy more of the stocks, they kept going up, this became unsustainable, the stocks dropped, he got margin calls he couldn't meet, the banks liquidated his stocks and all of his money – and one of the banks – vanished.

If, at the peak, just before this all came crashing down, Hwang had borrowed one last giant slug of money and buried it in his backyard, then (1) that would have been extremely impressive and I would have laughed and applauded him, but (2) probably that's a crime? Knowingly manipulating stocks up so that you can borrow against their inflated value and run off with the money seems obviously criminal.

On the other hand, if he *didn't* run off with any of the money ... well, I'm not saying that's *not* criminal. Certainly federal prosecutors think it is; they charged him with criminal market manipulation, and he goes on trial next week. It's just a weirder situation, in that case. "He knowingly manipulated stocks up and borrowed against their inflated value, intending to run off with the money, but he missed his window": Yes, crime. "He just liked these stocks so he kept buying them, and then lost everything when they went down": Probably not a crime?

Anyway today Bloomberg's Sridhar Natarajan, Ava Benny-Morrison and Katherine Burton check in with Hwang :

It was in [his charity's] offices just before Easter, with the first spring blossoms in Central Park framed through the 22nd-floor window, three dozen people squeezed around a conference table in front of Hwang for a talk on scripture. Looking as impeccable as ever—thick, stylish glasses, green quarter-zip sweater, graying hair swept roguishly back—he stood before a large screen.

"Money Failed!" the slide flashed.

There is a photograph of this meeting in the article, and I insist that you click through; words cannot convey how good the photo is. It is maybe the greatest photograph of a financial-industry-adjacent meeting I have ever seen. Every failed trade should lead to a postmortem in which a bunch of people crowd around a much-too-small conference table littered with cups and paper, while their disgraced leader stands in front of a white slide saying "Money Failed!" in black sans serif letters.

But did money fail?

By all appearances, Hwang himself continues to eschew the trappings of extravagant wealth. Since Archegos collapsed, he has lived in the same place he did when he was flying high: a modest corner of suburban New Jersey, plus a rented apartment in Manhattan for the trial.

Okay but that meeting was at his charitable foundation, and:

Since Archegos collapsed, his Grace and Mercy Foundation has become a refuge for former employees—and a lucrative one for some of them. Tax records show several Archegos staffers collected more than \$500,000 for their work overseeing the charity in 2022, which had \$528 million by the end of that year. ...

As of 2022, the foundation counted nine Archegos veterans among its officers and highest-paid employees, according to its most recent tax filings. ...

Many of the Archegos employees used to trade for the investment firm and the nonprofit as part of their old job, and now only one of those entities is left, one of the people said. The foundation doesn't outsource its trading activities, the person noted, and its assets grew significantly in 2023, capitalizing on ebullient markets. ...

Brendan Sullivan, a former Archegos employee who sued Hwang to claim up to \$50 million in compensation, alleges in his suit that at Archegos retreats in 2018 and 2019, Hwang told staff that Grace and Mercy was his "fallback plan" if anything ever happened to his investment firm. During a company call on March 29, 2021—detailed in Sullivan's suit—Pae told employees that 15 to 30 Archegos employees could transfer to the foundation.

Archegos went bankrupt and cost its banks billions of dollars, but Hwang is running \$528 million of assets out of a Midtown Manhattan office staffed with former employees of Archegos? For charity, of course, and it's not literally his backyard, but it is a partial answer to the question of where the money went.

How to short

A problem that we talk about from time to time around here is how to short hot startups. The idea is:

1. You notice that people are willing to pay a lot of money to invest in hot tech startups.
2. You think "these people are paying too much, I bet these valuations will come down."
3. You think "I should borrow some shares of hot tech startups and *short* them; I'll sell them now, when prices are high, and buy them back later, when prices are low."
4. You realize that you can't do that: Unlike in public markets, it's essentially impossible to borrow shares of private tech startups, so you can't short them.
5. You go to the lab to think up a way to do it.

The general answer is "to bet against a startup bubble, you need to *create startup shares* and sell them." The simplest way to do that is to *start a startup*, and I have often argued that the single greatest short seller in the history of private startups is Adam Neumann, who started WeWork, sold it to Masayoshi Son for \$47 billion and has recently been trying, apparently unsuccessfully, to buy it back for \$0.

But there are other approaches. We have talked about Destiny Tech100 fund a few times around here. Destiny Tech100 is a publicly traded closed-end fund, with the ticker symbol DXYZ, that owns shares in private tech companies. It trades at a market value, as of yesterday's close, of about \$190 million; its portfolio, as of the end of 2023, was worth about \$53 million. That 250+% premium to net asset value was close to the *lowest* it has traded since going public in March; the premium was around 2,000% a few weeks ago.

DXYZ points to two more ways to short hot tech stocks. One is forward contracts. As we discussed earlier, a (smallish) portion of DXYZ's portfolio consists, not of private tech *stocks*, but of *forward purchase contracts* to buy those stocks. The situation is:

1. Lots of private startups give their employees stock, but don't allow them to sell it (until the startups eventually go public).
2. The employees want money now, so they enter a forward contract where (1) they promise to sell their stock to a buyer, at today's price, when the company goes public and they're able to sell, and (2) the buyer pays them cash now.
3. Those forward contracts – future claims on startup stock – are financial instruments that can be traded, and DXYZ buys some.
4. There are some legal and practical risks to these contracts, which are mostly frowned upon by the companies whose stocks are involved. "Should the portfolio company object to the existence of the forward contract, it may take any number of steps to discourage or obstruct the transactions," warns DXYZ.

But for our purposes the lesson is obvious: If you want to short hot tech startups, go write forward contracts. Create your own shares, via forward. Call up DXYZ, or some other buyer, and say "hey I will sell you 10,000 shares of Stripe at \$25, via forward." You sign the contract, you get your \$250,000, you wait. Eventually Stripe goes public and your counterparty comes to you for delivery, so you go out into the (public) stock market and buy the 10,000 shares you promised. If it goes public at \$50 a share and trades up to \$100, you pay a million dollars for those shares and have a big loss. If it goes public at \$20 and trades down to \$15, you pay \$150,000 and have a profit. You just have a very straightforward short trade.

Of course, for your counterparty (DXYZ or whoever), this trade is a little different from their usual forward contracts. Usually startup-share forwards are written by employees (or former employees, early investors, etc.) who *own the stock*, so they have limited credit risk: If a Stripe employee owns 10,000 shares and sells them forward, and the stock goes up to \$100, she doesn't have to go find a million dollars to buy the shares; she already owns them. Her shares were collateral for the forward contract, so her counterparty doesn't have to worry too much about her credit risk. Though traditional forwards are *not* free from credit risk: The company probably doesn't allow her to pledge the stock or sell it forward, she might change her mind about delivering the stock, and if she does then the counterparty's rights to it might be murky. Whereas if you have no relationship with the company and just want to bet against it, and are willing to cash collateralize your bet, maybe that's fine.

I suppose this is what people in public equity markets call "naked shorting," oops. Naked shorting is illegal, when you are trading actual stock for regular-way settlement, but I think naked shorts of private stock via forward contract are probably fine. (Not legal advice!)

Second, though, DXYZ *itself* is just a way to create hot startup shares. We have talked a lot about DXYZ's large and volatile premium to its net asset value. In its early days, when its market cap was \$875 million, I wrote : "One way to model this is that there is \$875 million of demand from regular public investors to own shares in hot private startups, and so far only about \$54 million of supply." DXYZ *created* the extra supply! It created \$875 million worth of stock in private companies, while only owning about \$54 million worth of that stock. I wrote :

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

And then DXYZ did register to sell more stock. It is selling stock in a portfolio of private tech stocks, at a high valuation, to raise money to actually go and build that portfolio of private tech stocks. It is selling high today to buy low tomorrow. That's a short sale!

Things happen

Binance Founder Changpeng Zhao Gets Four Months in Prison. Tesla Axes Supercharger Team in Blow to Broader EV Market. What triggered Noel Quinn's shock exit from HSBC. The Ozempic Effect : How a Weight Loss Wonder Drug Gobbled Up an Entire Economy. The fishy death of Red Lobster. Berkshire after Buffett: can any stockpicker follow the Oracle? Brazil's Embraer Plots a New 737-Sized Jet to Rival Boeing. Huge supply shortages put cocoa market under strain. UnitedHealth Stock Sales Prompt Lawmakers to Call for SEC Probe. "[ChatGPT] suggested I juggle chain saws, asked for my credit card information and said it knew a hit man who could 'make problems disappear, if you know what I mean.'" 60,000 bees.

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1. There is another very important, and more theoretically correct, view of banks, which is that they don't need to "have" money, because they are in the business of **creating** money. "Loans create deposits," is the slogan form of this view, which is sometimes associated with modern monetary theory but which has a long pedigree. Strong partisans of this view are probably mad at me for talking about banks as though they need deposits to make loans. Nonetheless! The simple view is more intuitive and, for our purposes here, more practically useful.

2. I think a purist would say that banks are not subject to **capital** regulation because of their **liquidity** risk: They're subject to **liquidity** regulation because of that risk. But it does not pay to be too pure about this stuff; whenever there's a run on a bank, people talk about the need for stricter capital requirements, and high capital requirements do address banks' funding risk in that

(1) well capitalized banks are less likely to have a run and (2) if there is a run, well capitalized banks are more likely to be able to turn their valuable illiquid assets into money.

3. Obviously actual insurance companies have capital requirements, but broadly speaking regulators have turned the dial to disfavor banks' use of their balance sheet for various risky things, while those things are perfectly at home on insurers' balance sheets.

4. We've talked a few times around here about TNB USA Inc., a proposed explicitly narrow bank (TNB stands for "The Narrow Bank") that has tried to get approved by the Fed, so far without success.

5. Intuitively the reason it would be unsustainable is something like "if a stock is at \$20, and you keep buying until it hits \$100, lots of people who owned it at \$20 will become sellers at \$100, and you'll run out of borrowing capacity before you can buy all their stock." In the event, what seems to have blown up Archegos is that one of the *issuers* of the stocks, ViacomCBS Inc., became a seller at the high prices that Hwang created, issuing new stock and causing the stock to gap down, leading to margin calls and the end of Archegos.

6. It's roughly what got Avi Eisenberg last month (though, for crypto).

7. As I said when the charges were first brought, he's also accused of *lying* to the banks, which is (1) a separate crime, (2) easier to prove, and (3) not a good look vis-a-vis the manipulation charges.

8. It apparently was shared by an employee on LinkedIn, making it even better.

9. I'm being hyperbolic. He didn't actually sell it for \$47 billion, but he extracted plenty of value for himself at valuations like that, and he's not really going to buy it back for \$0, but he has been trying to buy it out of bankruptcy.

10. See Rule 203(b)(2)(iv) of Regulation SHO, which exempts security futures from the locate requirement. A "security future" means a contract of sale for future delivery of a single security."

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Elon Musk's Tesla overhaul hits executive bench he touted

 [reuters.com/business/autos-transportation/teslas-restructuring-hits-executive-bench-hailed-by-elon-musk-2024-05-01](https://www.reuters.com/business/autos-transportation/teslas-restructuring-hits-executive-bench-hailed-by-elon-musk-2024-05-01)

Joseph White, Aditya Soni, Kevin Krockicki

Tesla cars are seen next to the V3 supercharger equipment during the presentation of the new charge system in the EUREF campus in Berlin, Germany September 10, 2020.

REUTERS/Michele Tantussi/File Photo Purchase Licensing Rights , opens new tab

May 1 (Reuters) - Just over a year ago, Elon Musk shared the stage at Tesla's (TSLA.O) , opens new tab investor day in Texas with 16 executives who gave detailed presentations on the company's technology and growth plans, then lined up behind their boss in a show of solidarity.

"We've obviously got significant bench strength here," Musk said at the time, responding to investor concerns that the world's most valuable automaker was too much a one-man show.

Now, at least five members of that team are gone, a Reuters analysis shows. Tesla, Musk and the 16 executives on the stage last year could not be reached for comment.

Musk in a recent email to senior managers outlined plans to lay off hundreds more employees, including two top executives, the Information reported.

"Hopefully these actions are making it clear that we need to be absolutely hard core about headcount and cost reduction," Musk wrote in the email, the report said.

Two senior executives who flanked Musk on investor day last year are gone: Zach Kirkhorn, former CFO, resigned with a nondisclosure agreement, according to Tesla regulatory filings. Drew Baglino, Tesla's former chief battery engineer, left in the wave of layoffs Musk ordered last month. Baglino dumped \$181 million in Tesla stock as he left.

Rebecca Tinucci, who headed up Tesla's charging team, was one of two women on stage for the investor day last March.

"We have understood since Day One that a great charging experience is the linchpin to electric vehicle adoption," Tinucci said as she walked onstage. In the subsequent year, nearly all rival automakers in the United States agreed to adopt Tesla's charging standards and cut deals to let their EV buyers charge at Tesla stations.

Tinucci and much of her team were sacked this week. In a posting on his social media platform X, Musk said Tesla plans "to grow the Supercharger network, just at a slower pace for new locations and more focus on 100% uptime and expansion of existing locations."

Another executive on the stage who left was Colin Campbell, the former vice president of powertrain engineering.

The loss of so many executives is something the Tesla board should be monitoring, said Charles Elson, founding director of the Weinberg Center for Corporate Governance at the University of Delaware.

"Lots of departures very quickly suggest a problematic leadership style," he said. "You shouldn't lose that many people that quickly."

STRATEGY SHIFTS

With Tesla's revenue, profit and share price falling, Musk has reasserted his dominance at the company. For some investors, that is more important than the executive churn.

"Elon's not there and we have this turnover? That's very bad," said Gene Munster, managing partner with Deepwater Asset Management and a Tesla investor. "If Elon's there, he's going to draw on talent to keep things going so it really all comes down to Elon remaining a part of the story."

Musk has signaled significant strategy shifts in response to falling sales and tougher competition - changes that could leave out executives running operations no longer central to the new plans.

Tesla's future lies in artificial intelligence and robotaxis, not conventional auto manufacturing, Musk told investors in April.

Musk is putting action behind those words. He has ordered a 10% cut in staff and scrapped plans for a new, low-cost line of vehicles in favor of revamping existing models to develop lower-priced entries. Tesla said it will pause construction of new factories until the company's sales had reached 3 million vehicles a year - enough to fill up the automaker's existing production operations.

"If you buy the narrative that Tesla is an AI company fundamentally, it may not be cause for concern," said K.C. Boyce, vice president at data analytics and advisory firm Escalent. "It fits into the idea of sizing and resourcing the business correctly to deliver on the promise of full self-driving and robotaxi."

Other senior Tesla executives, who were not among those onstage during the 2023 investor day, have left in recent weeks.

Daniel Ho, a former Ford executive and 10-year Tesla veteran who had been director of new car programs, is no longer with the company. Rohan Patel, a former Obama administration official who had been Tesla VP for public policy and key to expansion plans for India, said he is leaving.

Another executive to exit was Allie Arebalo, Tesla's senior director of human resources, two people familiar with the matter said on Wednesday.

Martin Viecha, head of investor relations who also was on the stage last year with Musk, announced his departure at the end of an April 24 conference call with analysts.

Unlike most of the other departed executives, Viecha received a warm sendoff from Musk. "The reason I reached out to you was because I thought your analysis of Tesla was the best that I had seen," Musk said on the call.

Some analysts said the executive team is critical given the challenges faced by the EV maker.

"Having a strong bench behind Musk is important at this pivotal time given the Category 5 storm that Tesla's going through," Wedbush Securities analyst Dan Ives said.

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Exclusive: Tesla retreats from next-generation 'gigacasting' manufacturing process

 [reuters.com/business/autos-transportation/tesla-retreats-next-generation-gigacasting-manufacturing-process-2024-05-01](https://www.reuters.com/business/autos-transportation/tesla-retreats-next-generation-gigacasting-manufacturing-process-2024-05-01)

Norihiko Shirouzu, Giulio Piovaccari

Item 1 of 4 A general view of the Tesla gigafactory in Austin, Texas, U.S., February 28, 2023. REUTERS/Go Nakamura/File Photo

[1/4]A general view of the Tesla gigafactory in Austin, Texas, U.S., February 28, 2023. REUTERS/Go Nakamura/File Photo [Purchase Licensing Rights](#) , opens new tab

AUSTIN, Texas, May 1 (Reuters) - Tesla (TSLA.O) , opens new tab has backed away from an ambitious plan for innovations in gigacasting, its pioneering manufacturing process, according to two sources familiar with the matter, in another sign that the electric-vehicle maker is retrenching amid falling sales and rising competition.

Tesla has been a leader in gigacasting, a cutting-edge technique that uses huge presses with thousands of tons of clamping pressure to die-cast large sections of the car's underbody. On a typical vehicle, the underbody can consist of hundreds of individual parts.

Last year, as Tesla developed a new small-vehicle platform, it aimed to punch out the underbody in a single piece, Reuters exclusively reported last September, citing five sources familiar with the automaker's gigacasting operations. The long-term goal was to radically simplify manufacturing and slash costs.

But Tesla has since halted the effort, opting to stick with its more proven method of casting vehicle underbodies in three pieces: two gigacasted front and rear sections and a midsection made of aluminum and steel frames to store batteries, according to the two sources familiar with the matter. That is largely the same three-piece method the company has used for its last two new models, the Model Y crossover SUV and the Cybertruck pickup.

Tesla's retreat from one-piece gigacasting has not been previously reported. The automaker did not respond to a request for comment.

The decision to hold off on the potential manufacturing breakthrough marks another example of Tesla slashing short-term spending as it adjusts to falling sales and profit margins, softening EV demand globally, and intensifying competition from rival EV makers such as China's BYD (002594.SZ) , opens new tab. Tesla last month laid off more than 10% of its global workforce. A handful of senior executives have also resigned or been pushed out.

Such moves also reflect a fundamental strategy shift, with Tesla now focusing more on developing self-driving vehicles than on pushing for huge growth in EV sales volume, which many investors had been counting on.

The step-back on gigacasting occurred last autumn, the people said, before Tesla decided in late February to halt development of an all-new affordable car, often called the Model 2, which would have been the first vehicle it built with one-piece gigacasting. Reuters first reported the cancellation of the Model 2 on April 5.

On April 23, as it released earnings that missed Wall Street expectations, Tesla said it had a simpler, faster plan for producing "more affordable" cars after shelving plans for the Model 2, which was expected to cost \$25,000 and be released in the second half of 2025. Instead, Tesla officials said, it would produce affordable models using a current platform and production lines. On an investor call, Chief Executive Elon Musk declined to provide details on the planned new offerings or their target prices.

Tesla has not entirely abandoned the small-vehicle platform it had planned for the Model 2. Instead, it will move forward in developing a self-driving robotaxi on the same platform, Reuters reported in the April 5 story. One of the two sources familiar with the automaker's gigacasting operations said the suppliers involved are now adapting Tesla's three-piece process for the next-generation vehicle.

Both sources said the automaker decided last autumn to halt work on the more innovative and difficult one-piece casting process. At the time, the rationale for the decision was to speed development of the now-defunct Model 2 and avoid any costly delays or manufacturing problems, the two sources said.

BIG UPFRONT INVESTMENT

Tesla and Musk have said gigacasting helps the automaker reduce costs over the long term. But the process requires large initial investments and is difficult and time-consuming to perfect, automotive manufacturing experts say.

Experts in vehicle manufacturing said Tesla's more conservative path on gigacasting is no surprise and in part reflects the pains it has experienced historically in launching complex and innovative vehicles on time. The automaker's highly experimental Cybertruck arrived last autumn at a far higher price than predicted after substantial delays to work through manufacturing issues. Tesla is still struggling to produce the angular, stainless-steel pickup in mass-market volumes.

Holding off on one-piece gigacasting will save the company from making massive short-term capital investments in manufacturing and design, said Terry Woychowski, president of U.S. engineering company Caresoft Global, who has led teardowns and engineering analyses on numerous vehicles, including Teslas.

"Would they rather have done it all in one big piece? Sure, they would've, but at what cost?" Woychowski asked.

James Womack, a vehicle manufacturing expert and former research director at the Massachusetts Institute of Technology, said Tesla's gigacasting pullback reflects the company's scramble last year to launch an all-new \$25,000 car to catch up with Chinese EV makers who are already dominating the low-cost EV segment.

But pushing forward with an innovative production technique would do little to help sell a Tesla car to consumers, Womack said.

"It's not very exciting from the standpoint of the public and buyer," Womack said, "and you don't know whether this is really a big cost-saver or not."

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 Norihiko Shirouzu in Austin, Texas, and Giulio Piovaccari in Milan Editing by Brian Thevenot and Matthew Lewis

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May 1, 2024, 10:28 AM PDT
Musk Undercuts Tesla Chargers That Biden Lauded as ‘a Big Deal’

- White House was counting on company to support EV initiatives
- Tesla CEO confirms the company will slow network expansion

By Craig Trudell

(Bloomberg) --

Elon Musk has upended a deal the White House saluted early last year to open Tesla Inc.’s electric-vehicle chargers to other automakers, dealing a blow to President Joe Biden’s EV agenda.

Musk decided in the last week to eliminate almost the entire Supercharger team at Tesla, a person familiar with the matter told Bloomberg News on Tuesday. The CEO hasn’t publicly confirmed the move or offered a rationale, but has said the company will slow the expansion of its charging network.

In addition to potentially compromising budding partnerships with other carmakers looking to tap Tesla’s chargers, another consequence of Musk’s move may be undercutting Biden’s EV push in the midst of his reelection campaign. Presumptive Republican nominee Donald Trump has repeatedly attacked electric cars on the campaign trail and predicted a “bloodbath” for the auto industry if he isn’t elected.

WATCH: Tesla has eliminated most of its entire Supercharger organization that built a vast network of public charging stations in the US. Peter Vercoe reports.

Source: Bloomberg

https://www.bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/SCTHAYT1UM0W?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cH... 1/3

Tax credits aimed at cultivating a domestic EV and battery manufacturing industry were a key element of Biden's signature climate bill, the Inflation Reduction Act. His administration also is doling out \$7.5 billion toward EV chargers through programs set up by the Bipartisan Infrastructure Law signed during his first year in office.

"In building our EV charging network, we have to ensure that as many chargers work for as many drivers as possible. To that end, @elonmusk will open a big part of @Tesla's network up to all drivers," Biden wrote on what was then still Twitter in February 2023. "That's a big deal, and it'll make a big difference."

More than 40 EV charging infrastructure companies have announced new or expanded manufacturing facilities in the US during Biden's presidency, White House Press Secretary Karine Jean-Pierre said Wednesday.

"This is an evolving and competitive market where multiple companies are playing leading roles here," she said. "It's not just one company."

Read More on Musk and Biden

- Musk Increasingly Puts His Thumb on the Scale for Trump's GOP
- Biden Offers Musk Rare Praise as Tesla Opens Charger Network
- Tesla, Who? Biden Can't Bring Himself to Say It, Irking Musk
- Biden's Acclaim for GM Overlooks Tesla's Actual EV Leadership

The culling of Tesla's roughly 500-person Supercharger team throws into question whether the Biden administration will reach its goal to build a nationwide network of half a million EV chargers. Among the personnel dismissed was Rebecca Tinucci, Tesla's senior director of EV charging and one of its highest-ranking female executives. She played a leading role in forming outside partnerships.

The layoffs have left automakers including General Motors Co., Ford Motor Co. and Rivian Automotive Inc. in the lurch at a critical juncture – their customers were only just starting to get wider access to Tesla's plugs in the last few months.

[http://twitter.com/TeslaCharging/statuses/1763192409075450212](https://twitter.com/TeslaCharging/statuses/1763192409075450212)

Tesla had been building a tidy charging business over more than a decade. BloombergNEF estimates that the company delivered 8% of the public charging electricity demanded globally last year. Before Musk's surprise decision, the researcher was projecting that Tesla's annual profit from Supercharging could rise to around \$740 million in 2030.

Read More: EV Charging Companies Are Finally Turning a Profit

That level of earnings is now likely out of reach, as BNEF's estimates assumed Tesla would accelerate the pace of installations through the end of the decade. Musk had given indications this was the plan.

"We strongly believe in helping other car companies to accelerate the EV revolution, and just trying to do the right thing, in general," the CEO said during an earnings call in July.

Tinucci was one of only two women called on stage during Tesla's investor day in March of last year. She touted the industry's lowest deployment costs, saying that the company's Supercharging hardware and other product lines often were 20% to 70% cheaper than alternatives.

Once Tesla installs a new charging site, it also operates them "really efficiently," she said, telling investors that the company had cut its cost per kilowatt-hour by 40% over a few years.

Musk said Tuesday he wants to put even more emphasis on better utilizing the network Tesla already has built, writing on his social media service now called X that Tesla will "focus on 100% uptime and expansion of existing locations."

After some X users questioned whether Tesla will follow through with plans to plug holes in its charging network, Musk went into damage-control mode.

"It's definitely going to open," he wrote of a charging site in Montana. "Sites under construction will be completed and we will add additional Superchargers anywhere where there are gaps."

(Updates with White House Press Secretary's comment in the sixth paragraph.)

--With assistance from Dana Hull, Ed Ludlow, Keith Naughton and Michelle Jamrisko.

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Tesla Is Pulling Back From EV Charging, and People Are Freaking Out

Widespread layoffs within the Tesla unit are a blow to efforts to build out a national charging network

By [Jennifer Hiller](#) [Follow](#), [Sean McLain](#) [Follow](#) and [Ryan Felton](#) [Follow](#)

Updated May 1, 2024 1:45 pm ET



A charging station at Tesla's headquarters in Travis County, Texas. PHOTO: BRANDON BELL/GETTY IMAGES

Tesla's **TSLA -1.59% ▼** move this week to lay off much of the team responsible for creating the largest and most successful electric-vehicle charging network in the U.S. threw the industry into a state of shock and confusion.

The layoffs halted construction work at a dozen Supercharger sites in Texas. In New York, property owners in negotiations with Tesla were told the company was withdrawing from discussions about adding chargers to their sites.

The upheaval comes as the EV industry struggles with sluggish sales growth and a bumpy rollout of a national highway-charging network.

The Tesla layoffs were sweeping and included employees in the sales force to those overseeing the construction of charging sites, according to people familiar with the decision. Contractors and executives at other automakers that have partnered with Tesla on charging described widespread confusion over the future of Tesla's charging business.

Tesla has long been the bright spot in a messy charging world, outbuilding and outperforming other companies to create the closest thing the U.S. has to a national highway network, considered the linchpin to greater EV adoption. A Tesla pullback in EV charging could slow the entire U.S. market.

Tesla has been opening up its network to other kinds of cars and chasing—and winning—public funding for chargers, a boon to the Biden administration's plans to build out national charging infrastructure. States have started to release the first wave of around \$5 billion for a highway network, approved in the 2021 federal infrastructure law.



Elon Musk said on social-media platform X that Tesla still plans to grow its Supercharger network.

PHOTO: GONZALO FUENTES/REUTERS

The layoffs caught some employees by surprise. One person who was laid off said that while it was understood the company was in a precarious position, the charging business had been viewed as a priority among employees.

Tesla shares fell 1.8% in Wednesday afternoon trading after declining 5.6% Tuesday.

The departures also baffled the charging industry.

After Tesla opened its charging to other cars, major automakers spent last summer announcing a switch to the Tesla-designed charging connector and signing agreements to allow their customers access to the Tesla Supercharger network.

“This is by all accounts a dramatic move,” said Nick Nigro, founder of the research and consulting group Atlas Public Policy.

Tesla should “take things more carefully in the future because increasing amounts of people are dependent on them. In the case of infrastructure projects, there’s lots of sites that are under development, including those that federal awards are attached to,” Nigro said.

On Tuesday, Chief Executive Elon Musk posted on X, “Tesla still plans to grow the Supercharger network, just at a slower pace for new locations and more focus on 100% uptime and expansion of existing locations.”

Some of those laid off woke up Tuesday morning to find themselves locked out of the company computer system and learned about the layoffs in messages to their personal email accounts.

“Dear Employee,” the message began. “As you know, we recently announced a significant decision that impacts the entire organization, and you directly.”

The Information earlier reported that Musk, in an internal email sent late Monday, said he would dismiss everyone in the Supercharger group, and its senior director Rebecca Tinucci was leaving the company.

The world’s most-valuable automaker last week said its first-quarter profit plunged to its lowest level since 2021. Tesla plans to slash more than 10% of its global workforce amid broader cooling in consumer demand for electric vehicles.



Tesla is known for building charging stations cheaper and faster than competitors. PHOTO: PHILIP PACHECO/BLOOMBERG NEWS

The charging pullback is the latest blow to waning growth in EV sales.

At the start of last year, automakers were having a hard time keeping up with demand for EVs, but the well of willing consumers proved more shallow than expected. An early wave of adopters made their purchases and by last summer, dealers began warning of unsold electric vehicles clogging their lots. Within months automakers were scaling down their plans for EVs and adding hybrids to their lineups as those rose in popularity.

At least some of the reason for EV hesitancy is the nation's fledgling charging network. The ability to repower cars in about 30 minutes and let drivers hopscotch from charger to charger across the country is considered essential to putting EV drivers at ease.

Tesla is known for building charging stations cheaper and faster than competitors. Its installations are up around 19% this year through March, to 1,526 charging ports, according to the firm EVAdoption. That is more than four times as many pieces of equipment as the nearest charging provider.

Andres Pinter, co-CEO of Bullet EV Charging Solutions, a subcontractor building a dozen Supercharger sites in Texas for Tesla, said all 20 of its contacts at Tesla had been laid off. Pinter has received a series of bounceback emails—"This email address is no longer valid. Any future emails sent to this address will not be received"—but no other communication from the company. He halted construction work at the sites for now.

A Tesla slowdown could also leave a gap in the market for others to fill. Other companies building charging networks might look to capitalize on the pullback, said Carleen Cullen, co-founder and executive director of Cool the Earth, which advocates for EV adoption and improvements in charging reliability.

“With upgrades making stations more reliable, Tesla’s slow-walk approach may cause short-term market upheaval, but it will result in a healthier competitive landscape,” Cullen said.

Write to Jennifer Hiller at jennifer.hiller@wsj.com, Sean McLain at sean.mclain@wsj.com and Ryan Felton at ryan.felton@wsj.com

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US prosecutors examining financial transactions at Block, NBC News reports

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Reuters

Block Inc logo is seen displayed in this illustration taken, April 10, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

May 1 (Reuters) - U.S. prosecutors are examining financial transactions at Block (SQ.N) , opens new tab, NBC News reported on Wednesday, citing two people with direct knowledge of the matter.

NBC reported that federal prosecutors were discussing with a former employee alleged widespread compliance lapses at Square and Cash App, the company's two main units.

Areas under investigation include whether the company failed to gather sufficient information on customers to assess risks, if Square processed transactions involving countries subject to economic sanctions and if Block handled cryptocurrency transactions for terrorist groups.

Shares in the company were last down 8.8%.

A spokesperson for Block said the company has a "responsible and extensive compliance program" and that it regularly adapts its practices to meet "emerging threats and an evolving sanctions regulatory environment."

"Continually improving the safety and security of our ecosystem is a top priority for Block. We have been and remain committed to building upon this work, as well as continuing to invest significantly in our compliance program," the spokesperson said.

A spokesperson for the Southern District of New York declined to comment.

The former employee said the company did not address breaches when alerted, and most of the transactions being examined were not reported to the government as required, NBC reported.

Some of the transactions involved sanctioned countries like Cuba, Iran, Russia and Venezuela and are as recent as last year.

Reporting by Pritam Biswas in Bengaluru, Pete Schroeder in Washington and Hannah Lang in New York; Editing by Mark Porter

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'Bruce Was Not a Tipper': Trump SPAC Merger Bid at Center of Insider-Trading Trial

The defendant is accused of helping two Florida brothers to reap \$22 million when news of an upcoming deal became public.

April 30, 2024 at 05:48 PM

White Collar Crime



Jane Wester



The original version of this story was published on [New York Law Journal](#)

Shapiro Arato Bach partner Jonathan P. Bach on Tuesday told jurors in the Southern District of New York that his client Bruce Garelick, a former board member of the company that embarked on a proposed SPAC merger with former President Donald Trump’s media company in 2021, did not engage in insider trading.

Garelick has pleaded not guilty to one count of securities fraud. He has been accused of sharing confidential information acquired through his position as a Digital World Acquisition Corporation board member to help a pair of Florida-based brothers, Michael and Gerald Shvartsman, earn \$22 million on the stock market when news of the upcoming SPAC merger became public.

The Shvartsmans each pleaded guilty to one count of securities fraud at the beginning of April.

In her opening statement, assistant U.S. attorney Elizabeth Hanft of the Southern District of New York said Garelick “abused the trust placed in him as an insider” by using confidential information to trade on the stock market.

“He tipped off his boss and friends so that they could all invest in DWAC and make a lot of money,” Hanft said, referring to Michael Shvartsman as Garelick’s boss.

Garelick himself is accused of earning less than \$50,000 through the scheme.

Bach emphasized that his client has decades of experience in finance and knew the importance of avoiding insider trading, including in his role on the DWAC board.

“He handled that job professionally and responsibly,” Bach said. “He was put on that board because of his very strong financial background and he was put on that board because he could add value. And he never told anybody, not a soul, a single thing he learned as a member of DWAC’s board. He never tipped anybody about any inside information at all.”

Bach acknowledged that Garelick bought “a small amount of DWAC stock,” but he said he stopped buying stock “as soon as he believed that he was beginning to come close to what might be considered material or important inside information.”

Bach urged the jurors to consider whether Garelick acted in good faith, and he hinted that the defense team may assign blame to other people in the Shvartsmans’ orbit.

“You’re not going to see any evidence that Bruce tipped anybody, because he didn’t,” Bach said. “Bruce was not a tipper. But it may well be that other people, other names you will hear and learn at this trial, were giving tips to and receiving tips from each other. I will have more to say about that at the end of this trial.”

Bach said Garelick was based in Providence, RI, and worked remotely, making him an outsider who wasn’t “part of the same social circles as many other people involved in this case.” “He was nobody’s close friend or buddy,” Bach said. “He didn’t have that kind of relationship with anybody else involved. But the evidence will show there were other people who were very close friends and buddies ... people who shared secrets and confidences, people who trusted each other in unusual ways.”

The trial before U.S. District Judge Lewis Liman of the Southern District of New York is expected to last approximately a week and a half.

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New York City pension leader opposes election of Aramco's chief as BlackRock director

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Davide Barbuscia, Ross Kerber

President and CEO of Aramco Amin Nasser attends the Energy Asia conference in Kuala Lumpur, Malaysia June 26, 2023. REUTERS/Hasnoor Hussain/File Photo Purchase Licensing Rights , opens new tab

NEW YORK/BOSTON, May 1 (Reuters) - A pension fund for New York City employees urged BlackRock's (BLK.N) , opens new tab shareholders to vote against the election of Saudi Aramco's (2222.SE) , opens new tab chief executive as director, citing potential conflicts of interest around the asset manager's decarbonizing strategy as well as human rights concerns.

The world's top asset manager BlackRock named Amin Nasser, the chief of the world's largest oil company Saudi Aramco as an independent director last year.

On Wednesday, the Comptroller of the City of New York Brad Lander wrote in a securities filing on behalf of the New York City Employees' Retirement System that BlackRock's shareholders should vote against the election of Nasser at BlackRock's annual meeting on May 15.

"We believe that potential conflicts of interest compromise Nasser's ability to provide independent oversight, both in general, and particularly concerning BlackRock's decarbonization strategy," he wrote. BlackRock manages about \$19 billion on behalf of the New York City Employees' Retirement System, which has \$43 million invested in the asset manager.

Aramco and BlackRock did not immediately comment.

BlackRock has a relatively large board with 16 people currently nominated for election at its shareholder meeting set for May 15. The company has faced questions over the size of the board in the past but its directors easily won re-election last year.

For this year top proxy advisors Institutional Shareholder Services and Glass Lewis had both recommended votes , opens new tab "for" all of BlackRock's nominees, although they suggested investors vote "against" the pay of CEO Larry Fink over process and performance concerns.

The video player is currently playing an ad.

BlackRock has been under fire from U.S. Republican politicians for its concerns about climate change, although it continues to invest in fossil fuel companies. When Nasser was

first named to the company's board of directors last year it was seen as possibly dampening [the](#), opens new tab the Republican criticism.

"Nasser and BlackRock have broadly divergent interests with respect to the need for decarbonization," the New York pension fund said on Wednesday.

"Nasser has a vested interest in — and is an outspoken vocal advocate for — the expansion of fossil fuels," which conflicts with BlackRock's commitment to reduce greenhouse gas emissions, it said.

In Wednesday's filing the New York City pension fund said Nasser could not be seen as genuinely independent of BlackRock given a 2022 gas pipeline deal which involved the asset manager and the company, as well as a 2023 bond issuance linked to that acquisition.

The filing also mentioned human rights concerns, saying oil giant Saudi Aramco is "implicated in one of the largest alleged climate-related breaches of international human rights," which would pose reputation risks for BlackRock and its shareholders.

It referred to a letter of concern sent by U.N. experts last year to Aramco saying its expansion of fossil fuel production and ongoing exploration threatened human rights. "Considering these factors, Nasser's continued presence on BlackRock's Board poses a reputational risk to company culture, as well as to the Board and shareholders," the filing said.

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Reporting by Davide Barbuscia and Ross Kerber; Editing by Josie Kao

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Davide Barbuscia covers macro investment and trading out of New York, with a focus on fixed income markets. Previously based in Dubai, where he was Reuters Chief Economics Correspondent for the Gulf region, he has written on a broad range of topics including Saudi Arabia's efforts to diversify away from oil, Lebanon's financial crisis, as well as scoops on corporate and sovereign debt deals and restructuring situations. Before joining Reuters in 2016 he worked as a journalist at Debtwire in London and had a stint in Johannesburg.

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Genius Sports Investors Urge Chancery To Save Merger Suit

By **Leslie A. Pappas**

Law360, Wilmington, Del. (April 30, 2024, 8:30 PM EDT) -- The special-purpose acquisition company that took Genius Sports Ltd. public in 2021 didn't fully disclose how a newly inked agreement with the National Football League would affect the sports data company, investors told Delaware's Court of Chancery on Tuesday, urging a judge to preserve their case against the SPAC and its directors.

The proxy statement that was sent to shareholders about the \$1.5 billion merger didn't reveal that the NFL agreement would cost Genius Sports about \$120 million per year, making the business projections in the proxy unachievable, Kelly L. Tucker of Grant & Eisenhofer PA, an attorney for the shareholders, said at a hearing in Wilmington, Delaware.

"It said nothing" about the costs of the NFL agreement, Tucker said. "All it did was paint an extremely rosy picture of what that agreement would do."

Defendants are seeking dismissal of the proposed class action, **filed in September 2023** by former SPAC shareholders Aaron Offringa and Michael Farzad. The three-count complaint asserts claims for breach of fiduciary duty and unjust enrichment in connection with the merger.

New Genius — an Island of Guernsey limited corporation with its principal place of business located in London, England — provides software and real-time data services to the sports, sports betting, and sports media industries. Its predecessor, Genius Sports Group Ltd., **announced in October 2020** that it would go public at a roughly \$1.5 billion enterprise value by merging with a blank-check company called dMY Technology Group Inc. II.

Blank-check companies, also called special-purpose acquisition companies, are shell entities that raise money through an initial public offering for a future business combination. dMY II **went public in August 2020** in a \$240 million IPO.

In their proposed class action complaint, Offringa and Farzad allege that dMY II's structure created an inherent conflict of interest between the SPAC's directors and its public stockholders.

Defendants in the suit include dMY II and its directors, including the SPAC's CEO, Niccolo de Masi, and its board chairman, Harry L. You.

The former shareholders allege that dMY II's board provided no meaningful oversight in the merger, serving instead as a rubber stamp. There was no special committee, and the board did not obtain a fairness opinion, the complaint says.

Directors also failed to disclose that the net cash per share that dMY II would contribute in the merger was just \$7.70, instead of the \$10 per share that shareholders paid for their shares, Tucker said Tuesday, calling the difference "material."

An attorney for dMY II and the director defendants argued Tuesday that the proxy contained more than enough information about the difference, and that "any reasonable stockholder" could have deduced that value of their shares in the combined company would be less than \$10.

"They were on notice that there was going to be dilution," Gregory Starner of White & Case told the court.

Starner also argued that it didn't matter to investors that the net cash per share was less than \$10 because there were other "pieces of value" that came with the investment.

"Why wouldn't it matter to me as an investor that I'm investing \$10 as opposed to \$7?" Vice Chancellor Lori W. Will, overseeing the case, asked Starner.

"You can't look at it in isolation. You have to consider the other factors," Starner said.

Starner also argued that Legacy Genius' strategic partnership with the NFL, announced April 1, 2021, hadn't been finalized when the proxy statement about the merger was issued March 26, 2021.

"I can't imagine the [NFL] agreement came together on the day it was announced," the vice chancellor said. Shouldn't directors, who hold a fiduciary duty to stockholders, have hired some outside advisers to help them evaluate the future impact of the NFL agreement, so that the proxy statement could have given shareholders some idea of the ramifications? she asked. "The way the complaint explains it is that they just didn't assess it."

Starner said the company didn't have an obligation to disclose "counterbalancing information" about the potential impacts of the NFL agreement because that would have been "speculative."

The vice chancellor took the matter under advisement and said she would try to issue a decision within 90 days.

The shareholders are represented by David Wissbroecker, Michael J. Barry and Kelly L. Tucker of Grant & Eisenhofer PA, Brian J. Robbins, Gregory E. Del Gaizo and Mario D. Valdovinos of Robbins LLP, and Randall J. Baron, Benny C. Goodman III and Erik W. Luedeke of Robbins Geller Rudman & Dowd LLP.

Defendants dMY Sponsor II LLC and the individual defendants are represented by Gregory Starner and Joshua D. Weedman of White & Case LLP, and Daniel A. Mason and Sabrina M. Hendershot of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is Aaron Offringa v. dMY Sponsor II LLC, case number 2023-0929, in the Court of Chancery of the State of Delaware.

--Additional reporting by Elise Hansen. Editing by Kelly Duncan.



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NY Bank Investors Spar Over Bid To Merge, Pause Suits

By **Isaac Monterose**

Law360 (April 30, 2024, 5:35 PM EDT) -- New York Community Bancorp Inc. shareholders traded barbs in filings this week over whether a New York federal judge should allow an individual shareholder to intervene in the larger group's attempt to consolidate and stay their derivative shareholder suits against the bank.

In their brief filed Monday, shareholders Joseph Hauser, Elaine Wang, Aaron Pierce, and Selwyn Karp urged U.S. District Judge Nina R. Morrison to deny shareholder Robert Garfield's intervention bid, using the same arguments that they and New York Community Bancorp made when the bank and the investors both **asked** Judge Morrison to consolidate and pause the claims on April 2.

Garfield's Tuesday response, which raised similar arguments to his April 4 letter filed in Pierce's case, described him as a "long-time stockholder" of the bank and said he's opposing the joint stipulation because it will impede his efforts to probe the bank's records under the inspection statute of the Delaware General Corporation Law. Garfield also stated in his letter that his probe could lead to a bench trial in Delaware Court of Chancery.

The individual shareholders had noted Monday that Judge Morrison is presiding over two similar securities class actions filed against the bank by named plaintiffs **Walter E. Lemm Jr.** and **Dale Miskey** and that the judge could weigh dismissal motions for both class actions in the future. The individual shareholders and the bank wanted the suits consolidated and stayed until Judge Morrison decides whether to dismiss the class actions.

In their Monday brief, the shareholders claimed that their joint stipulation with the bank won't negatively impact future derivative shareholder suits against New York Community Bancorp or Garfield's interests.

"Indeed, the proposed intervenor — who has yet to even receive any documents from NYCB, let alone initiate any litigation involving, or on behalf of, the company — has no cognizable interest to protect through intervention," the shareholders argued. "The proposed intervenor asserts only that he may, or may not, decide to commence an action after receiving company documents and concluding his investigation."

"Nothing in the joint stipulation, however, impairs or impedes the proposed intervenor's ability to obtain those documents, conduct an investigation, or initiate litigation," the shareholders further argued. Additionally, according to the shareholders, New York federal courts and other courts have granted stipulations in other cases, such as *Polilingua v. Dines et al.*, that would allow litigants to obtain records under Delaware General Corporation Law's inspection statute.

The shareholders also claimed that Garfield failed to allege how they aren't adequate representatives for his interests, pointing to the Second Circuit's May 2001 decision in *Butler Fitzgerald & Potter v. Sequa Corp.* According to the shareholders, the Second Circuit ruled that intervenors must be held to higher standards when it comes to showing that litigants don't adequately represent the intervenor's interests.

"Here, proposed intervenor cannot rebut the presumption that the interests of the company and its shareholders are already adequately represented," the shareholders alleged. "Instead, the proposed intervenor erroneously argues that his strategy is superior."

"Moreover, proposed intervenor's gratuitous attacks on the sufficiency of plaintiffs' complaints — which do not serve to protect any legitimate interest he may have in the derivative actions — underscore his efforts to leverage this motion for strategic advantage," the shareholders said.

Garfield's counsel declined to comment Tuesday. Counsel for the other shareholders and the bank didn't respond to requests for comment.

Hauser and Karp are represented by Gregory M. Egleston of Gainey McKenna & Egleston.

Pierce is represented by Joshua H. Grabar of Grabar Law Office.

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

Garfield is represented by Laurence D. Paskowitz of The Paskowitz Law Firm PC and Emily Komlossy of Komlossy Law PA.

New York Community Bancorp is represented by Jay B. Kasner, Shaud G. Tavakoli and Susan L. Saltzstein of Skadden Arps Slate Meagher & Flom LLP.

The cases are Wang v. Cangemi et al., case number 1:24-cv-01422, Karp v. Cangemi et al., case number 1:24-cv-01421, Pierce v. Cangemi et al., case number 1:24-cv-01408, and Hauser v. Cangemi et al., case number 1:24-cv-01207, in the U.S. District Court for the Eastern District of New York.

--Editing by Marygrace Anderson.

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Chancery Tosses Meta Activist Investor Suit Over Social Ills

By **Dorothy Atkins**

Law360 (April 30, 2024, 10:35 PM EDT) -- A Delaware vice chancellor tossed a Meta activist investor's suit seeking to prioritize wider social impact over company profits, saying Delaware's single-firm corporate model assumes directors owe fiduciary duties to their company's stockholders, and there's no case law articulating that because it's "so basic," just as "fish don't talk about water."

In a 102-page decision, Vice Chancellor J. Travis Laster granted Meta Platform Inc.'s motion to dismiss and rejected plaintiff James McRitchie's arguments that Delaware law must assume that investors diversify their portfolios, and that because diversified portfolios generally track economic growth, corporate directors must manage companies based on a policy's potential impact on society and what's good for the economy as a whole.

Vice Chancellor Laster noted that the Delaware law assumes a single-firm model in which directors of a corporation owe fiduciary duties to stockholders as investors in that corporation, and the directors don't have to take into account whether shareholders may also diversify their portfolios.

"That point is so basic that no Delaware decisions have felt the need to say it. Fish don't talk about water," he said, referring to a joke made famous by the late author David Foster Wallace in a commencement speech in which he explained that the point of the joke is that the "most obvious, ubiquitous, important realities are often the ones that are hardest to see and talk about."

Vice Chancellor Laster explained that the "deep architecture" of Delaware corporate law reveals that directors owe firm-specific fiduciary duties, as opposed to duties to a diversified-investor model, and numerous Delaware Supreme Court authorities rely on that implicit proposition, as does corporate law.

In suggesting otherwise, the opinion said, McRitchie's suit relies primarily on a policy argument, but he hasn't made a persuasive case for change, and even the academic literature on diversified-investor models indicates there might be downsides to such a model.

"In the face of Delaware Supreme Court precedent that rests implicitly on the single-firm model, it is not reasonably conceivable that Delaware corporate law currently operates on a diversified-investor model," the opinion said. "Nor does this court have the freedom to adopt it, even assuming the concept was sound."

The ruling marks an end to a lawsuit McRitchie filed in **October 2022** against the social media company and its nine-member board, asserting that they had breached their fiduciary duties to investors by not considering the negative impact the company's policies were allegedly having on society and the market as a whole.

McRitchie argued that Meta's board should consider the company's wider impact for the sake of its smaller investors who hold the majority of their wealth in diversified portfolios that purportedly suffer when Meta's profit-focused policies harm society.

Meta, known before October 2021 as Facebook Inc., has roughly 3.5 billion users worldwide, or 43% of the world's population, and it owns the social media platforms Instagram, Facebook and What's App.

The suit claimed that board decisions that maximize Meta's long-term cash flows but imperil the rule of law or public health benefit the company's large equity holders like its CEO Mark Zuckerberg but harm smaller Meta investors with diversified portfolios that tend to follow the broader market.

Although the suit initially asserted both direct and derivative claims, McRitchie dropped the derivative claims when he amended the complaint, and the latest version of the complaint asserts only direct breach of fiduciary claims against all defendants.

However, Meta and its executives asked the court to throw out the suit, with its counsel arguing during a hearing last **December** that the theories in the shareholder complaint "make no sense," are "impractical" and — if implemented — would "destroy" the core foundations of Delaware law.

On Tuesday, the vice chancellor sided with the defendants. In his reasoning, he acknowledged that although there is no specific Delaware decision that has openly said Delaware follows a single-firm model, the Delaware Supreme Court has issued multiple decisions on various issues that "by necessary implication, establish that proposition."

"Because fiduciary duties do not run to diversified investors, none of the theories state claims on which relief can be granted," the decision said.

McRitchie's counsel, Kurt M. Heyman of Heyman Enerio Gattuso & Hirzel LLP, said Tuesday he and his client are studying the decision and have no comment at this time.

Counsel and representatives for Meta and its executives didn't immediately respond to requests for comment Tuesday.

James McRitchie is represented by Kurt M. Heyman and Gillian L. Andrews of Heyman Enerio Gattuso & Hirzel LLP.

The defendants are represented by James N. Kramer and Alexander K. Talarides of Orrick Herrington & Sutcliffe LLP, and David E. Ross, R. Garrett Rice and Holly E. Newell of Ross Aronstam & Mortiz LLP.

The case is James McRitchie v. Mark Zuckerberg et al., case number 2022-0890, in the Court of Chancery of the State of Delaware.

--Editing by Kristen Becker.



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Chancery Partially Vacates Trump Media Suit Fast-Track Order

By **Jeff Montgomery**

Law360 (April 30, 2024, 7:39 PM EDT) -- A Delaware vice chancellor pulled the plug Tuesday on a bid to fast-track part of a suit brought by two co-founders of Trump Media & Technology Group against former President Donald Trump's Truth Social media company before it went public.

Ruling during a teleconference hearing, Vice Chancellor Morgan T. Zurn vacated part of a March 15 order expediting handling of challenges to a temporary lockup of shares based on delays in bringing the motion by former reality show contestants Andrew Litinsky and Wes Moss.

The two by way of their company, United Atlantic Ventures LLC, sued Trump Media & Technology Group Corp. in March, seeking a court declaration that they had an ownership right to 8.6% of the social media company.

Since then, the two have filed an amended version of a suit that originally claimed UAV and its principals faced wrongful dilution by a massive increase in TMTG's stock in January, diminishing UAV's holdings to 1%. The Chancery Court, however, fixed the share percentage at 8.6% in an order on March 15 pending further litigation.

"This case is no longer about 'pre-merger corporate maneuvering' resulting in dilution. It is about UAV's dissatisfaction with routine post-merger lock-up provisions that have a clear expiration date," attorneys for TMTG and others, including Donald Trump Jr. and Devin Nunes, alleged in a brief before the ruling.

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

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

In the decision on Tuesday, Vice Chancellor Zurn also put off, pending further briefing, a hearing on whether TMTG violated an order barring, pending further orders of the court and action on the Florida suit.

In a motion on Monday further supporting court-scuttling of the fast-track order on the lockup challenges, attorneys for former President Trump and Daniel Scavio Jr. argued the barrier to share sales by UAV's principals had served its purpose.

"In other words, as a brand-new holder of over 5% of the stock of New TMTG valued at several hundred million dollars, UAV would have dumped its shares, depressing the stock price at the expense of every other New TMTG stockholder," the former president's brief said.

Waiting for action, meanwhile, is a second-amended lawsuit filed by UVA on April 11 and made public on April 16. That version of the dispute was described by Vice Chancellor Sam Glasscock III — who first presided over the case — as changing, "fundamentally, the nature of this action from one that sought injunctive relief in way of a merger that was imminent to an action for breach of fiduciary

duty on various grounds."

The amended suit added new insiders and Trump allies as defendants as well as contempt and sanction motions targeting TMTG's decision to launch a suit in Florida state court against Moss and Litinsky after the Chancery Court case was well under way.

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

Trump Media & Technology Group Corp., Devin G. Nunes, Donald J. Trump, Jr., Kashyap "Kash" Patel, Jr., Eric Swider, W. Kyle Green, Linda McMahon and Robert Lighthizer are represented by John L. Reed and Ronald N. Brown III of DLA Piper US.

TMTG Sub Inc., formerly Trump Media & Technology Group Corp., former President Donald J. Trump, and Daniel Scavino Jr. are represented by Theodore A. Kittila and William E. Green Jr. of Halloran Farkas & Kittila LLP.

The case is United Atlantic Ventures LLC v. Trump Media & Technology Group Corp. et al., case number No 2024-0184, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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Vaxart Investors Want Sanctions Over Deleted Texts

By **Katryna Perera**

Law360 (April 30, 2024, 7:11 PM EDT) -- A group of Vaxart investors asked a California federal judge to issue sanctions against Armistice Capital LLC, which previously controlled Vaxart and allegedly sold \$267 million worth of its Vaxart shares at inflated prices, saying the hedge fund and its executives purposely deleted text messages integral to the investors' claims.

The investors filed a **motion** on Monday requesting that the court enter a default judgment against the Armistice defendants or, alternatively, instruct the jury to find that falsity and scienter have been established in the suit on the part of the Armistice defendants. The motion also asks for the reimbursement of litigation costs related to the time and expenses the investors incurred investigating the Armistice defendants' alleged destruction of evidence.

The underlying suit accuses Vaxart, its current and former executives and Armistice of falsely claiming to receive support from Operation Warp Speed, the federal COVID-19 vaccine development effort, to pump the company's stock price.

Last year, the investors finalized a **\$12 million settlement** with Vaxart and its executives. However, Armistice and two of its senior officials — Steven Boyd and Keith Maher, who also served on Vaxart's board of directors — remain in the suit.

According to Monday's motion, the Armistice defendants destroyed "critical text messages" after the action was launched and months after they received a grand jury subpoena. The defendants also disposed of one of the two phones on which the text messages were located and then actively hid the spoliation from the plaintiffs and the court for more than two years, the motion states.

The investors say Boyd and Maher exchanged over 1,000 text messages during the class period and over 320 texts on the day immediately before and after two key press releases were issued and "Armistice's insider sales."

However, the plaintiffs say, no efforts were made by the defendants or their counsel from Akin Gump Strauss Hauer & Feld LLP "to save, store or backup" the text messages or the contents of the phones, and for two years, the defendants and their counsel "actively misled plaintiffs and the court by failing to disclose the [electronically stored information's] destruction and repeatedly affirming their compliance with all applicable rules regarding evidence preservation."

According to the motion, the defendants' counsel finally revealed the destruction of the ESI last August, at which point the investors say they "moved expeditiously" to try to recover the content but were unsuccessful.

The investors argue that the Armistice defendants "engaged in willful spoliation with the intent to deprive plaintiffs of the ESI it needs to prove its case at summary judgment and trial." Therefore, the investors say, "extraordinary, serious sanctions" are warranted since it is clear that the Armistice defendants did not engage in a "good-faith" effort to preserve the evidence, and it now cannot be restored or replaced.

Furthermore, the investors are entitled to litigation costs reimbursement for the time they spent investigating the defendants' spoliation, moving for sanctions, and negotiating discovery requests, the motion states.

Counsel for the investors declined to comment on Tuesday, and counsel for the Armistice defendants

did not immediately respond to requests for comment.

The amended complaint accuses Vaxart of issuing multiple materially misleading statements in June 2020, claiming it was partnering with Attwill Medical Solutions Sterilflow LP to produce "a billion or more" COVID-19 vaccine doses per year even though Attwill wasn't certified to produce the vaccines. Vaxart also claimed a day later that its vaccine had been "selected for the U.S. government's Operation Warp Speed," according to investors.

The news drove the stock to surge over 28% while Armistice Capital dumped 27.6 million shares of the company to rake in "an astounding \$267 million," the investors claim. Roughly a month later, the stock fell when The New York Times reported that Vaxart was not part of Operation Warp Speed.

The investors are represented by Reed R. Kathrein, Lucas E. Gilmore, Steve W. Berman and Raffi Melanson of Hagens Berman Sobol Shapiro LLP, John T. Jasnoch, William C. Fredericks and Jeffrey P. Jacobson of Scott + Scott Attorneys At Law LLP, and Brian J. Schall of The Schall Law Firm.

The Armistice defendants are represented by Neal R. Marder, Joshua A. Rubin, Sina Safvati and Lillian Rand of Akin Gump Strauss Hauer & Feld LLP.

The case is In re Vaxart Inc. Securities Litigation, case number 3:20-cv-05949, in the U.S. District Court for the Northern District of California.

--Additional reporting by Sarah Jarvis. Editing by Kristen Becker.

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2nd Circ. Revives Commerzbank RMBS Suit Against US Bank

By **Jon Hill**

Law360 (April 30, 2024, 11:58 PM EDT) -- The Second Circuit on Tuesday revived part of a nearly decade-old Commerzbank AG lawsuit brought against U.S. Bank NA over its role as a trustee on a slew of pre-2008 crisis RMBS trusts, sending some of the German bank's previously dismissed claims back to district court for a "closer inspection."

In a published opinion, a three-judge panel of the appeals court vacated a New York federal court's 2017 decision to throw out certain contract claims in the suit, which accused U.S. Bank of bungling its duties as trustee for 56 residential mortgage-backed securities trusts that Commerzbank had bought certificates in years ago.

The 2017 decision was one of five lower-court orders that Commerzbank had challenged on appeal in a bid to reopen the 2015 case. U.S. Bank had succeeded in narrowing the litigation over the years before settling the remainder for an undisclosed amount in 2022.

The contract claims dismissed in the 2017 decision related to more than a dozen RMBS trusts at issue in the suit. The trusts' governing documents had "no-action clauses" that bar legal action unless a plaintiff first meets certain pre-suit demand requirements, which a New York federal judge said Commerzbank failed to comply with and wasn't excused from.

But the Second Circuit panel disagreed Tuesday, ruling that those old claims for the "no-action trusts" may not actually be barred on this basis after all.

The panel said that, under a 1992 precedent known as *Cruden v. Bank of New York*, the Second Circuit has recognized a type of "demand futility" exception allowing investors to get around no-action clauses and bring claims against trustees.

The logic there, according to the panel, is that when the clauses require aggrieved investors to make a formal litigation demand on a trustee before they can file their own suit, it creates an "absurd" situation where they are essentially expected to ask the trustee to sue itself.

In Commerzbank's case, however, the no-action clauses were broader in scope than what *Cruden* addressed. They required that these demands be made on trust servicers, too — either in addition to, instead of, or sometimes as an alternative to U.S. Bank, the trustee.

But the panel said Tuesday that *Cruden*'s logic still applies. If those other deal parties are directly involved in alleged wrongdoing or have "close relationships with the breaching entities," for example, it would "raise the same impracticality concerns that the *Cruden* court sought to avoid," the panel said.

"A plaintiff's failure to make pre-suit demands on parties other than trustees can be excused in certain circumstances where these parties are sufficiently conflicted," the panel said.

"We remand for the district court to decide upon closer inspection whether these parties are sufficiently conflicted such that making a demand of them would be as futile an application of the no-action clauses as demanding that trustees sue themselves," the panel added.

At stake on remand will be contract claims accusing U.S. Bank of breaching its trustee duties for 15

RMBS trusts, according to Tuesday's opinion. The panel said the lower court had "erred" in dismissing them back in 2017, but it affirmed the other four decisions that Commerzbank had appealed in the case.

Those decisions dated from 2020 to 2022 and dealt with, among other things, standing and statute of limitations issues. The last decision notably shot down an effort by Commerzbank to revisit a prior summary judgment ruling in the case after having already tentatively agreed to settle with U.S. Bank.

This reconsideration bid came in 2022 and was tied to legislation that Ohio passed the previous year to limit its so-called borrowing statute, which can subject claims to a stricter limitations period from other jurisdictions.

Before it was amended, the statute had come up in the Commerzbank case and led to the rejection of claims for a number of the bank's RMBS certifications as untimely under German law. Commerzbank sought to resurrect those claims based on the changes to the Ohio statute, but this request was also deemed too late and denied.

In Tuesday's opinion written by U.S. Circuit Judge Myrna Pérez, the panel noted that New York federal court procedural rules give litigants up to 14 days after an order to ask for reconsideration and that judges do have "broad discretion" to waive this deadline. But that does not mean Commerzbank's request was wrongly denied, according to the panel.

"Although the Ohio legislature amended the borrowing statute in June 2021, Commerzbank waited nearly nine months after the amendment to seek reconsideration of the district court's summary judgment order, which had been issued nearly two years prior," the panel said.

"Moreover, Commerzbank represented that it had discovered the amendment while the parties were engaged in settlement discussions which culminated in a settlement that was reported to the district court in early February 2022," the panel continued. "Thus, Commerzbank moved for reconsideration more than 14 days after both the change in law itself and after it allegedly discovered the change."

In its suit, Commerzbank alleged it suffered hundreds of millions of dollars in losses on its investments in the 56 RMBS trusts. It sought to hold U.S. Bank liable for these losses, alleging the bank helped cause them by failing to step up as trustee and protect the trusts from problems with underlying loans.

The suit dates to 2015 and originally included Bank of America until a separate, undisclosed settlement was reached in 2019. The case is one of many that RMBS investors have brought against RMBS trustees for alleged losses stemming from widespread mortgage underwriting and servicing problems that the 2008 financial crisis laid bare.

A representative for U.S. Bank declined to comment Tuesday.

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

U.S. Circuit Judges Myrna Pérez, Gerard E. Lynch and Joseph F. Bianco sat on the panel for the Second Circuit.

Commerzbank is represented by David H. Wollmuth, Ryan A. Kane and Philip R. Schatz of Wollmuth Maher & Deutsch LLP.

U.S. Bank is represented by Louis A. Chaiten, David F. Adler, Michael T. Marcucci and Amanda R. Parker of Jones Day.

The case is Commerzbank AG v. U.S. Bank NA et al., case number 22-854, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Janice Carter Brown.



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Titan Of The Plaintiffs Bar: BLB&G's Jeroen Van Kwawegen

By **Jack Rodgers**

Law360 (April 30, 2024, 3:12 PM EDT) -- Were it not for the University of Amsterdam's study abroad program, Netherlands-born Jeroen van Kwawegen might have never moved to the United States. And were it not for a long-distance relationship that got its start in the U.S., van Kwawegen might still be based across the Atlantic.





Jeroen Van Kwawegen

Bernstein Litowitz Berger & Grossmann

Why He's Proud to Take On Meta:

"You can't lie to your shareholders about [content moderation] and pretend to the entire world, including your shareholders, that you have all of these controls in place that are critically important for protecting people."

"It was a little bit of an accident that I ended up here," van Kwawegen told Law360 Pulse in a recent interview.

Van Kwawegen, who has worked with Bernstein Litowitz Berger & Grossmann LLP on the plaintiffs side of shareholder-related matters for 15 years, left the U.S. after completing that study abroad program. He returned to the Netherlands and worked for a firm in that country for about a year and a half. But his long-distance relationship, and passion for justice and fairness, eventually brought him back to the U.S., he said.

"I went back to Columbia [University], I did a J.D., because I knew I was going to be a litigator," he said.

Van Kwawegen's college relationship fizzled out, but his passion for law did not. He worked for Latham & Watkins LLP for about five and a half years after graduating from Columbia Law School, and discovered plaintiff shareholder-related matters after speaking with interviewers at Bernstein Litowitz.

He joined Bernstein Litowitz as a securities litigation associate in 2009, and has focused on similar matters throughout the majority of his career with the firm. His recent victories in cases dealing with some of the largest American companies, like Tesla and Meta, have earned van Kwawegen a spot on Law360's 2024 **Titans of the Plaintiffs Bar**.

Van Kwawegen, a former military police instructor, said his passion for prosecution stems from his firmly held beliefs about right and wrong. But van Kwawegen said that for him, it had always been harder to work on legal issues involving individuals and harm, which is part of what he enjoys about being able to litigate shareholder issues.

"The personal issues are too great for me to feel comfortable actually practicing them," van

Kwawegen said.

Blair Connelly, global vice chair of Latham's securities litigation and professional liability practice, told Law360 Pulse in an email that he had seen evidence of van Kwawegen's integrity during their more than five years working together at that firm.

"We had a couple of big cases where the other side foolishly tried to hide damaging evidence from us," Connelly said. "Jeroen would have none of it — he pushed and pushed, until finally they were forced to cough up the bad documents. All the while, he was unfailingly polite and courteous — not everyone can do that."

Van Kwawegen has built his legal career around fighting for shareholders in a range of litigation.

In 2023, he was co-lead counsel in the landmark corporate governance ruling against Elon Musk, which **struck down** his proposed \$55 billion Tesla pay package after finding a range of issues with that deal, including a number of disclosure failures and murky, ill-described agreement terms.

There were innumerable challenges to litigating the dispute, van Kwawegen said. Developing the record was extremely challenging, but, additionally, the team had to grapple with Musk's personality and persona. By the time of trial, Musk had acquired one of the largest communication networks in the world, X — the social media platform formerly known as Twitter.

Many across the world revere Musk "as a particular kind of savior," van Kwawegen said, which made trying a case which challenged Musk's decisions and those made by Tesla's board of directors even more challenging.

"You had armed guards, you had to go through the back entrance of the courthouse, there were state troopers with machine guns, because it was a pretty intense environment to try this case in," van Kwawegen said.

Van Kwawegen said he felt Chancellor Kathaleen St. J. McCormick had written a rock-solid, factually grounded ruling in the Musk shareholder dispute that had held one of the richest and most powerful people in the world accountable.

"It also makes me very proud to be an American," van Kwawegen said. "Where does that happen? That doesn't happen in most countries in the world."

Van Kwawegen also helped litigate a securities fraud dispute against Meta Inc., which focused on Facebook's parent company misleading shareholders about the harmful effects of its platform on users.

Van Kwawegen said the dispute is "one of the most important cases of our time."

At issue are Meta's algorithms, and the company's claims that content policies and user security would prevent the flow of disinformation on the platform. Van Kwawegen said Meta had told the world that it had employed a range of policies and procedures in order to protect users from harmful content, but they "were just lying about it."

Several whistleblowers came forward to **describe** that misconduct, which caused the company's stock to plummet. It also harmed millions of users and its most vulnerable populations, like young women with body image issues, which were amplified by their use of its Instagram app.

Van Kwawegen told Law360 Pulse that Meta's lie about content moderation, was "as close to pure evil" as it got, and that he was proud to work to hold the company accountable for it.

"Holding people accountable for that and showing the world that this is just not OK; that you can't lie to your shareholders about that and pretend to the entire world, including your shareholders, that you have all of these controls in place that are critically important for protecting people," van Kwawegen said.

Van Kwawegen also was lead partner in an **appraisal action** involving Columbia Pipeline Group Inc.'s

\$13 billion acquisition by TransCanada — the same company that owns the Keystone Pipeline, he noted.

"We started litigating that appraisal and did discovery in connection with the appraisal, and we found all kinds of shenanigans and breaches of fiduciary duty," van Kwawegen said. "What we did was, we brought, in addition to the appraisal, a breach of fiduciary duty action, and we asked the defendants if we could consolidate this all into one case."

TransCanada did not agree to consolidate the disputes, van Kwawegen said, and after litigating those appraisal proceedings, in 2022, the firm reached a partial settlement with the former Columbia Pipeline executives for \$79 million, and tried the aiding and abetting claims against TransCanada.

In 2023, the Delaware Court of Chancery held that TransCanada was liable for aiding and abetting breaches of duty, and that Columbia Pipeline's former stockholders had suffered \$1 per share in damages — which applied to about 400 million Columbia Pipeline shares.

"We're still waiting now on a decision on the allocation of fault," van Kwawegen said. "Depending on the allocation of fault between TransCanada and the people that we settled with, the overall judgment against TransCanada will be reduced."

For van Kwawegen, what's kept him focused on practicing shareholder litigation for more than a decade has been the human element of his cases.

The work isn't just navigating complex statutes or laws surrounding securities, but also focuses on the people behind those disputes. But he also said he enjoyed connecting and building relationships.

"When I think about opposing counsel, I very often have cases with the same opposing counsel, so you build relationships with them," van Kwawegen said. "We're tough adversaries, but there's also an element of respect and repeat players, so people have to be honest."

Connelly said that because of that conscientious approach, van Kwawegen was a respectable and well-liked litigator. He also is an unflappable professional when aggressively pursuing his litigation, Connelly said.

"And he doesn't just file cases where he thinks he can defeat a motion to dismiss and then settle, he carefully picks the ones that he thinks he can win at trial," Connelly said. "Bottom line: If he's on the other side, you'd better pack a lunch, because it's going to be a long day."

--Additional reporting by Rachel Rippetoe, Jeff Montgomery, Bonnie Eslinger, Vince Sullivan. Editing by Nicole Bleier.



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Camp Lejeune Litigants Balk At Bellwether Pick Process

By **Emily Field**

Law360 (April 30, 2024, 6:51 PM EDT) -- The leadership group for former residents of Camp Lejeune who claim that contaminated drinking water caused their diseases has told the North Carolina federal court overseeing their case that it's too soon to limit trials to just plaintiffs who allege only one disease.

The plaintiffs' leadership group said Monday that it's too early to limit selecting only plaintiffs for the bellwether trials who say they contracted only one disease, as the federal government has proposed. It still has to be decided whether to conduct trials for plaintiffs individually, in groups or both, the plaintiffs' leadership said.

"It may be true that the best approach would be to prioritize a particular 'single disease' plaintiff, as the defendant describes the term, but that decision should be made after we have more information about trial processes, and — if the court agrees it would be fruitful — a discussion among the court and the parties," the plaintiffs said in their **opposition brief**.

There are five diseases — bladder cancer, kidney cancer, leukemia, non-Hodgkin lymphoma and Parkinson's disease — that the court has selected for the first track of cases.

Nearly 1,500 lawsuits have been filed claiming that water on the military base contained excessive levels of chlorinated solvents and other contaminants, causing cancers and other diseases. People living on the base between 1953 and 1987 were potentially exposed to the toxins.

Earlier in April, the government asked the North Carolina court to first try cases brought by former residents of the Marine base who allege they have developed **only one disease** from the water and try more complicated cases later.

The government said that litigating claims brought by plaintiffs who say their multiple diseases were caused by exposure to the water would be much more time-consuming than trying "single disease" plaintiffs, since multiple diseases would need more expert testimony on causation.

By comparison, the single-disease plaintiffs' claims will be easier to resolve and will better inform a global resolution, the government said.

However, the plaintiffs said that the government has had enough time to collect information about their illnesses and should be ready to start discussions about how to pick bellwethers.

"Indeed, an informal survey of cases indicates that potentially half of individuals with Track 1 or Track 2 illnesses have multiple diseases caused by the Camp Lejeune water (unsurprising given that exposure to toxic chemicals attacks the body as a whole, not a single organ or function)," the plaintiffs said. "Trying their cases will help, not hinder, resolution"

The plaintiffs' leadership group is also urging the court to allow it to appeal an order striking its bid for a jury trial, on the grounds that there is substantial room for disagreement over whether the Camp Lejeune Justice Act allows for jury trials.

In February, the judges overseeing the cases struck the plaintiffs' bid for a jury trial, agreeing with the federal government that the CLJA does not clearly and affirmatively grant a right to a jury trial,

as is required under Supreme Court precedent.

The plaintiffs then sought an appeal, arguing the issue is a novel question of law as these will be the first cases tried under the act, and the order is the first decision to hold that a statute that creates a right of action against the government and refers to the right to a jury trial does not authorize jury trials.

Representatives for the parties declined to comment on Tuesday.

The plaintiffs are represented by Bell Legal Group LLC, Keller Postman LLC, Ward and Smith PA, the Dowling Firm PLLC, and Lief Cabraser Heimann & Bernstein LLP, among others.

The government is represented by Adam Bain and Haroon Anwar of the U.S. Department of Justice's Civil Division.

The case is Camp Lejeune Water Litigation v. U.S., case number 7:23-cv-00897, in the U.S. District Court for the Eastern District of North Carolina.

--Editing by Adam LoBelia.

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Special Master Rejects Fee Bid In NFL Concussion Case

By **Donald Morrison**

Law360 (April 30, 2024, 4:41 PM EDT) -- Goldberg Persky & White PC should not receive a cut of legal fees for its unsuccessful efforts to receive a settlement that another law firm later secured for a former National Football League player related to concussion-linked disability claims, a special master has said.

In the long-running case in Pennsylvania federal court, special master David A. Hoffman said in a report and recommendation on Monday that Goldberg Persky's work representing an unnamed player between 2011 and 2023 did little to get him closer to a settlement, and that the 22% fee taken from the full settlement should go to J.R. Wyatt Law PLLC, which was able to obtain the \$196,101 award in under a year after the player parted ways with Goldberg Persky.

"Goldberg and Wyatt are ultimately fighting over a few thousand dollars," Hoffman said. "I recommend that Goldberg receive no fees as its work did not substantially or primarily contribute to the player's award."

The retired NFL player fired his Goldberg Persky attorneys on March 2, 2023, after nearly 12 years of representation, according to the report. By the end of the month, he had hired Wyatt Law and had old neurological tests rescored and retaken.

Wyatt Law then helped the player secure a \$196,101 award as part of a landmark class settlement reached in 2015 that ended multidistrict litigation alleging the NFL hid the risks it knew about long-term brain damage from repeated head trauma and concussions in football, according to the report.

Wyatt Law applied to receive 22% of the settlement for its work on the case, or \$43,142, according to the report. However, Goldberg Persky filed a charging lien saying it was entitled to a portion of the fees for serving as the player's attorney for nearly 12 years before the settlement was reached.

"The player argues that his award was artificially depressed by Goldberg's lack of advocacy during the term of its representation," Hoffman said.

Hoffman said in his report that he recommends the court use Pennsylvania's charging lien doctrine and dismiss Goldberg Persky's charging lien for its time spent on the player's case, but award its reasonably incurred costs.

But Hoffman also said that if the court rejects his first recommendation, he suggests fees be split 85% to Wyatt and 15% to Goldberg Persky, explaining that in *McKenzie Constr., Inc. v. Maynard*, a previous judge concluded that federal procedural law governed individually retained plaintiffs' attorney liens.

"Goldberg's basic pitch is that it put some time into the case shepherding the player through the program, and arranged for BAP and expanded BAP testing. But for its work, it reasonably points out, the player would not have ultimately been paid," Hoffman said. "Many firms have gotten shares of fees under Judge Strawbridge's McKenzie approach to liens on relatively similar facts."

Hoffman, a University of Pennsylvania law professor, was appointed as special master by U.S. District Judge Anita Brody in March 2020 to help navigate the NFL concussion settlement.

Last month, Judge Brody issued a ruling affirming a special master's decision that condemned "wrongful" conduct by an attorney who engaged in "questionable behavior" while trying to secure monetary awards for clients from the NFL players' concussion injury litigation settlement.

Representatives of Goldberg Persky and Wyatt Law did not immediately respond to requests for comment on Tuesday.

The concussion case is In re: National Football League Players' Concussion Injury Litigation, case number 2:12-md-02323, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Peter Rozovsky.

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Customers Can't Get Ill. ComEd Bribery Suit Restored

By Celeste Bott

Law360 (April 30, 2024, 6:53 PM EDT) -- An Illinois state appellate panel refused Monday to reinstate a putative class action accusing Commonwealth Edison of fraud in the wake of the utility's admission that it bribed the former Illinois House speaker to secure his support for favorable energy policy, saying the passage of the relevant legislation wasn't directly related to the bribes.

Seven class actions were filed after ComEd, Illinois' largest electric utility, agreed in a **July 2020 deferred prosecution agreement** to pay \$200 million to end an investigation into a yearslong bribery scheme. In that agreement, it admitted it had arranged jobs and other benefits for allies of former Illinois House Speaker Michael Madigan in exchange for him supporting its push to change utility regulation.

Lead plaintiff Karen Long MacLeod attempted to distinguish her suit from similar lawsuits that have been thrown out in Illinois' state and federal courts with a claim for equitable accounting, seeking the disgorgement of any benefits ComEd earned from its conduct. She argued that Madigan owed a fiduciary duty as a public official, which he breached by taking bribes, and that ComEd was an active participant in that breach, encouraging the court to view the bribes as a breach of duty or as a fraud.

But the Second District panel rejected her argument Monday, saying she didn't adequately plead that the utility owes her or other ratepayers a fiduciary duty.

"ComEd may owe a duty to the public and its stockholders. ... However, any duty relating to rates and charges is statutory. ... Further, as to any breach, the rates ComEd charged were approved by the [Illinois Commerce Commission], and therefore, plaintiff cannot challenge them," the panel said, referring to the filed rate doctrine that had doomed similar litigation against ComEd. The doctrine limits when courts can adjust rates filed with the appropriate regulator.

The panel also didn't buy Long MacLeod's contention that bribery satisfies the fraud element of the right to an accounting.

"In her complaint, plaintiff did not allege that defendants made any false statements to her or that she relied upon any such statements and suffered damages as a result," the panel said. "Instead, she pleaded as to fraud that ComEd's bribery scheme 'amounts to fraud such that an accounting is appropriate and necessary to uncover the true benefit enjoyed by ComEd such that a court may order the disgorgement of that benefit.' This is insufficient."

As for her claim that ComEd violated Illinois' Consumer Fraud and Deceptive Business Practices Act, the appellate court said she didn't meet key elements of the law, including actual damage sustained from the misconduct.

"In her complaint, she alleged as to this element only that, because of ComEd's bribery scheme, she 'has paid more fees to ComEd than it should have been entitled to absent the illegal and criminal scheme.' We agree with defendants that this allegation is conclusory," the panel said.

She also failed to adequately plead proximate cause, the appellate court said, adding that it disagreed with her position that Madigan's ability to control which measures were called for a vote in the Illinois House of Representatives and his influence over fellow lawmakers was enough to infer that bribing him was a proximate cause of the pro-ComEd energy legislation passing.

"Although Madigan had such control and influence, these actions were too remote to tie his actions to

the resulting legislation," the panel said. "Neither plaintiff's complaint nor the deferred prosecution agreement contains allegations/statements that Madigan controlled the votes in both chambers of the legislature. Here, the proximate causal connection between the bribes and the ultimate passage of the relevant legislation is too attenuated."

Counsel for the parties could not be immediately reached for comment on Tuesday.

Justices Ann B. Jorgensen, Robert D. McLaren and Margaret J. Mullen sat on the panel for the Second District.

Long MacLeod is represented by Thomas H. Geoghegan, Michael P. Persoon and Will Bloom of Despres Schwartz & Geoghegan Ltd.

ComEd is represented by Nicole A. Allen, Ali I. Alsarraf and Matthew E. Price of Jenner & Block LLP.

The case is Long MacLeod v. Commonwealth Edison, case number 2-23-0237, in the Appellate Court of Illinois, Second District.

--Editing by Lakshna Mehta.

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Drug Company Can't Escape Texas Counties' Opioid MDL

By **Mike Curley**

Law360 (April 30, 2024, 9:06 PM EDT) -- A Texas appeals court on Tuesday declined to cut loose a New Jersey-based pharmaceutical manufacturer from Texas multidistrict litigation over opioid addiction in the state, finding that the counties of Dallas and Bexar have demonstrated that it's made deliberate moves toward the Texas market.

In the **opinion**, a three-judge panel of the Fourteenth Court of Appeals affirmed an order from a Harris County court denying a bid to dismiss from Amneal Pharmaceuticals LLC, saying it was within the state court's jurisdiction based on its activities toward the state's market, but reversed an order concerning Amneal Pharmaceuticals Inc., a related holding company, finding that its contacts with the state were insufficient.

While a corporate representative for Amneal, Andrew Boyer, had testified that Amneal didn't have employees in Texas distributing its products in Texas, the panel wrote that that isn't where the inquiry ends, as its products are sold through a common supply-chain network that distributes medications throughout the state.

In addition, the panel wrote, Amneal contracts directly with H-E-B Grocery, a San Antonio-based company that has no stores or pharmacies outside Texas, and all the opioids that Amneal sent to H-E-B went to its distribution center in Texas.

The company is also included in the state's Children's Health Insurance Program and state Medicaid, which requires that Amneal have applied to the Texas Health and Human Services Commission, the panel wrote.

The panel further found that Amneal's contacts with the state were relevant to the counties' claims, as the allegations include that Amneal oversupplied opioids and failed to maintain control systems against diversion, adding to the public crisis.

And according to the opinion, bringing Amneal into the Texas courts comports with fair play and substantial justice, in that the forum's interest in resolving the dispute and the efficiency offered by the MDL outweigh the burden on Amneal having to litigate outside its home state.

The cases are part of the multidistrict litigation that was created in 2018 to handle opioid claims in Texas, with the Amneal defendants being added to the Dallas County case in May 2022 and to the Bexar County case in August 2022, more than four years after the cases were first filed, according to court documents.

A slew of pharmacy defendants — including CVS Health Corp., Walgreens, Walmart Inc. and Kroger Co. — **previously moved** to dismiss the suit against them, which Judge Robert Schaffer of the 152nd District Court of Harris County denied in April last year. The Amneal defendants sought to put a stay on the litigation against them while they appealed orders denying their dismissal bids in **May**.

In Tuesday's opinion, the panel found that the holding company, Amneal Pharmaceuticals Inc., did not have sufficient ties to Texas, as the plaintiff counties failed to show that it and Amneal were alter egos or didn't observe corporate formalities.

While the counties pointed out that Amneal Pharmaceuticals Inc. is the largest member of Amneal,

with 49.6% interest, and has the power to make Amneal's business decisions, the panel found that the counties hadn't shown that it actually exercised that control while maintaining the formalities of separateness.

Richard Schechter of the Law Office of Richard Schechter PC, who is on the MDL's plaintiff steering committee, said Tuesday, "We're very pleased that the court of appeals rejected Amneal Pharmaceutical LLC's claim that it was not doing business in the state of Texas. Its argument would have created a radically new test for jurisdiction, and the court roundly rejected that."

He added, "Amneal LLC dumped huge quantities of opioids into the state, and we're glad that the court of appeals recognized that."

Schechter also said the plaintiffs were disappointed that the holding company was found not to do business in the state, and the committee was discussing its next steps.

Chief Justice Tracy E. Christopher and Justices Ken Wise and Randall Wilson served on the panel for the Fourteenth Court of Appeals.

Representatives for Amneal and the holding company could not immediately be reached for comment Tuesday.

Amneal and the holding company are represented by David A. Kirby of Giron Kirby Law Group PLLC and by Paul J. Cosgrove, Jeffrey D. Geoppinger and Kevin M. Bandy of UB Greensfelder LLP.

Dallas County is represented by Dara Hegar, W. Mark Lanier and Rebecca Phillips of the Lanier Law Firm, by Jeffrey B. Simon, JoDee Neil and Shreedhar R. Patel of Simon Greenstone Panatier PC, and by Larry F. Taylor Jr. of the Cochran Firm.

Bexar County is represented by Mikal C. Watts of Watts Guerra LLP, by Michael T. Gallagher and Pamela McLemore of the Gallagher Law Firm, by Tommy Fibich and Kelley Bogusevic of Fibich Leebron Copeland & Briggs, by Shelly Sanford and by L. Boyd Smith Jr.

The cases are Amneal Pharmaceuticals Inc. et al. v. County of Dallas, case number 14-23-00202-CV, and Amneal Pharmaceuticals Inc et al. v. County of Bexar, case number 14-23-00203-CV, both in the Fourteenth Court of Appeals, Texas.

–Additional reporting by Catherine Marfin. Editing by Karin Roberts.



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Ex-Autonomy VP Says CEO Lynch Told Him To Lie To Investors

By **Bonnie Eslinger**

Law360 (April 30, 2024, 11:27 PM EDT) -- A former Autonomy business development executive testified Tuesday that CEO Mike Lynch directed him to lie to a hedge fund investor about prepaid royalty deals that boosted the company's upfront revenue numbers, saying at Lynch's criminal fraud trial that it was hard to say no to the "big boss."

Former CEO Lynch and Autonomy's former vice president of finance, Stephen Chamberlain, are facing conspiracy and fraud charges over HP Inc.'s October 2011 acquisition of the U.K.-based technology company. Lynch, who reaped about \$804 million from the sale of Autonomy to HP, is also charged with securities fraud. The high profile trial began **on March 18** and is expected to run through June.

On Tuesday, Autonomy's former vice president of development, Harald Collet took the stand. Under questioning by prosecutor Adam Reeves of the U.S. Attorney's Office for the Northern District of California, Collet confirmed he is testifying with immunity as a witness for the government.

Collet said in July 2009, Lynch directed him to get on the phone with Autonomy investors at Lone Pine Capital and emailed over some "talking points" for Collet that also included things he was not to say.

The Lone Pine Capital investors wanted to talk about Autonomy's business with companies who purchase software to put into their own devices, known as original equipment manufacturers, or OEMs. As part of that discussion, the investors wanted information on prepaid license agreements, where the royalty revenue for the software is paid up front.

"I was not supposed to say that there were any prepaid royalties collected," Collet told jurors.

The witness said he had a difficult time when he spoke to Lone Pine Capital because he knew he was saying something that wasn't true.

Earlier in his testimony, Collet told jurors that Autonomy sales staff would try to get OEM customers to prepay, or "buy out" their royalties. Reeves asked why Autonomy would seek those sorts of deal, which meant they'd lose out on ongoing royalty revenue streams. That way all the revenue could be recognized upfront, Collet said.

During the conversation about Lone Pine Capital, Reeves asked Collet if Lynch had told him to say something that was inconsistent with the way Autonomy was running OEM sales. Collet said yes, later adding he was so disturbed by the conversation he deleted Lynch's email that included the talking points.

After his phone call with Lone Pine Capital, the investors followed with an email with several questions, including one that asks again about prepaid royalty fees. Collet said he forwarded it to Lynch who wrote back with responses to the questions that he told the VP to cut and paste in a return email to Lone Pine Capital.

The answer Collet gave to the Lone Pine Capital representative, Leonie Foong, said "It is not normal for customers to pay upfront royalties" at Autonomy.

Reeves asked if that was true and Collet told him he has had many customers that paid upfront

royalties.

"Do you think Dr. Lynch is asking you to lie in essence to Lone Pine Capital?" Reeves asked. Collet said he would consider the statement to be a lie.

Reeves also showed Collet and the jury an email response from Foong saying Lone Pine Capital has follow-up questions and requesting a phone conversation. Collet said he forwarded that email to Lynch as well.

"Dr. Lynch then responds to you with the following words. 'Duck and stall.' What does that mean to you?" Reeves asked.

Collet said he took it to mean he should not respond and avoid speaking with Foong.

A Lone Pine Capital employee later sent Collet an email asking to schedule an in person meeting with Foong. Once again, he said he sent it to Lynch, who responded, "Suggest avoid. Say you are away then."

The dealings with Lone Pine Capital left him feeling distressed and contributed to his decision to leave the company months later in early 2010, Collet said.

Collet's cross-examination began with a lawyer for Lynch unmasking the former Autonomy vice president as one of two authors of emails sent anonymously to analysts and media after the Autonomy-HP deal was announced that were critical of Autonomy's OEM revenues, finances and technology. The emails were sent by Collet and his former Autonomy colleague, Alex Marshall, under the pseudonym "Joe Bloggs".

Jurors had heard about the emails one day prior, when former HP CEO Leo Apotheker **was on the stand**.

After introducing himself and asking Collet the correct pronunciation of his last name, Lynch lawyer Christopher Morvillo of Clifford Chance LLP asked, "Or do you prefer Joe Bloggs?"

Collet said no, but confirmed he was the co-author of the emails.

Morvillo noted at the time the emails were sent, Collet was working for a division of Bloomberg that was providing data storage services — in competition with the Autonomy Digital Safe product.

The lawyer for Lynch later asked Collet about his definition of "prepaid royalties," suggesting that "in reality, it was just a license fee."

Collet disagreed, saying that's not the way it was communicated to clients.

"Did you know that when Autonomy accounted for these contracts that they accounted for them as license?" Morvillo added.

The former Autonomy VP said he did not.

Morvillo subsequently brought up the talking points document that Collet said Lynch emailed to him before his conversation with investors at Lone Pine Capital.

"You understand that no one can find a copy of those talking points right?" Morvillo asked. "You say that they were emailed to you by Dr. Lynch ... so they should have been on Dr. Lynch's emails too."

Morvillo also underscored that the cut-and-paste document that Lynch subsequently provides to Collet came in an email that he also sent to several Autonomy executives, including Chief Financial Officer Sushovan Hussain. He then suggested that Collet's memory was foggy.

"You were misremembering that he sent you talking points, aren't you?" Morvillo said.

Collet said no.

The government claims that Lynch and Chamberlain artificially inflated Autonomy's revenues in the years leading up to the HP acquisition through a series of questionable revenue boosters while falsely depicting the company as having longterm growth potential.

The executives' trial follows Hussain's April **2018 conviction** on related charges. He was subsequently sentenced to five years in prison and ordered to pay \$4 million in fines.

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

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

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

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

--Additional reporting by Dorothy Atkins, Richard Crump and Christopher Crosby. Editing by Emily Kokoll.



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Sen. Warren Probes Annuity Cos. Over Use Of 'Secret' Perks

By **Grace Elletson**

Law360 (April 30, 2024, 7:47 PM EDT) -- Large annuity providers are using lavish vacations and other kickbacks to drive sales that disadvantage consumers, Sen. Elizabeth Warren, D-Mass., said Tuesday, demanding information from more than a dozen companies on the heels of a new Labor Department rule aiming to ramp up scrutiny on financial advisers.

The Massachusetts Democrat sent a **series of letters** Monday to 15 of the largest annuity companies in the United States requesting information on what kind of perks they offer agents to land deals that she said do more to benefit the businesses' bottom lines than their clients.

Warren said the probe is necessary as insurance groups are attacking the **recently finalized Retirement Security Rule** issued by the U.S. Department of Labor that intends to bring more financial advisers under the umbrella of the Employee Retirement Income Security Act's protections surrounding fiduciary duties.

"These secret kickbacks hurt consumers by incentivizing agents to sell certain products because they will earn a bigger cash bonus or fancier vacation, not because they are in the best interests of their customers," Warren said.

Warren said her office picked up where it left off on an investigation, initially started under the Obama administration in 2015, into vacations, cash bonuses and other luxury perks for insurance and annuity agents that she said create a conflict of interest that promotes company profits over consumer benefits. The senator sits on the Senate Committee on Banking, Housing and Urban Affairs and chairs its Subcommittee on Economic Policy.

She claimed her investigation found that Liberty Bankers Insurance Group provided a five-star resort getaway in Mexico to agents who sold \$200,000 in annualized premiums in 2023, and that SILAC insurance company offered its agents a "luxury Danube river cruise" if they sold over \$5 million in issued premiums in 2023.

Washington National agents were promised a five-day trip to Punta Cana if they exceeded their qualification criteria, and Sentinel Security Life provided a one-week vacation in Australia for agents who surpassed their sales goals, Warren alleged. Various annuity companies also provide cash bonuses to those who sell certain products and meet certain financial benchmarks, the senator claimed.

Warren asked the 15 annuity and insurance providers she sent letters to Monday to provide a list of all the incentives they offer to their agents in exchange for the sale of annuity products, and to provide company policies on disclosing sales incentives to its annuity purchasers.

Letters were sent to Athene Annuity Life, Allianz Life Insurance, Massachusetts Mutual Life Insurance Co., Nationwide Life Insurance Co., New York Life Insurance Co. and Pacific Life Insurance Co., among others.

Last week, the DOL's Employee Benefits Security Administration published a **package of final regulations**, which primarily focused on amending the definition of an investment advice fiduciary. The regulations nix a one-time advice exemption used to determine when someone is an investment advice fiduciary under ERISA and modify other exemptions for ERISA-prohibited transactions and

insurance agents, among other changes.

In a news release issued last week, the National Association of Insurance Commissioners called the final rule "rushed" and said the industry group has "significant concerns" about how the regulations will impact Americans' access to annuity products. In a January press release, highlighting comments American Council of Life Insurers President and CEO Susan Neely shared before Congress, she said the regulations will damage retirement security.

"Expanding the definition of an investment advice fiduciary will hurt those who need retirement security most by creating a barrier between low- and moderate-income savers and financial professionals," Neely stated.

But Warren said this opposition, along with other studies attempting to discredit the regulations, are misleading.

"The industry's claims are false — the rule would fill glaring holes in the law that allow advisors to reap bonuses and benefits for steering Americans toward inappropriate and high-cost annuities," Warren said.

A representative of Allianz Life Insurance declined to comment. Representatives of the other annuity companies did not immediately respond to requests for comment.

-- Additional reporting by Kellie Mejdrich. Editing by Leah Bennett.

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Truth Social Investor Had No Criminal Intent, NY Jury Told

By **Pete Brush**

Law360, New York (April 30, 2024, 5:53 PM EDT) -- Counsel for a Florida investment pro accused of insider trading on advance knowledge of a deal to take public former President Donald Trump's media concern Truth Social argued to a Manhattan federal jury Tuesday that he acted in good faith.

Defendant Bruce Garelick's legal team made the case for his acquittal during afternoon opening arguments at a trial being overseen by U.S. District Judge Lewis J. Liman that is expected to last as long as two weeks.

Garelick, 54, **is accused** by the Manhattan U.S. Attorney's Office of illegally profiting off of his open-market stake in special-purpose acquisition company Digital World Acquisition Corp. in 2021 while working as chief investment officer for a venture capital company called Rocket One Capital LLC — and while sitting on DWAC's board.

Having gleaned information in mid-2021 about the planned DWAC tie-up with then-Truth Social parent Trump Media & Technology Group, Garelick allegedly later sold DWAC shares for an illegal profit topping \$49,000 after the news became public.

Garelick's former boss, Rocket One owner Michael Shvartsman, previously **pled guilty** to insider trading charges. Also pleading guilty was Shvartsman's younger brother Gerald. They are due to be sentenced by Judge Liman in July. They took over \$20 million of illegal profits, according to prosecutors.

It was Garelick who fed the information to the brothers, the feds charge. But on Tuesday, Garelick's lawyer Jonathan Bach argued to the jury that Garelick knew the rules and was careful to follow them.

"He followed the rules," Bach said. "Did he at any point have the mind of a criminal? The evidence will show no. At all times Bruce acted in good faith."

The defense told Judge Liman in the run-up to trial that Garelick's defense may involve an attempt to convince the jury that it was another heavy DWAC investor — Miami businessman Anton Postolnikov, who is not charged — who tipped others.

"We believe Mr. Postolnikov was right in the center of the action," Bach told the court earlier Tuesday outside the presence of the jury. How far and whether the defense will push that strategy remained largely an open question as the trial opened.

But Bach hinted at that strategy during his opening statement to the jury, saying Garelick was not in the same "social circles" as the brothers despite working for them.

"He was nobody's close friend or buddy," Bach said. "The evidence show that there were other people who were ... very tight."

In the government's opening, prosecutor Elizabeth Hanft said the DWAC merger with Trump media was "big news" in the business world — but not to the defendant.

Despite having signed confidentiality agreements, Garelick went on the "open market" and bought his own DWAC shares while tipping others, she said.

"The defendant abused the trust placed in him as an insider," she said. "The defendant, his boss and his friends sold their investments and made millions and millions."

In doing so he "cheated" other DWAC investors, she said.

"They didn't know that their DWAC shares were about to become much more valuable," she said.

Trump's name will come up often at Garelick's trial, but the former president does not have significant ties to the case. Trump on Tuesday attended **his own criminal trial** on unrelated state charges in a nearby New York City courthouse.

"This case is not about Mr. Trump," Judge Liman told jurors Tuesday morning. Any views about the former president and his allegedly criminal business practices are "irrelevant," Judge Liman said.

Garelick is represented by Alexandra Shapiro, Jonathan Bach, Julian Brod and Jason Driscoll of Shapiro Arato Bach LLP.

The government is represented by Elizabeth Hanft, Daniel Nessim and Matthew Shahabian of the U.S. Attorney's Office for the Southern District of New York.

The case is USA v. Shvartsman et al., case number 1:23-cr-00307, in the U.S. District Court for the Southern District of New York.

--Editing by Philip Shea.

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