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May 3, 2024, 10:06 AM PDT
PG&E Investors' Wildfire Case Halt Must Be Reconsidered
By [Martina Barash](#)
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-  [9th Cir. Docket](#)
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- Case stems from 2017-2018 fires blamed on electric utility
- Lower court imposed stay of all claims during PG&E bankruptcy

Bloomberg Law News 2024-05-03T13:36:18265563047-04:00
PG&E Investors' Wildfire Case Halt Must Be Reconsidered

By Martina Barash 2024-05-03T13:06:55000-04:00

- Case stems from 2017-2018 fires blamed on electric utility
- Lower court imposed stay of all claims during PG&E bankruptcy

The Ninth Circuit on Friday asked a lower court to reassess halting a securities suit over wildfire readiness against PG&E Corp. officers, directors, and underwriters during the utility's bankruptcy proceedings.

The trial court gave insufficient reasons for imposing a pause, or stay, in claims against the approximately 40 non-debtors, the US Court of Appeals for the Ninth Circuit said.

Morgan Stanley & Co., Citigroup Global Markets Inc., and J.P. Morgan Securities LLC are among the underwriters in the suit, which stems from California wildfires in 2017 and 2018.

The investors alleged that PG&E, its officers and directors, and its underwriters “lured the public into believing PG&E was a prudent, safe, fully-compliant corporate citizen worth more than \$71 per share,” according to the plaintiffs’ brief to the appeals court. Instead, it was a “wrongdoer” whose conduct caused their investment losses, they said.

PG&E Corp.—a holding company—is the corporate parent of public utility Pacific Gas & Electric Co., also known as PG&E. The utility filed for Chapter 11 bankruptcy in January 2019 and emerged in July 2020. PG&E Corp. also filed under Chapter 11.

PG&E's bankruptcy filing caused an automatic stay of the investors’ claims against it in the US District Court for the Northern District of California, but not of the claims against the directors, officers, and underwriters, according to the brief. The trial court issued a stay of the entire case pending resolution of the bankruptcy proceedings, and the investors appealed.

At oral argument in September 2023, two members of the Ninth Circuit panel expressed doubts about the lower court's basis for halting the case.

In its opinion, the appeals court asked the lower court to take another look. "Even if there are efficiencies to be gained by a stay, the district court must also weigh the relative hardships that a stay might cause," Judge Danielle J. Forrest said for the Ninth Circuit.

Judge J. Clifford Wallace also served on the panel, as did Judge Danny J. Boggs of the Sixth Circuit, sitting by designation.

Labaton Keller Sucharow LLP, Robbins Geller Rudman & Dowd LLP, Adamski Moroski Madden Cumberland & Green LLP, and Coblentz Patch Duffy & Bass LLP represented the investors. Simpson Thacher & Bartlett LLP, McDermott Will & Emery LLP, and Davis Polk & Wardwell LLP represented the defendants.

The case is Pub. Emps. Ret. Ass'n of New Mexico v. Earley , 9th Cir., No. 22-16711, 5/3/24 .

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Published: May 3, 2024 | Result Date: Feb. 2, 2024 |

Bookmark

Case number: 3:21-md-02996-CRB Settlement – **\$207,000,000**

Judge

Charles R. Breyer

Court

USDC Northern District of California

Attorneys

Plaintiff

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Facts

McKinsey & Company is a worldwide consulting firm. One of its clients, Purdue Pharma, is the maker of Oxycontin. McKinsey helped Purdue devise marketing strategies for its products.

A group of private citizens, city governments, Native American tribes, school districts, and others filed suit against McKinsey in the Northern District of California.

Contentions

PLAINTIFFS' CONTENTIONS: Plaintiffs contended that McKinsey played a seminal role in helping Purdue carry out a targeted marketing campaign to increase sales; that these campaigns deceptively downplayed the dangers of addiction associated with Oxycontin; and that these deceptive campaigns led to the over-prescribing of opioids, resulting in the national opioid epidemic. The plaintiffs contended that McKinsey had acted fraudulently; had been negligent; had created a public nuisance; and had violated numerous state consumer protection laws.

DEFENDANT'S CONTENTIONS: McKinsey denied any wrongdoing or liability and all the plaintiffs' material allegations and claims. Moreover, McKinsey contended that it had never manufactured, distributed, or sold prescription medicine; and that it had never interacted with or made any representations to any of the plaintiffs.

Settlement Discussions

In August 2022, the parties participated in a two-day in person mediation session with Jed D. Melnick, Esq. and Simone Lechuk of JAMS. They continued remote mediation with Melnick through early 2023, resulting in a settlement agreement.

Result

McKinsey and the government-unit plaintiffs reached an agreement wherein McKinsey admitted no liability or wrongdoing but agreed to pay \$207 million to settle their claims. This was in addition to an approximately \$641.5 million settlement agreement reached with other plaintiffs.

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Judge OKs pact between Labaton, Robbins Geller to lead suit against Boeing

 legalnewsline.com/stories/658236309-judge-oks-pact-between-labaton-robbins-geller-to-lead-suit-against-boeing

May 3, 2024

Attorneys & Judges

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

ALEXANDRIA, Va. (Legal Newsline) - Sure, a Virginia judge has ruled in approving a partnership between two class action law firms trying to sue Boeing over a drop in its stock value.

Judge Leonie Brinkema on April 22 said Labaton Keller Sucharow and Robbins Geller are free to team as lead counsel for a lawsuit against the company, which suffered financial problems caused by recent failures of its 737 Max planes.

The two had filed competing motions for appointment as lead counsel but on April 15 notified the court they had decided to work together.

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

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

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

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

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

Investor suit against dental supplier moves forward in part | Secondary Sources | National

 today.westlaw.com/Document/I60bbb755096011ef8921fbef1a541940/View/FullText.html

(May 03, 2024) - Dentsply Sirona Inc. must face part of a shareholder lawsuit alleging the dental supplier and two former executives fraudulently inflated revenues in 2021 to boost performance-based compensation, a New York federal judge has ruled.

San Antonio Fire & Police Pension Fund et al. v. Dentsply Sirona Inc. et al., No. 22-cv-6339, 2024 WL 1898512 (S.D.N.Y. May 1, 2024).

The proposed class action plausibly alleges that Dentsply engaged in a "channel stuffing" scheme to conceal declining revenues, U.S. District Judge Arun Subramanian of the Southern District of New York ruled May 1.

The judge allowed securities fraud claims to proceed against former Dentsply CEO Donald M. Casey Jr. and former Chief Financial Officer Jorge Gomez, but dismissed claims against former Chief Accounting Officer Ranjit Chadha.

He also said the U.S. Supreme Court's recent ruling in *Macquarie Infrastructure Corp. v. Moab Partners LP*, 144 S. Ct. 885 (2024), required dismissal of claims under Item 303 of Securities and Exchange Commission Regulation S-K, 17 C.F.R. § 229.303.

Revenue inflation scheme?

The lawsuit alleges the defendants orchestrated a scheme to inflate Dentsply's revenues amid a downturn caused by declining demand, supply chain issues and product defects.

The company improperly recognized revenue tied to incentives and rebates it had offered distributors so they would purchase more products than they needed, the amended complaint says. The scheme allowed Casey and Gomez to reap millions of dollars in performance-based compensation, according to the suit.

Dentsply's problems emerged in early 2022 when it disclosed supply chain issues and announced that Casey had been fired, the complaint says.

In May 2022, the company disclosed a financial restatement and a related internal investigation. The results of the probe, released that November, revealed Dentsply's reliance on incentives and improper accounting tactics, the suit says.

The disclosures caused Dentsply's share price to fall from nearly \$59 on Feb. 27, 2022, to close at \$30.35 on Nov. 14, 2022, according to the complaint.

'Culture of fear'

The defendants moved to dismiss the suit for failure to plead a claim for relief under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j(b). The amended complaint fails to plead a false or misleading statement or omission and deceptive intent, the motion said.

Judge Subramanian said the suit plausibly alleges that statements about the strength of Dentsply's earnings and demand for products were false. Statements downplaying supply chain issues in the second half of 2021 also could have misled investors, he said.

The judge dismissed allegations that the defendants had concealed known trends and uncertainties in violation of Item 303 of Regulation S-K. The plaintiffs failed to identify statements rendered misleading by the alleged omission, as required under *Macquarie*, he said.

Judge Subramanian said the suit pleaded a strong inference of deceptive intent through allegations that Casey and Gomez were motivated to hit compensation targets.

The amended complaint also shows that the two executives fostered "a culture of fear" at Dentsply to meet unrealistic sales targets, the judge said.

He dismissed the claims against Chadha with prejudice, saying the allegations support an inference that Chadha was "kept in the dark" about the scheme.

He gave the plaintiffs until May 7 to file an amended complaint as to the Item 303 claims only.

Javier Bleichmar of Bleichmar Fonti & Auld LLP represents lead plaintiff City of Birmingham Retirement and Relief System and two other pension funds.

Roger A. Cooper of Cleary Gottlieb Steen & Hamilton LLP and Andrew W. Stern of Sidley Austin LLP represent Dentsply.

H. Christopher Boehning of Paul, Weiss, Rifkind, Wharton & Garrison LLP represented Chadha.

By Nicole Banas

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Article: Robbins Geller tapped to lead investor suit against dental supplier 2023 SECDBRF 0123

Date: June 6, 2023

A New York federal judge has appointed Robbins Geller Rudman & Dowd LLP to lead a proposed class action claiming two former Dentsply Sirona Inc. executives inflated the dental product manufacturer's earnings to award themselves performance-based compensation.

End of
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Dentsply, Execs Must Face Investors' Securities Fraud Class Suit

By Bernie Pazanowski

- Accused of making fraudulent profit statements during Covid
- Some statements misleading, officers had motive, knowledge

Bloomberg Law News 2024-05-03T09:41:09206903347-04:00

Dentsply, Execs Must Face Investors' Securities Fraud Class Suit

By Bernie Pazanowski 2024-05-02T14:31:51000-04:00

- Accused of making fraudulent profit statements during Covid
- Some statements misleading, officers had motive, knowledge

Dentsply Sirona Inc. and two of its officers must face investors' class claims that they were misled about the financial health of the company during the Covid-19 pandemic, a federal court said.

The investors' lawsuit sufficiently stated fraud claims against Dentsply—a multibillion-dollar company that manufactures dental products—its chief executive officer Donald M. Casey Jr., and chief financial officer Jorge Gomez, Judge Arun Subramanian said for the US District Court for the Southern District of New York on Wednesday.

During the pandemic the dental industry faced supply chain issues and lack of demand for professional dental products, while many dentist offices had to shut down.

The investors, which include multiple pension plans, alleged that Dentsply officers, Casey, Gomez, and chief accounting officer Ranjit S. Chadha told investors that the company was doing just fine while artificially inflating sales by forcing distributors to take on more inventory using a technique called channel stuffing, the opinion said.

When Dentsply's scheme came to light, its stock price dropped over 30%, and Casey, Gomez, and Chadha were either fired or left the company.

The investors sued alleging that the defendants made dozens of statements about the supply chain, the inventory, the product quality, and the company's overall health during the class period, June 9, 2021 to Nov. 13, 2022, that were misleading and violated Sections 10(b) and 20(a) of the 1934 Securities Exchange Act and SEC Rule 10b-5.

Certain statements, including "As we go into the fourth quarter, we're optimistic that things will get closer and closer to normal," and "[W]e're pretty optimistic that our growth prospects are good," weren't actionable because they were puffery or didn't convey any specific message, Subramanian said, rejecting the defendants' argument to that effect. But other statements, such as "We feel very good that we have adequate supply" were actionable because they can be interpreted to indicate that Dentsply had the supply necessary to meet its demand, he said.

Based on the investors' allegations about supply-chain issues Dentsply was experiencing, statements downplaying those problems are also plausibly misleading, Subramanian said.

The investors sufficiently alleged that the defendants had a motive to make the misleading statements by alleging that the fraud "translated into millions in performance-based pay," the judge said.

The complaint sufficiently alleged a pattern of wrongdoing by Dentsply, Casey, and Gomez, the judge said. The investors said that the company had previously been accused of a channel-stuffing scheme, Casey and Gomez were aware of those allegations, and a number of red flags about the current scheme were visible, he said.

A compelling inference can be drawn from the investors' allegations that Casey and Gomez orchestrated the channel-stuffing scheme, but there are no specific allegations linking Chadha to the alleged fraud, Subramanian said.

The plaintiffs also sufficiently alleged that the loss was foreseeable and materialized as a result of the risk concealed in the the defendant's allegedly fraudulent statements, the judge said.

Chaney & Drexel LLC and Bleichmar Fonti & Auld LLP are among the attorneys representing the investors. Vorys Sater Seymour & Pease LLP and Cleary Gottlieb Steen & Hamilton LLP represented Dentsply. Simpson Thacher & Bartlett LLP represented Casey. Levine Lee LLP represented Gomez. Paul, Weiss, Rifkind, Wharton & Garrison LLP represented Chadha.

The case is San Antonio Fire & Police Pension Fund v. Dentsply Sirona Inc. , 2024 BL 149140, S.D.N.Y., No. 22-cv-6339 (AS), 5/1/24 .

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Drugmaker Amneal agrees to \$270 million U.S. opioid settlement

 [reuters.com/business/healthcare-pharmaceuticals/drugmaker-amneal-agrees-270-million-us-opioid-settlement-2024-05-03](https://www.reuters.com/business/healthcare-pharmaceuticals/drugmaker-amneal-agrees-270-million-us-opioid-settlement-2024-05-03)

Nate Raymond

Tablets of the opioid-based Hydrocodone at a pharmacy in Portsmouth, Ohio, June 21, 2017. REUTERS/Bryan Woolston/File Photo Purchase Licensing Rights , opens new tab

May 3 (Reuters) - Amneal Pharmaceuticals (AMRX.O) , opens new tab said on Friday it had reached a deal valued at more than \$270 million to resolve claims it helped fuel the deadly U.S. opioid epidemic, becoming the latest drug company to settle lawsuits over the addiction crisis brought by states and local governments.

Amneal reached an agreement in principle to pay \$92.5 million in cash and provide \$180 million worth of naloxone nasal spray, an overdose treatment medication, to resolve lawsuits by U.S. states, local governments and Native American tribes.

The settlement, which is payable over 10 years, would if finalized resolve nearly all of the more than 900 opioid-related lawsuits against Amneal, the company said. It did not admit wrongdoing as part of the nationwide settlement.

"We remain committed to helping those impacted by the opioid crisis by enhancing access to naloxone nasal spray, which is an emergency treatment for opioid overdose and helps save lives," Amneal said in a statement.

The settlement added to the more than \$51 billion that drug manufacturers, distributors, pharmacy operators and consultants have agreed to pay to resolve lawsuits and investigations over their roles in the drug addiction and overdose crisis.

Nearly 645,000 people died in the United States from overdoses involving opioids, both prescription and illicit, from 1999 to 2021, according to the U.S. Centers for Disease Control and Prevention.

State attorneys general accused Bridgewater, New Jersey-based Amneal of failing to monitor and report suspicious orders by its customers of generic opioid medications. The company sold nearly nine billion pills from 2006 to 2019, the states said.

"Amneal became one of the largest generic pharmaceutical companies in the world by profiting off the sale of dangerous opioids," said New York Attorney General Letitia James said in a statement.

She said the settlement would provide funding and resources for states to address the opioid epidemic and help those suffering from drug addiction.

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May 3, 2024, 9:05 AM PDT
Equinix Hit With Shareholder Lawsuit Over Accounting Claims
By [Matthew Bultman](#)
Documents

-  [Complaint](#)
-  [Docket](#)

- COURT:** N.D. Cal.
- TRACK DOCKET:** No. [3:24-cv-02656](#)

Bloomberg Law News 2024-05-03T12:27:22587414105-04:00
Equinix Hit With Shareholder Lawsuit Over Accounting Claims

By Matthew Bultman 2024-05-03T12:05:30000-04:00

- COURT:** N.D. Cal.
- TRACK DOCKET:** No. [3:24-cv-02656](#)

Equinix Inc. was sued by a shareholder over allegations the data center real estate investment trust manipulates its accounting for a key profitability metric.

The proposed class action, filed Thursday in the US District Court for the Northern District of California, draws on a report released in March by short-seller Hindenburg Research, which bet against Equinix shares. Real estate investment trusts, which own income-producing real estate, have been a popular target for short-sellers in recent months amid a downturn in office prices and high interest rates.

Hindenburg’s report said Equinix misclassified operational costs as investments in new facilities or other revenue-generating initiatives. In one example cited by the complaint, Hindenburg alleged Equinix would treat changing lightbulbs as growth projects.

Days after Hindenburg’s report, Equinix said it received a subpoena from federal prosecutors in California. The company, which has launched its own investigation, at the time said it intended to fully cooperate. Equinix didn’t respond to a request for further comment.

Equinix’s shares dipped below \$793 after the company’s announcement, a 6% decrease from before the short-seller report, according to the shareholder complaint.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X8ASQUQO000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6...> 1/2

"As a result of Defendants' wrongful acts and omissions, and the precipitous decline in the market value of the Company's common shares, Plaintiff and other Class members have suffered significant losses and damages," the shareholder lawsuit said.

The Rosen Law Firm represents the plaintiff.

The case is Chan v. Equinix, Inc. , N.D. Cal., No. 24-cv-02656, 5/2/24 .

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Masimo Leadership Mishandled Acquisition, Inventory, Suit Says

By Martina Barash

- **COURT:** S.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-00781](#)

Bloomberg Law News 2024-05-03T10:23:05070937172-04:00

Masimo Leadership Mishandled Acquisition, Inventory, Suit Says

By Martina Barash 2024-05-02T17:28:27000-04:00

- **COURT:** S.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-00781](#)

Executives and directors at Masimo Corp. are responsible for the health monitor maker's ill-fated purchase of a consumer audio company, slumping sales, and misrepresentations about those problems, an investor alleges in a new suit.

Masimo's stock price declined several times in July and August 2023 after the company announced disappointing second-quarter revenue, subjecting it to an investor class action, shareholder Linda McClellan said. She filed her derivative suit Wednesday in the US District Court for the Southern District of California.

Masimo's \$1.03 billion acquisition of Sound United, completed in April 2022, set the stage for the directors' and executives' breaches of their fiduciary duties starting in May 2022, McClellan says. "After the acquisition, Masimo was plagued by rising inventory and stagnating sales in its new non-health care segment," she says. "The issues were exacerbated by pervasive deficiencies in the Company's internal controls and by a complete failure to integrate Sound United into the Company's existing operations."

When demand for its monitoring products waned with the Covid-19 pandemic late in 2022, Masimo "lost its ability to compensate" for the softness in its new audio segment, she says.

McClellan brings claims for securities fraud, breach of fiduciary duty, unjust enrichment, abuse of control, gross mismanagement, and waste of corporate assets. She seeks compensatory and punitive damages, along with a constructive trust on the defendants' "profits and special benefits and unjust enrichment."

Wolf Haldenstein Adler Freeman & Herz LLP and Rigrodsky Law PA represent McClellan.

The case is McClellan v. Masimo Corp. , S.D. Cal., No. 3:24-cv-00781, complaint 5/1/24 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

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Qatar World Cup Deaths Blamed on Jacobs Board in Lawsuit (1)

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0431](#)

Bloomberg Law News 2024-05-03T10:22:39651362196-04:00

Qatar World Cup Deaths Blamed on Jacobs Board in Lawsuit (1)

By Mike Leonard 2024-05-02T09:08:19000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0431](#)

Jacobs Solutions Inc. board members looked the other way while thousands of workers building FIFA World Cup facilities in Qatar died on the company's watch before the 2022 event, a newly unsealed lawsuit says.

The engineering giant's directors had ample notice of the exploitive Qatari migrant labor system—characterized by rampant trafficking, abusive conditions, and other human rights violations—yet ignored their duty to monitor the safety of workers who spent years building multibillion-dollar stadiums, according to the shareholder complaint filed by a pension fund.

"All this information about the horrors of the World Cup project was public knowledge," the suit says. "Tragedy unsurprisingly ensued."

Justin Rassi—an attorney for Jacobs who doesn't represent its board—said in a statement Thursday that the company will assess the complaint "in accordance with best practices to determine the appropriate response."

'Horrendous Conditions'

The lawsuit in Delaware's Chancery Court involves shareholder derivative claims, which are technically filed on a corporation's behalf against its leaders. Damages in derivative cases are typically paid into a company's coffers by its officers, its directors, or their insurers.

The case concerns the “kafala” labor used throughout the Middle East, including in Qatar, where migrants make up around 94% of the workforce. The system, which relies on private businesses to sponsor and house foreign workers, gives those employers an inhumane level of control over their lives, the suit says.

Workers allegedly require permission from their sponsor to quit their jobs or leave the country, which can involve repaying a “recruitment fee” or other debts. They’re often paid less than they were promised, hit with arbitrary wage deductions, forced to work long hours in temperatures well over 100 degrees, and housed in shacks, according to the complaint.

“The country’s kafala system is government-sanctioned indentured servitude” involving “horrendous conditions,” the lawsuit says. “Observers estimate that hundreds, if not thousands, of workers die each year as a result of the working conditions.”

Board members at Jacobs, which has offices throughout the region, must have been familiar with the system when the company acquired CH2M Hill Inc.—which had a contract overseeing World Cup construction—in one of the largest ever deals in the engineering sector, according to the complaint.

“These abuses were widely covered by the media, the US government, and NGOs,” the suit says.

Not One Meeting

Despite paying lip service to human rights protections, the Jacobs board allegedly turned over documents indicating it never held a single meeting about the issue. “Indeed, it appears that the board still does not receive any reports on the company’s compliance with human rights laws and norms,” according to the complaint.

At least 6,500 migrant workers had died building World Cup facilities by 2021, the year before the event, according to media reports at the time. Given the presence on the ground of Jacobs employees, it’s likely they witnessed some of the abuses firsthand, the suit says.

The company now faces a federal lawsuit brought by former migrant workers who say it violated human trafficking laws. The case could lead to “severe financial consequences” and “untold reputational harm,” according to the complaint.

Rassi, the attorney representing Jacobs, said the shareholder complaint repeats many of the allegations raised in the federal case.

“Jacobs has vigorously defended the Colorado lawsuit and has filed a motion to dismiss that case,” he said.

The new lawsuit was made public April 29 after being filed under seal April 24 by the Wirral Borough Council as Administering Authority of Merseyside Pension Fund.

The fund is represented by Bernstein Litowitz Berger & Grossmann LLP. Jacobs is represented by Debevoise & Plimpton LLP. Its board members haven’t yet made court appearances.

The case is Wirral Bor. Council as Admin. Auth. of Merseyside Pension Fund v. Abani , Del. Ch., No. 2024-0431, complaint unsealed 4/29/24 .

(Updates with Jacobs comments in paragraphs four, 14, and 15; additional legal details in paragraph five; and attorney information in paragraph 17.)

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May 3, 2024, 8:50AM PDT

Activision, Microsoft Ask Court to Find \$69 Billion Merger Valid

By Mike Leonard

- COURT: Del. Ch.
- TRACK DOCKET: No. 2024-0466

Bloomberg Law News 2024-05-03T13:34:55400515304-04:00

Activision, Microsoft Ask Court to Find \$69 Billion Merger Valid

By Mike Leonard 2024-05-03T11:50:43000-04:00

- COURT: Del. Ch.
- TRACK DOCKET: No. 2024-0466

Microsoft Corp. and Activision Blizzard Inc. are asking a Delaware court to uphold their \$69 billion merger two months after a judge in the state allowed a pension fund to challenge the transaction.

The companies filed a petition Thursday in Delaware’s Chancery Court seeking to validate the video game sector’s largest-ever merger, which closed in October after a nearly two-year fight with global antitrust regulators that finally signed off on it, subject to certain conditions. Under the circumstances, a decision declaring the deal valid would remove a “cloud of uncertainty” without harming anyone, according to the 42-page court filing.

The transaction “was unanimously approved by the Activision board following an extensive process guided by sophisticated legal and financial advisors, which comported with widespread market practice,” the petition says. “It was overwhelmingly approved by Activision’s stockholders. Microsoft, Activision, and each of their current and former stockholders have relied on the validity of the merger.”

The filing is a response to a novel Feb. 29 ruling by Chancellor Kathaleen St. J. McCormick, the court’s chief judge. The decision allowed a Swedish state-owned pension fund to move forward with claims that the deal was improperly consummated when corporate leaders signed off on a version of the merger agreement that was too preliminary. That case, a proposed class action, seeks damages on behalf of former Activision stockholders.

Microsoft and Activision are represented by Young Conaway Stargatt & Taylor LLP and Simpson Thacher & Bartlett LLP. Activision is also represented by Skadden, Arps, Slate, Meagher & Flom LLP.

The case is In re Activision Blizzard Inc. , Del. Ch., No. 2024-0466, petition filed 5/2/24 .

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<https://www.law.com/2024/05/03/using-ai-to-predict-outcomes-in-class-action-litigation/>



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EXPERT OPINION

Using AI to Predict Outcomes in Class Action Litigation

While AI in the legal profession still has a long way to go before it truly replaces the role of lawyers and judges on a large scale, AI has many uses that can increase efficiency. It is likely that we will only see AI take on a larger role and continue to change the way we practice law.

May 03, 2024 at 12:10 PM

Class Actions

By Daniel B. Garrie and Michael Mann | May 03, 2024 at 12:10 PM



In evaluating whether to take on a potential class action case, attorneys have to consider many things. How many other people have been harmed in the same way as the prospective plaintiff? How likely is it that their claims will succeed? How likely is it to get class certification? Have other lawsuits asserting the same claims already been filed? It can be a challenging analysis to undertake even before getting involved in the actual case. The development of legal artificial intelligence (AI) tools in recent years is starting to have an impact on this type of analysis for class actions. This article explores how using AI can impact class action lawsuits and change the legal landscape.

But first, what does AI mean in this context? The term AI within the legal technology field refers, at a basic level, to software designed to perform fairly routine language-related tasks, such as reading court rulings, very quickly over a large data set. It generally involves machine learning, which enables the software to improve its performance according to human direction and feedback. Legal AI tools use natural language processing (NLP) software that can understand written or spoken commands, enabling lawyers to easily give direction and feedback to the AI without needing to use computer programming.

One use of AI in the legal field is to predict court rulings on potential litigation issues. AI tools can analyze extremely large volumes of court rulings to determine the decisions reached by the judge in relation to the facts of each case. This analysis can be used to identify trends in fact patterns corresponding with favorable or unfavorable rulings as well as other types of trends such as those pertaining to jurisdiction, specific judges, specific types of plaintiffs, specific defendants, etc.

The general consensus at this time is that while AI can do well at identifying patterns in court rulings, AI tools do not currently have the capability to identify the subtleties of why these rulings are made or explain exactly why one litigation strategy was more successful than another. In connection with a recent University College London study on AI predicting the outcomes of human rights-related cases, study lead Nikolaos Aletras commented, “There is a lot of hype about AI, but we don’t see it replacing judges or lawyers any time soon. What we do think is they’d find it useful for rapidly identifying patterns in cases that lead to certain outcomes.” The researchers here programmed an AI system to analyze and predict the outcomes for hundreds of cases heard by the European Court of Human Rights. The AI was able to correctly predict the outcomes of 584 cases at a 79% rate of accuracy.

AI can come into play for class actions in several ways. Lawyers can use AI tools to attempt to determine the likelihood of success for a potential class action matter before taking on the case. This is particularly useful in situations where the case would be taken on contingency. This would then reduce the likelihood of wasting resources on a losing case and

increase efficiency for the law firm. This can be useful for plaintiffs and defendants alike in informing settlement negotiations as well.

A related but different use for AI is to predict whether the court will certify the proposed class. This can help inform lawyers' decisions as to whether they should pursue a case as a class action or as an individual case. Being able to make more data-driven decisions earlier in the process will help class action litigators craft the appropriate legal strategies from the outset. AI also has the potential to dramatically broaden access to legal services, which are prohibitively expensive for many individuals and small businesses. As the Center for American Progress has written, "promoting equal, meaningful access to legal representation in the U.S. justice system is critical to ending poverty, combating discrimination, and creating opportunity."

AI will also likely make it less expensive to file lawsuits for potential plaintiffs as AI can be used to automate the more mundane aspects of legal research and even initial drafting. It is possible to draft complaints with little human input or revision using AI. Even more nuanced, larger-scale complaints can be drafted more quickly with AI handling some portion. These changes might make it possible for people to file lawsuits who otherwise would not have the resources to do so.

As many lawsuits arise from contractual disputes, I note that AI tools can also be used to review and analyze contracts. These tools can identify the language in contracts which may need to be modified in relation to new legislation or case law to reduce the likelihood of contract disputes. Rather than having lawyers manually review contracts and case law, AI can perform searches on a huge volume of data in a fraction of the time, allowing lawyers to concentrate efforts on more valuable work. This can be especially valuable for large corporations with many subsidiaries that employ many third-party vendors. Often in such cases, the corporations and subsidiaries simply renew contracts as a matter of routine without performing any review, as the transaction cost of reviewing contracts for all their vendors would be too high. Using an AI tool to automate such review would help avoid risks of contract disputes in the event something goes wrong with a vendor, such as a data breach.

While AI in the legal profession still has a long way to go before it truly replaces the role of lawyers and judges on a large scale, AI has many uses that can increase efficiency. It is likely that we will only see AI take on a larger role and continue to change the way we practice law.

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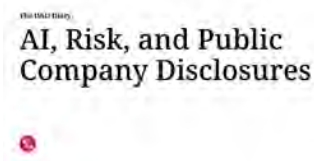
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May 2, 2024



By Kevin LaCroix on May 2, 2024

Posted in Artificial Intelligence

Since OpenAI launched ChatGPT in November 2022, the race to capitalize on emerging artificial intelligence (AI) technologies has super-charged the financial markets. The stock prices of AI-associated companies, such as Nvidia and Super Micro Computer, have soared. Several AI-related companies — such as, for example, Astera Labs and Rubrik — have recently successfully completed IPOs, so much so that the long-moribund market for IPOs is showing definite signs of life. Other AI companies — including for example, Zapata and MultiplAI Health Ltd. — recently became public through mergers with SPACs.

With the consuming interest in AI in the financial markets, many companies want to try to catch some of the lightning for themselves. However, what the companies say about AI, their AI prospects, and their AI risks could have significant consequences for the companies' corporate and securities litigation risks, as well as their risks of regulatory scrutiny.

A May 1, 2024, *Law360* article entitled “AI is Top of Mind for Companies – and Securities Regulators” (here, subscription required) discusses the disclosure challenges that publicly traded companies face when it comes to AI. As the article puts it, a company's public reference to AI can cut one of two ways; on the one hand, companies that are developing AI-related products will want to try to highlight their growth opportunities, while on the other hand, many companies find that they must disclose potential security or competitive risks. In either case, or for some companies, in both cases, increasing numbers of companies are finding AI-related issues material to their operations. Indeed, according to a source the article cites, since the launch of ChatGPT, reporting companies have referred to AI or artificial intelligence in SEC filings more than 20,200 times.

The SEC has already made it clear that it is keenly interested in reporting companies' AI-related disclosures. As I noted in a post on this site at the time, last December, SEC Chair Gary Gensler specifically warned against AI-related misrepresentations, and cautioned reporting companies against so-called “AI-washing,” echoing concerns about climate change-related “greenwashing,” and referring to companies that attempt to burnish their

investment profile with outsized claims about their AI-related opportunities. More recently, SEC Enforcement Director Gurbir Grewal warned about the potential for AI-washing to mislead investors, harm consumers, and violate the securities laws.

The SEC has not yet brought an enforcement action against a reporting company based for “AI washing” or otherwise related to AI-related disclosures, although in March the agency did fine two investment advisers for making misleading statements about their use of AI. And even though the SEC has itself not brought an enforcement action based on AI-washing or other AI-related disclosures, there have been several AI-related securities class action lawsuits filed this year, including the action brought in February 2024 against software platform Innodata (discussed here) and the lawsuit filed in March 2024 against security screening company Evolv (as discussed here).

The *Law360* article doesn't mention it, but there is an added regulatory concern when it comes to company's use of AI, that has to do with the EU's Artificial Intelligence Act, which the European Parliament approved in March of this year. The Act seeks to classify and regulate AI applications based on their risk to cause harm, with the highest risk level uses banned entirely, and other high-level risk uses subject to security, transparency, and quality requirements. The Act applies to both suppliers and users of AI within the EU. It can apply to companies from outside the EU if they have products or services within the EU. The Act will take effect 20 days after its publication in the Official Journal of the EU, which is expected some time this month. Many of the Act's provisions will stage in over the next two years. The newly created EU AI Office will oversee the Act's implementation and enforcement. The consequences for noncompliance can be hefty, ranging from penalties of €35 million or 7 percent of global revenue to €7.5 million or 1.5 percent of revenue, depending on the infringement and size of the company. With potential penalties that sizeable, the risk attendant to the Act extends not only to enforcement but also to the possibility of a follow-on civil action brought by investors alleging that management misrepresented their company's compliance with the Act or violated their duty of care with respect to the implementation of the Act.

Given all of these developments, it should come as no surprise that many companies increasingly are finding it advantageous, useful, or simply prudent to refer to AI in their periodic reports. Notably, even companies that are “not traditionally thought of as technology companies are incorporating AI-related disclosures in their periodic reports.” Companies' various disclosures have taken a variety of forms, as noted in the *Law360* article to which I linked above.

For example, many companies have included AI-related references in their periodic risk disclosures. For example, as cited in the article, some companies have noted that the company could be harmed if its applications produce faulty analysis or recommendations.

Other companies have noted that the company could be competitively disadvantaged if competitors deploy AI faster than they do.

The article notes that even companies that are not themselves developing AI related products or services may need to consider whether to make AI-related disclosures, for example whether and to what extent their operations could be affected by competitors', customers', suppliers' or vendors' use of AI.

Companies, including even non-technology companies, will want to consider disclosing the extent to which they use AI systems internally, such as, for example, in hiring decisions or processes, or for customer support services.

Companies may also want to consider AI-related disclosures in connection with the SEC's recently released cybersecurity disclosure guidelines; for example, the company may want to disclose the ways in which AI-related issues could affect the company's data security and privacy-related vulnerabilities and capabilities.

Finally, in light of the potential applicability of the EU's Artificial Intelligence Act, companies may want to address their regulatory risks in the risk disclosure statements.

All of these issues underscore the ways in which AI represents a developing disclosure challenge. Many companies, even well-advised and well-intentioned companies, may struggle to match their disclosures to the evolving risks and opportunities that AI presents. The SEC has made it very clear that it is monitoring companies' AI-related disclosures. And the plaintiffs' lawyers have also already shown that they will target companies that overstate their AI capabilities and prospects or understate their AI-related risks.

I don't have a sense that, to this point, AI-related disclosure has been a high-priority D&O underwriting item, although I suspect that underwriters are wary of companies' AI-related hype, particularly for companies whose business models are built around the development or use of AI-related products or services. I suspect that increasingly underwriters will be closely scrutinizing companies AI-related risk-factor disclosures, particularly with respect to operational and competitive risks that AI presents. I also suspect that even if AI issues are not an underwriting priority today, they will become so over the next few months.

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What Does ‘All Natural’ Mean? 2nd Circuit Rules in Favor of Kind Bar Maker in Class Action

“Plaintiffs’ testimony, even taken collectively, does not establish an objective definition of how a reasonable consumer acting reasonably understands the term ‘All Natural,’” the appeals court stated.

May 02, 2024 at 05:11 PM

Consumer Products

By Jane Wester | May 02, 2024 at 05:11 PM

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

[f](#)[in](#)[t](#)[p](#)[e](#)[c](#)

A three-judge panel of the U.S. Court of Appeals for the Second Circuit on Thursday upheld a summary judgment ruling in favor of Kind LLC, the maker of nut-laden granola bars and other snack foods, in a multidistrict class action suit regarding Kind’s use of the words “All Natural” on its packaging.

Circuit Judges Steven Menashi, Eunice Lee and Sarah Merriam ruled that the definitions of “All Natural” as pleaded failed to create a triable issue of fact, and that the plaintiffs’ deposition testimony also failed to create a triable issue of fact.

“Plaintiffs’ testimony, even taken collectively, does not establish an objective definition of how a reasonable consumer acting reasonably understands the term ‘All Natural,’” Merriam wrote for the panel. “To the contrary, it establishes how divergent consumers’ expectations can be.”

While one plaintiff said she expected “All Natural” to mean “not synthetic,” another said she thought the phrase indicated “that the product was made from whole grains, nuts, and fruit,” and a third interpreted it to mean “that the ingredients were literally plucked from the ground,” Merriam noted.

“Notably, several plaintiffs testified that consumers could have different understandings about the implications of the term ‘All Natural,’ that these understandings could change over time, and that not everyone would agree with their particular understanding of that term,” Merriam wrote. “Plaintiffs fail to explain how a trier of fact could apply these shifting definitions to reach a conclusion as to whether the use of the term ‘All Natural’ on KIND product labels was deceptive.”

The panel also rejected the plaintiffs’ argument that an “ordinary dictionary definition” of the word “natural” could meet the burden of establishing what a reasonable consumer would expect from the phrase, Merriam wrote.

“Plaintiffs argue that we should rely on the dictionary definition of ‘natural’ used at class certification: ‘existing in or caused by nature; not made or caused by humankind.’ ... But this definition is not useful when applied to a mass-produced snack bar wrapped in plastic,” Merriam wrote. “Such a bar is clearly made by humans. It gets plaintiffs no closer to demonstrating what a reasonable consumer would expect of a KIND product bearing the ‘All Natural’ label.”

The panel also found that the district court did not abuse its discretion in precluding the reports of two experts and ruled that the plaintiffs’ arguments regarding decertification of the class are moot.

Kind was represented by a King & Spalding team led by partners Keri Borders and Dale Giali. The plaintiffs were represented by firms including Finkelstein, Blankinship, Frei-Pearson & Garber; Ahdoot & Wolfson; and Pearson Warshaw.

The Second Circuit rendered its decision in *Charity Bustamante et al. v. Kind LLC*, No. 22-2684.

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Class Action

May 3, 2024, 8:47 AM PDT

Federal Judge Consolidates Sugar Price-Fixing Cases in New York

By Katie Arcieri

Documents

 [Order](#) Docket

- Domino, other sugar producers allegedly harmed competition
- Judge says other cases can be added to master docket

Bloomberg Law News 2024-05-03T12:57:30107726533-04:00

Federal Judge Consolidates Sugar Price-Fixing Cases in New York

By Katie Arcieri 2024-05-03T11:47:21000-04:00

- Domino, other sugar producers allegedly harmed competition
- Judge says other cases can be added to master docket

A New York federal judge consolidated six cases accusing Domino Foods Inc. and other large producers and sellers of granulated sugar of conspiring to artificially inflate prices.

The six suits brought on behalf of indirect and direct purchasers of granulated sugar were merged for pretrial proceedings and other purposes, Judge Victor Marrero of the US District Court for the Southern District of New York said in an order.

The plaintiffs, led by health-care provider KPH Healthcare Services Inc., claimed competition in the sugar market was harmed due to the defendants' alleged anticompetitive conduct, and that purchasers of sugar were deprived of benefits arising from price competition. Defendants in the proposed class actions include ASR Group International Inc., American Sugar Refining, Inc., and Michigan Sugar Co.

Marrero said he may amend Wednesday's order if the Judicial Panel on Multidistrict Litigation centralizes and transfers other related actions to the New York court. The order comes as class action attorneys brace for a new rule that could overhaul how judges sort through the initial stages of multidistrict litigation.

Kohn, Swift & Graf, P.C. and Hausfeld LLP represent the plaintiffs. Firms including A&O Shearman and Latham & Watkins LLP represent the sugar companies.

The case is KPH Healthcare Services, Inc. v. ASR Group International, Inc. , S.D.N.Y., No. 1:24-cv-01941, 5/1/24 .

GSK knew about Zantac cancer risk, attorneys tell jury in first trial

 [reuters.com/legal/gsk-knew-about-zantac-cancer-risk-attorneys-tell-jury-first-trial-2024-05-02](https://www.reuters.com/legal/gsk-knew-about-zantac-cancer-risk-attorneys-tell-jury-first-trial-2024-05-02)

Diana Jones

Item 1 of 2 Zantac heartburn pills are seen in this picture illustration taken October 1, 2019.
REUTERS/Brendan McDermid/Illustration/File Photo

[1/2]Zantac heartburn pills are seen in this picture illustration taken October 1, 2019.
REUTERS/Brendan McDermid/Illustration/File Photo [Purchase Licensing Rights](#) , opens new tab

May 2 (Reuters) - U.S. attorneys for a woman who claims her colon cancer was caused by the now discontinued heartburn drug Zantac on Thursday told a jury in Chicago that pharmaceutical companies GSK and Boehringer Ingelheim knew the product could cause cancer if it was not handled properly but failed to warn the public.

Mikal Watts, who is representing 89-year-old Angela Valadez, said the companies knew that Zantac's active ingredient, ranitidine, would turn into a cancer-causing substance called NDMA as it aged or was exposed to extreme temperatures, but did not ensure it was properly handled by transporters, distributors and stores.

Valadez's case is one of tens of thousands against GSK, Boehringer Ingelheim and other pharmaceutical companies, which have worried investors in recent years. It will offer the first test of whether the cancer claims in the long-running litigation will persuade a jury, since all cases previously set for trial settled or were dropped.

GSK and Boehringer Ingelheim are the only defendants in the trial, after other companies settled.

Watts told the jury the pills would change color as they degraded, but the companies would cover it up.

"They know we're not going to take a product that looks bad, so they put a paint job on it," Watts said.

Attorneys for GSK, which developed the active ingredient in Zantac but later sold the brand to other companies, and Boehringer Ingelheim, which sold the drug from 2006 until 2017, countered that Zantac has been repeatedly proven to be safe and effective and that no scientific or medical study had connected Zantac to cancer.

There is "no objective evidence linking Ms. Valadez's cancer to Zantac," GSK's attorney Tarek Ismail told the jury. "No genetic test, lab report, imaging study... nothing whatsoever."

Valadez, who said she took Zantac every day for at least 18 years, had a host of risk factors that made her more likely to develop colon cancer, Ismail said.

First approved in 1983, Zantac became the world's best selling medicine in 1988 and one of the first-ever drugs to top \$1 billion in annual sales. It was originally marketed by a forerunner of GSK and later sold successively to other companies.

In 2020, the U.S. Food and Drug Administration asked drugmakers to pull Zantac and its generic versions off the market after NDMA was found in samples of the drug. Thousands of lawsuits began piling up in federal and state courts.

A new version of Zantac now on the market has a different active ingredient and does not contain ranitidine.

The companies notched a significant win in 2022 when a judge dismissed about 50,000 claims centralized in federal court in Florida. That judge concluded that the opinions of the plaintiffs' expert witnesses that Zantac can cause cancer were not supported by sound science.

More than 70,000 Zantac cases remain pending in the U.S., many of them in Delaware state court where a judge is considering similar arguments from drugmakers that plaintiffs' expert testimony should be kept out.

Some other cases were previously settled, including several individual cases just before trial, and about 4,000 state court lawsuits outside of Delaware against French drugmaker Sanofi SA (SASY.PA) [opens new tab](#).

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Litigation

May 2, 2024, 5:05 PM PDT

GSK, Boehringer Put Profits Over Safety, Zantac Jury Told (1)

By Jef Feeley

- Chicago woman's suit is first of thousands to reach a US jury
- Companies argue no link of heartburn drug to woman's cancer

Bloomberg Law News 2024-05-03T13:30:26268880436-04:00
GSK, Boehringer Put Profits Over Safety, Zantac Jury Told (1)

By Jef Feeley2024-05-02T20:05:51726-04:00

- Chicago woman's suit is first of thousands to reach a US jury
- Companies argue no link of heartburn drug to woman's cancer

Drugmakers GSK Plc and Boehringer Ingelheim GmbH prioritized profits over consumer safety by hiding the cancer risks of their once-blockbuster heartburn drug Zantac, according to lawyers representing a Chicago woman in the first of thousands of such claims to go before a US jury.

Angela Valadez, 89, used over-the-counter Zantac religiously for 18 years before being diagnosed with colorectal cancer, she said in her lawsuit. She's now seeking at least \$640 million in compensatory damages, according to court filings. Both GSK and Boehringer sold Zantac at different times during 30 years that the drug was one of the top-selling antacids in the US.

London-based GSK, which developed Zantac in 1983, knew early on the drug could cause cancer and sold it anyway without warnings, Mikal Watts, Valadez's lawyer, told an Illinois state court jury Thursday in Chicago. In his opening statement, Watts said internal files show a study laying out the drug's risks were withheld from US regulators by GSK executives for 37 years.

"A whole lot of Zantac got sold over that period," Watts told the nine-woman, three-man panel in a tiny Cook County Circuit Court room. Internal documents also show Zantac generated more revenue in 1983 than all of GSK's other drugs combined, he said. "Zantac was bigger than the whole company."

Valadez's suit is one of tens of thousands pending against GSK, Boehringer, Pfizer Inc. and Sanofi, which all sold Zantac at different times. The potential of costly legal risks has been a concern for investors in the companies.

GSK and Boehringer are the only defendants in the Valadez case, after Pfizer agreed earlier to a settlement. Sanofi wasn't named in her suit.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X4V2L064000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d...> 1/3

Blockbuster Drug

Zantac hit the US market as a prescription drug in 1983 before becoming an over-the-counter product in 1996. It was the world's top-selling medicine five years later and recognized as one of the first blockbuster drugs to rack up more than \$1 billion in annual sales.

Paris-based Sanofi agreed to pay more than [\\$100 million](#) to settle about 4,000 lawsuits claiming it failed to warn users that Zantac could cause cancer, Bloomberg News reported last month. The French drugmaker still faces claims in other state courts.

GSK has settled some cases before they went to trial, but it opted to let jurors hear the claim by Valadez. She argues Zantac's former active ingredient, ranitidine, formed the likely carcinogen NDMA over time or when stored in elevated temperatures. The US Food and Drug Administration recalled Zantac in 2019 over the NDMA discovery.

Tarek Ismail, one of GSK's lawyers, told jurors in his opening statement that no scientific studies have linked Zantac or NDMA to colorectal cancer. He said Valadez likely developed the illness – which affects millions of Americans every year – because of other risk factors. He said Valadez didn't get a colonoscopy until she was 80.

GSK said it decided to take the case to trial to defend itself against "unfair and unwarranted allegations" that Valadez developed the potentially fatal disease from the heartburn medication.

No Liability

Andy Bayman, one of Boehringer's lawyers, told jurors that the German drugmaker had no liability. Valadez had been taking Zantac for two decades before the company acquired the rights to the drug in 2006, Bayman said. Boehringer "never picked up any signs" Zantac was tainted with NDMA while it owned the drug, he said. Boehringer sold the Zantac rights to Sanofi in 2017.

After the FDA recall, Sanofi won approval to return Zantac to US store shelves, but without ranitidine. It's now made with famotidine, the active ingredient in competitor Pepcid, which is marketed jointly by Johnson & Johnson and Merck & Co.

All the Zantac makers got a boost in 2022 when a federal judge [threw out](#) more than 5,000 suits filed in federal court in Florida, saying the science behind the cancer claims was flawed. That decision also applied to about 50,000 unfilled cases also covered by the so-called multi-district litigation (MDL), according to court filings. Many of those cases later were refiled in state court in Delaware.

Judge Vivian Medinilla in Wilmington is weighing the validity of the scientific evidence underlying the more than 70,000 Zantac cases filed in her court and is expected to rule soon on whether juries can hear those suits.

(Updates with details on MDL case dismissals in Florida.)

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Steve Stroth, Peter Jeffrey

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Documents

- Decision
- District court docket

- Subsidiaries supplied information essential to selling plans
- About 2 million people in 26 states have these groups' plans

Centene to Face Proposed Class Fraud Claims Over Health Plans

By Mary Anne Pazanowski 2024-05-03T10:20:09000-04:00

- Subsidiaries supplied information essential to selling plans
- About 2 million people in 26 states have these groups' plans

Health insurance consumers can proceed with a proposed class action alleging that Centene Corp. and its subsidiaries deceived them into buying plans their doctors wouldn't accept.

The plaintiffs adequately alleged a civil violation of the federal Racketeer Influenced and Corrupt Organizations Act and violations of consumer protection laws in 11 states, the US District Court for the Northern District of Illinois said Thursday.

Centene is the largest provider of Medicaid managed care plans and Affordable Care Act exchange plans in the country, Judge Nancy L. Maldonado said. About 2 million people have ACA plans sold by Centene's Ambetter subsidiary in 26 states, and the parent company provides Medicaid plans in 25 of them, it said.

The allegedly unlawful scheme involved consumers who became ineligible for Medicaid. Ambetter used information obtained through the managed care plans to market exchange plans to these consumers, the plaintiffs said.

Ambetter's marketing materials deceptively led consumers to believe that they would receive the same coverage as when they were on Medicaid, the plaintiffs said. For example, the company distributed provider lists that, in fact, included doctors who didn't accept the plans, they said.

RICO Debate

RICO makes it unlawful for any person tied to an “enterprise” to engage in a pattern criminal-like activity in interstate commerce. Centene, in moving to dismiss the complaint, said no enterprise could be made up solely of a parent corporation and its subsidiaries.

This case, however, alleged facts similar to that of a “prototypical” RICO case by describing the role each participant took in furthering an unlawful scheme, Maldonado said.

Centene, for example, allegedly deliberately took control of companies that provided Medicaid services in order to get access to information about their members, she said. Provision of that information by the subsidiaries allegedly enabled Centene to “perpetuate a fraud” that it wouldn’t have been able to complete otherwise, she said.

It was a close question, but at a litigation stage when the court must accept the alleged facts as true, the plaintiffs adequately established an enterprise distinct from Centene itself, Maldonado said.

The plaintiffs adequately pleaded the who, what, where, when, and how of the underlying fraudulent activities, mail and wire fraud, Maldonado also said. But they “pled themselves out of court” on an unjust enrichment claim by alleging that they had contracts the defendants, she said.

Maldonado deferred standing questions to the class certification stage.

Terrell Marshall Law Group PLLC, Gustafson Gluek PLLC, Wexler Boley & Elgersma LLP, and Cotchett Pitre & McCarthy LLP represent the plaintiffs. Williams & Connolly LLP represents Centene.

The case is *Havrilla v. Centene Corp.*, N.D. Ill., No. 22-cv-4126, 5/2/24.

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Is FirstEnergy a victim? Former executives say the company shouldn't be labeled one

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5/3/24 Akron Beacon J. (Ohio) (No Page)

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Akron Beacon Journal (Ohio)

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May 3, 2024

Is FirstEnergy a victim? Former executives say the company shouldn't be labeled one

FirstEnergy and its allies bankrolled one of the state's largest scandals, but state prosecutors say the company should be labeled a victim.

Jessie Balmert, Akron Beacon Journal

Akron-based FirstEnergy and its allies bankrolled one of Ohio's largest corruption scandals. But state prosecutors now say the company should be labeled a victim of its former leaders' actions.

Two former executives accused of bribing a top utility regulator aren't buying it.

"FirstEnergy does not qualify as a victim under this constitutional standard for the fundamental reason that FirstEnergy is an admitted (and accused) co-conspirator and participant in the alleged crime," wrote attorneys for former FirstEnergy CEO Chuck Jones and former Senior Vice President of External Affairs Michael Dowling.

FirstEnergy, its subsidiaries and its allies paid more than \$60 million to help former Ohio House Speaker Larry Householder win control of the Ohio House of Representatives, pass a \$1 billion bailout for two nuclear plants and defend that law against a ballot initiative to block it.

Jones and Dowling are accused of bribing former Public Utilities Commission of Ohio Chairman Sam Randazzo with a \$4.3 million payment to work on FirstEnergy's behalf within Gov. Mike DeWine's administration. Both men have pleaded not guilty. Randazzo, who was

also charged, died last month.

State prosecutors, including Ohio Attorney General Dave Yost's office, accused Jones and Dowling of stealing from FirstEnergy when they executed that \$4.3 million contract with Randazzo. Using that premise, FirstEnergy was a victim of theft.

But FirstEnergy has already admitted it made that payment – and intended it to be a bribe, the ex-executives' attorneys wrote.

Attorneys for the former executives argue that if FirstEnergy is designated a "victim," the company would unfairly benefit from rules meant to protect crime victims called Marsy's Law. That designation could prevent Jones and Dowling from getting records or interviews from FirstEnergy or its employees.

"The state should not be permitted to gain unfair tactical advantages in a criminal prosecution by improperly designating FirstEnergy as a "victim," especially when that designation contradicts FirstEnergy's own admissions and the position the State has taken consistently and stridently in this case and elsewhere," wrote attorneys Carole S. Rendon, who is representing Jones, and John F. McCaffrey, who is representing Dowling.

Another investigation into FirstEnergy?

Meanwhile, state prosecutors are investigating FirstEnergy, the former executives' attorneys wrote. FirstEnergy could be charged criminally or could enter into a deferred prosecution agreement, which would allow the company to avoid prosecution in exchange for admitting wrongdoing and paying a penalty. State prosecutors also offered immunity to several former executives, according to the filing.

A FirstEnergy spokeswoman said state investigators informed FirstEnergy that the former executives' attorneys were wrong in their assertion that FirstEnergy is a target of an investigation or could be charged criminally. Yost's office said they would respond in court.

FirstEnergy entered into a deferred prosecution agreement with federal prosecutors in 2021, admitted it bribed Randazzo and Householder and paid a \$230 million fine.

More: FirstEnergy CEO says company may have to put 'money on the table' to move past scandal

Current FirstEnergy CEO Brian X. Tierney alluded to the possible resolution of the state criminal investigation in a recent earnings call, saying the company "may have to put a little bit of money on the table."

FirstEnergy is not a victim, former executives say byjbalmer on Scribd

Akron Beacon Journal reporter Patrick Williams contributed to this article.

Jessie Balmert is a reporter for the USA TODAY Network Ohio Bureau, which serves the Columbus Dispatch, Cincinnati Enquirer, Akron Beacon Journal and 18 other affiliated news organizations across Ohio

This article originally appeared on Cincinnati Enquirer: Is FirstEnergy a victim? Former executives say the company shouldn't be labeled one

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NewsRoom

Accounting & Consulting services**SEC shuts down Trump Media auditor over 'massive fraud'**

BF Borgers ran 'sham audit mill' whose work affects more than 1,500 corporate filings, US financial regulator says



BF Borgers built the eighth-largest client list of any US audit firm while operating out of a single-storey building in a Denver suburb © Rachel Woolf/FT

Stephen Foley in New York 2 HOURS AGO



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The US Securities and Exchange Commission has shut down the auditor of Donald Trump's social media company, accusing it of "massive fraud".

The US regulator charged the firm, BF Borgers, and its founder, Ben Borgers, on Friday with falsely representing to clients that its audit work would comply with US standards, and fabricating documentation.

It said Borgers, one of the most prolific auditors of US public companies, was responsible for "one of the largest wholesale failures by gatekeepers in our financial markets".

Without admitting or denying the SEC's findings, the firm has agreed to pay a \$12mn penalty and Ben Borgers to pay \$2mn. Ben Borgers did not immediately respond to a request for comment.

Borgers has expanded rapidly to become auditor to hundreds of small and microcap companies — including the former US president's [Trump Media & Technology Group](#) — but the [SEC said](#) that three-quarters of its audits were faulty.

The agency said it was stepping in to permanently close what it called a “massive fraud” and “sham audit mill”, and it told Borgers' clients they would need to check past financial statements in case they contained errors. The firm's “deliberate and systemic failure” to meet professional standards affected more than 1,500 company filings, the SEC said.

Borgers built the eighth-largest client list of any US audit firm in just 15 years while still operating out of a single-storey building in a suburb of Denver, Colorado. Its latest regulatory filing showed it had just 50 staff, 10 of whom are certified public accountants. [Ben Borgers](#) himself signed off on more than 140 audit opinions in the past year, according to Ideagen Audit Analytics — far more than any other accountant in the US.

Regulators have been raising increasingly loud warnings about the quality of his work. His firm was found to have a 100 per cent deficiency rate in audits inspected by the Public Company Accounting Oversight Board, the Colorado state board of accountancy fined him \$5,000 earlier this year for bad audits of retirement plans and Canada's audit regulator barred BF Borgers from operating in that country last year.

The SEC's order barring the firm from public auditing leaves more than 170 US public companies searching for new accountants, an issue that appeared to hit some share prices on Friday morning. TMTG was down 4 per cent in early trading.

“Trump Media looks forward to working with new auditing partners in accordance with today's SEC order,” the company said.

The regulator said it would monitor the situation and advised companies they were entitled to limited extensions for filing their financial results if needed.

“Reports that were filed before the date of the order do not necessarily need to be amended solely because of the . . . order,” the SEC said, but it added: “Issuers should consider whether their filings may need to be amended to address any reporting deficiencies arising from the BF Borgers engagement.”

Additional reporting by Jennifer Hughes in New York

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May 3, 2024, 7:38 AM PDT

SEC Accuses Trump Media's Accounting Firm of Massive Fraud (1)

By Lydia Beyoud, Austin Weinstein and Nicola M. White

- BF Borgers pays \$12 million to settle probe of audit firm
- SEC alleged 'massive fraud' and vast accounting failures

Bloomberg Law News 2024-05-03T13:35:40811216635-04:00

SEC Accuses Trump Media's Accounting Firm of Massive Fraud (1)

By Lydia Beyoud, Austin Weinstein and Nicola M. White2024-05-03T10:38:18860-04:00

- BF Borgers pays \$12 million to settle probe of audit firm
- SEC alleged 'massive fraud' and vast accounting failures

The Securities and Exchange Commission accused the auditor of Donald Trump’s social-media company of massive fraud that affected more than 1,500 regulatory filings.

BF Borgers CPA PC and its founder, Benjamin Borgers, will be permanently suspended from practicing and appearing as accountants before the SEC, and will pay a total of \$14 million in fines to settle the probe, the SEC said in a Friday release.

“Ben Borgers and his audit firm, BF Borgers, were responsible for one of the largest wholesale failures by gatekeepers in our financial markets,” **Gurbir Grewal**, the SEC’s enforcement chief, said in a statement. “Because investors rely on the audited financial statements of public companies when making their investment decisions, the accountants and accounting firms that audit those statements play a critical role in our financial markets. Borgers and his firm completely abandoned that role, but thanks to the painstaking work of the SEC staff, Borgers and his sham audit mill have been permanently shut down.”

BF Borgers didn’t immediately respond to a request for comment Friday morning. The firm has been one of the most prolific auditors in the US. The most recent review of its audits by US regulators found a 100% deficiency rate. In its order, the SEC described false audit work papers, “nonexistent work” and fabricated meetings.

The SEC didn’t immediately reply to a request for comment on BF Borgers’ work for Trump Media & Technology Group Corp. Trump Media “looks forward to working with new auditing partners in accordance with today’s SEC order,” a representative for the company said.

Read More: [Trump Media's Accounting Firm Has Audit Deficiency History](#)

The regulator’s settlement with BF Borgers didn’t say whether Trump Media was one of the companies whose filings involved alleged fraud by the accounting firm.

Trump Media has used the Colorado-based accounting firm since 2022, and retained its services after it went public by merging with Digital World Acquisitions Corp., a special purpose acquisition company. Inspections by the Public Company Accounting Oversight Board haven't yet covered BF Borgers' audits of Trump Media.

The former president's social-media company was the biggest client by market capitalization on BF Borgers' client roster. Although the firm is one of the busiest in the US, more than 80% of its clients trade over-the-counter, meaning they are too small to meet the listing requirements of large exchanges, according to research firm Ideagen Audit Analytics.

BF Borgers was among the top 10 auditing firms with the most publicly traded clients in 2023, according to the firm.

The auditor has faced regulatory scrutiny in both Canada and the US. It scored poor marks on the last two annual inspections from the US audit regulator, with the PCAOB citing a 100% deficiency rate in the sample of audits it inspected for 2021 and 2022.

The audit watchdog said BF Borgers, which has hundreds of clients, more than doubled its clients between 2019 and 2021 but didn't add more staff to handle the additional workload. Just one person was responsible for 147 audits, the regulator said in an expanded inspection report.

(Updates with additional background starting in third paragraph.)

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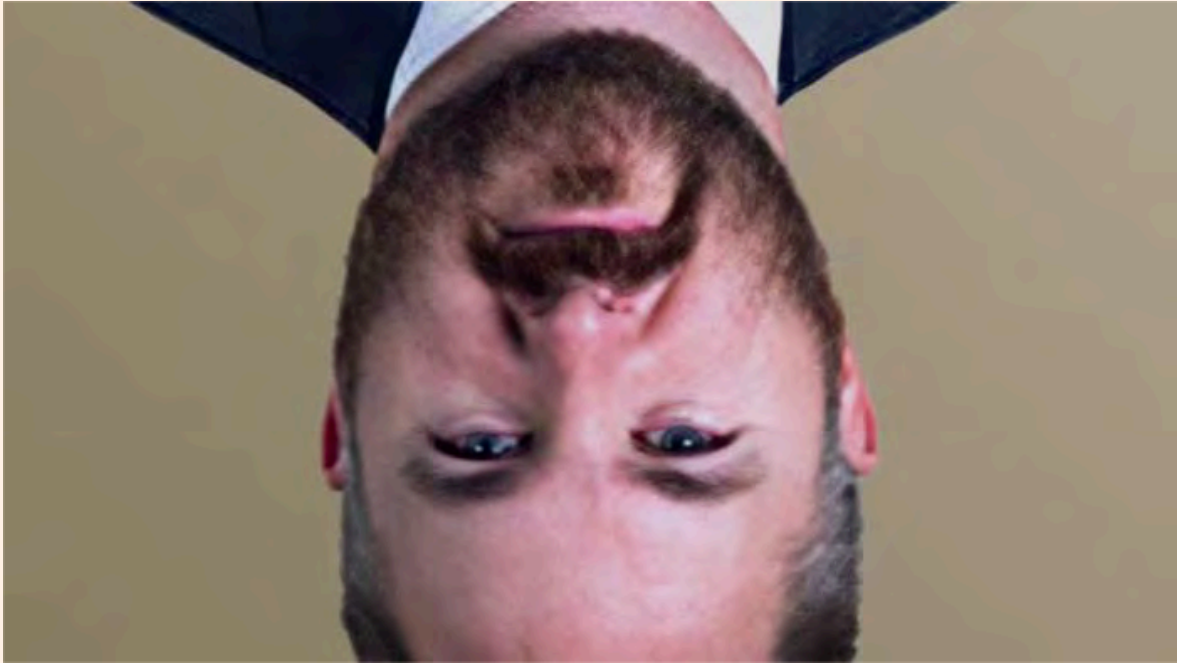
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FT Alphaville Accountancy

OK maybe Trump Media's auditor is really bad at a lot of things

The bell tolls for Big Ben



George Steer and Louis Ashworth 4 HOURS AGO



Shocking news just out on [BF Boogers](#), FT Alphaville's favourite US auditing firm and the go-to-guys for Donald Trump's social media empire.

[Per MainFT's Stephen Foley:](#)

“

The US Securities and Exchange Commission has shut down the auditor of Donald Trump's social media company, accusing it of “massive fraud”.

The US regulator said the firm, BF Borgers, and its founder, Ben Borgers, were responsible for “one of the largest wholesale failures by gatekeepers in our financial markets”.

Borgers, one of the most prolific auditors of US public companies, was charged on Friday with falsely representing to clients that the firm's work would comply with US standards, and fabricating audit documentation.

Without admitting or denying the SEC's findings, the firm has agreed to pay a \$12mn penalty and Ben Borgers to pay \$2mn.

The SEC's [full order](#) is well worth your time, but here are some of the juicy details that caught our eye:

“

4. [...] Among other things, as engagement partner, Borgers failed to conduct or participate in audit planning meetings and to review important workpapers for many audits, including workpapers relating to his purported supervision and review of the engagement team's work and conclusions.

“

16. Borgers instructed BF Borgers audit staff and contractors to copy workpapers from previous engagements as the final workpapers for new engagements. Specifically, audit staff updated the balance sheet date and date of completion on the workpapers, but all of the other information indicating the substantive work done on the engagement was simply copied from the corresponding workpaper from the previous audit or quarterly review

17. For example, each engagement had a workpaper called “Engagement Team Discussion” which purported to document a planning meeting held by the engagement team at the beginning of the engagement . . . But, at BF Borgers, those planning meetings did not occur. Instead, the staff level auditor simply rolled forward the Engagement Team Discussion workpaper from the prior year or quarter, updating the balance sheet date information on the document and inserting a new (and false) date of a planning meeting that never happened.

“

20. BF Borgers had audit management software which permitted individuals to electronically “sign off” on workpapers. But Borgers did not use that software to sign off on workpapers. Instead, Borgers instructed a staff member to electronically sign off on all workpapers for each engagement within the firm’s audit management software. Borgers provided that staff member with usernames to create the false appearance of separate sign offs by the staff auditor, the engagement partner, and the EQR on individual workpapers. In reality, all of those sign offs were done by the same staff person within seconds of each other.

21. According to Borgers, his emails were the only written records evidencing the work he performed as engagement partner on BF Borgers engagements. However, Respondents did not include any of those emails as part of the workpapers retained by BF Borgers. They also failed to preserve the vast majority of Borgers’ emails that pre-dated March 2023 by permitting those emails to be auto-deleted due to purported storage-size limitations on the firm’s computer systems.

It’s unclear at pixel time whether the \$2mn civil penalty personally levied against BF Borgers’ founder will be split with alter-aliases [Ben F Brogers](#), [Blake F Borgers](#), [Ben F Vonesh and Ben F orgers](#), or some combination of the above.

For anyone considering applying for Trump Media & Social Group's newly-vacant auditing gig, the bar has been set terrifyingly low. EY, this is finally your time to shine.

Further reading

— [Trump Media's auditor is really bad at spelling his own name](#)

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US SEC charges auditor BF Borgers, whose clients include Trump Media, with fraud

 [reuters.com/business/us-sec-charges-audit-firm-bf-borgers-with-fraud-affecting-more-than-1500-filings-2024-05-03](https://www.reuters.com/business/us-sec-charges-audit-firm-bf-borgers-with-fraud-affecting-more-than-1500-filings-2024-05-03)

Reuters

The seal of the U.S. Securities and Exchange Commission (SEC) is seen at their headquarters in Washington, D.C., U.S., May 12, 2021. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights , opens new tab

WASHINGTON, May 3 (Reuters) - Auditor BF Borgers and its owner Benjamin Borgers, whose clients include Trump Media, were charged by the U.S. Securities and Exchange Commission with "massive fraud" that affected more than 1,500 SEC filings, the agency said on Friday.

BF Borgers agreed to pay a \$12 million civil penalty, and Benjamin Borgers agreed to pay \$2 million, to settle the SEC's charges. They also agreed to permanent suspensions from practicing as accountants on SEC filings, effective immediately.

Borgers did not immediately respond to a request for comment.

Reuters could not immediately ascertain which filings or companies had been affected. The SEC, however, said a "significant" number of listed companies will have to switch accountants in coming days as a result of the enforcement action.

Borgers served as Trump Media's auditor from 2022 and was still its auditor as of last month, according to its filings.

"Trump Media looks forward to working with new auditing partners in accordance with today's SEC order," a spokesperson for former President Donald Trump's media company wrote in an email.

Borgers has also acted for fintech and crypto companies, and many other small issuers, SEC filings show.

According to the SEC, Borgers did not properly prepare and maintain audit documentation, fabricated audit planning meetings, and in some cases simply passed off previous audits for the current audit period.

Of 369 BF Borgers clients whose filings from January 2021 through June 2023 incorporated BF Borgers's audits and reviews, at least 75% incorporated audits that did not comply with the SEC's rules.

“Ben Borgers and his audit firm, BF Borgers, were responsible for one of the largest wholesale failures by gatekeepers in our financial markets,” Gurbir Grewal, Director of the SEC’s Division of Enforcement, said in a statement.

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Reporting by Michelle Price; Editing by Chizu Nomiya

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No Atty Fees For Objectors To \$5.6B Swipe Fees Settlement

By **Lauren Berg**

Law360 (May 2, 2024, 10:14 PM EDT) -- Class members who initially objected to a \$5.6 billion settlement with Visa and Mastercard cannot collect nearly \$1 million in attorney fees, a New York federal judge ruled Thursday, saying they haven't shown their objections to the original 2013 settlement substantially benefited the class.

U.S. District Judge Margo K. Brodie, in a 16-page **order**, denied the motion brought by Unlimited Vacations and Cruises, USA Pets, Gnarlywood and Quincy Woodwrights for **\$983,605 in attorney fees**, saying they've only offered a "conclusory statement" that Unlimited's appeal of the 2013 settlement in the long-running antitrust litigation led to the Second Circuit vacating the deal over concerns about adequate class representation.

They also haven't shown how Unlimited's objections to class counsel's award of attorney fees related to the initial settlement led to an improved settlement in 2019, the order stated.

"Between 2013 and 2019, Unlimited first filed a notice of appeal in 2014 ... and then in 2015; opposed disbursement of named plaintiffs' service awards; moved for production of documents; filed another notice of appeal; and moved to vacate the court's order on class counsel's motion for attorneys' fees," Judge Brodie said.

"Objectors do not articulate how any of these activities — which ceased in 2015 — improved the 2019 settlement, reached four years later and only '[a]fter additional extensive discovery and renegotiations,'" she added.

However, Judge Brodie did grant the objectors reimbursement for their costs of \$6,786 for counsel representing Unlimited and USA Pets, and \$6,455 for counsel representing Gnarlywood and Quincy Woodwrights, according to the order. But she did order the parties to provide a more-detailed breakdown of their costs.

The multidistrict litigation, which lasted for over a decade, is based on allegations that Visa, Mastercard and several banks maintained a series of network rules that enabled the companies to charge merchants higher transaction fees than the retailers would have tolerated in a competitive market.

The sides **first settled the case** in 2012 for \$7.25 billion, only to have the Second Circuit **upend the deal** in 2016 after finding issues with the same counsel representing merchants seeking damages and those seeking changes to the network rules moving forward.

Nevertheless, about \$5.4 billion had already been placed in escrow by the card companies and banks when they **inked a new deal** with merchants in September 2018 that would see them pay out up to **\$900 million more**.

In their motion for attorney fees filed in February, the objectors argued they were "closely involved" in the court's review of the second settlement and its corresponding requests for attorney fees and incentive awards.

They said their involvement **reduced** a portion of the sought-after \$900,000 service award to eight lead plaintiffs because some of it, according to the appeals court, reflected "lobbying for changes in

law that do not benefit the class."

According to the objectors, they are also responsible for a \$14 million reduction in class counsel fees, from the requested \$537 million to a final figure of \$523 million.

But in her order Thursday, Judge Brodie held that they didn't show that their objections to those attorney fees in the 2019 settlement caused the court to make the \$14 million reduction. She said the objectors are ignoring the multifactor analysis the court used in deciding to reduce class counsel's fees, including a lodestar crosscheck.

"The court reduced class counsel's attorneys' fees not only because the 2019 settlement no longer contained injunctive relief, but 'due largely to the fact that the settlement value ... is nevertheless a small recovery when viewed in light of the size of the class, especially given that merchants are no longer guaranteed injunctive relief as they were in the 2013 settlement agreement,'" the judge said.

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

The objectors are represented by Kendrick Jan of Kendrick Jan APC and John J. Pentz.

The settling merchants are represented by Steve Shadowen of Hilliard & Shadowen LLP, Robert Eisler of Grant & Eisenhofer PA, Linda Nussbaum of Nussbaum Law Group PC and Michael Freed of Freed Kanner London & Millen LLC.

Visa is represented by Arnold & Porter and Holwell Shuster & Goldberg LLP.

Mastercard is represented by Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, case number 1:05-md-01720, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Katryna Perera, Bryan Koenig, Matthew Perlman and Aaron Keller. Editing by Janice Carter Brown.



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NY AG Strikes \$270M Multistate Opioid Deal With Amneal

By **Emily Field**

Law360 (May 3, 2024, 11:18 AM EDT) -- The New York state attorney general on Friday said that a \$270 million multistate deal had been reached with opioid manufacturer Amneal Pharmaceuticals for its role in the addiction epidemic over allegations that the company failed to report suspicious orders of the narcotics.

Letitia James' office said that the deal will provide \$92.5 million in cash over the next decade and \$180 million worth of the overdose medication naloxone to the states in the deal, which are California, Delaware, Tennessee, Utah and Virginia. According to her statement, Amneal sold almost nine billion opioid pills between 2006 and 2019.

"While this settlement can't fully reverse the damage done as a result of the national crisis, it will provide essential funding and resources for New York and other states to ensure those suffering get the help they need," James said in a statement. "I am proud to have secured over \$2.7 billion to tackle the opioid epidemic in New York, and my office will continue to hold accountable the companies responsible for fueling this crisis."

Amneal said in a separate statement that the settlement in principle does not include an admission of wrongdoing and that the deal depends on enough members to opt in to the final deal.

"We remain committed to helping those impacted by the opioid crisis by enhancing access to naloxone nasal spray, which is an emergency treatment for opioid overdose and helps save lives," the company said.

In **February**, James and the same state attorneys general announced a \$150 million agreement with Hikma Pharmaceuticals to end similar claims over the opioid crisis.

That deal accompanied a \$350 million opioid settlement also announced Thursday resolving litigation against France-based advertising giant Publicis Health LLC, which all 50 U.S. states had accused of exacerbating the opioid crisis through its work with the manufacturer of Oxycontin.

The deals come in the wake of multibillion-dollar settlements reached with top pharmacy chains like CVS Pharmacy and Walgreens and major drugmakers like Teva Pharmaceuticals and Allergan.

So far, law firms have secured more than \$51 billion for communities affected by the opioid crisis, according to a statement by co-leads of the MDL plaintiffs executive committee, Jayne Conroy of Simmons Hanly Conroy LLC, Paul T. Farrell Jr. of Farrell & Fuller Law LLC and Joe Rice of Motley Rice LLC.

The state of New York was represented by Jennifer Levy and Matthew Conrad of the Office of the New York State Attorney General.

Counsel information for Amneal was not immediately available Friday.

--Editing by Alyssa Miller.



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Endo Judge Hopes Criminal Sentence Warns Opioid Makers

By **Danielle Ferguson**

Law360, Detroit (May 2, 2024, 11:22 PM EDT) -- A Michigan federal judge said Thursday she hoped Endo's criminal sentence for falsely advertising a pain medication as "abuse deterrent" would itself be a deterrent for other opioid makers, as she accepted the company's recent \$200 million settlement deal with federal prosecutors.

Endo pled guilty last month to falsely labeling Opana ER as "crush proof," or resistant to crushing. U.S. District Judge Linda V. Parker sentenced Endo on Thursday to a \$1.086 billion criminal fine, the highest allowed by statute, and a \$450 million forfeiture.

Endo struck a deal to avoid that fine if it paid the government **\$365 million over 10 years**. But the deal also allowed the company to instead pay \$200 million at once when it exited bankruptcy to resolve the criminal fine, a nearly \$500 million civil False Claim Act complaint and all IRS claims, which Endo told the court happened last week. It may also pay up to \$100 million more if performance targets are met.

The fine has been satisfied by the \$200 million lump sum the company paid after emerging from bankruptcy on April 23, when the company's plan of reorganization became effective, Endo attorney Carole Rendon of BakerHostetler, told the court Thursday. The \$450 million forfeiture was fully satisfied by funding public and tribal opioid trusts, Rendon said.

Judge Parker said Thursday that it was "significant" that this case was held in Michigan, as the state has "high incidents of opioid abuse." The opioid epidemic, she said, has been "devastating" for the country.

"It knows no color. It knows no age. It devastates. It's hard to see that," Judge Parker said as she handed down the sentence, which was in accordance with the agreement announced in February.

She said she heard Endo's ownership of its actions and noted the changes the company has made since the alleged conduct in 2012 and 2013, such as pulling Opana ER from the market in 2017. As part of the sentencing agreement, the company cannot promote its opioids to healthcare providers.

"Hopefully this will allow for significant deterrence for other companies that distribute opioids," Judge Parker said.

Federal prosecutor Ben Cornfeld said the agreement and funding of the trusts will ensure the money Endo paid "will be put in hands of people who need it most to combat the opioid crisis."

He noted this is the second-largest set of criminal monetary penalties ever imposed on a pharmaceutical company, second only to a 2020 Purdue Pharma **settlement** with the government.

Endo's Chief Legal Officer Matthew Maletta told the court the company takes full responsibility for the actions of a group of sales representatives who portrayed the drug to healthcare providers as being "crush proof." He said the sentencing is a milestone to mark the end of this period and allow the "new company and its team members to move forward."

"We can and will build on important changes the company has made since the conduct at issue here took place," Maletta told Judge Parker.

In April, Endo **pled guilty** to one misdemeanor count of violating the Federal Food, Drug, and Cosmetic Act over its sales of Opana ER, which prosecutors say was inadequately labeled but pushed by some of the company's sales reps as being resistant to crushing. Despite the U.S. Food and Drug Administration's instructions not to label the drug as "tamper resistant," some Endo sales representatives touted Opana ER that way to doctors in, among other districts, the Eastern District of Michigan.

Rendon said the company has made numerous internal changes to ensure this misconduct "will never happen again." The company hasn't marketed opioids to healthcare providers since December 2016, she said. Opioid sales represent less than 7% of Endo's total revenue, Rendon said.

Judge Parker asked Rendon how the agreed-upon payment got to \$200 million, down from the more than \$1 billion fine. Rendon said the number was reached due to the company's "very limited resources."

Endo — an Irish company with its U.S. headquarters in Pennsylvania — sought Chapter 11 protection in August 2022 for itself and some subsidiaries, aiming to deal with billions of dollars of debt and thousands of lawsuits over its sale of opioid painkillers and other products.

The company is now known as Endo Inc., a newly formed entity that acquired the assets of Endo International as part of the company's bankruptcy reorganization, according to Thursday's proceedings and the company's website.

Maletta said Endo Inc. has new leaders and an entirely new board of directors.

Maletta declined to comment beyond his in-court statements. Attorneys for the U.S. Department of Justice declined to comment.

The government is represented by Ben Cornfeld and A. Brant Cook of the U.S. Department of Justice's Civil Division.

Endo is represented by Carole Rendon and Sarah Spring of BakerHostetler.

The case is U.S. v. Endo Health Solutions Inc., case number 2:24-cr-20159, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Stewart Bishop. Editing by Michael Watanabe.



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Barnes & Noble Joins Visa, Mastercard Settlement Objectors

By **Jared Foretek**

Law360 (May 2, 2024, 8:07 PM EDT) -- A new collection of major retailers is joining Target Corp. and Grubhub in objecting to a proposed settlement deal cut by Visa and Mastercard, saying the deal would actually codify an illegal price-fixing agreement.

The wide-ranging group of plaintiffs, led by 7-Eleven, includes chain retailers like Barnes & Noble Inc., Dick's Sporting Goods, Starbucks, The Gap Inc. and Ralph Lauren Corp. At the very least, they say, the objecting retailers should be allowed to opt out of the settlement, which as proposed would bar claims from plaintiffs who opted out of the class that agreed to the settlement.

"This settlement asks this court to put its imprimatur on supracompetitive credit card interchange rates that Visa and Mastercard, improperly, jointly agreed to with the complicity of the [equitable relief class counsel]," the 7-Eleven plaintiffs write.

The new objections, filed Wednesday, come less than a week after Target and Grubhub **took a similar position on the deal**, in which Visa and Mastercard agreed to cut their merchant fees by roughly \$30 billion over the next several years.

A previous settlement in the long-running fee-fixing case was rejected by the Second Circuit in 2016, which held that it would "confiscate" the claims of unsatisfied members.

The 7-Eleven plaintiffs say the new deal, reached in March, should meet a similar fate, claiming that it extends an illegal mandate from the credit card companies that if a merchant accepts one of their cards, it must accept all of them. In return, the deal would impose a rate cap on merchant fees.

But the objecting retailers argue that the new cap would "lock in rates substantially above" those found elsewhere in the world, "maintaining the United States' distinction as the highest-cost payments market in the world."

As horizontal competitors, if Visa and Mastercard had come together on their own to reach such an agreement, the retailers say, "such conduct would be condemned per se as horizontal price-fixing."

More importantly, they claim, the U.S. Supreme Court has already invalidated "involuntary class" agreements in 2011's **Wal-Mart Stores Inc. v. Dukes** , holding that such agreements are only consistent with due process when they include an "indivisible injunction that will benefit the class as a whole," the merchants write.

"The proposed mandatory settlement fails that standard," they write. "This 'cap' will not benefit the class as a whole and may not benefit many class members at all. [The equitable relief class counsel's] failure to deliver an indivisible injunction benefitting the class as a whole renders them inadequate representatives, particularly for those ... who continue to actively litigate their claims."

Neither Visa nor Mastercard immediately responded to Law360's requests for comment Thursday.

The settling merchants are represented by Steve Shadowen of Hilliard & Shadowen LLP, Robert Eisler of Grant & Eisenhofer PA, Linda Nussbaum of Nussbaum Law Group PC and Michael Freed of Freed Kanner London & Millen LLC.

The plaintiffs are represented by Jeffrey I. Shinder, A. Owen Glist, Ankur Kapoor, Taline Sahakian and David A. Scupp of Constantine Cannon LLP.

Visa Inc. is represented by Arnold & Porter Kaye Scholer LLP and Holwell Shuster & Goldberg LLP.

Mastercard is represented by Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, case number 1:05-md-01720, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Matthew Perlman and Nadia Dreid. Editing by Jay Jackson Jr.

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Masimo Hit With Derivative Suit Over Audio Co. Acquisition

By **Katryna Perera**

Law360 (May 2, 2024, 9:23 PM EDT) -- The top brass at medical device company Masimo Corp. has been hit with a shareholder derivative action claiming they harmed the company and "confused" investors by pushing through a \$1 billion acquisition of an audio equipment company, allegedly causing a steep drop in stock prices and a \$5.1 billion market capitalization loss.

Masimo shareholder Linda McClellan filed a **complaint** in California federal court Wednesday against Masimo CEO Joe Kiani, its Chief Financial Officer Micah Young and several board members.

According to the complaint, before 2022, Masimo exclusively sold healthcare products. However, in February 2022, it acquired Sound United, a consumer audio equipment company that produces and sells loudspeakers, sound bars, amplifiers and other sound equipment, according to the suit.

The \$1 billion acquisition was the largest deal in Masimo's history, but it confused investors and employees since the two companies operate in vastly different industries.

"[Employees] failed to understand the purpose of the acquisition and considered it a 'strange marriage,'" the complaint says.

In the wake of the deal's announcement, Masimo's stock price declined, and the company lost \$5.1 billion in market capitalization, the suit alleges.

McClellan claims Kiani was advised internally and by outside consultants against the transaction, but pushed it through anyway. McClellan also claims that before the acquisition, Sound United had several material, undisclosed deficiencies and was "plagued by ineffective internal controls and a culture of fraudulent practices."

After the deal closed in April 2022, the complaint states Masimo and Sound United failed to achieve "synergy" and continued to operate as separate entities. Masimo also began to experience rising inventory and stagnating sales in its new nonhealthcare segment, according to the complaint.

"The issues were exacerbated by pervasive deficiencies in the company's internal controls and by a complete failure to integrate Sound United into the company's existing operations. As demand for Masimo's healthcare products began to decline by the end of 2022, the company lost its ability to compensate for its struggling non-healthcare segment," the complaint states.

Despite these issues, McClellan says Masimo's executives and board continued to tout the deal's success, and issued several false and misleading statements about Masimo's financial guidance and the supposed "strong demand" for the company's products.

The truth began to come to light in 2023 when Masimo revealed "dismal" financial results for the second quarter of the year and substantially lowered its full-year financial guidance, the complaint says.

McClellan says on this news, Masimo's declined almost 20% from \$147.16 per share on July 17, 2023, to \$117.73 on July 18, 2023. Additionally, as the market continued to "digest the news," the stock price fell again to close at \$112.28 per share on July 19, 2023.

A second stock price drop occurred in August when Kiani told investors during an earnings call that Masimo would reduce its expenses by \$100 million "to mitigate the impact of the shortfall on revenues," according to McClellan. On this news, Masimo's stock fell from \$120 per share on Aug. 8, 2023, to \$117.96 per share on Aug. 9, 2023, the suit says.

Shortly after the stock drop, the company was hit with a **securities class action** in California federal court alleging it misled investors by not disclosing that it was unable to accurately project sales and revenue metrics in its securities filings.

McClellan's suit seeks damages, attorney fees and a jury trial.

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

McClellan is represented by Betsy C. Manifold, Rachele R. Byrd, Alex J. Tramontano and Ferdeza Zekiri of Wolf Haldenstein Adler Freeman & Herz LLP and Seth D. Rigrodsky, Timothy J. MacFall and Samir Aougab of Rigrodsky Law PA.

Counsel information for the defendants was not immediately available.

The case is McClellan v. Masimo Corporation et al., case number 3:24-cv-00781, in the U.S. District Court for the Southern District of California.

--Editing by Drashti Mehta.

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ADM Investor Says Brass Misled About Growth, SEC Probe

By **Katryna Perera**

Law360 (May 2, 2024, 7:31 PM EDT) -- The current and former top brass of food processing company Archer-Daniels-Midland were hit with a derivative suit in Delaware federal court alleging they provided false information to investors about the company's growth and failed to disclose a U.S. Securities and Exchange Commission's investigation into its nutrition business.

Shareholder Joseph Galea **filed a complaint** on Wednesday against several of ADM's current and former executives and board members, including Juan Luciano, the company's current CEO, president and board chairman; and ADM's Chief Financial Officer Vikram Luthar.

According to the complaint, ADM is a multinational food processing and commodities trading corporation that produces oilseeds, corn, wheat, cocoa and other agricultural products. The nutrition segment of its business operates within various markets, including food, beverage, nutritional supplements and pet food.

From 2014 through 2019, the complaint states that ADM began increasing its growth by acquiring several companies, and in February 2020, it reported that the operating profit for its nutrition segment had increased by 23%, compared to a 9% increase the previous year.

Following the growth of the nutrition segment, ADM announced "short-term and long-term incentive compensation plans" designed to focus on the continued growth of the segment, according to the complaint.

Galea said that in January 2021, Luciano advertised that ADM's nutrition business was expected to enter a period of annual operating profit growth that would average 15%. That same year, Luciano's statements turned out to be accurate as the nutrition business saw increased earnings of more than 20%, according to the complaint.

However, Galea said, the growth was unsustainable. In 2022, the nutrition segment's operating profit only grew by 7%, and its earnings declined by roughly one-fifth in 2023.

Despite these declining results, investors were told that they should expect continued growth in the latter half of 2023, and ADM continued to push forward with its "aggressive M&A strategy" by announcing two more acquisitions for the nutrition segment in December.

According to Galea, the statements made about ADM's prospects were false, and shareholders were unaware that the company's accounting practices were hiding the true performance and growth of the nutrition segment, and impacting the accuracy and reliability of ADM's financial statements.

The truth began to emerge in January when ADM announced it had placed its CFO, Vikram Luthar, on leave, effective immediately.

"The company said that Luthar's 'leave is pending an ongoing investigation being conducted by outside counsel for ADM and the board's audit committee regarding certain accounting practices and procedures with respect to ADM's nutrition segment, including as related to certain intersegment transactions,'" the complaint states. "The company also revealed that its investigation was initiated in response to its receipt of a voluntary document request by the SEC."

As a result of the investigations and regulatory inquiries, ADM delayed its fourth quarter and fiscal year 2023 earnings release and withdrew its outlook for the nutrition segment, according to the complaint.

On this news, Galea said ADM's stock fell by \$16.23 per share, or 24%, from \$68.19 per share to \$51.69 per share on Jan. 22.

He said that over the last four years, the defendants have caused ADM to issue false and misleading statements to investors and have known, or were reckless in not knowing, that the nutrition segment's financial reporting and accounting practices did not provide investors with an accurate impression of the company's performance and prospects, and that the nutrition segment's accounting practices "created a heightened risk of regulatory scrutiny and adverse impacts to ADM's business."

The suit seeks damages, restitution, attorney fees, and reforms and improvements to ADM's corporate governance and internal procedures.

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

Galea is represented by Ryan M. Ernst of Bielli & Klauder LLC, and Gregory M. Nespole, Daniel Tepper, Correy A. Suk and Sidharth Kakkar of Levi & Korsinsky LLP.

Counsel information for the defendants was not immediately available.

The case is Galea v. Luciano et al., case number 1:24-cv-00534, in the U.S. District Court for the District of Delaware.

--Editing by Lakshna Mehta.



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Split 10th Circ. Spikes \$17.3M Atty Fee Over Class Notice

By **Dorothy Atkins**

Law360 (May 2, 2024, 4:54 PM EDT) -- A split Tenth Circuit panel has vacated for a second time a \$17.3 million attorney fee award for reaching a \$52 million class action settlement over gas well royalty payments, with the majority writing that the lower court erred by not requiring a new class notice regarding the revised fee bid.

In a 44-page published opinion Wednesday, U.S. Circuit Judge Veronica S. Rossman wrote for the 2-1 majority that the trial judge got it wrong when he found that class counsel wasn't required to send the 21,000 class members a new class notice in 2018 regarding the revised attorney fee request after its previous fee bid had been vacated by another Tenth Circuit panel.

The majority noted that although the amount of fees awarded didn't change between the initial fee request in 2015 and the revised request in 2018, class counsel provided more material supporting its revised fee request and made new arguments regarding the fees, so class members may have been harmed by not being aware of the changes.

"It takes little guesswork to conclude class members would have been prejudiced by their inability to review voluminous evidence about class counsel's work that was not previously available," Judge Rossman wrote.

But in a 19-page partial dissent, U.S. Circuit Judge Timothy M. Tymkovich wrote that while he agreed with the majority's finding regarding class counsel's failure to notify the class, he doubted that any other objections would arise given proper notice or that the class members were harmed by the lack of notice.

"Given that failure to provide more notice is unlikely to have affected the substantial rights of the class (whether to object or the fees ultimately awarded), I would conclude that the error here (if any) was harmless," Judge Tymkovich wrote.

The split ruling is the latest chapter in litigation that goes back to 2011, when Chieftain Royalty Co. filed a proposed class action on behalf of a roughly 21,000-member class, alleging that the well operator SM Energy Co. underpaid oil and gas royalties due on wells in Oklahoma.

The well operator cut a \$52 million deal to settle the litigation, and after it was preliminarily approved in September 2015, Chieftain Royalty filed a motion seeking 40% of the settlement in attorney fees, and an incentive award for its CEO, Robert Abernathy.

The court awarded \$17.3 million in attorney fees, or 33% of the settlement, along with a \$260,000 incentive award, which represents 1% of the settlement.

But two class members — Charles David Nutley and Danny George — challenged the deal, arguing that the incentive award was "astronomical," that the fee award was "excessive" and that the trial judge was required to use the lodestar approach under Oklahoma law instead of the percentage-of-the-fund approach.

In 2017, another Tenth Circuit panel affirmed the settlement, but reversed the fee and incentive awards, agreeing with the objectors and observing that class counsel didn't provide necessary records about their hours to be used in a lodestar calculation, which could end up preventing them

from getting fees at all. Any figures about hours worked were "mere estimates," the opinion said, and so the panel remanded the dispute to the U.S. District Court for the Western District of Oklahoma for further proceedings.

The panel also erased the \$260,000 incentive award for the Chieftain CEO, finding that the percentage-based incentive award was unsupported by the record.

The U.S. Supreme Court **declined to review** the Tenth Circuit's decision in November 2018, and on remand, the trial court **reawarded the same \$17.3 million in fees** and only slightly reduced the incentive award to \$232,440, but the objectors again challenged the decision.

One objector argued that the latest attorney fee motion required classwide notice because it involved a lodestar calculation, a new request for \$3 million in appellate services and numerous documents not previously provided to the class.

But U.S. District Judge Timothy D. DeGiusti rejected the objector's arguments across the board, and said his review of the class attorneys' hourly work on the case supports the \$17.3 million attorney fee request.

Judge DeGiusti also noted that while the fee dispute was being hashed out, the Oklahoma Supreme Court **issued controlling guidance**. In its 2021 opinion in **Strack v. Continental Resources Inc.** , the state's high court said the percentage-of-the-fund approach was an acceptable way to calculate a fee award, so long as the percentage was still found to be reasonable after being cross-checked using the lodestar approach.

Additionally, the trial judge said the six-figure incentive award was supported by the 774.8 hours Abernathy spent working on the case multiplied by a reasonable hourly rate of \$300.

But the objectors again took their challenges to the Tenth Circuit, and on Wednesday, the panel majority affirmed Abernathy's incentive award, but vacated the attorney fee award.

The majority agreed with the objector that the class should have been notified of the 2018 attorney fees motion, and that the district court erroneously concluded otherwise.

The majority wrote that the 2018 fee bid was an "altogether different motion for attorneys' fees" seeking different fee amounts for different work and with much more information and details provided.

"Under these circumstances, we cannot say the 2015 class notice provided the class with notice of the 2018 motion for attorneys' fees, even if class counsel titled the 2018 motion as merely a 'renewed' motion for attorneys' fees," the majority wrote.

The majority added that without notice of the 2018 motion for attorneys' fees, the class never had an opportunity to object to the new fee request or scrutinize the new supporting evidence, and the majority "will not speculate to find the error harmless."

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

U.S. Circuit Judges Timothy M. Tymkovich, Nancy L. Moritz and Veronica S. Rossman sat on the panel for the Tenth Circuit.

Chieftain Royalty is represented by Bradley E. Beckworth of Nix Patterson LLP.

Objector C. Benjamin Nutley, representing the estate of Charles David Nutley, is represented by Eric Alan Isaacson.

Objector Danny George is represented by John Jacob Pentz III.

The case is Chieftain Royalty Co. v. SM Energy Co. et al., case number 22-6069, in the U.S. Court of Appeals for the Tenth Circuit.



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Attys Due For Spam Suit Sanction, But Not \$750K, Judges Say

By **Greg Lamm**

Law360 (May 2, 2024, 8:54 PM EDT) -- Class counsel's misconduct in helping instigate a spam text suit against stock-trading app Robinhood Financial LLC warranted sanctions, a Washington state appeals court panel ruled Thursday, but the judges said the \$750,000 penalty went over the top in deterring the bad behavior.

A three-judge panel ruled that a trial court didn't err when it found that behavior by plaintiff Issac Gordon and his attorneys, including Brian G. Cameron, deserved to be punished. But the judges said the trial court assessed attorney fee sanctions under the state's frivolous claim statute and minor claims statute, which were not meant to be applied to complex class action litigation.

In **their opinion**, the judges remanded the \$750,000 in sanctions for the trial court to determine what amount was necessary to deter Gordon's and his legal counsel's "claim-manufacturing practices."

The panel said the trial court should consider the financial resources of the sanctioned counsel.

"Although we do not disturb the trial court's finding that 'substantial sanctions' are necessary, 'substantial' is a relative term," said Judge Robert Lawrence-Berrey, writing for the panel. "Small ships do not need large rudders to turn around."

The case involves accusations that Cameron, one of the appointed class counsel, and his brother orchestrated the lawsuit by forwarding texts about Robinhood's "Refer a Friend" marketing program to plaintiffs, who then claimed they did not know who sent the messages.

In their opinion, the judges said that, through discovery, it became apparent that Gordon had received the offending text message from Cameron's brother. It also became apparent that Gordon and his attorney had manufactured his claim, and that they had done this in other class action cases, the judges said.

Once caught, Gordon and his attorneys surreptitiously dismissed the lawsuit without prejudice, the judges said. On reconsideration, the trial court tossed the lawsuit with prejudice and slapped sanctions against Gordon and his attorneys for \$750,000.

A federal judge in a similar case later ruled that Robinhood could still be on the hook for violating anti-spam law if the company assisted in the text marketing program. In that case, in which Robinhood **agreed to pay \$9 million** to resolve proposed class claims, the judge determined that as long as Robinhood played a role in the Refer a Friend program, it did not matter that the spam texts were coming from class counsel.

In Thursday's opinion, the state appellate panel said Gordon's claim in the anti-spam suit was not frivolous. And the panel said Washington's minor claims statute — designed to encourage out-of-court settlements and to punish parties who unjustifiably bring or resist small claims — was misapplied in rendering sanctions in the state Robinhood case.

The judges said Gordon was a nominal party in the class action seeking more than \$5 million.

The judges noted that Robinhood sought to pressure Gordon, the putative class representative, to

settle his claim for \$1,501 or risk being on the hook for more than \$100,000 of Robinhood's attorney fees.

The judges said settlement of the putative class representative's claim would have cost Robinhood only \$1,501, but it would have forced plaintiffs' counsel to find a new putative class representative, who might then have received a similar settlement offer, the judges said.

The judges said that state lawmakers did not intend for the minor claims statute to apply to class action lawsuits, which are complex cases in which millions of dollars are often at stake.

Representatives for Gordon, Cameron and Robinhood did not immediately respond Thursday to requests for comment.

Judges George Fearing, Robert Lawrence-Berrey and Rebecca Pennell sat on the panel for the Washington Court of Appeals, Division III.

Gordon is represented by Kirk Miller of Kirk D. Miller PS and Brian G. Cameron of Cameron Sutherland PLLC.

Robinhood Financial is represented by Kenneth E. Payson and Lauren Rainwater of Davis Wright Tremaine LLP.

The case is Isaac Gordon v. Robinhood Financial LLC, case number 386236, in the Washington Court of Appeals, Division III.

--Editing by Rich Mills.

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Camp Lejeune Litigants Ask Court Who Can Represent Family

By **Emily Field**

Law360 (May 2, 2024, 8:53 PM EDT) -- Family members of former residents of Camp Lejeune who died, allegedly after being exposed to contaminated drinking water, asked the North Carolina federal court overseeing the litigation on Wednesday to clarify who can qualify to act as a legal representative for out-of-state decedents.

Five family members of people who have died of diseases allegedly caused by drinking the contaminated water said they needed clarification on the process for meeting the standards to act as legal representatives for their loved ones, saying the need is growing as aging and sick veterans continue to die and the number of their survivors who need guidance grows.

"These numbers increase daily. Many thousands of claims have been filed on behalf of a deceased family member and many more such representative claims will be filed," five of the plaintiffs said in a memo supporting their motion for partial summary judgment, filed in the U.S. District Court for the Eastern District of North Carolina. "Absent clear guidance from this court, lingering questions about legal representative status could impose enormous costs and risks on the parties, and burdens on the legal system."

Nearly 1,500 lawsuits have been filed claiming that water on the military base, in Jacksonville, along North Carolina's Crystal Coast, 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.

The plaintiffs say that the number of claims could grow to a million.

Two of the plaintiffs named in the motion, James Key II and Patricia Key, are siblings who say their parents lived on the Marine base between 1961 and 1963 and died of diseases caused from drinking the water. Their mother, Patricia, died from non-Hodgkin's lymphoma and an autoimmune disorder in 2022 and their father, James Sr., from Parkinson's disease in January.

They say that the Camp Lejeune Justice Act, signed in 2022, doesn't give details on how to qualify as legal representatives, so it's up to the court to clarify.

Earlier this week, the leadership group for former residents told the court that it's too soon to limit trials to plaintiffs who allege only one disease.

The plaintiffs' leadership group said Monday that it's too early to limit selecting 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 group 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.

In April, the government asked the North Carolina court to first try cases brought by former residents of the Marine base who allege that they have developed only one disease from the water and try

more complicated cases later.

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

Representatives for the government declined to comment on Thursday. Representatives for the plaintiffs did not immediately respond to requests for comment.

The plaintiffs are represented by Bell Legal Group LLC, Keller Postman LLC, Ward and Smith PA, the Dowling Firm PLLC and Lieff 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 Karin Roberts.

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Chancery Ruling Plays Role In Tesla's S&P Governance Grade

By Jeff Montgomery

Law360 (May 2, 2024, 7:33 PM EDT) -- Business rating agency Standard & Poor's has revised downward to "moderately negative" electric vehicle company Tesla Inc.'s grade for management and governance, pointing in part to CEO Elon Musk's dominant role, and the company's "uncommonly high" risk from lawsuits, including the Delaware Chancery Court's recent scuttling of his \$56 billion pay plan.

Although S&P kept the company's overall rating steady at BBB, Musk's negatives stood out. The agency's Wednesday report noted Tesla's "very high 'key person risk'" related to Musk himself, an assessment it said was highlighted by the Jan. 30 Chancery decision **striking down** a 10-year Musk compensation plan dating to 2018.

"In our view, to mitigate this risk, Tesla will need to significantly enhance the independence of its board and/or nominate new independent directors who do not have strong ties to Musk," S&P said.

The score emerged as attorneys for Tesla and company stockholders were lining up plans for briefing on a motion for the court to seize or shelter in a trust billions in company stock potentially cut loose by Chancellor Kathaleen St. J. McCormick's ruling on Musk's compensation.

Musk and the independence of directors for the companies he controls has been a central issue in other high-stakes, highly publicized Delaware cases in recent years. They include challenges to Tesla's \$2.6 billion takeover of rooftop solar venture SolarCity, U.S. Securities and Exchange Commission sanctions against Musk for tweeting about his businesses and litigation over Musk's acquisition of Twitter itself.

"Though none of these lawsuits or investigations so far have had any material impact on Tesla's brand or strong financial condition, in our view, the company remains overexposed relative to peers," the S&P added.

Also among the Musk-tied uncertainties is a scheduled June 13 Tesla stockholder vote on a potentially disruptive company proposal to reincorporate in Texas, where Tesla already is headquartered.

Tesla and Musk announced the reincorporation bid on Feb. 1, after an online poll of his followers on X, formerly Twitter, that was launched after Chancellor McCormick's ruling.

Musk also moved the charter of another prominent company, Space Exploration Technologies Corp., or SpaceX, from Delaware to Texas, days after the same compensation ruling, while shifting the charter of Neuralink Corp. from Delaware to Nevada at around the same time.

Anat Alon-Beck, associate professor of law at Case Western Reserve University, said Thursday it was unclear whether Musk's proposal to take Tesla into Texas, where a new business court won't fully open until late 2025, will succeed.

"I don't have a crystal ball as to what is going to happen. If I was an institutional investor, I wouldn't want this. Why would I want to have legal uncertainty?" Alon-Beck said.

"Chancellor McCormick got so much criticism," after the Musk compensation ruling, Alon-Beck said. "But she called it. He's been acting as if the board is just rubber-stamping whatever they're doing

based on what? His Tweets? Seriously? You can't make these things up."

Tesla did not immediately respond to a request for comment.

Corporation laws in Texas and Nevada both have some features in common with Delaware's including required director adherence to their duties as fiduciaries and duties of care through informed decision-making and active participation. Both states also oblige directors to act loyally, in the best interests of their companies.

But Alon-Beck said other states currently cannot offer the kind of certainty and structure of Delaware's corporation laws, or the value found in its courts.

"What's best for the company and what's best for the law firms is to have legal certainty," Alon-Beck said. "This could have been avoided if [Musk] would have just followed good corporate governance from the beginning."

Jill E. Fisch, Saul A. Fox distinguished professor of business law at the University of Pennsylvania Carey Law School, acknowledged before the S&P rating report rumblings of concern about the direction of Delaware court decisions.

State lawmakers are expected to take up legislation, not yet introduced, before the end of June overhauling some sections of Delaware's General Corporation Law in response to decisions that created a stir.

Among the proposed bill's spurs is Vice Chancellor J. Travis Laster's decision in **West Palm Beach Firefighters Pension Fund v. Moelis & Co.**, which shot down as "facially invalid" most provisions of a stockholder agreement that gave the company's controlling stockholder effective veto rights over many board decisions.

"There's a question of 'Where's the law going?'" Fisch said, and what role do Delaware's courts play in operating as a safeguard, Fisch said. "Do people invest in Delaware-incorporated companies with dual class stock because they know Delaware courts have their back?"

--Editing by Alex Hubbard.



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Chicken Buyers Request \$37M More In Price-Fixing Deal Fees

By **Lauraann Wood**

Law360 (May 2, 2024, 9:52 PM EDT) -- Direct broiler chicken purchasers who've inked more than \$284 million in price-fixing settlements are asking an Illinois federal judge for more than \$37 million in what would be a third distribution of fees and reimbursed costs to their co-lead counsel in the massive case.

The request is both reasonable and appropriate because the lawyers leading the charge for the direct buyers' claims expended "enormous resources" to pursue their case and successfully litigate complex issues, including at the class certification and summary judgment stages, their Wednesday motion told U.S. District Judge Thomas Durkin, who has presided over the case since its 2016 inception.

"The successful litigation of this complex antitrust class action reflects the skill, expertise and hard work of co-lead class counsel and other direct purchaser plaintiff counsel ... and the benefit to DPP class members is substantial, real and concrete compared to the significant litigation risks this case presented," the motion asserted.

If granted, the award would follow the more than \$59 million in fees and reimbursement class counsel received in 2021 from **their settlements** with Fieldale Farms Corp., Peco Foods Inc., George's Inc., Amick Farms LLC, Pilgrim's Pride Corp. and Tyson Foods Inc., as well as the nearly \$4.5 million they received in litigation expense reimbursement in December 2023 from deals they struck with **Mar-Jac Poultry Inc.**, Harrison Poultry Inc., Simmons Foods Inc., Mountaire Farms LLC, and OK Foods Inc., according to the motion.

Beyond the monetary component of the direct purchasers' settlements, which also includes deals with Koch Foods **and House of Raeford Farms**, each contained a cooperation agreement that helped the direct purchasers not only continue to litigate their case, but also go to trial **against Sanderson Farms**, according to the motion. And even **after losing** at trial, class counsel continued to work and eventually secured settlements with Sanderson and six other chicken producers **that won** summary judgment **to eliminate** additional costs those parties could have sought following post-trial proceedings, the buyers told Judge Durkin.

But the third round of payment is also warranted because class counsel performed a significant amount of heavy lifting to get the case off the ground and keep it moving forward, the direct purchasers argued. For instance, class counsel litigated the case for about two and a half years before the U.S. Department of Justice began investigating the alleged price-fixing at issue, and when it did, subpoenaing class counsel's extensive discovery record was the department's very first step in the process, the motion said.

"Class counsel believed in DPPs' case; invested extensive amounts of their time, effort and money; and prosecuted it vigorously," the purchasers told Judge Durkin. And the attorneys did so "at the risk of no recovery and declined other opportunities because of the complexity, time and expense this case demanded," they added.

The direct buyers' counsel declined to comment on Thursday, and representatives for the settling defendants didn't immediately respond to a request for comment.

Private plaintiffs began suing the nation's largest broiler-chicken producers in September 2016, claiming the companies coordinated and limited chicken production to raise prices and exchanged

detailed information about capacity, sales volume and other data through statistical research compiler Agri Stats Inc.

The litigation eventually ballooned into a sprawling consolidated case moving along on two tracks, with plaintiffs from nearly every point in the supply chain comprising three classes in each.

At trial, the direct purchasers asserted that Sanderson **banded together** with major producers Pilgrim's Pride and Tyson Foods to get more companies on board with the scheme to limit their chicken supply, which led to two unprecedented drops in product availability between 2008 and 2012 and the longest sustained period of profitability in the chicken business.

The conspiring companies didn't expressly agree to engage in such anti-competitive conduct, but Sanderson used several tools including earnings calls and Agri Stats to publicly signal its supply-reduction plans and prompt other companies to follow suit, the buyers alleged.

But Sanderson **blasted those assertions**, saying the purchasers had changed their story as the trial progressed, and that their liability theory ignored not only "what really happened" to the industry during the years at issue, but also how chicken is sold in the real world.

For instance, soaring prices for corn — the main component used in chicken feed — caused a significant financial strain on chicken producers, Sanderson argued. The country was also experiencing a major recession during most of the years at issue, which impacted how and where consumers bought chicken, the company asserted.

A class of commercial and institutional indirect purchasers proceeding along the case's so-called track one were set to take their shot before a jury in March, but they struck settlements that removed the anticipated courtroom showdown from the court's calendar. The class of end users also proceeding on track one will go to trial in early September, according to court records.

The direct purchasers are co-led by Lockridge Grindal Nauen PLLP and Pearson Warshaw LLP.

Law firms representing the settling defendants include Axinn Veltrop & Harkrider LLP, Armstrong Teasdale LLP, Quinn Emanuel Urquhart & Sullivan, Vedder Price PC and Kutak Rock LLP.

The case is In re: Broiler Chicken Antitrust Litigation, case number 1:16-cv-08637, in the U.S. District Court for the Northern District of Illinois.

--Editing by Melissa Treolo.



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Discover Ups Liability Costs For Card Pricing Issue To \$1.2B

By **Katryna Perera**

Law360 (May 2, 2024, 4:42 PM EDT) -- Discover Financial Services has put a \$1.2 billion price tag on remediation for its previously disclosed credit card pricing misclassification, which is now the subject of a U.S. Securities and Exchange Commission investigation, representing an increase of nearly 230% from the \$365 million liability it recorded nearly a year ago.

In a Form 10-Q filed with the SEC on Wednesday, Discover stated that based on its remediation efforts through the first quarter of 2024 and its pending merger with Capital One, the company determined it was "appropriate to increase its estimate of total remediation."

"The company increased its liability to \$1.2 billion through a charge to other expense for the three months ended March 31, 2024, to reflect the total amount the company now expects is probable to be disbursed in relation to the card product misclassification," the filing states.

The new recorded liability is a significant increase from the \$365 million Discover recorded last June to reimburse merchants and merchant acquirers due to its credit card misclassification.

The company disclosed last year that compliance failures had led it to misclassify certain credit card accounts beginning in 2007 by incorrectly placing the accounts in its highest pricing tier for merchants and acquirers.

According to Wednesday's filing, Discover completed the reclassification of its cards in November. As of Dec. 31, 2023, the balance of the liability was \$375 million, reflecting \$12 million of settlement disbursements made through that date and an additional \$11 million for the estimated effect of the prior card price tiering on discount and interchange assessments recorded in the last two quarters of 2023.

The filing also states that Discover has continued settlement discussions in 2024 and has made an additional \$9 million in settlement disbursement through the first quarter of the year.

Discover disclosed in October that it "is cooperating with an **SEC investigation** into the card product misclassification matter," and noted that it is also facing various lawsuits and may incur regulatory fines in the future stemming from the misclassification issue.

The company noted Wednesday that it doesn't know the final amount of potential refunds to merchants but believes "additional losses are probable as a result of these actions, and such losses could be material."

Discover also stated in its Wednesday filing that it remains in discussion with regulators and expects the discussions to result in enforcement actions, which may include remedies such as monetary penalties, "the amount of which cannot be estimated at this time and could be material."

Discover did not immediately respond to requests for comment on Thursday.

Top executives at Discover said last August that the company is "paying the price" for past underinvestment in compliance, days after former CEO Roger Hochschild abruptly left the company.

The company announced last July that it was pausing share buybacks pending an internal review of

its "compliance, risk management and corporate governance," pointing to the misclassification issue.

In October, the company reached a consent order with the Federal Deposit Insurance Corp. requiring it to rigorously review and bolster its consumer compliance infrastructure but sparing the company any fines.

Some of the other litigation Discover is facing over the misclassification issue include a **proposed class action** in Illinois federal court accusing it of misleading investors about its risk management and compliance protocols before oversight issues at the financial services giant came to light and Hochschild left the company.

The company's current and former top brass have also been named in a shareholder derivative suit in Delaware federal court, alleging **they caused** the misclassification issue as a result of an acknowledged compliance failure, leading to lost value and exposure to litigation and regulatory enforcement.

In February, Capital One announced that it would acquire Discover in a **\$35.3 billion all-stock deal** that it said would allow it to compete with the nation's top three credit card networks.

The deal is expected to close in late 2024 or early 2025, subject to closing conditions, regulatory approvals, and approvals by the shareholders of each company.

--Editing by Jay Jackson Jr.

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Titan Of The Plaintiffs Bar: Quinn Emanuel's Steig D. Olson

By **Patrick Hoff**

Law360 (May 2, 2024, 3:09 PM EDT) -- When Steig D. Olson was about 7 years old, his mother served as a juror in the trial of an Oklahoma man accused of having a gun in a bar, and Olson's parents took him to see part of the trial.





Steig D. Olson

Quinn Emanuel

Why He's An Attorney:

"I always saw the law as a sort of force to protect people, and as I grew up and developed my own conceptions of justice and what was important, that was the aspect that appealed to me."

"It was just this poor guy in a bar who was a convicted criminal, but I was really struck by how his lawyer generated sympathy for him, and also came up with this incredibly creative defense," Olson said.

The defense — that the man's pants were too tight for him to have quickly gotten rid of the gun when a police officer walked in — ultimately convinced the jury to acquit the man, and Olson said this left an imprint during a formative period of his life.

"This guy had nothing going for him, but he had a good lawyer who was able to get him acquitted, and I think that's what impressed me," he said. "I always saw the law as a sort of force to protect people, and as I grew up and developed my own conceptions of justice and what was important, that was the aspect that appealed to me."

Olson, now a partner at Quinn Emanuel Urquhart & Sullivan LLP, said that although his practice has broadened since his early days of exclusively doing plaintiff-side work, he's still drawn to "protecting the little guy from abuse and using the law to fight the misuse of power." Last year, for example, Olson helped secure a **\$500 million settlement** for investors who accused major financial institutions of colluding to thwart the modernization of the trillion-dollar stock loan market, earning him a place among **Law360's 2024 Titans of the Plaintiffs Bar**.

Michael Eisenkraft of Cohen Milstein Sellers & Toll PLLC, who was co-counsel with Olson on that case, said it's fun working with him, and he considers Olson to be one of the smartest lawyers with a variety of tools at his disposal.

Eisenkraft said that the first time he saw Olson argue in court, he was impressed that Olson was able to take a calm and measured approach that conveyed a sense of certainty.

"You just listen, and you're like, 'Yes, that is completely right.' He is extremely persuasive,"

Eisenkraft said. "You're just listening, and that's the best possible way of putting that. It makes everything sound not just correct, but the only possible outcome."

Olson told Law360 that one of the things he's proudest of in his career thus far is helping to build a practice at Quinn Emanuel that's had repeated success in going toe-to-toe with some of the world's biggest banks. Olson said that while it can be daunting at times, he feels lucky to be at a firm with the resources and talent to take on large complex cases, such as representing Home Depot in a long-running case accusing Visa and Mastercard of forcing merchants to accept cards with high transaction fees.

Home Depot in July 2019 opted out of a \$5.5 billion settlement class and last year reached a confidential settlement with Visa. In January, U.S. District Judge Margo K. Brodie said there was **more than enough evidence** for Home Depot's claims against Mastercard to go to trial, though the retailer and the payment services company agreed to settle those allegations in April.

"There's really no other firm that's a peer of ours that does cases like that and supports cases like that," Olson said. "They might do one or two, but none do them nearly at the level that we do them."

Greg Asciolla of DiCello Levitt said one thing that stands out about Olson is the strategic way he approaches cases by thinking almost from the outset about litigating through trial, which is rare in the antitrust practice. Asciolla has worked alongside Olson several times, including recently as co-lead counsel in a class action alleging that the largest aerospace engineering firms in the U.S., including Raytheon Technologies Corp.'s Pratt & Whitney division, conspired to ensure they wouldn't hire each other's engineers and skilled industry workers.

U.S. District Judge Sarala V. Nagala in January 2023 **denied** two motions to dismiss the no-poach suit, and late last year, the workers **struck deals** with several of Pratt & Whitney's subcontractors.

"Many antitrust cases settle, and it's relatively infrequent that a case goes to trial," Asciolla said. "So the ability to be able to be thinking about trial from day one really helps. ... He really has a strong grasp of the facts of the case, and that comes through as we share a work product."

Jeffrey Shinder of Constantine Cannon LLP also said that while Olson can have strong opinions — as most good lawyers do on certain issues — he's willing to defer to someone else if he doesn't know something, which makes for a good partnership. Shinder served as co-counsel with Olson in the case over interchange fees against Visa and Mastercard.

"He's good at tapping into that reservoir of specialized talent that can bring different perspectives to the table as part of that," Shinder said. "He really was a pleasure to work with, and we did well. And he was a big part of that."

Shinder and Eisenkraft also both noted Olson's talent for taking depositions, including high-profile depositions of executives and CEOs. Shinder said Olson's deposition skills are very trial-driven, and that he has a good sense of how judges are going to react because he clerked for a Second Circuit judge and a California federal judge.

"He's on the aggressive side, which I am, but he's thoughtful about it, which I consider myself to be as well," Shinder said. "We worked well together, and I respect him."

Olson said one thing people don't always appreciate about plaintiff cases is how hard they can be, because "you basically have to keep winning through the whole case."

"You can't get tripped up once," Olson said. "And it's taxing and grueling and stressful, and you don't win all the cases. So, sometimes, especially after doing it for a while, you do sometimes need to recharge your batteries, but you're prepared to keep fighting."

Eisenkraft said working with Olson is exhilarating and motivating, "because he goes full throttle," and it's easy to get caught up in his enthusiasm for the law.

"He's one of my favorite people to work with in the bar," Eisenkraft said. "And he's what a lawyer should be, in terms of being committed to intellectual rigor and making sure the client is represented

in the best way possible."

"It's good we have people like him to make lawyers look good, because sometimes we need that," Eisenkraft added.

--Additional reporting by Lauren Berg. Editing by Nicole Bleier.

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Whistleblower Claims Would 'Destroy' Autonomy, GC Was Told

By **Bonnie Eslinger**

Law360 (May 2, 2024, 11:48 PM EDT) -- Autonomy's former U.S. general counsel testified Thursday in the criminal fraud trial of former CEO Michael Lynch that the company's chief operating officer didn't want a whistleblower's claims to get into court, telling him that while the "law" was on their side, "the facts look bad" and would "destroy Autonomy."

Former CEO Lynch and Autonomy Corp.'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. The **high-profile trial** began March 18 and is expected to run through June.

Joel Scott, who served as general counsel for Autonomy in the U.S. from 2009 to 2012, returned for his fourth and final day on the witness stand. Scott's testimony began **on April 18**, but was postponed three times after that to put other government witnesses before jurors who, the court was told, had pressing schedule concerns.

Scott had **previously told jurors** that he fired Autonomy's U.S. finance chief, Brent Hogenson, in July 2010 after two investigations had been conducted, beginning with a probe into allegations of fraud within Autonomy's U.S. payroll department. It wasn't until later that he learned Hogenson had made whistleblower claims about some of Autonomy's accounting practices, Scott said.

On Thursday, Lynch lawyer Jonathan Baum of Steptoe LLP showed Scott a copy of a report from Autonomy's auditors at Deloitte stating that they had looked at Hogenson's allegations and didn't find any **merit to them**.

"Your understanding at the time was that Mr. Hogenson had actually communicated directly with Deloitte, so he had a chance to communicate whatever he wanted, nobody was filtering his comments," Baum said.

Scott said he recalled Hogenson saying he had reached out directly to Deloitte.

Later, Baum showed Scott correspondence from one of Autonomy's outside lawyers, Gregory Doll of Doll Amir Eley, that recommended settling Hogenson's wrongful termination/retaliation claims. Baum suggested that Scott had been gearing up to fight the claims.

"You thought at this point, you might actually litigate this thing," Baum said.

Scott disagreed, saying his boss, Autonomy Chief Operating Officer and general counsel Andrew Kanter didn't want the case to go public.

"It was made very clear to me that we wanted to settle," Scott said. "Andy had said ... it can't get into federal court."

Autonomy even looked to see if it could be kept confidential through arbitration, Scott said.

"Andy said to me, 'Joel, the facts look bad, but the law is on our side. If Brent goes public, if this goes public, that's going to destroy Autonomy. We can't let that happen,'" Scott told the court.

Baum pointed out that Doll's letter gave a different settlement justification: that litigation could be

costly.

In one California case, an attorney who only recovered \$26,000 in an employment case still walked away with an attorney fee award of \$837,000 that was held not to be unreasonable, Doll wrote.

Autonomy subsequently paid Hogenson **\$750,000** to resolve his wrongful termination claims.

On Thursday, Chamberlain's lawyer, Gary Lincenberg of Bird Marella Rhow Lincenberg Dooks & Nessim LLP, also got his time to cross-examine Scott. During his opening statement in March, Lincenberg had told jurors that his client had been "caught up as a pawn" in a fight between Autonomy and HP.

"I think you testified you had a good relationship with Mr. Chamberlain," Lincenberg said at the start of his cross-examination. "You viewed him as somebody who was honest in his dealings ... straightforward ... and somebody who, from your vantage point, performs his job in good faith."

Scott agreed on all counts.

Lincenberg used much of his time to address assertions by the government that Chamberlain had enabled a \$3.5 million sale of Autonomy software sold through a reseller to Bank of America to be illegally backdated so the revenue would be counted within the last quarter of 2010, when the deal happened in January 2011.

Jurors had previously been presented with documents showing when the reseller deal had been confirmed and how the date had been falsified. Chamberlain knew the deal was backdated because it came to him on Jan. 26, prosecutors told jurors.

Lincenberg showed Scott emails from December 2010 between Scott, Lynch, Chamberlain and Autonomy Chief Financial Officer Sushovan Hussain showing that Bank of America was negotiating an updated contract.

"It appears that what was being negotiated here involved a deal that would have had new license fees of \$19.5 million, do you see that?" Lynch's lawyer asked.

Another email, sent toward the end of the month from Bank of America representatives, states that the deal couldn't be finalized before the close of 2010 because "key individuals instrumental to closure are out."

Lincenberg asked Scott if it was his understanding that Bank of America wanted to do a deal, but it just wouldn't be done in December 2010. He agreed.

Lincenberg also showed the reply Hussain sent acknowledging the disappointing news, which also copied Deloitte's auditors.

Lincenberg then showed Scott an email from another Autonomy lawyer, J. Livius Guiao, that proposed purchase orders for reseller deals for the Bank of America software through three Autonomy resellers.

On Dec. 31, Chamberlain sent a response to Guiao at 11 p.m., New Year's Eve, from his mobile device, saying he doesn't have access to his laptop. "If these are normal-looking reseller deals, then go for it, otherwise call me," Lincenberg reads.

Lynch's lawyer also showed the court an email that Scott wrote weeks later, on Jan. 12, 2011, confirming that Bank of America had agreed to have its deal run through a reseller.

Scott and Chamberlain both questioned backdating one of the documents involved with the reseller deals, but Hussain had allayed those concerns, Lincenberg noted.

"He said that his intent was to show the audit committee the final BofA deal and make the case to take the revenue in Q4 2010," Lincenberg said. "And he advises you that he's not sure if he's going to be successful, but indicates he would be transparent with the auditors."

Lynch's lawyer confirmed that Chamberlain had also told him that Hussain had assured him of the same thing.

Further, Chamberlain had sent Deloitte an email in January saying Autonomy was still waiting on a document for the deal, signaling that he had been transparent with the auditors, Lincenberg said.

According to the government's case, the two executives duped HP into buying the British company at an inflated price of \$11.7 billion by using a variety of dubious revenue boosters, including posting revenue from reseller deals before an end-user was secured, undisclosed hardware sales, and software subscription deals that were prepaid to generate upfront revenue.

The trial continues on Monday.

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 Drooks & 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 Michael Watanabe.

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