

Bloomberg Law

Research Trail

My Work

000888

Help

Account

Bloomberg L...

robbins geller

?

Select Sources

Go

Home

Practice Centers

Litigation

Transactional

Business

Practitioner Tools

News & Analysis

Laws & Regulations

Secondary Sources

Manage Subscription

Bloomberg Law

May 3, 2024, 12:40 PM PDT

Nine-Figure Pattern Energy Buyout Suit Deal Approved in Delaware

By Jennifer Kay

Documents

Docket

- Investors challenged PEGI buyout in state and federal court
- First ever nine-figure settlement for *Revlon* claims

Bloomberg Law News 2024-05-06T13:57:08335897111-04:00
Nine-Figure Pattern Energy Buyout Suit Deal Approved in Delaware

By Jennifer Kay 2024-05-03T15:40:37000-04:00

- Investors challenged PEGI buyout in state and federal court
- First ever nine-figure settlement for *Revlon* claims

Pattern Energy Group LP will pay a historic \$100 million to resolve class action litigation in two Delaware courts over a 2020 take-private buyout of a wind and solar company by Riverstone Holdings LLC and Canada’s public pension fund.

It’s the first nine-figure settlement for a *Revlon* case, where the court applies a higher level of scrutiny to mergers involving a change of control, attorneys said during a hearing Friday before the Delaware Court of Chancery in Wilmington.

“Congratulations, this is a very good result for the class,” Vice Chancellor Morgan T. Zurn said in issuing a brief bench ruling.

“Recovering \$100 million on what are presumptively *Revlon* claims is no small thing,” said Ned Weinberger of Labaton Keller Sucharow LLP, representing the settlement class.

Zurn also approved a \$26.2 million fee award for the attorneys who represented former Pattern Energy Group Inc. shareholders, along with reimbursement for \$2.7 million in litigation expenses.

Under a standard named for a 1986 Delaware Supreme Court case, *Revlon Inc. v. MacAndrews & Forbes Holdings Inc.*, a board negotiating a merger has a duty to maximize the price.

Parallel Suits

The settlement ends parallel lawsuits in the Delaware Court of Chancery and US District Court for the District of Delaware. The parties agreed to seek approval only from the Chancery Court “for purposes of administrative convenience and efficiency,” according to a filing detailing the terms of the proposed settlement.

The lawsuits alleged the merger was a conflicted sale process in which Riverstone and PEGI officers and directors blocked a better third-party offer and issued a misleading proxy to obtain stockholder approval.

The parties reached a settlement eight weeks before the federal lawsuit was scheduled to go to trial.

Zurn also approved incentive awards totaling \$50,000 for the plaintiffs who led the two lawsuits.

The class is represented by Labaton Keller Sucharow LLP, **Robbins Geller** Rudman & Dowd LLP, Schall Law Firm, Farnan LLP, Entwistle & Cappucci LLP, Susman Godfrey LLP, and Fields Kupka & Shukurov LLP. Pattern Energy Group and other defendants are represented by Shearman & Sterling LLP, Abrams & Bayliss LLP, Richards, Layton & Finger PA, Sullivan & Cromwell LLP, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Potter Anderson & Corroon LLP, and Ropes & Gray LLP.

The case is In re Pattern Energy Grp. Inc. S'holders Litig., Del. Ch., No. 2020-0357, settlement hearing 5/3/24 .

To contact the reporter on this story: Jennifer Kay in Philadelphia at jkay@bloomberglaw.com

To contact the editors responsible for this story: Alex Clearfield at aclearfield@bloombergindustry.com; Patrick L. Gregory at pgregory@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law

Contact Us

View Full Desktop Site

Public Employees Retirement Association of New Mexico v. Earley

DJ [dailyjournal.com/dar/282547](https://www.dailyjournal.com/dar/282547)



Daily appellate reports

Do you agree with this judgment?

[Bookmark](#)

Civil Procedure, Bankruptcy

☐ Concur 0

☐ Dissent 0

Ruling by

Danielle Forrest

Lower Court

USDC Northern District of California

Lower Court Judge

Edward J. Davila

Staying securities fraud proceedings as to individual defendants during corporate Chapter 11 proceedings for judicial efficiency was inappropriate without weighing potential prejudice to shareholder plaintiffs in the fraud action.

Court

9th

Cite as

2024 DJDAR 3722

Published

May 6, 2024

Filing Date

May 3, 2024

Opinion Type

Opinion

Disposition Type

Vacated and Remanded

Oral Argument

Sep. 13, 2023

Summary

In June 2018, shareholders of Pacific Gas & Electric Company filed suit against PG&E and some of its officers, directors, and bond underwriters, alleging violations of securities laws. After the operative complaint was filed, PG&E filed for Chapter 11 bankruptcy, resulting in an automatic stay in the action as to PG&E but not as to the individual defendants. In November 2022, despite objection from the shareholder plaintiffs, which included the possibility of lost evidence from lengthy delay, the district court entered a stay as to the individual defendants

in the securities fraud action for the duration of the Chapter 11 proceedings, citing judicial efficiency and overlapping issues between bankruptcy proceedings and the securities fraud action as justifications. The shareholder plaintiffs appealed that order.

Vacated and remanded. When deciding whether to issue a docket management stay, district courts must weigh the possible damage that may result from granting the stay; the hardship or inequity a party may suffer in being required to go forward; and the orderly course of justice measure in terms of simplifying or complicating of issues, proof, and questions of law. Importantly, judicial efficiency on its own is not necessarily a sufficient ground to warrant imposing a stay. Moreover, even if there are efficiencies to be gained from a stay, it must still be determined if the stay will damage someone else: If so, the efficiency gained must be weighed against the hardship imposed. Here, although there were judicial efficiencies to be gained by issuing a stay until the Chapter 11 proceedings were concluded, the shareholders argued they would be prejudiced by a stay due to the danger of lost evidence, competition with other claimants in other proceedings for limited insurance proceeds; and the inability for class members who were unable to submit claims in the bankruptcy proceeding to pursue a remedy in court for an unknown length of time. Unfortunately, the order granting the stay did not address the shareholders' arguments, so there was no indication of the appropriate weighing of factors. Accordingly, the matter was remanded for all relevant interests to be weighed.

— Joshua Ogle

In re: PG&E CORPORATION
SECURITIES LITIGATION,
PUBLIC EMPLOYEES
RETIREMENT ASSOCIATION OF
NEW MEXICO, The Class; YORK
COUNTY ON BEHALF OF THE
COUNTY OF YORK RETIREMENT
FUND; CITY OF WARREN POLICE
AND FIRE RETIREMENT SYSTEM;
MID-JERSEY TRUCKING

Dental products company can't escape shareholder litigation over disappointing results

 legalnewsline.com/stories/658248958-dental-products-company-can-t-escape-shareholder-litigation-over-disappointing-results

May 6, 2024

Federal Court

Subramanian | Wikipedia

NEW YORK (Legal Newsline) - A federal judge has largely rejected the motion to dismiss a stockholder class action lawsuit against Dentsply, the world's largest producer of professional dental products.

The lawsuit says former executives Donald Casey and Jorge Gomez manipulated numbers to achieve maximum compensation for the first half of 2021 during the COVID pandemic. Judge Arun Subramanian, of New York, on May 1 rejected most of Dentsply's motion to dismiss, finding statements made to the public about supply-chain disruptions could be construed as misleading.

"Given these allegations, statements downplaying supply-chain issues in the second half of 2021 are plausibly misleading," Subramanian wrote.

"In September, Casey said that 'we're very comfortable that we're going to be able to deliver what our customers need,' and that '[w]e feel very good that we have adequate supply.'

"And in November and December, Casey and Gomez made several statements downplaying supply-chain problems. If the company was already facing severe supply-chain issues, these statements could be misleading."

The demand for dental products fell during the onset of the COVID pandemic, and the industry also faced supply-chain issues, the judge wrote. Dentsply executives are alleged to have claimed the company was fine while they were artificially inflating sales.

They did that by forcing distributors to take more inventory. Sales dropped after, executives were fired and the company conducted an internal investigation. Litigation followed.

Robbins Geller was picked out of three firms to lead the class action after scoring clients the City of Birmingham Retirement and Relief System, the El Paso Firemen & Policemen's Pension Fund and the Wayne County Employees' Retirement System.

That trio lost approximately \$3.8 million in their investments in Dentsply. The company's stock price dropped more than 13% to \$42.40 in April 2022.

An audit, the start of which was announced May 10, questioned whether incentives to sell products to distributors in the second half of 2021 were properly accounted for in statements filed with the SEC. The audit committee also said it was investigating allegations that former and current senior management directed those incentives to boost their executive compensation, the suit says.

ORGANIZATIONS IN THIS STORY

U.S. District Court for the Eastern District of New York

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

NOT FOR REPRINT
NEWS

En Banc Panel Adopts New Appellate Standard: Shareholder Suit Dismissed Against Cognizant

Cognizant agreed to pay \$25 million to the U.S. Securities and Exchange Commission in 2019 to settle charges that the payments it made to Indian government officials violated the Foreign Corrupt Practices Act.

May 03, 2024 at 02:41 PM

Securities Litigation



Charles Toutant

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

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

The U.S. Court of Appeals for the Third Circuit upheld the dismissal of a shareholder derivative action against Cognizant Technology Solutions after adopting a new standard of appellate review in a rare en banc ruling.

The court’s 13 judges adopted a de novo review standard in demand futility cases in place of the 32-year-old abuse-of-discretion standard that the court applied previously.

The decision follows the First, Second, Seventh, Eighth and Tenth circuits in adopting the de novo standard.

The en banc court ruled that U.S. District Judge Kevin McNulty correctly dismissed a shareholder suit claiming Cognizant’s directors and board members breached their fiduciary duty in connection with \$6 million in bribes paid by the company to Indian government officials from 2010 to 2015 to secure approvals for company offices in tax-advantaged special economic zones.

Cognizant, an information technology company whose headquarters are in Teaneck, New Jersey, [agreed to pay](#) \$25 million to the U.S. Securities and Exchange Commission in 2019 to settle charges that the payments violated the Foreign Corrupt Practices Act.

The plaintiffs in the shareholder suit failed to make a prelitigation demand on Cognizant’s board before bringing their suit, Third Circuit Judge Julio M. Fuentes wrote.

The defendants moved to dismiss on that basis, and McNulty granted the motions, finding that the complaint failed to state with particularity the reasons why making such a demand would be futile.

Fuentes wrote that applicable Delaware law holds such a demand is futile if a majority of the directors “received a material personal benefit from the alleged misconduct that is the subject of the litigation demand, faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand, or lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.”

If the answer to any of the questions is “yes” for at least half of the members, demand is excused as futile, Fuentes wrote.

The court’s longtime reliance on an abuse-of-discretion standard comes from a 1992 Third Circuit ruling, *Blasband v. Rales*, Fuentes wrote. But there are several reasons for overruling *Blasband’s* directive on the standard of review for demand futility cases, he wrote.

Not much rationale was offered in *Blasband* for adopting the abuse-of-discretion standard, according to Fuentes, and since that decision was handed down, every federal appeals court to consider the issue as a matter of first impression has adopted de novo review, he wrote. In addition, the U.S. Supreme Court has explained that stare decisis principles are least consequential in cases involving “procedural rules” that tend not to produce reliance interests, such as a standard of review, he wrote.

“Because plaintiffs fail to establish that a majority of the Cognizant directors is likely to face liability on the claims in this derivative action or is insufficiently independent from another director who is, they have not adequately pleaded demand futility under Rule 23.1 and Delaware law. On that basis, the District Court was correct to dismiss their complaint,” Fuentes wrote for the panel.

Counsel from Cohn Lifland Pearlman Herrmann & Knopf in Saddle Brook, New Jersey; Robbins Geller Rudman & Dowd in San Diego, California, and Kantrowitz Goldhamer & Graifman in Montvale, New Jersey, representing the plaintiff-appellants, did not respond to requests for comment about the case. Cognizant was represented by attorneys from Goodwin Procter, who also did not respond to requests for comment.

RELATED STORIES

[Evidence Fight Breaks Out as Bribery Trial Nears for Ex-Cognizant Legal Chief](#)

[Former Deputy GC of San Antonio-based Andeavor Joins Cognizant in the Wake of a Bribery Scandal During COVID-19 Outbreak](#)

Cognizant Technology Board Free of Investor Bribery Suit (1)

By Martina Barash

Bloomberg Law News 2024-05-06T13:02:5012765324-04:00

Cognizant Technology Board Free of Investor Bribery Suit (1)

By Martina Barash 2024-05-03T12:10:46000-04:00

Cognizant Technology Solutions Corp. investors didn't ask the company's board to initiate a suit over alleged anti-bribery misrepresentations and didn't show an excuse not to ask, the full Third Circuit said Friday, affirming their derivative suit's dismissal.

The suit's viability hinged on whether the board members were so compromised that a demand that they sue would be futile.

The US Court of Appeals for the Third Circuit decided to review the issue from scratch rather than on the basis of how well the lower court exercised its discretion, overturning a circuit precedent. In so doing, the Third Circuit joined several other federal appeals courts that have chosen the "de novo" review standard, normally used to look at other dismissals, for the demand futility issue.

Even under that de novo standard, which the investors sought, the suit can't proceed because the investors failed to allege the directors knew of company bribes in India, the appeals court said. Their knowledge could subject them to liability—excusing the investors' demand on them—but the investors' allegations that the directors were reckless didn't suffice, the court said.

The investors alleged that Cognizant employees paid about \$6 million in bribes to Indian government officials from 2010 to 2015 for permits and licenses to further the company's information technology business, according to the court.

The board allegedly received reports that its anti-corruption tools had weaknesses. Nevertheless, the board signed off on public sustainability reports stating that the company received no reports of corrupt activities in 2014 or 2015, the investors said.

After the bribery scheme came to light, Cognizant spent \$60 million in investigation costs and paid a \$25 million Securities and Exchange Commission penalty, they said. The investors sued the directors on behalf of the company.

Encroaching on Directors

"In a shareholder derivative suit, the plaintiff seeks to bring a claim that belongs to the corporation on the corporation's behalf," Judge Julio M. Fuentes said for the Third Circuit.

Such a suit "encroaches on the managerial freedom of directors," he said, quoting from a Delaware Supreme Court case. Thus, the person seeking to file a derivative suit must ask the board to bring a suit itself or else show that such a demand would be futile.

The US District Court for the District of New Jersey ruled that the Cognizant investors hadn't shown demand futility with the necessary level of detail and dismissed the suit.

The investors appealed. The Third Circuit heard the case en banc on its own initiative because of the potential to overturn a 1992 panel decision, *Blasband v. Rales*.

"When a district court dismisses a complaint due to the legal insufficiency of its allegations, that decision ordinarily gets de novo review," Fuentes said, writing for a unanimous 13-judge en banc panel. "We see no basis to treat demand futility cases any differently."

Knowledge Required

The Cognizant investors failed to show demand futility through the potential liability of the directors, the court said. They fell short on the requirement under Delaware law, where Cognizant is incorporated, that the directors knew they were making false statements, thus breaching their fiduciary duty of loyalty, Fuentes said.

In this context, "Delaware law appears to require that a director act with *knowledge* to breach the fiduciary duty of loyalty," the judge said.

The investors pointed to the directors' alleged knowledge of gaps in the company's anti-corruption compliance mechanisms, but that argument "conflates knowledge 'of deficiencies in the company's compliance systems' with knowledge 'of the bribery scheme' itself," Fuentes said.

Cognizant agreed to settle an investor class action over the bribery issue for \$95 million in September 2021.

Federman & Sherwood, Cohn Lifland Pearlman Herrmann & Knopf LLP, and Robbins Geller Rudman & Dowd LLP were among the firms representing the investors. Goodwin Procter LLP represented Cognizant. Jones Day and Tanenbaum Keale LLP represented defendant Gordon Coburn. Paul, Weiss, Rifkind, Wharton & Garrison LLP represented defendant Steven Schwartz.

The case is In re Cognizant Tech. Sols. Corp. Deriv. Litig. , 3d Cir. en banc, No. 22-3027, 5/3/24 .

(Updated throughout with detail from the opinion.)

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

To contact the editor responsible for this story: Andrew Harris at aharris@bloomberglaw.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law

Research Trail

My Work

000888

Help

Account

Class Action

Search Class Action

?

Select Sources

Go

Home

Practice Centers

Litigation

Transactional

Business

Practitioner Tools

News & Analysis

Laws & Regulations

Secondary Sources

 [Manage Subscription](#)

[Class Action](#)
May 6, 2024, 8:50 AM PDT; Updated: May 6, 2024, 9:56 AM PDT
Intel Sued Over Disappointing Results After Reorganization (1)
By [Martina Barash](#)
Documents

-  [Docket](#)
-  [Complaint](#)
-  [Company Info: Intel Corp.](#)
-  [Judge Trina L. Thompson](#)

- COURT:** N.D. Cal.
- TRACK DOCKET:** [No. 3:24-cv-02683](#)

Bloomberg Law News 2024-05-06T13:58:37157781005-04:00
Intel Sued Over Disappointing Results After Reorganization (1)

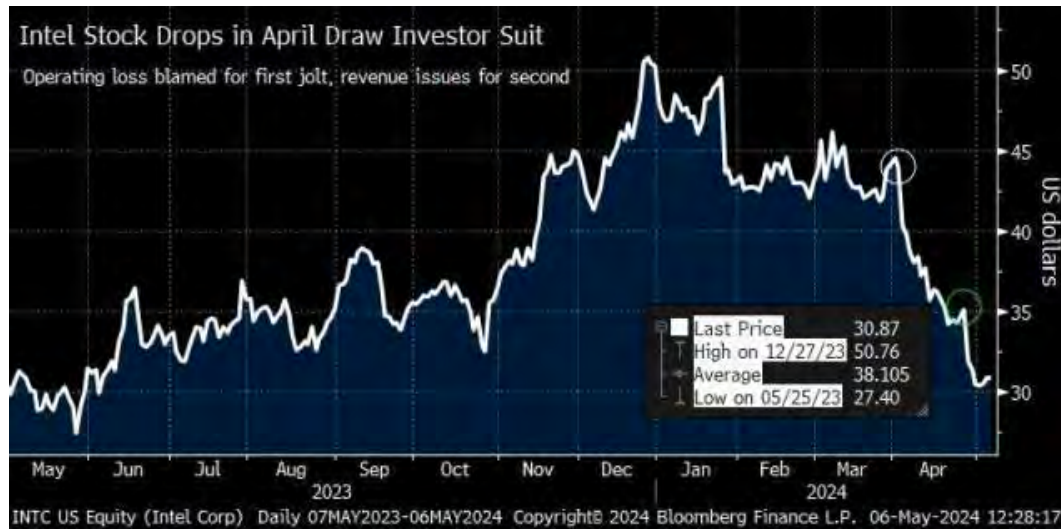
By [Martina Barash](#) 2024-05-06T11:50:37000-04:00

- COURT:** N.D. Cal.
- TRACK DOCKET:** No. 3:24-cv-02683

Intel Corp. made misleading statements about an internal reorganization that created a separate segment for manufacturing services, an investor alleges in a suit over a recent pair of stock drops.

That segment reported a \$7 billion operating loss for 2023, sending stock prices down 8.2% after the April 2 announcement, shareholder Patricia Quille said. Quille filed her suit May 3 in the US District Court for the Northern District of California.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X4JJQ44S000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly...> 1/3



There are at least hundreds or thousands of members in the proposed class, the complaint estimates.

Quille seeks compensatory damages on her securities fraud claims.

Intel didn't immediately respond to an emailed request for comment.

Glancy Prongay & Murray LLP and Frank R. Cruz, who practices in Century City, Calif., represent Quille.

The case is Quille v. Intel Corp. , N.D. Cal., No. 3:24-cv-02683, complaint 5/3/24 .

(Updated with stock price graph.)

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

To contact the editors responsible for this story: Brian Flood at bflood@bloombergindustry.com; Kiera Geraghty at kgeraghty@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

IRL Investors See Most of Claims Against Company Dismissed

By Bernie Pazanowski

- Defendants allegedly used bots to make app look profitable
- Securities fraud not sufficiently alleged but may be refiled

Bloomberg Law News 2024-05-06T13:03:31236881723-04:00

IRL Investors See Most of Claims Against Company Dismissed

By Bernie Pazanowski 2024-05-03T16:56:42000-04:00

- Defendants allegedly used bots to make app look profitable
- Securities fraud not sufficiently alleged but may be refiled

Plaintiffs who invested in the tech company In Real Life, reliant on its allegedly high-performing app, saw most of their claims dismissed by a federal court, but may refile them.

In 2021, IRL co-founder and former CEO Abraham Shafi allegedly said that the company's app was downloaded by 25% of US teenagers, had 12 million active users every month, and was growing with little marketing expense. In reality, an outside investigator concluded that 95% of the app's activity was generated by bots at the direction of Shafi and his relatives.

Two SoftBankGroup Corp. funds, SVF II Aggregator (DE) LLC and SoftBank Vision Fund II-2 LP, sued in July 2023 and alleged securities fraud, contract fraud, other fraud-related claims, and unjust enrichment. Shafi and his relatives allegedly persuaded the funds to invest \$150 million in the social media company after creating the fake user metrics.

The plaintiffs alleged 17 actionable misrepresentations associated with their securities fraud claim. To support the falsity of the statements, the plaintiffs mostly relied on findings from the outside investigator's report and from information from confidential witnesses.

Although the report's apparent access to data suggests some degree of reliability, the plaintiffs didn't plead facts allowing the court to rely on the allegations in it, said Judge Yvonne Gonzalez Rogers Thursday for the US District Court for the Northern District of California. Furthermore, the statements from three former IRL employees didn't include details about these employees' job descriptions or facts to infer that they had access to relevant data, she said.

"Standing alone, the testimony of these confidential witnesses cannot plead falsity as to these statements," the judge said.

The plaintiffs also contended that the falsity of some statements could be proven because entities controlled by Shafi's family members passed IRL funds to proxy services and advertising firms. But this claim wasn't pleaded with sufficient particularity to prove the statements were false, Rogers said.

The plaintiffs also didn't plead sufficient facts to support their claim under the California Corporations Code, Rogers said, because they failed to plead facts to establish jurisdiction.

But they did plead sufficient facts to allow their fraud with contract and unjust enrichment claims under California law, as to plaintiff SVF Aggregator II, to proceed, she said.

Finally, the plaintiffs' claims for fraudulent concealment, conspiracy to commit fraud, and aiding and abetting fraud were also dismissed with leave to amend.

Sullivan & Cromwell LLP represented the plaintiffs. Susman Godfrey LLP, Milbank LLP, Ben Nicholson of Costa Mesa, Calif., Miner Siddall LLP, and Gail R. Shifman of San Francisco, represented the defendants.

The case is SVF II Aggregator (DE) LLC v. Shafi , N.D. Cal., No. 23-cv-03834-YGR, 5/2/24 .

To contact the reporter on this story: Bernie Pazanowski in Washington at bpazanowski@bloombergindustry.com

To contact the editor responsible for this story: Blair Chavis at bchavis@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Delaware or Another State: What's the Difference?

K [dandodiary.com/2024/05/articles/corporate-law/delaware-or-another-state-whats-the-difference](https://www.dandodiary.com/2024/05/articles/corporate-law/delaware-or-another-state-whats-the-difference)

May 6, 2024



By Kevin LaCroix on May 6, 2024

Posted in Corporate Law



As readers undoubtedly have noted, one of the hot topics these days is the question whether corporations should change their state of incorporation from Delaware to that of another state, usually either Nevada or Texas. The dialog on this topic was already underway when Elon Musk

supercharged the conversation by vowing, in reaction to the Delaware court's disallowance of his \$56 billion pay package, to have Tesla change its state of incorporation from Delaware to Texas. I suspect that the state of incorporation debate is going to be with us for some time to come, making it important for those of us who might have to participate in (or at least listen to) the conversation to get a handle on the key differences between the states.

In looking into these issues, I was fortunate to find two very good resources: an April 10, 2024, *Law360* column by the Baker Botts law firm entitled "Comparing Corporate Law In Delaware, Texas and Nevada" (here, subscription required); and an April 23, 2024 memo from the Wilson Sonsini law firm entitled "Delaware's Status as the Favored Corporate Home: Reflections and Considerations" (here). Both of these memos are excellent; both cover the topic at length and in depth. My purpose in this post is not to repeat here what these memos have already said so well. Rather, I intend simply to summarize what the two memos identify as the important differences between Delaware, Nevada, and Texas, so that we (that is, both readers and me) can have a better idea of what is at stake in the current re-domestication debate.

Before getting to the differences, it is probably worth reviewing why we are having this debate now. As influential as Musk may be, this is happening now not just because Musk is mouthing off again. Commentators, observers, and practitioners have in fact raised a number of concerns about Delaware.

The Wilson Sonsini memo provides a succinct, bullet-pointed list of worries about Delaware; to summarize, the voices in the re-domestication debate cite a growing number of cases, particularly in the M&A context, where the courts have reached unexpected results; a

perception that Delaware's courts have adopted an increasingly suspicious or negative tone toward corporate boards and management; the challenges that Delaware case law can present for company founders or controlling shareholders; a sense that Delaware's courts are skeptical of the governance of venture-backed private companies; and an increasingly active, and successful, specialized plaintiffs' bar.

These questions increasingly are wrapped up in the larger question whether corporations would be better off reincorporating under the law of a state other than Delaware, particularly Nevada or Texas. Which of course begs the question of what the differences are in the legal environment between the three states.

The Courts

The most important consideration in the discussion has to do with the three states' respective courts. On this issue, the preference, at least historically and traditionally would go to Delaware. Delaware has, as the Wilson Sonsini memo puts it, "a talented, responsive, and knowledgeable judiciary." The Delaware Court of Chancery has "decades of experience and a long track record of handling (often in very expedited fashion) sophisticated business disputes." Delaware also has well developed case law; Delaware's extensive and decades-old case law "provides guidance to corporate actors in an array of situations"; no state "comes close to Delaware in the depth and breadth of corporate case law, and Delaware's cases are routinely cited by courts in every state."

The situation is different in Nevada and Texas. Nevada does have its own business courts, which it created in 2000, in fact to be modeled on Delaware's Court of Chancery. But while these specialized courts have been hearing cases for more than 20 years, the trial courts, according to the Baker Botts memo, "do not issue published written decisions," so there remains a "dearth of case law on many issues that regularly come before the courts." As a result, the outcome of business disputes in Nevada "can be more unpredictable than in Delaware."

Texas is about to have its own specialized business courts. The Texas Legislature created separate business courts in 2023. The courts will commence operations later this year. While there is, according to the Baker Botts memo, "currently little written case law in Texas," the business courts "will be required to issue written opinions" that "over time should help flesh out Texas' corporate case law, adding to the predictability of acting as a Texas corporation."

Fiduciary Duties

As I noted in a prior post on this re-domestication issue, one of the reasons some companies have given for their move to reincorporate from Delaware to Nevada is a perception that the companies' directors and officers are both less likely to face liability in Nevada and less likely to face D&O liability litigation overall.

There are in fact differences in the liability standards of the three states, although it could be argued that the similarities between the states are more important than the differences. As the Baker Botts memo notes, “each of these states requires corporate directors to comply with certain enumerated fiduciary duties, broadly fashioned to ensure that their decisions align with the corporation’s interests.” In all three states, the fiduciary duties include the duty of care, which requires each director to take an active role in the decision-making process and to make informed decisions, and the duty of loyalty. Texas also provides for a duty of obedience, which prohibits directors and officers from exceeding the scope of their powers.

However, unlike Delaware, both Texas and Nevada by statute permit directors to consider interests beyond the maximization of the corporation’s long-term value. Nevada’s statutes specifically allow directors to consider both long- and short-term interests, as well as the interests of employees, suppliers, creditors, or customers, and “the interests of the community.” Texas also permits consideration of both long- and short-term interests, as well as “any social purpose specified in the corporation’s certificate of formation.” Accordingly, corporations that believe their directors should consider such elements, or believe that allowing its directors to do so may “decrease the likelihood of unwarranted stockholder litigation,” may, according to the Baker Botts memo, “favor incorporation in Nevada or Texas.”

All three states also allow for director or officer exculpation for breaches of fiduciary duty, but they differ on when and how the officials may be exculpated. Both Delaware and Texas allow corporations to include in their articles of incorporation provisions exculpating directors for breaches of the duty of care, but not the duty of loyalty. Delaware recently expanded this to allow for officer exculpation. By contrast, Nevada by statute automatically exculpates director and officer liability for any breach of fiduciary duty, unless their breach involved intentional misconduct, fraud, or a knowing violation of the law. Thus, while all three states allow for exculpation, Nevada’s protection is the most extensive.

Standards of Review

The standards courts are to use in reviewing directors’ compliance with their duties may seem like an arcane issue of interest only to specialized practitioners, but in fact the standard the courts apply can be outcome determinative. Under the law of all three states, the vast majority of business decisions will be reviewed under the deferential business judgment standard. However, Delaware and Texas provide for stricter standards of review in certain cases.

In Delaware, when a decision is made by a board that is not majority independent and disinterested, or involves a controlling shareholder, the courts will use an entire fairness standard of review that places the burden on the directors to show both that the transaction

process and the financial determinations were fair. In connection with transactions that result in a change of control, Delaware's courts will impose a third standard of review, involving enhanced scrutiny, lying between business judgment and entire fairness.

Texas law, according to the Baker Botts memo, "does not provide quite so stringent heightened standards," and is "generally more deferential" to the decision so fiduciaries than Delaware, but case law does subject transactions in which a fiduciary derived a personal benefit to stricture judicial scrutiny.

Nevada, by contrast, "explicitly rejects the use of any standard other than the business judgment standard, even in the case of interested transactions." From my perspective, this factor, more than any other, tends to underscore the perception that directors and officers are less likely to be held liable under Nevada law, and less likely to be subject to liability litigation.

Books and Records Requests

Most readers of this blog will be familiar with stockholders' books and records requests under Delaware General Corporation Law Section 220, which, as the Baker Botts memo notes, "can provide a powerful tool to a stockholder seeking access to a corporation's books and records" – for example, to investigate wrongdoing or mismanagement, or to value the stockholder's shares." Texas's statutory stockholder information right is, according to the Baker Botts memo, similar to Delaware's, with some procedural differences, though "there is little case law interpreting it."

Nevada's stockholders' information rights are, by contrast, much more restrictive, limited the right to major stockholders and even then only for specific documents. The Nevada law establishes two tiers: stockholders who have held their shares for more than six months and who own at least 5% of outstanding shares may request the articles of incorporation, the bylaws, and a stock ledger; stockholders owning at least 15% of outstanding shares may access books of account and financial records, however corporations are exempted from providing these records of the give the shareholders a detailed, annual financial statement or comply with SEC reporting requirements.

Books and records requests are a potentially valuable shareholder right. On the other hand, "the volume and breadth of these requests can be a significant expense and burden on the corporation and feed the litigation culture that begets additional cost and distraction." The Nevada laws clearly are more protective of companies, their boards, and their management.

There are of course other important considerations and differences between the three states. The Wilson Sonsini emphasizes the fact that the Delaware legislature regularly reviews and updates the Delaware General Corporation Law, making the state's corporation laws more flexible and responsive. The law firm memo also cites the professionalism of Delaware's

Secretary of State's office, which is valuable in connection with corporate transactions. On the other hand, Delaware's annual franchise tax, which can run as much as \$200,000 to \$250,000 per year, is appreciably higher than the annual fees required in Nevada and Texas.

Discussion

While the discussion of these issues can quickly take on a technical, legalistic air, the question of whether companies should re-domesticate has important practical significance. For starters, nearly 70% of the Fortune 500 companies, and nearly 80% of all U.S. IPO companies, are incorporated in Delaware. A shift of public company incorporation away from Delaware would be a watershed event in the corporate legal environment in the United States.

As the above analysis shows, there are in fact important differences between the three states. With respect to at least some of the important considerations, there is evidence to suggest that the liability exposures of corporate directors and officers are less in Nevada than in Delaware, and arguably even in Texas. With that said, there is also little Nevada case law to corroborate this view; the track record in Nevada is nowhere nearly as extensive as in Delaware.

It is also worth emphasizing a point that the Baker Botts memo makes, which is that "although each state's corporation law is distinct, it bears reminding that at their foundations they are more alike than they are different." Each state "imposes meaningful fiduciary duties on corporate officers and directors and provides courts and stockholders with means to ensure those duties are followed."

Just the same, some companies are going to consider re-domesticating from Delaware to another state, including to Nevada. As I discussed in the context of a specific company in a prior blog post, some companies are in fact reincorporating. The fact is that the differences between the states' legal systems give rise to additional options, and the differences in the systems "may make them more appropriate for some corporations to consider."

All of that said, Delaware does have the advantage of decades of experience as the central source of corporate law. The "predictability and comprehensiveness of Delaware law, as well as the perception of outside investors' comfort with that law, will," according to the Baker Botts memo, "continue to attract most corporations for the foreseeable future."

Arguing Class Actions: Returning to the Plain Meaning of 'Predominance'

Arguing Class Actions is a monthly column for the National Law Journal written by DiCello Levitt's Adam J. Levitt.

May 06, 2024 at 06:00 AM

Class Actions

By Adam J. Levitt | May 06, 2024 at 06:00 AM



Often in the law, much hinges on the choice of a particular word. This is true of a contract, a statute, and it is no less true of the Federal Rules of Civil Procedure. There is one word in the Federal Rules, however, that has increasingly been interpreted contrary to its plain meaning. That word is “predominate,” in Federal Rule of Civil Procedure 23(b)(3). Rule 23(b)(3) says that a case may proceed as a class action when “questions of law or fact common to class members predominate over any questions affecting only individual members.” The choice of the word “predominate” unambiguously conveys the intent that cases be certified as class actions, even when there are a number of individual issues, as long as those individual issues are outweighed by common issues; that is, a finding that common issues “predominate” over individual issues. Yet, in class actions seeking Rule 23(b)(3) class certification, litigation often turns into a fight to prove that all issues are common across the class—thus erroneously conflating predominance with perfection, which is not what the rule contemplates or requires.

To read an implicit requirement into Rule 23(b)(3) that all, or nearly all, issues of law and fact must be common across the class is not only at odds with the choice of the word “predominate,” it is also at odds with the intention behind Rule 23(b)(3). When the Federal Rules were amended in 1966 and Rule 23(b)(3) was introduced, the Advisory Committee stated that the new rule was intended to allow for class actions where certification would “achieve economies of time, effort, and expense, and promote uniformity of decisions as to persons similarly situated.” Fed. R. Civ. P. 23(b)(3) advisory committee’s note to 1966 amendment. Benjamin Kaplan, reporter to the 1966 U.S. Judicial Conference Advisory Committee on Civil Rules, explained, “The reform of Rule 23 was intended to shake the law of class actions free of abstract categories ... and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through respective parties.” (See Benjamin Kaplan, “A Prefatory Note,” 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969).) In the same comment, Kaplan noted that the rule’s reconstruction sought “to promote more vigorously than before the dual missions of the class-action device,” by way of (1) reducing the amount of litigation by consolidating cases that may otherwise be duplicative and (2) providing a means of vindication “for groups of people who individually would be without effective strength to bring their opponents into court at all.” As the Supreme Court later stated in *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985), Rule 23(b)(3) permits “plaintiffs to pool claims which would be uneconomical to litigate individually.”

In challenging predominance at the class certification stage, class action defendants have, particularly in recent years, pushed an interpretation of Rule 23(b)(3) that requires an overwhelming predominance, if not complete uniformity, of common issues. For instance, defendants have homed in on differences between class members that, they argue, precludes class certification regardless of whether those differences would truly be material. The defense bar makes no secret of how it would prefer that “predominance” be applied; it has proposed that language be added to Rule 23(b)(3) that could drastically narrow when predominance could be satisfied by allowing a defendant to use “any fact or defense” to drive a wedge between class members. See DRI: The Voice of the Defense Bar, Comment to the Rule 23 Subcommittee, Advisory Committee on Civil Rules 1, 7 (Sept. 10, 15), available at http://www.uscourts.gov/sites/default/files/15-cv-dd-suggestion_dri_0.pdf.

It is important for courts to recognize that this is simply not what the plain meaning of “predominance” in Rule 23(b)(3) provides. See *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989) (the Federal Rules of Civil Procedure are given their plain meaning). “Predominate” does not mean “overwhelm”; it simply means, as the Supreme Court noted, that the common issues “are more prevalent or important” than the individual ones. *Tyson Foods v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). When properly applied consistent with its plain meaning, the predominance requirement ensures that respective class members’ interests are cohesive enough to permit class-wide adjudication. See 2 Newberg & Rubenstein on Class Actions § 4:49 (6th ed.). As the Advisory Committee notes state, it is only where “predominance exists that economies can be achieved by means of the class-action device.” Fed. R. Civ. P. 23(b)(3) advisory committee’s note to 1966 amendment. And when it comes to low damages claims that cannot prudently be pursued on an individual basis, the amount by which common issues must predominate in order to achieve such economies will almost always tolerate a handful of individual issues.

In *Siqueiros v. General Motors LLC*, for example, when the defendant contested class certification on the basis of potentially individual issues relating to its statute of limitations defense, the court granted plaintiffs’ motion to certify the class under Rule 23(b)(3), holding that “individual issues regarding [d]efendant’s statute of limitations defense could be addressed following the class-wide trial.” 2021 WL 2115400, at *23 (N.D. Cal. May 25, 2021). As it turned out, those individual issues did not feature at all in the class trial; the jury resolved the statute of limitations defense on a class-wide basis with no need for post-trial proceedings. See generally 2023 WL 7272508 (Nov. 2, 2023).

Rule 23(b)(3) provides plaintiffs with the flexibility to bring claims in an efficient and cost-effective manner, while simultaneously providing courts with the tools to guarantee that the class members share common interests so as to warrant class-wide review. See generally *Amchem Products v. Windsor*, 521 U.S. 591, 615 (1997). When used appropriately, class actions protect public health and safety, consumer rights, and the environment by issuing groupwide redress, rather than allowing thousands of individual cases, with similarly situated plaintiffs, to congest the courts and overwhelm judicial resources. See Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 (May 1, 1997), available at <http://www.uscourts.gov/sites/default/files/workingpapers-vol2.pdf> (referencing *In re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980); *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986); *In re Agent Orange Litigation*, 818 F.2d. 145 (2d. Cir. 1987)). Many courts, including the Supreme Court, have reinforced the importance of class actions as a tool for efficient and economically-sound litigation. See *Phillips Petroleum*, 472 U.S. at 809 (“Class actions may permit the plaintiffs to pool claims which would be uneconomical to litigate individually”); *Parko v. Shell Oil*, 739 F.3d 1083, 1085 (7th Cir. 2014) (noting that “predominance of issues common to all class members, like the other requirements for certification of a suit as a class action, goes to the efficiency of a class action as an alternative to individual suits”).

Reading into Rule 23(b)(3) a more exacting standard that requires uniformity among the claims of the class members, however, would undermine the rule’s intended purpose and limit its usefulness in determining liability in a class-wide adjudication. This is especially true in consumer cases, where certain claims may not be large enough to warrant individual litigation. If courts elect to hew to a narrow understanding of Rule 23(b)(3)’s predominance requirement, plaintiffs who nevertheless suffered injury at the hands of a defendant wrongdoer may not be able to seek adequate redress given that minor, immaterial case distinctions would preclude much-needed certification. Not only does such an approach undermine Rule 23’s purpose, plain language, and intent, but it effectively closes the courthouse doors to investors, consumers, small businesses, and others seeking to use the class action vehicle to achieve economic justice.

Page Printed From:

<https://www.law.com/dailybusinessreview/2024/05/06/attorneys-in-voyager-litigation-reveal-settlement-figures-with-gronkowski-2-other-prominent-athletes/>



NOT FOR REPRINT

Attorneys in Voyager Litigation Reveal Settlement Figures With Gronkowski, 2 Other Prominent Athletes

Mark Cuban and the Dallas Mavericks are the remaining defendants, with a trial set tip off in November.

May 06, 2024 at 02:25 PM

Verdicts-Settlements



Michael A. Mora



What You Need to Know

- Attorneys filed a preliminary approval of a settlement they obtained from three prominent sports figures in the Voyager litigation.
- In the motion, the attorneys are also seeking the appointment of class counsel and class representatives, and the certification of the proposed settlement class.
- It will be up to a federal district court judge in Miami to rule on the matter.

Attorneys are seeking preliminary approval from a federal district court judge in Miami of a multimillion-dollar settlement that they obtained from three prominent sports athletes who promoted the since-collapsed cryptocurrency platform, Voyager.

Adam Moskowitz of the Moskowitz Law Firm in Miami, Florida, and David Boies of Boies Schiller Flexner in Armonk, New York, obtained the settlements from defendants—ex-NFL star Robert Gronkowski, NBA player Victor Oladipo, and NASCAR driver Landon Cassill—and are seeking the appointment as co-lead class counsel.

“The biggest challenge in reaching these settlements was having these celebrities, and their counsel, who deserve the credit for having the courage and common sense to do the right thing, take responsibility to help their big fans who trust them,” Moskowitz said. “These settlements are very important going forward because they support a workable and productive resolution for all crypto victims.”

Robert Mayfield, a partner at Bradley Arant Boult Cummings who represents Cassill and Gronkowski, did not respond to a request for comment. Jonathan Feldman, a partner at Phang & Feldman, who represents Oladipo, declined to comment.

Now, it will be up to U.S. District Judge Roy Altman of the Southern District of Florida to grant or deny the \$2,425,000 preliminary settlement, as well as additional requests in the motion, such as the appointment of class counsel and class

representatives, and the certification of the proposed settlement class.

The Voyager collapse and resulting bankruptcy resulted in over \$3 billion in losses for class members who purchased its unregistered securities in the form of VGX tokens and its interest-bearing accounts, court records show. Since then, former Miami-Dade Circuit Judge Michael Hanzman has held mediation sessions with the defendants, culminating so far with this settlement.

Moving forward, co-defendants Mark Cuban and the Dallas Mavericks are the remaining defendants, with a trial set to tip off in November, court records show.

Meanwhile, in March, the proposed class representatives moved to certify a nationwide issue class on two questions underlying these claims: first, whether VGX tokens and/or Voyager EPAs are securities under the New Jersey Uniform Securities Law; and second, whether the defendants' conduct amounts to solicitation such that they are statutory sellers under that law.

“Under New Jersey law, which applies nationwide in this instance as Voyager issued every EPA and VGX token offered or sold to plaintiffs and the class from their base of operations in New Jersey, defendants, as Voyager’s agents, are jointly and severally liable for the full measure of plaintiffs’ and the class’s damages to the same extent as Voyager,” the plaintiffs alleged in the motion.

In addition, Altman set two tracks of consolidated Voyager litigation, with “track one” being the plaintiffs’ remaining unsettled claims against the defendants Cuban and the Dallas Mavericks, while “track two” is against the other named consolidated defendants, such as the NBA, McCarter & English and the public relations firm, Ketchum, according to the motion.

NOT FOR REPRINT

Copyright © 2024 ALM Global, LLC. All Rights Reserved.

Page Printed From:
https://www.law.com/nationallawjournal/2024/05/03/in-270m-national-settlement-generic-opioid-maker-will-supply-reduced-rate-overdose-reversal-pill-cash/?
kw=In%20%24270M%20National%20Settlement%2C%20Generic%20Opioid%20Maker%20Will%20Supply%20Overdose%20Reversal%20Pill%2C%20Cash&utm_position=3&utm_source=email&utm_m



NOT FOR REPRINT

In \$270M National Settlement, Generic Opioid Maker Will Supply Overdose Reversal Pill, Cash

The settlement in principle accounts for New Jersey-based Amneal's role in fueling the national epidemic of opioid addictions and overdoses, New York and California said in separate statements.

May 03, 2024 at 05:41 PM

Pharmaceuticals



Brian Lee
Litigation Reporter



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

Amneal Pharmaceuticals will pay California, New York and four other states more than \$272 million in cash and a generic medication that can reverse the effects of an overdose, the states unveiled Friday.

The settlement in principle accounts for New Jersey-based Amneal’s role in fueling the national epidemic of opioid addictions and overdoses, New York and California said in separate statements.

Delaware, Virginia, Tennessee and Utah also helped broker the deal with the maker of generic opioids, along with an executive committee of attorneys general from Colorado, Idaho, Illinois, Massachusetts, North Carolina, Ohio, and Oregon.

The states alleged jointly that Amneal failed to properly monitor and report suspicious opioid orders.

Under settlement terms, which remain contingent on the company agreeing to significant changes in its business practices, Amneal will provide a combined \$92.5 million in cash spanning 10 years, and supplies of naloxone nasal spray valued at \$180 million.

The spray is the generic version of Narcan, a life-saving drug that can reverse or reduce the effects of an opioid overdose.

The U.S. Food and Drug Administration allowed naloxone to be purchased over the counter on April 24.

Amneal, which sold nearly 9 billion generic opioid pills from 2006 to 2019, didn’t immediately return a message on Friday seeking comment.

Robert Bonta and Letitia James, the attorneys general of California and New York, respectively, commented on the settlement.

“Today, I am thinking of the countless families and communities impacted by the opioid epidemic,” Bonta said in a prepared statement. “I can’t begin to imagine the immense pain they have been through. At the California Department of Justice, we will continue to hold accountable those that fueled this public health crisis. Today’s announcement builds on our efforts to heal our communities and respond to this epidemic from all angles, from recovery services to resources on prevention and treatment.”

“Amneal became one of the largest generic pharmaceutical companies in the world by profiting off the sale of dangerous opioids,” James said. “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.”

Both states have been at the forefront of opioid litigation with pharma.

New York’s AG said her office recovered more than \$2.7 billion from Hikma Pharmaceuticals, Teva Pharmaceuticals, Johnson & Johnson, and other industry giants since 2019.

Bonta said the California Department of Justice secured more than \$48 billion through multi-state settlements, including up to \$4.25 billion for California’s treatment and prevention strategies.

This latest development follows California’s announcement on Monday that Amneal Pharmaceuticals will sell naloxone to the state for the reduced rate of \$24 per pack, about 40% less than the market rate, the Associated Press reported.

That undertaking, led by California Gov. Gavin Newsom, was meant to provoke the market into reducing prices, with the Democrat signing the initiative into law in 2020, after a year of lobbying.

THE NATIONAL LAW JOURNAL

Breaking news and trends for law firm and legal departments about the evolving federal regulations in a volatile political climate.



FEDERAL LEGAL NEWS

- [Courts & Litigation](#)
- [Expert Columns](#)
- [Latest Stories](#)
- [Events](#)

SPECIAL COVERAGE

- [Special Reports](#)

Amneal Pharmaceuticals wants to settle nationwide opioid cases for \$272.5 million

 [courthousenews.com/amneal-pharmaceuticals-wants-to-settle-nationwide-opioid-cases-for-272-5-million](https://www.courthousenews.com/amneal-pharmaceuticals-wants-to-settle-nationwide-opioid-cases-for-272-5-million)

Edvard Pettersson

Under the terms of the settlement, the New Jersey-based company would provide \$92.5 million in cash and \$180 million worth of naloxone nasal sprays to treat overdoses.

(CN) — Amneal Pharmaceuticals on Friday said it is reaching a nationwide \$272.5 million settlement agreement that would resolve almost all claims it faces in lawsuits by states, counties, municipalities and Native American tribal nations.

The settlement, which doesn't include an admission of wrongdoing, would be payable over 10 years, the New Jersey-based drugmaker said in a press release announcing its first-quarter financial results.

Amneal would pay \$92.5 million in cash and provide \$180 million worth of naloxone nasal sprays, valued at \$125 per two-pack, to help treat opioid overdoses. Alternatively, the settling parties could opt to receive cash payments for 25% of the product value — up to \$45.0 million — during the last four years of the ten-year payment term, the company said.

Amneal produces several generic opioid products. A multi-state coalition of attorneys general claimed that the drugmaker knowingly failed to monitor and report suspicious orders placed by its customers, as it was required to by federal law.

It was one of the largest manufacturers of opioids from 2006 to 2019, selling nearly nine billion pills, New York Attorney General Letitia James said in a statement.

“Amneal became one of the largest generic pharmaceutical companies in the world by profiting off the sale of dangerous opioids,” James said. “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.

According to Amneal, the proposed settlement will depend on a sufficient number of parties agreeing to its final terms.

Many drugmakers, distributors and pharmacies, from Johnson & Johnson to Walmart, have agreed to pay billions in dollars to settle claims by states and local governments that they contributed to the devastating and ongoing U.S. opioid epidemic.

Every day, more than 130 people in the country die from opioid-related drug overdoses, according to the U.S. Health Resources & Services Administration. The agency says increased prescriptions for opioid medications like oxycodone and hydrocodone have led to widespread misuse of both prescription and non-prescription opioids.

The negotiations with Amneal were led by California, New York, Delaware, Tennessee, Utah, and Virginia, in coordination with an executive committee consisting of attorneys general from Colorado, Idaho, Illinois, Massachusetts, North Carolina, Ohio, and Oregon.

In addition to the financial terms, the final settlement also remains contingent on Amneal agreeing to change critical business practices, according to the California attorney general.

“Today, I am thinking of the countless families and communities impacted by the opioid epidemic. I can’t begin to imagine the immense pain they have been through,” California Attorney General Rob Bonta said in a statement. “At the California Department of Justice, we will continue to hold accountable those that fueled this public health crisis.”

Follow @edpettersson

Categories / Government, Health, National

Subscribe to Closing Arguments

Sign up for new weekly newsletter Closing Arguments to get the latest about ongoing trials, major litigation and hot cases and rulings in courthouses around the U.S. and the world.

Page Printed From:

https://www.law.com/njlawjournal/2024/05/03/they-would-be-our-adversary-beasley-allens-andy-birchfield-testifies-in-talc-dq-hearing/?cmp=share_twitter



NOT FOR REPRINT
NEWS

'They Would Be Our Adversary': Beasley Allen's Andy Birchfield Testifies in Talc DQ Hearing

Johnson & Johnson alleges that Birchfield breached his ethical duties by partnering with Legacy Liability Solutions CEO James Conlan, who was outside counsel to Johnson & Johnson while a partner at Faegre Drinker Biddle & Reath until 2022, to push a \$19 billion talc settlement proposal.

May 03, 2024 at 05:24 PM

Legal Ethics and Attorney Discipline



Aleeza Furman
Litigation Reporter



What You Need to Know

- Johnson & Johnson has alleged that Birchfield partnered with James Conlan, who was outside counsel while as a partner at Faegre Drinker Biddle & Reath until 2022.
- Birchfield testified Friday that Conlan never revealed confidential information about Johnson & Johnson.
- Birchfield refuted accusations from Johnson & Johnson that he opposed the company's bankruptcy plan out of self-interest.

In a Friday evidentiary hearing, Beasley Allen partner Andy Birchfield rebutted accusations from Johnson & Johnson that he opposed the company’s bankruptcy plans out of a desire to collect higher fees out of the talcum powder litigation.

Birchfield, facing possible disqualification from the talc litigation over his work with a former Johnson & Johnson lawyer, said his disapproval of the bankruptcy deal was based on client interests.

“The reason that we opposed that bankruptcy was because it would not provide reasonable compensation to the claimants,” Birchfield said.

Birchfield’s attorney, Fox Rothschild partner Jeffrey Pollock, framed Johnson & Johnson’s bid to disqualify Birchfield and Beasley Allen from the talc litigation as an attempt to discredit the firm.

“That firm is not out there for a payday,” Pollock said. “They’re out there to protect their clients.”

Johnson & Johnson alleges that Birchfield breached his ethical duties by partnering with Legacy Liability Solutions CEO James Conlan, who was outside counsel to Johnson & Johnson while a partner at Faegre Drinker Biddle & Reath until 2022, to push a \$19 billion talc settlement proposal. The proposal was more than double the \$8.9 billion settlement offered last year in the bankruptcy of subsidiary LTL Management.

During the Friday hearing, Johnson & Johnson attorney Steve Brody, of O'Melveny & Myers in Washington, D.C., asked Birchfield whether he believed working with Conlan to design a talc resolution was permissible.

Birchfield claimed he never obtained confidential information about Johnson & Johnson from Conlan and that he entered into discussions with Legacy knowing that Johnson & Johnson would have to accept the proposal for it to go forward.

"I recognized the role that they would play and that they would be standing in the shoes of J&J," Birchfield said of Legacy. "They would be our adversary."

The hearing, before Atlantic County Superior Court Judge John Porto and U.S. Magistrate Judge Rukhsanah Singh, both in New Jersey, comes after Johnson & Johnson filed [motions to disqualify](#) Birchfield, in Montgomery, Alabama, and his firm, from the leadership of the talc litigation. Beasley Allen principal Leigh O'Dell is co-lead plaintiffs counsel in the talc multidistrict litigation.

Both Porto, the judge in the talc multicounty litigation in New Jersey state courts, and Singh, in the talc multidistrict litigation in the U.S. District Court in New Jersey, found that [more evidence](#) was needed.

The motions are centered on the second Chapter 11 case of LTL, in which Johnson & Johnson had arranged to resolve 60,000 talc cases for \$8.9 billion. Birchfield and other plaintiffs lawyers, most of whom represent ovarian cancer victims, opposed the deal.

Birchfield's Friday testimony came on the third and final day of the [evidentiary hearing](#) on the disqualification motions.

It also followed two days after Johnson & Johnson [announced](#) a new \$6.5 billion settlement proposal, sparking further dispute with Beasley Allen.

In the company's May 1 announcement of the proposal, Johnson & Johnson worldwide vice president of litigation Erik Haas said, "Unlike the prior cases, it is the vote of the claimants—and not the conflicting financial incentives of the small minority of plaintiff lawyers who stand to receive excessive legal fees outside of a reorganization—that decides whether the plan may proceed."

Soon after, Beasley Allen released its own statement in opposition of the plan. In it, Birchfield vowed to resist the plan and said, "We believe any bankruptcy based on this solicitation and vote will be found fraudulent and filed in bad faith under the Bankruptcy Code."

At the start of the Friday hearing, both judges said the out-of-court fighting would not play into their decision-making.

"It is patently evident that there are things going on between the parties and the media," Singh said. However, she said, "We are here to determine this particular issue based off of the record presented."

RELATED STORIES

[In Talc DQ Hearing, Beasley Allen's Andy Birchfield Testifies: 'It Never Crossed My Mind'](#)

['I Was Kind of Dumbfounded': J&J Lawyers Testify in Talc Disqualification Hearing](#)

Beasley Allen's Andy Birchfield Faces Evidentiary Hearing on Disqualification

NOT FOR REPRINT

Copyright © 2024 ALM Global, LLC. All Rights Reserved.

Bloomberg Law
Research Trail
My Work
000888
Help
Account

Bloomberg T...
Search Bloomberg Terminal News
Advanced Search
Go

Home
Practice Centers
Litigation
Transactional
Business
Practitioner Tools
News & Analysis
Laws & Regulations
Secondary Sources

News from Bloomberg Terminal

May 6, 2024, 11:33AM PDT

Here, Have Some Extra Carbon Credits

By Matt Levine

(Bloomberg Opinion) --

BOGO carbon credits

There are two ways to think of a carbon credit:

1. A carbon credit represents one ton of carbon that has been removed from the atmosphere.
2. A carbon credit is a quasi-regulatory accounting quantity, where companies want to be able to tell certain audiences – shareholders, governments, activists, whoever – “we are carbon neutral,” and to get to carbon neutrality you add up your carbon emissions (measured in tons) and subtract the number of carbon credits you have bought.

The first approach thinks of carbon credits as physical quantities, things in the real world. The second approach thinks of carbon credits as instruments of accounting, or public relations, or regulatory compliance, or whatever your carbon regime is about.

They are necessarily *somewhat* related. If I went around certifying my own proprietary brand of carbon credits, and when asked “how do you ensure that these carbon credits really represent carbon removed from the atmosphere” I was like “I don’t, I just take the money and issue the credits,” then nobody would ascribe any value to my credits – they would not accomplish any public-relations or regulatory goal – and so nobody would buy them.

But they are not necessarily *perfectly* related. If a globally respected organization with a credible commitment to fighting climate change went around certifying carbon credits, and it had a rigorous process for examining each carbon-credit project and making sure that it represented true carbon removal, then its credits would probably have a lot of (public-relations, regulatory, market) value. And then if I went to one of its forests and found that a few acres of trees had burned down without anyone noticing, so the actual amount of carbon removal it certified was slightly higher than what it achieved, I’m not sure it would matter that much. Nobody is buying the credits as a physics experiment; making the quantities balance exactly in physical reality is not the goal. Being able to say “we are carbon neutral,” and having people believe you, is the goal.¹ That goal requires some general rigor and good faith, but it will tolerate a certain amount of physical slippage.

And so if the actual government comes to you and says “we’re having a special sale on carbon credits, act now and we’ll give you two tons of carbon credit for every ton of carbon you remove,” that’s ... fine? Ish? It’s, like, kind of okay as long as not too many people find out? And then if they do find out it’s awkward and embarrassing but not the end of the world? I don’t know; here’s a weird story about carbon accounting:

Shell sold to Canada’s largest oil sands companies millions of carbon credits tied to CO₂ removal that never took place, raising new doubts about a technology seen as crucial to mitigating greenhouse gas emissions.

As part of a subsidy scheme to boost the industry, the Alberta provincial government allowed Shell to register and sell carbon credits equivalent to twice the volume of emissions avoided by its Quest carbon capture facility between 2015 and 2021, the province's registry shows. The subsidy was reduced and then ended in 2022.

As a result of the scheme, Shell was able to register 5.7mn credits that had no equivalent CO₂ reductions, selling these to top oil sands producers and some of its own subsidiaries. Credits are typically equivalent to one tonne of CO₂. ...

Keith Stewart, a senior energy strategist with Greenpeace Canada, criticised these "phantom credits".

"Selling emissions credits for reductions that never happened . . . literally makes climate change worse."

Shell said carbon capture played "an important role in helping to decarbonise industry and sectors where emissions cannot be avoided" and that realising its potential "requires creating market incentives now."

One way to create incentives for carbon capture is for the government to write a big check to Shell for setting up the facility. But that costs money. Registering extra carbon credits is, for the government, more or less free. And then Shell can sell those credits for money to help pay for the facility. People who bought those credits thinking that they were getting exactly one ton of reduced carbon emissions were disappointed. People who bought those credits thinking that they were getting exactly one registered carbon credit were ... fine? They got the thing they paid for? Carbon credits? Do you think they are going back and restating their claims about carbon neutrality? I don't know:

Some of the largest buyers of the credits were Chevron, Canadian Natural Resources, ConocoPhillips, Imperial Oil and Suncor Energy. ...

Chevron, Canadian Natural Resources, ConocoPhillips, Imperial Oil and Suncor Energy declined to comment.

We talked last year about a Zimbabwean carbon credit project that turned out not to reduce carbon emissions by nearly as much as it had estimated, which was arguably a problem because it had sold carbon credits based on those estimates. At a meeting, a staffer asked if the credits were "based on reality," and the co-founder replied, "I give the question back: What is reality?" Always the relevant question in this business.

Trump Media had a fake auditor?

The funniest job in public accounting is now open:

The Securities and Exchange Commission accused the auditor of Donald Trump's social-media company of massive fraud affecting hundreds of companies and 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. "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." ...

Trump Media & Technology Group Corp. became a public company in March. Trump Media "looks forward to working with new auditing partners in accordance with today's SEC order," a representative for the company said.

I'm kidding, the job isn't actually open; last week Trump Media "engaged Semple, Marchal & Cooper, LLP ('SMC') as BF Borgers' replacement." Here is the SEC's press release; here is the order shutting down Borgers; here is the SEC staff statement on what to do if you are a public company that used Borgers and now needs to find a different auditor. ²

I have said before that, since Trump Media's financial statements don't *matter* – to its shareholders, to its managers, to its stock price, to its value proposition for its promoters – it doesn't especially matter that Trump Media used a "sham audit mill." Still it's not, you know, good. When it turns out that a company has a fake auditor, that raises some questions. I guess not that many questions. When Trump Media went public, I would not have *guessed* that it employed a fake auditor, because I was not aware that that was a thing. But if someone's going to employ a fake auditor, why not Trump Media.

The gist of the SEC case is that BF Borgers – which the Financial Times reported last month "is now the eighth largest audit firm in the country by number of clients," while employing only 10 certified public accountants – was an "audit mill." The SEC order says that BF Borgers had 350 clients whose financial statements were filed with the SEC, and Ben Borgers himself was the engagement partner for "the overwhelming majority" of those clients. He was stretched thin and "did not adequately review or supervise the audit engagements":

There were no audit planning meetings held in relation to any of BF Borgers' audit engagements. In addition, Borgers rarely interacted with the staff level auditors. Borgers failed to inform the team members as to the objectives, nature, timing, and extent of the auditing procedures they were to perform as well as relevant information regarding the particular client that could affect those procedures. ...

As the engagement partner, Borgers also failed both to review the work of the engagement team and to ensure that the workpapers properly and accurately documented the work performed on the audits.

Instead, they just cut and pasted old audit workpapers into new ones:

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. As a result, BF Borgers' workpapers falsely documented the performance of audit and review procedures and approvals that had not occurred, including falsely representing that both Borgers, as the engagement partner, and an EQR [engagement quality reviewer] reviewed and approved the workpapers.

Look, again, Trump Media's finances are not especially complicated, and they are not especially important to investors. The stock trades on – I mean, at best, it trades on hopes of potential future earnings, though there are other possible explanations for the stock price. But it's not like a one-penny shift in earnings per share is going to have a big effect on the stock.

I suspect it is not alone in this; lots of public companies – not usually big ones – are in similar situations, with simple businesses, modest revenues, big dreams, and investors who are not too concerned about the financial statements. Those companies, as a legal matter, need a certified public accountant to sign off on their financial statements, but they don't need the *best* accountant; they do not need to pay for the name brand and reputation of a well-known accounting firm to reassure investors that their finances have been reviewed scrupulously. It is apparently cheaper to hire an accountant who will review your finances less than scrupulously. Trump Media was arguably in the market for the absolute minimum amount of auditing services, though it managed to buy a bit less than that.

"The life cycle of fees"

One important thing that investment banks do is connect companies with public capital markets. If you are a company and you want to sell bonds, an investment bank will help you sell bonds to public bond investors. If you are a company and you want to sell stock to the public, an investment bank will help you do an initial public offering of your stock.

In modern finance, private capital markets are increasingly important. If you are a company and you want to borrow money, you could sell bonds, but there's also a booming private credit industry that will lend you money without a public bond sale. If you are a company and you don't want to sell stock to the public, venture capitalists and growth funds and other big private investors will buy your stock without an initial public offering.

Two generic things you could say about private markets are:

1. They are more customized than public markets. A corporate bond offering, or an initial public offering of stock, will be sold to dozens or hundreds of investors, and will have to be reasonably legible to them. Most of the things have to work the way things usually work; public markets are skeptical of weird stuff. A direct lending transaction or a venture investment can be negotiated with one investor, or just a few, and so there is more room to structure the transaction you want.
2. There is more room to disintermediate investment banks. Investment banks know all the public investors, who expect deals to come through banks; a company can't really do an IPO without an investment bank's sales force. But venture capitalists and private-credit direct lenders are very much in the business of calling up companies directly – or getting calls directly from companies – to talk about investment opportunities. You can raise venture capital or private credit without an investment bank.

On the other hand, investment banks hate to be disintermediated. If there are companies who want money, and investors who want to give it to them, investment banks are going to find a way to sit between them and take a cut.

And the fact that private markets tend to be more customizable than public ones is *good* for the banks. It gives them more to do: There is more complexity, there are more different deals to be done with different types of investors, so the banks' *advice* is more valuable. You can't really do an IPO or a bond offering without a bank, but you can *kind of* do an IPO or a bond offering with *any* bank; the process is pretty widely understood. (And in fact many companies will hire like 20 banks to underwrite their IPO or bond offering: You're not paying for specialized expertise; you're paying for a big sales force and rewarding banks for their relationship.)

We talked last month about how big investment banks are increasingly getting into the business of helping companies borrow money from the private credit market, for a fee. Obviously! Investment banks are in the business of matching investors with companies; private credit features investors and companies looking to match with each other; it can't keep the banks away for long. I wrote:

If you are a company looking to borrow money, the best user experience is something like "one person, whom we trust, shows up at our office, gives us a menu of borrowing options, lists the pros and cons of each one, and then goes and gets us the one we choose." Traditionally that person was an investment banker, and she'd show up with a pitchbook on the pros and cons of bonds and bank loans. The current situation is, I guess, that she shows up, does her pitch, leaves, and then you have appointments with six private lenders who offer alternatives. But that seems unstable. In the long run, the best user experience is probably that the investment banker adds another column, for private credit, to her pitchbook.

Today at the Information, Cory Weinberg reports on "How Investment Banks Are Helping Canva, Stripe, Figma Stay Private." The answer is (1) by arranging and advising on tender offers and secondary sales, so that early employees and investors can sell their stock without an IPO and (2) by investing their asset management clients' money in the companies' stock. Same idea: If you are a big private tech company looking to sell stock, the best user experience is for a banker you trust to show up with a pitchbook explaining how to do it. Traditionally, her pitchbook was just about IPOs. More recently, the pitchbook has added (and then deleted) columns for direct listings and special purpose acquisition companies. Now the pitchbook will have columns for private secondary sales and tender offers, because staying private is more appealing than it used to be. But the point is (1) the bank wants to offer all the services the clients might want and (2) the bank wants the fees:

Such tender offers are one reason investment bankers have fretted that there will be a relatively light volume of tech IPOs this year. That could create an awkward dynamic for the investment banks, which often compete to lead IPOs and can generate tens of millions of dollars in fees from such listings, based on a low single-digit percentage of the capital that companies raise.

Secondary deals yield similar fee charges but are "heavily negotiated," said Tom Callahan, CEO of Nasdaq Private Market, which runs secondary transactions. Usually only one or two banks work on those deals, however, making them potentially more lucrative than IPOs if companies raise enough cash.

Colin Stewart, global head of technology equity capital markets at Morgan Stanley, which advised CoreWeave on a \$642 million secondary sale that was completed in December, said the investment bank views secondary transactions as part of the "life cycle of fees you can earn."

He continued: "This adds another product to the life cycle. It may elongate the life cycle. But it adds another product." Honestly a longer life cycle is better, if you can charge fees the whole time? Big public tech companies will consume investment banking services, but those services will be somewhat commoditized. Big *private* tech companies will consume *expensive* investment banking services, if you pitch them right.

Biz Dev

In high-end professional organizations, it can be hard to distinguish the human resources function from the mergers-and-acquisitions function. If Alphabet Inc. wants to hire six 22-year-old engineers with good programming skills, it sends a recruiter to Stanford, does some interviews, makes some offers. If it wants to hire a 32-year-old researcher who has developed revolutionary new artificial intelligence methods, probably it makes an offer to acquire her startup.

Similarly if you run a multi-strategy hedge fund, you might want to add a new strategy by hiring a portfolio manager from outside your firm. Perhaps that portfolio manager currently works for another big multi-strategy fund, and you will hire her. Or perhaps she currently runs her own hedge fund, and you will acquire it. But regardless of the formalities, if you're hiring someone on a \$50 million guarantee, that arguably feels more like M&A than HR.

So here's a Business Insider story about hedge fund recruiters, I mean, sorry, "business development professionals":

The talent war that has broken out over top portfolio managers – including \$50 million guarantees that star athletes would envy – has been widely documented. Less well known are the men and women behind the scenes helping fuel these pay packages, so-called "business development" professionals. Unlike business development in corporate America, which focuses on growing a company's prospects with partners and clients, hedge-fund BD teams specialize in scouting and evaluating investment talent.

BDs have been quietly gaining power, growing in numbers, and earning multimillion-dollar paychecks at hedge funds by assembling winning trading teams, the lifeblood of the industry. They can be found at all kinds of hedge funds and proprietary trading firms, but have been key to the meteoric growth of the multimanager hedge fund, now the industry's dominant players. ...

Senior BD professionals now commonly earn more than \$1 million annually, with some top execs making north of \$5 million, BD execs and headhunters familiar with the market said. Midlevel BD professionals can earn \$500,000 and \$700,000, these people estimated. ...

Job duties vary from firm to firm, but in addition to entertaining and wooing candidates, BD execs map the universe of traders involved in a strategy. They vet the performance of traders and their reputations with industry contacts and even law enforcement. They construct offers and project when a hire might break even. They onboard PMs, and help marshal resources for their pods.

Yes, right, the ability to identify investments that will go up is rare and valuable and in high demand. But the ability to identify *people* who can identify investments that will go up is almost as good.

Shale

"You simply could not pay me enough to go to this dinner," I wrote last week, about a dinner that the Organization of Petroleum Exporting Countries (OPEC), the oil cartel, threw for a bunch of US shale oil producers, including Scott Sheffield of Pioneer Natural Resources. Just seems like a high risk of collusion? Like antitrust regulators would be waiting outside the restaurant with handcuffs? But in fact the dinner was in 2017, and the antitrust regulators only got around to Sheffield last week. And the Financial Times mentions that my scruples are unusual and in fact there are frequent well-attended OPEC/shale dinners:

Among the evidence the agency cited was a dinner Sheffield attended along with other US producers, hosted by the late Opec secretary-general Mohammed Barkindo, in 2017. Such dinners have become a regular industry feature in recent years, often hosted on the sidelines of the annual CERAWEEK energy conference in Houston.

Attendees say the gatherings have become increasingly cordial in recent years as memories fade of the cartel's efforts to sink the US shale industry by flooding the market with oil.

I guess one way to tell this story is that once OPEC was the dominant force in oil markets, and kept prices high; then the US shale revolution occurred, and US producers became formidable competitors to OPEC; then OPEC tried to fight back by increasing supply to drive down oil prices; and now they are all friends and have cordial dinners together and OPEC keeps supply in check, while the shale producers also keep supply in check? Maybe that's fine? I hope the food is good.

Things happen

"With the help of our friends at the Fed, they did put the income back in fixed income." Sony, Apollo Propose \$26 Billion Deal for Paramount Global. Bondholders to Push Ukraine to Resume Debt Payments After Hiatus. Is Hunterbrook Media a News Outlet or a Hedge Fund? Last Credit Suisse chief executive, Ulrich Körner, to leave UBS. The CEO Who Hired His Wife, Gave His Dog a Title, and Brought Down a Bank. Listless inflows dim hopes of revival for long-suffering active funds. Worsening Weather Is Igniting a \$25 Billion Market. How TikTok Is Wiring Gen Z's Money Brain. 'Finance Bro' Outfits Desperately Need an Update. Howard Schultz Is Giving His Successor at Starbucks Advice on LinkedIn. McDonald's brings back beloved McFlurry flavor, but not everyone is happy: 'It ain't right.'

If you'd like to get Money Stuff in handy email form, right in your inbox, please subscribe at this link. Or you can subscribe to Money Stuff and other great Bloomberg newsletters here. Thanks!

To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

1. "We use several valid third-party standards to determine whether an offset is permanent, ... new, ... [and] unique," says Chevron's carbon offset explainer page.
2. The SEC's timing here is relatively kind: Most companies publish their audited financial statements between late February and early April, so banning an auditor in early May gives its clients some time to find new auditors. And "reports that were filed before the date of the Order do not necessarily need to be amended," though "issuers should consider whether their filings may need to be amended to address any reporting deficiencies arising from the BF Borgers engagement."

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Trump Media Earnings Delay Expected After Auditor Barred by SEC

By Bailey Lipschultz

- BF Borgers was permanently suspended by the SEC on Friday
- Results from Truth Social owner may take months: professor

Bloomberg Law News 2024-05-06T12:54:37499245976-04:00

Trump Media Earnings Delay Expected After Auditor Barred by SEC

By Bailey Lipschultz2024-05-03T14:14:32651-04:00

- BF Borgers was permanently suspended by the SEC on Friday
- Results from Truth Social owner may take months: professor

Investors waiting for an update of how Donald Trump's media startup is faring will have to wait a bit longer — months by some accounts — before getting a look at financial results.

That's because the US Securities and Exchange Commission moved to permanently suspend Trump Media & Technology Group Inc.'s auditor, BF Borgers CPA PC, on Friday. Regulators are barring the accounting firm from practicing and appearing as accountants before the SEC after finding consistent problems and "nonexistent" work as the firm churned out audits. An industry watchdog previously found a 100% deficiency rate in the audits they inspected.

Trump Media listed BF Borgers as lead independent auditor in a filing dated April 17. BF Borgers didn't immediately respond to a request for comment.

Under SEC rules, publicly listed companies have 45 days from the end of a quarter to file audited financial reports, giving Trump Media until May 15. The SEC reminded companies impacted by the auditing firm's fallout that they can file for "a limited extension of the deadline," which would include first-quarter results for Trump Media.

The social-media company's report "will definitely be delayed," says Usha Rodrigues, a law professor at the University of Georgia and an expert on blank-check companies, like the one that brought Trump Media to the market. It will take 30 days "at the very least" to see the results, she said, though she saw a 60- to 90-day wait as more likely.

Read more: SEC Accuses Trump Media's Accounting Firm of Massive Fraud

Jay Ritter, professor of finance at the University of Florida, thinks it may take "several months before the audited first quarter numbers are available."

The special-purpose acquisition company that Trump Media merged with to go public, Digital World Acquisition Corp., had its own auditing issues in the lead up to the deal's completion. By August, the SPAC's auditor Marcum LLP — which was riddled with regulatory problems of its own — had abruptly resigned.

Trump Media's new auditor will likely take time to perform diligence and get up to speed with already-public filings, industry watchers agreed. "We will see either a slow, reputable accounting firm or one risk-comfortable enough to take on a high-risk client," University of Georgia's Rodrigues said.

The media company will likely file a regulatory update within days to confirm that it doesn't currently have an auditor and will be looking to hire a replacement. 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 specify 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. Inspections by the Public Company Accounting Oversight Board haven't yet covered BF Borgers' audits of Trump Media.

Trump Media's lofty valuation, worth some \$8.2 billion, has drawn skepticism from investors given the company reported just \$4.1 million in revenue last year and lost more than \$50 million. The stock remains one of the most expensive in the market to bet against with short sellers facing annual financing costs above 600% — meaning contrarians need the shares to decline just to not lose money.

Read more: Trump Media Skeptics Who Get Shares to Short Face Uphill Battle

Despite the disconnect between its fundamentals and valuation, the company has attracted retail traders and Wall Street professionals alike with wild swings drawing comparisons to the meme stock mania of 2021.

--With assistance from Lydia Beyoud, **Austin Weinstein** and Nicola M. White.

To contact the reporter on this story:

Bailey Lipschultz in New York at blipschultz@bloomberg.net

To contact the editors responsible for this story:

Elena Popina at epopina@bloomberg.net

End of Trump Media's Auditor Jolts Hundreds of Other Companies

By Nicola M. White

Documents

 [SEC Staff Statement](#)

 [SEC Order](#)

-
- Clients of BF Borgers CPA race to find a new auditor
 - SEC cited Borgers as “sham audit mill” with false work papers

Bloomberg Law News 2024-05-06T12:53:32913239606-04:00

End of Trump Media's Auditor Jolts Hundreds of Other Companies

By Nicola M. White 2024-05-03T16:59:09000-04:00

- Clients of BF Borgers CPA race to find a new auditor
- SEC cited Borgers as “sham audit mill” with false work papers

The sudden shutdown of what the SEC dubbed a “sham audit mill” will force hundreds of companies, including Trump Media & Technology Group Corp., to hunt for new auditors, scour old audits for potential problems, and scramble to meet public company regulatory deadlines.

The US Securities and Exchange Commission on Friday described widespread violations at BF Borgers CPA, hitting the firm and its founder with a total of \$14 million in fines to settle the charges. The regulator detailed false work papers, meetings about client risks that never happened, and audits copied from previous years as the Lakewood, Colo.-based firm churned out audit after to audit to meet a surge of new clients.

Borgers had clients ranging from American Rebel Holdings Inc., a Nashville-based business that makes apparel and backpacks for concealed carry guns, to Eva Live Inc., an AI-focused digital advertising company in California.

All of them will need to find new auditors—fast—if they want to make their next quarter's financial reporting deadlines in time. They have to alert the market that they no longer have an auditor by issuing a special 8-K financial form and will brace for scrutiny as new auditors question the work vetted by a firm that federal regulators said violated multiple rules.

"This will likely shut down a lot of companies, or make them go private," said Shaun Donnelly, CEO of mixed martial arts entertainment company Lingerie Fighting Championship Inc., a BF Borgers client.

Donnelly, who plans to keep his business a public enterprise, said he learned about his audit firm's shutdown from a reporter and would be seeking a new firm quickly. He won't be alone.

Despite its small size, BF Borgers churned out hundreds of audits, the majority for clients that are traded over-the-counter, meaning they are too small or don't meet the requirements to trade on a larger exchange. Expecting a wave of companies seeking answers, SEC staff accountants put out special guidance on Friday warning companies of their obligations when they no longer have an auditor.

Because BF Borgers is banned from practicing, any future 10-K annual reports or 10-Q quarterly financial filings cannot contain information that was vetted by that audit firm, the guidance says.

Filings published before Friday do not necessarily need to be amended, the SEC said, but companies should consider whether they'll have to fix any "deficiencies arising from the BF Borgers engagement."

Many companies are expected to miss SEC filing deadlines, the agency warned. The staff reminded companies they can use a limited extension period to meet deadlines, but didn't offer any time beyond that. SEC rules permit companies to file quarterly reports up to five days after their due date and annual reports up to 15.

Duke Pitts, president and CEO of Las Vegas-based nutritional supplement company Healthy Extracts Inc., which sells supplements including "ultimate brain nutrients," said he's "feverishly looking at other firms now" to replace Borgers. He said he hopes the SEC will give companies up to 60 days if possible to meet the deadline for 10-Q filings.

Pitts said he's "100% confident" in his company's accounting practices. "The biggest negative is the expense and the cost," of finding a new auditor, he said.

The SEC's guidance for Borgers' clients is "unusual and dramatic, frankly," said Jeffrey Johanns, accounting professor at the University of Texas McCombs School of Business. "I can't think of this kind of thing happening since Andersen."

The collapse of audit firm Arthur Andersen in 2002 after the Enron accounting scandal triggered an overhaul to US securities laws and the creation of the US audit watchdog, the Public Company Accounting Oversight Board. BF Borgers is nowhere near the size of Arthur Andersen, Johanns said, but its sheer number of clients meant the regulator had to issue a warning. The SEC in its order said it examined 369 audit clients from January 2021 through June 2023 and found flaws in three-quarters of them.

"The order really paints in painstaking detail how egregious Borgers was," said Chris Vanover, president of audit advisory firm CPA Club and a former PCAOB staffer. "I don't know if I've seen something just so blatantly foul."

While the majority of companies on BF Borgers' client roster—84%—trade over the counter, the firm last year ranked No. 8 on a list of audit firms with the most publicly traded clients, with just nine fewer clients than mid-tier firm BDO USA, according to research firm Ideagen Audit Analytics.

It secured its largest client, Trump Media Co., in 2022.

Trump Media "looks forward to working with new auditing partners in accordance with today's SEC order," a representative for the company told Bloomberg.

—*With assistance from Clara Hudson.*

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

To contact the editors responsible for this story: Jeff Harrington at jharrington@bloombergindustry.com; Amelia Gruber Cohn at agrubercohn@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law

Research Trail

My Work

000888

Help

Account

Home

Practice Centers

Litigation

Transactional

Business

Practitioner Tools

News & Analysis

Laws & Regulations

Secondary Sources

Manage Subscription

Securities Law

May 6, 2024, 10:40 AM PDT

Trump Media Replaces Auditor, Catapulting Obscure Arizona Firm

By Nicola M. White and Amanda Iacone

- Trump Media hires Phoenix-based firm as new auditor
- Firm replaces SEC-sanctioned BF Borgers CPA

Bloomberg Law News 2024-05-06T14:36:36659782353-04:00

Trump Media Replaces Auditor, Catapulting Obscure Arizona Firm

By Nicola M. White and Amanda Iacone 2024-05-06T13:40:02000-04:00

- Trump Media hires Phoenix-based firm as new auditor
- Firm replaces SEC-sanctioned BF Borgers CPA

Semple, Marchal & Cooper LLP, a small Phoenix-based audit firm, just landed a client that’s bigger by far than all its other business combined: Trump Media & Technology Group Corp.

Trump Media has a market capitalization of \$6.7 billion. Semple, Marchal & Cooper, until Monday, had two other Nasdaq-listed companies on its roster, according to data from the US audit regulator.

The audit firm’s largest client was Quest Resource Holding Corp., a Texas-based waste management company, with a market capitalization of \$214 million—more 30 times smaller than the former president’s social media firm.

Its next largest client, a cyber security software firm based in Scottsdale, Ariz., has a market capitalization of \$13 million, according to Bloomberg.

Senior partners at Semple, Marchal & Cooper, which describes itself as “not your average bean counters” on its LinkedIn page, did not immediately respond to requests for comment. Trump Media, which went public in March 2024, also didn’t immediately respond to a request for comment.

The auditor’s website also highlights membership with the BDO Alliance—an affiliation with the sixth largest US CPA firm that gives Semple, Marchal & Cooper access to BDO software, training, and staff resources meant to help smaller firms serve their own clients. BDO USA P.C. did not immediately respond to a request for comment about Semple’s portfolio.

The former president’s company said Monday that it had to fire the auditor it has used since 2022, BF Borgers CPA, after the US securities regulator on Friday permanently shut it down, calling the Colorado firm a “sham audit mill” that churned out fraudulent audits over the span of three years. Hundreds of the firm’s other former clients are in the same situation.

The SEC described widespread problems at BF Borgers and sanctioned the firm plus its founder with a total of \$14 million in fines to settle the charges on Friday. The Wall Street regulator detailed accusations of false work papers, meetings about client risks that never happened, and audits copied from previous years as the Lakewood, Colo.-based firm churned out audit after audit.

The sanctions covered BF Borgers’ work for public companies from January 2021 through June 2023.

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit www.djreprints.com.

<https://www.wsj.com/articles/regulator-explores-naming-companies-tied-to-auditing-deficiencies-amid-investor-pushback-8ee1d1f3>

CFO JOURNAL

Regulator Explores Naming Companies Tied to Auditing Deficiencies Amid Investor Pushback

Shareholders have long called for such disclosure in inspection reports, in part a bid to learn which specific audits had problems

By [Mark Maurer](#) [Follow](#)

May 6, 2024 1:46 pm ET



The PCAOB's investor advisory group last year recommended that the regulator reverse its policy of not identifying the companies whose audits were selected for inspection. PHOTO: ALYSSA SCHUKAR FOR THE WALL STREET JOURNAL

America's auditing regulator is exploring whether it should reveal the names of companies that received deficient audits of their financial information as part of its inspection reports, a hot-button issue that in the past was weighed but not acted on.

"That's an issue that we have definitely heard, and it's under consideration," Public Company Accounting Oversight Board Chair Erica Williams told The Wall Street Journal, referring to investor feedback. "There have been previous boards

that have focused on that issue, and so we're looking at the work that they've done there."

PCAOB staff are looking into this issue as it has for years under previous boards, Williams said. No formal consideration is under way, meaning the staff could recommend the issue be added to the agenda or drafted as a proposal for the board to vote on, but hasn't yet, she said.



Erica Williams, chair of the PCAOB. PHOTO:
ALYSSA SCHUKAR FOR THE WALL STREET JOURNAL

"Like every issue that comes to us, we take a look at it and take it under consideration," Williams said. "This issue, which is a longstanding one, is one that the staff is still taking into consideration."

Interpretations of the PCAOB's authority to release that information under the Sarbanes-Oxley Act of 2002, which created the watchdog, vary. The PCAOB in 2004 issued a memo saying the law statutorily limits its authority to make public

certain information from its inspection process. The regulator, under a different chair, in 2012 echoed that, saying such disclosure isn't an option that is consistent with the law's restrictions.

Meanwhile, investors have argued that the law gives the board discretion to determine what details are appropriate to include in inspections reports.

"We're not really operating from a blank slate here," said Williams, who has served as chair since 2022. "This is an incredibly complex issue."

The PCAOB, which is overseen by the Securities and Exchange Commission, inspects registered auditing firms either annually or every three years, depending on the number of audit opinions they provide. The reports include the percentage of audit deficiencies and other related details, but not the identities of the companies where inspectors found deficiencies in their outside auditing

firms' work. Sometimes the deficiencies consist of the auditing firms' failure to catch serious accounting errors.

The PCAOB's funding is largely provided by the companies whose financials must be audited by firms that are registered with the regulator. Its budget is set to total roughly \$385 million this year, up 10% planned from the previous year.

Investors for years have called for such disclosure by the PCAOB, in part a bid to learn which specific audits had problems.

The PCAOB's investor advisory group last year recommended that the regulator reverse its policy of not identifying the companies whose audits were selected for inspection. "By withholding the names of companies whose audits have been inspected, the PCAOB is willingly withholding from investors knowledge of which specific audits complied with laws, regulations, and professional standards," the group wrote at the time.

The Center for Audit Quality supports "purposeful transparency to instill more timeliness and utility" for stakeholders to the PCAOB's inspection process and findings, said Julie Bell Lindsay, chief executive of the professional group. But any new requirements to disclose confidential information should be proposed only after thoughtful and thorough engagement with stakeholders to understand the value, need and implications of such disclosures, she said.

Identifying companies in inspection reports likely would both harm the businesses and their investors by potentially lowering the stock price, said Tom Quaadman, executive vice president of the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness. In some cases, the company may have done nothing wrong and the audit deficiency itself is a matter of differing judgment, said Quaadman, who doesn't believe the PCAOB has the authority to make the change. "It doesn't necessarily reflect the reality of the financials of a company," he said.

Some investors have criticized the inspection reports, saying they are limited in scope and lack details. The PCAOB has said it is working to make inspections more efficient and transparent. In 2023, it inspected nearly 900 audits, up from 801 the previous year, the PCAOB said.

The PCAOB under Williams has sought to better incorporate investors' views into its standard-setting efforts. The regulator recently proposed a string of rules that many investors argue would help deliver greater transparency, but which auditors have said would add extra work and cost.

Write to Mark Maurer at mark.maurer@wsj.com

Opinion **Inside Business**

Why don't auditors find fraud?

Regulators have put forward a series of proposals to clarify and extend responsibilities to spot wrongdoing

STEPHEN FOLEY



Regulators fear auditors are failing in their role as a last line of defence for investors against corporate shenanigans © Evgeny Ivanov/Dreamstime

Stephen Foley YESTERDAY



Get ahead with daily markets updates. [Join the FT's WhatsApp channel](#)



For decades, investors have lamented how rarely external auditors uncover corporate fraud. From Enron to Wirecard, the cry after each scandal is, where were the auditors? The Association of Certified Fraud Examiners' biennial report on how workplace fraud gets detected has typically shown auditors are the ones uncovering the wrongdoing only 4 per cent of the time.

Bad news. The latest [report](#) out a few weeks ago said the number is down to 3 per cent. Whistleblower hotlines and other internal controls may have helped some companies themselves discover some malfeasance earlier, but what about when management is the perpetrator or a corporate culture is rotten? A [survey](#) of investors by the Center for Audit Quality, a trade group for large accounting firms, found that 57 per cent thought the current system “frequently” failed to detect illegal acts.

Regulators fear auditors are failing in their role as a last line of defence for investors against corporate shenanigans. Audit firms argue that company executives are responsible for the accuracy of financial statements and that the role of an auditor role is only to provide [reasonable assurance](#) — not a guarantee — that a financial statement is free from material misstatement.

It is an argument that has prompted the US Securities and Exchange Commission’s chief accountant, Paul Munter, to exclaim to me on more than one occasion that he is fed up hearing from auditors what they *do not* do.

But a series of proposals to clarify and extend auditors’ responsibilities has now been made. In the US, the Public Company Accounting Oversight Board is [revamping rules](#) on how auditors must look for and deal with evidence of a client’s non-compliance with laws and regulations (Noclar, in the jargon). The intent is to force auditors to cast a wider net for matters that could have a material effect on a company’s financials, even indirectly by leading to big fines or regulatory action that threatens the business.

Audit firms have responded that they cannot be expected to make [legal judgments](#), and that the huge amount of extra work implied by the Noclar proposal as currently drafted probably will not uncover anything significant that current procedures do not already.

A narrower proposal in the UK — which says auditors do not have to probe every minor law or regulation, and can use management’s own compliance programmes as a starting point — has elicited almost as thunderous a [set](#) of comment letters in opposition.

The latest move is by the International Auditing and Assurance Standards Board, which sets rules that are used as a template by scores of countries around the world. It has proposed strengthening standards on fraud detection to emphasise that auditors must look for financial misstatements that might not be “quantitatively material” but which might be “qualitatively material”, depending on who instigated the fraud and why it was perpetrated.

The emergence of all these proposals is no coincidence, and it is not as if audit firms themselves do not see room for improvement. PwC last year promised it would overhaul its fraud detection procedures and probe its clients’ whistleblower programmes more closely, among other reforms to boost audit quality. PwC boss Tim Ryan tried and failed to get all the Big Four firms to make a common pledge on these issues.

Other leaders still talk of an “expectations gap” between what investors want an audit to be and what it really is, as if it is the investors that need to be educated instead of the profession that needs to change.

An alternative response to some of the current proposals would embrace them to strengthen the hand of auditors. They provide new justification to pry open clients’ businesses, push back on hostile finance chiefs and chief executives, and flag more matters of concern to directors, to investors or to the authorities — to follow through on the professional scepticism that is supposed to be at the heart of the auditors’ creed. There is room for agreement, even on the contentious Noclar proposal.

Better still for auditors, there is evidence investors are willing to pay for a more robust service. The CAQ survey showed a majority would support auditors charging an additional 20 per cent or more to cover the extra work of rooting out non-compliance.

A high-quality audit is sometimes called a “credence good”, because its value is difficult to calculate. But, as the shareholders of Enron, Wirecard and countless others will tell you, the cost of a bad audit can be so much more.

stephen.foley@ft.com

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit www.djreprints.com.

<https://www.wsj.com/business/autos/elon-musk-tesla-pay-package-vote-6e365863>

Elon Musk Tries to Make Himself Indispensable at Tesla Ahead of Pay Vote

CEO is shifting EV maker's strategy and suggesting he could take ideas on AI elsewhere



By [Tim Higgins](#) [Follow](#)

May 3, 2024 9:00 pm ET

Elon Musk likes to say he doesn't want to be CEO of Tesla TSLA **0.66%** ▲ .

But the chief executive has spent the past weeks dramatically reworking the automaker in ways that make the person in the CEO chair even more crucial to its future.

He is pushing for changes that make Tesla's traditional car business less of a priority. As he instead focuses on robotics and driverless cars, he has threatened to take his ideas on advanced tech elsewhere if he isn't given more ownership of the electric-car maker.

Meanwhile, Tesla has begun a campaign to win shareholder approval in June to reauthorize his record \$56 billion compensation package, first approved in 2018. The pay package was rescinded in January by a Delaware judge who took issue with the board's ties to Musk and how the deal was put together.



Tesla's year-over-year sales in the first quarter dropped for the first time since 2020. PHOTO: QILAI SHEN/BLOOMBERG NEWS

That pay was linked to a string of milestones related to ambitious growth that Tesla met years ago and helped fuel its meteoric rise to become the first automaker to be valued—for a while—at more than \$1 trillion.

Now, Musk is predicting another rebirth, in which Tesla is a much different company and the world is a much different place—one resembling science fiction with humanoid robots and robotaxis.

Musk now describes Tesla's potential as a mashup of Uber, Airbnb and Amazon.com's cloud business. In his telling, the company would own cars used as Cybercabs and sell vehicles to owners who can then deploy those as robotaxis as well. He envisions the cars' onboard computers, when not in use, to be deployed for cloud services.

While many around the industry suspect Tesla is still far from rolling out vehicles that don't require humans behind the wheel, Musk has signaled that he is already preparing the company for such a future *today*.

"Tesla will spend around \$10B this year in combined training and inference AI, the latter being primarily in car," Musk tweeted recently. "Any company not spending at this level, and doing so efficiently, cannot compete."

He has boosted spending on AI development and has stressed development of a robotaxi, while also ordering sweeping layoffs, saying goodbye to several senior

leaders in the car business and causing some investors to worry he isn't focused enough on next-generation models for consumers to drive themselves.

This past week, he sent more shock waves through the car industry when he slashed much of the team responsible for Tesla's expansive charging network, known as Superchargers, and said he was slowing the build-out of new locations. Shares fell on the news Tuesday and are down 27% for the year through Friday.

Tesla began building the network more than a decade ago as it tried to address worries among early EV buyers about range anxiety.

Some investors had come to think of the network, which was being opened to rivals such as Ford Motor in highly publicized deals announced last year, as another growth engine for Tesla.

Adam Jonas, an analyst for Morgan Stanley, last year estimated the potentially high-margin Supercharger business was worth about \$20 billion to Tesla as car sales were expected to grow.

But then the music stopped.

Year-over-year sales in the first quarter fell for the first time since 2020, and analysts on average estimate Tesla might just eke out growth this year overall. That's a far cry from the 50% annual compounded growth target Tesla once was projecting.

Musk is acting as though he wants to leapfrog a race-to-the-bottom battle for making cheap mainstream EVs for what he says can be a high-margin AI business.

For Tesla's investors, it is a "3 Body Problem," or as fans of the Netflix show are familiar with, an issue in physics in which three celestial objects near each other disrupt the ability to predict their rotation.

In this case, Tesla faces an EV market contending with increased competition in China and growing popularity of hybrids in the U.S.; the promise of AI technology's upending business models; and Musk's own erratic ways—three forces that make it hard to predict where the company is headed.

“The EV industry in our view is entering a commoditized dark age, while the AI and robotics industry is entering a renaissance,” Jonas, long bullish on Tesla, told investors Thursday. “Tesla’s decision-making around what it does less of and what it does more of should be seen through this lens.”



Tesla’s humanoid robot, known as Optimus. PHOTO: NANCY KASZERMAN/ZUMA PRESS

Put another way, instead of trying to chart a course through massive colliding obstacles, Musk is trying to change solar systems all together.

“Not quite betting the company, but going balls to the wall for autonomy is a blindingly obvious move,” Musk tweeted. “Everything else is like variations on a horse carriage.”

The biggest potential for Tesla, Musk said, is how AI can be used in humanoid robots, dubbed Optimus, for application in homes as housekeepers or factories as workers.

But not without making Musk happy.

Even before the judge threw his compensation package into disarray, Musk surprised investors earlier this year by saying he didn’t feel comfortable

working on AI and robotics at Tesla without having a greater ownership stake—25%. He currently directly holds about 13%.

So, he wants the pay package he was previously given and more—maybe through a share buyback.

Without him, Musk suggested to investors, Tesla might not be able to do Optimus.

“If I got kidnapped by aliens tomorrow, Tesla will solve autonomy, maybe a little slower, but it would solve autonomy for vehicles at least,” he said. “I don’t know if we would win...with respect to Optimus or with respect to future products.”

Write to Tim Higgins at tim.higgins@wsj.com

Appeared in the May 4, 2024, print edition as 'At Tesla, Musk Moves To Get More Essential to Tesla Himself Essential to Himself Indispensable'.

Videos

Tesla lays off more staff in software, service teams, Electrek reports

 [reuters.com/business/autos-transportation/tesla-lays-off-more-staff-software-service-teams-electrek-reports-2024-05-06](https://www.reuters.com/business/autos-transportation/tesla-lays-off-more-staff-software-service-teams-electrek-reports-2024-05-06)

Reuters

The logo of a Tesla electric vehicle is placed on a car outside a dealership in Drogenbos, Belgium November 25, 2023. REUTERS/Yves Herman/File Photo Purchase Licensing Rights , opens new tab

May 6 (Reuters) - Electric-vehicle maker Tesla (TSLA.O) , opens new tab has laid off staff from the software, service and engineering departments, tech publication Electrek reported on Monday, citing sources familiar with the matter.

The move comes after the Elon Musk-led automaker disbanded its EV charging department following Tesla's announcement last month that it was reducing its global workforce by more than 10%.

Employees at the automaker received emails over the weekend as part of broader layoffs, according to the Electrek report.

Tesla, whose shares were up more than 1%, did not immediately respond to a Reuters request for comment.

The company disclosed in notices last month that it will lay off more than 6,700 employees across its locations in Texas, California, Nevada and New York.

Tesla has been under pressure from dropping sales and an intensifying price war among automakers as elevated interest rates have slowed the adoption of electric vehicles.

The company is looking to focus on autonomous driving software, robotaxis and its humanoid robot Optimus, and Musk could be cutting its spending on certain teams to preserve cash for those projects, analysts have said.

Tesla disclosed last month it expects to book more than \$350 million in costs in the second quarter for the mass layoffs. The job cuts also included an exodus of top executives, including Drew Baglino, Rohan Patel, Rebecca Tinucci and Daniel Ho.

The company said in April it was working on "new models" that would use its current platforms and production lines - a move that is expected to let it better control capital expenditures.

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

Reporting by Akash Sriram in Bengaluru; Editing by Shounak Dasgupta

Robinhood Crypto gets Wells notice from US SEC

 [reuters.com/business/finance/robinhood-crypto-gets-wells-notice-us-sec-2024-05-06](https://www.reuters.com/business/finance/robinhood-crypto-gets-wells-notice-us-sec-2024-05-06)

Reuters

Future of Money

Robinhood logo and representations of cryptocurrency are seen in this illustration taken December 12, 2023. REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights , opens new tab

May 6 (Reuters) - Retail trading platform Robinhood Markets (HOOD.O) , opens new tab said on Monday it received an enforcement action notice from the U.S. Securities and Exchange Commission (SEC) on May 4 over crypto tokens traded on its platform. The company said it received a so-called "Wells notice," which the SEC issues when it is planning to bring enforcement action against them. Such notices do not necessarily mean the company has engaged in wrongdoing.

"We firmly believe that the assets listed on our platform are not securities and we look forward to engaging with the SEC to make clear just how weak any case against Robinhood Crypto would be," Dan Gallagher, chief legal, compliance and corporate affairs officer at Robinhood, said.

The SEC has adopted a tough stance toward the digital currency industry, arguing most cryptocurrency tokens are securities and subject to its registration rules, while crypto firms have accused it of overreach. The regulator declined to comment on the enforcement action notice.

Coinbase (COIN.O) , opens new tab, the world's largest publicly traded cryptocurrency exchange, has also previously argued that crypto assets, unlike stocks and bonds, do not meet the definition of securities, a position held by the vast majority of the crypto industry. The SEC is engaged in a legal fight against Coinbase. Last year, it said the crypto exchange facilitated trading of at least 13 crypto tokens that should have been registered as securities and was operating illegally as a national securities exchange, broker and clearing agency without registering with the regulator.

Robinhood Crypto enables customers to deposit and withdraw cryptocurrencies to and from its custodial platform and also routes customer orders to liquidity providers based on the lowest price. It has been attempting for nearly two years to register with the SEC.

Last year, it removed digital tokens Solana, Cardano and Polygon from its platform.

Get a look at the day ahead in U.S. and global markets with the Morning Bid U.S. newsletter. Sign up here.

Page Printed From:
https://www.law.com/nationallawjournal/2024/05/06/first-filings-under-sec-cyber-disclosure-rules-offer-little-insight-into-material-incidents/?kw=Early%20Filings%20Under%20SEC%20Cyber-Disclosure%20Rules%20Offer%20Little%20Insight%20Into%20%27Material%27%20Incidents&utm_source=email&utm_medium=enl&utm_campaign=newsroomupdate&utm_content=20240506&utm_t



NOT FOR REPRINT
ANALYSIS

Early Filings Under SEC Cyber-Disclosure Rules Offer Little Insight Into 'Material' Incidents

Most of the 13 companies disclosing "material" breaches reported the incidents quickly but with few details. "Some [filings] are quite skinny in terms of facts, and you can see the SEC disagreeing with their compliance because they are relatively thin," Debevoise & Plimpton partner Ben Pedersen said.

May 06, 2024 at 11:33 AM

Cybersecurity



Maria Dinzeo



The original version of this story was published on [Corporate Counsel](#)

The early days of SEC cyber-incident disclosures haven't revealed much—and that may be a problem.

Thirteen companies have filed 8-Ks disclosing "material" cybersecurity incidents since the U.S. Securities and Exchange Commission's rules took effect in mid-December. But the filings have been largely cursory, which corporate attorneys say stems from the SEC's not providing clarity on what counts as material.

Most of the filings haven't specified whether the breach has had a material impact on the company's financial condition or operations. In some cases, they merely say that the company hasn't yet determined financial or operational materiality.

"There has been a great debate about whether these disclosures are disclosing nonmaterial incidents," said Debevoise & Plimpton partner Erez Liebermann, whose firm has been [tracking](#) the filings. "Many have the exact same language, that there is not yet any evidence of material financial or operational impact."

Such slim reporting may defeat the purpose of the rules, which are intended to help investors better understand cybersecurity risks and how companies are managing and responding to them.

Specifically, they [require](#) public companies to "describe the material aspects of the nature, scope, and timing of the incident, as well as the material impact or reasonably likely material impact of the incident on the registrant, including its financial condition and results of operations."

Some companies say they don't believe the incident has had or is reasonably likely to have a material impact on their overall business, leading experts to wonder whether the firms are rushing to make disclosures as a defensive measure.

"Companies may be voluntarily disclosing incidents they don't believe are material out of an abundance of caution, perhaps because of the intense scrutiny that there's been on cyber incidents from the SEC," said Ben Pedersen, a partner in Debevoise & Plimpton's capital markets group and member of its special situations and public company advisory teams.

That strategy comes with downsides, as firms may be subjected to more scrutiny from the SEC later on over potentially having downplayed an incident or failing to sufficiently describe it. "Some [filings] are quite skinny in terms of facts, and you can see the SEC disagreeing with their compliance because they are relatively thin," he said.

San Francisco-based Dropbox is the latest company [to file an 8-K](#) over a data breach. On May 1, it reported that on April 24 it became aware that hackers had breached its digital-signature product, Dropbox Sign, and accessed customer information, multifactor authentication keys and hashed passwords.

Dropbox said in its filing that it doesn't believe the incident had or is reasonably likely to have a material impact on its business.

Liebermann said Dropbox's 8-K is consistent with what he's seen from other companies. "Dropbox is walking the tightrope of disclosing an incident that may have material regulatory or reputational impact, while saying it does not rise to the level of material financial or operational impact," he said. "To the extent that this seems contradictory, it represents the bind that companies are facing in light of the rule."

Pedersen and Liebermann said they are seeing a clear trend toward companies disclosing quickly—in most cases they're submitting filings within five or six days of detecting an incident. The rules don't actually have a reporting deadline tied to when a breach is discovered. Instead, they require disclosure of material incidents within four days of when a company determined them to be material.

"In our discussions with clients we're encouraging people to take the time they need to get the facts to make a thoughtful and deliberative decision about materiality before disclosing," Pedersen said. "I'm cautiously optimistic that the market will move in that direction over time."

Pederson said some of his clients have been surprised by the "lack of information" in the disclosures filed so far. How they evolve likely will depend on how the SEC reacts. Companies may be more cautious about disclosing quickly "if the SEC starts pushing back on some of these very thin 8-Ks and asking for more information and additional amendments," Pedersen said.

So far the commission has been tight-lipped on whether it views disclosures so far to be in compliance with the rules. The agency did not respond to a request for comment from Law.com.

The SEC has pushed back on one company making an 8-K disclosure of a breach—VF Corp., a Denver-based maker of footwear and apparel, which [on Dec. 15 became the very first firm](#) to disclose an incident in response to the new rules. The filing said VF learned on Dec. 13 that a hacker had broken into its IT systems, disrupted its business operations and stolen some personal data.

“As the investigation of the incident is ongoing, the full scope, nature and impact of the incident are not yet known,” VF wrote. “As of the date of this filing, the incident has had and is reasonably likely to continue to have a material impact on the company’s business operations until recovery efforts are completed. The company has not yet determined whether the incident is reasonably likely to materially impact the company’s financial condition or results of operations.”

The SEC sent the company a letter on Jan. 5, asking that it file an amendment to its 8-K providing more information on how the breach affected business operations, what the material impacts have been and whether they were likely to continue. The letter included a reminder “that the company and its management are responsible for the accuracy and adequacy of their disclosures.”

VF [filed an amended 8-K](#) on Jan. 18, reporting that it “believes the threat actor was ejected” from its IT systems Dec. 15. It said that while the hacker stole the personal information of 35.5 million customers, that did not include social security numbers or bank account or credit card information—because VF does not retain that in its systems. Further, VF has seen no evidence that the hacker obtained customer passwords.

The filing added that while the incident did cause some customer order cancelations and inventory-replenishment problems and was still having some minor lingering effects, the company has concluded that “impacts of the cyber incident are not material and are not reasonably likely to be material to its financial condition and results of operations.”

VF also disclosed that it will be submitting claims for reimbursement of its expenses and losses to its cybersecurity insurers.

Corporate attorneys say that even if 8-K disclosures are falling short in terms of providing the specificity the SEC desires, the agency getting something else it wants: for cybersecurity to be viewed as much more than simply an IT issue.

“There’s no question that the SEC has succeeded in pushing cybersecurity further into the C-suite and the board,” said Leibermann, a member of the Debevoise & Plimpton's Data Strategy & Security Group, “We’re seeing more cyber risk oversight which is one of the goals the SEC is looking to achieve.”

Cliff Steinhauer, director of information security and engagement with the National Cybersecurity Alliance, said that by elevating the issue to the board level, “it can create opportunity for the board to say, ‘We need to invest in protecting ourselves.’”

Another positive effect of the rules is that they give the government and cybersecurity community more visibility into what’s happening across the cybersecurity landscape, including the frequency of attacks on large organizations, Steinhauer said.

But he said organizations are right to be worried about sharing too much information about a cyberattack in a public filing, especially when it might still be dealing with a ransom demand. “It may make sense not to give too much detail because you may still be vulnerable.”

Dan Draper, co-founder of Australia-based cybersecurity and data encryption platform CipherStash, said he’s concerned that the SEC’s rule might play into the hands of threat actors.

“When you publicly disclose information like that, it can be a feedback signal for attacks. They don’t necessarily know if their attack has worked. ... They can use [disclosure] as a mechanism to reveal information because they know organizations are forced to disclose,” he said.

“By disclosing, the victim companies are also giving signals to attackers that their attacks worked, and maybe helping other crime gangs realize the magnitude and breadth of the vulnerability.”

He added: “I understand why the SEC wants that information disclosed, but it comes with some consequences.”

THE

NATIONAL LAW JOURNAL

Breaking news and trends for law firm and legal departments about the evolving federal regulations in a volatile political climate.

FEDERAL LEGAL NEWS

- [Courts & Litigation](#)
- [Expert Columns](#)
- [Latest Stories](#)
- [Events](#)

SPECIAL COVERAGE

- [Special Reports](#)
- [Special Supplements](#)

SURVEYS & RANKINGS

- [The NLJ 500](#)

NATIONAL LAW JOURNAL

- [Current Issue](#)
- [Contact](#)
- [Sitemap](#)

NOT FOR REPRINT



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Chancery OKs Record-Breaking \$100M Pattern Energy Deal

By **Leslie A. Pappas**

Law360 (May 3, 2024, 4:43 PM EDT) -- A \$100 million settlement ending state and federal court litigation over Pattern Energy Group Inc.'s \$6.1 billion go-private sale in 2020 got the nod from Delaware's Court of Chancery on Friday, along with a requested \$26 million fee award and two \$25,000 incentive awards for the lead shareholder plaintiffs.

In a short bench ruling after arguments in Wilmington, Vice Chancellor Morgan T. Zurn congratulated plaintiff attorneys led by Labaton Keller Sucharow LLP and Entwistle & Cappucci LLP, saying the claims were strong, the settlement was good, and the participation from the shareholder plaintiffs was vigorous enough that the "unusual" incentive awards were "reasonable."

The deal is one of the largest of its kind in the Chancery's history, attorneys representing the lead plaintiffs — Jody Britt in the Chancery Court case and an investor group called the Water Island Funds in the District of Delaware litigation — told the court Friday.

There have only been a "handful" of nine-figure settlements of Chancery Court cases, and "no Revlon case has ever settled for nine figures," Ned Weinberger of Labaton Keller told the court, referring to the Delaware Supreme Court's landmark 1986 decision in [Revlon Inc. v. MacAndrews & Forbes Holdings Inc.](#) The Revlon doctrine holds that if a board pursues a sale or a change of control of the company, directors have a duty to shareholders to make a good faith effort to obtain the highest price possible.

The settlement is also one of the largest for a Section 14(a) claim, Andrew J. Entwistle of Entwistle & Cappucci LLP told the court. Section 14(a) of the Securities Exchange Act of 1934 prohibits material misrepresentations and omissions in proxy statements that are sent to stockholders.

"This is the largest ever standalone 14(a) case in the Third Circuit and the District of Delaware, and the third largest, to our knowledge, in the nation," Entwistle said.

The \$26 million attorney fee award, which represents the full amount requested, comes after reimbursement of \$2.78 million in expenses, according to court testimony Friday.

Attorneys spent "tens of thousands of hours" on the case, Weinberger said, which he said breaks down to under \$500 per hour.

The settlement brings an end to consolidated Chancery litigation dating to 2020. Investor plaintiffs in the Chancery and federal court suits alleged that the renewable power venture's \$6.1 billion go-private sale in 2020 was beset by unfair conduct and conflicts.

In 2021, Vice Chancellor Zurn **let most of the claims in the suit stand**, saying Britt raised reasonably conceivable claims that the deal was tilted toward an inferior bid from buyer Canadian Pension Advisory Board. The suit alleged that private equity investor Riverstone Holdings LLC and others exerted unfair control over the deal and acted in bad faith.

The defendants that signed off on the stipulation of settlement were Pattern Energy Group Inc., certain of its directors and officers, Riverstone and its affiliates, and Goldman Sachs & Co. LLC, which according to a court document served as a financial adviser to Pattern Energy Group.

The district court litigation, which also dates to 2020, alleges that Pattern Energy Group misled investors during its \$6.1 billion go-private sale. Last year, a federal judge **narrowed the class in that case** to include only those investors who still held their shares of the company at the time that merger closed.

In December, U.S. District Judge Maryellen Noreika entered an order directing parties in the federal case "to proceed with obtaining approval and administration of the settlement through the Court of Chancery."

Settlement documents were then filed in Chancery Court in December, detailing a proposed deal by which Pattern Energy Group Inc. would pay \$100 million to resolve claims in both courts.

The settlement was struck in late August after multiple mediation sessions.

Pattern Energy Group and the other defendants make no admission of wrongdoing, fault or liability under the settlement.

The investors are represented by Ned Weinberger, Mark Richardson, Michael C. Wagner, Brendan W. Sullivan, Jiahui (Rose) Wang and John Vielandi of Labaton Keller Sucharow LLP, Chad Johnson, Noam Mandel, Desiree Cummings, Jonathan Zweig, Cristelle Rabban, Ana Avalos Cuellar, Sabrina Tirabassi and Mason Roth of Robbins Geller Rudman & Dowd LLP, Brian Schall and Rina Restaino of The Schall Law Firm, Andrew J. Entwistle, Vincent R. Cappucci and Jessica A. Margulis of Entwistle & Cappucci LLP, Marc M. Seltzer and Krysta Kauble Pachman of Susman Godfrey LLP, Christopher J. Kupka of Fields Kupka & Shukurov LLP, and Sue L. Robinson, Brian E. Farnan and Michael J. Farnan of Farnan LLP.

Pattern Energy Group Inc. and certain directors or officers are represented by A. Thompson Bayliss, April M. Ferraro and Christopher F. Cannataro of Abrams & Bayliss LLP and Alan S. Goudiss and K. Mallory Brennan of Allen Overy Shearman Sterling.

Other directors are represented by Matthew D. Stachel, Jaren Janghorbani, Geoffrey Chepiga and Erin Morgan of Paul Weiss Rifkind Wharton & Garrison LLP.

Riverstone is represented by Rudolf Koch, Matthew D. Perri and Andrew L. Milam of Richards Layton & Finger PA and Matthew A. Schwartz and Julia A. Malkina of Sullivan & Cromwell LLP.

Goldman Sachs & Co. LLC is represented by Stephen C. Norman, Jaclyn C. Levy and Ellis H. Huff of Potter Anderson & Corroon LLP and David B. Hennes, Martin J. Crisp and Ethan M. Weinberg of Ropes & Gray LLP.

The state court case is In re Pattern Energy Group Inc. Stockholders Litigation, case number 2020-0357, in the Court of Chancery of the State of Delaware.

The federal court case is In re Pattern Energy Group Inc. Securities Litigation, case number 1:20-cv-00275, in the U.S. District Court for the District of Delaware.

--Additional reporting by Rose Krebs, Jeff Montgomery, and Emilie Ruscoe. Editing by Michael Watanabe.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

9th Circ. Orders 2nd Look At Stay In PG&E Wildfire Suit

By **Craig Clough**

Law360 (May 3, 2024, 9:33 PM EDT) -- The Ninth Circuit on Friday told a lower court to reconsider its order staying claims PG&E investors brought against officers, directors and others over wildfire liability, saying more factors should have been considered before the stay was granted.

The published **opinion** from the three-judge panel said that when issuing a docket management stay, a court must consider three "non-exclusive" factors. But the lower court judge who issued the stay for the individual defendants only considered one, which was judicial efficiency, and did not address if the plaintiffs will be unduly prejudiced by a stay, the panel said.

"Here, the district court's order gives no indication that plaintiffs' specific objections were considered or why the efficiencies the district court seeks to gain outweigh the potential prejudice caused by the significant delay," according to U.S. Circuit Judge Danielle J. Forrest, who wrote the opinion.

The panel vacated and remanded the stay order of U.S. District Judge Edward J. Davila, saying he "is in the better position to assess and weigh plaintiffs' objections to the stay in the first instance."

The 2018 lawsuit claims PG&E's annual financial reports touting its commitment to improving safety in its infrastructure were **false and misleading**, given that a report from the California Department of Forestry and Fire Protection found the company responsible for wildfires. An amended third complaint was filed in May 2019.

PG&E filed for bankruptcy in 2019 due in large part to its suspected role in causing the two major Northern California wildfires, the North Bay Fires in October 2017 and Camp Fire in November 2018, which saddled the company with more than **\$30 billion in potential liabilities**.

After PG&E filed for Chapter 11 in 2019, the bankruptcy court ordered it to proceed in alternative dispute resolution with the proposed class members who sued it. The California federal court then stayed the proposed class action to allow the ADR process to play out — an order that didn't affect case against the individual defendants.

In April 2021, the district court issued a notice of intent to stay for the individual defendants, who are current and former officers and directors of PG&E, along with some bond underwriters. The court said the stay would be in place pending completion of the claims procedure and the ADR process.

"The district court reasoned that a stay 'will promote judicial efficiency and economy, as well as avoid the potential for inconsistent judgments,' in part because 'the ongoing bankruptcy [securities] claim process will affect, among other things, the size and potential damage claims of the putative classes in this action,'" the panel said.

The plaintiffs "vigorously" objected to the notice of stay, and they argued it would prejudice them in several ways, including because the ADR process was predicted to last up to seven years.

The panel said that other cases, including its 2023 opinion in **Ernest Bock v. Steelman** , established **three factors** courts must consider when issuing a stay for docket management purposes: "(1) 'the possible damage which may result from the granting of a stay'; (2) 'the hardship or inequity which a party may suffer in being required to go forward'; and (3) 'the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law.'"

When the district court finally issued its stay order about a year and a half after the notice of stay, it did not weight all three factors, the panel said. It also differed from the reasoning given in the notice in several ways, and only focused on the potential judicial efficiencies of the order, it said.

"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," the panel said.

Because the defendants did not argue that they would face hardships without the stay, "there are no relative hardships to balance. The question is whether the stay imposes hardship on plaintiffs that outweighs the efficiencies to be gained by the stay," the panel said.

As to any prejudice the plaintiffs may suffer, "the district court's notice tersely acknowledged that a stay could cause prejudicial delay, but its order was silent as to plaintiffs' specific arguments raised in their objections," it said.

The panel also found that it has jurisdiction over the interlocutory appeal, even though a stay order is not ordinarily an appealable final decision.

Under the U.S. Supreme Court's 1983 ruling in [Moses H. Cone Memorial Hospital v. Mercury Construction](#) , a stay order is appealable as final if it places the plaintiff "effectively out of court." Due to the long possible delay, and the delay being indefinite, the panel found it has jurisdiction under the Cone doctrine.

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

U.S. Circuit Judges Clifford Wallace and Danielle J. Forrest and U.S. District Judge Danny J. Boggs sat on the panel for the Ninth Circuit.

The investors are represented by Carol C. Villegas, Thomas A. Dubbs and Michael P. Canty of Labaton Keller Sucharow LLP, Darren J. Robbins, Willow E. Radcliffe and Hadiya Deshmukh of Robbins Geller Rudman & Dowd LLP, James M. Wagstaffe of Adamski Moroski Madden Cumberland & Green LLP, and Frank Busch of Coblenz Patch Duffy & Bass LLP.

The defendants are represented by Stephen P. Blake, Jonathan Youngwood and Jonathan Sanders of Simpson Thacher & Bartlett LLP, Steven S. Scholes and Jason D. Strab of McDermott Will & Emery LLP, and Neal A. Potischman, Charles S. Duggan, Dana M. Seshens and Craig T. Cagney of Davis Polk & Wardwell LLP.

The case is In re: PG&E Corp. Securities Litigation, case number 22-16711, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Jonathan Capriel. Editing by Adam LoBelia.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Robbins Geller Attys To Take Stand In \$8M Sanctions Dispute

By **Bryan Koenig**

Law360 (May 3, 2024, 4:37 PM EDT) -- A petroleum refiner will put current and former Robbins Geller Rudman & Dowd LLP attorneys on the stand May 7 in an extraordinary evidentiary hearing testing what the plaintiffs' lawyers knew about an analyst's now-discredited findings as they pursued since-nixed price-fixing claims.

The hearing, which will take place in a San Diego federal courtroom before U.S. District Judge Jinsook Ohta, is the latest chapter of a saga that kicked off in 2015 over accusations that Alon USA Energy Inc. teamed up with other refiners to mask artificial supply constraints behind purported technical challenges. The case most recently went up to the Ninth Circuit as Alon accused the plaintiffs of costing it \$8 million to \$9 million in wasted legal bills.

By Alon's reckoning, it should never have had to face claims filed against it and units of BP, Chevron and Exxon Mobil because there was never any evidence that it cut back production.

However, the plaintiffs contend Alon cited from the memo at the center of the dispute and waited years before calling issue with it.

When one of Judge Ohta's predecessors on the case, U.S. District Judge Dana M. Sabraw, refused to order sanctions, Alon appealed, and a Ninth Circuit panel found on Dec. 26 that the lower court's record lacked the details of an intensely fact-focused probe needed to assess the motion.

"In this case, it is unclear whether or how that inquiry happened, given the brevity of the district court's orders denying sanctions and the lack of any hearing regarding the investigation undertaken by plaintiffs' attorneys," the panel said. "Therefore, without further development of the record, we cannot determine if the district court applied an incorrect legal standard or otherwise abused its discretion in denying sanctions."

The result of the appellate court's findings is the May 7 evidentiary hearing, in which Judge Ohta will hear testimony as ordered by the Ninth Circuit regarding the extent to which plaintiffs' counsel investigated the two allegations at issue in the sanctions motion. The appeals court wants Judge Ohta to establish how thoroughly Robbins Geller vetted the factual record before filing the complaints against Alon and after the company disputed the allegations.

Developing that record means putting the lawyers on the stand. In a filing on March 27, Alon listed nine people it plans on calling, plus potentially two more. Of those 11 people, 10 are attorneys, and the last is the energy industry expert on whom the entire fight rests, Robert McCullough of McCullough Research. Most of the lawyers listed have since left Robbins Geller, including Lonnie Browne, now a deputy attorney general with the California Department of Justice's Antitrust Section.

Scott L. Cummings, a professor at the University of California, Los Angeles School of Law, told Law360 that it's not unheard of to put lawyers on the stand to check their due diligence in contentious sanctions fights over "what lawyers knew and understood." Even so, "it's not the run-of-the-mill case," Cummings said.

Gas station and consumer plaintiffs grounded their allegations heavily on McCullough's findings from 2012, which said the refiners had the capacity to meet shortfalls, including those caused by a fire at a Washington BP facility.

However, Judge Ohta concluded in October 2022 that **summary judgment dismissing the allegations** against Alon and its fellow defendants was appropriate because the plaintiffs failed to show "any proof that defendants' actions were not profit maximizing or that they lowered supply despite market demand."

"The evidence suggests that defendants increased supply in California as demand rose," Judge Ohta said.

Alon wasn't satisfied with simply defeating the lawsuit and sought sanctions to recoup the costs of defending itself over six years. Its attorney, Carl W. Hittinger of BakerHostetler, told the Ninth Circuit the total cost was "between eight and nine million dollars."

Hittinger argued the plaintiffs couldn't simply rely on McCullough's findings when they called the closing of an Alon refinery on April 20, 2012, in Bakersfield, California, "suspicious." The problem, according to Alon, is that the Bakersfield hydrocracker — whose closing was the only allegation hooking Alon into the alleged conspiracy — actually started back up on that date after having been shut down the prior year.

"There's no declaration or affidavit from any attorney on the case. The only declaration is from Mr. McCullough. So the attorneys have never stepped up and said exactly what they did, what they discussed with Mr. McCullough, what investigation they did," Hittinger told the Ninth Circuit, according to a transcript of the oral arguments.

The basis for the antitrust claims was that Alon's hydrocracker plant shut down around the same time other major refineries run by other defendants shut down. The timing, according to the plaintiffs, suggested a collusive effort to reduce gasoline supply in California.

However, the plant had actually shut down in December 2011 — which does not overlap with the other refineries closing down, as the plaintiffs alleged — as part of a seasonal slowdown in the asphalt industry before restarting operations in June 2012, Alon said in court filings.

Despite being notified of this in 2019 and told all the information was publicly available, the plaintiffs continued their case against Alon.

Alon later said the district court abused its discretion by not explaining its reasons for denying its motion for sanctions. The district court erred by stating the plaintiffs' reliance on the report was reasonable because it was cited in news articles and by a Washington state senator, Hittinger told the panel.

Hittinger also argued the district court was wrong to say Alon waited too long to object to the McCullough report's veracity. The company couldn't have simply raised the real story of the Bakersfield hydrocracker earlier than it did in April 2019 because defendants can't "raise factual issues of any kind" when pursuing a motion to dismiss or a judgment on the pleadings, he said.

The panel appeared sympathetic to those arguments, including U.S. Circuit Judge Bridget S. Bade, who suggested permitting plaintiffs' attorneys to "rely on anything" risked "gutting" the investigatory requirements of Rule 11 of the Federal Rules of Civil Procedure.

Judge Bade also suggested that Alon's delay in pointing out the complaint's errant facts about the shutdown may affect only the amount of damages Alon might be due from a sanctions order.

During the hearing, Steven Francis Hubachek of Robbins Geller defended gas station plaintiff Persian Gulf Inc.'s conduct by arguing that Alon waited years to point out the factual inaccuracy and by asserting that plaintiffs were safe in relying on the McCullough findings, which also were cited by third parties.

"When we filed the complaint, you know, we had every reason to believe McCullough. He's had decades of experience. We weren't prepared to rely upon Alon's own statements," Hubachek said.

Hubachek also defended the decision to continue pressing the case against Alon even after the

company pointed out the factual inaccuracy, based on assertions of a conspiracy and that Alon didn't reopen the refinery "at a time where it was economically advantageous to them."

George G. Aguilar of Robbins LLP, defended the consumer plaintiffs' conduct during the hearing, arguing that the refinery industry "isn't shy about taking issue with any sort of allegation ... especially in this instance where the crux ... and the purpose of the McCullough report ... was to establish the artificially high prices of gasoline in California."

Persian Gulf has continued to defend the plaintiffs' approach in the months since, including in a February filing accusing Hittinger of "multiple misstatements" during the Ninth Circuit arguments, including his assertions about the refinery shutdown in December 2011, which the plaintiff said "had nothing to do with the refinery's availability in 2012."

Instead, Persian Gulf argued that analysts were surprised the plant remained shuttered earlier that year, noting that the details of the plant's operation were based on Alon's own emissions data, not just the analyst report.

Further, the gas station owner argued in an April 30 prehearing brief that it's "substantively indisputable" that Alon "chose to supply less gasoline than it could have" during a spring 2012 supply shortage.

Counsel's investigation of that supply and Alon's participation in the market, "were thorough and conscientious," Persian Gulf said, adding that Alon cited the McCullough report in its initial reaction to the litigation to argue, alongside the other refiners, that there was nothing unusual about plant closures, and for years did not dispute details of the plant closure.

"This evidence will show extensive corroboration of: (1) the report (including Alon's own statements), which remains substantively accurate, with no basis for doubting it, and (2) a widely held perception, backed by Alon's own acts and statements, that it was a participant in the California gasoline refinery market even in 2016, when plaintiff filed the amended complaint," Persian Gulf said.

Alon's own responses to the shutdown issue and the litigation were "slippery" and heightened the suspicion driving the claims against it, Persian Gulf said.

"At the evidentiary hearing, plaintiff will establish that its counsel's investigation included consideration of this entire web of obfuscation," Persian Gulf said.

Alon is represented by Carl W. Hittinger, Tyson Y. Herrold and Kamran Ahmadian of Baker & Hostetler LLP.

The consumer plaintiffs are represented by Michael J. Nicoud of Robbins LLP.

Persian Gulf is represented by Jason A. Forge and Alexandra S. Bernay of Robbins Geller Rudman & Dowd LLP and Jason S. Hartley of Hartley LLP.

The consumer cases are Richard Bartlett et al. v. BP West Coast Products LLC et al., case number 3:18-cv-01374, and Rinaldi et al. v. BP West Coast Products LLC et al., case number 3:18-cv-01377. The gas station case is Persian Gulf Inc. v. BP West Coast Products LLC et al., case number 3:15-cv-01749, all in the U.S. District Court for the Southern District of California. The appellate cases are Persian Gulf Inc. v. Alon USA Energy Inc., et al., case number 22-56016, and Joshua Ebright et al. v. Alon USA Energy Inc. et al., case number 22-56018, both in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Craig Clough and Matthew Perlman. Editing by Drashti Mehta.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

3rd Circ. Clarifies Review Standard For Derivative Suits

By **P.J. D'Annunzio**

Law360 (May 3, 2024, 6:06 PM EDT) -- In a precedential ruling Friday declining to revive Cognizant Technology investors' derivative claims over a bribery scandal, the full Third Circuit held that the best way to review such cases on appeal was from the beginning, not giving deference to the lower court's decision or considering whether there was an abuse of discretion.

The court held en banc that it would depart from the abuse of discretion approach it had espoused in derivative suits since its 1992 ruling in **Blasband v. Rales** . While not going so far as to invalidate Blasband, the court did join other circuits and state supreme courts in using the de novo standard.

"To the extent we relied upon the general practice of some of our sister courts of appeals, 'developments since [Blasband] was handed down' have substantially eroded that practice; every court of appeals to consider this issue as a matter of first impression during that period has adopted de novo review, and others have departed from precedent to do the same," U.S. Circuit Judge Julio Fuentes wrote in the court's **opinion**.

"Moreover," it continued, "reviewing demand futility cases for an abuse of discretion 'is not only unworkable in practice but also flawed in conception' because whether demand is futile is not a matter of one's discretion, but instead depends only on whether the plaintiff adequately pleaded the state-law requirements. That being so, it hardly makes sense to review whether a district court has abused discretion that it does not have."

With that in mind, the en banc panel upheld the lower court's dismissal of the investors' case based on a **failure to plead demand futility**.

The investors claimed that a bribery scheme originating in India cost them more than \$4 billion and sued the directors of Cognizant under Delaware law.

The stockholders said the alleged loss came from the directors failing to halt the company's president and chief legal officer from taking part in a scheme involving a construction permit for the company's campus in India, resulting in criminal and regulatory charges and caused the company's stock to significantly drop.

But U.S. District Judge Kevin McNulty said the shareholders did not make a demand on the company's board before filing the derivative action over the alleged bribery of Indian officials. Therefore, he held that they failed to plead demand futility in that they didn't give the board notice to act.

The investors argued that the directors had a duty to inform them of the alleged bribery, and they were told there were no instances of corruption at the time. The investors claimed this was a falsehood.

The Third Circuit said that the likelihood of liability against the directors had to be considered in determining whether the claim could move forward.

"Plaintiffs never allege that the director defendants knew Cognizant officers and employees had paid bribes to foreign government officials, nor that the director defendants knew they were otherwise participating in wrongdoing by publishing the reports," the opinion said. "And that is fatal to plaintiffs'

claim because, under these circumstances, the director defendants must have known that they were disseminating false or misleading information to have violated their fiduciary duty of loyalty."

Attorneys for the parties did not immediately respond to requests for comment Friday.

The investors are represented by Cohn Lifland Pearlman Herrmann & Knopf LLP, Robbins Geller Rudman & Dowd LLP, Federman & Sherwood, and others.

Cognizant and its directors are represented by Charles A. Brown and Daniel P. Roeser of Goodwin Procter LLP.

The case is *In re: Cognizant Technology Solutions Corp. Derivative Litigation*, case number 22-3027, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Lauren Berg. Editing by Adam LoBelia.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

6 States Strike \$270M 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.

Update: This story's headline has been updated to reflect the number of states.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Goldman Settles Decade-Old Metal-Rigging Class Action

By **Bonnie Eslinger**

Law360 (May 3, 2024, 7:55 PM EDT) -- Goldman Sachs Group Inc. has settled a decade-old putative class action claiming the investment bank and others conspired to manipulate platinum and palladium market values, according to a Friday filing with the U.S. Securities and Exchange Commission.

The suit, **first filed** in New York federal court in 2014 and amended in 2017, claimed Goldman Sachs and the other defendants violated federal antitrust laws and the Commodity Exchange Act in connection with the alleged conspiracy.

"On April 19, 2024, the parties reached a settlement in principle, subject to final documentation and court approval, to resolve the class action," the 10-Q filing with the SEC states. "The firm has reserved the full amount of its proposed contribution to the settlement."

While the notice does not include the settlement terms or any amount Goldman Sachs is expected to pay, the SEC filing notes that the firm "has reserved the full amount of its proposed contribution to the settlement."

The case originated as five separate suits that were consolidated in 2015. The suits alleged the banks colluded to manipulate benchmark prices of precious metals by coordinating sell orders with chat rooms, digital messages, phone calls and emails. The banks allegedly used the knowledge of downward price swings to sell metals and derivatives at opportune times.

The other defendants in the case include HSBC Bank, UBS AG, BASF Metals Ltd. and ICBC Standard Bank PLLC.

The plaintiffs, who had done transactions in markets for platinum and palladium, sought financial compensation and injunctive relief for the alleged violations of the antitrust laws and the Commodities Exchange Act.

They claimed the defendants — mostly foreign companies — manipulated the benchmark prices for platinum and palladium through collusive trading on the futures market to depress the price of the metals and by abusing the process for setting the benchmark prices.

A trial court judge tossed the suit in 2020, but the U.S. Court of Appeals for the Second Circuit **reversed the dismissal** of some of the plaintiffs' antitrust claims and vacated the lower court's dismissal of the suit's Commodity Exchange Act claim in February 2023.

"The defendants allegedly benefited from this conduct via trading in the physical markets and holding short positions in the futures market," the Second Circuit said. "The district court held that it had personal jurisdiction over two of the foreign defendants, but it dismissed the plaintiffs' antitrust claims for lack of antitrust standing and the plaintiffs' CEA claims for being impermissibly extraterritorial."

In their decision, the appellate panel reversed the district court's holding that plaintiffs Larry Hollin and White Oak Fund LP lacked antitrust standing to sue for manipulation of the New York Mercantile Exchange futures market in platinum and palladium.

However, the appellate court affirmed the district court's conclusion that another plaintiff, KPFF Investment Inc., did not have antitrust standing.

Additionally, the appellate decision vacated the trial court's dismissal of the plaintiffs' CEA claims.

"The plaintiffs have alleged sufficient domestic activity so that the CEA claims are not impermissibly extraterritorial," the opinion said.

The panel noted that it has previously held that the CEA does not apply to conduct beyond the U.S., meaning a plaintiff must sufficiently allege transactions and conduct within the U.S. to bring a CEA claim against a foreign entity.

The plaintiffs demonstrated more than one type of domestic transaction by the defendants, the panel ruled. The exchange plaintiffs' claims that they sold futures contracts on the NYMEX is demonstrative of a domestic transaction, according to the ruling.

The plaintiffs sufficiently alleged domestic conduct by the defendants as well, the panel said, noting that the metals benchmark prices were set by trading activity of BASF, Goldman Sachs, HSCB and ICBC, which all trade metals in the U.S.

The defendants' petition for rehearing or rehearing en banc with the U.S. Court of Appeals for the Second Circuit was denied in April 2023, according to the SEC filing.

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

The plaintiffs are represented by Michael Dell'Angelo of Berger Montague and Gregory S. Asciolla of DiCello Levitt LLC.

Goldman Sachs is represented by Richard C. Pepperman II, Jonathan S. Carter and Mark A. Popovsky of Sullivan & Cromwell LLP.

HSBC is represented by Damien Marshall, Leigh Nathanson, Laura Harris and Brian Donovan of King & Spalding LLP.

ICBC is represented by Robert G. Houck and John D. Friel of Clifford Chance LLP.

BASF is represented by Michael D. Hynes and Avi Mediratta of DLA Piper LLP.

The case is In re: Platinum and Palladium Antitrust Litigation, case number 14-cv-09391, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Elliot Weld. Editing by Drashti Mehta.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Hagens Berman To Spearhead Litigation Over Skin Tech Woes

By **Hailey Konnath**

Law360 (May 3, 2024, 11:15 PM EDT) -- Hagens Berman Sobol Shapiro LLP was appointed lead counsel in securities litigation claiming Beauty Health Co. hid the news of a defective skin care device, beating competing bids from Glancy Prongay & Murray LLP and Pomerantz LLP, according to an order in Delaware federal court.

U.S. District Judge Sherilyn Peace Garnett on Thursday granted a motion filed by Hagens Berman's clients, Priscilla and Martijn Dijkgraaf, both of whom were appointed lead plaintiffs in the proposed class action.

The Dijkgraafs don't have the largest financial interest of the competing lead plaintiffs — they say they lost \$78,391 after the truth emerged about Beauty Health's device. However, the plaintiffs with the largest interest, Glancy Prongay clients Jeff and Kevin Brown, have unique trading habits that make them atypical of the proposed class in the litigation, according to the decision.

The Dijkgraafs, on the other hand, have met their burden of establishing their typicality, Judge Garnett said.

And the Dijkgraafs have requested the appointment of Hagens Berman, which submitted a resume "demonstrating the firm's experience with and past successes in securities litigation," the judge noted. No other party has pushed back against Hagens Berman's ability to serve as lead counsel, she noted.

The suit centers on Syndeo, a machine that performs hydradermabrasion, a type of facial. According to the investors, the company's press releases and disclosures painted an optimistic picture of Syndeo's launch. However, in reality, the device had issues that led to "frequent treatment interruptions" that cost Beauty Health, the investors say. Their suit also lists several officers as defendants.

Hagens Berman's and Glancy Prongay's clients opposed each other's bids to lead the case and also opposed the bid from Pomerantz and its client. However, Pomerantz's client, Joseph Jou, eventually filed a notice of non-opposition, noting that he doesn't have the largest financial interest in the litigation within the scope of the Private Securities Litigation Reform Act.

In Thursday's order, Judge Garnett said the Browns were "presumptively the most adequate lead plaintiffs." However, the Dijkgraafs argued that the Browns weren't "typical" of the proposed class because their trading activity calls for unique defenses. That's because the Browns conducted "thousands of trades" during the class period, and they also purchased substantial positions in the company's stock before selling those positions, the Dijkgraafs said.

Judge Garnett declined to disqualify them based on their day trading alone, noting that the Browns' ownership of shares extended throughout the relevant time period.

"Jeff Brown's habit of fully closing out his position in company stock, however, raises the risk that he may be subject to unique defenses with regards to his damages, undermining the typicality of his claims," the judge said.

She added that while Beauty Health might not ultimately prevail on that argument, "its determination would likely play a large role in this litigation and involve concomitant expense."

On top of that, the Browns made substantial purchases of Beauty Health stock even after a disclosure underlying the litigation was made, according to the decision.

"This substantial post-disclosure increase in the Browns' position could, as other courts have found in similar circumstances, undermine the Browns' ability to invoke the fraud-on-the-market presumption of reliance," Judge Garnett said.

And with the Browns out of the picture, the Dijkgraafs are presumptively the next most adequate plaintiffs, she added.

Beauty Health and counsel for the competing lead plaintiffs didn't immediately respond to requests for comment late Friday.

Beauty Health is also facing a **stockholder derivative complaint** in Delaware's Chancery Court. An investor in that suit claims that the company's misleading statements led to stock price drops, analyst downgrades and the federal securities action when the truth came out.

The Dijkgraafs are represented by Reed R. Kathrein and Lucas E. Gilmore of Hagens Berman Sobol Shapiro LLP.

The Browns are represented by Robert V. Prongay, Charles Linehan and Pavithra Rajesh of Glancy Prongay & Murray LLP, and Corey D. Holzer of Holzer & Holzer LLC.

Jou is represented by Jennifer Pafiti of Pomerantz LLP.

Counsel information for the defendants was not immediately available.

The case is Abduladhim Alghazwi et al. v. The Beauty Health Co. et al., case number 2:23-cv-09733, in U.S. District Court of the Central District of California.

--Additional reporting by Leslie A. Pappas. Editing by Kristen Becker.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Hess-Chevron Merger Hit With Class Disclosure Suit In Del.

By **Sydney Price**

Law360 (May 3, 2024, 6:54 PM EDT) -- A Hess stockholder sued the energy company in Delaware's Court of Chancery over alleged deal disclosure failures in the proposed \$53 billion Chevron-Hess merger, adding to a list of complications that include claims by other energy giants to Hess interests.

Chevron announced its deal for Hess in October, an all-stock transaction valued at around \$53 billion, or \$171 per share. Under the terms of the agreement, Hess shareholders will receive 1.0250 shares of Chevron stock for each Hess share, with the total value of the deal, including debt, estimated at \$60 billion.

However, investor George Assad alleges in his suit filed Thursday that the proxy statement Hess filed on April 26 fails to disclose projections for unlevered free cash flow, which is its available cash before accounting for interest and other debts. Assad calls this "the most critical projection metric" for Hess stockholders. Assad said it is imperative investors receive this critical information before May 28, when stockholders will vote on the proposed transaction in a special meeting.

The suit alleges Goldman Sachs, which serves as a financial adviser to Hess' board, relied upon these projections to create its fairness opinion on the transaction.

Assad also alleges that the proxy statement fails to disclose information regarding potential conflicts of interest faced by Hess' other financial adviser, J.P. Morgan Securities LLC.

"If this material information is not timely disseminated, Plaintiff and all other public stockholders of Hess will suffer the irreparable injury of an uninformed voting decision and Hess' public stockholders may not receive the true value of their investment," the suit states.

In addition to Hess, the suit's individual defendants include Hess board chairman and former Deloitte & Touche CEO James H. Quigley, as well as several Hess directors. Assad alleges the defendants breached their fiduciary duties in facilitating the proposed transaction.

The proposed merger has already hit other roadblocks on its way to closing. In December, the Federal Trade Commission asked Chevron and Hess for **more information** about the proposed merger, and both companies said they are cooperating with the FTC on the merger review process.

In February, **Chevron revealed** that Exxon Mobil Corp. and China National Offshore Oil Corp. believe they have preemptive rights to buy Hess' stake in a lucrative oil project off the coast of Guyana, a hitch Chevron said could lead to failure to close the deal.

Assad's suit seeks an order preliminarily and permanently enjoining the defendants from closing the transaction.

Counsel for Assad and a representative of Hess did not immediately respond to requests for comment on Friday.

Assad is represented by Richard A. Acocelli, Kelly K. Moran and Alexandra E. Eisig of Acocelli Law PLC and Brian D. Long of Long Law LLC.

Counsel information for Hess and the individual defendants was not immediately available on Friday.

The case is Assad v. Hess Corporation et al., case number 2024-0468, in the Court of Chancery of the State of Delaware.

--Editing by Vaqas Asghar.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Chancery OKs Extra Digging Into Trump Media Share Dispute

By **Jeff Montgomery**

Law360 (May 3, 2024, 6:56 PM EDT) -- The sponsor of a special-purpose acquisition company that took Donald Trump's social media venture public earlier this year won Delaware Court of Chancery approval Friday to briefly dig deeper into disputed share-exchange terms for the deal, with more than \$58 million on the line.

Vice Chancellor Lori W. Will set a May 10 deadline for the sponsor, ARC Global Investments II LLC, and the SPAC, Digital World Acquisition Corp., to determine whether ARC should receive additional documents relevant to claims that DWAC shortchanged ARC to the tune of 1.6 million shares.

"It's tough for me to see how the documents are irrelevant," Vice Chancellor Will said in a ruling in favor of ARC's discovery demand immediately after teleconference arguments.

At issue in part are ARC allegations that DWAC improperly classified convertible notes held by pre-closing Trump Media and Technology Group in a way that allowed their conversion into shares on closing, diluting the overall equity and reducing the shares available to ARC after closing.

DWAC challenged ARC's position and argued that the Chancery Court should reject, on multiple grounds, ARC's call for deeper discovery in support of the suit it filed in February.

The suit accused DWAC and its directors of breaching its charter and alleged breaches of fiduciary duty. It also sought a declaratory judgment in favor of ARC's position, which would give the sponsor 1,604,703 additional Class A shares in Trump Media and Technology Group, worth about \$58.4 million at DWAC's April 19 closing price.

TMTG documents sought by ARC "relate to whether certain security holders are included in the conversion ratio, which seems relevant" under Chancery Court rules, Vice Chancellor Will said. "They relate to anti-dilution and the conversion ratio, which are central to the case."

Matthew D. Perri of Richards Layton & Finger PA, counsel to ARC, argued that "TMTG noteholders are not sellers. TMTG noteholders lent TMTG cash" and are not eligible to claim shares in the newly public company under the agreement.

Perri added that ARC is "entitled to documents about how TMTG viewed its creditors in the context of this business combination" and their treatment in share distributions.

D. Scott Carlton of Paul Hastings LLP told Chancellor Will that "ARC is seeking TMTG documents that have no value to charter interpretation or its application. The litigation is a dispute between DWAC and ARC. TMTG has no role in the conversion ratio" that determines post-closing share holdings.

Despite ARC's arguments, Carlton said, "noteholders are not carved out from the definition of seller. It says 'any sellers.' There's no ambiguity."

Although DWAC said it already has produced about 1,300 documents totaling 25,000 pages in response to ARC's demands from five sources, Vice Chancellor Will said she did not view the numbers as disproportionate and said it was unlikely that many more would be produced by TMTG.

"Defendants need to turn this around quickly," the vice chancellor said, asking DWAC to produce the

documents "as soon as they can and targeting completion of production by next Friday."

ARC sued Digital World and its directors, Eric S. Swider, Frank J. Andrews, Edward J. Preble and Jeffrey A. Smith, on Feb. 29.

Trump founded TMTG in 2021. Digital World went public in September 2021 after completing a \$250 million initial public offering, and it announced in October 2021 that it would take the social media platform public, in a deal that was then valued at \$1.7 billion.

The SPAC raised \$1 billion for the effort in May 2022 in a PIPE deal — a private investment in public equity — but the financing package to support the deal has dwindled as investors pulled their financial commitments. In December, Digital World disclosed that cancellations from the PIPE totaled \$484.5 million.

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

Digital World Acquisition Corp. is represented by Kevin M. Coen and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP and Bradley J. Biondi, Traci Zeller, Nicholas J. Griepsma and D. Scott Carlton of Paul Hastings LLP.

The case is ARC Global Investment II LLC v. Digital World Acquisition Corp., case number 2024-0186, in the Court of Chancery of the State of Delaware.

--Editing by Rich Mills.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Publix Can't Send Questions To Ga. Justices In Opioid Suit

By **Peter McGuire**

Law360 (May 3, 2024, 3:59 PM EDT) -- A federal judge overseeing national opioid litigation has rejected Publix's bid to ask the Georgia Supreme Court "convoluted and confusing" questions about if the state's public nuisance law applied to allegations the supermarket chain overdistributed painkillers.

The company's request was years late, U.S. District Judge Dan Aaron Polster said, considering he previously rejected an initial bid to certify a similar question to Georgia justices. The judge already decided Cobb County, Georgia, could bring its public nuisance claim when he denied Publix Super Markets Inc.'s motion to dismiss the case in 2022, a decision the Sixth Circuit refused to upset, the judge added in his Wednesday ruling.

"Now, Publix **asks this court** yet again to certify questions to the Georgia Supreme Court, this time laying out a prolix proposal of four multi-part and multi-sub-part questions," Judge Polster said. "This request has even less merits than Publix's first request."

Cobb County's lawsuit against drugmakers such as Purdue Pharma and pharmacies such as Publix was rolled into a **national multidistrict litigation** in the Northern District of Ohio alongside dozens of cases trying to hold private companies responsible for the national opioid abuse epidemic. The county's suit is one of the five **bellwether cases** selected by Judge Polster about three years ago.

Publix last month asked to bring questions about the county's public nuisance allegations to Georgia's high court. The justices could decide if the laws apply to the sales of legal prescription opioids, as a way to remedy alleged malpractice or for local governments to recoup the cost of public services, according to the company.

But Judge Polster told the company more than two years ago that its petition to certify questions to the Georgia court was untimely since he had already analyzed and decided the same legal issue when he rejected its motion to dismiss, according to the ruling.

"If Publix's first request for certification, made in 2021, was tendered too late — and the court concluded it was — then Publix's second request is obviously only more so," Judge Polster said.

Plus, the company's convoluted and confusing questions were largely meaningless for resolving the case, so they couldn't be pitched to the Georgia Supreme Court under Peach State law, the judge added. Georgia only allows certification of questions that are determinative to the case, a hurdle Publix couldn't clear, the judge added.

The supermarket chain's framing of the plaintiffs' allegations in one of its proposed questions would be contested, Judge Polster said. Publix focused on whether the company's specific conduct was a nuisance and not whether its conduct created a condition found to be a nuisance, a distinction that's "hotly contested" between the parties, according to the ruling.

"In sum, compared to Publix's first, denied request to certify a question to the Georgia Supreme Court, Publix's current request proposes questions that are even less appropriate and even more late," the judge said.

Representatives for Publix and the county did not immediately respond to requests for comment

Friday.

Publix is represented by Michael P. Kohler of Miller & Martin PLLC.

The plaintiffs' executive committee is represented by Jayne Conroy of Simmons Hanly Conroy LLP, Joseph F. Rice of Motley Rice LLC, Paul T. Farrell Jr. of Farrell & Fuller and Peter H. Weinberger of Spangenberg Shibley & Liber LLP.

The multidistrict litigation is In re: National Prescription Opiate Litigation, case number 1:17-md-2804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Emily Field and Jeff Overley. Editing by Marygrace Anderson.

All Content © 2003-2024, Portfolio Media, Inc.