

Tesla Awaits Dell Attorney Fee Appeal at Delaware High Court

By Jennifer Kay

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- Arguments over fees in Dell settlement set for Wednesday

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Tesla Awaits Dell Attorney Fee Appeal at Delaware High Court

By Jennifer Kay 2024-05-14T05:00:14000-04:00

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Recent litigation involving Dell Technologies Inc. and Tesla Inc. has raised a hotly-debated question in Delaware—how much should plaintiffs' attorneys get paid?

The Delaware Supreme Court hears arguments Wednesday in an appeal seeking to reverse last year's \$267 million award to lawyers who negotiated a historic \$1 billion settlement over a contentious stock conversion at Dell. The argument follows sky-high fee applications in the state's Court of Chancery in two lawsuits involving Tesla CEO Elon Musk's pay package and compensation for the electric vehicle manufacturer's directors.

Nine-figure fee awards are rare in Delaware, so there's little incentive for the high court to disturb the Chancery Court's Dell decision, said Paul Regan, a professor at the Widener University Delaware Law School.

"These are outlier, massive-outcome cases in which the stockholders have been delivered multi-billion-dollar recoveries because of the work of these lawyers," he said.

A hedge fund challenged the payout for the attorneys representing the pension fund who brought the Dell case in Chancery Court. The settlement resolved claims that founder Michael Dell and private equity giant Silver Lake LLC coerced investors into the 2018 stock conversion.

The \$1 billion deal, reached 19 days before trial, set a Chancery Court record for stockholder settlements. The attorneys' fees are the second-highest in court history, after \$304 million awarded in a 2011 case involving the takeover of a Mexican mining company.

Pentwater Capital Management LP argues the court abused its discretion in approving "a windfall" amounting to 27% of the settlement, according to an appeals brief.

Delaware precedents allow rewarding entrepreneurial counsel for holding major corporations accountable through complex litigation, Vice Chancellor J. Travis Laster wrote in an opinion approving those fees. The plaintiffs' attorneys "obtained a real and unprecedented result" after investing \$4 million in the case, he said, while awarding a smaller percentage given the higher settlement didn't follow precedent.

Pending Paydays

The Dell appeal comes as the Chancery Court's chief judge considers two huge fee award requests in the Tesla lawsuits.

In one case, lawyers want a \$230 million payout for representing a pension fund that pushed Tesla to a pending \$919 million settlement over board compensation. Tesla contends \$63.5 million for attorneys' fees would suffice.

Chancellor Kathaleen St. Jude McCormick has said whether she approves that settlement and fee award depends on how she decides what fees are reasonable for the lawyers representing an investor who successfully challenged Musk's CEO pay.

McCormick rejected Musk's \$56 billion pay package in a post-trial opinion as an "unfair price" reached through a process rife with conflicts of interest.

The investor's legal team asked to be paid in 29 million Tesla shares worth about \$5 billion, which Musk called "criminal." McCormick scheduled arguments on the matter in July.

"Ultra-mega award recoveries by lawyers" is new ground for Delaware, Regan said. It's ground the state's judges may have to explore more frequently as they encounter ever-larger tech companies.

The mining case's \$304 million fee award was surprising at the time, but over a decade later, big tech companies have "crazy amounts of market value that we've never seen before," he said.

Considering that, Delaware courts may look at a fee application for stock worth about \$5 billion and think, "maybe this fits and it's not controversial," he said.

Fee Award Debate

In the Dell case, Pentwater and seven other funds asked Laster to follow federal court methodology that constricts payouts in cases involving big settlements. Laster said the federal policy conflicts with Delaware's multi-factor test to ensure legal fees are fair.

Those factors include a case's complexity and the stage it reaches, the attorneys' experience and ability, and any contingency arrangement that leaves them vulnerable to not being paid at all.

Laster is "very shareholder-oriented" and wouldn't approve "a fee that was unrelated to services rendered," said Charles Elson, a retired University of Delaware professor.

In the four decades since Delaware's high court established the multi-factor test, it's never reversed the Chancery Court's "exercise of discretion in determining a reasonable fee award," attorneys for the pension fund that led the Dell lawsuit said in a brief.

Two groups of law professors have debated in amicus briefs for *Dell* over how judges should set fee awards.

One camp of four professors said Laster should've used a declining-percentage method that shrinks the percentage awarded to plaintiffs' attorneys as a settlement grows larger, a method often used in federal securities class actions.

They argue it's consistent with the Delaware Supreme Court's approval of fees in the 2011 mining case, where the plaintiffs' attorneys took home 15% of the \$2 billion in damages awarded after trial.

A group of three other professors who feel Laster got it right said judges should "follow what real clients do in the real world" when awarding fees, namely paying fixed or increasing percentages.

In the Dell case, the pension fund's attorneys originally asked for \$285 million, knowing Delaware judges don't consider such requests lightly, Elson said.

"An ask is a starting point, not an ending point," he said.

The case is *In re Dell Tech. Inc. Class V S'holders Litig.*, Del., No. 349,2023, oral argument 5/15/24 .

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Social media companies argue against public nuisance claims

DJ [dailyjournal.com/articles/378759-social-media-companies-argue-against-public-nuisance-claims](https://www.dailyjournal.com/articles/378759-social-media-companies-argue-against-public-nuisance-claims)

May 14, 2024

"It is nearly universally true that public nuisance is limited spatially," Ashley W. Hardin of Williams & Connolly LLP told the court during a hearing on proceedings brought by school districts who say social media products are damaging students' mental health.

Counsel for social media companies including Meta, Snapchat and YouTube argued against public nuisance claims brought by multiple school districts who say their products are damaging to students' mental health at a hearing on Monday.

Judge Carolyn Kuhl took demurrers and motions to strike by the companies under submission after hearing arguments from the companies and the plaintiffs, who argued that defendants created a public nuisance in schools by knowingly selling an addictive product and pushing its use during school hours. Social Media Cases, JCCP5255 (L.A. Super. Ct., filed Oct. 24, 2022)

"The Surgeon General, among many other public health bodies, has recognized that we're facing a mental health crisis, and researchers, as well as the defendants on documents discussed in our complaint, have agreed that defendants have played a role in causing that," said Felicia Craick of Keller Rohrback Law Offices LLP in Seattle, Washington, who appeared on behalf of the school district plaintiffs.

"As a result, defendants' conduct has fundamentally changed the learning and teaching environment in plaintiffs' schools in the public space of the public school system," Craick added.

These remarks came in reply to statements made by Ashley W. Hardin of Williams & Connolly LLP in Washington D.C., who appeared on behalf of YouTube and argued that the plaintiffs were misusing public nuisance law.

"It is nearly universally true that public nuisance is limited spatially, meaning that nearly all of the examples in the history of public nuisance are limited to a physical specific location where one can go and encounter the nuisance-causing activity and the interference. Plaintiffs' claims do not fit that limitation," Hardin said.

Furthermore, Hardin argued, public nuisance law does not apply to claims related to a defectively designed or wrongfully distributed product.

Meanwhile, Jonathan H. Blavin of Munger, Tolles & Olson LLP in San Francisco, who represented Snap, argued that the claims were barred by the First Amendment and Section 230 of the Communications Decency Act, which shields online services from liability for third-party content.

Blavin pointed to the plaintiffs' claims that the defendant companies were responsible for harmful content recommended by their platforms' algorithms and disseminated widely by users, including viral challenges the districts said resulted in damage to school property.

"The courts have consistently applied Section 230 to public nuisance claims across a broad range of cases, ranging from guns to prostitution to obscenity, and this includes when government entities seek to recoup the money that day spent as a result of harms allegedly caused by protected publishing activities," Blavin said. "It also includes when the plaintiffs do not allege that they themselves use the defendant services, or that they themselves were exposed to particular harmful content."

In response, counsel for the plaintiffs claimed that the court had previously ruled that the claims were not subject to 230 in rulings on previous demurrers.

"The gravamen of our case does not treat defendants as publishers of their users' content," said Josh Autry of Morgan and Morgan PA in Lexington, Kentucky, who appeared on behalf of the school district plaintiffs. "Because of that, this case should proceed to discovery, and that's why defendants are not bringing a demurrer."

Another status conference in coordinated proceedings is scheduled for May 31.

#378759

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Social media companies ask judge to strike youth addiction lawsuit filed by school districts

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Hillel Aron

The mobile phone apps for Facebook, Instagram and WhatsApp are shown on a device in New York. (AP Photo/Richard Drew, File)

LOS ANGELES (CN) — Lawyers for the biggest social media companies in the world appeared in court on Monday to ask a Los Angeles Superior Court Judge to dismiss most of a lawsuit filed against them by hundreds of school districts who say the social media platforms have exacerbated mental health issues in their students.

More than a thousand claims filed against Facebook, Instagram, Snapchat, TikTok and YouTube have been consolidated into a pair of sprawling multi-district actions that includes lawsuits filed by more than 700 personal injury victims and 600 school districts all across the country.

The school districts say that the popular social media apps have fomented a mental health crisis, and have caused students to become depressed, distracted and more difficult to educate. One of their claims is that the companies have created a public nuisance, a legal theory previously employed in mass torts against the makers and sellers of opioids, lead paint, e-cigarettes and firearms.

On Monday, YouTube attorney Ashley Hardin argued that the public nuisance law was never intended to "address all of society's problems," but was rather meant for the more limited purpose of when, say, someone pollutes on public land.

"Nearly all examples are limited to a specific location," said Hardin. In most of the jurisdictions, she said, "public nuisance does not cover claims where there is a defectively designed product."

"There is nothing about the alleged interference that impacts the public's ability to be in public," she added.

Hardin said the harms being claimed by the school districts — that using apps like Instagram and Facebook have led teens to develop body dysmorphia, anxiety and depression — are individual harms and private harms.

"It's hard to imagine a less collective or more individual interference than how one thinks about one's own body," she said.

The school districts have also put forward three other causes of action including for negligence and gross negligence.

The plaintiffs' attorney Felicia Craick argued Monday that the social media companies had deliberately designed their products to be addictive to minors, and had purposely targeted high schools, citing a piece of internal communication from Meta in 2018 which read, "Winning schools is the way to win with teens."

The social media companies, Craick said, have "fundamentally changed the learning environment in public schools," and their conduct has "resulted in a significant disruption to school operations."

The defendants argued that the school districts themselves hadn't been harmed directly by social media, but were seeking to sue on behalf of its own students, which they had no right to do.

"The relationship between the school districts and the students is too tenuous," said TikTok attorney David Mattern. He compared it to school districts suing over sugary treats, notebooks used by student to pass notes or cell phones.

Mattern also pointed out that the defendants comprise an industry "that has been widely recognized to provide a public benefit" — namely, encouraging free speech. The apps' lawyers argued that they should be shielded from the lawsuit by the First Amendment and by Section 230 of the Communications Decency Act.

They have also sought immunity from the consolidated personal injury lawsuits under Section 230. Nearly two months after arguments for that motion was heard, Superior Court Judge Carolyn Kuhl has yet to render a verdict. Kuhl did not issue a ruling on the motions argued on Monday either, and did not indicate how she would rule.

As of May 9, there are 741 personal injury plaintiffs from 40 different states that have filed claims against the social media companies, as well as 617 school districts from 34 states, six local governments and three Native American tribes. The court plans to pick a number of plaintiffs to serve as bellwether cases, which will go to trial — the outcome of which will be used to determine a global settlement.

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Social Media Judge Says Algorithms, Peer Pressure Hard to Divide

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- School districts fight to stay in social media addiction suits
- Meta, TikTok argue schools are too distant from alleged harm

A California state judge considering whether school districts can sue social media giants for student addiction said Monday that it's hard to tell whether harms related to social media can be blamed on its algorithms, or if other factors, like peer pressure, are to blame.

"You can't really tell whether the content was something the student found themselves or whether it was pushed onto them," California Superior Court, Los Angeles County Judge Carolyn B. Kuhl said.

Though Kuhl's note that it's difficult to track the origin of the influence on students would broadly favor tech companies — including Meta Platforms Inc., Snap Inc., TikTok Inc., and Google LLC that want Kuhl to scrap complaints by school districts in California, Florida, Rhode Island, and Washington — Kuhl didn't show a strong leaning during more than three hours of oral arguments on a demurrer and a motion to dismiss the districts' suits.

In a major Judicial Council Coordination Proceeding, which is similar to multidistrict litigation but at the state level, the districts allege that social media has increased the cost of education because it makes students more distracted and disruptive, driving up the need for classroom discipline, employee training, and communication with parents.

School property damage from the "devious lick" TikTok challenge, which encouraged users to destroy and steal items like toilet seats, exit signs, and fire extinguishers, doesn't stem entirely from social media content—but rather its influence on student behavior—so a federal liability shield called Section 230 doesn't apply, argued Josh Autry, an attorney for the school districts.

Autry, of Morgan & Morgan, drew a distinction between the school district bids and the *Wozniak v. YouTube LLC* ruling, which found that harm stemmed directly from YouTube hoax posts.

He argued that school districts in this case are experiencing a different kind of "downstream harm," prompted by social media algorithms that influence students by making trends such as property damage go viral.

A California appeals court found in March that YouTube isn't responsible for a hoax that altered footage of Apple Inc. co-founder Steve Wozniak and other tech icons to sell a fake Bitcoin giveaway. YouTube was deemed not responsible for most of the hoax's harm because it stemmed directly from the posts themselves, Autry said.

'On the Front Lines'

The social media companies argue that school districts can't get damages for harms allegedly suffered by students because the children are third parties. The alleged negative impacts of social media also aren't unique enough to schools, they say.

"A school district has no right to educate students in a vacuum—free from the mental and physical consequences that arise from a global pandemic, hunger, inadequate sleep, abuse, neglect, or any number of other external factors that make classroom learning more difficult and educating students costlier," the tech companies said in court documents, noting that the district complaints would make line-drawing impossible for company liability.

Attorneys for the districts shot back in court filings that schools are "on the front lines" of a mental health crisis specifically created by social media companies, and they have a special responsibility to care for children's mental health.

Social media companies could have easily predicted that addicting youth to their products and encouraging their use in schools would disrupt education, the districts argued, citing Snap's "Snap to School" campaign and Meta's notifications that intentionally target students when they're busy.

Felicia Craick for the districts during Monday arguments distinguished social media giants from other companies, like fast food companies, whose products could raise public health concerns.

"You have to look at the facts," said Craick, of Keller Rohrback. To make a similar suit against a company like McDonald's Corp., "you need McDonald's not only involving an addictive product, but also following students, telling them to eat the burgers, and breaking into schools, telling the students to eat, and controlling burgers even after McDonald's doesn't physically have them anymore."

Addictive Platform Design

Meta, Snap, TikTok Inc., and Google LLC face allegations that they designed their platforms to be addictive, causing depression and anxiety in children.

Lawyers for the plaintiffs are attempting to wield a novel argument that the platforms are defectively designed to bypass a federal shield protecting online platforms from suits over third-party content.

Kuhl in October said social media sites aren't "products," but the plaintiffs made a claim that the companies were careless, so the companies couldn't use the First Amendment or the federal shield to block the suits.

Kuhl in March sustained the platforms' demurrer to claims for sex and age discrimination—one of 13 causes of action—without giving plaintiffs an opportunity to revise their complaint. But she gave plaintiffs a chance to try again and add more factual allegations to claims that the companies failed to warn users about risks of using the sites.

The case is Social Media Cases JCCP, Cal. Super. Ct., No. JCCP5255, 5/13/24 .

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Inari Medical Hit With Investor Suit After DOJ Probe Revealed

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Class Action

May 14, 2024, 7:52 AM PDT

Matthew Bultman

Reporter

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** No. 1:24-cv-03686

Inari Medical Inc. was sued by a shareholder over a stock price drop after the medical device company revealed it faced a US Department of Justice investigation into payments to health-care providers.

The proposed class action, filed Monday in the US District Court for the Southern District of New York, alleges Inari touted its product sales and results, while hiding that those numbers were inflated by the payments under scrutiny.

“Unbeknownst to investors, while Defendants were speaking positively about the Company’s growth prospects, it had been engaging in illegal business practices,” the complaint said.

Irvine, Calif.-based Inari makes devices for treating blood clots that form in a vein.

In late February, the company disclosed the DOJ sent a civil investigative demand seeking information about payments to health-care professionals relating to meals and consulting services. Inari said at the time it was cooperating with the investigation.

The company’s share price fell 21%, or over \$12 per share, by the next trading day, according to the complaint.

The Michiana Area Electrical Workers’ Pension Fund, a union pension fund in Michigan, is seeking to represent all investors who bought Inari shares over a two-year span, ending in February 2024.

A representative for Inari didn’t immediately respond to a request for comment.

Grant & Eisenhofer represents the MAEWPF.

The case is Michiana Area Electrical Workers’ Pension Fund v. Inari Medical, Inc. , S.D.N.Y., No. 24-cv-03686, complaint filed 5/13/24 .

Apache Investors Secure Initial Approval of \$65 Million Deal

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Class Action

May 14, 2024, 9:39 AM PDT

Matthew Bultman

Reporter

- Investors alleged they were misled about 'Alphine High' field
- Deal revealed days after class certification recommended

Apache Corp. will pay \$65 million to settle a shareholder lawsuit alleging the oil and gas company misled investors about a disappointing West Texas shale discovery, under a deal initially approved by a federal magistrate judge.

Investors in court filings said the settlement was an “excellent result,” ending more than three years of litigation. Magistrate Judge Andrew Edison in the US District Court for the Southern District of Texas preliminarily approved the deal in an order filed Monday.

The lawsuit was filed in 2021, after Apache posted a roughly \$3 billion writedown on the drilling project. The suit accused Apache, a subsidiary of APA Corp., of misleading investors about the potential to recover oil and gas at the “Alpine High” field in the Texas panhandle.

After years of touting Alpine High, Apache was eventually forced to admit that the field was virtually barren, investors said. The complaint alleged Apache “recklessly gambled on Alpine High,” and lied to investors about the resources in play and Apache’s ability to extract them.

Apache and the investors said they’d agreed to settle the case in March, shortly after Edison recommended their class be certified.

A settlement hearing is scheduled for mid-September in Houston.

Saxena White PA and Kessler Topaz Meltzer & Check LLP are lead counsel for the plaintiffs. Baker Botts LLP represents Apache.

The case is In re Apache Corp. Securities Litigation , S.D. Tex., No. 21-cv-00575, order filed 5/13/24 .

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May 13, 2024, 12:34 PM PDT

Musk Faces Lawsuit for Drug Use, X Posts Under the Influence

By Mike Leonard

- Billionaire drug use jeopardizes federal contracts, suit says
- Board allegedly unwilling or unable to check 'superstar CEO'

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Musk Faces Lawsuit for Drug Use, X Posts Under the Influence

By Mike Leonard 2024-05-13T15:34:20000-04:00

- Billionaire drug use jeopardizes federal contracts, suit says
- Board allegedly unwilling or unable to check 'superstar CEO'

Elon Musk's use of illicit drugs such as cocaine, ecstasy, ketamine, and LSD threatens Tesla Inc.'s business, including by apparently influencing his sometimes erratic behavior online, according to a newly unsealed court filing.

An investor added the legal claims against Musk and other Tesla board members to an existing lawsuit that initially reflected an attempt to curb the billionaire's market-moving social media activity. The new complaint in Delaware's Chancery Court comes about two weeks after the US Supreme Court turned down the chance to let Musk out of his "Twitter sitter" agreement with the Securities and Exchange Commission.

Read More: Supreme Court Spurns Musk's Twitter Sitter Appeal in SEC Win

The shareholder suit still centers on claims that a Tesla board beholden to Musk has failed to police his posts on the social network that became X, which he bought for \$44 billion in 2022 and renamed. The filing quotes liberally from the recent court ruling invalidating his \$55 billion pay package, which described him as a "superstar CEO" who dominates corporate decision-making at the automaker.

But the new version of the lawsuit adds significant details, many of them about Musk's alleged—and self-reported—use of mind-altering drugs. "The board is unwilling or unable to exercise oversight of the TechnoKing of Tesla despite Musk's admitted and wide-ranging illicit drug use, despite being concerned that it has influenced his market-moving tweets," the suit says.

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

Miami House Party

Reports of Musk's drug use represent a growing headache for Tesla and its board, particularly in the wake of a Wall Street Journal article that detailed its extent in January. He said publicly that he has a ketamine prescription and posted on social media that "if drugs actually helped improve my net productivity over time, I would definitely take them!"

"Musk is reported to have consumed tabs of acid at a house party in Los Angeles, psychedelic mushrooms at an event in Mexico, smoked marijuana on Joe Rogan's show, and recreationally used ketamine with his brother and Tesla board member Kimbal Musk at a house party in Miami," the suit says. "While Musk claims to have a prescription for ketamine, its prescribed use would not include taking it at house parties and sharing it with others."

Read More: Elon Musk's Drug Use Is the Latest Headache for Tesla's Board

According to the new shareholder complaint, certain Tesla directors have privately voiced concerns about Musk's drug use. The habit also threatens the company's federal contracts, including those related to a project building out the national electric vehicle charging infrastructure, the lawsuit says.

The partly redacted court filing also devotes significant space to allegations about online posts by Musk that don't appear to have been vetted. That may have to do with the "upheaval" at the top of the company's legal department over the past five years, the amended suit says.

It was originally filed under seal May 6 before being made public May 10.

The investor leading the litigation, David Wagner, is represented by Heyman Enerio Gattuso & Hirzel LLP. Tesla, Musk, and the board are represented by Young Conaway Stargatt & Taylor LLP and Freshfields Bruckhaus Deringer US LLP.

The case is Wagner v. Musk , Del. Ch., No. 2022-0953, amended complaint filed 5/10/24 .

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Anavex President's Concealment Cost Company Millions, Suit Says

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Anavex Life Sciences Corp.'s Chief Executive Officer Christopher Missling and company directors were hit with a shareholder derivative lawsuit alleging they concealed from investors that clinical trials used different measures to assess its treatment for a neurodevelopmental disorder.

When the concealment was discovered, plaintiff and shareholder Denise Deangelis alleges, it caused the value of the company's stock to drop, triggering securities class actions.

As a result of the defendants' misconduct, Anavex "has lost and expended, and will continue to lose and expend, many millions of dollars," including legal fees, costs, and payments to satisfy judgments in securities class actions, Deangelis alleges in her complaint filed Monday in the US District Court for the District of Nevada.

Anavex publicly stated that it would use the same metrics in both its "Avatar" and "Excellence" studies of blarcamesine—also referred to as ANAVEX 2-73—to treat Alzheimer's disease and also Rett Syndrome, a neurodevelopmental disorder that primarily affects females. But the company later revealed in its trial results that it hadn't measured the outcomes of both trials in the same way, according to the complaint.

The Avatar studies investigated blarcamesine's suitability as a treatment for adults with Rett Syndrome, whereas the Excellence studies dealt with pediatric patients, according to the complaint.

Anavex's Excellence trials, which ultimately failed to achieve statistical significance, utilized a "mixed-effect model for repeated measure" in analyzing data, which wasn't used in the previous study.

The same day Anavex announced the Excellence clinical trial results, the company's stock had its biggest single-day decline since 2020, falling more than 35% to close at \$6.04 per share on Jan. 2, 2024, according to data compiled by Bloomberg.

The complaint alleges violations of Section 14(a) of the Exchange Act, breach of fiduciary duties, unjust enrichment, waste of corporate assets, gross mismanagement, abuse of control, and a private right of contribution against Missling under Sections 10b and 21D of the Exchange Act.

The complaint seeks a declaratory judgment, an award of damages to Anavex, and an order requiring the company and officers to “reform and improve its corporate governance and internal procedures to comply with applicable laws and to protect Anavex and its shareholders.” Deangelis also seeks attorneys’ fees and costs.

The complaint also names as defendants company directors Peter Donhauser, Jiong Ma, Athanasios Skarpelos, Steffen Thomas, and Claus Van Der Velden.

Anavex didn’t immediately respond to a request for comment.

Leverly & Associates represents Deangelis.

The case is Deangelis v. Anavex Life Sciences Corp. 24-cv-00891 , D. Nev., No. 24-cv-00891, complaint filed 5/13/24 .

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Sullivan Hits Back Against FTX Investors' 'Dubious' Fraud Claims

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FTX law firm Sullivan & Cromwell is slamming the “dubious” claim by some of the failed crypto exchange’s investors that its lawyers were complicit in a billion-dollar fraud.

A federal lawsuit against the firm by FTX investors is based on “innuendo masquerading as facts,” Sullivan Cromwell said Monday in a court filing. Defrauded FTX customers are set to get all of their money back from the failed exchange in bankruptcy proceedings, according to the firm.

“Plaintiffs in this action, a handful of alleged FTX customers, purport to bring claims against Sullivan & Cromwell to recover the same damages for which they are already being compensated through the bankruptcy process,” the firm said, asking a federal judge in Florida to dismiss the lawsuit.

Sullivan & Cromwell worked for FTX in the 16 months leading up to its November 2022 crash. The firm has come under a spotlight over its ties to the exchange once led by Sam Bankman-Fried, who in March was sentenced to 25 years in prison for stealing billions from customers.

A proposed class of investors represented by The Moskowitz Law Firm in February sued the firm for allegedly aiding and abetting the fraudulent activity that happened at the exchange. The firm is also facing a court-mandated review into whether it has any conflicts of interest that should have been addressed as it leads FTX through bankruptcy proceedings.

Controversy over the powerful Wall Street firm’s work for FTX ultimately caused it to lose out on a high-profile outside monitor assignment overseeing crypto exchange Binance Holdings Ltd, Bloomberg News reported.

Sullivan & Cromwell has billed more than \$180 million over the last 18 months for work guiding FTX through Chapter 11 restructuring proceedings in Delaware.

In Monday’s filing in the US District Court for the Southern District of Florida, the firm said FTX investors have still made no accusation that Sullivan & Cromwell had knowledge of any fraud while performing certain legal services. Courts have held that “lawful legal services to a fraudster does not impute knowledge of the fraud,” said the firm’s counsel, lawyers from Hunton Andrews Kurth.

Sullivan & Cromwell also touted its work on the FTX bankruptcy, calling it a “tremendous success” that will compensate the injured customers through the bankruptcy process.

The exchange on May 8 revealed that it has collected billions more than it needs to cover what customers lost. It sets creditors up to receive full recoveries based on the price of their crypto assets at the time of the bankruptcy, plus interest.

Sullivan & Cromwell is among several third-party advisers and celebrity endorsers, including former NFL star Tom Brady, facing investor claims of enabling FTX's fraud in Miami federal court. Bankman-Fried in April agreed to cooperate in exchange for the plaintiffs dropping civil claims against him.

The case is Re: FTX Cryptocurrency Exchange Collapse Litigation , S.D. Fla., 1:23-md-03076, 5/13/24 S.D. Fla., 23-md-03076, 05/13/2024

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Uber-backed proposal to cap Nevada lawyers' contingency fees survives initial challenge

 [reuters.com/legal/government/column-uber-backed-proposal-cap-nevada-lawyers-contingency-fees-survives-initial-2024-05-13](https://www.reuters.com/legal/government/column-uber-backed-proposal-cap-nevada-lawyers-contingency-fees-survives-initial-2024-05-13)

Alison Frankel

The logo of Uber is seen at a temporary showroom at the Promenade road during the World Economic Forum (WEF) 2023, in the Alpine resort of Davos, Switzerland, January 20, 2023. REUTERS/Arnd Wiegmann Purchase Licensing Rights , opens new tab

May 13 (Reuters) - An Uber-backed Nevada ballot initiative that would impose the most sweeping and draconian contingency fee limit in the U.S. has survived its first legal challenge.

District Court Judge James Russell of Carson City ruled on Friday that the ballot initiative to cap contingency fees in all civil cases at 20% complies with Nevada requirements for petitions seeking signatures from Nevada voters.

That's not a particularly high bar. As I've previously reported, Nevada requires only that ballot initiatives present prospective petition-signers with a single issue whose effects are briefly and fairly described.

Russell held that the fee cap petition, which was proposed by a political action committee backed primarily by the ride-share company, satisfied both elements because it addresses just that one matter and offers a "straightforward, succinct and non-argumentative" description of the proposal's effects.

Opponents of the fee cap, including the Nevada Justice Association and an association for Uber riders who allege they were sexual assaulted by Uber drivers, have argued that the initiative is misleading because it does not inform prospective petition signers of the follow-on effects of the fee cap.

Challengers presented Russell with declarations from nearly three dozen Nevada lawyers who said the fee cap would make it harder for all kinds of plaintiffs – from patent owners and defrauded shareholders to law enforcement officers injured in the line of duty – to find lawyers to handle their cases. (Lawyers typically receive contingency fees of 25-40% of their clients' recovery.)

Fee cap opponents also argued that the proposal failed to warn Nevadans that they will end up bearing more Medicaid costs if personal injury plaintiffs can't find lawyers. Plaintiffs who recover money from the defendants who caused their injuries must reimburse the state

Medicaid systems for the cost of their care. If lawyers won't take their cases, fee cap opponents said, Nevada taxpayers will be on the hook for the full cost of care for Medicaid patients.



Russell credited challengers with "strong arguments" on the fee cap's downstream effects of limiting access to legal counsel and reducing reimbursements to Nevada's Medicaid system. But he said these potential consequences were "too speculative and hypothetical to be required to be included in the petition's description."

The challengers said on Friday that they will appeal Russell's ruling to the Nevada Supreme Court, citing the trial judge's acknowledgement of their strong arguments about the impact of the fee cap.

"We're confident that the Nevada Supreme Court will agree with us that the voters need to be truthfully informed about these important effects before Uber's proposal can be placed on the ballot," said the groups' lead counsel, Deepak Gupta of Gupta Wessler, in an email statement.

Uber did not respond to my email query about Russell's decision. The company has denied allegations that it failed to protect riders from sexual assault and has said reports of assault have declined after its adoption of additional safety measures.

The political action committee that filed the Nevada petition said in a statement that Russell's approval of the ballot initiative is "a win for plaintiffs and Nevada voters."

"Despite the misleading arguments of trial attorneys," the statement said, "this ballot measure will put more money into the victims' pockets, without in any way limiting an individual's ability to sue or the amount victims can recover."

The 20% Nevada fee cap, according to a declaration [here](#), opens new tab filed by challengers, would be by far the most restrictive in the country. Two other states, Oklahoma and Michigan, impose fee caps in all civil cases but the limits are 50% and 33%, respectively. Several other states cap contingency fees in medical malpractice cases but the lowest limit is New York's 30% cap.

Even if the Nevada cap's critics don't succeed on appeal, they will have additional opportunities to oppose the measure, as Russell's ruling notes. Assuming that Uber and the petition's other supporters amass the requisite 100,000 or so signatures from Nevada voters, the measure will proceed to the Nevada legislature. If state lawmakers decline to enact the proposal outright, the legislative can decide to present voters with an alternative when the initiative goes before voters.

And before the initiative actually appears on general election ballots, Nevada voters will receive state-approved statements from the initiative's supporters and opponents, outlining their arguments for and against the fee cap.

Both sides can also run public campaigns addressing the proposed cap. If the Supreme Court allows Uber and the other backers to begin collecting signatures, I wouldn't be surprised to see the proposal's critics start running ads explaining their opposition.

Read more:

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

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

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Reporting By Alison Frankel

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Alison Frankel

Thomson Reuters

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NEWS

Sanctions Ordered After CEO Skips Deposition in MDL

ZHP sought to invoke the Apex Doctrine, which seeks to limit depositions of individuals at the “apex” of a corporation based on the premise that lower-level employees are likely to have firsthand knowledge of the material facts, and that deposing the top executives of a corporation is likely to impose a significant burden.

May 13, 2024 at 06:11 PM

Products Liability



Charles Toutant

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

A pharmaceutical manufacturer based in China is facing a monetary sanction in a New Jersey court for failing to make its CEO available for a deposition in multidisciplinary litigation over alleged cancer-causing contamination in the blood pressure drug Valsartan.

Thomas Vanaskie, a former judge of the U.S. Court of Appeals for the Third Circuit who is now serving as a special master in the Valsartan MDL, ordered the sanctions in the case, which is being heard in federal court in Camden, New Jersey. He cited the failure by Zhejiang Huahai Pharmaceutical Co. to compel CEO Baohua Chen to sit for his deposition, and the company’s violations of orders to produce certain documents.

Vanaskie, who is with Stevens & Lee in Scranton, Pennsylvania, will set the amount of sanctions at a later date after hearing input from plaintiffs counsel about the costs and attorney fees associated with its efforts to obtain ZHP’s compliance, and a proposed monetary penalty if it is believed such a measure is appropriate. He also sought the plaintiffs’ input on an adverse-inference jury instruction concerning information that would have been disclosed in Chen’s deposition and the documents.

China bars people within its borders from cooperating with the U.S. justice system, but Chen sought permission from the government to travel to Macau for a deposition.

Vanaskie notified ZHP on Oct. 27, 2021, that it wanted Chen’s deposition completed by Dec. 15 of that year. However, on Nov. 22, 2021, ZHP replied that the Chinese Communist Party Committee had approved Chen’s trip to Macao, but the Taizhou Public Security Bureau, Exit-Entry Administration and the Taizhou Federation of Industry and Commerce refused to approve Chen’s travel request.

“From the record, it appears that ZHP has sought to benefit from the United States pharmaceutical market but is unwilling to uphold its obligation to abide by United States discovery requirements. As such, ZHP’s conduct is sanctionable under Rule 37 of the Federal Rules of Civil Procedure,” Vanaskie wrote.

“Taken together, these substantive sanctions will mitigate, to some extent, the prejudice plaintiffs have suffered as a result of ZHP’s noncompliance and send a clear message to other foreign corporations that they must take their discovery obligations in United States Courts seriously,” Vanaskie wrote.

ZHP is represented by Skadden, Arps, Slate, Meagher & Flom. The company’s attorneys did not respond to a request for comment about the ruling.

Other ZHP employees have been deposed in the case.

But ZHP sought to invoke the Apex Doctrine, which seeks to limit depositions of individuals at the “apex” of a corporation, based on the premise that lower-level employees are likely to have firsthand knowledge of the material facts, and that deposing the top executives of a corporation is likely to impose a significant burden.

But Vanaskie wrote that the plaintiffs “have adequately shown that Mr. Chen’s involvement and authority with respect to the development, manufacture, sale and recall of Valsartan was substantial and that it is likely that Mr. Chen has personal or unique firsthand knowledge regarding the matters at issue in this case,”

The Valsartan MDL was brought by plaintiffs who claim they developed cancer after taking Valsartan, a generic blood pressure drug.

When ZHP began producing the key ingredients for the drug, it “tinkered with the manufacturing process, so that it could manufacture more of the drug substance cheaper, and then be able to sell it cheaper in order to get market share,” said Adam Slater of Mazie, Slater, Katz & Freeman in Roseland, New Jersey, who is liaison counsel and co-lead counsel for the plaintiffs, who argued the sanctions motion.

That change in the process allegedly caused the formulation of a chemical called N-nitrosodimethylamine, also known as NDMA, a substance that causes cancer, Slater said. But ZHP never conducted a risk assessment related to this change in the process, which would have warned of such a problem, Slater said.

The documents that ZHP allegedly sent related in part to just when the company knew about the contaminant’s presence. Plaintiffs claim the company was made aware of the problem a year before any public announcement was made, Slater said.

Last year, plaintiffs won certification of classes for plaintiffs seeking medical monitoring and economic loss. A first bellwether Valsartan trial for economic loss on behalf of third-party payers had been scheduled for March but has been postponed, with no new date set, Slater said.

Slater said the judge’s ruling “sends a strong message to other Chinese companies and other foreign companies in general.”

“I don’t think it’s limited just to these facts, or just limited to this context,” he claimed. “It points up the the bigger issue of companies that sell their products into the United States, but don’t want to be subjected to the full scope of the laws of the United States when those products turn out to be defective and unsafe.”

Slater added, “And I think that this decision is a very strong statement that they can’t just take the benefits of selling in the U.S., they also have to deal with the burdens, which includes following the law and being accountable when they violate the law.”

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Youth Climate Lawsuit Faces Dire Path After Ninth Circuit Ruling

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The 21 young plaintiffs leading the most closely watched US climate lawsuit of the last decade face an uncertain legal future, thanks to a federal government victory that threatens to end the case for now.

Judges from the US Court of Appeals for the Ninth Circuit quashed the case on May 1, accepting a February mandamus bid from the Justice Department asking for the panel to dismiss the lawsuit.

The decision compels Judge Ann Aiken of the US District Court for the District of Oregon to toss the case, which she had resurrected last year under an amended complaint that raised the possibility the young people would make it to trial.

The move to permanently defeat the case is “tragic and unjust,” and the US should come to agreement at the settlement table instead, according to Julia Olson, Our Children’s Trust chief legal counsel and an attorney in *Juliana v. US*.

Now, they’re left with few options to keep the case in courts, according to legal observers tracking the suit. They will likely ask for a rehearing with a full Ninth Circuit panel, but could also turn to the US Supreme Court or file a new case altogether.

This isn’t the first time the Ninth Circuit has handed a loss to *Juliana*. Another panel “reluctantly” dismissed their first complaint in 2020, citing their inability to provide the redress requested by the plaintiffs: a mandate that the government do more to stem global warming.

This 2024 ruling echoed its predecessor, finding once again that plaintiffs don’t have standing to keep the case in play. The current panel failed to see how the plaintiffs’ amended request for a statement of wrongdoing from the government would solve their claims, especially after the same circuit dismissed the case four years ago.

“Declaratory relief is prospective,” according to the May 1 decision. “The Juliana plaintiffs do not seek damages but seek only prospective relief.”

What’s Next?

That line of thought, according to *Juliana*’s Olson, sets a bad precedent.

“A declaration of our constitutional rights by the courts is one of the few things that has moved our nation to greater justice and equality throughout history,” Olson said in statement in response to the ruling. “The court’s opinion that declaring dangerous and discriminatory government systems unconstitutional doesn’t matter, is simply false.”

A request for an en banc hearing at the Ninth Circuit is a likely next step, but getting those petitions accepted is difficult under the best of circumstances. *Juliana* has already been tossed twice by the West Coast appellate bench.

That leaves a petition at the US Supreme Court as another option, but some attorneys and legal experts are wary of the case’s potential in front of justices. A Supreme Court push wouldn’t fare well given the makeup of the high court, according to Michael Gerrard, head of Columbia University’s Sabin Center for Climate Change Law.

“I think the plaintiffs would be ill-advised to try to get to the Supreme Court because that is not likely to turn out well,” Gerrard said. “This court is not sympathetic to climate cases.”

In the case of settlement, Gerrard noted that petitioning the government to admit they aren’t doing enough to stem fossil fuel development after weeks of rolling out key climate regulations—including power plant and vehicle emission limits—is also a long shot.

Given these pitfalls, filing a new case altogether with brand new claims would be “the path of least resistance,” Widener University law professor James May said, noting that there have been plenty of federal climate failings since the case was filed in 2015.

“There are things that have happened or failed to happen since 2015 that could be the basis for a new lawsuit, that the plaintiffs could not have brought in 2015—because those things hadn’t happened yet—and that have not been ruled on on the merits,” May said.

The case is *United States v. U.S. Dist. Court for the Dist. of Or.*, 9th Cir. App., No. 24-684 .

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Godaddy's \$35 Million Junk Fax Deal Tossed by Eleventh Circuit

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A proposed \$35 million settlement of a class action alleging Godaddy.com LLC sent marketing texts in violation of the Telephone Consumer Protection Act was thrown out Monday by a federal appeals court.

The lower court abused its discretion in approving the deal, overlooking evidence of collusion between class counsel and the Godaddy.com attorneys, failing to ensure absent class members were informed about a case before the US Supreme Court likely to decide the central issue in their case, and improperly calculating attorneys' fees after concluding the deal wasn't a coupon settlement, the US Court of Appeals for the Eleventh Circuit said.

The district court "materially breached its duty" to absent class members when it approved a settlement agreement that "advanced the lawyers' interests" at their expense, Judge Gerald Bard Tjoflat said for the court.

Attorneys for the class were set to receive up to \$10.5 million in fees. They contributed to the court's abuse of discretion by not reminding it of the need to inform the class about the potentially dispositive case before the Supreme Court, *Facebook Inc. v. Duguid*, Tjoflat said.

Plaintiffs Susan Drazen and Jason Bennett alleged in an August 2021 lawsuit that Godaddy sent messages and placed telephone calls to their cellular telephones using an automatic dialing system, in violation of the TCPA.

Judge Kristi K. Dubose of the US District Court for the Southern District of Alabama gave final approval to the settlement in December 2020, overruling the objections of Juan Pinto, who argued that the amount of the settlement was inadequate and the attorneys' fees were excessive.

Supreme Court Case

At issue in the appellate ruling were the objections raised by Pinto, but the court went beyond the briefs to consider the impact on the court's settlement deliberations of class counsel's maneuvering to obtain final approval of the deal before a Supreme Court ruling in *Duguid* that risked rendering the plaintiffs' claims worthless.

Both Drazen's lawsuit and the Duguid lawsuit turned on an unsettled question of TCPA interpretation, whether an autodialer under the TCPA must have the capacity to generate random or sequential phone numbers.

The high court granted certiorari in *Duguid* in July 2020, on the same day that the settlement administrator in the Drazen lawsuit emailed the required notice to the class, and fifteen days before class counsel submitted their motion for attorneys' fees.

Class counsel in Drazen realized that over \$2.26 million of class members' claims would disappear if their case was stayed pending the decision in *Duguid* and if the court ruled favorably to Godaddy.com, Tjoflat said.

As a result, they worked to persuade the district court to approve the deal and award attorneys' fees before that, he said.

Class counsel were able to do so "in the nick of time," but contributed to the court's abuse of discretion by failing to ensure adequate notice to absent class members, Tjoflat said.

Their attempt to obtain \$10.5 million in attorneys' fees made them adversaries of the class, and their agreement to include overbroad liability releases in the deal suggested they were, in effect, representing Godaddy, the judge said.

"The District Court neglected its duty in failing to inform the absent Class Members about the Facebook issue: whether GoDaddy used an ATDS in making the calls and sending the text messages," Tjoflat said. "This was the dispositive issue in the case. Both sides agreed that this was so. Can there be any doubt that the District Court's failure to inform the Class Members denied them due process of law?"

Judge Elizabeth L. Branch concurred in the opinion.

Judge Charles R. Wilson concurred in the judgment, but issued a single page opinion indicating he would have addressed only the district court's erroneous determination that the settlement wasn't a coupon settlement, and its impact on the calculation of attorneys' fees.

John R. Cox PLLC, Bock Hatch & Oppenheim LLC, McGuire Law PC, and Underwood & Reimer PC represent Drazen and the class. Cozen O'Connor PC represents Godaddy.com. Bandas Law Firm PC represents Pinto.

The case is Drazen v. Pinto , 11th Cir., No. 21-10199, 5/13/24 .

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Dell Hit With Suit Over Breach Affecting Millions of Customers

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Computer maker Dell Inc. failed to protect the personal information of millions of customers that was exposed in a data breach announced May 9, a proposed federal class action said.

John Lattimore alleged that Dell breached its obligations to provide adequate data-security measures, properly maintain its systems and software, encrypt sensitive data, and provide timely and adequate notice to affected people.

Data exposed in the breach included names, physical addresses, Dell hardware and order information, service tags, item descriptions, dates of order, and related warranty information, according to a complaint filed May 10 in the US District Court for the Western District of Texas.

The complaint alleged that the breach affected 49 million customers, referencing a late April report from a news service covering the dark web that a “threat actor” was offering a Dell database for sale containing 49 million “customer records.”

Dell didn’t respond immediately to a request for comment.

Victims have suffered injury in the form of increased risk of fraud and identity theft, lost time and out-of-pocket costs incurred responding to the breach, emotional distress, payment for data-security that wasn’t provided, and reduced value of their personal information, the complaint said.

Lattimore seeks to represent a class of all people in the US whose information was compromised in the breach.

The lawsuit brings claims of negligence, breach of contract, breach of implied contract, and unjust enrichment.

Lattimore is seeking actual damages, nominal damages, consequential damages, punitive damages, injunctive relief, attorneys’ fees and costs, and pre- and post-judgment interest.

Morgan & Morgan PA represents Lattimore and the proposed class.

The case is Lattimore v. Dell Inc. , W.D. Tex., No. 1:24-cv-00499, complaint filed 5/10/24 .

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New Balance Shoe Customers End Suit Over 'Made in USA' Claims

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Bloomberg Law 000888

Class Action

The New Balance Inc. logo is displayed outside the company's headquarters in Boston on July 31, 2018.

Photographer: Scott Eisen/Bloomberg

May 13, 2024, 2:39 PM PDT

Tre'Vaughn Howard

New Balance Athletics Inc. and a group of customers, who alleged the company deceptively marketed certain shoe models as “Made in the USA” when up to 30% of their components are produced outside of the US, have agreed to settle their suit.

Plaintiff Matthew Cristostomo brought a proposed class action against the sneaker company for charging a premium on US-made sneakers that didn’t satisfy Federal Trade Commission regulations which require products marketed as “Made in the USA” to be made “all or virtually all” in the United States.

Cristostomo—along with four other named plaintiffs—agreed to dismiss the suit with prejudice against New Balance, with each party bearing its costs, expenses, and attorneys’ fees, according to the joint stipulation, filed in the US District Court for the District of Massachusetts.

- The plaintiffs said New Balance’s website listed USA-made sneakers ranging in price from \$174 to \$259, while shoes that weren’t marketed as such, went for as little as \$59
- The company did have small disclaimers stating its “MADE” series involves shoes containing a domestic value of 70% or greater. But plaintiffs’ argued the small print was inconsistent with the prominent claims of where it was made
- The plaintiffs also asserted a reasonable consumer wouldn’t expect that the sole—which is a major part of a shoe—wasn’t made in the United States. New Balance previously entered into a class settlement over its “Made in the USA” claims for consumers who purchased certain footwear between December 2012 to January 2019

Neither party immediately responded to a request for comment.

Reardon Scanlon LLP and Bursor & Fisher PA represent the plaintiffs. Orrick, Herrington & Sutcliffe LLP represents New Balance.

The case is Cristostomo v. New Balance Athletics Inc. , D. Mass., No. 1:21-cv-12095, joint stipulation 5/10/24 .

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Apple defends iCloud service against antitrust claims

DJ [dailyjournal.com/articles/378750](https://www.dailyjournal.com/articles/378750)

May 14, 2024

Apple Inc. asked a federal judge in San Jose to dismiss a putative class action against its iCloud service, arguing that consumers are not required to sign up for cloud storage with the tech giant to use other Apple products.

Attorneys for Apple Inc. asked a federal judge in San Jose to toss a putative antitrust class action against its iCloud service, saying consumers are not required to sign up for cloud storage with the tech giant to use other Apple products.

An iCloud design feature limiting the types of app data and files is meant to protect the security and privacy of Apple device users and does not impede them from choosing other cloud storage providers, Latham & Watkins LLP partner Belinda S. Lee wrote in Friday's motion to dismiss the claims.

Lee, the firm's vice chair of antitrust and competition practice, cited a 2022 ruling by the 9th U.S. Circuit Court of Appeals that a company can have a competitive advantage because of a product or infrastructure uniquely situated to serve its customers. "Apple designed iCloud's backup feature this way because it ensures the most secure and seamless method of restoring core app data and device files -- access to which could give someone unfettered entry to the most sensitive, intimate, and private information," the attorney wrote.

Plaintiffs' attorneys at Hagens Berman Sobol Shapiro LLP did not respond to an inquiry for comment on Apple's proffered defenses. A hearing on the motion is scheduled for Aug. 22 before U.S. District Judge P. Casey Pitts.

According to the complaint, the Cupertino company hindered competition by arbitrarily restricting iCloud from hosting certain files without a valid technological or security-based reason. "From a security and functionality standpoint, iCloud is no better (and often inferior) to other cloud storage platforms ... As a result of this restraint, would-be cloud competitors are unable to offer Apple's device holders a full-service cloud-storage solution, or even a pale comparison," wrote Hagens Berman partner Ben M. Harrington.

The attorney added that Apple has insulated itself from any real threat and charges supracompetitive fees for iCloud subscriptions. Introduced in 2011, iCloud generates billions of dollars in revenue for the tech giant each year. *Gamboa v. Apple Inc.*, 5:24-cv-01270-PCP

(N.D. Cal., filed Mar. 1, 2024).

However, Lee denied that Apple charged exorbitant fees and said plaintiffs' attorneys erroneously inferred market power from gross margins. The courts have held that, as businesses may be highly profitable merely by having low costs through superior efficiency, gross margins may not accurately reflect market dominance, the attorney wrote. "The complaint relies exclusively on facially flawed calculations ... and conveniently ignores that iCloud pricing is competitive with other cloud storage solutions available on Apple devices," said Lee.

#378750

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One of Jeffrey Epstein's Protectors at JPMorgan Chase, Mary Erdoes, Has Sold \$29 Million of Her Stock in the Bank Since Just Before Epstein's Arrest in 2019

 wallstreetonparade.com/2024/05/one-of-jeffrey-epsteins-protectors-at-jpmorgan-chase-mary-erdoes-has-sold-29-million-of-her-stock-in-the-bank-since-just-before-epsteins-arrest-in-2019



By Pam Martens and Russ Martens: May 14, 2024 ~

In 2020, Netflix released a documentary series titled “Filthy Rich,” based on the book by the same name. The series examined how sex trafficker Jeffrey Epstein was able to continue to enjoy his wealth and power even after Palm Beach, Florida police had built a case that he had sexually-assaulted more than a dozen young girls – many from public schools in middle-class areas surrounding the mansions of Palm Beach.

A sweetheart deal between the Florida State Attorney and the U.S. Department of Justice allowed Epstein to serve just 13 months in jail from June 2008 to July 2009, most of it in a work release program in which he was driven to an office daily by his chauffeured limousine. Epstein was allowed to be on the loose for another decade until the Department of Justice was embarrassed into arresting Epstein on federal sex trafficking charges on July 6, 2019, following an explosive series of articles about



Mary Erdoes, CEO of JPMorgan Chase Asset & Wealth Management

Epstein's victims by Julie Brown in the Miami Herald. (Epstein died in a Manhattan jail on August 10, 2019, a little more than a month after his arrest. His death was ruled a suicide by the New York City Medical Examiner.)

Despite Epstein's earlier arrest in Florida and sensational headlines that followed, Epstein was able to continue his long-term banking relationship with the largest bank in the United States – JPMorgan Chase – until at least 2013. (JPMorgan Chase is now a five-count felon itself, able to endlessly cut sweetheart deals with the U.S. Department of Justice.)

One of Epstein's protectors at JPMorgan Chase was Mary Erdoes – who continues to serve as CEO of the bank's Asset & Wealth Management business that caters to the ultra-wealthy.

Erdoes may never get as "filthy rich" as Epstein, but she has sold \$29 million of her JPMorgan Chase stock since just before Epstein's arrest in 2019. That includes the following amounts: \$3.9 million so far this year; \$3.7 million in 2023 as headlines flew around the world over the Epstein-related allegations against the bank made by the Attorney General of the U.S. Virgin Islands in federal court in Manhattan; \$3.9 million in 2022; \$7.4 million in 2021; \$2.4 million in 2020; and less than three months before Epstein was indicted in 2019, Erdoes sold \$7.95 million. These dollar amounts do not include the millions in stock sales that Erdoes made, ostensibly to pay taxes on stock awards.

How did Erdoes come by all of this stock in the bank? The company granted it to Erdoes on the basis of good performance.

This is what the Attorney General of the U.S. Virgin Islands alleged in a federal lawsuit last year against JPMorgan Chase and Erdoes: (Epstein owned a private island and compound in the U.S. Virgin Islands.)

"In 2006, a JP Morgan Rapid Response Team noted that Epstein 'routinely' made cash withdrawals in amounts from \$40,000 to \$80,000 several times per month, totaling over \$750,000 per year. In addition, Mary Erdoes admitted in her deposition that JP Morgan was aware by 2006 that Epstein was accused of paying cash to have underage girls and young women brought to his home. In the years that followed, JP Morgan employees, including senior executives, emailed internally that Epstein was under investigation or had been sued for trafficking or sexual abuse. This includes an email in 2010 between Mary Erdoes and Jes Staley regarding a federal investigation of Epstein for child trafficking; a 2011 email summarizing a few 2010 news stories connecting Epstein to human trafficking and promising to 'monitor the accounts and cash usage closely going forward;' and a 2011 compliance memo noting that '[n]umerous articles detail various law enforcement agencies investigating Jeffrey Epstein for allegedly participating in child trafficking and molesting underage girls' and that 'Epstein had settled a dozen civil lawsuits out of court from his victims regarding solicitation for an undisclosed amount.' Internal emails also questioned who Epstein's clients were, circulating an article regarding whether Epstein was running a Ponzi scheme.

“Indeed, Epstein’s behavior was so widely known at JPMorgan that senior executives joked about Epstein’s interest in young girls. In 2008, for example, Mary Erdoes received an email asking her whether Epstein was at an event ‘with miley cyrus.’ In her deposition, Mary Erdoes testified that JP Morgan terminated Epstein as a customer in 2013 after she became aware that the withdrawals were ‘actual cash.’ However, Epstein had made substantial cash withdrawals every year he banked with JP Morgan....”

This is how the New York Times reported Erdoes’ role with Epstein in August 2019: “When compliance officers at JPMorgan Chase conducted a sweep of their wealthy clients a decade ago, they recommended that the bank cut its ties to the financier Jeffrey E. Epstein because his accounts posed unacceptable legal and reputational risks.” The reason the relationship was allowed to continue, “according to six former senior executives and other bank employees familiar with the matter, was that Mary C. Erdoes, one of JPMorgan’s highest-ranking executives, intervened to keep him as a client, ” according to the New York Times article.

Any person with a criminal history of paying hard cash to underage girls for sex assaults, and who is taking large sums of hard cash from a bank, should be terminated immediately. The bank is also legally-mandated to file reports with the Financial Crimes Enforcement Network (FinCEN). But according to an expert report written by a former FBI agent of 23 years, Shaun O’Neill, and introduced into evidence last year in the U.S. Virgin Islands’ federal court case, the following massive sums of hard cash were provided to Epstein by JPMorgan Chase:

“Epstein was able to withdraw large amounts of cash from his JPMC accounts for years [Redacted]. In the year 2003, Epstein was able to withdraw highly suspicious amounts of cash totaling \$175,311. In 2004, he withdrew \$840,000. In 2005, he withdrew \$904,337. In 2006, he withdrew \$938,625. In 2007, he withdrew \$526,000. In 2008, he withdrew \$469,000. In 2009, he withdrew \$165,011. In 2010, he withdrew \$253,397. In 2011, he withdrew \$260,000. In 2012, he withdrew \$290,000. In 2013, he withdrew \$197,152.”

O’Neill writes further in the statement filed with the court last year:

“Human trafficking under U.S. law was transformed with the enactment of the Trafficking Victims Protection Act (the TVPA) in 2000. The TVPA equipped law enforcement, prosecutors and victim advocates with new tools and resources to mount a comprehensive and coordinated strategy to combat modern forms of slavery both domestically and internationally...

“In reference to sex trafficking of a minor with great relevance to the numerous victims at the hands of Jeffrey Epstein, minors need not demonstrate force, fraud, or coercion were used against them to induce them to engage in a commercial sex act. Rather, U.S. law has firmly

established that minors cannot consent to commercial sex. Additionally, there is recognition that many forms of human trafficking do not involve force but rather occur through psychological manipulation against victims.”

O'Neill indicated that “Based on the review of the 17 victim statements contained within the July 25, 2006 Palm Beach Police Department Incident Report, more than ten victims were under the age of 18. The elements of child sex trafficking were present as the allegations referenced a commercial sex act involving a minor and there is no such thing as a ‘child prostitute.’ The allegations reflected a textbook definition of human trafficking.”

O'Neill put the blame for the expansion of Epstein's sex trafficking ring at the feet of JPMorgan Chase, writing:

“Had JPMC cooperated with federal law enforcement and [Redacted]...Epstein would have been federally charged at a much earlier date. He likely would not have received the Florida Non-Prosecution Agreement, and he would have been imprisoned for the sex trafficking and money laundering crimes that he committed at an earlier time, thereby shrinking his overall list of victims.”

The long-tenured Chairman and CEO of JPMorgan Chase, Jamie Dimon, was deposed in the U.S. Virgin Islands court case. His narrative is that he lived a cloistered existence in a corner office on the 48th floor of 270 Park Avenue where even the top executives who directly reported to him and worked only “a couple hundred feet” away from his office, never shared with Dimon their knowledge of, and meetings over, the bank's concerns about Epstein's massive withdrawals of hard cash, his prior history as a jailed sex offender in Florida, or his appearance on the front page of the New York Post in 2011 with the giant, all caps bold headline: “PRINCE AND PERV,” featuring a photo of Prince Andrew and Epstein, and the commentary: “Randy Andy with NYC sex creep.”

Somehow, the fact that Epstein was referring to JPMorgan Chase some of the richest and most politically-connected men in the world also escaped Dimon's perch in that corner office. According to the Attorney General of the U.S. Virgin Islands, Epstein referred the following individuals to the bank as clients: the sixth richest man in the world, Microsoft co-founder and billionaire Bill Gates; the ninth richest man in the world, Google co-founder and billionaire Sergey Brin; the Sultan of Dubai, Sultan Ahmed bin Sulayem; media and real estate billionaire Mort Zuckerman; former U.S. Treasury Secretary and former Harvard President Larry Summers, and numerous others.

As chance would have it, Dimon – for the first time since taking the helm of the bank – is also selling large chunks of his stock in the bank. See Jamie Dimon Dumped \$150 Million of His JPMorgan Stock in February; Now He Says His Regulators Want 25 Percent More Capital at his Bank.

For how the bank settled its Epstein-related lawsuits last year, see JPMorgan's Settlements Reach \$365 Million Over Civil Claims It Banked Jeffrey Epstein's Sex Trafficking of Minors; Criminal Charges Could Lie Ahead.

Column: Tesla threatened to fire law firm in bid to block Musk pay critic – court document

 [reuters.com/legal/transactional/column-tesla-threatened-fire-law-firm-bid-block-musk-pay-critic-court-document-2024-05-13](https://www.reuters.com/legal/transactional/column-tesla-threatened-fire-law-firm-bid-block-musk-pay-critic-court-document-2024-05-13)

Alison Frankel

A Tesla logo is seen at a groundbreaking ceremony of Tesla Shanghai Gigafactory in Shanghai, China January 7, 2019. REUTERS/Aly Song Purchase Licensing Rights , opens new tab

May 13 (Reuters) - A Delaware law professor accused Tesla on Monday of threatening to fire one of its longtime law firms if he proceeded with plans to file a friend-of-the-court brief criticizing the company's bid to restore CEO Elon Musk's \$56 billion pay package.

Retired professor Charles Elson of the University of Delaware alleged in a legal filing , opens new tab that Holland & Knight, for which Elson has worked for nearly three decades as a consultant, told him that Tesla said it would end its relationship with the law firm unless Elson abandoned plans to submit his brief , opens new tab.

Tesla's tactic was "extraordinary and appalling," Elson said in the filing, which seeks permission from the court to submit the brief.

After he learned of the electric carmaker's alleged threat to Holland & Knight, Elson said in the filing, he resigned from his consulting arrangement "to protect that firm from retaliation while upholding the important principle of academic freedom."

Tesla did not respond to a query about Elson's allegations.

Holland & Knight denied in an email statement that it was pressured by Tesla. "Holland & Knight determined that Charles Elson's proposed course of action was inconsistent with the firm's obligations to its client, Tesla," the statement said. "This determination was not based on any coercion or threats by anyone, including Tesla."

Holland & Knight represents Tesla in unrelated employment matters, including a race discrimination suit by a California civil rights agency and a separate race discrimination case by the U.S. Equal Employment Opportunity Commission, according to news reports.

Elson, a corporate governance expert, submitted a previous friend-of-the-court brief , opens new tab that was cited several times in the Delaware Chancery Court opinion , opens new tab that voided Musk's pay package. The judge called the compensation granted by Tesla's board "an unfathomable sum" that was unfair to shareholders.

Tesla did not raise objections to Elson's first brief, which argued that Tesla's board did not need to authorize an "unfair" grant of stock options to incentivize Musk. Delaware Chancellor Kathaleen McCormick called his argument "persuasive" in her Jan. 30 opinion invalidating Musk's pay.

Elson sought to file his second brief after Tesla announced last month that it intends to hold a new shareholder vote to reinstitute Musk's compensation. Elson's proposed brief argues that Delaware law does not permit the "unprecedented" maneuver of undoing a Chancery Court judgment through a shareholder vote.

Elson's lawyer, Joel Fleming from the Equity Litigation Group, sent the proposed new brief to Tesla on Friday morning, according to Elson's filing. A Tesla lawyer from DLA Piper called Fleming later that day to assert that Elson had a conflict of interest, and that Fleming should wait before filing the proposed brief, Elson's filing said.

The filing did not offer more detail about DLA Piper's call to Fleming. A DLA lawyer did not provide a response to my query. Fleming declined to comment.

Elson then received an email from Holland & Knight, according to the filing, informing him "that the firm represents Tesla in certain unrelated matters and that Tesla had threatened to fire Holland & Knight if Professor Elson submitted this amicus brief."

Elson said in his filing that there is no conflict of interest because he is not a lawyer at Holland & Knight but only consults with the firm on corporate governance matters. Elson also said he is acting as a friend of the court, not an advocate, in the Musk case.

"I am very disappointed with these events," said Elson in an interview. He declined to say how much Holland & Knight paid him, but said the monthly payment "helped cover my mortgage."

Read more:

Tesla tries legal 'Band-Aid' to revive Musk's huge pay deal

Judge voids Elon Musk's 'unfathomable' \$56 billion Tesla pay package

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Reporting By Alison Frankel

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Xponential dumps Geisler as company faces investigation by US Attorney's Office

 [healthclubmanagement.co.uk/health-club-management-news/Xponential-dumps-Geisler-over-investigation-by-US-Attorneys-Office/353209](https://www.healthclubmanagement.co.uk/health-club-management-news/Xponential-dumps-Geisler-over-investigation-by-US-Attorneys-Office/353209)

By Liz Terry

Xponential Fitness today indefinitely suspended founder and CEO, Anthony Geisler, saying it had been notified on 7 May that the company is facing a legal challenge by the United States Attorney's Office for the Central District of California.

The challenge comes as a result of a filing that was first made in February this year.

Brenda Morris, who has been on the Xponential board since 2019, will act as interim CEO, while a replacement is found.

Xponential had also recently disclosed that it's under investigation by the US Securities and Exchange Commission.

Members of the company's board say they will 'cooperate with both the US Attorney's Office and the Securities and Exchange Commission,' establishing a committee to investigate all allegations. This group will include independent directors Chelsea Grayson, Jair Clarke and Jeffrey Lawrence.

The challenge filed on 9 February was a class action lawsuit brought against the company for financial damages.

The suit – City of Taylor General Employees Retirement System v Xponential Fitness Inc – was filed in the state of California.

Fifteen American law firms, including Robbins Geller Rudman & Dowd and Levi & Korsinsky, also speculatively sought engagement with complainants in a bid to gather a substantial enough cohort to represent Xponential Fitness shareholders in the case in a bid to recover funds. The deadline for them to come forward to participate in the legal action was 9 April. It's understood some of the law firms had up to 70 participants.

At the time, Xponential told *HCM* the company would vigorously defend itself against the claims that certain executive officers violated the Securities Exchange Act between 26 July 2021 and 7 December 2023.

The company has been fighting to stave off rumours of problems since June 2023 when Fuzzy Panda Research published a damning report on its prospects.

Fuzzy Panda made a series of allegations about Geisler and the general trading position of the business, including that in spite of claims by the company it had “never closed” a location, 30 had been permanently closed.

It also said it had evidence that eight out of ten Xponential brands were losing money, calling the business “an abusive franchisor that is a house of cards.”

Shares in the company – the largest global franchisor of boutique fitness brands – fell 37 per cent on the day Fuzzy Panda published, but a fast response from Xponential directors, who called the report ‘misleading’ and ‘inaccurate’ and positive statements from other analysts, such as Raymond James – who said the response of the market was ‘overdone’ – saw them rebound.

Further signs that all was not well came on the day of the deadline for legal action (9 April), when two widely respected Xponential execs – John Kersh and Garrett Marshall – both exited the business on the same day to take up other senior positions in the sector.

Now, a month later, Anthony Geisler has departed.

At the time of the Fuzzy Panda report, Mark Grabowski, chair of the board and founder of Snapdragon Capital Partners – the company’s largest investor – said: “I’ve known and worked closely with Anthony Geisler... since investing in Club Pilates at my prior firm. I couldn’t speak more highly of his passion, commitment to excellence and professionalism.”

However, in announcing Geisler’s ousting today, Grabowski said: “The Board has determined that appointing Brenda Morris to serve as Interim CEO is in the best interest of Xponential, its employees, customers, franchisees and shareholders.”

In a bid to steady the ship, Xponential also re-affirmed it stands behind its full-year 2024 guidance which was originally announced on 2 May 2024.

Background notes

Details of the lawsuit brought on 9 February 2024

City of Taylor General Employees Retirement System v Xponential Fitness Inc.

The allegations are that:- False and/or misleading statements were made relating to the closure of 30 Xponential Fitness franchise locations.

- Xponential’s reported same-store sales and average unit volume metrics had been exaggerated by the company excluding details about underperforming stores.

- Eight out of 10 of Xponential’s brands at that point in time were losing money each month and more than 50 per cent did not make a positive financial return overall.

- More than 60 per cent of the company's revenue was one-time and non-recurring.
- More than 100 franchises were for sale at a price that was at least 75 per cent less than their initial cost.
- The court action will also contend that Xponential misled some franchisees into taking on franchises by misrepresenting the financial profile and profitability of existing studios, as well as the expected rate of return for new openings.
- As a result, court papers contend that some franchisees are substantially in debt, suffering high attrition rates and running non-viable studios that have no realistic path to profitability.

False Claims Act trends and expected enforcement priorities for 2024

 [reuters.com/legal/litigation/false-claims-act-trends-expected-enforcement-priorities-2024-2024-05-13](https://www.reuters.com/legal/litigation/false-claims-act-trends-expected-enforcement-priorities-2024-2024-05-13)

Scott McBride, Rasmeet Chahil

Signage is seen at the United States Department of Justice headquarters in Washington, D.C., U.S., August 29, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

May 13, 2024 - The Department of Justice's (DOJ or Justice Department) Civil Fraud Section recently announced that its False Claims Act (FCA) settlements and judgments in 2023 totaled nearly \$2.7 billion. "False Claims Act Settlements and Judgments Exceed \$2.68 Billion in Fiscal Year 2023," U.S. Department of Justice (Feb. 22, 2024) (hereinafter "Press Release"). The Justice Department also announced its commitment to initiating cases without qui tam relators. In 2023, it initiated 500 such matters, a significant leap from the prior year's total of 305 and significantly above the prior record of self-initiated cases of 340 in 1987.

In addition, the Justice Department has focused its efforts on improper payments under the Paycheck Protection Program (PPP) and its Civil Cyber-Fraud Initiative.

This article will discuss the DOJ's priorities and trends for 2024.

Background

The FCA imposes liability on any company or person (typically a federal contractor) that submits a claim to the federal government that they know (or should know) is false. The FCA is one of the federal government's primary litigation tools in combating fraud against the government. The FCA contains a qui tam provision that allows private citizens, informally known as "whistleblowers," to file suits on behalf of the government.

Qui tam suits have traditionally been an important driver of FCA litigation. This trend has continued, as suits filed by whistleblowers made up 87% of the Justice Department's 2023 recoveries. However, the DOJ's decision to intervene in qui tam cases remains a critical inflection point — 81% of 2023 FCA recoveries were in cases where the government chose to intervene.

On its FCA settlements and judgments, the Justice Department touted this as the "highest number of settlements and judgments in history" — 543 for the year. However, the dollar figure — \$2.68 billion — is actually one of the smaller totals in recent history. By way of

comparison, from 2010 to 2019, the DOJ's recoveries consistently approached, or exceeded, more than \$3 billion each year. The highwater mark was in 2021, when the Justice Department recovered \$5.7 billion total.

The press release showed that the relators' bar has also been active; in 2023, 16% of recoveries came from qui tam cases where the government declined to intervene. While this is a return to the norm after the anomaly of 2022 (when 54% of recoveries were in non-intervened cases), it is an increase from prior years, when the percentage of recoveries in non-intervened cases have been in the single digits (e.g., 8% in 2021 and 9% in 2020). A government declination is not the harbinger of a doomed case that it once was.

As with prior years, health care cases accounted for the largest portion of FCA recoveries, with cases targeting managed-care providers, pharmacies, hospitals, physicians, opioids, and unlawful kickbacks. Specifically, the Justice Department highlighted FCA cases regarding the Medicare Advantage (Medicare Part C) program, medically unnecessary services and substandard care fraud, claims related to the opioid epidemic, and claims based on violations of the federal anti-kickback statute. The DOJ also emphasized its enforcement efforts targeting government defense contractors.

Another recent area of focus for the Justice Department has been improper payments under the Paycheck Protection Program (PPP). The PPP was enacted during the COVID-19 pandemic to provide loans guaranteed by the U.S. Small Business Administration (SBA) to eligible small businesses for payroll, rent, utility payments, and other business-related costs. In 2023, the DOJ resolved approximately 270 False Claims Act matters involving PPP loans, recovering over \$48.3 million.

In its press release, the Justice Department also highlighted its Civil Cyber-Fraud Initiative, which was announced in October 2021. Under this initiative, the DOJ uses the FCA to hold government contractors liable for violating cybersecurity requirements and/or knowingly misrepresenting their cybersecurity protocols.

For example, Verizon paid \$4 million to resolve FCA allegations that it failed to completely satisfy certain cybersecurity controls in connection with an information technology service provided to federal agencies. "Cooperating Federal Contractor Resolves Liability for Alleged False Claims Caused by Failure to Fully Implement Cybersecurity Controls," U.S. Department of Justice (Sept. 5, 2023).

The DOJ's announcement of this settlement was also notable because it discussed the steps that Verizon took to obtain "cooperation credit." The Justice Department's guidance in this area has been limited in the four years since it announced the cooperation-credit policy, but the DOJ noted that "Verizon provided the government with a written self-disclosure, initiated an independent investigation and compliance review of the issues and provided the government with multiple detailed supplemental written disclosures."

Expected DOJ priorities and trends for 2024

Looking forward, health care and life sciences companies, and all who come in contact with federal dollars (including investors), will need to remain diligent with compliance efforts. In Principal Deputy Assistant Attorney General Brian M. Boynton's remarks on the 2023 recoveries, he said that the Justice Department will continue to focus on cybersecurity, pandemic fraud, health care fraud, and the potential role of private equity investors in the conduct of health care entities in 2024 and beyond. "Principal Deputy Assistant Attorney General Brian M. Boynton Delivers Remarks at the 2024 Federal Bar Association's Qui Tam Conference," U.S. Department of Justice (Feb. 22, 2024).

On the cybersecurity front, those who contract with the government will need to pay close attention to cybersecurity requirements and ensure that there are systems in place to detect breaches so that they can be rapidly reported. The Federal Acquisition Regulatory (FAR) Council proposed two rules last fall that would increase cybersecurity requirements for federal contractors. The first proposed rule would "standardize cybersecurity contractual requirements across Federal agencies for unclassified Federal information systems." Proposed Rule, 88 F.R. 68402 (Oct. 3, 2023).

The second proposed rule would require contractors to share information on cyber threats and report cyber incidents to the government within eight hours of discovery. See Proposed Rule, 88 F.R. 68055 (Oct. 3, 2023). In addition to remaining vigilant, companies that do identify violations should take advantage of the DOJ's cooperation policy to mitigate potential liability.

As noted above, pandemic-related fraud kept government investigators busy in 2023. Although many of the pandemic-related fraud cases resulted in relatively small recoveries, the government remains focused on the misuse of COVID-19 pandemic funds. In 2023, federal agencies created interagency task forces and shared information to assist in prosecuting and investigating many of these matters, and these joint efforts undoubtedly will continue.

The DOJ has also recently used the FCA to pursue alleged violations by private equity investors and venture capital funds involving their portfolio companies. In recent cases, the DOJ has taken the position that issues raised during a private equity investor's due diligence of a potential investment that are not immediately corrected are enough to hold an investor liable under the FCA.

For example, private equity firms H.I.G. Growth Partners and H.I.G. Capital (collectively, H.I.G.) and former executives of South Bay Mental Health Center, Inc. (South Bay) agreed to pay \$25 million for allegedly causing fraudulent claims to be submitted to federal and Massachusetts health care programs and for failure to stop pre-investment misconduct after

investing. "Private Equity Firm and Former Mental Health Center Executives Pay \$25 Million Over Alleged False Claims Submitted for Unlicensed and Unsupervised Patient Care," Massachusetts Office of the Attorney General (Oct. 14, 2021).

The relator alleged that, during the due diligence process, H.I.G. learned of South Bay's misconduct and knew or should have known that the conduct continued after the acquisition due to its ongoing management of South Bay. See U.S. ex rel. Martino-Fleming v. South Bay Mental Health Ctr., No. 15-13065 (D. Mass.)

Cases like this one highlight the importance of thorough due diligence for investors, including for FCA risks. It is also important for investors to ensure that the portfolio company's management operates independently and reports to the board of directors. When the corporate form is disregarded, private equity investors are put at higher risk.

Outside of the FCA, the DOJ also recently announced its whistleblower rewards pilot program, which it designed to provide reporting incentives in cases where whistleblowers are not eligible for payment from other government programs. In an address in March, Deputy Attorney General Lisa Monaco said that the Justice Department would create and implement this program over the next 90 days. "Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime," U.S. Department of Justice (Mar. 7, 2024).

The program is meant to fill in the gaps where a whistleblower informs the Justice Department of corporate misconduct, but has no existing financial disclosure incentive (such as a qui tam relator's entitlement to payment in an FCA action). Examples of such matters include domestic corruption cases and Foreign Corrupt Practices Act (FCPA) cases involving violations by non-issuers.

The program would only apply to information not previously reported, so that only the first whistleblower in the door would be eligible for a reward. According to the DOJ, this is to encourage companies and individuals to come forward as soon as they are aware of potential misconduct. It remains to be seen whether this will disincentivize whistleblowers to report suspected misconduct internally at the company. If it does, it risks depriving companies of the opportunity to address concerns first.

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Matt Levine's Money Stuff: AMC Is Back Too

By Matt Levine 2024-05-14T14:29:56096-04:00

Meme corporate finance

Ahahaha what:

Meme-stock traders again piled into shares of GameStop Corp. and AMC Entertainment Holdings Inc. in a revival of the retail-trading frenzy that had rocked markets during the pandemic.

The video-game retailer jumped as much as 113% on Tuesday, while the beleaguered movie theater chain surged 129% — triggering multiple halts in the trading of both throughout the morning. GameStop has picked up about \$12 billion in market value this month as its stock has soared, while AMC has gained some \$2 billion.

The latest rally erupted on Monday following the return to social media of Keith Gill, who drove the meme-stock mania of 2021 under the moniker “Roaring Kitty.” Gill shot to fame that year by rallying day traders on Reddit in an effort to squeeze GameStop short sellers.

On Tuesday morning, AMC announced it had completed a previously announced at-the-market offering of shares, raising about \$250 million in total as it sold 72.5 million shares for an average price of \$3.45. AMC traded as high as \$11.88 on Tuesday.

So we talked yesterday about the GameStop rally, which appears to have been sparked by Gill rather cryptically returning to Twitter/X. Gill of course led GameStop's January 2021 trip to the moon, and is closely associated with that company in particular. ([There is a movie](#) about it!) But I neglected to mention that AMC — whose association with Gill is pretty much “Keith Gill memed GameStop, and AMC was also a meme stock” — rallied hard yesterday, apparently on pure meme-stock sympathy.

But why did AMC rally today? Well, probably also meme-stock sympathy; GameStop is up again. But if I were an AMC investor, I suppose I would find it bullish that AMC (1) was selling a bunch of stock into the market and (2) stopped. There is a good technical reason for AMC investors to be happy:

There is less supply coming. When AMC's stock rallied hard on Monday, AMC was selling into the demand. If AMC rallies today, AMC will *not* be selling into the demand. It has finished the offering.

Which is ... bad timing? For AMC? Here is [AMC's announcement](#); it launched a \$250 million at-the-market offering on March 28 and sold 72.5 million shares over a period of about six weeks ending yesterday. Yesterday was a really good day for AMC! The previous six weeks, less so. My guess is that roughly one-quarter of the offering was done yesterday, to take advantage of the rally. But that means the other three-quarters were not. The stock was trading at \$8.39 at noon today, so \$3.45 is not a particularly impressive price for AMC to get.

I asked yesterday:

Keith Gill seems to have added like \$3 billion of market capitalization to GameStop by tweeting a picture of a guy. I assume he captured at most a tiny fraction of this value. Given this very particular skill that he has — the ability to add billions of dollars of value to, at least, this stock, with essentially no effort — what is the best way for him to monetize it? What is the highest-value use that financial markets could find for Keith Gill?

If you were Ryan Cohen, would you hire Gill to run GameStop's investor relations? If you were, like, Tesla, would you hire Gill to run investor relations? Trump Media & Technology Group? Apple? How much would you pay him?

Well? If you were AMC, how much would you have paid Keith Gill to tweet a drawing of a guy leaning forward in a chair *one* day into your at-the-market offering, instead of six weeks into the offering? How much would you pay Keith Gill each month for a month-ahead calendar of his social media plans?

Also: Let's say that AMC learns its lesson and *does* pay Gill to tweet inscrutable cartoons at the optimum times for its own corporate financing needs. Would that be ... legal? Would it be market manipulation? Would it be *insider trading*? Are Keith Gill's tweets, which are maybe-sort-of obliquely about GameStop, material nonpublic information *about AMC*?

Elsewhere, "[GameStop short sellers](#) lost almost \$1 billion in Monday's monster rally," what. [And](#): "Many other meme stocks that once had cult followings have been revived this week following the social media reappearance of Keith Patrick Gill." And John Authers argues that "GameStop Mania Won't Pack a Punch Like in 2021."

The Harvard of trading

I think that, if you had only five minutes with a world-class trader, and you asked her “teach me the essentials of trading,” probably she would spend the five minutes on adverse selection. The essential lesson is that, if you are being offered a trade, that probably means it’s a bad trade; your job is to understand that thoroughly so you can figure out the exceptions. There are many ways to teach this lesson, but my favorite probably comes from a reader email I quoted last October, when I was writing a lot about Sam Bankman-Fried’s coin flipping at Jane Street:

This was a Susquehanna interview question 25 years ago! They made me do the math on 1000 coin flips. EV(heads) (easy), standard deviation (slightly harder), then they offered me a +EV bet on the outcome. I said “let’s go.”

They said “Wrong. If we’re offering it to you, you shouldn’t take it.”

I said “We just did the math.”

They said “We have a guy on the floor of the Amex who can flip 55% heads.”

The point here is that Susquehanna International Group employed a guy who was really good at flipping coins so they land heads, *so that* Susquehanna’s traders didn’t get too cocky about their bets. “I’ve done the math and this trade has positive expected value,” they will say, but then they’ll pause and remember the coin-flip guy and think “if this trade really has positive expected value, why is it being offered to me,” and they think a bit harder about it and become better traders.

This lesson applies beyond individual trades. For instance, there is the structure of the investment management industry. Agustin Lebron, a former Jane Street trader, has a very good book called [The Laws of Trading](#), in which he says:

The profitable trades that exist in the world are either (a) the ones you’re intimately involved in running, or (b) the ones that are inaccessible to you. There is no (c). And what’s funny about the situation in trading is that, if we were talking about just about any other industry, the very notion of a (c) would be laughable. Imagine if someone who’s good at manufacturing cars came to you and said: “Hey. I’m a profitable car-maker. If you like, I’ll let you take all the profit from my car-making skill in

exchange for a small fee for me.” You would rightly suspect they’re trying to pull one over on you. So why is the situation different in trading?

Similarly! At Bloomberg Businessweek, Alice Kantor profiles IM Academy, a multilevel marketing scheme for stock and commodities trading. At the object level, this seems like a bad trading school:

During the pandemic, IM grew from a small New York operation into a global phenomenon by selling the promise that it could teach anyone, particularly teens and twentysomethings, how to become a savvy retail investor. For a one-time \$275 fee and \$250 a month, members had access to online courses and coaches providing trading strategies—the “Yale of forex, the Harvard of trading,” as a salesman described IM in a marketing video. When young people weren’t being invited by their friends to become budding stock market mavens, they might encounter Instagram videos showing how others had gotten rich with the IM method or hear about celebrity members, including fashion model Blac Chyna and professional boxer Floyd Mayweather Jr.

But at the meta level, it provides a helpful lesson in adverse selection. The thing that IM Academy teaches, if you are paying attention, is “if they know so much about how to make money in financial markets, why would they teach me how to do it for just \$250 a month?”

Weiss

Any time a financial firm goes bankrupt, someone will trot out [the old Hemingway line](#): “How did _____ go bankrupt? Two ways. Gradually, then suddenly.” Hemingway says it about a person, and personal bankruptcy doesn’t *have* to happen that way: People can go bankrupt suddenly and then gradually (medical debt), or only gradually (overspending), or only suddenly (casino). Even *business* bankruptcy sometimes involves a slow steady slide into insolvency; we talked the other day about Bed Bath & Beyond’s months of waiting on the doorstep of bankruptcy while it sold more stock. But *financial* firm bankruptcies are pretty much always gradually-then-suddenly. You run a very leveraged balance sheet, you do some stuff that leaves you poorly positioned, you hold your breath, someone notices, there is a race by all of your creditors to call in their debts and you collapse over a weekend. The essence of a financial firm is relying on flighty leverage; the only way for it to end is suddenly.

But here is Bloomberg’s Hema Parmar on the bankruptcy of Weiss Multi-Strategy Advisers, which, fine, yes, was gradual-then-sudden — George Weiss told his employees to sell everything one Thursday — but was about as close as you’ll get to an “only gradual” hedge fund failure:

Interviews with about two dozen people familiar with Weiss and court documents depict a collapse caused not by a disastrous trade, but rather years of high spending that the firm failed to rein in even as assets fell and performance faltered. George Weiss, 81, and Chief Investment Officer Jordi Visser, 57, ran the \$2.3 billion firm with the glitz of larger multistrategy rivals, but without the discipline, the ruthlessness to cut losing traders or the ability to push more costs onto investors, according to the people and court filings. ...

While Weiss lost money in only three of its 46 years in business, it struggled to manage costs. The firm — which ran \$4 billion at its 2021 peak — had at least 110 employees, including well-compensated traders and a packed back-office staff, working out of offices in Manhattan, Miami and Connecticut.

Rent for the 20th and 21st floor of its Park Avenue location alone totaled almost \$3 million a year, a bankruptcy filing shows.

The firm kept senior and veteran executives even after they posted declines of tens of millions of dollars. Deputy Chief Investment Officer Mike Edwards lost more than \$100 million between 2020 and 2023 and stopped trading as a result, people said. Edwards didn't provide a comment for this story.

But rather than fire the underperformers — as multistrategy firms commonly do — Visser and Weiss kept their longtime colleagues on the payroll.

The point from Agustin Lebron in the previous section is that, if you run a multistrategy hedge fund, the right price to charge your clients is somewhere between “all of your alpha” and “all of your returns.” If you overshoot that just slightly you end up bankrupt, but you paid a lot of people well along the way.

Everything is not commodities fraud

A central thesis of this column is that everything is securities fraud, so the US Securities and Exchange Commission is the premier general-purpose meta-regulator in the US. The modern US political system has a hard time with substantive regulation of high-profile, politically divisive topics. How, if at all, should US policy address climate change? One possibility is “Congress can determine the will of the people and then write laws that reflect it,” but that seems hard. Another possibility is something like “the invisible hand of the market, operating through markets for products and

employees and corporate financing, will reflect the (dollar-weighted) desires of the people, and then public companies will act in ways that respond to those desires.” Which, I mean, has its flaws, but seems sort of viable. And then a company’s statements and actions about climate change are subject to securities regulation, to securities-fraud lawsuits from people who dislike them, and to disclosure regulation by the SEC.

The rise of Donald Trump has also meant that US election results are now controversial, with the Trumpist Republican Party now open to disputing election outcomes it doesn’t like. Is that securities fraud? If the deep state conspires to steal an election from your preferred candidate, or if your less-preferred candidate goes around falsely claiming that an election was stolen from him by the deep state, can you sue for securities fraud? Can the SEC step in?

So far I think the answer is no, election irregularities are not securities fraud, though you can see glimmers of the possibility. There’s a [shareholder derivative lawsuit](#) against Fox News for lying about election fraud, and who knows what Trump Media & Technology Group Corp. might get up to.

But are election irregularities *commodities* fraud? Should the US Commodity Futures Trading Commission regulate elections, evaluate their fairness, declare winners and punish those who attempt to manipulate them?

This is an ever-so-slightly live possibility, because the CFTC is authorized by law to [regulate “event contracts,”](#) meaning roughly “prediction markets,” so if you want to run a public exchange for bets on election outcomes, you have to go to the CFTC for approval. Exchanges occasionally do ask the CFTC for approval to list election contracts, and then [the CFTC says no](#).

But it could theoretically say yes. And then there’d be an election, and one candidate would win, and the other candidate would say “no this election was stolen from me,” and the outcome for the financial purpose of settling the contracts would be disputed. And either the losing candidate would be *wrong*, and lying about the election being stolen, in which case there would be arguable commodities fraud inflating the price of his contracts. Or he’d be *right* about the election being stolen, in which case there would be arguable commodities fraud depressing the price of his contracts. And people with money on the line would go to court. And the thesis of “everything is securities fraud” is that US law is somehow more *responsive* to financial-market claims than it is to other, substantive claims, and so the courts and the CFTC would feel more compelled to address the claim “this election was stolen, which is commodities fraud,” than they would to address the claim “this election was stolen, which is bad on its own.”

I realize that all of this sounds incredibly dumb and far-fetched, but in my defense last week the CFTC [proposed new rules to ban election contracts](#). This is in part, [as Scott Alexander points out](#), so it can save time : Right now, people ask the CFTC to approve election contracts, and it says no; if it's always going to say no, it's simpler to have a blanket rule against the contracts so people stop asking. But it is also in part because the CFTC does not want to meddle in elections. Here is the [statement of CFTC Chairman Rostin Behnam](#) proposing the rules:

To be clear, that means that event contracts on the outcome of a political contest such as an election could not be listed for trading or accepted for clearing under the proposed rule. Such contracts not only fail to serve the economic purpose of the futures markets—they are illegal in several states and could potentially and impermissibly preempt State responsibilities for overseeing federal elections. ...

Allowing these contracts would push the CFTC, a financial market regulator, into a position far beyond its Congressional mandate and expertise. To be blunt, such contracts would put the CFTC in the role of an election cop.

The CFTC's jurisdiction as mandated by Congress and solidified in our statute, the Commodity Exchange Act, recognizes our expertise in markets for goods, services, rights, and interests—which can include events associated with financial, commercial, or economic consequences. We are tasked with upholding the public interest by ensuring that America's derivatives markets provide a means for managing and assuming price risks and providing for price discovery through liquid, fair, open, transparent, and financially secure trading facilities. Market integrity is featured so prominently within that mandate that the CFTC has civil enforcement authority when it comes to the potential for fraud, manipulation, and other abuses such as the dissemination of false information in the underlying or commodity cash markets. Political control contracts on CFTC-regulated exchanges would push the CFTC far beyond this historical expertise and jurisdiction, and potentially place the CFTC in the position of monitoring such markets for fraud and manipulation in elections themselves.

They are [also looking to ban](#) contracts relating to awards shows, and that strikes me as a mistake. I can see how it would be bad, for the CFTC and for democratic legitimacy, for the CFTC to get into the business of policing elections. But surely it would just be fun for the CFTC to police the Oscars?

Cross-selling

I wrote yesterday about UBS Group AG's plans to perhaps pay its investment bankers bonuses if

they refer business to its wealth management business. I suggested that investment bankers would be “hideously embarrassed” to pitch wealth management to their clients, but that’s what the bosses want:

And so every big investment bank will from time to time announce an initiative that is like “we’re going to tell our investment bankers that they should really mention our wealth management business to their corporate-executive clients,” and it really does tell the investment bankers that, and the investment bankers are like “yes we are team players and want to help our wealth management colleagues bring in more revenue,” but they shudder a little as they say it, and do they actually go out and pitch the wealth management business? I don’t know, I’m not in the meetings.

I got a few good reader emails. One reader wrote:

A banker’s reluctance to provide referrals to their wealth management colleagues may be caused by the increased relationship risk the referral brings, not necessarily their mercenary nature. I can easily imagine the client conversation: “Nice job running the books on that bond issue, oh, and thanks for the intro to your wealth management buddy. The money I gave him is trailing my overall portfolio by 120 bps. I’ll call you if I need your advice again.” ... Banking relationships are under enough competitive pressure as is. Why introduce a new variable, over which you have no control?

And, sure, though if you are the chief executive officer of a big bank and you’re pushing for more cross-selling, ideally *you* think that your wealth managers do a good job? Ideally you could *persuade* your investment bankers that their wealth management colleagues are actually competent? But, right, the investment bankers will be skeptical. Another reader wrote:

I am in a bunch of these meetings, and I can affirm that they do go pitch the business, occasionally, gingerly, usually in a walk-and-talk at a conference where the wealth manager was standing outside the door of the meeting room.

Yes this is exactly how I pictured it. “So, it’s been great seeing you. Oh we also do wealth management. Okay bye!”

Cross-selling (2)

That said, the idea is not a bad one. Good investment bankers understand that, while their client is the *company*, the path to a good client relationship runs through befriending and helping out the company's *executives*. Sometimes this means helping them out with good corporate-finance ideas that will impress the board or their bosses, but other times it means helping them out in their personal capacity. Classically this means taking them golfing. Sometimes it means referring executives to new jobs, which can be good for the new employer and also make the executive more loyal to the banker. And sometimes hooking an executive up with a really good private wealth adviser — if you happen to have one — *is* good client service. The question is just how confident the investment bankers are that their bank's private wealth managers are really good ones.

Bloomberg's Heather Perlberg caught up a while back with Don Engel, a former Drexel Burnham Lambert investment banker who died earlier this year. He seems to have specialized in winning corporate financing business by helping executives in their personal capacity:

Engel was quick to admit that he was never one of the financial brains at Drexel. He worked in the corporate finance department but he didn't have an MBA. What he did have, however, was an almost preternatural sense for what clients really wanted. That sense, Engel insisted, could be at times more useful than numbers and business school case studies ever could. CEOs have lonely jobs, he told me. So, he set out to become a kind of therapist-in-residence at Drexel — the guy CEOs and corporate raiders could turn to in confidence to talk through personal problems. Marriages and affairs, current or prospective, were usually at the top of the list. ...

"In most cases, the CEO has no one to talk to," Engel said. "He can't tell people what's going on with his wife, with his girlfriend. He can't tell them about what's going on with his mistress."

He went on: "He is imploding, and there I am, because I understand all this. So then, once you start to understand that person, then you have a relationship. And that's what I did best."

If your investment banking job consists of talking to CEOs about their mistresses, might you also get into the ancillary business of referring potential mistresses to the executives? Engel absolutely did, is the point of the rest of the article.

Things happen

Anglo Goes for Bold Breakup Plan in Move to Fend Off BHP. The hunt for the [missing Greensill](#)

billions. [Accountant shortage](#) prompts US plan for quicker path to qualification. More Regulators Eye [Whistleblower Award Programs](#) Hoping for Insider Tips. Billions Exit Thematic ETFs as Traders Move On From Buzzy Themes. Country Garden [Avoids Further Default](#) With Payments on Onshore Bonds. Why the World Has Gone [Cuckoo for Copper](#). How the [Maple-Syrup Cartel](#) Keeps a Sticky Grip on Global Market. Mega Millions winner [sued by family](#) for breaking promise to share \$1.35B jackpot.

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- 1. Just a rough guess. The average of the volume-weighted daily AMC stock prices from March 28 through May 10 was about \$3.08 per share; the VWAP yesterday was \$4.51. AMC sold 72.5 million shares for \$250 million, or \$3.45 per share. If they sold 26% at \$4.51 and the other 74% at \$3.08, that would get you to \$3.45. There's no particular reason to assume that they matched the VWAP for the first six weeks and then pounded out all the rest yesterday, but it does feel sort of plausible.
- 2. It reminds me of American Bitcoin Academy, an online crypto trading course that settled fraud charges with the US Securities and Exchange Commission in February. American Bitcoin Academy took money from its "students," used it to buy Bitcoin, and then lost the Bitcoin in a hack. Its founder "did a spectacularly good job of educating his students about Bitcoin," I wrote.
- 3. For a while I maintained a [list of financial journalism cliches](#) on Ello, but Ello is dead now. I incorporated them here though.
- 4. Or they do it in crypto. Here's a Bloomberg News story from today about Peter Thiel's investment in Polymarket, the crypto prediction market that is banned in the US.
- 5. Alexander [also writes](#): "If someone tries to manipulate nickel futures by blowing up a nickel mine, I think (I'm not an expert) this the the FBI's problem, not the CFTC's. In the same way, I would hope a regulatory framework could be developed that would investigate election fraud without making it the CFTC's problem. Given that there's already a big incentive for all the groups named above to manipulate elections in various ways, I would hope that some framework like this already exists." Again, a central thesis of this column is that that sort of thing **should** exist, but in fact the financial regulators do turn out to be the general-purpose meta-regulators.

FAT Brands Is Criminally And Civilly Charged

 fcpprofessor.com/fat-brands-criminally-civilly-charged

May 14, 2024

It is rare for a publicly traded company to force the Securities and Exchange Commission to prove a civil case in court. The vast majority of issuers opt to resolve a matter through – in recent years – nearly always an administrative order.

It is extremely rare for a publicly traded company to force the Department of Justice to prove a criminal case in court. The vast majority of issuers opt to resolve a matter through – in recent years – an alternative resolution vehicle such as a non-prosecution agreement, deferred prosecution, etc.

FAT Brands (a global franchising company which currently owns 18 restaurant brands including Johnny Rockets, Fazoli's, Ponderosa, and Bonanza Steakhouses) appears to be that rare company as the company (and various current or former executives) were recently civilly charged by the SEC and criminally charged by the DOJ. (See [here](#) and [here](#)).

The SEC charges include alleged violations of the FCPA's books and records and internal controls provisions in yet another so-called non-FCPA, FCPA enforcement action.

SEC Matter

In summary fashion, this complaint alleges:

“Between October 2017 and March 2021 (the “Relevant Period”), Andrew Wiederhorn (“Wiederhorn”), the former chief executive officer and current director and controlling shareholder of FAT Brands Inc. (“FAT” or the “Company”) used almost \$27 million of FAT’s cash on his personal expenses including private jets, first class airfare, luxury vacations, his rent and mortgage payments, shopping, and jewelry. During this time, Wiederhorn falsely told the Company’s auditors, board of directors, and investors that neither he nor his family members had any direct or indirect material interest in the FAT cash that Wiederhorn used for those personal expenditures.

Between July 2018 and March 2021, Wiederhorn engaged in deceptive acts and made false and misleading statements to make it appear that the millions of dollars of FAT’s money he was spending on himself and on his family each year were company loans to FAT’s affiliate Fog Cutter Capital Group, Inc. (“FCCG”), another company that Wiederhorn controlled, for FCCG’s business expenses. Wiederhorn used his control over FCCG to take the money that FCCG was receiving from FAT and spend it on himself. Wiederhorn then misled FAT’s board of directors (the “FAT Board”) and the Company’s auditors, leading them to believe that FCCG was using the proceeds from FAT’s loans solely for FCCG’s business expenses and pre-existing liabilities.

Although this fraudulent scheme allowed Wiederhorn to hide from the FAT Board, the Company’s auditors, and investors the fact that he was spending FAT’s cash to fund his lavish lifestyle, it stripped FAT of approximately 40 percent of its revenue during the Relevant Period, often leaving the Company with insufficient cash to pay its own bills. Between 2017 and 2019, Wiederhorn instructed his son to wire over \$9 million into FAT, concealing that Wiederhorn used millions of FAT’s funds for his own personal spending and that FAT was otherwise unable to pay its own bills.

Wiederhorn enlisted the help of Ron Roe (“Roe”), the Company’s former chief financial officer (“CFO”) and current senior vice president (“SVP”) of finance and executive officer to execute his scheme. Roe used his position at the Company to send FAT funds to Wiederhorn, Wiederhorn’s family, or Wiederhorn’s creditors. Both Roe and Rebecca Hershinger (“Hershinger”), another former CFO at FAT, personally signed, certified, and disseminated false and misleading statements that failed to properly disclose Wiederhorn’s personal interest in these transactions.”

Based on the above, FAT is charged with violating, among other things, the FCPA’s books and records and internal controls provisions; and Wiederhorn, Roe, and Hershinger are charged with, among other things, aiding and abetting FAT’s violations of the books and records and internal controls provisions.

Under the heading, “FAT’s Books and Records Were Inaccurate and the Company Failed to Maintain a Sufficient Internal Accounting Controls,” the complaint alleges:

“FAT failed to make and keep books and records that accurately reflected the reportable related person transactions. Specifically, FAT failed to track and report its own CEO’s direct or indirect material interest in the Company was sending to FCCG, an affiliate company.

Wiederhorn made false and misleading statements in his director and officer questionnaires about reportable related person transactions that would have allowed FAT to accurately track and report those transactions.

In addition, despite FAT’s auditor notifying the FAT Board of an internal control deficiency relating to Wiederhorn having complete control over FAT’s accounts in early 2020, FAT did not devise or maintain an internal accounting control system that provided reasonable assurance that access to assets was consistent with addressing this deficiency. Despite the FAT Board devising a control on April 14, 2020 which required FAT Board advance approval for any additional lending to FCCG be approved in advance by the FAT Board, Wiederhorn authorized loan amounts from FAT to FCCG beyond the limits approved by the FAT Board. As a result, during the second quarter, the third quarter, and the fourth quarter of 2020, Wiederhorn lent FAT money to FCCG far in excess of the FAT Board-approved amounts.

Wiederhorn, as FAT’s CEO, knew or was reckless in not knowing that FAT failed to track, report, and disclose reportable related person transactions, that he could transfer money from FAT at his own discretion, and that he made false statements to the FAT Board at April 2020 meetings regarding the purpose of the FAT loans to FCCG. Wiederhorn was also aware that the FAT Board included a control on April 14, 2020 requiring that any additional lending to FCCG be approved in advance by the FAT Board, and that he authorized loan amounts from FAT to FCCG beyond the limits approved by the FAT Board. In addition, Wiederhorn signed director and officer questionnaires that made false and misleading statements about reportable related person transactions that would have allowed FAT to accurately track and report these transactions.

Roe, as FAT’s CFO and SVP of finance, knew or was reckless in not knowing that FAT failed to track, report, and disclose reportable related person transactions, that Wiederhorn could transfer money from FAT at his own discretion, and that Wiederhorn made false statements to the FAT Board at April 2020 meetings regarding the purpose of the FAT loans to FCCG. Roe was a signatory of the Intercompany Agreement and attended the April 14, 2020 meeting wherein the FAT Board added an internal control requiring that any additional lending to FCCG be approved in advance by the FAT Board. However, Roe did not take any steps to implement an internal

accounting control system that prevented Wiederhorn from circumventing or violating the FAT Board's internal control, despite being aware that Wiederhorn authorized loan amounts from FAT to FCCG beyond the limits approved by the FAT Board.

Hershinger, as FAT's CFO, knew or was reckless in not knowing that FAT failed to track, report, and disclose reportable related person transactions, that Wiederhorn could transfer money from FAT at his own discretion, and that Wiederhorn made false statements to the FAT Board at April 2020 meetings regarding the purpose of the FAT loans to FCCG. Hershinger attended the April 14, 2020 meeting wherein the FAT Board added an internal control requiring that any additional lending to FCCG be approved in advance by the FAT Board. However, Hershinger did not take any steps to implement an internal accounting control system that prevented Wiederhorn from circumventing or violating the FAT Board's internal control, despite being aware that Wiederhorn authorized loan amounts from FAT to FCCG beyond the limits approved by the FAT Board.

Hershinger was also aware that Wiederhorn signed director and officer questionnaires that made false and misleading statements about reportable related person transactions that would have allowed FAT to accurately track and report these transactions."

According to the complaint:

"FAT, Wiederhorn, and Roe executed tolling agreements suspending the period for one year and sixty days. Hershinger executed tolling agreements in 2023 and 2024 suspending the period for five months and sixty days."

DOJ Matter

As stated in this DOJ release:

"Andrew A. Wiederhorn, the former CEO and current controlling shareholder of the publicly traded Fat Brands Inc. (FAT), has been indicted on federal charges alleging a scheme to conceal \$47 million in distributions he received in the form of shareholder loans from the IRS, FAT's minority shareholders, and the broader investing public ...

According to the indictment ..., Wiederhorn – assisted by FAT's chief financial officer and his outside accountant at advisory firm Andersen – concealed millions of dollars in reportable compensation and taxable income and evaded the payment of millions of dollars in taxes, while causing FAT itself to violate the Sarbanes-Oxley Act's prohibition on direct and indirect extensions of credit to public-company CEOs in the form of a personal loan."

The release identifies the following defendants charged in the indictment:

- Wiederhorn
- William Amon, a certified public accountant, attorney, and one-time managing director of Andersen's Los Angeles Office, who provided tax-advisory services to Wiederhorn, FAT, and FAT's former affiliate, Fog Cutter Capital Corporation (FOG);
- Rebecca Hershinger who formerly served as FAT's CFO and, in that role, certified FAT's public filings; and
- Fat Brands Inc.

The release states:

"Wiederhorn is charged with one count of endeavoring to obstruct the administration of the Internal Revenue Code, six counts of tax evasion, and one count of false statements and omission of material facts in statements to accountants in connection with audits and reviews.

Both Wiederhorn and Hershinger are charged with four counts of wire fraud, two counts of false statements and omission of material facts in statements to accountants in connection with audits and reviews, and one count of certifying faulty financial reports.

Wiederhorn, Hershinger and FAT are charged with two counts of extension and maintenance of credit in the form of personal loan from issuer to executive officer.

Hershinger is also charged with one count of making false statements to federal investigators, including, among things, denying that company funds were being used to pay Wiederhorn's personal American Express bill.

Amon is charged with four counts of aiding and assisting the filing of false tax returns."

In this release, FAT Brands states:

"FAT Brands was informed that it has been indicted on two violations of SOX 402 for arranging approximately \$2.65 million in loans to Andy Wiederhorn. These charges are unprecedented, unwarranted, unsubstantiated, and unjust. They are based on conduct that ended over three years ago and ignore the Company's cooperation with the investigation. FAT Brands will take all necessary action to defend itself, while seeking a just resolution to these charges."

In this SEC filing, referring to both the DOJ and SEC matters, FAT Brands states: "The Company is evaluating these charges and intends to vigorously defend itself against them."

Last Friday, when the DOJ and SEC matters were announced, FAT Brands stock closed down 27%. (See [here](#) for more).



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Del. Ruling Highlights M&A Deal Adviser Conflict Disclosures

By **Gregory Gooding, Maeve O'Connor and Bill Regner** (May 10, 2024, 6:58 PM EDT)

On May 1, the Delaware Supreme Court **reversed** a Delaware Chancery Court decision dismissing challenges to the acquisition of Inovalon Holdings Inc. by a consortium led by Swedish private equity firm Nordic Capital.[1]

This ruling in *City of Sarasota Firefighters' Pension Fund v. Inovalon* demonstrates the importance of full disclosure of financial adviser conflicts in order to obtain the benefit of business judgment rule review under the Court of Chancery's 2014 decision in *Kahn v. M&F Worldwide Corp.*

Under the Delaware Supreme Court's MFW decision, a going-private merger with a controlling stockholder is subject to business judgment review, rather than the more stringent test of entire fairness, if it is conditioned from the outset on approval by a special committee of independent and disinterested directors and by a fully informed, uncoerced vote of a majority of the shares held by parties unaffiliated with the controller.

In the Inovalon case, the Supreme Court held that the majority-of-the-minority stockholder vote approving the transaction was not fully informed as a result of inadequate disclosure of conflicts of interest on the part of financial advisers to the special committee.

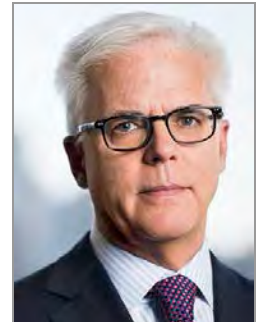
As a result of its dual-class capital structure, Inovalon was controlled by its founder and CEO, who held approximately 64% of the company's voting power. Another 23% of the vote was held by a former Inovalon director.

After various discussions led by the founder with financial sponsors and strategic parties, Nordic proposed to acquire Inovalon for \$43 per share, specifying both that Nordic typically requests management to roll over a portion of their equity and that in the event of any management equity rollover a special committee and majority-of-the-minority approval would be required.

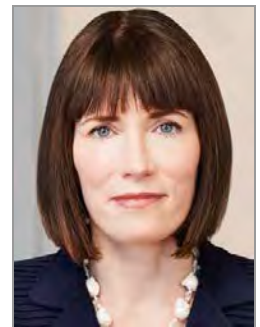
Inovalon's board instructed its financial adviser to push for at least \$44 per share in exchange for a grant of exclusivity. Nordic agreed to that price and stated that it would fund the deal with a \$3.5 billion Nordic equity commitment, \$2.55 billion in equity commitments from co-investors and \$1.75 billion in debt. At an ensuing Inovalon board meeting, the founder informed the board that Nordic had requested that he roll over a portion of his equity. The board then formed a special committee.

At its first meeting, the special committee engaged legal counsel, finding that although the firm it hired had been working with Inovalon on the transaction for about a month, it was not Inovalon's historical counsel and was independent of Inovalon management and the founder.

Three days later, the committee engaged a second financial adviser. Each financial adviser provided relationship disclosure to the special committee, specifying work for Nordic on unrelated matters, although the first adviser's disclosure did not mention prior business with other members of Nordic's



Gregory Gooding



Maeve O'Connor



Bill Regner

equity consortium. Ten days after the special committee hired counsel, the founder informed the committee that he and the other rollover participants had engaged the same firm to work on the rollover arrangements.

Nordic, having come up short in its equity fundraising, subsequently lowered its price to \$40.25 per share, which was rejected by the special committee. Ultimately the parties agreed on a deal at \$41 per share, with a \$700 million rollover from the founder and a \$600 million rollover from the former director.

The founder's rollover agreement included an annexed management incentive plan term sheet, which was nonbinding but contemplated 8% of the post-transaction fully diluted equity being subject to the management incentive plan, with 5% granted to employees at closing and 3% held in reserve.

Following closing, the plaintiffs brought breach of fiduciary claims against the founder and the other Inovalon directors. The Court of Chancery found that the requirements of MFW had been satisfied and dismissed the claims. On appeal, the plaintiffs focused on two reasons they claimed the transaction failed to comply with MFW.

First, they argued that the transaction flunked MFW's *ab initio* test — which requires the protective structures of MFW to be put in place at the outset of the transaction — because the founder engaged in substantive negotiations before the special committee was formed. Second, they asserted that due to inadequate disclosure of the banker conflicts, the majority-of-the-minority vote was not fully informed.

The court reversed on the basis of the second argument and did not reach the *ab initio* question.

The court found that the Inovalon proxy statement failed to adequately disclose conflicts of both financial advisers. It found that language stating that the second adviser "may provide" services to Nordic and its co-investors was misleading, given that the adviser was in fact providing such services, creating a concurrent conflict.

In the case of the first adviser, the court held that disclosure that the bank would receive "customary compensation" in connection with disclosed concurrent representations was insufficient because it kept stockholders from contextualizing and evaluating the conflicts. It also found that the proxy statement failed to disclose the first adviser's fees for prior work for members of Nordic's equity consortium, which amounted to nearly \$400 million in the relevant two-year period.

The court stated that while "there is no hard and fast rule that requires financial advisors to always disclose the specific amount of their fees from a counterparty in a transaction," the question is subject to a materiality standard.

The court found that in this case that materiality standard was met, noting that the undisclosed compensation was roughly 25 times the disclosed fees that the first adviser received from Nordic and 10 times the fees that it received in the transaction, thus creating a misleading picture.

Finally, the court addressed disclosure about the second adviser's role in the bidder outreach process, which the plaintiffs claimed had been overstated in the proxy.

The court observed that the disclosures about the second adviser's role do not sit comfortably with corresponding accounts in the minutes, and it cautioned boards, committees and their advisers to take care in accurately describing events and roles played by board and committee members and their advisers — but the court declined to pile on another basis for reversal.

Although the court focused on financial adviser conflict disclosure as the basis for its reversal, the Inovalon decision offers an important lesson about conflict management generally.

In its opinion, the court noted several potentially problematic conflicts, including the founder's conducting merger discussions prior to obtaining board approval; the overlapping use of counsel by the target company, the special committee and the rollover stockholders; and a conflicted financial adviser's taking the lead role in outreach to other potential bidders.

Yet the court described none of these conflicts as paralyzing. Instead, the court focused on the extent to which they were known by the special committee and disclosed to the minority stockholders.

While complete purity may not be a realistic goal of a going-private merger involving a controlling stockholder, transparency goes a long way in protecting participants in such a transaction from liability.

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Bill Regner is a partner at the firm.

Debevoise partners Andrew Bab, Matt Kaplan and Jonathan Levitsky contributed to this article.

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[1] **City of Sarasota Firefighters' Pension Fund et al. v. Inovalon Holdings, Inc. et al.** , No. 305, 2023 (Del. May 1, 2024).

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Standardizing Early Case Appraisal In Securities Class Actions

By **Assen Koev** (May 13, 2024, 3:23 PM EDT)

Initial case assessment in securities class action litigation refers to a preliminary internal investigation by defense counsel in the earliest stages of a case. Such an investigation, which includes legal and economic analyses, is advocated by a number of prominent securities class action litigators as an important step in planning the defense strategy. Yet, it is far too often not undertaken.[1]

In this article, I focus narrowly on the economic analysis portion of the initial case assessment, which I refer to as an initial economic assessment.

There is no agreement on what an initial economic assessment should include. Some suggest using this time to perform a damages estimate and determine which areas will be addressed in later stages of the case.[2] Settlement estimates should be on the list as well.



Assen Koev

What is generally agreed upon is that an initial economic assessment is a review of a wide range of fundamental economic questions and is, therefore, a limited high-level analysis by necessity.

An initial economic assessment, just like an initial case assessment, is rarely performed to address the full range of those questions. If and when economic consultants are retained before the motion to dismiss, the questions are often targeted based on some salient features of the case. Thus, potentially strategically important questions remain unaddressed until much later stages of the case.

In this article, I argue that a simple standardization of the initial economic assessment analysis can significantly improve its effectiveness and increase the likelihood of its implementation, thus providing counsel, clients and insurers with a much clearer view of the case at the early planning stage.[3]

The Importance of the Initial Damage Assessment on a Current Case

A comprehensive illustration of an initial economic assessment is the subject of a separate write-up. In this section, I provide an example of the importance of initial damage assessment only.

On Feb. 20, after market close, cybersecurity company Palo Alto Networks announced earnings and significantly reduced its guidance. The steep daily stock price decline on Feb. 21 triggered immediate and numerous notifications of investigations for securities law violations.

For example, Block & Leviton LLP announced an investigation noting that Palo Alto Networks' announcement "[wiped] away tens of billions of dollars of shareholder value." [4] While the statement itself is correct — the company's market capitalization declined by over \$33 billion — it provides an inaccurate perception of the size of the case that was filed five days later.

A preliminary damages analysis shows that supportable damage claims in the Palo Alto Networks litigation would likely not exceed \$3 billion, a tenth of the staggering loss of value on Feb. 21!

This estimate is driven by the short class period of the filed case, large institutional holdings not traded in the class period and the increasing trajectory of the stock price during the class period.[5]

The estimate is even lower if potential defense-side loss causation analyses are applied.

Reasons for the Infrequent Use of Initial Economic Assessment

There are a number of reasons for the infrequent use of economic assessment at the outset of a securities class action. Some of them are the reasons hindering the initial case assessment in general. Others are specific to economic research itself.

For example, Doug Greene, the leader of BakerHostelter's securities and governance litigation team, wrote in 2022 that the infrequent use of initial case assessment — and by association, initial economic assessment — can be attributed to

a low cap or budget offered to secure the engagement; the (incorrect) view that a motion to dismiss is mostly a matter of identifying what the complaint does not allege, as opposed to an affirmative narrative that sticks up for the defendants' honesty and good faith; and understandable backlash over some firms' use of the background review to do a full-blown internal investigation.[6]

The infrequent use of initial economic assessment is also driven by reasons unique to the economic research in securities class action litigation. The very high stakes in securities class actions inevitably demand exhaustive, careful, highly customized and, ultimately, expensive economic analyses.

Even preliminary and internal analyses follow this trend because these results form the basis of counsel's and client's expectations, and affect the broader defense strategy. Expert economists are weary of producing limited preliminary analyses with strategic implications. Reputational concerns alone result in strong incentives for any limited analysis to snowball into full-blown investigations closer to those typically performed at the later stages of the case.

Exhaustive high-cost research projects are, of course, unjustifiable at the outset of many cases for a number of reasons.

First, approximately 50% of all filed securities class actions are dismissed at the motion to dismiss stage. It is hard to justify significant expenditure on early analyses of damages, class certification or loss causation, when these stages have less than — and for some, much less than — a 50% chance of being reached.

Second, with the increase in the number of cases against smaller companies, detailed economic analyses are rarely undertaken because the total cost of litigation becomes an important deterrent.

Consider, for example, that 31% of all cases between 2014 and 2022 settled for less than \$4 million. [7] That is one of the reasons defense counsel is often interested in early settlement projections for small cases. The expected settlement in these cases is a threshold for sizing up the entire litigation budget. Setting aside strategic considerations, low expected settlements provide strong disincentives to undertake costly litigation and perform extensive economic analyses upfront.[8]

Third, customized economic analyses, by definition, change with the changing nature of cases. Those with a long tenure in economic consulting are familiar with various waves of litigations like the initial public offering cases, the options backdating cases, the financial crisis cases, the special-purpose acquisition company cases, the merger objection cases, the opioid cases, and so on.

Each of these litigation waves came with its own set of economic facts and logic. The differences in the economic underpinnings across these case types make customized analysis an ever-moving target, thus contributing to persistently high consulting costs.

Defining "Standardized Analyses" in Securities Class Action Litigation

As the prior section points out, an initial economic assessment may be infeasible in many cases if it is performed in the typical exhaustive and customized format as most securities class action economic research is. In this section, I list some methodologies that (1) have been widely accepted, (2) can be implemented in a highly efficient manner, and (3) are highly informative for the initial economic

assessment stage. I refer to them as standardized analyses.

- Market-efficiency analysis — Cammer factors, Krogman factors, autocorrelation;^[9]
- Price impact and loss causation — event chronology (event study, daily and/or intraday price charts, and news headlines);
- Damages analysis — "plaintiff-style damages"; and
- Settlement analysis — settlement prediction models.

The simple fact is that every major line of inquiry in a securities class action litigation has some standardized methodologies associated with it, alongside innumerable unique or cutting-edge ones. This should not be a surprise. After all, the legal framework of Section 10(b) of the Exchange Act and Section 11 of the Securities Act is over 90 years old. The Private Securities Litigation Reform Act is almost 30 years old. The event study — the "workhorse" in securities class action analysis — is over 55 years old. The efficient markets hypothesis is over 50 years old.

Basic v. Levinson, the landmark U.S. Supreme Court case that allowed securities class action plaintiffs to rely on a rebuttable presumption of market efficiency in demonstrating reliance, is over 35 years old.^[10] So is the U.S. District Court for the District of New Jersey's 1989 decision in Cammer v. Bloom, which, along with the U.S. District Court for the Northern District of Texas' 2001 ruling in Krogman v. Sterritt, are, by far, the most commonly used precedent cases for determining the efficiency of the market for a security in a securities litigation.

So, while legal interpretations, research techniques and technology continue to evolve, we have more than enough experience to provide standardized answers to most economic questions in securities class action litigation.

The list above is typical, though neither complete nor unique. In fact, the "standardized analysis" for any particular securities class action question will depend on the approach that counsel and their consultants typically use and can produce in the most efficient manner.

The Advantages of Standardization at the Initial Economic Assessment Stage

Standardized analyses have a lower expected cost.

Standardization of analyses can lower the expected cost of producing the initial economic assessment analysis by either standardization of the research tasks or outright automation.

Automation is a possibility for many standardized analyses. Take, as an illustrative example, the event study — the most ubiquitous and still-considered gold standard tool in securities class action analysis. The implementations of event studies in securities class actions are fairly similar in most cases, and not very different from the methodology published in the seminal 1969 paper, "The Adjustment of Stock Prices to New Information," that formalized the event study in its current form.^[11]

This conclusion is not lost on researchers and practitioners. A simple online search shows a number of commercial event study tools available for researchers and practitioners. The legal profession has benefited from the introduction of automation and artificial intelligence in many standardized workflows, such as document review or case law research. Standardized economic analyses are no different.

Even without automation, a standardization of the research tasks generates efficiency by building experience. It is far more efficient for consultants to deliver results on, say, market efficiency, based on the Cammer and Krogman factors, than on other rarely used and custom-designed tests. The experience accumulated by the consulting staff translates into higher-quality results, a better understanding of the results and fewer hours billed.

Standardized analyses have lower cost uncertainty.

Standardization reduces not only the expected costs but also the cost uncertainty. A standardized analysis is, by definition, a well-defined analysis. The cost of its implementation is not only relatively lower but also less variable than that of open-ended exploratory analyses.

Understandably, many questions in securities class action litigation are open-ended and exploratory. The analysis of loss causation, for example, depends on the facts of the case and the discovery materials that are reviewed as part of the analysis.

Open-ended analyses carry a justifiable risk of snowballing into more exhaustive or wider research projects with ever-increasing costs.

However, if counsel and consultants agree on a standard set of analyses with a prespecified scope for the initial economic assessment stage, expectations become manageable. The cost and delivery schedule uncertainty decline significantly for the client and counsel. The consultant, on the other hand, has fewer incentives to explore more side questions or delve deeper to prevent potential future surprises.

Standardized analyses capture core results.

The standardized preliminary analysis is not a small piece of the comprehensive research required later in the case. In fact, it often contains the core of the complete analysis. Loss causation analyses, for example, involve a review of the news, analyst reports, U.S. Securities and Exchange Commission filings, discovery materials, and other case-specific materials.

In most cases, however, the analysis integrates many of these into an event study to test the materiality of the misstatements. Hence, a preliminary implementation of a standardized event study, particularly if combined with a preliminary review of news headlines, would provide a considerable portion of the loss causation results that a more exhaustive analysis would produce at a later stage.

This approach is also observed in practice. Many economic consultants and experts routinely include standardized chronologies — event studies combined with news headlines — in expert reports.

Of course, experts perform exhaustive reviews of the news contents at the report preparation stage. However, a chronology and price charts, depicting the daily or intraday prices and major news headlines, provide counsel with an almost complete picture of the information environment during the class period.

Standardized analyses make the overall consulting process more efficient.

From a purely mechanical standpoint, once an important step or analysis is standardized for the purposes of an initial economic assessment, it will be performed more efficiently at the later stage when a complete, in-depth and customized analysis is performed. Investing in the standardization of an event study, trading model or other analysis implies that all future uses of these analyses will be performed more efficiently as well.

Any economist who has been through the process of writing an expert report knows that multiple iterations, scenario analyses and robustness checks are all but guaranteed in that process. Having some of these steps standardized can make a big difference to the full-blown research effort.

From a strategic viewpoint, both counsel and economists benefit from having preliminary results while planning legal and research strategies. Preliminary results can guide the planning process, and pinpoint important areas for research and weaknesses in the complaint or the defendant's position. Without a preliminary analysis, these processes are driven by experience and assumptions.

Standardized analyses reduce the learning cost of the audience.

Any customized analysis inevitably puts noneconomist audiences — counsel and clients — at the bottom of a potentially steep learning curve associated with that specific analysis. Producing a new custom-built analysis at the outset of a case adds a learning cost for counsel to what could be an

already substantial consulting bill.

A standardized analysis, on the other hand, allows counsel to build up an understanding of the analysis with every implementation, across cases and even through continuing legal education credits built on the standardized framework. This is not a trivial advantage considering the trend of less specialization and less efficiency due to the fact that most defense counsel handle only a few cases. [12]

Concluding Remarks

As noted earlier, different counsel and their consultants can apply different standardized analyses depending on their usual practice. Standardization also provides an extra level of flexibility in implementation. A very initial analysis can be performed using fully automated or AI-assisted tools.

The benefit of starting with automated standardized analyses is that (1) they are usually extremely fast and cost-effective, and (2) counsel can always refer any interesting results to their consultants for deeper probing. Other standardized — and if needed, nonstandardized — analyses can be added based on the generated results.

The important point is that when the initial assessment starts with standardized, rather than customized, tools, counsel and consultants can now choose how exhaustive they want to be.

Assen Koev is founder and manager at SCA iPortal.

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[1] Doug Greene, "The State of Securities Litigation: Good Communication is Key to Improving Securities Litigation Outcomes | D&O Discourse (dandodiscourse.com)."

[2] Id.

[3] Under "standardization," I only mean the use of widely accepted and frequently used analyses like event studies, damages models, settlement prediction models, and others. The article should not be interpreted as advocating the "standardization" of IEA analyses across firms or even across cases for a particular law firm.

[4] <https://www.morningstar.com/news/globe-newswire/9041389/shareholder-alert-recent-purchasers-of-palo-alto-networks-who-have-lost-money-may-be-able-to-recover-damages-block-leviton-is-investigating>.

[5] For examples where an upward price trajectory can significantly curb damage claims, see J. Schreiber and J. Tschirgi (2020), "Market Rebound May Curb Securities Class Actions, Damages", Law360, July 31, 2020.

[6] Doug Greene, "The State of Securities Litigation: Good Communication is Key to Improving Securities Litigation Outcomes | D&O Discourse (dandodiscourse.com)."

[7] Cornerstone Research, "Securities Class Action Settlements: 2023 Review and Analysis".

[8] See also discussion of the cost concerns in litigation against small companies by Doug Greene in "Putting 'Litigation' Back in 'Securities Litigation' | D&O Discourse (dandodiscourse.com)."

[9] "Market Efficiency" refers to the "Efficient Markets Hypothesis (EMH)" which posits that all value relevant information is incorporated in the stock price very quickly. See Fama, Eugene F. "Efficient capital markets." Journal of finance 25.2 (1970): 383-417. See also, *Cammer v. Bloom* , 711 F. Supp. 1264 (D.N.J. 1989) and *Krogman v. Sterritt* , 202 F.R.D. 467, 474 (N.D. Tex. 2001).

[10] **Basic Inc. v. Levinson**  : 485 U.S. 224 (1988).

[11] See Fama, E. Fisher, L., Jensen, M. and Roll, R. "The Adjustment of Stock Prices to New Information." International Economic Review 10, 1-21, (February 1969).

[12] See, "Putting 'Litigation' Back in 'Securities Litigation' | D&O Discourse (dandodiscourse.com)."

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Judge Says Bold, Italic Font Muddies Allbirds Investor Suit

By **Katryna Perera**

Law360 (May 13, 2024, 9:12 PM EDT) -- A California federal judge has tossed for now a proposed class action from Allbirds Inc. investors who claim the sustainable shoe retailer made false and misleading statements in registration documents connected to its initial public offering, saying the complaint doesn't indicate which statements from the company's executives were allegedly misleading.

U.S. District Judge Araceli Martínez-Olguín issued an **order** on Friday dismissing the investors' suit with leave to amend, saying that "the parties' briefing reflects a lack of clarity as to which statements, or portions of statements, are allegedly false or misleading."

According to the order, the investors told the court they use "bold and italicized font" to indicate statements or portions of statements that are false and misleading. However, Judge Martínez-Olguín said Friday that rather than "guess" which "instances of bold and italicized font plaintiffs intend to denote the statements (or portions of statements) they claim are false and misleading," the plaintiffs need to make it clear in the first instance when they file their amended complaint.

Allbirds, several of its executives, and the underwriters that facilitated the company's IPO filed a dismissal motion in November 2023. They specifically argued that the complaint should be dismissed because it is "puzzle-pled," and neither they nor the court can identify which statements the investors challenge and why.

But even assuming that every statement included in the complaint is challenged, all the statements are still inactionable, the motion stated, "because they consist of accurate reports of historical performance, vague expressions of corporate optimism, statements of opinion, and protected forward-looking statements."

The defendants further argued that the suit should be tossed because the investors failed to plead a strong inference of scienter or knowledge of wrongdoing.

"The complaint offers only conclusory and unreliable allegations to suggest that defendants allegedly knew of apparel and inventory related issues but purposely misled consumers otherwise," the motion stated. "Plaintiffs identify no contemporaneous facts that demonstrate defendants' purported knowledge that any challenged statement was false or misleading when made."

The investors filed suit in **April 2023** after an announcement of the company's fourth quarter 2022 results, in which Allbirds reported a net loss of \$24.9 million and a full year 2022 net loss of \$101.4 million.

In Allbirds' November 2021 IPO, the company **raised \$303 million**, pricing above its range at \$15 per share. It also offered 1 million more shares than originally planned, directly selling 16.3 million shares while existing shareholders sold 3.8 million shares.

Investors jumped at the offering, sending Allbirds' shares up \$13.64, or 91%, to close at \$28.64 in debut trading. But according to plaintiff Gennady Shnayder, the company was making misleading statements to investors.

Starting with its registration statement and amendments in summer and fall 2021, and continuing

until March 2023, Shnayder said the company failed to disclose trends or uncertainties that could affect its operations. Namely, he claimed, Allbirds was "shifting its focus toward new customers at the expense of its core customers."

Shnayder said the company was overemphasizing products outside its core range and failing to alert investors of the "narrow appeal" of those products.

He accused the company of underinvesting in customers' favorite products, which he names as its lifestyle and performance shoes such as the Dasher and the Runner, and said this underinvestment was showing in Allbirds' sales figures.

Shnayder said that on March 9, 2023, after markets closed and CFO Mike Bufano had stepped down in the wake of the company's losses, the company issued a press release echoing what he said was left out of its prior statements.

CEO Joseph Zwillinger said in the March 9 statement, "We overemphasized products that extended beyond our core DNA. And as a result, some products and colors have had narrower appeal than expected."

"Because we were spending significant time and resources on these new products that did not resonate well, we underinvested in our core consumers' favorite products," he continued.

The proposed class includes everyone who acquired stock in Allbirds connected with the IPO or registration statement connected with the IPO or securities between Nov. 4, 2021, and March 9, 2023.

Counsel for Allbirds and the other defendants declined to comment on Monday, and counsel for the investors did not immediately respond to requests for comment.

The investors are represented by Tamar A. Weinrib and Jennifer Pafiti of Pomerantz LLP and Junbo Hao of Hao Law Firm.

Allbirds and the individual defendants are represented by Koji F. Fukumura, Ryan E. Blair and Heather M. Speers of Cooley LLP.

The underwriter defendants are represented by Mark R.S. Foster, Virginia F. Milstead and Scott D. Musoff of Skadden Arps Slate Meagher & Flom LLP.

The case is Shnayder v. Allbirds Inc. et al., case number 3:23-cv-01811, in the U.S. District Court for the Northern District of California.

--Additional reporting by Renee Hickman. Editing by Kristen Becker.



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Biogen Investors Seek Class Cert. In Alzheimer's Drug Suit

By **Sydney Price**

Law360 (May 13, 2024, 10:18 PM EDT) -- A proposed class of Biogen shareholders urged a Massachusetts federal court to certify their now-revived class action alleging the drugmaker made misleading statements about a deficient Alzheimer's drug, arguing it can sufficiently lead the suit with Block & Leviton LLP as class counsel.

The Oklahoma Firefighters Pension and Retirement System sought class certification on Friday, a month after it filed an amended complaint and two months after U.S. District Judge William G. Young reopened the case. Judge Young previously granted Biogen's motion to **dismiss the suit** with prejudice for failing to state a claim.

The plaintiffs are proposing a class of investors who purchased or otherwise acquired Biogen common stock between June 8, 2021, and Jan. 11, 2022. The pension fund said on Friday that its claims are typical of the class and that the suit satisfies all other requirements for class certification.

"No antagonism exists between lead plaintiff and the class, and proposed class counsel, Block & Leviton, is competent and experienced in litigating securities class actions," the motion states.

The latest version of the suit alleges Biogen made false and misleading statements in connection with the rollout of its Alzheimer's drug, Aduhelm. Biogen's U.S. Food and Drug Administration interactions over Aduhelm later became the subject of federal investigations and contributed to a significant portion of the medical community questioning Aduhelm's efficacy, driving provider hesitancy to prescribe it, the suit says.

The lawsuit covers two major shifts in the company's stock.

The suit claims Biogen's price "skyrocketed" after Aduhelm was approved by the FDA the day before the class period began, increasing from \$286.14 per share to close at \$395.85 on June 7, 2021, a \$14.6 billion price increase in the company's market capitalization in one day.

However, at the end of the class period, when the Centers for Medicare & Medicaid Services said it would only cover the drug for patients in hospital-sponsored clinical trials, Biogen's stock price fell to \$225 per share, according to the suit.

Biogen's former CEO, Michel Vounatsos, and President, Alisha A. Alaimo, are named defendants in the latest version of the suit.

The suit accuses Vounatsos and Alaimo of falsely claiming 900 sites were ready to treat patients with Aduhelm shortly after the drug's FDA approval.

In dismissing the suit last year, which had the same class period and similar allegations, Judge Young said a reasonable investor would have understood Vounatsos' and Alaimo's statements about the 900 sites being "ready" to mean they had "expressed a willingness to treat patients with an innovative treatment for Alzheimer's disease" and not that they had undergone all the necessary regulatory reviews.

Both versions of the suit allege Vounatsos and Alaimo told investors that a "bottleneck" to commercialization was in analyzing the spinal fluid but withheld that collecting the fluid was also a

potential bottleneck.

Judge Young told the investors previously that their claim was insufficient.

"All that Oklahoma Firefighters bring before this court is the conclusory allegation that the real bottleneck concerned the collection of spinal fluid," the judge said in her order last year, underlining 'real' for effect. "This is not sufficient 'meat on the bone' to survive a motion to dismiss."

However, the case was reopened after the investors claimed they had "new" evidence to support their claims, including a congressional report showing consultants for Biogen had told it that prices were excessive and additional allegations from Biogen's former employees.

Judge Young noted when reopening the case in March that although the congressional report is not "new" and that the plaintiffs had it in their possession "for months," the court would still allow them to use it in their suit.

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

The plaintiffs are represented by Jacob A. Walker, Jeffrey C. Block, Michael D. Gaines and Brendan Jarboe of Block & Leviton LLP.

Biogen and its executives are represented by James R. Carroll, Michael S. Hines and Yaw Anim of Skadden Arps Slate Meagher & Flom LLP.

The case is Oklahoma Firefighters Pension and Retirement System v. Biogen Inc. et al., case number 1:22-cv-10200, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Craig Clough. Editing by Drashti Mehta.

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SPAC Investor Says Insiders Overvalued Satellite Co. Deal

By **Sydney Price**

Law360 (May 13, 2024, 10:48 PM EDT) -- An investor has sued a blank-check company and several of its top brass in Delaware Chancery Court, alleging the defendants protected their buy-ins while leaving public investors to suffer losses following a merger with satellite imaging company BlackSky Holdings Inc.

Dean William Drulias alleges in a Friday complaint that directors, controllers and officers of Osprey, a special-purpose acquisition company, had "powerful incentive" to complete a merger with BlackSky, a company that uses satellite imagery for mapping and monitoring shipping, agricultural and military activity, among other things, according to the suit.

Drulias accuses the defendants of entering the deal to avoid the SPAC's liquidation in November 2021, which would have been required if Osprey failed to close the business combination within 24 months of its November 2019 initial public offering.

On Sept. 8, 2021, Osprey's public stockholders approved the merger with BlackSky, which closed the next day, according to the suit. The suit alleges the merger was a "financial windfall" for the defendants. The day the merger closed, the founder shares were worth \$90 million, a 360,000% return on the Osprey defendant's initial investment, the suit claims.

However, since Sept. 6, 2021, Osprey public stock has lost approximately 85% of its value, according to the suit.

"Even valued at April 26, 2024's rock-bottom closing share price of \$1.26, the founder shares are worth over \$9.9 million, a return of over 39,000%," the suit says.

In addition to Osprey, the suit's individual defendants include former Osprey CEO David DiDomenico, former co-Chairman Jonathan Cohen, former Chief Financial Officer Jeffrey Brotman, along with other former Osprey directors and controllers.

Activist shareholder Jana Partners LLC and private equity firm Hepco Capital Management are also defendants in the suit. According to the suit, Cohen directly controls Hepco, and DiDomenico is in charge of Jana's SPAC investment initiative. Osprey was established "as a collaboration" between Hepco and Jana, according to the suit.

Osprey's shares were valued at \$10 in the merger agreement, but the suit says there was less than \$7 in net cash underlying each share, making its August 2021 proxy statement filed in connection with the merger false or at least materially misleading.

The proxy statement also failed to disclose that a significant portion of BlackSky's projected revenue was not from "existing contracts and expected contract extensions and expansions," the suit says.

Following the merger, BlackSky's stock price rapidly plummeted, the suit alleges.

By Dec. 17, 2021, BlackSky's stock price dropped below \$6 and continued to fall. On Feb. 22, 2022, BlackSky announced that it failed to meet a \$40 million revenue projection for 2021 and that its actual yearly revenues were \$34.1 million, more than 35% lower than the projected revenue relied upon by the board in approving and recommending the merger, according to the suit.

The suit accuses the defendants of breaching their fiduciary duties and unjust enrichment. Drulias seeks to represent a class of all record and beneficial holders of Osprey common stock who held common stock as of the redemption deadline through the merger's closing.

Counsel for Drulias and a representative for BlackSky did not immediately respond to requests for comment Monday.

Drulias is represented by Kelly L. Tucker, Rebecca A. Musarra and Edward M. Lilly of Grant & Eisenhofer PA and Michael Klausner of Stanford Law School.

Counsel information for the defendants was not immediately available.

The case is Drulias v. Osprey Sponsor II et al., case number 2024-0478, in the Court of Chancery of the State of Delaware.

--Editing by Drashti Mehta.

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Chancery Orders Check Of Trump-Tied SPAC Sponsor Deal

By **Jeff Montgomery**

Law360 (May 13, 2024, 9:48 PM EDT) -- Delaware's Court of Chancery refused Monday to impose a settlement on investors behind the sponsor of the company that took former President Donald Trump's Truth Social media company public after they filed and later abandoned a suit to remove the special-purpose acquisition company's managing member.

But Vice Chancellor Lori W. Will, ruling from the bench after argument, also declined to dismiss claims against the group without prejudice, pending limited discovery, followed by a hearing, on whether the investors assented to a term sheet proposed by counsel for the managing member, Patrick Orlando, and the SPAC, ARC Global Investments II LLC.

More than 20 investors in ARC Global who initially sued for Orlando's removal March 27 told the court last week that they terminated their counsel and sought withdrawal of the suit, citing objections to an "onerous" settlement agreement about which they were purportedly unaware. One member, nonattorney Gregg Alper, spoke for investors at Monday's teleconferenced hearing.

"I can't say today, having heard from Mr. Alper without evidence, whether there was miscommunication between them and their counsel or actual assent," the vice chancellor ruled.

Complicating the picture was the investor group's declared termination before the hearing of their own counsel, Thomas A. Uebler of McCollum D'Emilio Smith Uebler LLC. Vice Chancellor Will accepted Uebler's exit from the case Monday before taking up the remaining issues.

In a letter to Vice Chancellor Will, last week, the ARC Global members alleged that Orlando's attorneys on May 6 filed a motion to enforce a settlement term sheet for the March suit that was not seen by most of the dissenting ARC parties until April 28. At the time, it was allegedly deemed by the dissenting members as an offer they were free to accept or reject, the sponsor letter to the court said.

Alper told the vice chancellor that he learned the settlement had been "confirmed" in an email sent by Matthew D. Perri of Richards Layton & Finger PA, counsel to Orlando and ARC Global.

"That was the first time I learned we had actually been bound to a settlement, or purportedly bound to a settlement," said Alper, an investor and co-founder of Pro Legal Service, a provider of service of process services for the legal industry.

Court records show that counsel for Orlando and ARC Global had suggested before the members sought dismissal that Vice Chancellor Will set a protective, \$69 million bond. In a court document, an attorney for ARC initially suggested that damages could warrant a bond as high as \$186 million.

"A party seeking to enforce a settlement agreement has the burden of proving the existence of a contract by a preponderance of the evidence," Vice Chancellor Will said. Although a signed agreement is not necessary, an agreement to terms must be shown, she added.

Dissenting ARC members said in an email to the court that the settlement called for "devastating," unapproved concessions. Included, ARC members said, were provisions that would heavily dilute their shares under terms allegedly never presented or explained to the group by Uebler, who did not discuss the claim or issue during the hearing.

"Not only did plaintiff's counsel lack actual authority to bind plaintiffs to the term sheet, defendants' counsel could not have reasonably believed that Mr. Uebler or the Uebler's firm even maintained apparent authority to consent to the term sheet on plaintiffs' behalf," the objection, which listed 23 members of ARC Global, said.

Orlando was the first CEO and chairman of Digital World Acquisition Corp., the ARC-backed SPAC that took Truth Social public in March. He was fired from Digital World following disclosures that he had failed to publicly disclose early "de-SPAC" merger talks with Trump Media & Technology Group, failed to make public an agreement to pay TMTG \$1 million if the SPAC deal failed and failed to disclose transfers of ARC shares after his firing.

The U.S. Securities and Exchange Commission imposed an \$18 million sanction in connection with Digital World's conduct.

An April 2 motion to dismiss the Orlando removal complaint, filed by Orlando's and ARC's counsel, said the SPAC agreement requires at least 80% percent of shares in order to be effective, well above the "at least" 50.1% that the dissenting stockholders said they hold.

Vice Chancellor Will, who had earlier canceled a hearing set for Monday on motion by Orlando's counsel to dismiss ARC's suit, put the hearing back on the schedule for Monday after noting receipt of the ARC Global members' purported notice of withdrawal.

The ARC member withdrawal notice, among other details, said that if Uebler or any other lawyer in his firm purported to accept the settlement term sheet on behalf of plaintiffs, they did so in direct violation" of his law firm's engagement letter "and without settlement authority from plaintiffs."

Vice Chancellor Will did not comment on the allegation but noted her initial rejection of the dissenting group's attempt to file their objections directly to the court, based on failure to submit it through their Delaware counsel, Uebler. The objection was later docketed after it was submitted by Orlando's counsel.

The rejected settlement term sheet presented by Orlando's counsel earlier, the dissenting ARC members' letter said, purported to release Orlando "from and against all claims or acts, including malfeasance or breach of fiduciary duty," up through and including the settlement date.

It also would allegedly bar ARC's members from seeking damages for dilution even though ARC's members alleged that "a substantial portion of that dilution has occurred because Mr. Orlando paid his personal legal expenses with [ARC] assets in defending actions against him for fraud and related claims' allegedly committed by him" outside his capacity as managing member of ARC.

"In short, acceptance of the term sheet would be to effectively keep plaintiffs totally in the dark about the financial operations and results of ARC II to date and into the future — a proposition to which this plaintiffs group would never agree," the letter said.

In the ARC Global Investments II LLC case, Aaron Leon and others named in the suit are represented by Thomas Uebler, Brian Demott and Adam J. Waskie of McCollom D'Emilio Smith Uebler LLC.

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

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

--Additional reporting by Leslie Pappas and Tom Zanki. Editing by Jay Jackson Jr.



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Chancery Scuttles Unfair Pirate Ship Salvage Co. Merger

By **Jeff Montgomery**

Law360 (May 13, 2024, 5:01 PM EDT) -- Finding the deal "wholly devoid" of attempts at fairness, a Delaware vice chancellor has ordered the unwinding of a 2018 pirate treasure hunting and salvage company merger with an asset-holding affiliate, while also finding that delay and fading evidence have scuttled minority investor fiduciary breach claims.

Vice Chancellor Nathan A. Cook's rulings late Friday resolved for now some disputes between Paul S. Buddenhagen, a longtime Marine Exploration Inc. minority investor, and MEI founder Barry L. Clifford, a well-known underwater explorer.

Clifford, his allies and minority investors have battled for years over salvage and monetization of gold and silver coins and other pirate treasures from the wreck of the Whydah Galley. The ship sank off Cape Cod, Massachusetts, in 1717 while commanded by the pirate Sam Bellamy, and was discovered during a search by Clifford and others in 1982.

Buddenhagen has argued that Clifford's camp controlled less than 40% of the "authentic shares" of MEI when it merged with potentially treasure-rich affiliate Whydah International Inc. in a deal that put Clifford's interests on both sides of the transaction, while diluting the rights of minority investors, including Buddenhagen.

"Lacking any semblance of fair process and no reasonable metric for evaluating the fairness of the price, the defendants used the merger to grant themselves additional equity and to extract rights to a substantially greater share of the Whydah assets, all to the detriment of the minority stockholders," Vice Chancellor Cook concluded after a trial last year.

Samuel T. Hirzel II of Heyman Enerio Gattuso & Hirzel LLP, counsel to Clifford, said Monday that his clients were pleased with the decision and hopeful that it would allow the company to move forward.

"The court recognized Mr. Buddenhagen's opportunistic strike and rejected the overreach that prevented any attempt at a second pre-trial settlement," Hirzel said. "The company and its minority stockholders would have received a vastly better deal in the settlement that Mr. Buddenhagen blew up in 2021 than they did after trial."

Richard L. Renck of Duane Morris LLP, counsel to Buddenhagen and other investors, said "We're pleased that in the 122-page opinion the court confirmed what had been alleged in this litigation and proven at trial — that is, that the defendants have engaged in decades of breaches of fiduciary duties in managing the entity, including ham-fisted efforts to falsify corporate documents."

Renck said unwinding of the "extremely unfair merger" prevented dilution that would leave minority stockholders with only 10% of their investment. It also returned 40% of the company to the same investors. The ultimate result from this decision, the unwinding of an extremely unfair merger, prevented the unfair dilution (down to approximately 10%) of the minority stockholders and returned 40% of the company back to them. Clifford, he added "is on notice that the minority stockholders of MEI are awakened and will hold him to compliance with his fiduciary duties as this entity moves forward."

Buddenhagen argued in a suit filed in 2019 that Clifford and another MEI director breached their fiduciary duty to the company over many years by issuing to themselves nearly all the voting and

economic power of MEI through a series of self-interested share transactions.

The deals revolved around the Whydah, its thousands of coins that are said to be worth hundreds of millions of dollars, and its potential tourism value, as well as what the suit described as self-interested decisions by Clifford and his allies since the ship's discovery.

Vice Chancellor Cook found in part that "it is frankly difficult to think of even a single act defendants took that might suggest they intended anything other than for the [merger] process here to be manifestly unfair." Methods included manipulating corporate records by "writing, rewriting, and backdating many drafts" of board minutes spanning a decade.

Buddenhagen's claims, however, were found by the court to have suffered from decades of inattention and unreasonable delay.

"Despite being on inquiry notice of his potential non-merger claims many years prior, the plaintiff did not act," the vice chancellor wrote. "And for 23 years, while roosting atop his claims, the plaintiff continued his slumber."

The price of delay was illustrated in part, the opinion noted, by the loss of MEI records to a flood several years before the case was filed, with the delay and loss of documents seriously prejudicing the defense.

"There is a serious risk that a defendant will be held liable either because he bears the burden of proof and can no longer obtain exonerating evidence," the vice chancellor wrote, "or, more perniciously, because only the evidence damning him was, by chance alone, not the subject of decay. Delaware law thus compels me to reject the plaintiff's delayed claims."

Buddenhagen "awoke to raise these claims only after learning that the defendants caused MEI to merge with an entity [Whydah International] the defendants owned," Vice Chancellor Cook wrote. "The defendants undertook the merger in anticipation of a significant payout and their belief they were close to uncovering the mother lode" of treasure.

Hirzel said the rescission decision returns the Whydah assets to his client but does not include corporate governance changes included in a rejected settlement.

"The fact that Mr. Buddenhagen did not seek the remedy of rescission — and defendants were pleased to accept rescission — only confirms our position that defendants believed that they were better off economically prior to the 2018 merger," Hirzel said.

Much of the energy on both sides arose from historic if unproven accounts, including one that recalled reported comments from one of the pirates captured after the Whydah's sinking.

Before his hanging, the account went, the pirate said treasure chests were kept between the ship's surface and cannon decks. With the sunken ship resting upside down, an undetermined amount of treasure remains trapped.

"Clifford's testimony and contemporaneous evidence also showed that defendants believed they were on the cusp of uncovering significant treasure from the Whydah," Cook wrote. "In making this assessment, I note that Clifford is the only person involved in this action who could provide a first-hand account of the state of the Whydah's wreck site," having dived on the site.

Buddenhagen is represented by Richard L. Renck, Tracey E. Timlin and Michael B. Gonen of Duane Morris LLP.

Clifford and the estate of Robert T. Lazier are represented by Samuel T. Hirzel II and Gillian L. Andrews of Heyman Enerio Gattuso & Hirzel LLP.

The case is Paul S. Buddenhagen, individually and on behalf of all others similarly situated, and derivatively on behalf of Maritime Explorations Inc. v. Barry L. Clifford and the estate of Robert T. Lazier, case number 2019-0258, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.

Update: This story has been updated to include comment from counsel for the plaintiffs.

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Wireless Charging Co. Promotes General Counsel To CEO

By **Sue Reisinger**

Law360 (May 13, 2024, 4:08 PM EDT) -- WiTricity Corp., which sells wireless charging systems for electric vehicles, on Monday announced it has appointed its chief legal officer as the private company's next chief executive officer and a member of the board of directors.

Joe Benz will assume the CEO role and join the board immediately, succeeding Alex Gruzen, who has been the WiTricity CEO since 2014, WiTricity said. Benz did not return messages seeking comment.

Gruzen steered WiTricity, founded in 2007, through the complex transition from a licensing and technology transfer company to a product company, the company said. He will continue to serve as a consultant.

Most recently, Benz has served as general counsel and chief legal officer for the company, overseeing the continued development of WiTricity's global patent portfolio and guiding the company through the myriad operating agreements necessary to transition to a product company.



Joe Benz

"Joe Benz is a phenomenal leader with an impressive and proven track record of operational results and broad experience in the transportation industry," WiTricity board member and major investor Kenneth Horowitz, who is also a major investor said in a statement as part of the announcement.

"We are incredibly fortunate to promote from within," Horowitz added, "allowing us to leverage his deep familiarity with WiTricity and make a seamless transition. It has been my absolute pleasure to work with Joe over the past two years, and we are excited to see how his leadership will propel the company forward into this next phase."

The company offers the Halo wireless charging platform and recently announced the launch of a wireless charging system for golf carts and neighborhood electric vehicles, called NEVs. The wireless technology is based on magnetic resonance.

Benz brings over 30 years of operational and leadership experience in both the military and private sectors.

The company's statement said he is known for his considerable operational expertise and has a record of delivering results by building teams and implementing processes to maximize talent, leverage intellectual property and develop winning solutions.

Prior to joining WiTricity two years ago, Benz served for two years as chief intellectual property counsel and senior director at the Boeing Co., where he led an organizational redesign and business transformation, according to WiTricity and Benz's LinkedIn profile. He also served nearly three years as chief IP counsel for the Ford Motor Co. and president & COO of Ford Global Technologies, a Ford subsidiary responsible for a global business dealing with joint ventures, major suppliers and other strategic partners.

Benz also spent five years as counsel with Paul Hastings LLP and, before that, two years with Robbins Geller Rudman & Dowd LLP, both in the Atlanta area, according to his LinkedIn profile. He also spent

two years as an associate with Townsend and Townsend and Crew LLP, and three years with Alston & Bird LLP.

Benz served in active military duty and U.S. Army Reserve service, including multiple combat tours in a career spanning more than 28 years, WiTricity said. During his last tour in Afghanistan from 2016 to 2017, he was responsible for directing and overseeing U.S. Army operations throughout the theater, a role that involved strategic partnerships with over 25 coalition partners and direct interaction with the Afghan government.

He continues to serve as a colonel in the Army Reserve. The 1990 graduate of the U.S. Military Academy in West Point, New York, earned his law degree from Emory University School of Law in 2003.

"This is a very important time for WiTricity, requiring focused leadership in all segments of our business," investor and board member David Baum said in the company announcement. "Joe Benz is the right leader at the right time in WiTricity's evolution. He has led under the most challenging circumstances and always delivered superior results."

--Editing by Amy French.

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E-Discovery Quarterly: Recent Rulings On Text Message Data

By **Tom Paskowitz, Robert Keeling and Colleen Kenney** (May 10, 2024, 4:40 PM EDT)

This article is part of a quarterly column analyzing the most notable e-discovery developments from the previous three months. This installment takes a closer look at recent decisions involving the production or spoliation of text message data.

Electronically stored information on cellphones, and in particular text message data, represents one of the many challenges faced by lawyers and courts in the e-discovery space as a result of the proliferation of ESI in recent decades.

A few recent court decisions have surprisingly held that business-related texts on employee personal devices may be found to be within an organization's possession, custody or control, and therefore subject to the organization's preservation obligations.[1]

But this leads to uncertainty when it comes to the preservation and collection of such data.

For example, the Sedona Principles — which provide guidance addressing the unique challenges posed by the production of electronically stored information — note that "mobile devices that are not synchronized with the organization's servers may require physical collection of the mobile device to meet preservation or discovery obligations." But, the principles continue, "it may not be necessary to image the device if the costs, burdens, and other issues associated with imaging the device outweigh the benefits of retrieving unique, relevant ESI from the device." [2]

The principles also note that "wholesale text message retention is regularly disproportionate for both sides of the litigation." [3]

Given this uncertainty, it is not surprising that disputes involving the production or spoliation of text message data have figured prominently in recent court decisions. A few key themes can be derived from these decisions.

Unique Issues With Cellphone Data

Data on personal cellphones can be particularly beguiling from an e-discovery perspective in cases involving corporate defendants because the individual custodian, and not the organization, has control over the device. This can lead to issues involving the storage of information on the phone, auto-delete settings and what happens when a phone gets upgraded.

A **January order** from the Delaware Court of Chancery in *Goldstein v. Denner* highlights these pitfalls. In *Goldstein*, the plaintiff alleged that the defendants engaged in insider trading in connection with a proposed acquisition, and served discovery seeking communications involving one of the principals who negotiated the transaction.[4]

In later granting spoliation sanctions regarding those communications, the court relied on extensive



Tom Paskowitz



Robert Keeling



Colleen Kenney

evidence showing that the principal's phone was never imaged or collected because the defendants' general counsel repeatedly told their outside counsel that there was a policy against using text messages for business purposes, and that the general counsel had looked through the principal's text messages and found nothing responsive.[5]

It was only after the plaintiff received text messages from other parties involving the principal that outside counsel looked into the principal's phone, but by that point, the principal claimed to have lost all of his text messages when he upgraded his phone to a new model.[6]

The U.S. District Court for the Southern District of Florida in *DeMartino v. Empire Holdings & Investments LLC* faced similar issues. Although the court ultimately denied spoliation sanctions, it concluded that one of the defendants lost relevant text messages by failing to take reasonable steps to preserve them.[7]

Like in *Denner*, the court relied on extensive evidence in the record regarding that defendant's conduct with respect to his personal cellphone, including that the defendant sent texts for business purposes, and that he purchased a new phone during the period at issue and performed a factory reset on the old phone after transferring all historical text messages to the new phone.[8]

It later turned out that older texts were deleted off the defendant's new phone as his storage ran out.[9]

These decisions reflect the importance of considering ESI sources on personal cellphones early in a litigation. As the court in *Goldstein* noted, "[r]elying solely on the client to identify the universe of relevant information, without reasonable inquiry to verify that the client accurately captured that universe, can lead to sources of information being overlooked." [10]

Intent Matters

Because cellphone data is under the possession and control of individual custodians if it is not collected or imaged by counsel, questions regarding the individual's intent can arise if data is lost.

Under Rule 37 of the Federal Rules of Civil Procedure, ESI "that should have been preserved in the anticipation or conduct of litigation" is considered lost when "a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." [11]

If a court finds the loss prejudicial, it "may order measures no greater than necessary to cure the prejudice." [12] But, if the court finds that an offending plaintiff "acted with the intent to deprive another party of the information's use in the litigation," additional sanctions — including terminating sanctions — are authorized. [13]

Several courts have recently addressed the intent of individual parties and custodians as part of the sanctions analysis.

For example, in *Jones v. Riot Hospitality Group LLC*, the U.S. Court of Appeals for the Ninth Circuit in March **upheld** a U.S. District Court for the District of Arizona ruling that the plaintiff spoliated text messages with the intent to deprive the defendants of their use, where there was "ample circumstantial evidence that [the plaintiff] intentionally destroyed a significant number of text messages and collaborated with others to do so." [14]

The plaintiff had produced "thousands of text messages" and argued that this negated any finding of intent to delete any messages, but the Ninth Circuit relied on other evidence from the plaintiff's third-party imaging vendor suggesting that she had "deleted some messages from the very periods covered by her productions." [15]

The Ninth Circuit also relied on a screenshot of a relevant text from the plaintiff's phone that was no longer available as further evidence of intentional spoliation, in part because the plaintiff could not explain why some messages were selectively deleted. [16]

Based on this evidence, the Ninth Circuit affirmed the district court's finding that the plaintiff "affirmatively selected certain text messages for deletion while otherwise preserving text messages

sent around the same time." [17]

In late March, the U.S. District Court for the District of Nevada in *Armstrong v. Holmes* faced similar circumstances in granting a jury instruction regarding the spoliation of text messages where the record contained "prolific" relevant messages between the defendant and several people, but none between the defendant and her daughter — suggesting selective deletion. [18]

The defendant tried to argue that living with her daughter "reduced the need to send messages via text," but the court was unpersuaded because the defendant admitted that she "engaged in selective preservation of messages" by keeping "messages that she thought were important to the case, but delete[ing] the others." [19]

Credibility was also front and center in *Buddenberg v. Estate of Weisdack*, where the U.S. District Court for the Northern District of Ohio imposed sanctions for deliberate deletions and alterations of relevant text messages. [20]

The court noted evidence that one of her relevant texts "appears to start midstream," and others were deemed by a forensic investigator to have been altered. [21] And although the plaintiff denied having deleted any relevant text messages, the court discounted this testimony based on "her demeanor, carefully evasive answers, and pregnant pauses." [22]

Takeaways

As noted above, ESI on personal cellphones can present unique challenges because the cost, burden and other issues associated with collecting data may outweigh the benefits of collection. But, as the decisions above demonstrate, careful balancing of those considerations is important.

These decisions reflect that counsel should often be involved in that balancing regarding what text message data should be preserved, collected, reviewed and produced.

An inquiry into these questions — which may include consideration of the relevance of the custodian to the subject matter of the dispute and the extent to which custodians used their mobile phone for business purposes — typically should be made deliberately and early in a litigation or investigation.

Tom Paskowitz is a partner at Sidley Austin LLP.

Robert Keeling is a partner and a head of the firm's e-discovery and data analytics group.

Colleen Kenney is a partner and also a head of the firm's e-discovery and data analytics group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See, e.g., *Goldstein v. Denner* , 310 A.3d 548, 573 (Del. Ch. Jan. 26, 2024); *Cap. Senior Living Inc. v. Barnhisser* , No. 22-CV-00606, 2024 WL 278105, at *5 (N.D. Ohio Jan. 25, 2024) (finding that a party had control over work-related text messages on a custodian's personal phone).

[2] The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, 63 (2018).

[3] *Id.*

[4] *Goldstein*, 310 A.3d at 557.

[5] *Id.* at *561-62.

[6] *Id.* at *565.

[7] **DeMartino v. Empire Holdings & Invs. LLC** , No. 22-CV-14301, 2024 WL 712456 (S.D. Fla. Jan. 26, 2024), report and recommendation adopted, No. 22-14301-CIV, 2024 WL 707252 (S.D. Fla. Feb. 21, 2024).

[8] 2024 WL 712456 at *1.

[9] *Id.* at *6. A court in New Mexico faced similar issues when granting a motion to compel the plaintiff to produce text messages where it appeared that plaintiff's counsel did not review any text messages but instead had the plaintiff review and pull the text messages she decided were responsive and relevant. **Alsaadi v. Saulsbury Indus. Inc.** , No. 23-CV-291 KG/KRS, 2024 WL 531246, at *1-2 (D.N.M. Feb. 9, 2024). Cf. **Boston Retirement System v. Uber Technologies Inc.** , No. 19-cv-06361-RS (DMR), 2024 WL 555891 (N.D. Cal. Feb. 12, 2024) (denying a motion to compel additional text messages from two custodians because the plaintiff did not provide "compelling evidence" to substantiate that the text message productions were inadequate).

[10] Goldstein, 2024 WL 303638, at *23.

[11] Fed. R. Civ. P. 37(e).

[12] Fed. R. Civ. P. 37(e)(1).

[13] Fed. R. Civ. P. 37(e)(2).

[14] **Jones v. Riot Hosp. Grp. LLC** , 95 F.4th 730, 735-36 (9th Cir. 2024).

[15] *Id.*

[16] *Id.*

[17] *Id.* at 736.

[18] **Armstrong v. Holmes** , No. 322CV00375ARTCSD, 2024 WL 1345214, at *4 (D. Nev. Mar. 29, 2024).

[19] *Id.* at *4.

[20] **Buddenberg v. Est. of Weisdack** , No. 18-CV-00522, 2024 WL 159001, at *65, 74-75 (N.D. Ohio Jan. 16, 2024).

[21] *Id.* at *65-67.

[22] *Id.* at *74.



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11th Circ. Says Class Attys Self-Dealt In \$35M TCPA Settlement

By Kelcey Caulder

Law360 (May 14, 2024, 12:18 AM EDT) -- The Eleventh Circuit on Monday dismissed a proposed \$35 million settlement of a class action alleging GoDaddy.com violated the Telephone Consumer Protection Act by sending unwanted marketing texts, saying the deal may have come by through nefarious means.

A lower court abused its discretion in approving the deal, a three-judge panel said in a 123-page published **opinion**, because it overlooked evidence of collusion between class counsel and GoDaddy's attorneys, treated the settlement as a common fund when it was claims-made, and improperly calculated attorney fees after erroneously concluding the deal wasn't a coupon settlement.

Under the settlement, GoDaddy agreed to provide up to \$35 million to pay both class members' claims and up to \$10.5 million to class counsel as attorney fees. But, the Eleventh Circuit said, the deal had a series of unfair provisions in it, including a Draconian opt-out process that appeared to have been intentionally structured to make it impossible to leave the settlement class, and an "overbroad" release provision that let not just GoDaddy but also a long list of potentially connected entities off the hook for future claims.

The appeals court said it seemed that class counsel had agreed to the release provisions GoDaddy wanted because "their hope for attorney's fees depended on their agreement."

"Class counsel, in seeking \$10.5 million in fees, were representing themselves," the Eleventh Circuit said. "They were the absent class members' adversaries. At the same time, class counsel were in effect representing GoDaddy in obtaining overbroad releases of GoDaddy and scores of 'affiliates' from claims yet to materialize."

The deal required class members to release claims against not only GoDaddy but also "its past and present parents, predecessors, successors, affiliates, holding companies, subsidiaries, employees, agents, attorneys, board members, assigns, partners, contractors, joint venturers, or third-party agents with which it has or had contracts, and/or their affiliates."

The lower court appeared to have been "disturbed" by the breadth of that provision, the panel said, and "went too far" by limiting its reach to the claims alleged in the complaint against GoDaddy. That should not have happened, according to the opinion, because district judges cannot "rewrite" settlements.

"Precedent required the district court to deny the proposed settlement and deny class counsel's motion for attorney's fees," the Eleventh Circuit said.

That is a problem, the panel said, but not the only one.

Under the settlement, the Eleventh Circuit said the named plaintiffs would receive "preferential treatment" and their attorney fees of up to \$10.5 million would not be reduced even if class members' claims totaled more than \$35 million. The panel also said that "about 98.1%" of class members would be bound by the agreement but would receive "absolutely nothing in exchange for giving GoDaddy overbroad releases" because they failed to opt out of the settlement.

That outcome appears to have been "deliberately structured" by the parties' lawyers, the Eleventh

Circuit said, given the "stringent opt-out requirements" outlined in the long-form notice sent to class members. The panel took particular issue with a requirement that class members send a signed request that they be left out of the settlement, in which they were also expected to swear under penalty of perjury that they were members of the settlement class.

"How many class members would take the time and effort to compose a letter to comply with that opt-out instruction?" the Eleventh Circuit asked. "How many would be aware of the elements of the crime of perjury, like materiality? And how many would think they should consult a lawyer before signing a letter under penalty of perjury?"

Considering the opt-out requirements and the settlement administrator's "apparent discretionary authority" to reject opt-out letters as insufficient, the panel said it was reasonable to infer the agreement was crafted by attorneys on both sides to "ensure that no class members would opt out and the entire class would therefore be bound by its sweeping release provisions."

"As the absent class members' fiduciary, the district court should have noted the inference," the Eleventh Circuit said. "It bore on the fairness and reasonableness of the proposed settlement agreement."

The district court's error as it relates to the fairness of the deal was "induced" by class counsel, according to the opinion, which agreed to the release provisions GoDaddy wanted because "their hope for attorney's fees depended on their agreement."

"Class counsel, in seeking \$10.5 million in fees, were representing themselves," the Eleventh Circuit said. "They were the absent class members' adversaries. At the same time, class counsel were in effect representing GoDaddy in obtaining overbroad releases of GoDaddy and scores of 'affiliates' from claims yet to materialize."

Still, the panel said the district court failed to see the conflict the attorneys had with class members and wrongly found that their representation of the absent class members was adequate.

The district court also improperly characterized the settlement as a common fund settlement instead of a claims-made settlement, the Eleventh Circuit said, explaining that the agreement was a claims-made settlement because, based on its terms, the \$35 million was not a fund created for the payment of "vouchers, cash awards, attorney's fees, and administration costs." Instead, GoDaddy would pay out an amount equal to the claims actually made and settlement costs.

"In basing its award of class counsel's attorney's fees in part on a finding that the settlement created a common fund, the district court abused its discretion because the finding constitutes clear error," the panel said. "That said, we hold that [the Class Action Fairness Act] applies to this settlement, so its attorney's fees provisions govern how to calculate attorney's fees in this case."

CAFA applies, according to the opinion, because the settlement was a coupon settlement, through which class members could choose between a \$35 cash award or a \$150 voucher with credits redeemable for GoDaddy's products and services.

Attorney fees for coupon settlements under CAFA "may be based on the value of the coupons that are redeemed, the lodestar method, or a combination of both," the Eleventh Circuit said.

Because that leaves the question of how and when to determine the value of redeemed coupons, the panel said it would be reasonable in "many cases" for courts to approve motions for attorney fees only after the coupons' expiration date. It would also be reasonable, according to the opinion, to estimate the redemption rate of the coupons when approving the settlement.

"Accordingly, calculating attorney's fees in this case as a percentage of the possible relief available to class members used the wrong legal standard and was thus an abuse of discretion," the panel said.

The Eleventh Circuit sent the case, which comprises several consolidated cases, back to the lower court for further proceedings consistent with its opinion.

According to court records, the class accused GoDaddy of violating the TCPA by using an automatic

telephone dialing system to send unwanted calls and text messages promoting its products. The \$35 million settlement was preliminarily approved in 2020.

In the intervening years, the case has come before the Eleventh Circuit three times. In July 2022, it **vacated** approval of the settlement after finding some class members would not have standing under circuit precedent. And in July 2023, the full Eleventh Circuit **rejected** GoDaddy's argument that a plaintiff who received a single unwanted text message would not have standing to sue under the TCPA, departing from its **2019 precedent** in the case **Salcedo v. Hanna** .

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

U.S. Circuit Judges Gerald Bard Tjoflat, Charles R. Wilson and Elizabeth L. Branch sat on the panel for the Eleventh Circuit.

GoDaddy is represented by Matthew B. Criscuolo and Jeffrey M. Monhait of Cozen O'Connor.

Plaintiff Susan Drazen is represented by Earl P. Underwood Jr. of Underwood & Riemer PC, Eugene Y. Turin and Evan Meyers of McGuire Law PC, Kenneth J. Riemer of Riemer Law LLC, David Max Oppenheim and Robert M. Hatch of Bock Hatch & Oppenheim LLC and John R. Cox of John R. Cox PLLC.

Appellant Juan Pinto is represented by Robert W. Clore, Christopher A. Bandas and Jason Eric Pepe of Bandas Law Firm PC.

The case is Drazen et al. v. Pinto, case number 21-10199, in the U.S. Court of Appeals for the Eleventh Circuit.

--Additional reporting by Carolina Bolado, Hailey Konnath and Allison Grande. Editing by Adam LoBelia.

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BofA Let 'Off The Hook' In ATM Fee Row, 9th Circ. Told

By **Craig Clough**

Law360 (May 13, 2024, 11:35 PM EDT) -- An attorney for a proposed class alleging Bank of America wrongly charged them for out-of-network balance inquiries at ATMs told a Ninth Circuit panel Monday that the district court erred in tossing all the claims by applying arguments about a different defendant.

Jae Kook Kim of Lynch Carpenter LLP, who represents the proposed class, appeared before the three-judge panel during a hearing in Pasadena, California, that was also live-streamed, and said the pared-down appeal only focuses on breach of contract and breach of the covenant of good faith and fair dealing claims against Bank of America and not other defendant companies that operated the out-of-network ATMs.

The case is about customers like his client, Brittany Covell, being charged more than one fee for a balance inquiry despite only authorizing one, but the district court was distracted by claims against another defendant when it tossed the case and denied **class certification**, Kim said.

"I think the district court got caught up on ... a lot of the language and arguments we used primarily with respect to a different ATM defendant called Cardtronics, which is the largest independent ATM operator in the country. We had used certain language about whether a customer intended to do these balance inquiries," Kim said.

But the breach of contract claim against Bank of America does not require knowledge and intent, and the trial court "is letting BofA off the hook," Kim said.

"Where that's an error is these claims are under breach of contract," Kim added. "Unlike common law fraud, which has never been asserted against BofA in this case, knowledge and intent by BofA is not an element of anything we have to prove here."

Shawn R. Obi of Winston & Strawn LLP, who represents Bank of America, said Covell is "trying to shoehorn in a fraud claim" under the guise of a breach claim.

The trial court action includes multiple plaintiffs, but Kim told the panel he was appearing only on behalf of Covell.

Kristen Schertzer originally sued BofA in February 2019, arguing that the bank is breaching its fee disclosure agreement by systematically charging excessive fees on international charges and ATM withdrawals.

The suit was later amended with additional named plaintiffs, including Covell, and included a challenge to an alleged "multifaceted scheme" between BofA and ATM operators to charge unwarranted out-of-network balance inquiry fees.

Co-defendants included Cardtronics and FCTI, which operate out-of-network ATMs at issue in the suit.

The cardholders claimed that each time one of the ATMs told them their bank account balance, Bank of America charged them \$2.50 — and paid 25 cents of that fee to the company responsible for the ATM where the balance inquiry was made.

The Bank of America cardholders claimed that Cardtronics slapped them with a fee by offering them

a balance statement on a printed receipt, and that they were charged two fees by FCTI "despite making only one balance inquiry."

Judge Jeffrey T. Miller ultimately granted summary judgment to the defendants while also denying a class certification bid. On appeal, the proposed class is looking to reverse the class certification order that applied to users of FCTI ATMs at 7-Eleven locations nationwide and the granting of summary judgment to BofA along with denying a motion for relief from judgment.

On Monday, Kim told the panel that "[w]ith respect to their customers use of FCTI screens, [the breach claim] had nothing to do with subjective intent because our argument is you can't double charge out-of-network fees to balance inquires when only one balance inquiry happened."

"And I think one of the things that the trial court got hung up on was the language about potentially you know knowledge or people's intent, which was really an argument we had made in regards to the Cardtronics case which is no longer part of this case," Kim said.

Obi told the court that the breach of contract claim does not apply to the allegations, and that if customers were facing "tricky" screens at out-of-network ATM, then their remedy is to take the issue up with the operators of those ATMs.

"Whatever complains she has with these screens should not be breach of contract claim with her bank," Obi said.

The proposed class is represented by Jae K. Kim of Lynch Carpenter LLP.

Bank of America is represented by Shawn Rieko Obi of Winston & Strawn LLP.

The case is Kristen Schertzer v. Bank of America NA, case number 23-55104, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Jasmin Boyce. Editing by Peter Rozovsky.



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Irked Autonomy Judge Vents On HP Fraud Trial's Slow Pace

By **Bonnie Eslinger**

Law360 (May 13, 2024, 11:32 PM EDT) -- U.S. District Judge Charles Breyer on Monday blasted lawyers for the government and two former Autonomy Corp. PLC executives in a criminal fraud case over the trial's slow progress, saying he's "annoyed," but also "complicit" because he "did not take more of a controlling posture."

Former Autonomy CEO Michael Lynch and Finance Vice President Stephen Chamberlain are being tried on conspiracy and fraud charges related to HP Inc.'s October 2011 acquisition of the U.K. technology company. The trial **kicked off** on March 18, and the government is still presenting its case-in-chief.

Midday Monday, outside the presence of the jury, Judge Breyer slammed all sides for taking too long with their questioning of witnesses.

"I've seen it continually through this case," the judge said. "Neither side has exercised what I consider appropriate restraint in terms of time commitments."

Judge Breyer said there was no reason for the trial to be dragging on, with such experienced lawyers.

"Yes, I'm annoyed," he said. "Number one, the competence of lawyers on both sides is exceptional. ... There can be no excuse that you people don't understand trials or this is your first rodeo."

He also said he was willing to take a little blame for the situation.

"Now we have a situation that is of our making, and I was complicit in it," the judge said. "I regret that I did not take more of a controlling posture in this case."

Judge Breyer said Lynch and Chamberlain are entitled to time for an effective defense.

"I'm sorry, I'm venting," the judge said. "But we've got a serious situation here."

Members of the jury have inquired when their service to the court will be over, Judge Breyer said.

"I can't tell the jury when this case is going to end," the judge said. "The only time you can have some accurate prediction, that's not based upon a wish, is after the government rests."

At that point, the defense will be able to determine their arguments and what witnesses and evidence they want to put before the jury, the judge said.

On Monday, the government called KPMG partner Andrew Gersh to the stand to testify about the firm's due diligence on behalf of HP before the tech giant bought Autonomy. Gersh testified that Autonomy executives, including Chamberlain and then-Chief Financial Officer Sushovan Hussain, misled him into believing that there was an "insignificant" amount of low-profit-margin hardware sales at the company, which claimed to be a "pure" software business.

Prosecutor Kristina Green showed Gersh and the jury a page from Autonomy's 2010 annual report that said hardware is a small part of the company's business and is offered to customers who need it to use Autonomy's software.

Green asked what conclusions Gersh drew about the amount of such products Autonomy was selling based on the statement.

"Very, almost insignificant relative to the overall Autonomy revenue," he said.

Gross margins were an important metric to KPMG's review, Gersh said, because they show the profitability of the products that Autonomy is selling.

Later, the prosecutor asked Gersh if he recalled being told or seeing anything in the 2010 annual report that indicated Autonomy was also reselling hardware without any software loaded onto it, and Gersh said no.

"If you had seen a reference to Autonomy selling approximately \$100 million in straight hardware sales in 2010, for example, would that have been significant to you?" Green asked.

Gersh said yes, adding that it would change the company's value.

"HP thinks it's buying a software business," Gersh said. "To suddenly learn that \$100 million of the revenues is not software revenue ... would significantly change its valuation."

Earlier in the trial, the defendants filed a motion in anticipation of Gersh's testimony, asking to introduce post-acquisition evidence that HP knew all along of Autonomy's hardware sales and Autonomy's valuation did not change materially after the acquisition because of hardware sales.

"In other words, HP got the benefit of its bargain when it purchased Autonomy, regardless of the hardware sales, and was therefore not defrauded," the motion said.

After Gersh's direct examination, and outside the jury's presence, Lynch counsel Brian Heberlig of Steptoe LLP said he understood the court wouldn't allow the post-acquisition evidence. Still, he wanted to state his opposition for the record.

Gersh is "impeachable based on what he learned post-acquisition," Heberlig said. "I understand the court has precluded that, but it's inconsistent with how he behaved after the acquisition."

Later, before the jury, Heberlig pointed out to Gersh that the words used in the company's statement did not suggest hardware sales were minuscule.

"The words here were 'small, small part of the business,' right? Heberlig pointed out. "So your interpretation of that was insignificant?"

Gersh said he was also given that impression during an August conference call with Autonomy executives.

Heberlig asked if they used the word "insignificant," and Gersh said he didn't remember.

The trial continues on Tuesday.

The executives' trial follows Hussain's April **2018 conviction** on related charges. He was sentenced to five years in prison and ordered to pay \$4 million in fines.

The government is represented by Robert S. Leach, Adam A. Reeves and Kristina N. Green of the U.S. Attorney's Office for the Northern District of California and Zachary Abrahamson of the U.S. Department of Justice's Antitrust Division.

Michael Lynch is represented by Christopher J. Morvillo, Celeste Koeleveld and Daniel S. Silver of Clifford Chance LLP and Jonathan M. Baum, Reid H. Weingarten, Brian M. Heberlig, Michelle L. Levin, Nicholas P. Silverman and Drew C. Harris of Steptoe LLP.

Stephen Chamberlain is represented by Gary S. Lincenberg, Ray S. Seilie and Michael C. Landman of Bird Marella Rhow Lincenberg Dooks & Nessim LLP.

The case is U.S. v. Mike Lynch et al., case number 3:18-cr-00577, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins, Richard Crump and Christopher Crosby. Editing by Brian Baresch.

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What's Behind 'Nuclear' Verdicts? Skeptical Juries, Attys Say

By **Spencer Brewer**

Law360 (May 14, 2024, 12:37 PM EDT) -- Jurors becoming more skeptical of corporations are handing down sky-high verdicts, including a recent \$2.3 billion verdict against Monsanto and a \$1.7 billion verdict against Ford, and trial attorneys say it's forcing a shift in the strategies they employ as they aim to score — or prevent — so-called nuclear verdicts.

Last year, juries across the country awarded \$14.5 billion in a category of over-\$10 million verdicts derided by defense attorneys as "nuclear," according to a recent report from Marathon Strategies, a communications and research company.

Thomas R. Kline of Kline & Specter PC, one of the attorneys **behind the large Monsanto verdict** earlier this year, told Law360 that jurors are taking a harsher look at corporations and governments in the courtroom.

"The jurors react to the life and times in which they live, and that includes an assessment of fairness and reasonableness under the facts that are before them," Kline said.

In 2023, 89 lawsuits against a corporate defendant resulted in a "nuclear verdict" award — a 15-year high, according to the report. Juries in some states are more prone to dishing out nuclear verdicts — Missouri leads the pack, while Texas was slightly behind, seeing a total of \$4 billion and \$3.7 billion, respectively.

Plaintiff and defense attorneys alike agree that a skepticism of institutions has affected juries, triggering a flurry of activity in how they're handling trials and in how states are responding with policy changes.

Strategy Shifts to Account for Different Jury Perspectives

A significant portion of the increase in product liability cases that ended in a nuclear verdict stemmed from cases involving Roundup, Monsanto's weed killer, such as the case Kline was involved in, according to the report.

In Kline's case, counsel for Lycoming County, Pennsylvania, resident John McKivison convinced the jury that Roundup caused him to develop non-Hodgkin lymphoma, and the state court verdict represented the conclusion of the third bellwether trial in the Philadelphia-based Roundup mass tort. Two previous Philadelphia juries hit Bayer AG unit Monsanto with separate \$3.5 million and \$175 million verdicts in the mass tort.

In the Ford case, a Georgia jury **awarded \$1.7 billion** in punitive damages in August 2022 against Ford Motor Co. in a case that stemmed from a truck rollover that killed a Georgia couple. The jury found Ford 70% to blame for the deaths of Voncile and Melvin Hill, who were crushed by the roof of their 2002 Ford Super Duty F-250 when it rolled in a 2014 accident on a rural Georgia road.

The jurors in the second trial in the case were instructed by the court that the roof on the Hills' truck was defectively designed, dangerously weak and susceptible to collapse in rollover accidents, and that the accident was foreseeable. Those facts were established by the court in a July 2018 sanctions order against Ford, in relation to its conduct in the first trial.

The first trial, held in the same Georgia state court in 2018, ended in a mistrial and resulted in Ford being sanctioned for violating court orders about witness testimony.

By Kline's reckoning, the words "nuclear verdict" are nothing more than corporate propaganda aimed at convincing the wider public that large verdicts are somehow unfair. Large verdicts aren't something new — early in his career, Kline represented a plaintiff who was awarded about \$5 million in 1983, or roughly \$16 million today.

"Jurors in different cases are motivated by different facts and different theories and different strategies, and all of that is influential and consequential," he said. "But has the jury system changed? No."

Attitudes toward institutions count, Kline said, and public opinion has become more skeptical of corporations. Those attitudes enter jury rooms.

"I don't think it makes them unfair toward corporations or towards governmental agencies," he said. "But I think it makes them more skeptical and more willing to accept a challenge to authority."

Many lawyers feel that the COVID-19 pandemic played into the growth of that anti-institutional mindset, said Mark Trachtenberg, partner in the appellate section of Haynes and Boone LLP. The number of large verdicts floating through the appeals courts in Texas has increased significantly over the last few years, he said.

Aside from anti-institutional sentiment, headlines about nuclear verdicts can shift the baseline for verdicts, Trachtenberg said. Additionally, juries have begun taking mental anguish more seriously than they did previously, he said, and counting mental anguish as something real and recompensable.

Plaintiffs counsel can employ a variety of strategies to get juries thinking about big-ticket verdicts, such as "anchoring," or "reptile theory." Anchoring refers to the plaintiff's counsel presenting the jury with a large number that then sticks in their minds. Even if juries select a number below the one put out, it still sets a high bar.

Reptile theory evokes the primal parts of the brain through curated witness questioning. The plaintiff's counsel leads the jury to believe the defendant has broken a rule that jeopardizes the safety of others.

"There's a lot of discussion from defense counsel about whether to provide a counteranchor and to kind of be more deliberate about exposing strategy by an anchoring," Trachtenberg said.

Defendants can get in trouble if they don't throw out an alternative anchor, but it doesn't make sense in every case, said Jenny Hergenrother, partner at Alston & Bird LLP. In addition to anti-institutional sentiment, the last few years have ushered in a skepticism of science in certain populations that can sometimes come back to bite defendants, she said.

The best strategy defense counsel can put up revolves around personalizing corporations, demonstrating that people make up corporations and verdicts against corporations have effects on those people, Hergenrother said. Admittedly, personalization is much easier for the plaintiff's counsel to accomplish, she said.

When it comes to countering reptile theory, it's all in the witness preparation, she said. Defense counsel who prep witnesses to avoid answering in absolutes can avoid playing into reptile theory.

Whatever skepticism the wider public may have against corporations, that doesn't translate into a verdict unless the plaintiff comes to the table with evidence, Kline said. Juries aren't going "nuclear," and they have a safety net of a trial judge and appellate judges to make sure things don't go awry, he said.

Corporations regularly come out with new buzzwords when they want to grumble about litigation that doesn't go their way, said Brent Walker, partner at Aldous Walker LLP. The firm recently represented the family of a man who **died at a Frito-Lay factory** in Texas while working for a subcontractor, a

case that saw a jury verdict of about \$72 million.

"One of the old buzzwords was runaway juries — that was used more in the late '80s, early '90s to talk about juries," he said. "At some point, you can't use that explanation anymore when what jurors are doing is relatively consistent across different cases, in different areas of law and different jury pools."

Other Factors Behind the Rise in Large Verdicts

The cases that go to trial don't get that far at random, said Theodore Rave, professor at the University of Texas School of Law. The defense has incentive to settle if it thinks it will lose, and the plaintiff will always want to push its strongest case to trial.

"It can sometimes be a little bit tricky to infer a lot from the cases that actually go to trial, because in many instances those are going to be the outliers, not the average," he said.

The number of "nuclear verdict" lawsuits last year represents a 27% increase compared to the year before, according to the Marathon Strategies report. Pennsylvania, for example, the state where the jury handed down the \$2.3 billion Monsanto verdict earlier this year, had \$1.2 billion worth of nuclear verdicts last year.

Nuclear verdicts have grown in both number and size since 2009, the first year tracked in the report. While blockbuster verdicts measuring in hundreds of millions to billions of dollars have risen, so too has the baseline — In 2023, the median nuclear verdict increased from \$41 million to \$44 million, an increase of about 7%.

Since the Great Recession, the cumulative increase of the median nuclear verdict has outstripped the rate of inflation, according to the report.

Verdicts in product liability cases have grown by 38%, representing the greatest area of growth in nuclear verdicts. Meanwhile, verdicts in intellectual property cases have dropped by 43%, representing the sector with the greatest level of decline, according to the report.

Product liability is a catchall, and the number of cases that had large jury verdicts were rising even before the COVID-19 pandemic, Phil Singer, founder of Marathon Strategies, said. Additionally, many outcomes depend on state law, different cultures in different states, and the facts of the case.

State Legislatures Respond

Several states have taken up the issue in their legislatures, aiming to limit the scope of megaverdicts, according to the report.

Those states include Iowa, Indiana, Montana and Florida, where Gov. Ron DeSantis signed into law a sweeping tort reform bill this year, saying it would cut down on frivolous litigation. These laws take steps such as increasing transparency in third-party litigation financing and capping liability damages, according to the report.

In Florida, the **new bill did away** with Florida's current comparative negligence rule, which allows plaintiffs to recover damages even if they are primarily at fault. The law states that "any party found to be greater than 50% at fault for his or her own harm may not recover any damages."

The law also takes aim at the state's bad faith statute by spelling out that negligence alone on the part of an insurer is not enough to constitute bad faith, making it more difficult for claimants to get punitive damages on bad faith claims.

Last year, Iowa became the first state in the country to legally cap noneconomic damages against trucking companies, setting the cap at \$5 million. Other states, such as Indiana and Montana, created greater litigation transparency.

At least 11 states considered measures that could expand liability in wrongful death cases. Five enacted those measures: Maine, Delaware, Illinois, Minnesota and Rhode Island. Of these, Maine in

particular hasn't been associated with nuclear verdicts in the past.

It's difficult to predict how things will play out in state legislatures or at the appellate level, Hergenrother said. But factors like skepticism of institutions will likely affect juries for the long haul.

"We see the courtroom as sort of a microcosm of what's going on in society," she said. "As politics and other things are making us more divisive outside the courtroom, I think that tends to make folks more polarized and divisive inside the courtroom."

--Editing by Robert Rudinger.

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SEC Says Biotech Co., Atty Should Pay \$14M For Investor Lies

By **Thy Vo**

Law360 (May 13, 2024, 7:17 PM EDT) -- Federal securities regulators have said a Colorado biotech startup and two of its founders should pay more than \$14 million in ill-gotten profits, including interest, for lying to investors about the company's financial position, arguing that the founders showed a "total disregard" for investors.

U.S. District Judge Philip A. Brimmer concluded in a March order that Cell>Point LLC partners Terry and Greg Colip violated federal securities laws by telling investors that the company's three founders had contributed \$30 million in capital to the radiopharmaceutical venture, despite knowing they had only pitched in \$8.2 million. Greg Colip is also a lawyer in Texas, and is representing the defendants in the suit.

In a motion filed Friday, the [U.S. Securities and Exchange Commission](#) urged the court to not only require Cell>Point and the Colips to pay more than \$14 million for their profits stemming from the misconduct, but also award equivalent civil penalties to deter them from violating securities laws again.

The SEC is asking for disgorgement and prejudgment interest judgments of \$7.3 million against Cell>Point and \$3.9 million against each of the Colips, who are brothers.

"The Colips used investors' money as their piggybank for years, as demonstrated by the attached financial analyses, and prioritized their own well-being over victims who entrusted to them millions of dollars," regulators argued in a motion seeking final judgment. "That investor money was not used to further clinical trials or build a robust company from which investors might one day see dividends."

Regulators also asked the court to ban the Colips from ever serving as officers or directors of a public company, and from violating federal securities laws again.

The SEC cited Judge Brimmer's three **contempt orders** against the Colips after they solicited loans, in violation of a preliminary injunction, and then failed to disclose the injunction and contempt order when soliciting another \$124,000 in new investments.

"Given their facility (and relative ease) in creating new shell entities, if not enjoined, defendants could readily create new investment vehicles and begin soliciting new investor funds," the SEC said, claiming that during the litigation the Colips tried to use a Cayman Islands-based entity, Cell Theranostics Ltd., to transfer Cell>Point's assets to a non-party to the litigation.

Cell>Point was founded in 2001 to develop radiopharmaceutical therapies, and hasn't earned any revenue since its founding, according to Judge Brimmer's March order granting partial summary judgment for the SEC. Greg Colip, who is representing the defendants in the suit, is the company's CEO, while Terry Colip is the chief financial officer and was largely responsible for interacting with investors.

Securities regulators filed a lawsuit in June 2021 **accusing the company** and the brothers of lying to investors about several aspects of the venture, including falsely claiming they were close to completing clinical trials for a drug, Oncardia, even though those trials ended years prior.

Judge Brimmer sided **with regulators** in March, according to a summary judgment order that found

the brothers had recklessly misrepresented the founders' capital contributions to Cell>Point in slide decks and investor materials, resulting in an inflated and misleading claim that the company had raised between \$83 million and \$104 million in capital.

Cell>Point raised more than \$10.2 million from investors based on those misrepresentations, the judge said, finding that investors could reasonably conclude that Cell>Point had more capital than it really did to develop novel drugs. The brothers' claims were also misleading because, in reality, they owed money to the company, Judge Brimmer said.

Terry Colip owed Cell>Point more than \$5 million, while Greg Colip borrowed nearly \$3 million from the company, according to the March order.

"These are significantly different circumstances than founders who have put tens of millions of dollars of their own capital into the company and who stand to lose their investment if the company fails," the judge wrote.

In Friday's motion, regulators said the court should also impose significant civil penalties against each of the defendants, arguing that the Colips not only overstated Cell>Point's financial position, but kept adjusting contribution amounts as time went on to "give the impression of a growing company."

The Colips also haven't admitted they did anything wrong, the SEC argued, citing the court's sanctions orders that the brothers still haven't paid. Judge Brimmer has ordered the Colips to pay \$124,106, plus 10% annual interest, back to the four investors they solicited the money from.

"Defendants have sought to avoid paying the most-recent sanction of \$124,000 (with interest) by failing to provide full and timely accountings and simply declining to pay the sanction despite having available money," according to the motion.

The Colips have told the court that they have been struggling financially since the lawsuit was filed. Terry Colip filed for Chapter 11 bankruptcy in March.

In his summary judgment order, Judge Brimmer concluded that the bankruptcy petition would not stay the SEC suit because of an exception for government regulators.

Regulators asked the court to either include the \$124,000 sanctions in his final judgment, or maintain jurisdiction over the sanctions until they have been paid.

In an email to Law360 on Monday, Greg Colip said the defendants plan to file a response by the end of May.

"With all respect to the court and his honor, we disagree with the conclusion of the court in respect to the SEC's motion for partial summary judgment and with the remedies that were recently requested," Greg Colip said.

A spokesperson for the SEC declined to comment Monday.

The SEC is represented in-house by Zachary T. Carlyle and James P. McDonald.

The defendants are represented by Greg R. Colip.

The case is U.S. Securities and Exchange Commission v. Cell Point LLC et al., case number 1:21-cv-01574, in the U.S. District Court for the District of Colorado.

--Additional reporting by Adam Lidgett. Editing by Kelly Duncan.



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Tesla Threatened To Fire Holland & Knight, Law Prof Says

By **Hailey Konnath**

Law360 (May 13, 2024, 11:55 PM EDT) -- Tesla tried to bully a law professor out of filing an amicus brief in investors' suit over Elon Musk's \$56 billion compensation plan, in part by threatening to fire the company's longtime outside counsel at Holland & Knight LLP if the professor submitted his brief, according to a filing Monday in Delaware.

University of Delaware professor Charles M. Elson outlines the alleged threat in a motion to leave to file his brief in Delaware's Chancery Court, saying that Musk — through Tesla — told the firm it wouldn't work with it anymore if Elson filed his brief. Holland & Knight has a consulting relationship with the professor, according to the motion.

Tesla's counsel also falsely claimed he had a conflict of interest preventing him from filing his brief, Elson says.

"A law professor cannot allow his academic judgment to be compromised by threats," Elson contends.

He says that while the asserted "conflict" lacked any substance, the economic threat to Holland & Knight "was real." And it's not the first time Tesla has tried to "bully a law professor" by making a serious threat to a law firm with which that professor had a consulting relationship, he claims.

According to the motion, Elson is a leading authority on corporate law. He's already filed a brief on the "development and goals of equity-linked executive compensation" earlier in the litigation in which investors **have asked** the court to seize or shelter in a trust tens of billions of dollars in company stock.

That stock was sidelined in January when the court struck down Musk's 10-year compensation plan. Tesla wants to call a stockholder meeting in June to hold a second ratification vote on the pay plan as well as vote on reincorporating the company in Texas, potentially ditching Delaware court jurisdiction over future issues.

Now Elson is looking to weigh in on the dispute again, he says. His lawyers emailed a copy of his brief to counsel for the parties and asked whether they would consent to his motion for leave to file it, he states. While the investors' lawyers said they didn't oppose it, Tesla's counsel with DLA Piper called Elson's counsel "to assert, without further explanation, that Professor Elson 'may have a conflict,'" according to the motion, and asked him to hold off on filing the brief.

Then he received an email from Holland & Knight, with which he's had a consulting relationship, he says.

"Holland & Knight informed Professor Elson that the firm represents Tesla in certain unrelated matters and that Tesla had threatened to fire Holland & Knight if Professor Elson submitted this amicus brief," he contends.

"To protect that firm from retaliation while upholding the important principle of academic freedom, Professor Elson resigned from Holland & Knight earlier this morning, ending a relationship of nearly 30 years," the brief states.

Elson asks the court to permit him to file the brief, saying that "Musk was willing to go to extraordinary — and appalling — lengths to prevent this court" from reading it.

Tesla, Holland & Knight and counsel for the other parties didn't immediately respond to requests for comment late Monday.

The investors are represented by Jeroen van Kwawegen, Gregory V. Varallo and Glenn R. McGillivray of Bernstein Litowitz Berger & Grossmann LLP, Jeremy S. Friedman, Spencer M. Oster and David F.E. Tejtrel of Friedman Oster & Tejtrel PLLC and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC.

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

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

Elson is represented by Christine M. Mackintosh of Grant & Eisenhofer PA and Joel Fleming and Amanda Crawford of Equity Litigation Group LLP.

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

--Additional reporting by Jeff Montgomery. Editing by Kristen Becker.

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