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Toymaker Funko Gets Investors' Inventory Chaos Suit Thrown Out

By Martina Barash 2024-05-17T08:13:06000-04:00

- Company allegedly misled investors about warehouse, software
- Complaint falls short in pleading securities fraud, court says

Funko Inc. investors failed to show that the Pop! figurine maker's statements about a warehouse move and new inventory software were false, a federal court said, dismissing the proposed class action.

The shareholders also didn't adequately allege the necessary level of intent for securities fraud, Judge James L. Robart said Thursday for the US District Court for the Western District of Washington.

The suit came after a 59% one-day drop in Funko's stock price on Nov. 4, 2022—steeper than any prior decline for the stock, according to data compiled by Bloomberg—and an additional selloff on March 2, 2023, following announcements of financial results.

Good inventory management is essential for Funko because some of its pop culture-derived vinyl figures are in demand for only a short period or are licensed for a limited duration, the investors alleged.

Funko misled shareholders when it promoted a planned transition from warehouses in Washington state to a distribution center in Buckeye, Ariz., they [said](#). The company was also changing its inventory management software at that time, the investors said. Neither process went smoothly, resulting in "chaos" at the Buckeye facility, they said.

But Robart said he "generally" agreed with Funko that the 28 "challenged statements either are not false or misleading, or are protected forward-looking statements, opinions, or puffery." The investors didn't meet the falsity requirement for securities fraud claims, he said.

They also failed to create an inference of fraudulent intent, even with confidential witness accounts,

he said.

The investors will have a chance to re-plead their claims.

Robbins Geller Rudman & Dowd LLP is lead counsel for the investors. Latham & Watkins LLP and DLA Piper US represent Funko.

The case is [Studen v. Funko Inc.](#) , W.D. Wash., No. 2:23-cv-00824, 5/16/24 .

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FirstEnergy fights release of reports documenting internal investigation of House Bill 6 scandal

 1.next.westlaw.com/Document/le6262cf013b311efa6dc9756fd0c43f8/View/FullText.html

NewsRoom

5/16/24 cleveland.com (Cleveland, Ohio) (No Page)

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May 16, 2024

FirstEnergy fights release of reports documenting internal investigation of House Bill 6 scandal

Andrew J. Tobias; cleveland.com

COLUMBUS, Ohio — FirstEnergy Corp. is fighting to prevent the release of reports documenting the Akron electricity company's internal investigations into the events surrounding the House Bill 6 scandal, which led to the 2020 arrest and subsequent convictions of ex-House Speaker Larry Householder and others.

The Ohio Consumers' Counsel said Thursday that FirstEnergy lawyers have refused to produce the reports, which the agency has been seeking for years. Last week, a federal judge ordered their release as part of ongoing litigation between FirstEnergy and large shareholders who say they lost money because of the scandal.

The OCC said that despite U.S. Southern District of Ohio Chief Judge Algenon L. Marbley's order, the company is citing a different ruling from the Public Utilities Commission of Ohio from several years ago that said the reports are privileged and not subject to release.

"It is disappointing (but not surprising) that FirstEnergy continues its lawyered-up efforts to block public scrutiny of information that could provide much needed answers to consumers about the H.B. 6 scandal," Maureen Willis, Agency Director of the Office of the Ohio Consumers' Counsel, said in a prepared statement. "At the same time, FirstEnergy has claimed that it is 'redoubling' its commitment to 'integrity, openness, and trust.' Actions speak louder than words. True change is needed."

FirstEnergy spokesperson Jennifer Young said in email only that the company "disagrees with the OCC's assessment of the district court's decision." Young also pointed to a section of Marbley's order that says that while facts related to the lawsuit are subject to public release, the company's lawyers themselves are not subject to discovery.

The reports in question summarize investigations performed by two law firms — Squire Patton Boggs and Jones Day — that FirstEnergy commissioned in the days following Householder's arrest on July 21, 2020.

Two former FirstEnergy executives who are defendants in the lawsuit, ex-CEO Chuck Jones and ex-top lobbyist Michael Dowling, as well as the case's plaintiffs have requested the records via discovery, the process of exchanging information in connection to a legal case.

Dowling and Jones' lawyers have said the company has disclosed information from the internal investigations in a selective way that makes them look bad while deflecting blame from anyone else in the company. FirstEnergy says the reports document legal advice that should be kept private under attorney-client privilege.

Ohio Consumers' Counsel has a separate legal agreement with FirstEnergy for the company to provide the agency with any records the company provides through discovery to parties in the federal lawsuit. The OCC previously has obtained and then released other records related to the lawsuit to cleveland.com/The Plain Dealer and other media outlets in response to public records requests, which has led to multiple news articles about their contents.

The lawsuit dates back to shortly after Householder's arrest in 2020. It's dragged out for years as lawyers have wrangled over discovery and other legal issues. Marbley previously halted proceedings in the case — including discovery and attempts to depose potential witnesses such as Lt. Gov. Jon Husted — as an appeals court deals with an appeal filed by FirstEnergy over whether shareholders should have been granted class-action lawsuit while pursuing the case.

A special master who is helping administer the case on Thursday ordered the parties to file detailed lists accounting where the discovery process stands — including what documents and interviews they've obtained and what they yet hope to do — by next Wednesday.

Parallel to the civil litigation, there remain active criminal cases in connection to the House Bill 6 scandal. As part of an investigation conducted by Attorney General Dave Yost's office, Householder, Jones and Dowling all face state charges filed in recent months. Jones and Dowling have pleaded not guilty and denied wrongdoing while Householder, who is serving a 20-year federal prison sentence following his conviction on corruption charges last year, is scheduled to be arraigned on the state charges in Cuyahoga County on Friday.

House Bill 6 is a state energy law signed by Gov. Mike DeWine in 2019 that, among other things, provided \$1 billion to bail out two financially troubled nuclear power plants owned by a previous FirstEnergy subsidiary. Many aspects of the bill since have been repealed.

FirstEnergy has admitted that it paid more than \$60 million in bribes to Householder and others, including political spending that helped Householder become Ohio House speaker, in exchange for Householder's help passing the bill.

Andrew Tobias covers state politics and government for cleveland.com and The Plain Dealer
---- Index References ----

Company: FIRSTENERGY CORP.

News Subject: (Business Lawsuits & Settlements (1BU19); Business Litigation (1BU04); Business Management (1BU42); Corporate Events (1CR05); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33))

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FirstEnergy Names Deandra Williams-Lewis Chief Privacy Officer

 1.next.westlaw.com/Document/l85f1e650146511efb86ff95bf5342fbb/View/FullText.html

NewsRoom

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AP Alerts

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May 17, 2024

FirstEnergy Names Deandra Williams-Lewis Chief Privacy Officer

The Associated Press

AKRON, Ohio, May 17, 2024 /PRNewswire/ -- FirstEnergy Corp. (NYSE: FE) has named Deandra Williams-Lewis to the role of Chief Privacy Officer, in addition to her current role as Director, Ethics & Compliance, effective May 19.

In this newly created role, Williams-Lewis will guide FirstEnergy's stewardship of sensitive customer and employee information while continuing to oversee the management of ethics and compliance risks; promoting ethical business conduct; developing policies, procedures and controls; and managing complaints and concerns. She will continue reporting to Antonio Fernández, Vice President and Chief Ethics & Compliance Officer.

"Deandra's appointment is consistent with our commitment to being good stewards of customer and employee information, as well as our focus on continuous improvement," said Fernández. "We are operating in a dynamic environment with ever-changing expectations around privacy. Deandra's deep experience in the area of ethics and compliance will be valuable in developing and maturing FirstEnergy's privacy program."

Williams-Lewis joined FirstEnergy as Director, Ethics & Compliance, in 2021. Previously, she worked at ReliabilityFirst as Senior Director of Corporate Services, overseeing the Human Resources, Finance, Information Technology, Security and Infrastructure departments. From 2010 to 2015, Williams-Lewis was an executive at GE Lighting, where she led the global compliance program and the diversity and inclusion program. During her career, she has held various positions at KPMG, BearingPoint, Altos Federal Group and Maxim Healthcare.

Williams-Lewis earned a Bachelor of Arts degree in English from Hampton University in Hampton, Va., as well as a Juris Doctor from Howard University's School of Law in Washington, D.C. She is an active member in the community, serving on the Board of Directors for the MetroHealth Foundation and the Diversity Center of Northeast Ohio.

FirstEnergy is dedicated to integrity, safety, reliability and operational excellence. Its electric distribution companies form one of the nation's largest investor-owned electric systems, serving more than 6 million customers in Ohio, Pennsylvania, New Jersey, West Virginia, Maryland and New York. The company's transmission subsidiaries operate more than 24,000 miles of transmission lines that connect the Midwest and Mid-Atlantic regions. Follow FirstEnergy online at www.firstenergycorp.com and on X, formerly known as Twitter, @FirstEnergyCorp .

Editor's Note: A professional photo of Deandra Williams-Lewis is available for download on Flickr.

View original content to download multimedia: <https://www.prnewswire.com/news-releases/firstenergy-names-deandra-williams-lewis-chief-privacy-officer-302149075.html>

SOURCE FirstEnergy Corp.

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Industry: (Financial Regulatory Compliance (1FI59); Financial Services (1FI37); Financial Services Regulatory (1FI03))

Region: (Americas (1AM92); North America (1NO39); Ohio (1OH35); U.S. Midwest Region (1MI19); USA (1US73))

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McKinsey consulting firm to face negligence claims from pregnant mothers over opioid crisis

 [courthousenews.com/mckinsey-consulting-firm-to-face-negligence-claims-from-pregnant-mothers-over-opioid-crisis](https://www.courthousenews.com/mckinsey-consulting-firm-to-face-negligence-claims-from-pregnant-mothers-over-opioid-crisis)

Michael Gennaro

The mothers claimed that McKinsey conspired with Oxycontin maker Purdue Pharma to boost sales of the pill while downplaying risks of addiction, causing health issues in their children.

SAN FRANCISCO (CN) — A federal judge allowed on Thursday some claims to proceed from a narrow class of consumers in an ongoing suit against management consulting company McKinsey and Co. over its role in the opioid crisis, specifically for how it affected women who took opioids during their pregnancy and their children.

McKinsey was accused of devising strategies for its client, Oxycontin maker Purdue Pharma, that boosted sales of high-dose pills with deceptive messaging to doctors that downplayed the risks of addiction.

The original class of plaintiffs in the multi-district litigation were private citizens, city governments, Native American tribes, school districts, and mothers of children with neonatal abstinence syndrome from opioid exposure in the womb. They argued that McKinsey consultants conducted extensive research that helped Purdue carry out a targeted marketing plan to increase sales.

Most parties settled their claims against McKinsey, but 11 mothers who say they used opioids while they were pregnant declined to settle, claiming that their children's exposure to the opioids in utero caused neonatal abstinence syndrome, a condition that mimics drug withdrawal.

U.S. Senior District Judge Charles Breyer ruled that negligence and failure to warn claims from the pregnant women can proceed because precedent has established that McKinsey can be held liable for injuries they or their conspirators inflicted on the public.

McKinsey argued for these claims to be dismissed because it said it did not intend to harm any of the victims. Breyer wrote that intent did not matter because McKinsey's failure to warn consumers about opioid risks harmed the class nonetheless.

"The allegations are that the failure to adequately disclose these risks was an intentional object of agreement between McKinsey and its clients, and that the failure to warn harmed the NAS plaintiffs," Breyer wrote. "That these underlying torts are not themselves usually

categorized as ‘intentional torts’ is irrelevant. Plaintiffs may hold McKinsey liable for harms caused by its clients’ breaches of duty where these were carried out in furtherance of a common design with McKinsey.”

Breyer tossed misrepresentation and fraud claims under the theory of public nuisance, however, because the plaintiffs had not pleaded a special injury.

The judge wrote that the personal injuries from opioid exposure were not suffered by a few but rather by millions of adults and minors alike, and the NAS plaintiffs had not explained how they were uniquely harmed by their exposure to opioids.

“Plaintiffs’ special injury allegations are stuck between two fatal problems,” Breyer wrote. “If plaintiffs characterize the nuisance more or less as they did in the original pleading—as an epidemic of opioid overprescription and abuse—then cannot show how their injuries are different in kind from those suffered by others who suffered injuries from using or abusing opioids.”

“And if plaintiffs characterize the nuisance differently, as the creation and maintenance of an illegal secondary market in opioids that interferes with the public’s rights ‘to use and enjoy public spaces ... and to be free from the deleterious health and safety effect of an illegal drug trade,’ then it is difficult to see how the NAS Plaintiffs were injured by the nuisance,” he added.

Conspiracy claims based on fraud and intentional misrepresentation did not survive either. Breyer determined the plaintiffs could not reliably prove the theory of the underlying fraud — that their doctors relied on McKinsey and its conspirators’ misrepresentations about the benefits and risks of opioid use.

The plaintiffs argued that if their doctors had not been misled, the doctors would not have prescribed opioids to the plaintiffs.

“At this stage plaintiffs are not able to determine what specific information their doctors received and relied on regarding the risks of opioid use. The best plaintiffs can do is allege ‘on information and belief’ that their doctors relied on the alleged misrepresentations and that some of them were on McKinsey ‘target lists’ meaning lists of high-volume prescribers McKinsey compiled for its clients’ sales representatives,” Breyer wrote.

Requests for comment from lead attorneys for both sides were not returned before publication.

Categories / Courts, Health, Personal Injury

Plumbing Company AMPAM Sued Over \$247 Million Stock Plan Deal

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Class Action

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** No. 5:24-cv-01038

AMPAM Parks Mechanical Inc. was sued by current and former employees who say they got a bad deal when the plumbing subcontractor became worker-owned through an employee stock ownership plan.

The proposed class action, filed Thursday in the US District Court for the Central District of California, centers on a 2019 transaction in which AMPAM's former owners sold their shares in the company to an ESOP for \$247 million. Workers say the purchase price was wildly inflated and failed to account for the fact that certain of AMPAM's founders retained functional control and even a "hidden ownership interest" in the company.

The plaintiffs, Alfredo Ramirez and Ramón Santos Castro, say the stock plan didn't have an appropriate trustee in place to look out for their interests. Rather, the AMPAM defendants handpicked a trustee they thought "would be easy to deal with, would not conduct much due diligence, and would approve the Transaction on terms that were favorable to the Sellers rather than in the best interest of the ESOP and its participants," according to the lawsuit.

The seven-count complaint brings claims under the Employee Retirement Income Security Act on behalf of a proposed class of about 797 participants in the AMPAM stock plan.

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

Cohen Milstein Sellers & Toll PLLC and Shaun P. Martin of San Diego represent the workers.

The case is Ramirez v. AMPAM Parks Mech., Inc. , C.D. Cal., No. 5:24-cv-01038, complaint 5/16/24 .

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Astec Settlement Over EU Biomass Plans Wins First Court Approval

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Class Action

Astec Industries' \$13.7 million settlement with investors over alleged misrepresentations related to its venture into European wood pellet plants earned preliminarily approval from a federal judge.

The investors alleged that Astec touted two of its modular manufacturing facilities as a blueprint for a “booming pellet plant industry” serving European utilities, despite knowing that the plants were “riddled with problems.” The industrial manufacturing company’s push into wood pellets was intended to meet growing demand in the European Union, where utilities are required to use at least 20% biomass in their energy production.

- The October 2018 announcement of poor financial results tied to the plants triggered a 25% decline in Astec’s stock price, the company’s steepest single-day loss in 14 years. Investors subsequently filed a class action alleging they were misled. While their claims were originally dismissed by the US District Court for the Eastern District of Tennessee, the Sixth Circuit in 2022 allowed the lawsuit to proceed
- The settlement is “sufficiently fair, reasonable and adequate” Judge Charles E. Atchley said Thursday in allowing the settlement process to proceed
- The class, led by a retirement plan for government employees of Taylor, Mich., consists of investors who purchased publicly-traded Astec common stock between July 26, 2016, and Oct. 22, 2018

The Rosen Law Firm PA is lead counsel for the class. Alston & Bird LLP and Chambliss, Bahner & Stophel PC represent Astec.

The case is City of Taylor Gen. Emp. Ret. Sys. v. Astec Indus. Inc , E.D. Tenn., No. 1:19-cv-00024, 5/16/24 .

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Illumina-Grail Deal Challenge Case Must Be Unsealed, Judge Says

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Illumina Inc. lost its bid Thursday to keep a lid on a pension fund lawsuit blaming its board for the costly fallout of its failed \$7 billion deal to acquire Grail Inc.

The gene sequencing giant failed to show that disclosing redacted information would do Illumina any meaningful damage, such as by harming its competitive standing or undermining settlement negotiations, a Delaware judge said in a 14-page ruling. The lawsuit targets the company's current and former directors.

"To shield the information for which continued confidential treatment is sought from the public and the Fourth Estate, the company must demonstrate a harm it would suffer from disclosure that outweighs the public's interest in access," Vice Chancellor Paul A. Fioravanti Jr. wrote. "It has not done so."

The judge pointed to "national media coverage" of the litigation, one of four parallel cases in Delaware's Chancery Court centering on claims that Illumina's corporate leaders ignored obvious risks by rushing recklessly into the transaction, which it's now unwinding after regulators in the US and Europe blocked the deal. Illumina said May 6 that it expects to complete the divestiture in the second quarter.

The lawsuits include one filed by billionaire activist investor Carl Icahn, who waged a partly successful proxy fight last year based on his harsh public criticisms of the planned merger. Icahn—who declined to seek additional board seats this year—was forced to withdraw an initial version of his own court complaint after Fioravanti ruled that it improperly included confidential information gleaned from the Illumina director affiliated with him.

Wednesday's decision—filed publicly on Thursday—handed a win to Francine McKenna, an independent journalist who challenged the case's designation as confidential. McKenna publishes a newsletter on Substack.

Fioravanti said the redacted portions of the pension fund's complaint were "integral" to allegations that the decision by Illumina's directors to increase their liability insurance before attempting to buy Grail shows they knew the deal was on shaky legal ground.

"Those facts are not tangential," the judge said. "The public cannot understand this argument without understanding the nature and magnitude of that insurance and its cost. By contrast, any harm to the company by disclosure of that information is slight."

The pension fund, the City of Omaha Police and Firefighters Retirement System, is represented by Christensen & Dougherty LLP and Scott & Scott Attorneys at Law LLP. Illumina is represented by Potter Anderson & Corroon LLP and Cravath, Swaine & Moore LLP. Its board members are represented by Abrams & Bayliss LLP and Wachtell, Lipton, Rosen & Katz. McKenna represented herself.

The case is City of Omaha Police & Firefighters Ret. Sys. v. deSouza , Del. Ch., No. 2024-0172, 5/16/24 .

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Tesla told law firm 'relationship about to be terminated' in spat over law professor brief – email

 [reuters.com/legal/transactional/column-tesla-told-law-firm-relationship-about-be-terminated-spat-over-law-2024-05-16](https://www.reuters.com/legal/transactional/column-tesla-told-law-firm-relationship-about-be-terminated-spat-over-law-2024-05-16)

Alison Frankel

Tesla super chargers are shown in Mojave, California, U.S. July 10, 2019. REUTERS/Mike Blake Purchase Licensing 

May 16 (Reuters) - Did Tesla bully one of its major outside law firms to squelch a friend-of-the-court brief by a law professor who was also a consultant at the firm?

That accusation surfaced earlier this week in a filing , opens new tab by retired University of Delaware law professor Charles Elson, who asked a Delaware Chancery Court judge for permission to submit a brief , opens new tab. Elson's brief argued that Delaware law does not support Tesla's plan to reinstitute CEO Elon Musk's invalidated \$56 billion pay package by holding a new shareholder vote on Musk's compensation.

Elson asserted that after his lawyer circulated the proposed brief to Tesla, law firm Holland & Knight -- where Elson has been a corporate governance consultant for nearly 30 years -- objected. Elson's filing said he received an email from Holland & Knight informing him that "Tesla had threatened to fire Holland & Knight if Professor Elson submitted this amicus brief."

Elson's filing did not include the email in which Holland & Knight told him about Tesla's purported threat. And in the wake of the filing, both Holland & Knight and Tesla denied that Tesla pressured the law firm -- which represents the company in at least two high-profile employment cases -- about Elson's amicus brief.

I've now seen the Holland & Knight email.

On its face, the email seems to support Elson's assertion that Tesla sought to "bully a law professor by making a serious economic threat to a law firm with which the professor had a consulting relationship."

So exactly what does the message say? The email was sent to Elson on May 10 by Holland & Knight partner Christopher Kelly, who heads the firm's litigation department. He informed Elson that Holland & Knight partner Sara Begley, who represents Tesla (TSLA.O) , opens new tab in a race discrimination lawsuit brought by the U.S. Equal Employment Opportunity Commission, "is reporting that Tesla's GC has called her and advised that our relationship with Tesla is about to be terminated on account of actions you are taking" in the Musk compensation case.

Tesla, Kelly continued, told Begley that Elson's proposed brief "is directly in conflict with positions Tesla and/or Elon Musk are taking in the Delaware case."

Kelly warned Elson not to file the proposed brief before a conference call with Holland & Knight lawyers to discuss the dispute.

Three days later, Elson resigned from the firm. And in his filing on Monday, seeking leave from Chancellor Kathaleen McCormick, the Delaware judge, to file his amicus brief, he and his lawyer, Joel Fleming of Equity Litigation Group, described Tesla's tactics as "extraordinary and appalling."

But there's a surprise twist in the tale of the email: Holland & Knight said in an email statement on Thursday that in its rush to contact Elson about the proposed amicus brief, a partner at the firm included an "incorrect" assertion in the crucial email.

"There was never a threat of any kind from Tesla," Holland & Knight said in the new statement. "Tesla simply reached out to inquire whether we were aware of Prof. Elson's proposed filing in Delaware. We independently made the determination that his filing would be inconsistent with our obligations to our client."

I sent a request for comment to three Holland & Knight partners: Kelly, the who sent the May 10 email to Elson; Begley, the partner whose conversation with Tesla's general counsel is cited in the email; and Holland & Knight chair Robert Grammig, who is cc'ed on the email. None responded to my query.

I told Elson about Holland & Knight's assertion that the email contained an incorrect account of Tesla's inquiry. His response: "The email speaks for itself."

Tesla and its counsel at DLA Piper did not respond to my query about the May 10 email.

The company denied asserting improper pressure on its outside counsel in a May 14 letter [↗](#), opens new tab to the judge that asked her to deny Elson's request to file the brief. Tesla said there was nothing wrong with a client alerting outside counsel about a potential conflict of interest or for outside counsel, in turn, "to insist that their lawyers – consultants or otherwise – comply with their ethical and fiduciary responsibilities."

Tesla also told the Delaware chancellor that Elson's proposed brief should not have been filed because it is not relevant to the only issue pending before her, an award of attorneys' fees to the plaintiffs' lawyers who persuaded the judge to void Musk's pay package [↗](#), opens new tab last January. Tesla asserted that Elson's views on its plan to hold a shareholder vote on restoring Musk's stock options "would not provide the court with any meaningful assistance."

Elson and his counsel Fleming noted in their request to file the new amicus brief that Tesla did not object to an earlier friend-of-the-court brief from Elson in the Chancery Court litigation over Musk's compensation. The chancellor cited Elson's previous brief, which argued that Tesla's board did not need to authorize a lavish grant of stock options in order to incentivize Musk, several times in her decision invalidating the CEO's "unfathomable" compensation as unfair to shareholders.

In a May 14 response [\[link\]](#), opens new tab to Tesla's letter calling on the judge to reject the new brief, Elson rejected Tesla's assertion that the filing created a conflict for Holland & Knight. He said he was not acting as a lawyer in his consulting role at Holland & Knight, is not acting as a lawyer in offering his views in a friend-of-the-court filing and is not acting adversely to Tesla.

Tesla said in its May 14 letter to the chancellor that it will file its formal opposition to Elson's new proposed brief on May 21.

Read more:

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

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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Alison Frankel

Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

Tesla Inc

Tesla's chair on Elon Musk: 'I might wake up to a tweet. I don't wake up to a strategy shift'

Robyn Denholm rejects criticisms of carmaker's governance ahead of landmark votes on Musk's pay and Texas move

Tabby Kinder and **Stephen Morris** in San Francisco 35 MINUTES AGO



Robyn Denholm, Tesla's Sydney-based chair, is used to waking up to unexpected tweets from the carmaker's chief executive Elon Musk.

"If I had a magic wand, Twitter wouldn't exist," she joked in a rare interview with the Financial Times.

[Musk](#)'s provocative posts on the social media site he bought in 2022 and later renamed X have landed him in trouble with regulators and governments — and caused problems for Tesla's own directors. The billionaire wrote on the platform in January that Tesla would "move immediately" to hold a vote on reincorporating in Texas, following a Delaware court's damning ruling that voided his record \$56bn pay package.

This put the carmaker's board in a tricky position. It had to follow proper process by forming an independent committee to analyse a potential move. While they ultimately came to the same conclusion, the pre-emptive tweet made it harder to rebut the court's judgment that they were "supine servants of an overweening master".

“Do we have tough conversations about tweets? Absolutely,” Denholm told the FT. But, she said, “he’s a contrarian, and you can’t be a contrarian part of the time, so you’ve got to work with that as a board . . . I might wake up in the morning and read a tweet that I wasn’t expecting. I don’t wake up to a strategy shift that we haven’t talked about”.



The decision on Elon Musk’s pay comes at the same time as investors have criticised Tesla for rash strategic pivots and poor treatment of employees © Caroline Brehman/EPA-EFE

Overseeing the erratic entrepreneur as he runs the world’s most valuable carmaker is one of the toughest jobs in corporate America. But Denholm faces the defining moment of her six-year tenure: convincing shareholders at Tesla’s annual meeting next month to award Musk the largest payday in US corporate history, while galvanising its mammoth base of retail investors to back the Texas plan.

Her reputation is on the line. The Delaware ruling blasted Denholm for a “lackadaisical approach” to governance and suggested her objectivity had been compromised by “life-changing” sums of money. She made \$280mn selling Tesla shares in 2021 and 2022 alone, dwarfing the earnings of peers at the likes of Apple and Google.

Denholm, 60, the only woman to chair a “magnificent seven” US technology company, must navigate all this from her home 13,000 miles from Tesla’s headquarters, as its stock is plunging amid flagging global demand for [electric vehicles](#), while executing the largest lay-offs in its history as part of a strategic push to focus more heavily on artificial intelligence and robotics.

Although Musk's tweets present difficulties, she owes her job to one of them — a 2018 post that he had “funding secured” to take Tesla private at \$420 a share, which prompted a surge in its stock and charges of securities fraud.



Musk's settlement with the Securities and Exchange Commission a month later forced him to step aside as chair for at least three years and pay a \$20mn fine, while requiring him to get approval for his tweets from a Tesla lawyer.

“It was like, ‘Robyn, what the hell have you done?’,” she recalls friends saying of her agreement to replace him. Although she had been a Tesla director for four years, by 2018 Musk had become a loose cannon on social media and the company was one of the most shorted in history as mounting losses stoked fears it could go bankrupt. “I was not ready for the public focus on that move,” Denholm said. “I didn’t warn my mum.”

With a long career in operations and finance, most recently before chairing Tesla as chief financial officer of Australian telecoms group Telstra, Denholm is firm but low-key. She has spent her time at Tesla carefully avoiding the spotlight, as the superstar CEO has eclipsed the visibility of her and the rest of the board.



Since Denholm became chair, Tesla has become profitable after years of losses and missed production targets © Damian Bennett

Yet the scale of the task ahead as the annual meeting approaches means she has to do “uncomfortable things like talk to the press”. To reincorporate in Texas, Tesla must win support from 50 per cent of its outstanding shares, with uncast votes counted as “no”.

Since Denholm became chair, Tesla has become profitable after years of losses and missed production targets. Its workforce has grown to 140,000 from about 50,000, while its annual car sales have soared to 1.8mn from fewer than 250,000.

She dismisses the notion that her role requires her to babysit Musk, saying his behaviour is outside her remit.

“To me, the role of the chair is really to make sure the board has a good relationship with the CEO and the executive team,” she said. “We’re there on behalf of shareholders to make sure that management is doing their job, and their job is primarily to grow shareholder value over time.”

Musk has attracted controversy over his drug use, openly admitting to medicinal use of ketamine and smoking marijuana during a live interview. But Denholm said reports in the Wall Street Journal that Musk had also taken LSD, cocaine, ecstasy and psychedelic mushrooms at parties, and that Tesla board members were privately concerned, were “absolute BS . . . I have been around this company for 10 years and I have never seen any evidence”.

Tesla shares soared during the pandemic, with its market value passing \$1tn in October 2021, but this has since slumped to about \$550bn. First-quarter delivery numbers this year missed the lowest Wall Street estimates, and it reported its first year-on-year sales decline in four years.

Tesla's valuation has more than halved since a 2021 peak

Market cap (\$bn)

1000

FINANCIAL TIMES

Source: LSEG

The company's entire board — which includes venture capitalist Ira Ehrenpreis, Airbnb co-founder Joe Gebbia, former 21st Century Fox CEO James Murdoch, ex-Tesla chief technology officer JB Straubel and former Walgreens executive Kathleen Wilson-Thompson — has been mobilised. They have spent the past two weeks alongside Denholm lobbying investors in New York and California about Tesla's plans for the future. Kimbal Musk, Elon's brother, is also a director but was exempted from the shareholder outreach drive.

Operating quietly behind the scenes at Tesla became much harder for Denholm in February when the Delaware judge questioned the directors' independence, saying: "Musk operates as if free of board oversight."



Tesla shares soared during the pandemic, with its market value passing \$1tn in October 2021, but this has since plunged to about \$550bn © ddp/star-images via Reuters

The ruling noted that some directors, including Murdoch, had taken joint family holidays with Musk, while Antonio Gracias, a private equity veteran who left the board in 2021, had interests worth more than \$1bn in Musk-controlled companies.

But Denholm strongly rejects any suggestion that the directors do not function correctly. "The board is so diligent and so effective as a board in terms of [making] sure that the management team are doing their job," she said. "Everybody spends an inordinate amount of time and energy not just working with Elon, because obviously we do that, but also working with the [rest of the] management team."

The judge also singled out Denholm herself, pointing to the fortune she had minted from Tesla shares and accusing her of being “lackadaisical in her oversight obligations” — a claim Denholm also rejects.

“That is crap,” Denholm said. “I had to look up that word . . . I will tell you, anybody who knows me, knows that I am not lackadaisical, now that I know what that word means. It is probably the furthest from the truth. I am really intense and very diligent in what I do.”

Robyn Denholm

Born: May 1962 in Sydney suburb of Milperra

Education: Bachelor's degree in economics from the University of Sydney; Master's degree in commerce from the University of New South Wales; chartered accountant

Career

1984: First job at Arthur Andersen

1989: Toyota Australia, vice-president of finance

1996: Joins Sun Microsystems finance division, relocating to the US in 2001

2007: Moves to Juniper Networks, rising to chief financial officer

2014: Named a Tesla director

2017: Returns to Sydney with telecoms group Telstra, again promoted to CFO

2018: Replaces Musk as Tesla chair, steps down from Telstra

2021-22: Earns \$280mn from sales of stock options

She dismissed criticism of her stock awards with the same argument she uses to justify Musk's pay package: her shares have gone up in step with the company, which is good for everyone.

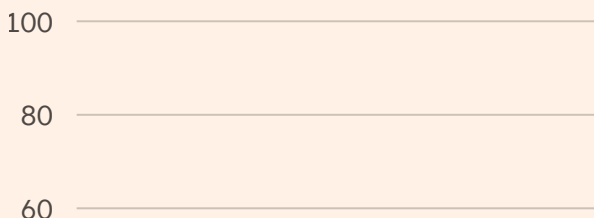
For Denholm, the life-changing wealth has only increased her independence. “If I didn't agree with something that was going on at the company, I could walk away tomorrow,” she said. “The fact that you've sold shares makes you more financially independent.”

And she was also disparaging of the judge's claims that she is too close to Musk — rejecting this, too, as “absolute BS”.

Tesla is appealing against the decision, whether its shareholders vote to move the business to Texas or not, according to Denholm. A successful appeal would also stop lawyers for the plaintiff that brought the challenge against Tesla taking in fees of about \$6bn in the company's equity — a quirk of the Delaware court system and a sum she slammed as excessive. "I mean, six-and-a-half billion dollars for a few days in court," she said.

Musk hit 12 financial targets to guarantee the maximum payout set in 2018 pay deal

Revenues (\$bn)



The shareholder vote on June 13 could have big implications for the future leadership of Tesla. Musk, who splits his time between running several other companies, including rocket builder SpaceX, brain implant technology group Neuralink and X, has threatened to spend more time away from Tesla if he does not hold about 25 per cent of its shares, arguing he needs a veto to prevent activists from hijacking the company's AI technology.

Musk sold billions of dollars of Tesla shares in 2021 and 2022, while using more as leverage for loans, to fund his \$44bn acquisition of Twitter, which damaged the carmaker's share price and took his stake below 13 per cent. The controversial compensation plan could rebuild much of his stake, boosting it to more than 20 per cent.

"Knowing Elon, they needed to be really ambitious goals," Denholm said of the 2018 award. "What we were trying to do was put in a 10-year plan that would ensure his focus, attention, [and be an] incentive."

Musk achieved all the targets, despite them being branded by critics as “ludicrously ambitious” and a “publicity stunt” at the time. By 2023, revenues were \$97bn and adjusted earnings were \$17bn. Musk, who receives no salary or other pay from the carmaker, would have received none of the new stock options had the valuation not reached the \$100bn mark.

But the board faces a struggle to bring some of its biggest investors onside now the payout is a reality. Tesla's largest institutional shareholder, Vanguard, as well as several other top-10 investors including State Street and Capital Group, voted against the compensation deal when it was outlined in 2018.

“We expect there to be ongoing conversations with particularly the larger shareholders, irrespective of their points of view in 2018,” said Denholm. In a recent plea to investors she claimed it would be “unfair” not to give Musk what he is due, noting that “Elon has not been paid for any of his work for Tesla for the past six years”.

The decision on Musk's pay comes at the same time as investors have criticised Tesla for rash strategic pivots and poor treatment of employees.

The CEO has reneged on plans to produce a low-cost model that he had only months earlier promised would be crucial to future growth. Staff received an email last month saying 10 per cent of Tesla's workforce — at least 14,000 jobs — would be cut, with passes immediately cancelled and internships withdrawn from students. Later that month he fired the 500-person team running its industry-leading supercharger network, including its boss Rebecca Tinucci, although soon had to hire some of them back.

For Denholm, Musk's blunt move stemmed from a desire to treat staff “as humanely as possible”.

“When we've made that call, he rips off the band aid . . . You want to get rid of the uncertainty for employees quickly,” she said. “Could we have done a better job of talking to these people through that or communicating with them a bit better? Absolutely. But that's not all on him.”

Tesla has weeks until shareholders express their confidence — or misgivings — in its plans for the future, and how well Musk should be paid to achieve them. With votes from retail investors around the world rolling in, the board is braced for proxy reports from the likes of ISS and Glass Lewis, which will advise its big institutional shareholders how to vote.

But even with the latest concerns about Musk and Tesla's share price, Denholm is optimistic.

“Every shareholder that I’ve ever talked to says that it worked,” she said of the controversial compensation plan, adding: “We get paid in options so if the share price doesn’t move, then we get nothing. That type of philosophy resonates with our shareholders.”

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GM, LG Agree to Settle Bolt Battery Fire Claims for \$150 Million

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Class Action

A General Motors Co. Chevrolet Bolt electric vehicle.

Photographer: David Paul Morris/Bloomberg.

- 2017-2022 Chevy Bolts owners eligible for \$700 or \$1,400
- GM recalled all Bolt vehicles in 2021 over battery defect

General Motors LLC and LG Chem Ltd. agreed to pay \$150 million to settle consumer claims alleging a defect in more than 100,000 Chevy Bolt electric cars could cause their batteries to catch fire when they were nearly fully charged.

The parties on Thursday asked the US District for the Eastern District of Michigan to preliminarily approve the deal. Judge Terrence G. Berg is overseeing the litigation.

The settlement will give class members who owned or leased 2017-2022 Chevy Bolts a \$700 payment if their car received or is eligible for GM's most recent and final battery replacement or \$1,400 if the vehicle is eligible for and gets a final software update. Around 22,560 class members are eligible for a payment.

Interim class counsel has agreed to ask for no more than 35% of the settlement for attorneys' fees and a \$2,000 service award for each plaintiff, according to the their motion for preliminary approval.

The litigation began in December 2020. By June 2021, eight cases alleging various warranty breaches and claims the companies knowingly hid the battery problem had been consolidated.

GM recalled all Chevy Bolts in 2021 over the defective battery, which was manufactured by LG.

The car model launched in 2016 as the company's first mass-market fully electric vehicle. GM announced it was discontinuing the Bolt in 2023 and shut down the plant that manufactured it. Before the car was discontinued, the Bolt's starting price was around \$24,000, making it one of the most affordable electric vehicles on the market.

The consumers are represented by The Miller Law Firm PC and Keller Rohrback LLP.

GM is represented by Mayer Brown LLP. LG is represented by Latham & Watkins LLP.

The case is In re Chevrolet Bolt EV Battery Litig. , E.D. Mich., No. 2:20-cv-13256, 5/16/24 .

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Class action targets internet game addiction

 stlrecord.com/stories/658912654-class-action-targets-internet-game-addiction

May 16, 2024

A child playing video games | Wikimedia Commons

JEFFERSON CITY — Several companies that create video games are being sued in a federal class action lawsuit alleging they fueled an addiction to video games with things like "micro-transactions."

A 24-year-old woman, Harper Glasscock, has filed the lawsuit against several gaming giants, including Activision Blizzard, Microsoft Corporation, and others, alleging the insidious manipulation of game design to foster addiction, particularly among minors and young adults.

The lawsuit, which was filed in the U.S. District Court for the Western District of Missouri Central Division, alleges the intentional exploitation of psychological vulnerabilities and predatory monetization tactics, all at the expense of consumers' well-being, according to the complaint filed in federal court.

Glasscock's complaint details two decades of gaming, beginning with her introduction to video games at the age of four.

Over the years, she claims, the proliferation of online gaming and micro transactions has fueled an epidemic of addiction, amplifying the detrimental impact on individuals' lives, according to the suit.

Central to Glasscock's argument is the assertion that gaming companies deliberately engineer their products to be addictive, leveraging feedback loops, reward systems and patented technologies developed with insights from behavioral psychologists and neuroscientists.

These features, the plaintiff argues, serve to prolong user engagement and encourage spending within games, prioritizing profit over user safety.

The plaintiff highlights the deceptive tactics employed by these companies, including drip pricing and dark patterns, which aim to manipulate consumer behavior and extract maximum revenue, according to the suit.

Specific monetization strategies such as loot boxes and pay-to-win models are singled out for their exploitation of players' willingness to spend money within the gaming environment.

“Defendants make their games addictive, in part, by encouraging long-term, extended game play despite knowledge that such extended play causes physical harm to the human brain – and particularly to a minor’s developing brain,” the complaint states. “Defendants’ motive in developing, designing, manufacturing, publishing, and selling addictive video game products is their own bottom line.”

Glasscock alleges brain damage, cognitive impairment, depression, anxiety and other mental health issues as direct outcomes of video game addiction, not only for herself but for countless others ensnared by the allure of digital entertainment, the complaint states.

“By making their games addictive, Defendants are able to maximize profits after the original purchase or free download,” the complaint states. “Within their games, Defendants offer significant opportunity to purchase downloadable game products or in-game transactions, known as ‘microtransactions,’ to allegedly give players an advantage in the game.”

The plaintiff calls for accountability, holding the defendants responsible for their deliberate misconduct and exploitation of vulnerable populations for financial gain.

“Predatory monetization schemes in video games are essentially purchasing systems within the games that disguise or withhold the long-term cost of an activity until players are already committed, both psychologically and financially,” the complaint states.

Glasscock is seeking compensatory and punitive damages. She is represented by Tyler W. Hudson, Eric D. Barton, Melody R. Dickson, Tina Bullock, Danielle Ward Mason, Breean Walas, and Steven B. Rotman.

The plaintiff’s attorneys declined to comment on the case. The defendants did not respond to requests for comment.

U.S. District Court for the Western District of Missouri Central Division case number: 2:24-cv-4036

ORGANIZATIONS IN THIS STORY

U.S. District Court for the Western District of Missouri

How Investors Can Prevent Another Paramount Fiasco: Chris Hughes

By Chris Hughes 2024-05-17T00:00:25148-04:00

The drama surrounding the future of Hollywood studio Paramount Global turns on one of the most fundamental questions in mergers and acquisitions: Should shareholders be treated equally in a takeover?

Indeed, this messy situation has become a case study in how ordinary investors in the US may sometimes suffer in M&A because they lack the formal protections adopted by other major markets.

Paramount's share capital is oddly divided between a small portion of voting stock and a large block of non-voting stock. The company's controlling shareholder, Shari Redstone, has been considering a sale of her majority holding in the voting shares. These were worth nearly \$700 million at Thursday's close, out of the firm's total market value of around \$9 billion.

A consortium led by David Ellison, founder of *Top Gun: Maverick* producer Skydance Media LLC, has been trying to take the helm. It made a controversial proposal to secure Redstone's controlling holding and then merge Paramount with Skydance, with the latter valued at \$5 billion. The mooted price for the Redstone holding company that owns the stake (along with some movie theatres) is around \$2 billion. That's still a lot less than making an offer to buy all the voting and non-voting shares.

Cue an epic row.

The other stockholders are cross at the possibility of Redstone receiving a big cash payday while they would get a merger that's hard to see generating a comparable premium. Some would rather receive a clean takeover that paid out for everyone. Rival Sony Group Corp. and buyout firm Apollo Global Management Inc. have also made an approach, as has media mogul Byron Allen. Redstone has tasked a subcommittee of the board with weighing it all up.

The general issue here is whether a controlling shareholder should be able to bag a takeover

premium without sharing it among fellow investors.

The argument that such a transaction would be wrong goes roughly like this: While you invest in a company dominated by a controlling shareholder at your own risk, it very much matters to you who that controlling shareholder is. You deserve the chance to sell at a decent price if the controller changes.



Moreover, takeover premiums can be viewed as an asset belonging to all shareholders. Investors with voting stock should therefore get the same price as the controller; any non-voting holders should get a clearly comparable top-up rather than a completely different transaction.

Hence most major markets outside the US require bidders to make offers to all shareholders and not just one. This so-called mandatory bid rule can kick in if a buyer acquires a holding large enough to confer effective control, say around 30% of the votes. This protects ordinary investors from falling prey to a new controlling shareholder who may pursue a self-serving strategy.

Likewise in private equity, investments often include “tag-along” rights enabling minorities to exit

alongside a lead shareholder.

But in the US, there's no all-encompassing law forcing any sharing of proceeds. There's just a handful of exceptions. For example, a dominant shareholder couldn't legally sell to a "looter" with foreseeable plans to abuse their power. This isn't going to be easy to prove.

The US view is essentially that the sale of a controlling stake is a contract between two willing parties. Minority shareholders' protection rests on litigating if they feel wronged. The typical grounds would be that board directors, or a controlling investor, had breached their fiduciary duties.

In academic circles, the US approach gets the more supportive hearing. The mandatory bid rule stands accused of impeding the efficient functioning of the market by thwarting bidders who can't afford to buy the company whole. This supposedly hinders control passing to new stewards who might run things better with, say, a 40% stake. Another criticism is that the mandatory bid rule wrongly harmonizes the takeover price. The controlling shareholder may enjoy certain strategic benefits other shareholders don't — justification for a price differential.

The snag here is we can't see the putative transactions that should have happened but didn't because the mandatory bid rule was a deterrent. Unable to prove a negative, we can't be categorical on the matter.

The consensus is that neither strategy is better in all circumstances, but a strong case can be made that the US system creates more efficient outcomes overall, says Edmund Schuster, associate professor of corporate law at the London School of Economics. "This comes at the expense of equal treatment and thus, some would say, fairness," he says.

The academic critique of the rule may nevertheless be overly harsh. Mandatory bids help competitive auctions get won by the bidder who can create most value, Schuster has argued.

Paramount is, of course, an exceptional situation due the lopsided mix of voting and non-voting shares. But try telling its shareholders that their pain is the cost of investing in a market that's theoretically more efficient than Europe's. The intensity of feeling here shows how much investors value a sense of fairness in M&A, regardless of what may be legally permissible and predictable.

That points to two consequences from all this. Outside the US, some experts have suggested

companies should be able to opt out of the mandatory bid regime. Such arguments should find it harder to gain traction after Paramount.

It would be naive to suggest that US corporate law would or should adopt anything like the rules seen elsewhere. But Paramount may influence how investors approach companies going public. The situation reinforces the idea that dual-class share structures should be time-limited. Incoming investors could also do worse than push for tag-along rights to stay with the listed company.

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Endeavor's \$13 billion deal highlights push to sidestep minority shareholders

 [reuters.com/markets/deals/endeavors-13-billion-deal-highlights-push-sidestep-minority-shareholders-2024-05-17](https://www.reuters.com/markets/deals/endeavors-13-billion-deal-highlights-push-sidestep-minority-shareholders-2024-05-17)

Anirban Sen, Tom Hals

Trading information and logo for Endeavor Group Holdings, Inc. is displayed on a screen on the floor of the New York Stock Exchange (NYSE) in New York City, U.S., May 10, 2023. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

May 17 (Reuters) - Endeavor Group's (EDR.N) , opens new tab decision to deny minority shareholders the ability to veto a \$13 billion deal to take the entertainment conglomerate private is the latest example of a company's controlling investors risking lawsuits to avoid paying a higher deal price.

At stake is a corporate governance safeguard that reassures minority investors they are getting a fair price and protects companies' stock market valuations from taking a hit on concerns a deal would undervalue them, corporate lawyers and investment bankers say.

Endeavor agreed last month to be taken private by a consortium of its investors, led by private equity firm Silver Lake, which holds 71% of the voting stock in the company. It inked the deal without agreeing to hold a vote where a majority of the investors not participating in the consortium would have to approve it.

Without such a "majority-of-the-minority-investors" threshold, a deal vote becomes a formality, since the shareholders that control the company are also the ones buying out the minority investors.

A special committee of independent board directors that negotiated the deal on behalf of Endeavor tried unsuccessfully to convince Silver Lake to sign off on a majority-of-minorities shareholder vote, people familiar with the matter told Reuters.

Nearly a dozen lawyers and bankers told Reuters there is a growing realization among the controlling investors of companies that the financial benefit of depriving minority shareholders of a deal veto outweighs the legal risks.

"(The shareholder vote) opens the door to an activist who can say, 'I know you're negotiating with the special committee, but now you're going to negotiate with me, and I'm going to squeeze a second bite'," said Phillip Mills, an M&A partner at law firm Davis Polk.

Endeavor did not respond to requests for comment on the decision not to stage a shareholder vote on the deal. Silver Lake declined to comment.

Endeavor, run by Hollywood power broker Ari Emanuel, is well-known for representing film and television talent. It has grown to become a sports and entertainment behemoth through more than 20 acquisitions.

At least three other U.S. companies were taken private by majority shareholders over the last two years without seeking approval by minority investors.

These include buyout firm Thomas H. Lee's \$2.5 billion deal in February to take medical equipment management company Agiliti private, and grill maker Weber's controlling shareholders led by BDT Capital acquiring it last year for \$3.7 billion.

If this trend of controlled companies denying minority shareholder vetoes to take-private deals continues, it could weigh on these companies' valuations as investors bet they would be sold at a lower premium, investment bankers and analysts say.

HIGHER COST OF SETTLEMENT

Swedish bank Handelsbanken, which is suing Endeavor for selling itself too cheap, cited the omission of a shareholder vote in its lawsuit as evidence of the company trying to shortchange investors.

Endeavor said in a regulatory filing last week it has also received multiple shareholder requests seeking internal records of the deliberations on the deal.

The lawyers who are advising companies against giving minority shareholders a deal vote argue the worst that can happen, based on court precedent in Delaware where most companies are incorporated, is that the controlling shareholders may be ordered in court to pay 5% to 10% over the deal price, possibly years after the transaction has closed.

Skipping the vote, on the other hand, prevents hedge funds and other activist shareholders from making deal price demands and allows a transaction to close more quickly, the lawyers say.

"When controllers are taking private their publicly traded targets, they often come to the rational conclusion that requiring an extra approval by a majority of the minority-held shares will not be necessary for the transaction to be fair to the minority shareholders. It is not unusual for controlling shareholders to take on this burden rather than the execution risk of a special minority shareholder approval," said Ethan Klingsberg, co-head of U.S. corporate and M&A at law firm Freshfields Bruckhaus Deringer.

Freshfields advised Endeavor chairman Patrick Whitesell on the deal, but Klingsberg said he was not involved in it and was not commenting on the Endeavor transaction.

To be sure, some controlled companies still give a veto to minority shareholders on deals involving insiders to minimize litigation risk. Website designing platform Squarespace (SQSP.N) [opens new tab](#) said on Monday it would hold a vote for its minority shareholders on its \$6.9 billion sale to private equity firm Permira and its controlling investors, including CEO Anthony Casalena and investment firms General Atlantic and Accel. Silver Lake has experience with investors trying to squeeze it for more money on a deal. It opted for a vote for minority shareholders when it inked a \$24.4 billion deal in 2013 to take Michael Dell's eponymous computer maker private.

This resulted in the private equity firm offering a small price sweetener, some \$350 million, to complete the deal, after Carl Icahn and other activist investors agitated for more money.

"Having a vote may be helpful from a business judgment rule perspective, but may inject real unpredictability into the transaction itself. Once a transaction is announced, you have merger arbs and other parties moving into the stock, so the voters at the time of the special meeting are not necessarily long-term holders of your stock," said Iliana Ongun, an M&A partner at law firm Milbank.

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Funko Beats Investor Suit Over Warehouse Move For Now

By **Katryna Perera**

Law360 (May 16, 2024, 7:42 PM EDT) -- Toy company Funko Inc. on Thursday beat a proposed investor class action alleging it failed to disclose accurate information about problems relocating a distribution center and updating critical software, with a Washington federal judge saying the investors have failed to prove the company's statements were false or misleading, among other things.

U.S. District Judge James L. Robart issued an **order** saying the suing shareholders have failed to establish falsity or knowledge of wrongdoing by the individual defendants, and granted Funko's **dismissal motion**. He did, however, give the investors a chance to amend.

According to the order, the complaint challenges six "risk factors" contained within Funko's filings with the U.S. Securities and Exchange Commission, which identified potential risks with Funko's inventory management, as false or misleading.

Judge Robart said these statements fail to meet the falsity mark because the investors do not offer any particularized allegations showing that Funko's executives knew at the time that the risks had materialized or were likely to occur.

"On the whole, plaintiffs' generalized allegations fail to plausibly show the executive defendants knew that Funko was holding excess product for a long period of time, writing down excess product, or discarding excess product — the specific risks that the inventory-related disclosures warned of," the order states.

The judge also dismissed several other statements included in the complaint for being forward-looking, accompanied by cautionary language, or puffery or opinion.

Beyond "falsity problems," the judge said the suit can be tossed for the independent reason that the investors fell short of plausibly alleging scienter. According to the order, the complaint "lacks a coherent theory of motive to defraud," as well as detailed and specific allegations showing how Funko's executives were exposed to certain information within the company that they later used for their benefit.

A more compelling inference is that the executives did not know about unfolding infrastructural problems and genuinely viewed rising operational costs as temporary, among other things, the order states.

In a statement to Law360 on Thursday, Kevin McDonough of Latham & Watkins LLP, counsel for Funko, said, "We appreciate the court's careful consideration of the issues presented and are pleased with the decision dismissing the complaint."

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

The **suit**, which was most recently amended in October, alleges that Funko was experiencing significantly larger delays in implementing its new software than it was disclosing in public statements. Funko's former CEO and President Andrew M. Perlmutter and former Chief Financial Officer Jennifer Fall Jung are also accused of violating federal securities law with their statements.

According to the suit, investors were damaged in August 2022 when Funko's stock price dropped 18%. On Aug. 4 that year, the company revealed a delay in the rollout of its enterprise resource planning software designed to manage day-to-day business activities, including supply chain operations, the suit states. That same day, Funko also announced that its inventories were up nearly 171% year-over-year due to the receipt of products that had been delayed in transit.

The suit alleges that Jung attributed the increase in Funko's inventory solely to "receipt of delayed inventory." By suggesting inventory was "in a healthy position" and "generally high quality," she omitted or misrepresented material facts, the suit claims. The delayed shipping containers actually held aging products that were no longer in demand or were out of license and unable to be sold, according to the suit.

The investors are represented by Hillary B. Stakem, Ting H. Liu and Jessica E. Robertson of Robbins Geller Rudman & Dowd LLP, Gretchen Freeman Cappio of Keller Rohrback LLP, and Charles H. Linehan of Glancy Prongay & Murray LLP.

Funko and the individual defendants are represented by Kevin McDonough, Thomas Giblin, Alexis Kellert Godfrey and Elizabeth Parvis of Latham & Watkins LLP.

The case is *Studen v. Funko Inc. et al.*, case number 2:23-cv-00824, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Sydney Price. Editing by Daniel King.

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C3.ai Shareholder Sues In Del., Citing Baker Hughes Pact

By **Leslie A. Pappas**

Law360 (May 16, 2024, 2:29 PM EDT) -- A shareholder of artificial intelligence-driven software developer C3.ai Inc. filed a derivative suit in Delaware's Court of Chancery late Wednesday, alleging breaches of fiduciary duty and unjust enrichment related to the California company's strategic partnership with Baker Hughes Co.

Details of the suit were unavailable on Thursday, as shareholder Michele Pankow filed the complaint under seal, but a supplemental informational sheet attached to the complaint said her claims related to "false and misleading statements concerning C3's strategic partnership with Baker Hughes Co., including that C3's products would be jointly marketed and sold with the active engagement of Baker Hughes' 12,000+ person salesforce."

A public version of the complaint will be filed within three days, according to a letter to the Register in Chancery filed alongside the complaint.

Executive management named as defendants in the lawsuit include the company's chairman and chief executive officer Thomas M. Siebel, president and chief technology officer Edward Y. Abbo, and executive vice president Houman Behzadi.

Current C3.ai board members who are named as defendants include former U.S. Secretary of State Condoleezza Rice, former Coursera CEO Richard C. Levin, Makena Capital Management managing director Michael G. McCaffery, former Apple Inc. general counsel Bruce Sewell, former Siemens AG executive Lisa A. Davis and former Lenovo Group Limited CEO Stephen M. Ward Jr.

Baker Hughes Chairman and CEO Lorenzo Simonelli, a former C3.ai board member, is also named as a defendant in the case, among others.

Founded in 2009 with headquarters in Redwood City, California, C3.ai offers enterprise AI-application software, including an end-to-end platform for developing, deploying and operating enterprise AI applications, according to the company's website. The company's products target the financial services, manufacturing, aerospace and defense, health care, agribusiness, telecommunications, oil and gas, and utility industries.

Backed in part by Baker Hughes and entities affiliated with private equity firm TPG Capital, C3.ai **went public in 2020** in a \$610 million initial public offering.

C3.ai's relationship with Baker Hughes came under scrutiny a couple of years later, after a short-seller published a report in February 2022 that described the relationship as "struggling."

A shareholder filed a **proposed class action** in California in March 2022, claiming C3.ai's shares were inflated when it launched its IPO, in part because it was hiding its deteriorating relationship with Baker Hughes.

C3.ai's officers and directors touted the companies' strategic relationship related to oil and gas markets, suggesting Baker Hughes had a 12,000-person sales team engaged in selling C3.ai's software, the suit said.

But in reality, the suit alleged, the tech company had a separate sales division that lacked

connections with the oil industry. The reseller agreement also turned out to be fruitless, as Baker Hughes did not bring in any deals, according to the complaint, which was amended in February 2023 to add Baker Hughes as a defendant.

Baker Hughes **sought dismissal of the suit**, arguing it had failed to show the oil giant fraudulently influenced C3.ai Inc.'s business decisions.

U.S. District Judge Haywood S. Gilliam Jr. **scaled back the suit** in February, dismissing claims of insider trading and allegations of false and misleading statements about Baker Hughes' sales force, finding "while investors may have been interested to know what proportion of the 12,000-strong BH sales force was engaged in selling C3 products," the defendants were not required by federal law to disclose that information.

Baker Hughes told Law360 that it does not comment on pending legal matters. None of the other parties immediately responded to Law360's requests for comment Thursday.

Michele Pankow is represented by P. Bradford deLeeuw of deLeeuw Law LLC.

Counsel information for C3.ai and the individual defendants was not immediately available.

The case is Michele Pankow v. Thomas M. Siebel et al., case number 2024-0520, in the Court of Chancery of the State of Delaware.

--Additional reporting by Sierra Jackson, Emilie Ruscoe, Sydney Price and Henrik Nilsson. Editing by Philip Shea.



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MoneyLion Beats Investor Suit Over Reverse Stock Split

By **Sydney Price**

Law360 (May 16, 2024, 6:32 PM EDT) -- A New York federal judge has dismissed a lawsuit by shareholders of digital finance platform MoneyLion, who allege the company and its directors approved a reverse stock split that stripped preferred shareholders of their rights, saying the investors should have known the consequences of the vote.

The investor suit claimed the reverse stock split, approved last April, was intended to wipe out the value of the preferred shareholders and boost the value of MoneyLion's common stock. The automatic conversion provision replaced the plaintiffs' preferred stock, but the proxy statement did not sufficiently disclose the impact to preferred shareholders, the investors alleged.

U.S. District Judge P. Kevin Castel said in his Wednesday order that the allegedly omitted information was not material. Investors should have known from the information already available that a potential effect of the reverse stock split was the automatic conversion provision, Judge Castel said.

A reasonable investor would have voted no differently had the proxy disclosed the stock split was intended to trigger the preferred stock's automatic conversion provision, the order said.

In February 2022, MoneyLion completed its acquisition of financial services search engine Even Financial Inc. The plaintiffs in this suit owned Even Financial shares that were converted to MoneyLion shares as part of the transaction.

According to the investors' July 2023 complaint, the reverse stock split occurred because MoneyLion's average closing price dropped to less than \$1 for a 30-day trading period, making it noncompliant with the New York Stock Exchange's minimum share price requirement. On May 26, 2023, after MoneyLion's common shares traded for over \$10 for 20 consecutive days, the automatic conversion provision was triggered.

The suit alleged the defendants could have conducted a reverse stock split at a lower ratio but chose 1-for-30, the maximum possible ratio, to adversely affect the preferred shareholders. The complaint alleged CEO Diwakar Choubey and Chief Financial Officer Richard Correia, who are also defendants in the suit, said the purpose of the high ratio was to trigger the automatic conversion provision during a June 2023 meeting.

Judge Castel further concluded that the complaint fails to plausibly allege the defendants' failure to disclose the reason for conducting the stock split was triggering the automatic conversion provision was immaterial.

"An investor who voted in favor of the reverse stock split did so because he wanted MoneyLion's common stock price to rise; this prevented MoneyLion's common stock from being delisted from the NYSE and increased the common stock's appeal to a broader range of investors," Judge Castel said.

Counsel for the defendants declined to comment on Thursday. Counsel for the investors did not immediately respond to requests for comment.

The investors are represented by Jeffrey A. Simes and Alexander Talel of Goodwin Procter LLP.

The MoneyLion defendants are represented by Adam Greene and Brian Marc Burnovski of Davis Polk

& Wardwell LLP.

The case is Canaan X L.P. et al. v. MoneyLion Inc. et al., case number 1:23-cv-06550, in the U.S. District Court for the Southern District of New York.

--Editing by Drashti Mehta.

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Olo Investor Sues In Chancery To Stop Raine Group Takeover

By **Leslie A. Pappas**

Law360 (May 16, 2024, 1:38 PM EDT) -- A shareholder in New York online food-ordering company Olo Inc. sued its officers, directors and largest stockholder in Delaware's Court of Chancery on Wednesday, alleging the board had approved a stock buyback program that would hand control of the company to its largest shareholder for no consideration.

The proposed class action from stockholder Richard Scarantino alleges New York merchant bank Raine Group LLC, Olo's largest stockholder, has "exploited its influence over Olo's board to cause the company to authorize a stock repurchase program that imminently threatens to grant Raine outright voting control over Olo, with the company and its soon-to-be minority stockholders footing the bill and receiving no control premium in return."

The board approved a stock buyback program on April 30 that authorizes the company to buy back \$100 million of the company's Class A common stock. Repurchasing just 52% of that amount would give Raine more than 50% voting control of the company without having to pay a control premium, according to the complaint.

Raine currently has approximately 49.2% of the company's voting power and already has powerful influence over the board, the complaint says.

"The board has sat idle and has failed to implement any protections to prevent Raine from obtaining control through the 2024 stock buyback program," the complaint says.

Scarantino asked the court to fast-track the case and is seeking a temporary restraining order to stop Olo from repurchasing stock.

Defendants include Olo's chief executive officer Noah H. Glass, the rest of the company's nine-member board, the Raine Group and two of its affiliates that hold Olo stock.

The New York-based restaurant software and delivery company, founded in 2005, has been the target of other shareholder litigation.

About a year after it **went public in 2021**, shareholders **filed a securities class action** in the Southern District of New York, alleging the company had touted the success of its Subway partnership even though it knew its relationship with the sandwich-restaurant franchise would soon end.

When the company announced in August 2022 that Subway would stop using the Olo platform, Olo's stock price plummeted 36%, wiping out more than \$480 million in shareholder value.

The Subway exit prompted Olo shareholders to file similar complaints in Delaware's Court of Chancery **in May 2023** and **November 2023**.

Raine was an early investor in Olo, dropping \$40 million into the restaurant software company as part of its first large-scale funding round, the Scarantino complaint says.

That round and other subsequent investments made Raine the company's largest stockholder, giving it approximately 27.1% voting power shortly before Olo went public, the complaint says.

After the IPO, when Olo began to experience business setbacks and saw its share price decline, Raine started to exert its influence over Olo's board to gain more voting control, the complaint alleges.

The board authorized a stock repurchase program in September 2022, shortly after the company issued its revised earning guidance and announced the loss of Subway as a client, authorizing the company to repurchase \$100 million in Class A common stock.

When the 2022 stock buyback program was announced, Raine had 40.8% voting power in Olo. By the end of it, Raine's voting power had increased to 49.2%, even though it didn't buy any additional shares, the complaint says.

The five-count complaint raises direct and derivative claims of breaches of fiduciary duty against the directors and against Glass as an officer, and raises one claim of aiding and abetting against Raine.

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

Scarantino is represented by Jeroen van Kwawegen, Edward Timlin, Cristopher J. Orrico, Shiva Mohan and Daniel E. Meyer of Bernstein Litowitz Berger & Grossmann LLP and Richard A. Maniskas of RM Law PC.

Counsel information for the defendants was not immediately available.

The case is Richard Scarantino v. Noah H. Glass et al., case number 2024-0517, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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3rd Circ. Shuns Teva's 'Novel' Appeal On Israeli Investor Class

By **Jessica Corso**

Law360 (May 16, 2024, 8:48 PM EDT) -- The Third Circuit on Thursday turned away an appeal brought by Teva Pharmaceutical Industries Ltd., saying the class certification stage was not the right time to hear arguments over the "novel" question of the applicability of U.S. securities laws to Israeli-listed shares.

The pharmaceutical giant had asked the court for permission to appeal U.S. District Judge Karen S. Marston's ruling **certifying a class** of investors who claim the company lied about illegal kickback payments it allegedly made to cover Medicare co-payments of patients taking its multiple sclerosis drug.

Because the class included not only those who purchased shares through the New York Stock Exchange but also through the Tel Aviv Stock Exchange, Teva argued that the certification touched on a novel issue that merited interlocutory review. A three-judge panel of the Third Circuit disagreed.

"Here, Teva's challenge amounts to a request to define — at the class certification stage — the reach of Section 10(b) of the Securities Exchange Act with respect to dual-listed securities," the court said in a unanimous **opinion** authored by U.S. Circuit Judge D. Brooks Smith.

"Novel as it may be," the challenge goes to the merits of the case, the court said, "and thus need not be decided at the class certification stage."

Nor did the court believe that Judge Marston's analysis of classwide damages claims, known as a predominance analysis, needed its immediate attention.

"[W]e agree with the district court's predominance analysis," the Third Circuit said in its precedential decision.

Teva investors sued in 2020, accusing the company and some of its executives of making false and misleading statements about why the multiple sclerosis drug, Copaxone, saw such commercial success.

The complaint alleged that the company failed to disclose that it was coordinating with nonprofits Chronic Disease Fund and The Assistance Fund, as well as with pharmacy Advanced Care Scripts Inc., to cover patient co-pays for Copaxone.

In August 2020, just a month before the complaint was filed, the U.S. Department of Justice **lodged a complaint** against Teva over the alleged \$300 million kickback scheme. Suing investors say the news of the government's lawsuit caused Teva's American depositary receipt price to drop by almost 10%.

The government's case against Teva is ongoing.

In November, Judge Marston certified a class of those who purchased Teva securities between Oct. 29, 2015, and Aug. 18, 2020, over the objections of the pharmaceutical company, which among other things argued that the U.S. Supreme Court made it clear in **Morrison v. National Australia Bank Ltd.** that U.S. securities laws apply only to shares listed on domestic exchanges.

The Morrison decision, which was handed down in 2010, did find that securities fraud claims under Section 10(b) do not apply to extraterritorial causes of action but said nothing about dual-listed securities like the ones at issue in the Teva case, the Third Circuit said.

Judge Marston "acknowledged as much," the court ruled, citing in her class certification opinion a ruling from the Israel Supreme Court finding that U.S. securities laws are applicable in Israel.

U.S. Circuit Judges Patty Shwartz, Cindy Chung and D. Brooks Smith sat on the panel for the Third Circuit.

Neither attorneys for Teva nor the shareholder class immediately returned a request for comment Thursday.

The class is represented by Timothy Peter, James Wilson and Robert Killorin of Faruqi & Faruqi LLP.

Teva is represented by Linda Coberly, Daniel Blouin, James Smith and Kerry Donovan of Winston & Strawn LLP and Mathieu Shapiro and Melissa Blanco of Obermayer Rebmann Maxwell & Hippel LLP.

The case is Forsythe et al. v. Teva Pharmaceuticals Industries Ltd. et al., case number 23-8050, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Lauren Berg. Editing by Rich Mills.

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2nd Circ. Backs Win For Big Banks In Forex-Rigging Suit

By **Elliot Weld**

Law360 (May 16, 2024, 2:37 PM EDT) -- The Second Circuit on Thursday backed a ruling in favor of a group of large banks accused of conspiring to manipulate the foreign currency exchange market in euros and dollars, agreeing with a lower court that the plaintiffs hadn't made qualifying transactions or shown how prices were distorted.

A three-judge panel said in a **summary order** that plaintiffs John Nypl and Bill Rubinsohn had not made physical purchases of euros at a U.S. branch of any of the defendant banks, which include JPMorgan Chase, Bank of America, Barclays and Citigroup.

The decision upholds a **March 2023 ruling** by U.S. District Judge Lorna Schofield granting summary judgment for the banks in the case, which dates to 2015.

Nypl and Rubinsohn had argued that the scope of their proposed class — customers "who directly purchased supracompetitive foreign currency" — includes those who transacted with debit or credit cards. But the panel said the plaintiffs' previous representations undermined their argument.

While opposing the bank's motion to transfer the case to Manhattan from the Northern District of California, the plaintiffs distinguished the case from other suits related to the same alleged conspiracy by saying they sought to represent customers "who purchased foreign currency for dollars at their local banks," the panel said.

Later, when opposing a motion to stay the case, the plaintiffs told the district court that their class members "take physical delivery of foreign currency" in transactions involving "immediate delivery" of that currency at local banks, the order said.

"In short, the district court did not err in its reading of the third amended complaint and did not abuse its discretion in declining leave to amend a fourth time to add qualifying transactions that plaintiffs had explicitly disclaimed as a matter of litigation strategy," the panel said.

The banks were granted summary judgment on claims brought by four other plaintiffs, Lisa McCarthy, Valarie Jolly, Mad Travel Inc. and Go Everywhere Inc., since those plaintiffs hadn't provided a basis for a jury to decide which direction prices fluctuated as a result of the alleged scheme.

The suit was filed a day after the U.S. Department of Justice announced a **\$5.6 billion settlement** with five of the defendant banks over claims they manipulated global forex markets. The appellate panel said the settlements don't show that the plaintiffs in this case suffered an injury from artificially inflated prices.

Those settlements show that market makers eliminated competition in forex markets in a variety of ways that resulted in an inflated euro price against the dollar or the reverse depending on the day, according to the ruling.

"Given the nature of this market and alleged conspiracy to demonstrate an antitrust injury, a plaintiff must submit proof that she purchased euros on a particular date during the timeframe of the alleged conspiracy, and that she suffered harm as a result of that transaction," the panel said. "The district court properly concluded that plaintiffs have offered no evidence from which a rational jury could find that they suffered actual harm as a result of a particular transaction in a manipulated market."

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

The plaintiffs are represented by Joseph Alioto Sr. of Alioto Law Firm.

JPMorgan Chase is represented by Tansy Woan and Boris Bershteyn of Skadden Arps Slate Meagher & Flom LLP.

Bank of America is represented by Adam Hakki, Jeffrey Resetarits and Richard Schwed of A&O Shearman.

Barclays is represented by Matthew Schwartz, Christopher Dunne and Mark Popovsky of Sullivan & Cromwell LLP.

Citigroup is represented by Andrew Ruffino of Covington & Burling LLP.

HSBC is represented by J. Matthew Goodin and Julia Webb of Locke Lord LLP.

Royal Bank of Scotland is represented by Paul Mishkin of Davis Polk & Wardwell LLP.

UBS AG is represented by Eric Stock and Seth Rokosky of Gibson Dunn & Crutcher LLP.

The case is McCarthy et al. v. Bank of America et al., case number 23-0619 in the U.S. Court of Appeals for the Second Circuit.

--Editing by Alex Hubbard.

Correction: A previous version of this story misidentified Bank of America's counsel. The error has been corrected.

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\$2B Default Recommended For Making Fair Trial 'Impossible'

By **Bryan Koenig**

Law360 (May 16, 2024, 11:28 PM EDT) -- Years of lies should put a pair of Chinese electronics companies on the hook for over \$2 billion in default judgment, a special master told a California federal judge, adding that their yearslong no-show and disregard of U.S. counsel advice to retain documents have rendered a fair trial "impossible."

Special master Vaughn R. Walker suggested throwing the book at Irico Display Devices Co. Ltd and Irico Group Corp. in a **report and recommendation finding** that only "terminating sanctions" would suffice to remedy their decision to abandon sprawling price-fixing litigation over a key component in older televisions and computer monitors, only to reappear after an 8-year absence and continue "bad faith discovery and other litigation misconduct."

"Less drastic sanctions such as monetary sanctions alone would not remedy the destruction of highly relevant evidence or the long delays resulting in loss of virtually all witnesses and other relevant information. Monetary sanctions alone would not adequately compensate plaintiffs for having the ability to prove their case essentially destroyed," Walker, a retired federal judge, said in the May 14 report. "A jury instruction to presume that the evidence lost would have been unfavorable to defendants would not be an adequate remedy in light of the vast swaths of missing and highly relevant information that Irico should have preserved and produced."

Irico, Walker said, is the only company remaining in litigation first filed in 2007 in the wake of a U.S. Department of Justice criminal probe into price-fixing of cathode ray tubes, which he said were made "obsolete" by the introduction of LCD and other technology. Claims against every other defendant, including **major electronics companies** like LG Electronics, have been "settled or otherwise resolved," he said.

Irico's response, according to the 78-page finding, was to ignore the advice of the Pillsbury Winthrop Shaw Pittman LLP lawyers it hired soon after getting hit with the complaint. In particular, Irico opted against their advice to preserve documents, instead preferring, in the words of a crucial document cited in the ruling, to "let nature take its course," firing Pillsbury months after hiring the firm and opting to try and wait out the litigation.

According to Walker, the clock started to run out in 2017, after direct and indirect purchaser classes sought default judgment against Irico for its deadbeat status, prompting the company to reappear. When tripled under antitrust law, minus \$212.2 million in settlements from the other defendants, the plaintiffs had put the estimated liability against Irico at roughly \$2.42 billion, according to the report.

Walker appeared to allude to the possibility of eye-popping damages, if U.S. District Judge Jon S. Tigar approves default judgment, when discussing the appropriateness of holding Irico jointly and severally liable for the price-fixing of its peers.

"The size of any judgment that may follow re-entry of Irico's default is immaterial to whether default should be entered. The prospect of a large judgment should not, therefore, impede the re-entry of that default and a prove up of damages to the classes and a final reckoning of the long deferred jurisdictional issue," Walker said.

"When the last remaining defendant has thwarted and evaded its opportunity to defend the case on

law and the merits, there is no unfairness in the prospect of imposing on that last remaining defendant the full amount of treble damages suffered by the plaintiff classes not otherwise recovered from the defendants that did participate in this litigation," he continued.

Even though Irico's conduct has left essentially no documentation of its participation in the price-fixing scheme, Walker found it sufficient to hold the company liable based on evidence from its peers. He called for sanctions compensating plaintiffs for the years spent litigating against Irico and for default judgment, which could set up a trial solely on penalties.

Counsel for Irico and the direct purchaser plaintiffs declined to comment Thursday.

Walker's ire Tuesday focused principally on two failings: the yearslong failure to preserve evidence and the failure to produce for deposition one of only two executives still around who could discuss the case.

Irico, according to the report, had tried arguing that it believed itself to be immune from U.S. antitrust liability as an arm of the Chinese government. But Walker deemed those arguments utterly unbelievable, finding contemporaneous discussions from 2008 justifying the abandonment of the litigation and the failure to preserve evidence for "far more mundane reasons."

Walker also deemed it "mystifying" that Irico thought it best to wait to be sued directly. And he excoriated arguments that the company didn't have to participate because it had no direct U.S. sales, a claim he said "turned out to be false, in light of Irico's production of documents regarding ... sales of Irico's CRT products in the United States during the class period, which it tried to claw back."

Citing communications with Pillsbury, Walker said it's clear Irico has no basis for contending it didn't understand its obligations to preserve documents that it lost over the years due to policies like the automatic deletion of emails and the recycling of computers.

"In November 2022, apparently realizing how damaging this looked, Irico changed its story and filed its third supplemental objections and responses to [indirect purchaser plaintiffs'] third set of interrogatories to state: Irico no longer contends that its initial efforts to preserve documents in August 2008 were limited solely to documents regarding sales of CRTs to the United States," he said. "The undersigned finds Irico's blatant attempt to change its discovery responses and [Irico executive] Yan Yunlong's sworn deposition testimony to be disrespectful of the court and the integrity of these proceedings."

Walker was similarly aghast over the failure to depose executive Su Xiaohua. While Irico had claimed that Su resigned soon before his scheduled deposition in May 2022 to avoid severe Chinese COVID quarantine rules that would be triggered by traveling to Macau for the deposition, Walker said that Su continued to be paid for months afterward, meaning he was still under the company's power to mandate his compliance.

"These facts disclose in full color the systematic nature of Irico's bad faith and willful flouting of its obligations to conduct this litigation in a manner that would allow a fair trial in this case. With Su's failure to appear for deposition, there is no one left at Irico who was present at Irico during the class period who can testify about Irico's participation at competitor meetings," Walker said. "The only other remaining Irico employee who admittedly attended many competitor meetings, Zhao-Jie Wang, was extremely evasive during his deposition and repeatedly claimed that he did not remember or did not know many facts."

Walker went on find that Irico's "many delays, misrepresentations, and spoliation or concealment of relevant documents have frustrated the entire litigation process," all to the company's benefit, and leaves no documents or witnesses available to discuss its role in the conspiracy.

"The undersigned finds that given Irico's ongoing, systematic spoliation of documents, failures to search for relevant documents, misrepresentations to the court, unnecessary and inappropriate delays and repeated violations of court orders, Irico's litigation misconduct renders a fair trial in this case impossible," Walker said.

The plaintiffs are represented by R. Alexander Saveri, Geoffrey C. Rushing, Matthew D. Heaphy and

David Y. Hwu of Saveri & Saveri Inc., Mario N. Alioto and Lauren C. Capurro of Trump Alioto Trump & Prescott LLP, Steven F. Benz, Robert Conrad Klipper and Gregory G. Rapawy of Kellogg Hansen Todd Figel & Frederick PLLC and James Gerard Beebe Dallal, Joseph W. Cotchett, Imtiaz A. Siddiqui and Adam J. Zapala of Cotchett Pitre & McCarthy LLP.

Irico is represented by John M. Taladay, Evan J. Werbel, Thomas E. Carter and Andrew L. Lucarelli of Baker Botts LLP.

The case is MDL No. 1917 In Re: Cathode Ray Tube (CRT) Antitrust Litigation, case number 4:07-cv-05944, in the U.S. District Court for the Northern District of California.

--Additional reporting by Nadia Dreid. Editing by Michael Watanabe.

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9th Circ. Won't Let Alexa Users Revive Voice Data Privacy Row

By Allison Grande

Law360 (May 16, 2024, 11:40 PM EDT) -- The Ninth Circuit on Thursday refused to reinstate a proposed class action alleging Amazon's Alexa software illegally collects voice data to target users with advertisements, agreeing with the lower court that the e-commerce giant had clearly disclosed the practice and the plaintiffs hadn't shown they were harmed.

In an unpublished **memorandum**, a three-judge appellate panel unanimously affirmed a Washington federal judge's May 2023 decision to **dismiss with prejudice** Ohio resident James Gray and Massachusetts resident Scott Horton's suit alleging Amazon.com Inc.'s voice data collection practices run afoul of privacy statutes and aren't unambiguously disclosed to users.

The consumers had argued that the lower court had erred in finding that they had consented to Amazon's voice data collection practices, saying they could not have known from Amazon's ambiguous disclosures that it was **feeding their voice recordings** into its "targeted advertising machine."

But the panel rejected this contention, finding "no error" in the district court's interpretation of the Alexa terms of use, which expressly incorporated Amazon's privacy notice that the consumers don't dispute they had accepted and were bound to.

"Plaintiffs contend that the district court should have considered Amazon's subsequent conduct and other extrinsic evidence, but 'the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used,' and courts 'do not interpret what was intended to be written but what was written,'" the panel wrote in upholding the dismissal of consumers' claim of breach of the implied covenant of good faith and fair dealing. "The district court properly focused on 'what was written,' and there was no error in its conclusion that the privacy notice made sufficiently clear that voice data would be used for targeted advertising purposes."

Amazon's disclosure of this conduct in its privacy policy additionally supported throwing out the consumers' intrusion upon seclusion claim, as they "consequently lacked a 'legitimate and reasonable expectation of privacy,'" the panel found.

The district court's dismissal of the consumers' claim that Amazon breached the Washington Consumer Protection Act was also correct "because, applying the proper standard, the district court correctly concluded that plaintiffs had failed to plead causation," according to the panel.

In order to prove a WCPA claim, plaintiffs must establish that the defendant's unfair or deceptive conduct caused them to suffer an injury. But Gray and Horton had failed to allege that they had suffered an injury either because of Amazon's disclosures in its privacy notice or because of its public statements that it wasn't using voice recordings for targeted advertising purposes, the panel ruled.

"As the district court correctly found, plaintiffs did not adequately allege causation for those statements because they made no allegations that they 'viewed or heard any of those statements or were otherwise aware of them at the time they purchased their Alexa-enabled devices or at any time prior to the filing of this lawsuit,'" the panel said.

The plaintiffs also didn't fare well in their bid to resurrect their claim under Washington's Personality Rights Act, which prohibits the unauthorized use of an individual's voice on or for the purpose of

advertising goods, products or services in the state.

The panel found that the statute didn't apply to this dispute because its language and other provisions "indicate that the statute is directed to misappropriating a person's voice in promotional content, i.e., advertising a product using a person's voice or likeness."

"That is not the type of conduct alleged by plaintiffs in this case," the panel ruled, adding that it would make no presumption that the legislature "intended to make any innovation on the common law without clearly manifesting such intent."

The panel also rejected the consumers' challenge to the district court's denial of leave to amend their complaint, finding that the lower court "effectively provided plaintiffs a chance to amend because it carefully considered plaintiffs' proposed amended complaint and explained in detail why it was still deficient."

"Despite the court's prior order, plaintiffs' proposed amended complaint failed to allege that they had viewed, heard, or were aware of Amazon's allegedly deceptive public statements when they purchased their devices," the panel noted. "The district court was thus correct to conclude that the proposed amendment was futile."

U.S. District Judge Barbara Jacobs Rothstein initially dismissed the complaint in January 2023, finding that even if the company was using consumers' voice data as alleged, Amazon's disclosures — as of the suit's filing — were **sufficient notice** of the potential for that use.

The consumers quickly amended their complaint, claiming violations of state consumer protection statutes, including the Personality Rights Act, and breach of the implied covenant of good faith and fair dealing. They also claimed that the terms and conditions in place when they purchased and activated their devices did not give Amazon consent to collect their voice data for targeted ads, nor did they clearly disclose its practices.

But last May, Judge Rothstein tossed the latest rendition of the lawsuit again, this time with prejudice. In doing so, she sided with Amazon and held that the amended allegations "merely repeat the same arguments the court has already rejected" in their earlier complaint.

Judge Rothstein concluded that the amended suit also didn't point to any material differences between the language of the older terms and the terms she interpreted in her first decision, and she was also unconvinced by the new complaint's expanded citation of a research paper to suggest that most consumers were misled by Amazon's alleged public assurances that "voice recordings" are not used for targeted ads.

Counsel for the consumers and a representative for Amazon didn't respond to requests for comment Thursday.

U.S. Circuit Judges Danielle J. Forrest and Patrick J. Bumatay and U.S. District Judge James Donato sat on the panel for the Ninth Circuit.

The consumers are represented by Rebecca L. Solomon and Jason T. Dennett of Tousley Brain Stephens PLLC, and Adam J. Levitt, Amy E. Keller, Nada Djordjevic, David Straite and Corban Rhodes of DiCello Levitt LLC.

Amazon is represented by Brian D. Buckley, Y. Monica Chan, Laurence F. Pulgram, Jedediah Wakefield, Tyler G. Newby, Esther D. Galan and Armen N. Nercessian of Fenwick & West LLP.

The case is Gray et al. v. Amazon.com Inc. et al., case number 23-35377, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dorothy Atkins. Editing by Adam LoBelia.



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BIC Hit With Class Action Over PFAS-Containing Razors

By **Jonathan Capriel**

Law360 (May 16, 2024, 8:51 PM EDT) -- The makers of BIC razors intentionally use so-called forever chemicals in several of their products but failed to mention that to customers, who say they wouldn't have bought the razors if they'd known they were exposing themselves to toxic chemicals.

Casina Butler and Benson Pai filed a proposed class action Wednesday in California federal court against BIC USA, telling the court that a public advocacy group had recently discovered via public record request that BIC was using per- and polyfluoroalkyl substances, or PFAS, in some of its razors.

Butler and Pai say they were misled by BIC, which disclosed its use of PFAS to the state of Maine due to a recently passed law that mandated that companies do so, because the company did nothing to warn consumers that the razors they were buying contained chemicals that could "rais[e] a host of health effects, such as various cancers, liver damage, and immunotoxicity effects."

"Because of the concerns presented by PFAS, consumers — like Plaintiffs — care about their presence, even if in small amounts," the pair said in their proposed class action.

PFAS are a family of chemicals often called "forever chemicals" because they are nearly impossible to break down in the environment and have been tied to cancer, fertility issues, high blood pressure in pregnant women and other health problems, according to U.S. Environmental Protection Agency data.

The chemicals have been used for many years in a wide variety of products and have been found to accumulate in humans and other living beings. Current research has linked exposure to the substances with serious health problems, including cancer.

Maine passed a law banning intentionally added PFAS in any products sold on the market within the state, but that requirement doesn't take effect until 2030. In the meantime, companies are supposed to report to the Maine Department of Environmental Protection any products that do include intentionally added PFAS.

That's how advocacy group Defend Our Health found out about BIC razors containing PFAs in the lubricated strip that is used on disposable razors to make the user's shave smoother, according to the lawsuit. The group filed a public information request for communications with the department related to PFAS and BIC's disclosure was turned over, they told the court.

Since customers place razors "directly against their skin," consumers would naturally be concerned about PFAs exposure, the proposed class said. Consumers would have bought a different product or not been willing to pay as much for BIC's product if they had known about the chemicals in the razors, they argued.

The proposed class seeks to represent anyone who bought a BIC razor that contains PFAS.

The proposed class is represented by L. Timothy Fisher of Bursor & Fisher PA.

Counsel information for BIC USA was not immediately available.

The suit is Butler et al. v. BIC USA Inc., case number 4:24-cv-02955, in the U.S. District Court for the

District of Northern California.

--Editing by Emily Kokoll.

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Exploring An Alternative Model Of Litigation Finance

By **Bob Koneck, Chris Le Neve Foster and Richard Butters** (May 16, 2024, 5:10 PM EDT)

There is a new model for financing litigation.

Its nomenclature is unsettled. But the most apt description is insurance-backed litigation funding.

It differs from traditional litigation funding in two main ways — the pricing and the parties.[1]

In terms of pricing, traditional litigation funders typically require repayment of deployed capital plus (1) multiples of deployed capital, (2) a percentage of damages, or (3) both. In contrast, insurance-backed litigation funders usually charge interest, and otherwise have no right to the damages or fees from the litigation.

Regarding parties, traditional litigation funding generally involves two parties: a capital provider, and either a law firm or its client. In contrast, insurance-backed litigation funding involves three parties: an insurer; a capital provider, and either a law firm or its client.

These differences may become increasingly important. According to Westfleet Advisor's 2023 Litigation Finance Market Report, **published in March**, the litigation finance "industry [is] in a state of flux," and some litigation funders are starting to "ration[]" their capital." [2]

Lawyers and clients seeking financial support for their cases may therefore decide to explore novel financing structures. Insurance-backed litigation funding is one such novel structure. This article defines and explains the process for obtaining it.

What is insurance-backed litigation funding?

Traditional commercial litigation funding is now common knowledge.

Traditional funders provide nonrecourse capital to support litigation. Their single source of recovery is usually damages from financed litigation. If the financed litigation is unsuccessful, traditional funders may suffer a total loss. If the financed litigation is successful, traditional funders recover their deployed capital plus (1) multiples of their capital, (2) a percentage of the damages, or (3) a combination of both.

Insurance-backed litigation funders also provide nonrecourse capital to support litigation. But the structure usually differs from traditional funding.

It works like this: A law firm or their client secures an insurance policy insuring a minimum level of recovery in the litigation. The law firm or client then raises nonrecourse financing to support the litigation.

The financing is secured by, and repaid from, two sources instead of one: (1) damages from the financed litigation, as in traditional litigation funding; and (2) the proceeds of the insurance policy



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that will pay out if the financed litigation yields a monetary recovery insufficient to repay the funder.

In other words, if the firm or client prevails, insurance-backed funders receive their deployed capital and interest from the recovered damages. But if the firm or client loses, the loss triggers a payout under the insurance policy that repays the funders their deployed capital and, depending on the structure of the financing, some or all of the funders' accrued but unpaid interest.[3]

This dynamic allows insurance-backed funders to price their capital using an interest rate, without any right to the remaining upside in the litigation. Insurance-backed litigation funding is thus usually cheaper. Price is its main advantage.

Its main disadvantage is enhanced execution risk. There are at least three parties making decisions needed to close the funding deal. This can slow or complicate the process.

What is the process of securing insurance-backed litigation funding?

Insurance-backed litigation funding usually involves three steps: (1) requesting terms for insurance, (2) requesting terms for financing, and (3) simultaneously closing both the insurance and funding deals.

Step One: The Insurance

The process begins with a law firm or its client seeking terms for a contingent risk insurance policy.

Contingent risk insurance is the foundation of insurance-backed litigation funding.[4] In relevant part, a contingent risk insurance policy insures a prenegotiated portion of the estimated expenditures — a policy limit — involved in litigating a single prejudgment dispute or a portfolio of prejudgment disputes.

If the insured recovers an amount equal to or greater than the policy limit, the insurer pays nothing. If the insured recovers less than the policy limit, the insurer pays the difference between any recovery and the policy limit.

Factors Insurers Consider

Insurers offering contingent risk insurance increasingly employ lawyers to review legal risks and negotiate policies, some of whom are former litigators and litigation funders. These lawyers rigorously evaluate and weigh many factors when deciding to issue terms for a contingent risk insurance policy.

These include, among other things, the merits of the litigation, the litigation budget, the projected damages, the arrangement with trial counsel, the potential for settlement, the anticipated duration, the identity and motives of the various stakeholders, and trial counsels' level of skill and experience. [5]

Insurers vary in their preferences as to claim types. But most will consider a broad spectrum of commercial disputes, such as those involving claims for breach of contract, antitrust violations or patent infringement, among many other claims.

In addition, insurers often prefer to issue policies covering a portfolio of unrelated cases over those covering a single case, though insurers will consider both. For this reason, among others, traditional litigation funding will likely remain the standard method of financing single cases for the foreseeable future.

Portfolios present multiple avenues to recovery. In theory, this diversification increases the probability that the insured will recover an amount equal to the policy limit and, as a result, that the insurer will pay no claim. Portfolios of cases are therefore less risky for insurers and easier to insure than a single case.

On the whole, insurers will support only exceedingly strong cases and lawyers.[6]

Insurance Terms

Following analysis of the above factors, alongside others, an insurer may decide to issue a nonbinding indication letter, or NBIL, outlining the proposed terms of the insurance.

NBILs are highly bespoke. Insurers carefully structure NBILs to reflect the unique and complex risk profile of the insured legal matters.

Among other important items, the NBIL will contain a policy limit. The NBIL will also provide a premium for the proposed policy. This is often a single upfront payment constituting a percentage of the policy limit.^[7] Funders generally finance this for law firms or law firms' clients.

And some NBILs may provide a backstop date at which the insured can make a claim, even if the insured litigation is ongoing. To illustrate, the NBIL may allow the insured to make a claim up to the policy limit at (1) the final, nonappealable result of the insured litigation or (2) five years from policy inception — whichever is earlier.

The above feature is helpful to funders. It provides certainty about the timing of repayment, which allows funders to better manage risk and price their capital.

Step Two: The Funding

After receiving one or more NBILs, the law firm or its client is ready to engage funders.

Types of Funders

Some dedicated litigation funders — i.e., those who focus exclusively on legal finance — can provide insurance-backed litigation funding. But many dedicated funders are unable to offer the credit-like pricing that accompanies an insurance-backed funding deal.

The pool of funders for insurance-backed deals thus includes many others for whom legal finance is one of multiple unrelated investment strategies, such as large hedge funds, credit funds and family offices.

Factors Funders Consider

Funders analyze the same issues as insurers noted above. But funders will also heavily focus on the terms of the proposed insurance, because proceeds from this insurance will, as discussed, repay the funder's deployed capital — and possibly interest — if the financed litigation is unsuccessful.

Additionally, funders will evaluate the credit risk of the defendant or defendants. The reason: Contingent risk insurance policies usually insure legal risk, not credit risk. So these policies will generally not pay if the litigation is successful, but the defendants are unable to satisfy the judgment. Funders must therefore be confident that the defendant or defendants can and will pay a final judgment.

Funding Terms

For the reasons noted above, insurance-backed funders face less risk than traditional funders. As a result, they do not typically take a percentage of damages or charge multiples of their capital. Instead, they charge interest only.

This interest accrues during the funding arrangement and is payable only upon (1) a successful outcome in the funded cases, or (2) a payout under the insurance policy.

The loan-to-value — that is, the capital committed relative to the policy limit — determines if proceeds paid under the insurance policy will cover only capital committed or, instead, also accrued but unpaid interest.

If the loan-to-value is 100%, the funder is providing committed capital equal to the policy limit. A payout under this policy will therefore cover the committed capital at most. If the loan-to-value is, for

example, 90%, a payout under the policy could cover committed capital with 10% of the policy limit remaining to cover accrued but unpaid interest.

Apart from the above, insurance-backed funding terms mostly mirror the terms in a traditional litigation funding arrangement.

Step Three: Closing

After reviewing the range of insurance and funding options, a law firm or their client — whoever is seeking the insurance and funding — will sign an NBIL and a funding term sheet.

This begins a period of exclusivity during which the insurer and funder will finalize their due diligence and negotiate the funding agreement and the insurance policy.

The law firm or client will then simultaneously sign both the funding agreement and the insurance policy, the funder will finance the premium for the insurance policy, and the funder will begin financing the litigation.

Conclusion

The legal finance market is evolving. Insurance-backed litigation funding is an example of this evolution.

Insurance-backed litigation funding usually offers cheaper pricing to law firms and clients seeking financial support for expensive and meritorious cases, but it can involve higher execution risk.

Law firms and clients should therefore carefully consider if this alternative to traditional funding is a good option.

Bob Koneck is a senior vice president, Christopher Le Neve Foster is a managing director and Richard Butters is an executive director at Atlantic Global Risk LLC.

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[1] "Litigation finance" may refer to either commercial litigation finance or consumer litigation finance. These two markets involve distinct laws, parties, pricing, structures, funding procedures, and claim types. This article focuses on commercial litigation finance.

[2] <https://www.westfleetadvisors.com/publications/2023-litigation-finance-market-report/>.

[3] Insurance-backed litigation funding as described here is comparatively novel. But dedicated litigation funders— that is, those who focus exclusively on legal finance—have already used a similar structure in two scenarios. In one scenario, the dedicated litigation funder obtains an insurance policy covering a portion of the capital it raises. This "principal protection" in theory allows the funder to subsequently provide less expensive funding to lawyers and their clients. In another and likely more common scenario, a dedicated litigation funder enters multiple separate traditional litigation funding agreements with separate law firms or clients. These are priced in the traditional litigation funding way. The funder then obtains insurance that protects its committed capital across this portfolio of funded matters. The funder has therefore de-risked by insuring a minimum level of recovery across a portfolio of separate funded disputes. Insurance-backed funding as described in this article does the same, but it allows the law firm or their client to benefit directly from the insurance, rather than the dedicated litigation funder.

[4] An increasing number of insurers offer "contingent risk insurance" or "litigation risk insurance," which are umbrella categories that encompass a variety of policies that insure the legal risks of both plaintiffs and defendants. Examples include judgment preservation insurance, adverse judgment insurance, contingent fee insurance, and capital protection insurance. A summary of these policies is

beyond the scope of this article.

[6] Over time, this could bifurcate the legal funding market. Parties with the best cases could pursue the credit-like pricing of insurance-backed legal funding and parties with slightly riskier, albeit still meritorious, cases could pursue the equity-like pricing of traditional litigation funding.

[7] Insurers may instead ask the insured to pay a smaller upfront premium payment (again, tied to the policy limit) along with a second premium payment that is deferred and contingent on a successful outcome on the litigation.

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Lessons On Challenging Class Plaintiffs' Expert Testimony

By **Jennifer Romano and Raija Horstman** (May 16, 2024, 5:48 PM EDT)

Class actions are often an unpleasant, but familiar, reality for many companies.

More than 10,000 class action cases were filed in federal courts in 2023 asserting all types of claims: securities, antitrust, Employee Retirement Income Security Act, employment, consumer protection, privacy, insurance and product liability. And there have been almost 2,400 class actions already filed in federal courts in 2024.

In 2023, class action plaintiffs had a success rate of more than 70% in obtaining certification.

While the number is inflated because it includes cases where class certification was granted for settlement purposes, there are still a significant number of cases where the court granted class certification, at least in part, after contested briefing. In many of these cases, experts played a significant role in class certification.

Regardless of the merits of a class action claim, for a class to be certified, every class action must satisfy the four requirements under Rule 23(a) of the Federal Rules of Civil Procedure: numerosity, commonality, typicality and adequacy, as well as the requirements of either Rule 23(b)(1), (2), or (3).^[1]

In class actions seeking damages, the plaintiff must establish that questions of law or fact common to class members predominate over questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.^[2]

The predominance inquiry under Rule 23(b)(3) is more demanding than the commonality inquiry under Rule 23(a), so plaintiffs increasingly use expert opinions to make that showing. But what can class action defendants do in response?

Be prepared to bring a Daubert challenge at class certification.

In *Comcast v. Behrends*, the U.S. Supreme Court held in 2013 that in assessing Rule 23(b)(3) predominance at class certification, the court must conduct a rigorous analysis to ensure that any models supporting a plaintiff's damages case are consistent with its liability case.

At this stage, the court considers only whether expert evidence is useful in evaluating whether class certification requirements have been met.

In April, the U.S. Court of Appeals for the Ninth Circuit **clarified** in *Lytle v. Nutramax Laboratories Inc.* that the expert need not complete an analysis or calculation at the time of class certification, as long as the expert adequately identifies the sources of information and a reliable methodology that will be applied "to show that damages are capable of determination on a class-wide basis."^[3]

Therefore, while courts still evaluate challenged expert testimony under the Daubert standard, that



Jennifer Romano



Raija Horstman

analysis is not dispositive. Rather, the analysis scrutinizes the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence.

And as the Ninth Circuit recognized in *Lytle*, the Daubert analysis may vary depending on the timing of the class certification.[4] If discovery has closed and an expert's analysis is complete at the time of certification, there would be no reason to delay the assessment of the ultimate admissibility of an expert's opinion at trial.[5]

But, if the expert's work has not been completed, then only a limited Daubert analysis is necessary to determine whether the expert's methodology is reliable.[6]

Two recent decisions from the U.S. District Court for the Northern District of California highlight the importance of experts at class certification.

In *Simon and Simon PC v. Align Technology Inc.*, the district court held a two-day evidentiary hearing regarding the experts' opinions on common impact and common damages. The court **held on Nov. 29, 2023**, that the experts' opinions were reliable and capable of providing classwide answers to questions central to the plaintiffs' claims, thereby satisfying the predominance requirement.[7]

However, the court noted that it would reconsider arguments to exclude certain portions of the expert testimony at summary judgment and pretrial, if necessary.[8]

In contrast, in *UnifySCC v. Cody*, the district court found on Jan. 29 that the plaintiffs' damages model satisfied the standard set forth in *Comcast*, and was consistent with the plaintiffs' theory of liability, but the district court granted class certification as to liability only because the proposed damages model required consideration of factors unique to each individual.

The court held that individualized determinations predominated over any common question as to class damages, and it expressly rejected the plaintiffs' argument that their expert could conduct alternative damages models for subclasses.[9]

While expert evidence was useful in obtaining class certification for the plaintiffs in both of these cases, the court's holding in *UnifySCC* shows that limitations in expert opinions can be leveraged to oppose certification as well.

If at first you don't succeed, try again.

As suggested by the court in *Simon and Simon*, even if the expert's opinion is not excluded at the class certification stage, discovery may offer additional opportunities to challenge experts.

For example, if documents or data is not available to support a damages model proposed by a plaintiff's expert, individualized mini trials on damages may become necessary.

This is what happened in *Bowerman v. Field Asset Services Inc.* in the Ninth Circuit last year, where the Northern District of California granted class certification, granted partial summary judgment on liability, held a bellwether jury trial on damages, and issued an interim award of attorney fees.[10]

On appeal, the defendant again argued that the class could not meet the predominance requirement because complex, individual inquiries were needed to establish damages.[11] The Ninth Circuit reversed the district court's decision last year granting class certification in large part because the plaintiff withdrew his damages expert after the district court "raised questions about the reliability of his data and opinions concerning an aggregate damages model." [12]

The district court had further noted that "the damages phase of this class action is far messier than promised by plaintiffs' counsel when the case was certified." [13]

In the absence of common evidence to establish damages, the Ninth Circuit held that individual issues predominated over the common questions, and class certification was improper.[14]

Thus, even if an expert's opinion is allowed and relied upon at class certification, discovery may uncover additional arguments to challenge the expert in a motion to decertify the class at a later

time.

Consider offering affirmative opinions at class certification, instead of just rebutting the plaintiff's experts' opinions.

Two recent Ninth Circuit opinions address the use of affirmative defensive expert opinions at class certification.

First, the dissenting opinion in *DZ Reserve v. Meta Platforms Inc.* in March **suggested** that class certification may not have been proper had there been an affirmative defensive expert opinion.

In *DZ Reserve*, the plaintiffs sought certification of a class to pursue claims for fraudulent misrepresentation, fraudulent concealment and violation of California's Unfair Competition Law, arising out of representations made to online advertisers about the potential reach of their advertisements.

The plaintiffs sought both injunctive relief and damages. In support of their motion for class certification, the plaintiffs offered multiple expert opinions, including:

- A statistics expert who measured the inflated reach associated with the challenged representation;
- An expert who conducted a conjoint survey to test the impact of the representation;
- An auction expert who calculated a price premium;
- An economist who confirmed the price premium opinion and opined that damages could be calculated on a classwide basis; and
- An expert who opined about the increased advertising budget based on the challenged representation that was used to determine the price premium.[15]

The defendant offered its own expert critiquing the plaintiffs' expert opinion that the defendant's reach representations were always significantly inflated. But, the defendant's expert did not offer his own affirmative opinions.[16]

At class certification, the defendant in *DZ Reserve* sought to exclude two of the plaintiffs' expert opinions, and by extension, the portions of the other experts that relied on those opinions.[17] The court excluded the last expert regarding the advertising budget on the ground that he offered nothing more than his personal interpretation of documents and evidence.[18]

As to the expert providing the conjoint analysis, the court found the defendant's objections all went to the weight and not the admissibility of the expert opinion.[19] However, the court noted that "if evidence emerges at trial that substantially impeaches [the expert's] methods and conclusions, the door may be opened to consideration of decertification."[20]

The district court found that the remaining expert opinions were sufficient to establish predominance and superiority of the class action and the Ninth Circuit affirmed.

While exclusion of one of the plaintiffs' experts ultimately did not prevent certification of the class, the dissenting opinion authored by U.S. District Judge Katherine B. Forrest emphasized the importance of competing expert opinions. The dissent stated that the plaintiff had not established predominance because:

- The objective perspective of a reasonable advertiser could not be determined for the proposed class that included "millions of advertisers of all types conducting advertising campaigns ranging from millions of dollars to tens of dollars"; and

- The defendant had provided evolving disclosures stating that its representations about reach were estimates.

In addition, the dissent emphasized that had the defendant's expert opined affirmatively that the challenged representations resulted in no inflation of reach for at least some class members, as opposed to merely critiquing the plaintiffs' expert opinion about significant inflation, there could not have been a classwide material misrepresentation.

In the eyes of the dissent, affirmative expert opinion testimony by the defendant would have defeated class certification.

Second, in *Lytle v. Nutramax Laboratories* in the Ninth Circuit in April, the defendant did offer affirmative expert opinions at class certification, and the decision illustrates the scrutiny the courts will apply to that opinion.[21]

In *Lytle*, the plaintiffs sought certification of a class to pursue a claim for violation of the California Consumers Legal Remedies Act for false and misleading advertising related to marketing products as promoting healthy joints in dogs.[22] In support of their motion for class certification, the plaintiffs offered both a damages expert and an advertising expert.[23]

The defendants also offered expert opinion from two experts: one who conducted a consumer survey about purchasing decisions; and one who conducted a consumer choice survey similar to that proposed by the plaintiffs' expert and showed the challenged representations had no material impact on price.[24]

In *Lytle*, the U.S. District Court for the Central District of California found there were flaws in the defendant's expert reports that undercut their persuasiveness.[25] For example, the court found that the consumer survey on price failed to remove from the packaging the primary statement that the plaintiffs claimed was false.[26]

And while the defense expert's consumer survey on purchasing decisions showed that the most common motivations for purchasing the product was advice from a veterinarian or someone else — and not the packaging — the survey also indicated a near-universal understanding that the product's purpose was to help improve or maintain joint health.[27]

As the Ninth Circuit noted, under the CLRA, a misrepresentation need not be the sole or even the decisive cause of the purchase.[28] Therefore, the Ninth Circuit held it was not an abuse of discretion for the district court to credit the plaintiffs' experts more and grant class certification.

However, the Ninth Circuit suggested that in some cases evidence by the defense regarding consumer reliance on other sources of information may be sufficient to preclude a presumption of reliance necessary for class certification.[29]

When a plaintiff seeks certification under Rule 23(b)(3), defendants should expect plaintiffs to offer expert evidence on damages as well as the merits of the other elements of the claims.

Defendants should be prepared to both challenge the plaintiff's expert evidence and offer credible opposing expert evidence to demonstrate that individualized issues predominate over classwide issues and that the plaintiff cannot prove the claims using classwide evidence.

Jennifer Romano is a partner and Raija Horstman is counsel at Crowell & Moring LLP.

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[1] Fed. R. Civ. P. 23.

[2] Fed. R. Civ. P. 23(b)(3).

[3] *Lytle v. Nutramax Laboratories, Inc.*, 2024 WL 1710663 (9th Cir. April 22, 2024).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Bowerman v. Field Asset Services*, 60 F.4th 459 (9th Cir. 2023).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *DZ Reserve v. Meta Platforms, Inc.*, 2022 WL 912890 (N.D. Cal. March 29, 2022).

[16] *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223 (9th Cir. 2024).

[17] *DZ Reserve v. Meta Platforms, Inc.*, 2022 WL 912890 (N.D. Cal. March 29, 2022).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Lytle v. Nutramax Laboratories, Inc.*, 2024 WL 1710663 (9th Cir. April 22, 2024).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*



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NJ Judge Scrutinizes J&J Unit's Libel Claim Over Talc Study

By **George Woolston**

Law360 (May 16, 2024, 7:25 PM EDT) -- A bankrupt Johnson & Johnson unit's libel claims over a scientific article linking talcum powder to mesothelioma intrigued a New Jersey federal judge during an oral argument on Thursday, prompting her to muse that the author's consideration of other exposures seemed to bolster the study at issue.

U.S. District Judge Georgette Castner challenged LTL Management Co.'s argument that Dr. Jacqueline Miriam Moline made a false statement, and not a scientific conclusion, when she determined that the study participants' use of talcum powder — J&J's onetime signature product — was their only exposure to asbestos that could have caused mesothelioma. Moline based her review on materials such as deposition transcripts and medical records.

Counsel for LTL, Matthew Bush of [King & Spalding LLP](#), noted Moline repeatedly stated in the article that in all the study's 33 cases, other potential exposures were considered.

"Isn't that a qualifier that Moline considered potential exposures, but concluded there was no identification of another source other than talc?" Judge Castner asked Bush in response.

Bush explained LTL's argument is that Moline, in reviewing the deposition transcripts and medical records of the study participants, said there were no other potential exposures to asbestos — when in fact she knew some of the participants had said in the transcripts they had been exposed through other sources.

Bush said Moline knew in at least two of the cases the participants had been exposed to asbestos in other ways, such as smoking cigarettes and having asbestos removed from their basement.

"For her to say there are not any other potential exposures is false," Bush said. "I think it's a false statement, but even if it's an opinion, it's still actionable."

LTL is a J&J spinoff that was formed to assume the massive liability the personal care products giant accumulated in **lawsuits** by cancer patients. Moline is one of several doctors whom LTL sued over articles they authored that alleged exposure to asbestos in talc powder caused mesothelioma.

The complaint against Moline centers around an article she published that concerned study results for a group of 33 mesothelioma patients, in which Moline concluded exposure to asbestos in talc products could cause the disease.

Judge Castner also asked counsel for Moline to explain how the statements are not actionable, given she is required to assume all of LTL's allegations as true at the pleading stage.

The judge also inquired about the case Moline heavily relied upon in her argument to **dismiss LTL's suit**, the 2023 Third Circuit decision in [Pacira Biosciences Inc. v. American Society of Anesthesiologists Inc.](#) , which held an academic article's data and methodology cannot form the basis for trade libel under New Jersey law but noted there may be an exception if there are allegations of fraud.

Moline's attorney, Kevin H. Marino of Marino Tortorella & Boyle PC, argued Moline made clear in the article that it should be viewed "in the context of its limitations" — that she relied upon the self-

reporting of the 33 participants who are all plaintiffs in talc cases, that she is often an expert in talc cases, and that she only reviewed deposition testimony and the medical records of the participants.

Moline was "saying in context, talc powder should be considered as a source of asbestos exposure," Marino said. "It isn't trade libel on the longest day that you live."

Judge Castner further pressed LTL on whether the district court was the appropriate venue to address its dispute with the article and not in the underlying cases where they can challenge Moline's testimony and qualifications as an expert.

Bush said the district court was appropriate because in addition to her scientific journal article and testimony in court, Moline has made the same statements to the public in publications such as Time Magazine.

"There are separate lanes and remedies to address separate harms," Bush said.

Judge Castner told the parties she would reserve her decision until a later date.

Moline is represented by Kevin H. Marino and John D. Tortorella of Marino Tortorella & Boyle PC.

LTL Management is represented by Matthew Bush of King & Spalding LLP and Peter C. Harvey and Thomas P. Kurland of Patterson Belknap Webb & Tyler LLP.

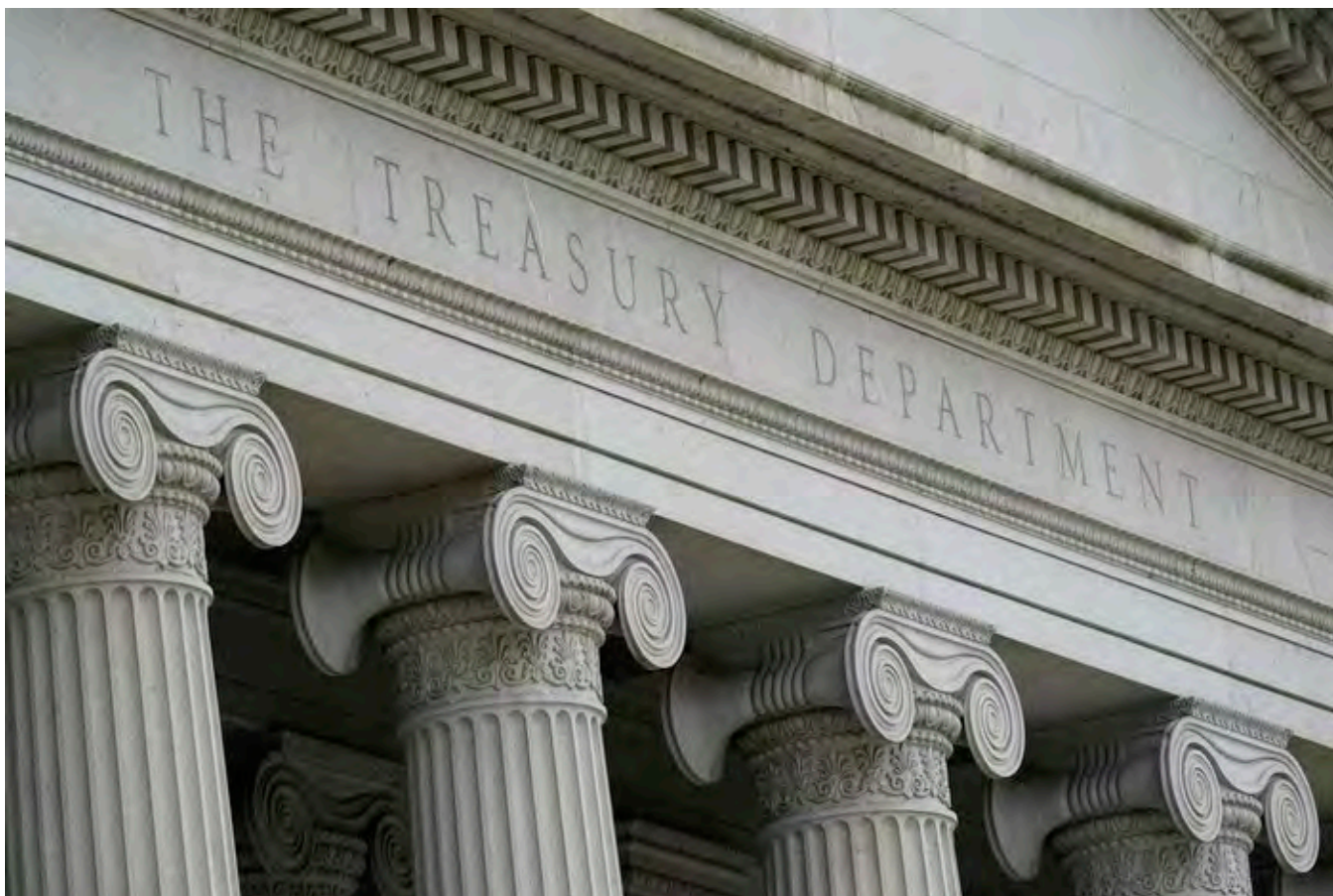
The case is LTL Management LLC v. Moline, case number 3:23-cv-02990, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Mike Curley and Vince Sullivan. Editing by Michael Watanabe.

No Relief For Struggling SPACs Under Buyback Tax Proposal

By **Tom Zanki**

Law360 (May 16, 2024, 4:51 PM EDT) -- Special-purpose acquisition companies won't get sought-after relief from a new 1% tax on stock buybacks under a recent Treasury Department proposal that otherwise provides helpful clarity on the tax's implications for the subdued SPAC market, lawyers say.



A group of hedge fund advocates said Treasury should spare special-purpose acquisition companies from the new tax on buybacks because, they said, those aren't the kind of purchases Congress wanted to discourage. (AP Photo/Patrick Semansky)

The U.S. Department of the Treasury determined the levy applies to investor shares redeemed before a SPAC merger minus potential offsets under **proposed rules** defining the scope of the excise tax, which Congress aimed at publicly listed operating companies under a 2022 law.

Treasury officials noted some market participants questioned whether the buyback levy should apply to SPACs, which are shell vehicles formed through an initial public offering in order to acquire and take a target company public. SPAC shares trade on a public exchange while the sponsor seeks an acquisition target, though investors can redeem their shares and get their money back before any merger is consummated.

In the more typical context, operating companies conduct buybacks as a way of returning cash to shareholders without triggering the tax consequences of issuing dividends. S&P 500 companies reportedly

spent \$181.2 billion in the first quarter on buybacks. Also called share repurchases, buybacks represented a major use of corporate cash that has drawn scrutiny from Congress, resulting in the new tax.

Attorneys said they were not surprised that Treasury's April 9 proposal did not grant any carve-outs to SPACs, noting that the Inflation Reduction Act — the statute that authorized the repurchase tax — expressly covers domestic firms whose shares trade publicly.

The statute also defines "repurchase" to include a corporation's acquisition of any stock from a shareholder for property that qualifies as a redemption of the stock as defined in the tax code, including those that occur in connection with certain mergers.

"There is no room for the Treasury to wiggle out" of the statute's requirements, Moses & Singer LLP partner Steve Lueker said.

Treasury's proposal could be finalized later this year following a public-comment period. The tax would apply to all corporate repurchases made after Dec. 31, 2022.

The Managed Funds Association, which represents hedge funds — key investors in SPAC offerings — objected to applying the tax to SPACs on grounds that redemptions that occur before such mergers were not the kind of repurchases that Congress sought to discourage, according to a letter filed last year after Treasury and the Internal Revenue Service **issued guidance** on the topic.

The tax as constituted now is not expected to unsettle the SPAC market, which is already struggling due to market and regulatory headwinds. Nor has the tax caused a huge dent in ordinary buybacks, which companies are still conducting in large volumes.

Yet it could become more costly if Congress raises the levy in the future. President Joe Biden has proposed **quadrupling the tax** to 4%, potentially hitting SPAC coffers harder. IPO proceeds are maintained in a trust overseen by the SPAC until an eventual merger or liquidation.

Allowing investors to redeem their shares — essentially a money-back guarantee plus interest — is a key feature of SPAC deals. Redemptions have skyrocketed as the market has soured in the past two years, sometimes exceeding 90% before mergers.

The buyback tax would amount to another headwind for SPACs, which have **crashed** after a boom earlier this decade as rising interest rates dampen the allure of speculative investments. Poor stock performances of many post-merger SPACs have also chilled investor appetite, in addition to tighter securities regulations set to **take effect** in July.

One variable that could be worth watching is whether the tax provides SPACs an incentive to locate offshore given it only applies to U.S.-based companies.

Lawyers note the tax alone is unlikely to influence a decision on where to incorporate, but combined with other factors — some SPACs have **set up shop in the Cayman Islands** following perceived adverse rulings on U.S.-based SPACs by Delaware courts — tax ramifications could favor locating abroad.

"It definitely is a factor that people consider," DLA Piper LLP partner Tom Geraghty said. "One percent of these trust fund proceeds is a lot, especially if it goes up to 4%."

Lawyers also note SPACs received some helpful clarity in that Treasury officials proposed that liquidations — where a SPAC dissolves because it failed to find a merger target and thus returns shareholders their money — will not be subject to the tax.

The proposal also confirms that new issuances of stock could be counted to offset tax liability triggered by prior repurchases through a "netting" rule. SPACs sometimes issue additional shares through a private investment in public equity, or PIPE, before closing a merger. PIPEs effectively raise additional money to support an acquisition or can serve as a backstop to offset investor redemptions.

This netting rule also has exceptions in that it would only apply to shares issued by the original SPAC entity.

Occasionally, such as in cross-border mergers involving multiple jurisdictions, a SPAC will form a new holding company that creates two new subsidiaries, one for the original SPAC and one for the target

business. This is called a "double dummy" transaction.

If the new holding company issues shares as part of a PIPE or other capital raise, Treasury officials propose the issuing company will not be eligible for the "netting" rule.

Apart from such rare scenarios, lawyers said SPAC sponsors should not be subject to the repurchase tax as long as PIPEs or similar transactions are conducted within the same tax year as the eventual merger.

"With the netting rule, you can mitigate the tax substantially or eliminate it altogether," Mayer Brown LLP partner Remmelt Reigersman said. "From our perspective, [the tax] is not a SPAC killer."

--Editing by Philip Shea and Kelly Duncan.

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Stubhub, Attys Face Sanctions Bid Over 'Strategy Of Evasion'

By **Bonnie Eslinger**

Law360 (May 16, 2024, 8:16 PM EDT) -- Counsel for consumers seeking StubHub refunds for events canceled or rescheduled due to COVID-19 urged a California federal magistrate judge Thursday to sanction the online ticket platform and its lawyers, saying they've "engaged in a strategy of evasion, denial and distortion" to avoid producing hyperlinked documents despite a court order.

Last year, a California magistrate judge overseeing discovery disputes in the multidistrict litigation over COVID-19 refunds ordered StubHub to produce hyperlinked documents that StubHub claims were lost. In March, the consumers filed their motion for sanctions related to the hyperlinks dispute, the focus of Thursday's hearing, along with a motion filed by StubHub Inc. to modify the discovery order to limit the number of hyperlinked documents StubHub will have to try and recover.

A lawyer for the consumers told U.S. Magistrate Judge Thomas S. Hixson that while StubHub claims it has undertaken Herculean efforts to find the hyperlinked documents referenced in hundreds of emails produced in discovery, the company avoided options that would have produced better results.

"Over the course of nearly two years StubHub and its counsel ... have engaged in a strategy of evasion, denial and distortion to avoid producing the hyperlinked documents as required and to try to evade any consequences for that failure," said Henry Kelston of Ahdoot & Wolfson PC.

Judge Hixson asked Kelston if it would be possible for the court to grant the plaintiff's motion for sanctions and StubHub's motion to modify the production order.

Kelston said both could be granted.

"But the impact of StubHub's past conduct, and the way that it conducted itself and handled this issue for the last few years, which caused significant delay and expense, that still needs to be addressed," Kelston added.

The court could do that by granting the plaintiffs' motion for monetary sanctions, he said.

"The combination of substandard discovery practice and strategic misconduct has severely prejudiced our ability to get discovery and prepare for class certification and trial," the lawyer said.

A lawyer for StubHub, Daniel Campbell of McDermott Will and Emery LLP, told the court that counsel and their client took the discovery order seriously with the goal of getting to litigate the merits of the case.

StubHub has provided the court with a declaration from a specialist with the vendor that did the electronic discovery work, Russel Brown of Epiq. He and his team took the identified hyperlinks for documents said to be on Google Drive and ran "proprietary software with full administrative access to the Google workspace at StubHub" and retrieved all the hyperlinked documents that could be retrieved, Campbell said. The court has also been provided with a declaration from the CEO of another vendor, Digital Mountain, who took looked over Epiq's efforts.

"She basically audited what Epiq did," Campbell said. "She found that StubHub used industry standard and proprietary tools and went above and beyond."

That included a process of identifying emails with hyperlinks one by one and then searching through documents in StubHub's electronic files to find the document that matches the link.

"We have a discovery consultant that is in house at McDermott ... and those folks spent a substantial amount of effort linking the metadata together of the document and the hyperlink document," Campbell said.

Sometimes, when a link was clicked, an error message would be presented saying the document is not retrievable or inaccessible, the StubHub lawyer said.

"Although we would say EIS [electronic information system] protocol does not require you to, we'd try to look at those documents...in an attempt to remediate the failure, but you don't have very much information about why something failed," Campbell said.

The lawyer for the plaintiffs told the court that the discovery dispute has created a blockade to discovery in the case.

"Plaintiffs are severely prejudiced in their ability to prepare for depositions by having...a bunch of emails and a bunch of documents and no way to tell which documents go with which email," Kelston said.

Judge Hixon asked the lawyer what the court should do if StubHub is correct and the problem cannot be solved.

Kelston said StubHub has not shown that.

"StubHub's efforts to solve the problem have been superficial and ineffective," Kelston said. "That's part of why we are here asking the court to order StubHub to take certain actions to improve the performance in producing hyperlink documents."

Judge Hixon did not issue a ruling from the bench on Thursday, but took the matter under submission.

According to the motion for sanctions, the plaintiffs push for the documents from StubHub but also ask to be allowed to use their own e-discovery vendor, at StubHub's expense, to access the "native" file format information for documents that have hyperlinks. The plaintiffs also want the court to order StubHub and its counsel to pay \$500,000 toward their attorney fees and expenses.

The discovery dispute is the latest chapter in an MDL consolidated in 2020, alleging StubHub Inc. wrongfully changed its refund policies for events canceled due to the COVID-19 pandemic, which forced music and show venues to shut down for months starting in March 2020.

The present version of the sprawling 31-count complaint alleges StubHub enticed consumers across the country to purchase tickets with its "FanProtect™ Guarantee," which purportedly promised 100% refunds if events are canceled.

But amid the pandemic, StubHub allegedly refused to honor the terms of the guarantee and instead "unilaterally and surreptitiously" redefined key terms of the guarantee so that StubHub could keep the cash it collected for ticket prices and service fees as it was being acquired by rival ticket-seller Viagogo for \$4 billion in a deal that closed in 2021, the suit alleges.

The consumers claim that StubHub violated the terms of the guarantee and instead offered "useless credits that may well expire prior to the end of the pandemic," in violation of multiple state consumer protection statutes as well as California's Consumer Legal Remedies Act, the state's Unfair Competition Law and the False Advertising Law.

In April 2021, the parties entered into a stipulation governing electronically stored information, or ESI, as part of which they agreed to treat hyperlinks in emails as attachments that are required to be produced.

During a **discovery hearing** two years later, however, plaintiffs told the court that StubHub had not

produced more than 800 hyperlinked documents that appeared in emails produced by StubHub during discovery. Most of the hyperlinks are inactive and not easily searchable, the attorney said.

At that time Judge Hixson noted that StubHub had entered a stipulation agreeing to produce hyperlinked documents in its ESI agreement with the consumers. Legal counsel had an obligation to "do some research" into its client and StubHub's ability to produce documents, the judge said.

The judge gave StubHub until mid-May to produce the documents or file a motion asking to be relieved of the stipulation along with a deposition from a witness who can testify to the issue.

Since the case was first filed, the common law claims of the named plaintiffs' have been compelled to arbitration, narrowing the litigation to the California statutory claims, according to court documents.

The consumers are represented by Henry Kelston and Bradley K. King of Ahdoot & Wolfson PC and Tiasha Palikovic and Jessica Hunter of Wittels McInturff Palikovic.

StubHub is represented by William P. Donovan, Jr., Daniel Campbell and Emilie E. O'Toole of McDermott Will & Emery LLP.

The case is In Re: StubHub Refund Litigation, case number 4:20-md-02951, in the U.S. District Court for the Northern District of California.

--Editing by Vaqas Asghar.

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Whirlpool, Others Must Face Trimmed Gas Stove Safety Suits

By **Lauren Berg**

Law360 (May 16, 2024, 7:26 PM EDT) -- Whirlpool Corp., Samsung Electronics and BSH Home Appliances Corp. must face trimmed claims in a trio of proposed class actions accusing them of failing to disclose to consumers the pollutant risks associated with natural gas stoves, a California federal judge ruled.

U.S. District Judge John W. Holcomb, in a 29-page **order** Tuesday, partially denied the appliance companies' motions to dismiss, tossing without prejudice the consumers' claims for affirmative misrepresentation, fraudulent omission, breach of Illinois Consumer Fraud and Deceptive Business Practices Act and injunctive relief, but leaving intact their implied warranty and unjust enrichment claims, as well as most of their fraud claims.

For instance, the consumers have not identified "with particularity any misrepresentation" made by the companies concerning their gas stoves. They have, however, done enough to support most of their claims of fraudulent omission, according to the order.

"Plaintiffs aver that defendants' products have 'a defective design that carries significant (and undisclosed) air pollution risks,'" Judge Holcomb said, adding that they also allege "defendants' products 'emit air pollutants such as nitrogen dioxide, carbon monoxide and fine particulate matter at levels the [U.S. Environmental Protection Agency] and World Health Organization have said are unsafe and linked to respiratory illness, cardiovascular problems, cancer and other health conditions.'"

"Plaintiffs also plead that all of defendants' products 'emit gases this way when they are used for cooking,'" he added. "Plaintiffs sufficiently allege the existence of a design defect, with sufficient particularity at the pleading stage."

The judge also found that the consumers have plausibly pled that the defendants knew about the alleged defect, the order states.

Plaintiff Robert Hedrick kicked off the litigation, launching a proposed class action against BSH in March 2023, before Nicholas Kalergis joined the suit as a named plaintiff in October, according to court records. Debra Goldstein followed with a proposed class action against Whirlpool in June 2023, with Elynn Norris and A.J. Stone filing their action against Samsung a month later.

All the plaintiffs purchased gas stoves made by the companies in their respective suits before learning about the existence of potentially harmful air pollutants emanating from gas stoves, according to their suits.

They allege that the three companies know about the potential human health risks associated with the pollutants but have failed to use a different design for their stoves that could avoid those harms or reduce the emission of pollutants, the suits state.

What's more, the companies' packaging, instructions and warning labels don't mention the potential pollutant risks, leading consumers to believe there was no such risk, the plaintiffs said.

Although none of them have experienced any health problems related to the stoves, the plaintiffs claim they "overpaid" for the products because the companies didn't include a warning about the

potential pollutant risks, according to their suits.

The suits claim violations of California's Unfair Competition Law, False Advertising Law, Consumer Legal Remedies Act; breach of Illinois' Consumer Fraud and Deceptive Business Practices Act; violations of state consumer protection statutes; breach of implied warranties; fraudulent omission; and unjust enrichment, among other claims.

The plaintiffs have identified four proposed classes: a nationwide class of people who bought the defendants' products, a California subclass, an Illinois subclass of those who bought BSH's products, and a consumer protection subclass of those who bought the defendants' products in California, Connecticut, Illinois, Maryland, Missouri and New York.

Whirlpool and BSH filed their motions to dismiss in October, while Samsung filed its motion in November, court records show.

In his order Tuesday, Judge Holcomb dismissed the consumers' claim for injunctive relief, finding that they don't have standing to obtain such relief because they haven't shown "a real and immediate threat of repeat injury." He also struck their plea for punitive damages, saying they haven't plausibly pled "gross fraud, malice or willfulness," the order states.

But the judge did reject the defendants' argument that the consumers' claims are preempted by the federal Energy Policy and Conservation Act, saying their allegations that they overpaid for their gas stoves because of the lack of warnings don't concern energy use as defined under the EPCA.

"If additional facts come to light that suggest that plaintiffs' claims may be preempted by the EPCA, then defendants may raise this issue again," Judge Holcomb said.

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

The consumers are represented by Gabriel Doble, Richard Lyon, Simon Franzini, Christin Cho, Jonas B. Jacobson and Martin Brenner of Dovel & Luner LLP.

BSH Home Appliances is represented by Emily T. Kuwahara, Rebecca B. Chaney, Scott Winkelman and Robbie Jost of Crowell & Moring LLP.

Whirlpool is represented by Tamara A. Bush and Martin F. Hirshland of Dykema Gossett LLP and Andrew M. Unthank, Michael T. Williams and Natalie R. Colao of Wheeler Trigg O'Donnell LLP.

Samsung is represented by Arthur E. Brown, Lori B. Leskin, Elie Salamon and Oscar Ramallo of Arnold & Porter Kaye Scholer LLP.

The cases are Robert Hedrick et al. v. BSH Home Appliances Corp., case number 8:23-cv-00358, Debra Goldstein v. Whirlpool Corp., case number 2:23-cv-04752, and Ellyn Norris et al. v. Samsung Electronics America Inc., case number 5:23-cv-01496, all in the U.S. District Court for the Central District of California.

--Editing by Jay Jackson Jr.